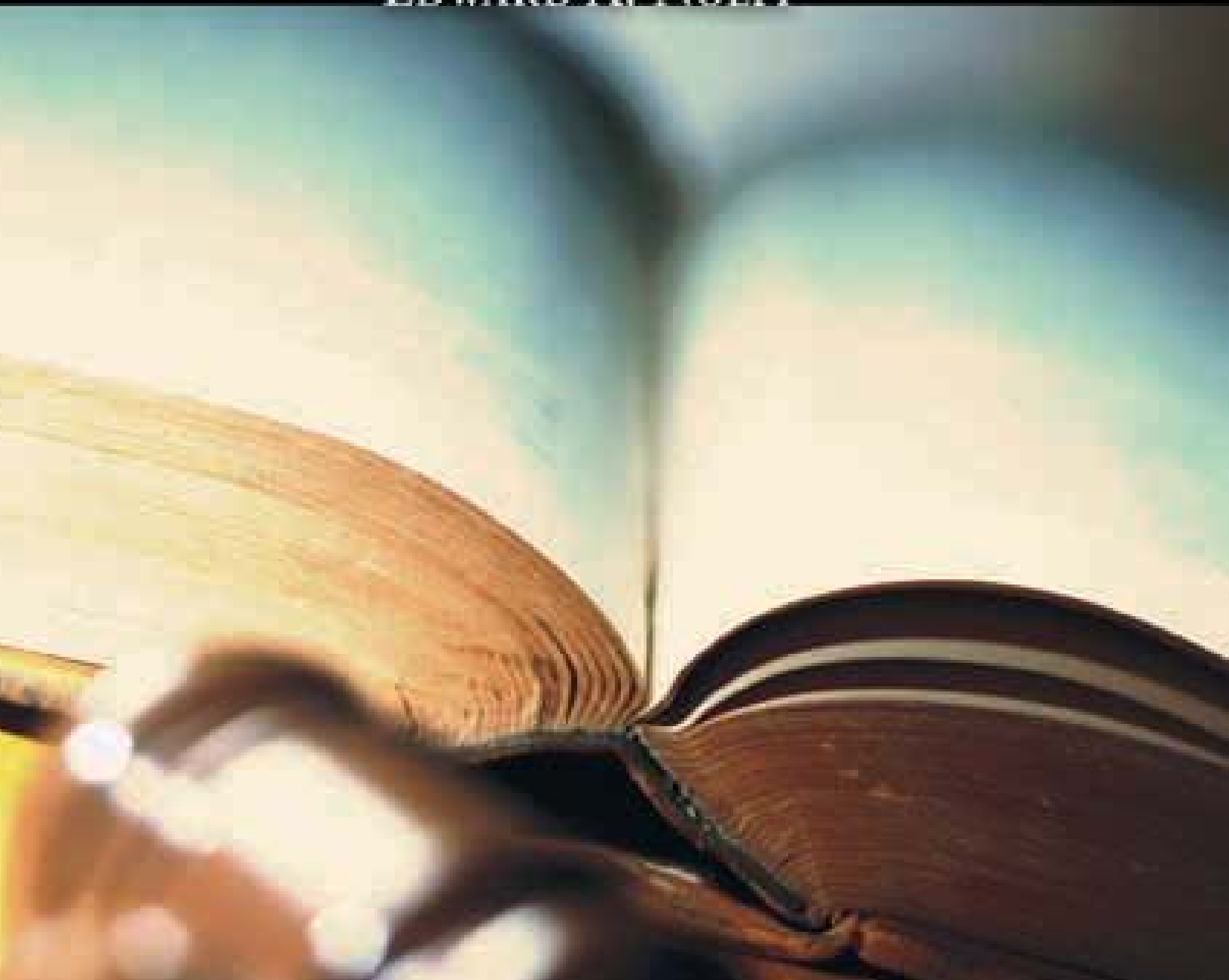
Legal Terminology Explained

Edward A. Nolfi



Legal Terminology Explained

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Legal Terminology Explained

Edward A. Nolfi

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This book is dedicated to my wife, Sheri, and to my sons,
Anthony and Brian. Without their love and support,
this book could not have been written.

About the Author

Edward A. Nolfi

Edward A. Nolfi proposed modern law dictionary projects when he was an associate editor at the Lawyers Co-operative Publishing Company in the mid-1980s, and when he was a lead case law editor and product developer with LexisNexis in the early 2000s, because he was aware of the need for a better law dictionary. While earning an A.B with Honors Thesis (Religious Studies) from Brown University, and while earning a J.D. (Law) from the University of Akron, Ed was inspired by teachers who could explain complex terminology with concise definitions in common words. In particular, Ed was inspired by medical and law school professor Marvin Platt, a doctor and a lawyer, who gave concise definitions of legal terms to medical students, and gave concise definitions of medical terms to law students.

Since the mid-1980s, Ed has developed his own concise definitions of legal terms, especially while teaching paralegal and court reporting students at the Academy of Court Reporting in Akron, Ohio; while teaching paralegal students at Kent State University in Kent, Ohio; while teaching legal assistant and criminal justice students at Mount Aloysius College in Cresson, Pennsylvania; and while teaching business, computer, and criminal justice students at Remington College in Cleveland, Ohio.

Along the way, Ed became an author for Glencoe/McGraw-Hill and McGraw-Hill/Irwin. Ed is the author of the nation's first formal legal research textbook for paralegals, *Basic Legal Research* (1993), and its recently published second edition, *Basic Legal Research for Paralegals* (2008). Ed is also the author of *Basic Wills, Trusts, and Estates* (1995) and the *Ohio Supplement to Basic Civil Litigation* (1993). A lawyer since 1983—with a quarter century of legal experience—Ed is admitted to the bar in New York and Ohio and in several federal courts, including the U.S. Supreme Court.

In 2004, Publisher Linda Schreiber learned of Ed's profound interest in writing a comprehensive text that explained legal terminology in a reasonably accurate, brief, clear, and explanatory style—and his ability to do so. Recognizing the inherent value of such a text for all students of the law, especially paralegals, Linda approved the project. The result is *Legal Terminology Explained*.

Introduction

LEGALESE AND LEGAL TERMINOLOGY EXPLAINED

One of life's biggest pain points is legalese. Lawyers have a jargon that is hard to understand. Even worse, the jargon cannot be avoided, because more than a game, law is something you can't quit. The law applies *by definition*.

In a brief, clear, and explanatory style, *Legal Terminology Explained* provides reasonably accurate definitions to law-related words and phrases. A good example is "legalese." It helps to know that "legal" means law-related and "-ese" means typical style or vocabulary. Legalese refers to a kind of legal style or vocabulary—a bad kind. Legalese is the confusing, excessive, or unnecessary use of legal terminology.

The word "uninitiated" means those who have not undertaken to become familiar with something and the reasons for it. To the uninitiated in law, all legal terminology is legalese because all legal terminology is confusing, excessive, or unnecessary. *Legal Terminology Explained* initiates the uninitiated.

LEARNING AND TEACHING LEGAL TERMINOLOGY

The people most pained by legal terminology are those who have the task of learning it, including (A) students in legal career programs such as court reporting, legal assistant, legal secretary, paralegal, and private investigator; (B) students in law-related programs such as business, criminal justice, government, legal studies, political science, and pre-law; (C) students in programs that overlap the law such as education, journalism, philosophy, religion, and social work; (D) students in law school; and (E) all people who feel that they are students of the law, whether or not they are in school, and whether or not they have graduated.

Few texts focus on legal terminology. As a result, students of the law have often resorted to law dictionaries that are excessive, incomplete, and/or incomprehensible. Although a law dictionary is not designed to be read from A to Z, some students of the law attempt to learn legal terminology by reading a law dictionary from A to Z. The attempt is rarely successful. A better way is to read and study *Legal Terminology Explained,* a text designed to be read from beginning to end.

LEGAL TERMINOLOGY IS NOT EXPLAINED BY A LAW DICTIONARY

A law dictionary does not explain legal terminology.

A law dictionary is usually *excessive* because it includes words and phrases rarely encountered. Among the 30,000 words and phrases in the 1969 edition of *Ballentine's Law Dictionary,* for example, is "unblocked frog"—a railroad phrase for the uncovered portion of the movable track in a switch.

A law dictionary is usually *incomplete* because it does not include words and phrases often encountered, or necessary to understand other words and phrases. *Not* among the 30,000 words and phrases in the 1969 edition of *Ballentine's Law Dictionary,* for

example, is "exordium clause"—the customary opening provision in a will. The smaller the law dictionary, the more likely it omits words and phrases often encountered.

A law dictionary also may be incomplete because it does not indicate an origin of a key word or phrase, or because it does not distinguish the various senses in which a word or phrase is used. *Legal Terminology Explained* does.

By itself, a law dictionary is usually *incomprehensible* because related terms are not discussed together in a systematic way and because the legalese is often defined with more legalese, in a circular or inconsistent manner. *Legal Terminology Explained* discusses each word and phrase in a brief narrative among related words and phrases, in a logical progression, according to a high-level outline. As much as possible, related words and phrases are defined with related definitions, without circularity. Some words and phrases relate to multiple chapters, but their definitions remain the same.

An online feature of *Legal Terminology Explained* is the Index of Legal Terminology. The index is designed to help the reader find particular legal words and phrases among similar words as well as particular words or phrases in the narratives. For the convenience of readers using the index as a reference, the index also defines words and phrases that, for the sake of brevity, were not defined in a narrative.

USING *LEGAL TERMINOLOGY EXPLAINED*

This section explains why, in a brief, clear, and explanatory style, *Legal Terminology Explained* provides reasonably accurate definitions to law-related words and phrases. In addition to indicating where the elements of *Legal Terminology Explained* can be found, the table of contents provides an outline of the logical progression of the text.

57 BRIEF CHAPTERS IN NARRATIVE FORM

Legal Terminology Explained defines and discusses each law-related word and phrase in a brief narrative among related words and phrases, in a logical progression, according to a high-level outline.

Study this sample from Chapter 1, Law, Generally:

> From *loving wisdom,* **philosophy** is the intellectual effort to have a general understanding of knowledge and the underlying nature of reality. The **philosophy of law** or **legal philosophy** is the intellectual discussion of law with respect to different beliefs about knowledge and the underlying nature of reality. **Juris** means of right or of law. From *right knowledge,* **jurisprudence**[1] is another name for legal philosophy or the philosophy of law. Some people define jurisprudence as "the science of the law" and so express their philosophy that law can be studied like a science.
>
> From *law knowledge,* **jurisprudence**[2] means all law or all the law.

On or shortly after its first use in a narrative, every law-related word or phrase is defined. When it is being defined, a word or phrase appears in **bold**. When two or more words or phrases have the same reasonably accurate definition or set of definitions, they appear together (such as "**philosophy of law** or **legal philosophy**").

If an origin of a defined word or phrase, or a part thereof, has not yet been indicated or is worth repeating, and if the origin is not implicit or obvious, one or more origins is indicated near the defined word or phrase. When the word "from" is used before a word (or words) in *italics,* it means "**f**rom a **r**oot (or roots) **o**riginally **m**eaning" the word (or words) in *italics*. Thus, "From *loving wisdom,* **philosophy**" indicates that the word "philosophy" is rooted in a phrase originally meaning "loving wisdom."

Most words and phrases have many roots and are the result of several adaptations. The indicated origin is not the complete origin (the etymology). It simply helps to orient the reader toward the definition and to suggest why the word or phrase exists. It is a "teaser and pleaser" that is worth mentioning, but not usually worth memorizing.

What a student should focus on is the reasonably accurate definition or definitions provided for each defined word or phrase. Reviewers of the text found that the definitions could be discerned from contextual clues without being marked. Thus, "the intellectual effort to have a general understanding of knowledge and the underlying nature of reality" is the reasonably accurate definition of philosophy and "legal philosophy" or "the philosophy of law" are reasonably accurate definitions of jurisprudence in the sense of philosophy. The definitions are clearly set out, in the manner of a dictionary, in the comprehensive Index to Legal Terminology, located at www.mhhe.com/nolfi09.

Notice that legal terminology can be confusing in many ways. One legal word or phrase can have more than one reasonably accurate definition. Two or more legal words or phrases can have the same reasonably accurate definition or the same set of reasonably accurate definitions. Most confusing of all, one legal word or phrase, or more, can be used in more than one sense.

Legal Terminology Explained distinguishes the various senses in which legal words and phrases are used. In addition to appearing in **bold**, a defined word or phrase may be followed by a superscript number to indicate that there are other senses of the word or phrase defined elsewhere in *Legal Terminology Explained*.

Superscript [1] indicates the first sense of the term defined in *Legal Terminology Explained,* superscript [2] indicates the second sense of the term defined in *Legal Terminology Explained,* and so on. Thus, **jurisprudence**[1] is jurisprudence in the sense of legal philosophy or the philosophy of law, to be distinguished from **jurisprudence**[2], which is jurisprudence in the sense of all law or all the law.

Although not identified as such, notes—directions, references, suggestions, and commentary—usually appear at the end of a paragraph, or in the next paragraph. Notes are permitted exceptions to the logical progression and to the rule that every law-related word or phrase is defined on or shortly after its first use.

READ WHAT YOU NEED

Legal Terminology Explained has many chapters, but you only need to read what you need.

The only way to create a text useful to students of the law is to create a comprehensive text. The challenge is to create a text that is also useful to those who only need it for a limited purpose. *Legal Terminology Explained* has many chapters, but they are brief chapters, concisely written in an explanatory style. If it is not possible to cover all the chapters in the time available, individual chapters can be covered, recommended, or skipped, as appropriate. If it is not possible to cover all the terms in a chapter, terms can be covered, recommended, or skipped, as appropriate.

Again, *Legal Terminology Explained* has many chapters, but you only need to read what you need. Don't be surprised, however, if you end up reading everything because in *Legal Terminology Explained,* legal terminology is . . . explained!

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I thank the many people who assisted in the creation of *Legal Terminology Explained*.

Linda Schreiber, my publisher at McGraw-Hill/Irwin, had the vision to see the unique value of *Legal Terminology Explained,* and the courage to order its publication. Tammy Higham, my editor at McGraw-Hill/Irwin, provided useful criticism and guidance and tolerated the time it took to produce a comprehensive text from scratch. Freelance editor Beth Baugh used her extensive knowledge of modern textbook publishing to help me clear many hurdles. Copy editor Betsy Blumenthal and proofreader, David Shapiro, caught my blind spot errors. Project manager Marlena Pechan made the textbook a reality. Finally, the reviewers provided thought-provoking feedback and suggestions and collectively laid out all the options. I am responsible for the choices I made. Below is a list of the reviewers who contributed to this book:

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Brief Contents

Contents

Part One

Law

Chapter 1

Law, Generally

LAW, FUNDAMENTALLY

From *order,* a **command** is a declaration of what a person or entity can, cannot, must, or must not do. From *superior*, a **sovereign** is a person or entity with the power to command. The declaration of what a person or entity can, cannot, must, or must not do, by a person or entity with the power to so declare, is known as law. Simply put, from *layer* or *something laid down*, **law**[1] is, fundamentally, the command of a sovereign.

NO GENERALLY ACCEPTED DEFINITION

One of the remarkable things about law is that it has no generally accepted definition. Some people believe that law is so abstract, so complex, or so vast that it cannot be defined. Many texts begin with the authors claiming that the object of their study—law—cannot be adequately defined. The great debate is: who has a bigger ego, authors who claim that they cannot define the object of their study or authors who clam that they can?

Before studying law, I studied religion (beliefs about the nature of ultimate reality). Although modern law has taken a place in society distinct from religion, there is a similar debate in religion about whether people can define and explain the object or objects of their beliefs. In the manner of those who believe that religion can be explained, *Legal Terminology Explained* is written with the belief that legal terminology can be explained. Not only can legal terminology be explained, it can be explained without denying that law is abstract, complex, and vast.

ABSTRACT

Law is abstract. Law exists only because some sovereign—some person or entity with the power to command—declares that it exists. Saint Thomas Aquinas (1225–1274) defined law as an ordinance of reason for the common good, promulgated by the one who has the care of the community.

To understand law, think of reality as a landscape. A sovereign lays down commands on top of that landscape, thereby adding a layer to reality. One result, for example, is that the book in your hand is more than a book. It is a book in your "possession" and, according to the sovereign, it can only be taken away from you if certain other sovereign commands apply.

The word **law**[2] is used to refer to law in theory: what a sovereign *could* command. The phrase **the law** is used to refer to law in reality: what a sovereign *does* command.

From *sourced in law,* **legal** means law-related, related to law, or according to the law. From *not sourced in law,* **illegal** means against the law. **Lawful** means according

to the law, with emphasis, and **unlawful** means against the law, with emphasis. From *fasten,* **binding**, and from *effective,* **valid**, both mean legally something. From *none*, **null**, and from *empty,* **void**[1] (the noun), both mean legally nothing.

The law creates two real abstractions: rights and duties. From *just claim,* a **right** is an obligation of the sovereign or arising from the sovereign's commands, a legal obligation owed to a person, and something to which a person is entitled. From *special law,* a **privilege**[1] is a special right. From *obligation,* a **duty**[1] is an obligation to the sovereign or resulting from the sovereign's commands; a legal obligation owed by a person. It is a legal obligation that is required to be performed. An **affirmative duty** is a law that requires certain parties to positively act in a circumstance and not wait until they are asked to do that which they are required to do.

The law also creates procedures for applying and contesting those abstractions. For example, from *give up (a claim),* to **waive**[1] is, generally, to forgo a right or to release another from a duty. A **waiver**[1] is, generally, an act, statement, or document forgoing a right or releasing another from a duty.

Because law is abstract, it is sometimes viewed as a game, like chess. Law does have a game-playing aspect because strategy and tactics are involved, but law is more than a game. If you don't like a game such as chess, you don't have to play, or if you do start to play, you can quit. Unlike a game, **law**[3], in importance, is the game you can't quit.

Law exists, by definition. On October 9, 1989, a good student asked me: "Does the law really exist?" I answered with a smile: "Yes. That's why I don't punch you in the nose." From *action,* **by operation of law** means by, through, or as a result of the law, especially the automatic effect of the law without any action by the person affected. For example, if you do not leave directions regarding whom you want to get your property after you die, the law provides a default plan.

The importance of law is sometimes expressed by the Latin phrase **de minimis non curat lex**, which means the law does not care for minimal things or the law does not concern itself with trifles. A trifle the law ignores is **de minimis**.

The game-playing aspect of law explains why law is often loosely defined as a set of rules, like the rules of a game. Although "rules" is an easy way to explain law, technically law is not a type of rule. Instead, a rule is a type of law. Because most games have simple objects (for example, score the most runs) and complex procedures (for example, pitching, batting, base running, and fielding), most commands in a game are commands about procedure. In law, most commands are about the objects. From *principle of conduct,* a **rule**[1] is a command about conduct or procedure or a reference to conduct or procedure. (However, the phrase **rule of law**[1] sometimes refers to the sources of law that control an issue.)

If something is not the command of a sovereign, it is not the law. If something is a command but not of a sovereign, it is not the law. If something *could be* a command of a sovereign, *but has not been* commanded by a sovereign, it is not the law. If something *was* a command of a sovereign, *but is no longer* commanded by a sovereign, it is not the law.

It is important to distinguish law, which is the command of a sovereign, and **policy**[1], which is the command of a nonsovereign such as a business or social organization. From *the art of government,* a **policy**[2] is a guideline or rule created in an organization to provide direction in advance of an expected recurring situation (for example, a dress code). If a policy is not also the command of a sovereign, it is not a law.

By making a command, a sovereign indicates that it expects the command to be abided by or followed. From *to hear,* to **obey** is to abide by or follow a command. To **obey the law** is to abide by or do what is legal, and to not abide by or do what is illegal.

From *to force,* to **enforce** is to make a command a present or practical reality. To **enforce the law** is to make the law a present or practical reality. A sovereign or a

representative of the sovereign enforces the law by acting according to the law and by punishing those who do not obey the law.

From *upright,* **justice**[1] is obedience to the law and enforcement of the law. That is why the **legal system**—which consists of the law, things generally associated with the law, and persons and entities that obey the law and enforce the law—is also known as the **justice system**.

COMPLEX

Law is complex. Law is as complex as the reality over which it is laid. There are profound disputes about religion, humanity, and language. These disputes are reflected in the language of the law.

From *word/boundary,* a **term**[1] is a word or phrase having a precise or peculiar use in an art, science, subject, or profession. From *word study,* a **terminology** is a collection of terms (vocabulary). **Legal terminology** is the collection of words and phrases having a precise or peculiar use in the subject and profession of law.

From *of office,* **official**[1] (the adjective) means by a sovereign (or similar organization), on behalf of a sovereign (or similar organization), or endorsed by a sovereign (or similar organization). There is no official legal dictionary. Like ordinary terms, legal terms are defined by an examination and explanation of their use.

Because humans vary in experience, knowledge, judgment, and purpose, legal terms are defined differently in different sources. The definitions in *Legal Terminology Explained* are designed to explain legal terminology. It is assumed that you will blend in definitions from other sources as you grow in experience, knowledge, judgment, and purpose.

From *loving wisdom,* **philosophy** is the intellectual effort to have a general understanding of knowledge and the underlying nature of reality. The **philosophy of law** or **legal philosophy** is the intellectual discussion of law with respect to different beliefs about knowledge and the underlying nature of reality. **Juris** means of right or of law. From *right knowledge,* **jurisprudence**[1] is another name for legal philosophy or the philosophy of law. Some people define jurisprudence as "the science of the law" and so express their philosophy that law can be studied like a science.

From *law knowledge,* **jurisprudence**[2] means all law or all the law. From *fairness,* **justice**[2] is obedience to the law and enforcement of the law, according to the underlying nature of reality. There is little agreement about justice in this sense because there is a complex relationship between modern law and religion.

From *worldly,* **secularism** is the philosophy of setting aside or living without religion. **Secular** means having set aside or living without religion.

In the United States of America, the law is secular. Although most of the country's original leaders were religious, they agreed to set religion aside in order to establish a robust society and economy in which everyone participated. On matters of religion, they agreed to disagree. Sovereignty was placed in the hands of human beings. Nevertheless, most of those human beings prayed for guidance from their almighty.

A modern argument for secularism is that law is a uniform standard not changed by personal notions of justice and morality. The argument against secularism is that ultimate reality, not law, is the standard not changed by personal notions of justice and morality.

The tension between secularism and religion is reflected in the tension between natural law and positivism. From *innate character,* **natural law** is the legal philosophy that there is an ideal law that agrees with the nature and state of mankind, and the legal philosophy that the law is best studied by comparing it with the ideal law. From *formally laid down,* **positive law**[1] is "the law" actually commanded by a human

sovereign or the law actually enacted, and **positivism** is the legal philosophy that the law is best studied by concentrating on positive law and denying or setting aside natural law.

The law was not always secular. From *model,* a **canon**[1] is a church law. Church law is known as **canon law**. In England, during the Middle Ages, disputes about family matters were often left to the church. As a result, some canon law concepts became part of English and American law.

From *manner,* **morality** refers to generally accepted standards of conduct, including standards from religion. **Moral** means meeting generally accepted standards of conduct, including standards from religion. Because American law is secular, the standards of American law sometimes fall below the level of morality. As a result, it is not always moral to merely obey human law.

For example, American law permits a seller to engage in **puffing**, which, from *inflating praise,* is making nonfactual statements of belief or opinion such as that a product or service is "good," "wonderful," or "best," even if the seller does not actually have that belief or opinion. Puffing a seller does not believe is lying.

From *moral study,* **ethics** refers to generally accepted standards of conduct not based on religion, especially the generally accepted standards of conduct of a particular group. **Ethical** means meeting generally accepted standards of conduct not based on religion. From *block (of wood),* a **code**[1] is a topical collection of law or ethics, or a topical collection of statutes. (Topical means by topic. Statutes are discussed in Chapter 7.) Because ethics are not based on religion, a person may be required by the law to abide by a code of ethics.

Law is usually commanded in an attempt to solve human problems. As a result, the purpose of the **law**[4] can be thought of as human solutions to human problems. To the extent humans are not perfect—to the extent humans lack courage, foresight, honesty, or knowledge—human law is not perfect. In the words of Oliver Wendell Holmes Jr. (1841–1935), who became a judge on the U.S. Supreme Court, "The life of the law has not been logic; it has been experience." In other words, the life of the **law**[5] is human command experience—the history of humans governing by their commands.

Besides the problems humans have with ordinary language, legal terminology, including the different senses in which individual legal terms are used, is not always understood or explained. As a result, humans, including lawyers, are not always sure what the law provides. Humans can be persuaded, and what they are persuaded to believe becomes their reality. In the words of Aaron Burr (1756–1836), lawyer and vice president of the United States under Thomas Jefferson, in practice "The **law**[6] is what's boldly asserted and plausibly maintained."

VAST

Law is vast. Law is as vast as the reality over which it is laid.

In the words of Oliver Wendell Holmes Jr., in its nature "**law**[7] is a seamless web." Although law is usually studied branch by branch, its branches often overlap. For example, if a jeweler steals your watch left for repair, at least four different branches of law apply: the property law of bailment, the law of contracts, the tort of conversion, and the crime of theft. To have a good general understanding of law, you need a good general understanding of each of the main branches of law.

Finally, in the words of Joseph Story (1779–1845), a judge on the U.S. Supreme Court who was also a professor of law at Harvard University, in terms of fascination: "I will not say with Lord Hale, that 'The **law**[8] will admit of no rival,' . . . but I will say that it is a jealous mistress, and requires a long and constant courtship."

NO GENERALLY ACCEPTED OUTLINE

Another remarkable thing about law is that it has no generally accepted outline.

From *away rope,* an **outline** is a condensed summary showing the pattern of subordination of one thought to another. An outline marks the limits of a subject and puts the contents of the subject in order. Making and using an outline involves, from *group,* **classification**[1], which is the grouping of similar items or the arrangement of books and other media in a library. An outline may be or contain, from *arrangement,* a **taxonomy**, which is an organization of classifications from general to specific.

Because no one person or entity has control over the legal system of the United States, there is no official outline of the law of the United States. Some outlines can be found in the organization and content of professional and scholarly publications. In particular, law publishing companies have a need to present the law to their customers in an orderly manner. They have developed detailed taxonomies of the law.

In the late 1800s, West Publishing Company (now a division of the Thomson Corporation) began a taxonomy of the law, the **Key Number System®**, based on its indexing of case law in the United States. In the late 1900s, LexisNexis® (a division of Reed Elsevier) began a taxonomy of the law, the **Search Advisor™**, in conjunction with its Case Law Summaries Project.

Unfortunately, to facilitate research by experienced researchers, the Key Number System and Search Advisor taxonomies both start with more than 30 major classifications of law. To understand the basics of law, you need to understand how the major classifications of law fit together.

THE LIBRARY OF CONGRESS OUTLINE

An interesting public outline of the law comes from library science. From *place with books,* a **library** is an organized collection of books and other media kept for their use. The largest library in the United States is the **Library of Congress**.

The **Library of Congress Classification** is the letter-number system of classification used to organize books and other media in the Library of Congress. Developed in the early 1900s, the classification is reviewed periodically by committees of subject specialists. The classification is used in most college and law school libraries.

KF is the Library of Congress Classification for "Law of the United States" in general. Highlights of the KF outline are shown in Figure 1.1.

FIGURE 1.1
Highlights of the Library of Congress Classification for "Law of the United States" (KF)

KF No.	Description	KF No.	Description
1	Bibliography	1246	Torts (Extra-contractual liability)
16	Documents		
156	Law dictionaries. Words and phrases	1341	Agency
		1384	Corporations
240	Legal research. Legal bibliography	1600	Regulation of industry, trade, and commerce
297	Legal profession	3300	Social legislation
350	History	4501	Constitutional law
385	General and comprehensive works	6271	Taxation
		8700	Courts. Procedure
465	Persons	8810	Civil procedure
560	Property	9201	Criminal law
801	Contracts	9601	Criminal procedure

The KF outline provides many insights. Documents and people are both important. Law has a history. A legal system for persons, property, contracts, extracontractual liability, business, and society existed before being modified by the Constitution of the United States. Procedure is important but a relatively small part of the law. Criminal law is important but a separate and relatively small part of the law.

Of course, the KF outline has many limitations due to its inherent focus on bibliography. The number of items a library has under a classification does not necessarily relate to the importance of that classification.

THE *LEGAL TERMINOLOGY EXPLAINED* OUTLINE

For the sake of explaining legal terminology, *Legal Terminology Explained* is guided by the author's modified KF outline, set out in Figure 1.2. The order of the chapters in *Legal Terminology Explained* generally follows this outline. One exception is that the topics of legal research and writing have been moved to the last chapters.

Notice that the basic law of England, brought to the American colonies, and modified by and under the Constitution of the United States, consists of **civil and criminal law**. It is important to understand that the law is built on two kinds of law. Having different purposes, the two kinds of law are the basis for two distinct systems of law enforced by generally similar but different procedures.

From *citizen,* **civil law**[1] is, generally, the basic law between individuals (persons or entities) or, simply, law between individuals. From *sinful,* **criminal law**[1] is, generally, the basic law protecting society, the law protecting society from individuals who have become an intolerable danger to society, or, simply, law protecting society.

Each kind of law has two parts. From *essence,* **substantive law** refers to rights and duties under law, legal rights and duties, or legal substance. From *method,* **procedural law** or **legal procedure**, or, from *add,* **adjective law**, refers to how law is applied and contested, or legal procedure. Procedural law is the methods commanded for applying and contesting the law.

Because each kind of law has two parts, there are four major divisions of law. **Substantive civil law**, or, simply, **civil law**[2], refers to rights and duties under the law between individuals. **Substantive criminal law**, or, specifically, **criminal law**[2], refers to rights and duties under the law protecting society. **Civil procedure** refers to how the law between individuals is applied and contested. **Criminal procedure** refers to how the law protecting society is applied and contested.

From *response ability,* **criminal responsibility** means potentially subject to punishment for not obeying a criminal law. From *cause pain,* **punishment** is being made to do something you do not want to do, or being deprived of something you want or want to do. Being punished is, in theory, not your choice.

From *to bind,* an **obligation**[1] is, fundamentally, something expected of you because it is expected of everyone in similar circumstances. Meeting an obligation or not is, in theory, your choice.

Unlike criminal responsibility, **civil liability** means potentially subject to an obligation under a civil law, or potentially subject to an obligation for not obeying a civil law, or, simply, liability. From *to bind,* **liability**[1], civil responsibility, means actually subject to an obligation under a civil law, or actually subject to an obligation for not obeying a civil law. **Liable**[1], civilly responsible, refers to a person who is or was subject to an obligation because of a civil law, or a person who is or was subject to an obligation because of not obeying a civil law.

FIGURE 1.2 *Legal Terminology Explained* Outline

Law (Classifications Defined)	LTE Chapters	Law (Terminology)	KF
-Generally	1–2	-Generally	385
-Philosophy	1–2	-Jurisprudence	379
-Origins	2–5	-Legal History	350
-Taught	3–5	-Legal Education	262
-Managed	4–5	-Legal Profession	297
-With Office Organization	5	-Law Office Management	318
-By Trained Assistants	5	-Paralegalism	320
-Found in Texts	55–56	-Legal Research	240
-Put in Writing	57	-Legal Writing	250
-Fundamental Law	6–13	-Constitutional Law (Generally)	
-of the United States of America	6–12	-Constitutional Law	4501
-About Sovereign Management	9	-Administrative Law	5150
-About Necessity in War	13	-Military Law	7201
-About Other Sovereign Nations	13	-International Law	
-Basic Law	14–54	-Civil and Criminal Law	
-Between Individuals	14–45	-Civil Law	
-Rights and Duties	14–35	-Substantive Law	
-Governing Social Status	14–15	-Family Law	465
-Governing Ownership	16–18	-Property	560
-About Death	19–21	-Wills, Trusts, and Estates	726
-About Public Finance	22	-Taxation	6271
-About Trade	23–30	-Business Law	
-About Agreements	23–24	-Contracts	801
-About Agreements by a Business	25	-Commercial Law	871
-About Forms of Business	26–27	-Business Associations	1341
-About Financial Failures	29	-Bankruptcy	1501
-About Commerce	28	-Business Regulation	1600
-Rights in Human Creations	30	-Intellectual Property	2971
-About Society	31–35	-Social Legislation	3300
-About Pollution	31	-Environmental Law	3775
-About Working for Another	32	-Employment Law	3301
-Wrongs Against Individuals	33–35	-Torts	1246
-Applied and Contested	36–45	-Procedural Law	
-Legal Meeting Places	36, 49	-Courts	8700
-Between Individuals	37–45	-Civil Procedure	8810
-About Formal Proof	43	-Evidence	8931
-Strategy and Tactics	42–45	-Advocacy	8911
-Protecting Society	46–54	-Criminal Law	
-Rights and Duties	46–48	-Substantive Law	
-Wrongs Against Society	46–48	-Criminal Law	9201
-Applied and Contested	49–54	-Procedural Law	
-Protecting Society	49–54	-Criminal Procedure	9601
-About Formal Proof	43	-Criminal Evidence	9660
-Strategy and Tactics	52–54	-Criminal Advocacy	8911

Civil law is **remedial**[2], which, from *intense healing,* means related to restoring the proper relationship between individuals. From *with weigh out* (balance out), **compensation** is something that makes up for something else or something making whole, or the equivalent or a portion thereof, such as payment for services performed and payment for harm or injury caused.

GO TO THE NET

Visit the *Legal Terminology Explained* Online Learning Center at http://www.mhhe.com/nolfi09 for an expanded index and glossary, including:

- **entity**
- **immoral**
- **invalid**
- **law**[10]
- **lex**
- **nonbinding**
- **person**
- **religion**
- **religious**
- **theologian**
- **theology**
- **unethical**

Chapter 2

Law, Origins

THE CLASSIC HUMAN SOVEREIGN

From *story,* **legal history** is the origins of law, and the law-related past.

To understand the sovereigns in the United States, you need to know a few fundamental facts, myths, and legends from world, English, and American history.

Who makes the commands that people must obey? The classic answer is that the most powerful person, the person with the power to force others to obey, is sovereign.

In early human history, the most powerful person was usually a king. From *kin,* a **king** is the most powerful man in the land where he lives, usually the man who conquered that land or a male descendant of that man. From *godlike,* kings sometimes claimed a **divine right** to be sovereign—the right to lead, supposedly stemming from the fact that God allowed the king or his ancestors to conquer his land. The right to lead did not come from the people.

When a king died without a male descendant, the most powerful person could be a queen. From *woman,* a **queen** is the most powerful woman in the land where she lives, usually because she is the wife, widow, or female descendant of a king. From *fit for a king,* **royalty**[1] means of the family of a king or related to the family of a king. From *king's man,* a **baron** is a person having a connection to royalty such as a landowner whose ownership comes directly from a king in return for military or other service.

Law in the United States has been influenced by many events in world history. For example, **Hammurabi**, the king of Babylonia from 1792 B.C. to 1750 B.C., had scribes chisel into a temple rock column the **Code of Hammurabi**, a collection of 282 legal customs in ancient Babylonia (for example, "an eye for an eye" and "the strong shall not oppress the weak") considered undeniable because they were chiseled in stone. It was the first formalized legal system.

Although law in the United States has been influenced by many events in world history, there is one time and place in world history to which law in the United States can be traced. The time is A.D. 1066 and the place is England.

THE COMMON LAW

Claiming a divine right, on Christmas Day, 1066, William the Conqueror was crowned king of England. It was the climax of the **Norman Conquest**, when, in 1066, William the Conqueror, who had been living on the Normandy coast of France, crossed the English Channel with his army, defeated King Harold, and became king of England. It is the event in English history to which the U.S. legal system can be traced.

The Norman Conquest is significant because William exercised his sovereign powers in new ways. Unlike previous kings of England, who allowed local disputes to be resolved by local officials, William declared that he would resolve all disputes in England.

Declaring that all land in England was his, William fully established **feudalism**, which is, from *payment for property,* the land system in which a king or other landowner gives rights to land in exchange for services to the kingdom or the landowner. The Norman Conquest also explains why the law is full of Old English, French, and Latin words and phrases. In the Norman Conquest, people who spoke French conquered England at a time when Latin was the language of educated persons.

At first, William sought to personally decide disputes all over England. He soon realized, however, that he couldn't do so because he couldn't be in two places at once. He couldn't handle important national and international affairs in London, and at the same time be in Scotland to hear the various disputes there.

From *away send (as a representative),* to **delegate**[1] (the verb) is to confer authority on a person to act for you or for your benefit. William's solution was to delegate some of his sovereign power to decide disputes to representatives—the first judges. He gave them the power to decide disputes in his name, subject to his review.

From *residence,* a **court**[1] is a place where the law is formally decided and applied; a legal meeting place. From *fall (of circumstances),* a **case** is a legal controversy, especially a legal controversy that may be, has been, or could have been brought to a court. From *before-sit,* to **preside** is to oversee and control. From *right say,* a **judge** is a representative of the sovereign who presides over cases brought to a court, decides the facts as necessary, decides the law, and applies the law. From *testing,* a **trial** is the formal determination of the facts, and the original application of the law, in a case brought to court. A trial is also a formal adversarial proceeding to resolve a legal controversy. From *called upon,* an **appeal**[1] (the noun) is a review, especially a review of the conduct and decisions of a court or other decision maker, by a court or other decision maker with greater sovereign power. From *call upon,* to **appeal**[2] (the verb) is to seek a review.

William gave his judges large territories to cover on horseback. Each judge would ride into a town and announce that he had come to decide disputes on behalf of the king. After hearing and deciding all the disputes in that town, he announced when he expected to return and rode to the next town. Each judge "rode a circuit" of towns.

While on the road, these judges would often pass by each other. They would stop and invite each other to a roadside inn to talk about the cases they had decided. In discussing their cases over their favorite beverage, they learned that they had, on occasion, decided the outcome of similar cases differently.

The judges realized that their jobs were in jeopardy. They had observed that people have a sense of **simple justice**: that persons in like circumstances should be treated alike. If the peasants complained to the king that his judges were not treating them fairly because they were not treating persons in like circumstances alike, the king would have their heads! The judges realized that more important than the merits of their individual decisions, their decisions as a whole had to be consistent.

The judges agreed to continue to meet regularly. They would keep a record of the facts they found in each case, their reasoning in deciding the case, and their decision. At the inn, they would report and study each other's cases. If they had a case that presented a similar fact pattern or issue, they would try to follow the reasoning and law laid down by the judge in the case that had already been decided.

From *preceding,* a **precedent** is a preceding similar case, or the law established or applied in a preceding similar case. A precedent is a type of legal authority. From *that which settles,* a **legal authority** or **authority** is an authorized declaration of the law such as legislation of a legislature, an order of an executive, or a precedent of a court; or a person or entity able to make an authorized or persuasive declaration of the law.

From *speculate,* a **theory** is an idea explaining how something is, or an idea suggesting how something should be done. From *teaching,* a **doctrine** is a recurring theory; a theory that repeatedly makes sense to apply.

The judges developed the **doctrine of stare decisis**, which is generally following the law established or applied in a preceding similar case. Simply put, from *gaze fixed* or *stand by that decided,* **stare decisis** means to stand by the decision, and generally following precedent. With stare decisis, the judges put some stability and predictability into their decisions. A precedent repeatedly followed becomes well-established law.

By generally following precedent, the law made by judges in deciding actual cases, the judges, over time, made the law common to all of England, known, from *belonging to all,* as the **common law**. Restated, the common law is the law made by judges in deciding actual cases or a legal system emphasizing case law. It is judge-made law. **Case law**[1] is, in part, law made by a court in deciding an actual case.

As Joseph Story (1779–1845), a judge on the U.S. Supreme Court who was also a professor of law at Harvard University, once wrote, "[T]he common law of England [is] the grand reservoir of all our jurisprudence. [This is] obvious to every person acquainted with the history of the law." *United States v. Wonson,* 28 F. Cas. 745, 750 (C.C.D. Mass. 1812).

From *wild,* **jungle law** is having no law except survival. All law is better than jungle law. From *citizen,* **civil** and **civilized** mean under the same law and, therefore, orderly. The common law is civil and civilized.

Nevertheless, as a legal system, the common law may be contrasted with the legal system of France and many other Western countries known as **civil law**[3], which is law based on Roman law or a similar compilation of laws or a legal system emphasizing statutory law. From *established,* **statutory law** is law made by a legislature or law from the legislative branch. From *law-proposing body,* a **legislature**[1] is a sovereign entity that exists for the sole purpose of making law. (The phrase "civil law" is more often used to refer to law between individuals—as opposed to law protecting society.)

LAW AND EQUITY

Originally, a **court**[2] was a place where a king or queen lived or a king or queen's entourage. Gradually, court came to mean a king or queen's formal meeting place to handle governmental affairs and dispense justice. To meet to dispense justice is still known as to **hold court**.

The first court system in England after the Norman Conquest was the system of judges riding from town to town, deciding cases under the doctrine of stare decisis, and creating the common law. In the sense of a court system, **law**[9] means according to precedent.

Because the traveling judge would often be a stranger in town, he would often ask local townspeople, who knew the town, to help him decide the facts of the case. The judge would follow precedent, and because he was leaving town after the case, if the judge decided to impose punishment on a wrongdoer, it would have to be a one-time punishment such as imprisonment for a certain amount of time or paying a certain amount of money for whatever damage the wrongdoer caused to another.

The terms **law court** and **court of law** refer to a court in which a judge, assisted by a jury if needed, attempts to decide a case on precedents and imposes one-time punishments, if any, such as imprisonment or the payment of money for damage caused to another.

The highest law court in common law England was the **King's Bench** or the **Queen's Bench**. The **Star Chamber** was a special criminal law court in England during the 1500s and 1600s created to hear secret cases involving national security, and known

for the stars painted on its ceiling and infamous for the use of torture to obtain confessions. (The abuses of the Star Chamber ultimately led to the creation of the Fifth Amendment privilege against self-incrimination in the Constitution of the United States.)

The weakness of the law courts was the unavoidable unfairness that resulted when a wrongdoer committed wrongs while the judge was out of town and continuous or immediate relief was needed. While the judge was out of town, for example, a wrongdoer might unfairly sell his goods under the business name of another. Another wrongdoer might promise to do work that had to be performed immediately, like shoring up a dam, but unfairly refuse to do the work.

Not getting adequate relief from the law courts, people harmed by such wrongdoers would go to the king for help. From *equal,* they sought fairness and relief from unfairness, known as **equity**[1]. The king responded to requests for equity by creating another court system.

From *officer at the bar,* the king appointed a nontraveling judge, a **chancellor**, a judge of equity, to hear equity cases. Without a jury, and deeming fairness more important to the resolution of the case than precedent, the chancellor had the flexibility to impose a continuous or immediate punishment on a wrongdoer such as an injunction. From *impose,* an **injunction** is a stop command, a command requiring a person to stop doing something contrary to equity, or a must-do command, a command requiring a person to do something the person is obligated to do by equity.

The terms **equity court** and **court of equity** refer to a court in which a judge, without a jury, attempts to decide a case on fairness and imposes continuous or immediate punishments, if any, such as an injunction.

The highest equity court in England was the **Chancery**. The name **chancery court**[1] means a court of equity and **chancery law** is equity.

The **Exchequer** was a special common law court in England, having both law and equity divisions, for the collection of debts and duties owed the king, and the court in England named for the marked and scored checkered cloth covering its table.

FROM ENGLAND TO ITS COLONIES

Since 1066, the kings of England have gradually lost most of their sovereign powers to the legislature of England—now the legislature of Great Britain—from *speaking body,* the **Parliament**. Nevertheless, for more than 700 years, there were only two main sources of law in England: (1) the commands of the king and (2) the common law and equity made by judges. With the invention of the printing press, the decisions of judges were published. The sovereignty of the king and his judges was carried from England to its colonies, including America.

THE AMERICAN REVOLUTION

By the mid-1700s, the English had colonized the eastern coast of North America, displacing the claims of sovereignty by the Native Americans. The colonists were subjects of the king of England and subject to English common law and equity.

The American colonists, however, saw the oppressive sovereignty—from *cruel use of power,* the **tyranny**—inherent in having a human king. They wanted to start new lives in America, yet they were controlled by one man, the king of England, who reigned from over 3,000 miles away. Having little or no voice in their government, they were taxed, without representation, mostly for the benefit of the king of England. Finding this tyranny to be intolerable, they revolted.

On July 4, 1776, the American colonists declared their independence. At common law, from *thoroughly make clear,* a **declaration** was a formal document setting forth a cause for legal relief. The 1776 document declaring Americans independent of the sovereignty of the king of England is known as the **Declaration of Independence**.

After 1776, the American colonists created new sovereigns in North America, joined together as the United States of America. The creation of these new sovereigns is discussed in Chapter 6, The Constitution and Government, Generally.

THE MERGER OF LAW AND EQUITY

Gradually, over time, into the mid-1900s, law court judges realized that it was not necessary to have traveling judges on a regular basis. Modern transportation made it easier for people to come to a court with an established location such as in a state capital, a major city, or a county seat. Instead of the judges going out to the people to decide disputes, it was more convenient to have the people bring their disputes to the judges.

With the law courts in established locations, it became less important to have separate courts of law and equity. Sovereigns gradually merged law and equity. From *absorb in another,* a **merger**[1] is a combination or absorption of things into a single thing. The **merger of law and equity** is the principle that a single court can decide both matters of law and matters of equity. The distinction between matters of law and equity remains important, however, for knowing when a person is entitled to a trial by jury, for knowing when the court will focus on precedent or fairness, and for knowing what kinds of punishment or relief a court may impose.

GO TO THE NET

Visit the *Legal Terminology Explained* Online Learning Center at http://www.mhhe.com/nolfi09 for an expanded index and glossary, including:

- **abdication**
- **at common law**
- **Code Napoleon (Napoleonic Code)**
- **Great Commandment**
- **judicial precedent**
- **Justinian Code**
- **settled law**
- **Ten Commandments**
- **Napoleon Bonaparte (Napoleon I)**
- **Jesus Christ**
- **Henry II**
- **John (King of England)**
- **Justinian I**
- **Moses**
- **William the Conqueror**

Part Two

People in Law

Chapter 3

Lawyers

LAWYERS, GENERALLY

From *law doer* or *law sayer,* a **lawyer** is a legal expert, especially a legal expert who individualizes the law. From *one who leans on another,* a **client** is a legal customer, especially a legal customer for whom the law is individualized.

THE FIVE WAYS TO RESOLVE A DISPUTE WITHOUT VIOLENCE

There are five ways to resolve a dispute without violence, and lawyers are useful in all of them. The **five ways to resolve a dispute without violence** are avoidance, negotiation, mediation, arbitration, and adjudication.

The first way to resolve a dispute is, from *to empty,* **avoidance**, which is resolving a dispute by escaping from the dispute before the other person knows about it. If there is a dispute, but without discussion (A) you persuade the other person to act as you want, (B) you act or appear to act as the other person wants, or (C) you act or appear to act beyond where the other person can act against you, then the other person will not know there is a dispute or will not be able to act against you. If you avoid a dispute, then, as a practical matter, there is no dispute. Of course, if those on the other side of the dispute later learn of your avoidance, they may accuse you of doing something improper. Because people engage in avoidance, the judgment of some events is left not to law, but to history. (For example, was it immoral to keep certain information secret?) A lawyer can recommend the best way to avoid a dispute, including by obeying the law.

The second way to resolve a dispute is, from *deal,* **negotiation**[1], which is resolving a dispute by discussion and agreement, without a neutral third person. A lawyer can negotiate for a client and serve as a negotiator.

The third way to resolve a dispute is, from *in the middle,* **mediation**, which is resolving a dispute by discussion and agreement, with the help of a neutral third person not given the power to decide the dispute. A lawyer can negotiate for a client in mediation or serve as a mediator.

The fourth way to resolve a dispute is, from *to approach,* **arbitration**, which is resolving a dispute by the decision of a neutral third person to whom the disputants have given the power to decide the dispute. A lawyer can negotiate or fight for a client in arbitration or serve as an arbitrator.

The fifth way to resolve a dispute is, from *to judge,* **adjudication**[1], which is resolving a dispute by the decision of a neutral third person with inherent or sovereign power to decide the dispute. A lawyer can negotiate or fight for a client in court or serve as a judge.

Alternative dispute resolution (**ADR**) means, in part, resolution of a dispute by negotiation, mediation, or arbitration, rather than by adjudication.

THE NEED FOR LAWYERS

Society has always needed some people who know the law in detail. Justice requires some people who are obedient to the law and who enforce the law. As Martin Mayer found in studying lawyers for his 1966 book, *The Lawyers,* the **four functions of a lawyer** are counseling, securing, negotiating, and fighting.

A new need for legal experts arose in England after the Norman Conquest. The traveling judges appointed by William the Conqueror became the first experts of the common law. From *right say,* a **judge** is a representative of the sovereign who presides over cases brought to a court, decides the facts as necessary, decides the law, and applies the law. From *law expert,* a **jurist** is a judge who is also a legal scholar. In a traditional courtroom, the desk where the judge sits is known as, from *bank,* the **bench**[1]. Judges collectively are also known as the **bench**[2]. From *cohort,* **the court** or **court**[3] is an impersonal and respectful reference to the judge or judges deciding a case. From *you of esteem,* **your honor** is an impersonal and respectful way to address an individual judge.

A judge may employ a lawyer as an assistant decision maker. From *expert,* a **master**[1]; from *trusted person,* a **commissioner**[1]; from *expert trusted person,* a **master commissioner**; or from *person to whom referred,* a **referee** is a lawyer appointed by a judge to hear, recommend a decision for, but not decide, a case. The judge usually adopts the recommendation of an assistant decision maker, but does not have to. The appointment of a master, commissioner, master commissioner, or referee to hear, recommend a decision for, but not decide, a case is known as a **reference**[1]. Similar to a referee, from *official,* a **magistrate** is a subordinate judge. A magistrate is usually given power to issue search warrants, preside at arraignments, preside at pretrial hearings, and serve as a referee.

Although at common law the decisions of judges remained subject to the king's review, more legal experts were needed when the king made his life easier by appointing judges to review the decisions of other judges. From *called upon,* an **appellate court**[1] is, in part, a court that reviews the conduct and decisions of a trial court or a lower court and a court that decides whether the law was properly applied in a trial court or a lower court. From *upright,* a **justice**[3] is a judge on an appellate court. At the other extreme, in some states, a **justice of the peace** is a local judge with limited powers.

As people became aware that judges were generally following precedent, some followers of the law became legal experts who could give a valuable opinion as to how a judge was likely to decide a case and, therefore, whether or not it was worthwhile to bring the case to court. The need for legal experts increased again with the development of equity courts because people needed legal experts to tell them whether they should bring their case to a law court or to an equity court. From *advice,* to **counsel** is to give professional advice. A **counselor**[1] is, generally, a professional who gives professional advice. Emphasizing the counseling function of a lawyer, a lawyer is sometimes known as a **counselor**[2]. Law-related advice is **legal advice**. Counseling is usually given during or after an **interview**, which is, from *between see* (face-to-face), a discussion designed to obtain or exchange information.

The need for legal experts increased again as the law required more and more legal acts to be in writing. From *without care,* **securing** is ensuring that something has the desired effect. From *document,* an **instrument** is a formal legal writing. From *drawing,* a **draft**[1] (the noun) means a preliminary version of an instrument and, from *select for a special purpose,* **draft**[2] (the verb) means to write with special knowledge and skill. A client has a lawyer draft an instrument to ensure that it has the desired effect.

The need for legal experts continues to increase as society and its law become more and more complex. Furthermore, as a human matter, in most cases, you are better off having another person represent you in an important legal matter or proceeding. Being involved or potentially involved in an important legal matter or proceeding increases your stress, and stress makes it difficult for you to see, hear, and think clearly.

From *deal,* **negotiation**[2] is a discussion of something between persons who have an actual or potential conflict of interest in an effort to reach an agreement, ideally to their mutual benefit. To **negotiate**[1] is to discuss something with another who has an actual or potential conflict of interest in an effort to reach an agreement, ideally of mutual benefit. In most cases, a person should pass the negotiation of an actual or potential legal conflict to a lawyer. A **negotiator** is a person who directly engages in a negotiation, whether or not that person is a lawyer.

From *to present,* a **representative**[1] is a person who stands for or in another person's place and acts or speaks for that other person. From *to do,* an **agent**[1] is, generally, a representative or a person who acts for another. From *a person turned to,* an **attorney** is a legal agent or a legal representative. An attorney is a person who legally performs law-related acts on behalf of a client. Today, because almost without exception an attorney is required to be a licensed lawyer, it is correct to say that an attorney is a lawyer who represents a client. Thus, except for lawyers who do not represent clients, the words lawyer and attorney are synonymous. Technically, a lawyer who does not represent a client is not an attorney, but could be.

An **attorney-at-law** is a person capable of being a legal agent, unlike an **attorney-in-fact**[1], a nonlegal agent. A lawyer can represent you in court. A real estate broker who is not a lawyer cannot represent you in court, but can sell your house.

Another need for legal experts arises from the fact that, in most cases, it is more convincing for another person to argue your cause because it implies that another person believes in your cause and because anything you say may be regarded as self-serving. Furthermore, if you are accused of a serious crime, you are usually not in a position to collect evidence in your own defense. Fighting for a legal cause, like advancing or arguing for a cause generally, or the strategy and tactics in trying or appealing a case, is known, from *voice,* as **advocacy**. To **advocate**[1] (the verb) is to advance or argue for a cause. Emphasizing the fighting function of a lawyer, a lawyer is sometimes known as an **advocate**[2] (the noun), which is a person who advances or argues for a cause or an attorney who advances or argues for a client's cause.

The wisdom that, in most cases, you are better off having another person represent you in an important legal matter or proceeding, because, in most cases, it is more convincing for another person to argue your cause, is expressed in the famous saying **"A person who represents himself (or herself) has a fool for a client."** Nevertheless, a person always has the right to act without an attorney because in a few cases only that person knows, sets aside, or does not know the facts or the law such that it is better for that person to argue his or her own cause. In Latin meaning *for himself* or *for herself,* **pro se** (or **pro per**) means without being represented by an attorney. Notice that a lawyer can appear in court pro se because a lawyer can appear in court for himself or for herself without being represented by another lawyer. Note, however, that when the great criminal lawyer Clarence Darrow was accused of a crime, he decided to hire another lawyer, Earl Rogers, to represent him.

THE EDUCATION AND LICENSING OF LAWYERS

From *bring up,* **legal education** is how law is taught, law teaching, or law learned. After the Norman Conquest, the law was first studied by the traveling judges. They would stop on the road and invite each other to a roadside inn to talk about the cases

they had decided. That was how they educated themselves in the law. In England, the idea of meeting at an inn to study the law gradually became a formal system of legal education. In the 1300s, near the town of Westminister, **Inns of Court**, private English societies that prepare students to be lawyers, were formed. The four Inns of Court are Gray's Inn, Inner Temple, Lincoln's Inn, and Middle Temple.

In the early history of the United States, most students of the law became lawyers through an **apprenticeship**, which, from *learning a trade,* is when a current member of a profession or trade sponsors and trains a student to be a member of the profession or trade. A student would become a lawyer by reading the law and being prepared by a sponsoring lawyer. Abraham Lincoln, for example, became a lawyer by reading the law.

The law gradually became complex enough that the average lawyer did not have the time or the ability to teach a student of the law everything the student needed to know. The need for more than one teacher suggested the need for a school. A **law school** is a school that trains a student to be a lawyer. A **law student** is a student in training to be a lawyer. Traditionally, a **law professor**[1] is a professor who teaches law at a law school.

Founded in 1784, the first American law school, a proprietary school, was the **Litchfield Academy** in Connecticut. **Harvard Law School**, in Cambridge, Massachusetts, became a leading law school because it was where, in 1871, the case method was first used by Dean Christopher Columbus Langdell. The primary method of teaching used at most law schools, the **case method**[1] is training law students by having them read cases before a class and aggressively questioning them and their understanding of the law in class. This teaching by questioning in law school is said to be the **Socratic method**[1] used by the philosopher Socrates.

Many law students find the case method to be needlessly inefficient and frustrating. Because there are other methods of teaching, and other interpretations of Socrates' method, some people refer to the Socratic method as misused in law school as the **so-called Socratic method**. For example, the Jesuit interpretation of the **Socratic method**[2] is teaching by questioning to refine what has been learned by other methods, followed by correction of any misunderstanding.

Founded in 1900 and located in Washington, D.C., the **Association of American Law Schools** (**AALS**) is a trade association for law schools. In 1950, the AALS recommended that students attend college before attending law school. That recommendation became a requirement. In 1953, in response to inquiries about what students should study in college before they go to law school, the AALS recommended that a student study any subject in college *except law*. The self-serving notion that law could not be learned outside of law school was disproved in the 1970s, 1980s, and 1990s when many successful paralegal programs were created at the college level.

In Latin *legume baccalaureus,* the **Bachelor of Laws** or **L.L.B.**, is the traditional first academic degree in law. After the AALS recommended that students attend college before attending law school, the modern first academic degree in law gradually became, in Latin **Juris Doctor**, the **Doctor of Jurisprudence** or **J.D.** In Latin *legume magister,* the **Master of Laws** or **L.L.M.** is the first advanced academic degree in law. In Latin *scientia juris doctor,* the **Doctor of Juridical Science** or **S.J.D.**, or the **Doctor of the Science of Jurisprudence** or **J.S.D.**, is the second advanced academic degree in law or the highest academic degree in law. In Latin *legume doctor,* **Doctor of Laws** or **L.L.D.** is the honorary degree in law.

From *permission,* a **license**[1] is governmental permission to engage in a profession, trade, or activity. Licensing is required in an effort to protect the public from unqualified and incompetent persons working as professionals and tradespersons, or engaging in potentially dangerous activities. The state license a person must obtain to be a lawyer or an attorney is a **license to practice law**.

A lawyer is a legal expert who individualizes the law. Actually individualizing the law, including applying the law to individuals, is, from *perform,* the **practice of law** or **practice**[1] (of law), or to **practice law**. Because individuals are different, applying the law to them is always new, and so never perfected. For an experienced lawyer, however, his or her practice can approach perfection. The **unauthorized practice of law (UPL)** is engaging in the practice of law without a license to practice law.

In a traditional courtroom, the low fence that physically separates the trial participants from the spectators is known, from *barrier,* as the **bar**[1]. Lawyers collectively, all persons with a license to practice law and so permitted past the courtroom bar, are also known as the **bar**[2]. **Admission to the bar** or **admission**[1] means initial recognition of a person as a member of the bar. **Admitted to the bar** means having become a member of the bar. In many states, the **state bar** is the organization that licenses and oversees the practice of law and the conduct of attorneys in the state.

In almost every state and the District of Columbia, to go from a law school graduate to a licensed lawyer, a law school graduate must take and pass the state's or the District of Columbia's licensing test for lawyers, the **bar examination** or, simply, the **bar exam**. The bar exam is comprehensive and difficult to pass because its purpose is to weed out law school graduates who fail to grasp the basic principles of the law, or lack the ability to use those principles on behalf of a client. In preparing to take the bar exam, many law school graduates take a preparation course for the bar exam, a **bar review**.

If a law school graduate is of good character and has passed the bar exam, the last requirement to being admitted to the bar is to be sworn to the **lawyer's oath** of office. Generally, the oath is a lawyer's formal promise to defend the Constitution and to be faithful to clients. By promising to defend the Constitution, a lawyer becomes a member of the legal system with a duty to support and improve the legal system, known as an **officer of the court**.

From *servant,* a **knight** is a royal soldier. In Medieval England, under feudalism, few people actually owned their land. If you owned your own land, it was a mark of high social status. Traditionally, from *shield bearer* or *next in rank after a knight,* the title **esquire**[1] meant a member of the English landed gentry. Today, the title **Esquire**[2] and the title abbreviation **Esq.** mean a person admitted to the bar in one or more states.

From *declare openly* that one is called, a **profession** is a valuable calling requiring authority, expertise, or skill. From *educated calling,* a **learned profession** is an unusually valuable profession usually requiring formal education. Law is a learned profession and its experts are known as lawyers. Traditionally, lawyers claimed the entire "law-related" profession for themselves. Lawyers are still referred to as belonging to the "law-related" profession and not a "lawyers profession." The **legal profession** is the profession to which lawyers belong and the managers of law. In general, people who are not members of a profession are known, from *ordinary people,* as the **laity**. In general, a person who is not a lawyer is known as a **layperson**.

Founded in 1878 and located in Chicago, Illinois, the **American Bar Association (ABA)** is a voluntary national association of lawyers in the United States. One important function of the ABA is that it serves as the leading national accrediting body for law schools in the United States. Currently, there are more than 180 ABA-accredited law schools. Other national, state, and local bar associations are too numerous to list.

ROLES FOR LAWYERS

From *fall (of circumstances),* a **case** is a legal controversy, especially a legal controversy that may be, has been, or could have been brought to a court. From *complaining,* the **plaintiff** is the person who brings a case to a trial court. From *ward off,* the

defendant[1] is, generally, the person against whom a case is brought, or the person who responds to a case brought to a trial court.

From *all,* an **attorney general** is the lawyer for a sovereign for all purposes. The local lawyer for a sovereign, from *pursue,* a **prosecutor** or **prosecuting attorney**, or, from *detain,* a **district attorney** or **D.A.**, or, from *instigator,* a **solicitor**[1], is the lawyer for the plaintiff in a criminal case because the plaintiff in a criminal case is always the sovereign. The **United States attorney** in a given federal district is the local federal prosecutor. The **plaintiff's attorney** is the lawyer for the plaintiff in a civil case. In both criminal cases and civil cases, the **defense attorney** is the lawyer for the defendant.

In the United States, a lawyer is permitted to handle all aspects of a case. A **trial lawyer** is a lawyer who is frequently involved in trials. In England, trial work is a specialty. From *barrier,* a **barrister** is an English lawyer who tries cases; an English trial lawyer. From *instigator,* a **solicitor**[2] is an English lawyer who prepares and settles cases. Founded in 1972, the **Association of Trial Lawyers of America** (**ATLA**) is a national association of trial lawyers in the United States.

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- **Brandeis brief**
- **client intake**
- **Great Monkey Trial**
- **Hispanic National Bar Association (HNBA)**
- **ideal lawyer**
- **initial client meeting**
- ***Les Misérables***
- **Loeb and Leopold case**
- **National Bar Association (NBA)**
- **National Lawyers Guild (NLG)**
- **Sir William Blackstone**
- **Louis D. Brandeis**
- **Clarence Darrow**
- **Earl Stanley Gardner**
- **Patrick Henry**
- **Oliver Wendell Holmes Jr.**
- **Victor Hugo**
- **Thomas Jefferson**
- **Francis Scott Key**
- **Abraham Lincoln**
- **Horace Mann**
- **John Marshall**
- **Thurgood Marshall**
- **Perry Mason**
- **Saint Thomas More**
- **Sandra Day O'Connor**
- **Ernest Schopler**
- **Daniel Webster**
- **Noah Webster**

Chapter 4

Legal Ethics

LEGAL ETHICS, GENERALLY

Professional means of a profession or of the quality of a profession. **Professional duty** is exercising a reasonable level of skill, knowledge, training, and understanding related to the specific profession. **Professional ethics** are the generally accepted standards of conduct of a profession and **professional responsibility** is the inherent duty of a professional to abide by professional ethics.

Lawyers are bound by the code of ethics for lawyers in each state to which they are admitted and in which they are practicing. Since 1908, states have generally modeled their ethical codes for lawyers and judges after models recommended by the American Bar Association. To fully understand legal ethics, you must study legal ethics in detail. At a minimum, you should study the code of ethics for lawyers in your state.

From 1908 to 1969, the code of ethics for lawyers recommended by the ABA was the **Canons of Professional Ethics**. From 1969 to 1983, the code of ethics for lawyers recommended by the ABA was the ABA **Code of Professional Responsibility**, also known as the **Model Code**. From 1983 to present, the code of ethics for lawyers recommended by the ABA is the ABA **Model Rules of Professional Conduct**, also known as the **Model Rules**. From 1990 to present, the code of ethics for judges recommended by the ABA is the ABA Model **Code of Judicial Conduct**.

From *model,* a **canon**[2], as a matter of ethics, is a standard of professional conduct, one of the 32 standards of professional conduct in the Canons of Professional Ethics, or one of the general standards of professional conduct in the Model Code of Professional Responsibility.

THE SPECIFIC STANDARDS OF PROFESSIONAL CONDUCT FOR A LAWYER

The nine traditional canons of legal ethics provide a good brief summary of the specific standards of professional conduct for a lawyer. An ethical lawyer (1) assists in maintaining the legal profession's integrity and competence, (2) assists in making legal counsel available, (3) assists in preventing the unauthorized practice of law, (4) preserves client confidences and secrets, (5) exercises independent judgment for a client, (6) represents a client competently, (7) represents a client zealously within the bounds of the law, (8) assists in improving the legal system, and (9) avoids the appearance of professional impropriety.

In general, legal ethics require a lawyer to be loyal to the legal system and to try to improve the legal system. Only lawyers should practice law. Lawyers should be professional and help their clients as much as possible without harming the legal system. Lawyers should be competent, act for their clients, and keep their clients' secrets.

A license to practice law gives a lawyer the right to give legal advice and to perform legal services for money. From *hold,* a **retainer** is a down payment to an attorney, securing the attorney's services. From *payment,* an **attorney's fee** is money charged for legal services and one attorney's fee charged by one attorney. An **attorneys' fee** is one attorney's fee charged by more than one attorney, **attorney's fees** are more than one attorney's fee charged by one attorney, and **attorneys' fees** are more than one attorney's fee charged by more than one attorney. From *happening payment,* a **contingent fee** or **contingency fee** is an attorney's fee dependent on the result achieved for the client such as an attorney's fee based on a percentage of the amount recovered for the client. It is an attorney's fee calculated as a percentage of the final award in a civil case. It is unethical for an attorney to charge a contingent fee in a criminal or family law case.

The limited right of an attorney to keep client documents until an attorney's fee is paid or secured is the **attorney's lien**, sometimes known as a **retaining lien**.

Occasionally, a lawyer does not charge a fee. In Latin meaning *for the public good,* **pro bono publico**, or, simply, **pro bono**, is the ethical obligation, based on the privilege of practicing law, to provide some legal services for the public good, without charging a fee.

From *trusted,* a **fiduciary** is a trusted legal representative and a person who acts primarily for the benefit of another, upon whom the law imposes special duties of care, confidence, trust, and good faith. An attorney is a fiduciary for his or her client. From *mix,* to **commingle** is to combine or mix together money or other property such that it cannot be easily distinguished and traced to its source. One of the special duties of an attorney as the client's fiduciary is to not engage in the **commingling of funds**, which is combining or mixing together the money of the fiduciary (the attorney) and the money of the person for whom the fiduciary is acting (the client). In short, **commingling** is, in part, mixing a client's funds with the attorney's personal funds without permission. It is illegal and unethical for an attorney to not keep the money of a client separate and apart from the attorney's money.

Many states have **Interest on Lawyers' Trust Accounts** (**IOLTA**), which is a program in which attorneys who hold client funds for a short period of time are asked or required to deposit the funds in a trust account from which the interest is used for a charitable purpose such as providing the poor with legal services.

A **conflict of interest** is, in part, a clash between private and professional interests or competing professional interests that make impartiality difficult and creates an unfair advantage. A **conflict check** is a procedure to find or verify potential adverse interests before accepting a new client.

Lawyers may associate with other lawyers in the practice of law. The forms of business in which they may practice law, and related terms, are discussed in Chapter 26.

Professional misconduct is the failure of a professional to abide by professional ethics or malpractice. Malpractice is discussed in Chapter 34.

From *disciple,* **discipline**[1] is, generally, conforming yourself to established standards or conforming others to established standards. From *encouragement,* a **sanction** is a penalty for improper conduct. From *criticism,* a **censure**[1] is, generally, an announced warning to a person that he or she has acted improperly.

A lawyer proven to have acted unethically may be sanctioned by a court or by a state or local disciplinary body. For example, in the Code of Professional Responsibility, a minimum standard that a lawyer must meet to avoid a sanction is known as a **disciplinary rule** or **DR**.

From *repress,* a **reprimand** is a formal warning to a person that he or she has acted improperly. From *apart repress,* a **private reprimand** is a confidential formal warning to a lawyer that he or she has acted unethically. It is the minimum censure for an attorney who commits an ethical violation. The attorney is informed privately about

the violation, but no official public entry is made. From *open repress,* a **public reprimand** or **censure**[2] is an announced formal warning to a lawyer that he or she has acted unethically. It is a published censure of an attorney for an ethical violation. From *hang,* a **suspension** is prohibiting a lawyer from practicing law for a period of time, for serious unethical conduct. A **temporary suspension** is a punishment for an ethical violation such as when an attorney is temporarily prohibited from practicing law or representing clients. From *not of the bar,* **disbarment** is terminating a lawyer's license to practice law, for intolerable unethical conduct; or, loosely, temporary suspension or permanent revocation of an individual's license to practice law. To **disbar** a lawyer is to terminate a lawyer's license to practice law, for intolerable unethical conduct.

THE SPECIFIC STANDARDS OF PROFESSIONAL CONDUCT FOR A PARALEGAL

It is unethical for lawyers to circumvent their ethical obligations through the use of law-related professionals or others. As a result, to the extent that law-related professionals work with lawyers, they may be indirectly subject to the ethics of lawyers. Law-related professionals also may be directly subject to ethics of their own professions, especially ethical codes established by professional associations of which they become members.

Several paralegal associations discussed in Chapter 5 have ethical codes. For example, the 10 canons of the National Association of Legal Assistants' code of ethics provide a good brief summary of the specific standards of professional conduct for a paralegal. (See Figure 4.1.)

FIGURE 4.1
Ten Canons from the National Association of Legal Assistants Code of Ethics

An ethical paralegal

1. Does not perform attorney-only duties or illegal duties,
2. Performs tasks delegated and supervised by an attorney,
3. Does not engage in the unauthorized practice of law or assist an attorney in a violation of professional ethics,
4. Uses professional judgment but not in place of an attorney,
5. Discloses that he or she is a paralegal,
6. Maintains competency through education and continuing education,
7. Protects the confidential information of a client,
8. Avoids conflicts of interest,
9. Acts ethically and according to law, and
10. Guides his or her conduct by professional ethics.

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Chapter 5

Law-Related Professionals

LAW-RELATED PROFESSIONALS, GENERALLY

A **legal professional** is a member of a profession generally associated with law. Because law is now seriously taught to legal professional students, a **law professor**[2] is now a professor who teaches law at a law school, college, or proprietary school. **Continuing legal education (CLE)** is continued legal competence and skills training required of practicing professionals by a court, state bar, or professional association. **Certification** is the recognition of the attainment of a degree of academic and practical knowledge by a professional.

Paralegalism is the phenomenon of managing or practicing law with trained assistants. From *beside a member of the legal profession,* a **paralegal**[1], or, from *assisting a member of the legal profession,* a **legal assistant**[1], is, fundamentally, a person who assists a lawyer in individualizing the law. There is no generally accepted definition (see Figure 5.1). The fundamental definition is based on the definition of a lawyer. Some people believe that the terms "paralegal" and "legal assistant" are synonymous. Other people believe that the word "paralegal"—similar to "paramedic"—should alone indicate a person capable of working beside a professional, a **para-professional**.

Based on my experience as a lawyer who has led both paralegal and legal assistant programs, my full definition of a **paralegal**[2] or **legal assistant**[2] is a person who assists a lawyer in individualizing the law, performing, under the supervision of the lawyer, functions the lawyer would otherwise have to perform personally. I also define **paralegal**[3] as a person who assists a lawyer primarily by performing functions the lawyer would otherwise have to perform personally.

Analogous to the four functions of a lawyer, I find the **eight functions of a paralegal** to be knowledge, interviewing, investigation, legal research, legal writing, assistant advocacy, advocacy, and office management. Paralegal advocacy does not include the unauthorized practice of law. From *handle,* **law office management** is legal economics; the law managed with office organization.

The American Bar Association (ABA) does not accredit schools other than law schools, but it does have a voluntary approval program for legal assistant or paralegal programs. In 1997, the ABA adopted its definition of a legal assistant or paralegal. In summary, the ABA definition of a **legal assistant**[3] or a **paralegal**[4] is a qualified person employed to perform specifically delegated lawyer-responsible work.

Founded in 1975 and located in Tulsa, Oklahoma, the **National Association of Legal Assistants (NALA)** is a leading voluntary national association of legal assistants and paralegals in the United States. As adopted in 1986, the NALA definition of **legal assistants**[4] (defined in plural) or **paralegals**[5] (defined in plural) is a distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training, and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law that qualify them to do

FIGURE 5.1
Definitions of Paralegal

American Association for Paralegal Education (AAfPE)

- Persons who perform substantive and procedural legal work as authorized by law, which work, in the absence of the paralegal, would be performed by an attorney.

American Bar Association (ABA) (summary)

- A qualified person employed to perform specifically delegated lawyer-responsible work.

Benton, Deborah S. (author of McGraw-Hill's *Law for Paralegals*)

- A person qualified to assist an attorney, under direct supervision, in all substantive legal matters with the exception of appearing in court and rendering legal advice.

National Association of Legal Assistants (NALA)

- A distinguishable group of persons who assist attorneys in the delivery of legal services. Through formal education, training, and experience, legal assistants have knowledge and expertise regarding the legal system and substantive and procedural law that qualify them to do work of a legal nature under the supervision of an attorney.

National Federation of Paralegal Associations (NFPA)

- A person who is qualified through education, training, or work experience to perform substantive legal work that requires knowledge of legal concepts and is retained or employed by a lawyer, law office, governmental agency, or other entity or may be authorized by administrative, statutory, or court authority to perform this work.

Nolfi, Edward A. (the author)

- A person who assists a lawyer in individualizing the law.
- A person who assists a lawyer in individualizing the law, performing, under the supervision of the lawyer, functions the lawyer would otherwise have to perform personally.
- A person who assists a lawyer primarily by performing functions the lawyer would otherwise have to perform personally.

work of a legal nature under the supervision of an attorney. A person certified by the NALA as meeting its professional standards is known as a **Certified Legal Assistant®** (**CLA**). CLA also refers to the standardized test based primarily on general concepts and federal law administered in connection with paralegal/legal assistant certification.

Founded in 1974 and located in Seattle, Washington, the **National Federation of Paralegal Associations** (**NFPA**) is the largest voluntary national association of paralegals in the United States. As adopted in 2002, the NFPA definition of a **paralegal**[6] is a person who is qualified through education, training, or work experience to perform substantive legal work that requires knowledge of legal concepts and is retained or employed by a lawyer, law office, governmental agency, or other entity or may be authorized by administrative, statutory, or court authority to perform this work. A person certified by the NFPA as meeting its professional standards is known as a **Registered Paralegal** (**RP**). The **Paralegal Advanced Competency Exam** (**PACE**) is the NFPA's two-tiered paralegal certification program requiring a bachelor's degree, completion of a paralegal program, and practical experience to qualify for the proficiency examination leading to certification.

Founded in 1981 and located in Mount Royal, New Jersey, the **American Association for Paralegal Education** (**AAfPE**) is a national organization of paralegal educators promoting quality paralegal education. As of 2006, the AAfPE definition of **paralegals**[7] (defined in plural) is persons who perform substantive and procedural legal work as authorized by law, which work, in the absence of the paralegal, would be performed by an attorney.

The definition of **paralegal**[8] created for McGraw-Hill/Irwin by Deborah S. Benton, author of *Law for Paralegals,* is a person qualified to assist an attorney, under direct supervision, in all substantive legal matters with the exception of appearing in court and rendering legal advice. Her definition of **legal assistant**[5] is an individual qualified to assist an attorney in the delivery of legal services. A **freelancer** is a paralegal in business for him- or herself who contracts with an attorney or law firm to perform specific tasks for a designated fee.

From *legal secret entrusted,* a **legal secretary** is a person trained to perform specialized tasks directly related to the practice of law. Founded in 1949 and located in Tulsa, Oklahoma, the **National Association of Legal Secretaries** (**NALS**[1]) was, until 1999, the leading voluntary national association of legal secretaries in the United States. Because the association's membership also included legal assistants and paralegals, in 1999, the association made its acronym its name. **NALS, Inc.** or **NALS**[2] (since 1999) is a national association of members of the legal services professions. In 2002, NALS adopted the ABA definition of a legal assistant or paralegal. Traditionally, a person certified by NALS as meeting its basic legal secretary standards was known as an **Accredited Legal Secretary** (**ALS**[1]). Traditionally, a person certified by NALS as meeting its advanced legal secretary standards was known as a **Professional Legal Secretary** (**PLS**[1]). Today, a person certified by NALS as meeting its basic professional standards is known as an **ALS**[2]. Today, a person certified by NALS as meeting its advanced professional standards is known as a **PLS®**[2]. A person certified by NALS as meeting its paralegal standards is known as a **Professional Paralegal** (**PP**).

Founded in 1995 and located in Houston, Texas, **Legal Secretaries International, Inc.** is an international association of legal secretaries. A person certified by Legal Secretaries International, Inc. as meeting its professional standards is known as a **Certified Legal Secretary Specialist** (**CLSS** or **CL§**). (On a typewriter, a section symbol, §, was made by typing a lowercase "s", backspacing, turning the carriage down half a line, and typing another lowercase "s". In modern word processing, use the appropriate "Insert>Symbol" menu.)

A **private investigator** is a person licensed by the state to provide the service, for money, of obtaining personal information about the character or conduct of a person, recovering lost or stolen property, or collecting evidence for use in a legal proceeding. There are numerous national and state associations of private investigators. As a licensed professional, a private investigator can engage in investigative conduct that might otherwise be regarded as invasion of privacy or stalking.

From *copy written,* a **transcript** is a written record of what was said. In Latin, **verbatim** means *word-for-word*. **Real time** means as it happens. From *court back-carry,* a **court reporter** is a person who makes a verbatim record of a legal proceeding and a person skilled at making a real-time verbatim record of testimony, reading the testimony back from the record, and creating a verbatim transcript of the testimony. Court reporters are legal professionals. Their record-making and read-back services are needed for important trials. Verbatim transcripts are often needed for an appeal.

Founded in 1899 and located in Vienna, Virginia, the **National Court Reporters Association** (**NCRA**) is the leading voluntary national association of court reporters in the United States. The NCRA approves court-reporting programs.

GOVERNMENT OFFICIALS, GENERALLY

Government officials are required to promise to support the Constitution of the United States and perform their duties faithfully. From *solemn promise,* a solemn promise to perform as requested is, generally, an **oath**[1]. After or while a person has solemnly promised to perform as requested is, generally, being **under oath**[1]. From *take*

oath, to **swear**[1] means to solemnly promise. Specifically, to **swear**[2] means to solemnly promise, as the promisor will answer to God or other ultimate reality, subject to legal penalty. If, for any reason, a person will not swear to God or other ultimate reality, the person may make a solemn secular promise to perform as requested, known, generally, as an **affirmation**[1]. In conjunction with an oath, from *make firm* or make valid, to **affirm**[1] means to make a solemn secular promise subject to legal penalty. **Sworn**[1] means solemnly promised. Specifically, **sworn**[2] means solemnly promised, as the promisor will answer to God or other ultimate reality, or be subject to legal penalty. A **sworn statement** is a statement made under oath or affirmation. When or after a person swears or affirms an oath before an appropriate government official, the person is **sworn in**.

From *note openly,* a **notary public** is a government official whose sole functions are to administer oaths and to be an official government witness to statements made under oath. To **notarize** is to be a notary public, to act as an official witness to statements made under oath, and to record having so acted on the document or transcript.

GOVERNMENT OFFICIALS BEFORE OR WITHOUT A TRIAL

From *threading together to preserve,* **filing**[1] is depositing a document with a public official to preserve a record of it. **Filed** is having deposited a document with a public official to preserve a record of it. Proceedings in court usually begin with the filing of appropriate documents with the court's official record keeper. From *scribe,* a **clerk** is a government official responsible for maintaining public records. The **clerk of the court**, **clerk of court**, or **court clerk** is the government official who accepts documents for filing in one or more courts, the government official who maintains the official records of one or more courts, and an individual who manages the administrative functions of one or more courts. An assistant court clerk is usually known, from *appointed scribe,* as a **deputy clerk**.

Legal processes and proceedings before or without a trial often require information obtained with some assurance that the information is true. A common way is by requiring the person giving the information to do so under an oath to tell the truth. An **oath**[2] is a solemn promise to tell the truth, the whole truth, and nothing but the truth. An **affirmation**[2] is a solemn secular promise to tell the truth, the whole truth, and nothing but the truth. The phrase **under oath**[2] means after or while a person has solemnly promised to tell the truth, the whole truth, and nothing but the truth, or is obligated to tell the truth, the whole truth, and nothing but the truth.

Legal processes and proceedings before or without a trial can often be completed with written documents only. From *stated on oath,* an **affidavit**, a sworn statement, is a written statement made under oath before an appropriate government official (usually a notary public) or a written statement sworn or affirmed by the maker to be true. An **affiant** is the person who makes an affidavit. The **jurat** is the words indicating the date, the place of signing, and the person before whom an affidavit was signed, or the words indicating how, why, and for what purpose a document was signed.

From *put down,* a **deposition**[1] is, generally, when, before a trial, a person is required to answer oral questions under oath. A deposition is usually taken before a person who is both a court reporter and a notary public—a person who can both administer the oath and make a verbatim record of the oral questions and answers.

On rare occasions, when a nonlawyer or retired lawyer has special expertise, a court may appoint a nonlawyer to serve as the equivalent of a referee. From *to approach,* an **arbiter** is a nonlawyer appointed by a judge to hear, recommend a decision for, but not decide, a case; an assistant decision maker. Sometimes disputes can be resolved without a court hearing or trial. From *in the middle,* a **mediator** is the neutral third

party in mediation. From *to approach,* an **arbitrator** is the neutral third party in arbitration. As a general rule, mediators and arbitrators do not have to be lawyers.

GOVERNMENT OFFICIALS AT TRIAL OR ON APPEAL

From *administrator,* a **bailiff** is a judge's personal assistant and a court assistant who keeps order in the court, with duties such as administering oaths to the jury and witnesses during a trial. A court reporter that works full time for a particular court may be known as that court's **official court reporter**. From *law scribe,* a **law clerk** is usually a law student or new lawyer who assists a judge or attorney with legal research and writing, but also may be a paralegal who assists a judge or attorney with legal research and writing. A **staff attorney** is an experienced lawyer who assists a judge or attorney.

LAW ENFORCEMENT AGENCIES AND THEIR AGENTS

From *to make an effort* or *to force,* **enforcement** is an effort to ensure compliance with a social standard. **Law enforcement** is an effort to ensure compliance with criminal law. A **criminal justice professional** is a person who expertly enforces the law protecting society, or a policy protecting people, by performing functions that protect and serve. The **ten functions of a criminal justice professional** are to know, patrol, report, research, investigate, detect, detain, testify, guard, and serve.

After the commission of a crime, criminal cases usually begin with enforcement of the criminal law by law enforcement agencies and their agents. From *to do,* an **agent**[1] is, generally, a representative and a person who acts for another. A governmental entity, especially a law enforcement entity, that employs agents may be known as an **agency**[1]. From *server,* an **officer**[1] or **official**[2] is, generally, a formal agent or an agent in a position of substantial authority. There are numerous law enforcement agencies and agents involved in the enforcement of criminal law. Many are discussed here.

From *public order server,* the phrase **police officer**[1] is used, generally, to refer to any law enforcement officer. From *appointee,* an assistant officer, especially an assistant police officer, may be known as a **deputy**. When an ordinary person is asked by a police officer to assist the police officer in active law enforcement, the ordinary person is said to be **deputized**. From *uncover officer,* a **detective** is a law enforcement officer who specializes in investigating a crime and attempting to determine who committed the crime and how. A **crime scene investigator** or **CSI** is a law enforcement officer who specializes in collecting and analyzing evidence from where a crime occurred.

In England, a police officer, generally, is sometimes known, from *officer of the stable,* as a **constable**. An informal but not derogatory term for a police officer is **cop**, which is an acronym for constable on patrol.

In medieval England, apart from the king, the most important person enforcing the law was the local county law enforcement officer, from *shire officer,* the **sheriff**[1]. The tradition of having a county officer continues in most of the United States. Today, a **sheriff**[2] is a county-based generalist law enforcement officer for a state who investigates crimes, delivers court documents, protects courts, and guards and transports prisoners. As a general rule, a sheriff has jurisdiction when no other law enforcement officer has jurisdiction. From *appointee,* an assistant sheriff is a **deputy sheriff**. In Latin *power of the country,* a **posse comitatus** or **posse** is a group of persons summoned by a sheriff to assist the sheriff for a limited law enforcement purpose. (The term is sometimes used as an attempted justification for a group of persons taking anti-government action.)

In most states, a city, town, township, or village may employ its own law enforcement officers. From *public order division,* a **police department**, with the abbreviation **P.D.**, is the law enforcement division of a city, town, township, or village. In the specific sense, from *public order server,* a **police officer**[2] is a generalist law enforcement officer of a city, town, township, or village. The chief law enforcement officer of a police force is known, from *head,* as the **chief of police** or, from *trusted person*, as the **commissioner**[2].

In addition to generalist law enforcement officers, states also employ specialists. For example, a law enforcement officer primarily responsible for patrolling a state's highways is usually known as a **state trooper** or, simply, from *soldier,* a **trooper**. The **highway patrol** is the law enforcement agency primarily responsible for policing a state's roads.

A law enforcement officer for a state or federal prison is usually known as a **prison guard**. From *guardian* or *watcher,* the chief law enforcement officer of a state or federal prison is usually known as a **warden**.

A law enforcement officer for a state or federal park is usually known as a **park ranger** or, simply, from *roam over a large area,* a **ranger**. Note however, that a **Texas Ranger** is a statewide generalist law enforcement officer in Texas with a tradition of riding a horse on the Texas frontier.

A law enforcement officer of a particular state or federal agency may be known as an **agent**[2] or **special agent**[1]. The head of law enforcement agency may be known, from *set straight,* as its **director**[1]. The person responsible for conducting internal investigations in an agency may be known as that agency's **inspector general**.

The principal law enforcement agency for investigating federal crimes is the **Federal Bureau of Investigation**, commonly known as the **FBI**. The FBI is the investigative arm of the U.S. Department of Justice. A law enforcement officer of the FBI is an **FBI agent**.

The generalist law enforcement agency of the federal government is the **United States Marshals Service**. The Marshals Service, part of the U.S. Department of Justice, provides support and protection for the federal courts. A law enforcement officer of the United States Marshals Service, a **U.S. Marshal** or, from *stable officer,* a **marshal**[1], is essentially a federal sheriff; a federal generalist law enforcement officer who investigates crimes, delivers court documents, protects courts, and guards and transports prisoners.

The federal law enforcement agency for investigating crimes related to U.S. currency and for protecting the president and vice president of the United States, as well as major presidential candidates and those elected and their families, and visiting heads of state, is the **United States Secret Service**, commonly known as the **Secret Service**. The name is an allusion to the agency's need to perform some of its duties in secret. The Secret Service is part of the U.S. Department of Homeland Security. Before the U.S. Department of Homeland Security came into existence on January 24, 2003, the Secret Service was a part of the U.S. Department of the Treasury. A law enforcement officer of the United States Secret Service is a **Secret Service agent**.

The federal law enforcement agency for investigating crimes related to immigration, customs, and homeland security is the **United States Immigration and Customs Enforcement Service**, commonly known as **ICE**. ICE is the largest investigative arm of the U.S. Department of Homeland Security. A law enforcement officer of the United States Immigration and Customs Enforcement Service is an **ICE agent**.

Although not normally thought of as a law enforcement agency, the **Central Intelligence Agency**, commonly known as the **CIA**, is the federal agency that collects,

evaluates, and disseminates information on developments in foreign countries needed to safeguard national security. In addition to covert activities related to national security, the CIA may engage in covert activities in foreign countries that aid law enforcement in the United States such as counterterrorism and fighting international crime. A potential law enforcement officer of the Central Intelligence Agency is a **CIA agent**.

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- **billing**
- **Code of Professional Ethics (NCRA)**
- **competence**
- **Drug Enforcement Agency (DEA)**
- **DEA agent**
- **legal document assistant**
- **NALA Code of Ethics and Professional Responsibility**
- **NALS Code of Ethics and Professional Responsibility**
- **oath of witness[1] (traditional)**
- **oath of witness[2] (modern)**
- **Clarissa Saunders**
- **Frank Shepard**

Part Three

Constitutional Law and Government

Chapter 6

The Constitution and Government, Generally

CONSTITUTIONAL LAW AND GOVERNMENT, GENERALLY

From *arrangement,* **constitution**[1] generally means fundamental law. Generally, **constitutional law**[1] means the fundamental law or government under a constitution. In the sense of under a constitution, **constitutional law**[2] means the fundamental law under the Constitution of the United States or the fundamental law under the constitution of a state.

The unique purpose of a **constitution**[2] or **constitutional law**[3] is to be the first division of sovereign power, the frame for government, and the statement of how the government is "constituted." In other words, it is the supreme law of a sovereign and the law to which all other law must conform, subject only to a higher sovereign. Thus, **constitutional** means something that is in accord with and does not violate the constitution or its principles. **Unconstitutional** is not in accord with the constitution or its principles, violating the constitution or its principles, or fundamentally illegal.

From *to steer,* to **govern** is to use sovereign authority to administer all or part of the affairs of a sovereign. **Government**[1] is, generally, using sovereign authority to administer all or part of the affairs of a sovereign. The **government**[2] is the organization with sovereign authority to administer all or part of the affairs of a sovereign. There are many forms of government. From *without rule,* **anarchy** is the absence of government or the absence of a legal system.

THE AMERICAN REVOLUTION AND THE ARTICLES OF CONFEDERATION

As discussed in Chapter 2, by the mid-1700s, the English had colonized the eastern coast of North America, but the American colonists saw the oppressive sovereignty inherent in having a human king. From *intense rupture,* **corrupt** describes a person or organization that acts against the interests of those whom the person or organization has a duty to serve. Human kings tend to serve their own interests rather than the interests of their people. On July 4, 1776, the American colonists declared their independence. The 1776 document declaring Americans independent of the sovereignty of the king of England is known as the **Declaration of Independence**.

From *status,* **state** means a sovereign group of people, of a state, or one of the United States. The American colonists fought until their colonies were recognized as sovereign states. From *group (under one government),* a **nation** is a group of people subject to one human sovereign or fundamental law. The **United States of America (USA)**, abbreviated **United States** or **U.S.**[1], is the nation of sovereign states formed as a direct result of the Declaration of Independence. The people who played important roles in creating the United States, especially in achieving its independence from England, are known, from *bottom layers,* as the **founders**.

From *together establish,* a **confederate** is a person who helps another commit a crime, an accomplice, or an ally. With a sense of irony, the founders referred to their new sovereign states as a **confederation**, a combination of persons who help each other. From *section,* an **article** is one of a series of parts in a piece of writing. Adopted in 1781, the **Articles of Confederation** was the first constitution of the 13 colonies of England in America that became sovereign states. Under the Articles of Confederation, each state retained its sovereignty. It was soon realized, however, that the confederation was unworkable because it did not have a strong central government to tie the states together. For example, the laws of banking and commerce varied from state to state, making trade with a person in another state as difficult as trade with a foreign country.

THE CONSTITUTION OF THE UNITED STATES

A **delegate**[2] is a person chosen, and on whom authority has been conferred, to act for others or for their benefit. A **delegation**[1] is a group of delegates. The original **Constitutional Convention**[1] or **Philadelphia Convention** was when, in 1787, delegates from the states met in Philadelphia, Pennsylvania, to form a powerful government to unite the states. Throughout the summer, the delegation, mostly lawyers trained in English law, debated various plans and political theories and, on September 17, 1787 ("Constitution Day"), reached a consensus.

James Madison (1751–1836), known as the Father of the Constitution, was a leading delegate and record keeper at the Constitutional Convention, co-author of *The Federalist,* and the fourth president of the United States. ***The Federalist,*** also known as **The Federalist Papers**, were a series of letters to newspapers written by James Madison, Alexander Hamilton, and John Jay, under the shared pseudonym Publius, explaining and encouraging ratification of the Constitution of the United States.

From *confirm,* to **ratify** means to formally adopt or approve. Ratified on June 21, 1788, and put into effect in March 1789, the **Constitution of the United States**, or the **Constitution** (unmodified), is the fundamental law of the United States.

FEDERALISM AND THE SEPARATION OF POWERS

Two aspects of the Constitution were designed to prevent any one person from having the power and tyranny of a king: federalism and the separation of powers.

From *treaty union,* **federal** means of all the states or of the national government of the United States. The Constitution created a new sovereign: the federal government of the United States of America. The **federal government** is the national government of the United States of America, as established by the Constitution of the United States. Under **federalism** (political organization with both central and territorial governments and the concept that the national government of the United

States is a limited sovereign), the federal government of the United States only has the powers explicitly or implicitly granted to it by the Constitution.

After the people's right to vote, there are 51 sovereigns in the United States: the federal government of the United States and each of the 50 states. There is **federal law**, which is the law of the national government of the United States, and **state law**, which is the law of one or more of the states. Federal law and state law coexist, except where federal law exclusively covers a particular area of law such as the regulation of interstate commerce. The doctrine that federal law covering a particular area of law precludes state law, and the doctrine that state law covering a particular area of law precludes local law, is known, from *before-buy,* as **preemption**.

Under **separation of powers** (the concept of division of government into branches, with appropriate checks and balances, so that no one person has total control), the Constitution also divides the power of the federal government into three branches: legislative, executive, and judicial. The states freely adopted similar divisions of power.

From *repulse,* a **check**[1] is the power to restrain a power and, from *two pans,* a **balance**[1] is an even distribution of power among several persons or entities. **Checks and balances** are restraints and even distributions of government power, and the restraints and even distributions of government power in the Constitution of the United States.

POPULAR SOVEREIGNTY AND REPUBLICAN GOVERNMENT

In the Constitution of the United States, the most fundamental idea was **popular sovereignty**, which is the idea of government based on the consent of the governed. The divine right of kings was abolished. From *before walk,* the **preamble**, the formal preface, proclaims: "We the People of the United States . . . do ordain and establish this Constitution." Ultimate sovereignty was placed in the people but immediately expressed in the Constitution. The Constitution returned some sovereignty to the people by establishing a republic. A **republic** or **republican government** is, from *thing public,* a government in which the people have power and elect representatives to govern according to a written constitution.

The idea of having a fundamental document applicable to everyone, and sovereign, can be traced to the Magna Carta. From *great charter,* the **Magna Carta** is a document signed by King John in 1215 that placed the king under English law, limited the power of the king to oppress his subjects, and was interpreted as a grant of power to the Parliament, a prohibition against taxation without representation, and a guarantee of the right to trial by jury. From *card,* a **charter**[1] is, generally, a document that forms a government. The Constitution became America's charter.

The idea of having a fundamental document applicable to everyone, and sovereign, can also be traced to **John Locke**, the philosopher who developed the theory of social contract to explain the origin of government. A **social contract** is an agreement by everyone in society to give up part of their freedom to the government in exchange for protection of their rights by the government.

The Constitution made a new division of sovereign power and a new frame for government, but it did not create a new legal system from scratch. The basic law of England, brought to the American colonies, was modified by the Constitution, but otherwise it remained intact. Unless something was modified by the Constitution or the constitution of a state, or by the new federal or state governments, the courts in

deciding cases continued to look to the common law of England for precedents while developing the common law in America.

In order to get the Constitution ratified, amendments were proposed to guarantee the fundamental rights of each citizen under the new government. Ratified in 1791, from *list* and *just claims,* the **Bill of Rights** is the first 10 amendments to the Constitution of the United States and the guarantee of the most fundamental civil rights of each citizen of the United States.

The delegates who wrote the Constitution of the United States, and those who wrote the Bill of Rights, are known, from *planners,* as the **framers**.

THE STRUCTURE OF THE CONSTITUTION OF THE UNITED STATES

The Constitution of the United States is organized by articles, sections (if more than one), and clauses. From *cut,* a **section**[1] is a subpart of an article. From *conclusion,* a **clause** is a specific provision or an important phrase.

The first three articles of the Constitution create three branches for the federal government. From *paw,* a **branch** is a separate but dependent division of an organization.

From *law bringing* **legislative** is government primarily concerned with the future. Article I creates the **legislative branch** of the federal government, which is the branch of government that makes the law and the branch of government that "dreams up" the law.

From *complete,* **executive** is government primarily concerned with the present. Article II creates the **executive branch** of the federal government, which is the branch of government that enforces the law and the branch of government that protects and serves society one day at a time.

From *judge,* **judicial** is government primarily concerned with the past. Article III creates the **judicial branch** of the federal government, which is the branch of government that interprets the law and the branch of government that makes the law by the precedents left in deciding actual cases.

Article IV governs relationships between the states and the federal government. Article V governs the making of amendments. Article VI declares the supremacy of the Constitution. In particular, Article VI, Clause 2, is the **Supremacy Clause**, which is the constitutional clause providing that federal law and treaties are greater than, and prevail over, conflicting state law. The Supremacy Clause states, in part, that the Constitution, laws, and treaties of the United States are "the supreme law of the land . . . anything in the Constitution or laws of any state to the contrary notwithstanding." **Law of the land** is a phrase in the Magna Carta used to establish the rule of law in England and a phrase in the Supremacy Clause used to establish the rule of law in the United States. The **rule of law**[2] is the principle that everyone, including those who govern, must obey the law. Article VII provided for ratification of the Constitution.

SPECIAL FUNDAMENTAL RIGHTS

Having had kings and queens, in England there is royalty. There is also, from *honor,* **nobility**, which means of the high class of royalty, including royals and those recognized due to their character or service to royalty or country. **Nobles** are those who have or are given titles of nobility (for example, Sir John Doe). From *all,* all others are **commons**[1] or **commoners**, the vast majority who do not have a title of nobility.

In the United States, all people are of the same class. The Constitution prohibits the granting of a title of nobility. The Constitution also prohibits a **religious test**, a qualification, based on some religious belief or nonbelief, for public office.

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- **articles of the Constitution**
- **consent of the governed**
- **democracy**
- **dictator**
- **dictatorship**
- **monarch**
- **monarchy**
- **oligarch**
- **oligarchy**
- **per se**
- **representative democracy**
- **representative government**
- **Roman Republic**
- **royals**
- **royalty**
- **structure**
- **totalitarian government**
- **tyranny**
- **unconstitutional as applied**
- **unconstitutional on its face**
- **unconstitutional per se**
- **U.S. Constitution**

Chapter 7

Legislative Branch

THE LEGISLATIVE BRANCH, GENERALLY

From *law bringing,* **legislative** is government primarily concerned with the future. Article I of the Constitution creates the **legislative branch** of the federal government, which is the branch of government that makes the law and the branch of government that "dreams up" the law.

To **legislate** is to "dream up" the law or to make law, other than making law by setting a precedent. A **legislature**[1] is a sovereign entity that exists for the sole purpose of making law. A **legislator** is a member of a legislature. **Legislation** is making law, other than making law by setting a precedent; or law that has been made, other than by setting a precedent. The judicial branch may make law by setting a precedent.

CONGRESS, GENERALLY

A **delegate**[2] is a person chosen, and on whom authority has been conferred, to act for others or for their benefit. From *together walk,* a **congress**[1] is an official body of delegates. **Congress**[2], occasionally but officially known as **the Congress**, is the national legislature of the United States of America.

In creating the Congress, the framers attempted to create a greater legislature than England's Parliament. The Parliament is **bicameral**, meaning, from *two chambers,* having two legislative divisions, each legislative division known, from *shelter,* as a **house**[1]. In order for legislation to be passed, both houses—the nobility's House of Lords and the commoners' House of Commons—must agree on it.

Because the framers rejected the concept of nobility and put ultimate sovereignty in the people, their original thought was to have a legislature that was **unicameral**, meaning, from *one chamber,* having no legislative division. However, the framers were presented with the problem of balancing the representation of small states with large populations and large states with small populations.

Keeping a bicameral legislature, the framers adopted the **Great Compromise** or **Connecticut Compromise**, the agreement that Congress would be composed of a Senate, with two members from each state, and a House of Representatives, with one or more members from each state according to the size of the population.

From *council of elders,* the **Senate**[1] is the smaller, long-view, and upper house of Congress, with two members from each state who serve for six-year terms. A **senator**[1] is a member of the Senate. The **House of Representatives**, or, simply, the **House**[2], is the larger, short-view, and lower house of Congress, with one or more members from each state according to the size of the population who serve for two-year terms. A **representative**[2], a **congressman**, or a **congresswoman**, is a member of the House of Representatives. When referring to a period of time, a **Congress**[3] is a two-year period

in which the Congress meets, mirroring the two-year term of a representative. The 1st Congress met from 1789 to 1790 and the 110th Congress is meeting from 2007 to 2008. From *sitting,* a **session**[2] is one of the two yearly meeting periods of a Congress.

The **Speech or Debate Clause** is the constitutional provision that members of Congress are, except for treason, felony, and breach of the peace, privileged from arrest while going to, doing, or coming from their legislative work; and they cannot be questioned for any speech or debate in the House or Senate. The **privilege from arrest** is any privilege from arrest, but especially the constitutional right of members of Congress, except for treason, felony, and breach of the peace, to not be arrested while going to, doing, or coming from their legislative work.

One aspect of the Parliament retained by the Congress, and traditionally adopted by other social organizations, is the general use of parliamentary procedure. **Parliamentary procedure** is a code of rules, similar to those traditionally used in Parliament, for the fair and efficient discussion and determination of proposals during meetings of a group. Parliamentary procedure involves, generally, a presiding officer who systematically recognizes and permits members of the group to make proposals for consideration by the group, upon which the group debates and votes.

From *seat* (in the sense of where the power is), the **chair**[1] (the noun) is the presiding officer of a group, as in parliamentary procedure. To **chair**[2] (the verb) is to preside over a group, as in parliamentary procedure. From *proposal,* a parliamentary **motion**[1] is a proposal for consideration by the chair or the group, as in parliamentary procedure. From *who,* a **quorum** is the required number of a group who must be present to authorize activities by the group.

From *before-sit,* a **president**[1] is, generally, the chief or presiding officer. The presiding officer in the Senate is, generally, the **president of the Senate**[1] or the **President Pro Tempore**[1], both known, simply, as the **president**[2]. From *for a time,* **pro tempore**, abbreviated **pro tem**, means temporary.

The **president of the Senate**[2] is, specifically, the vice president of the United States with the power to vote only to break tie votes, and the person who presides over the Senate except when the president is tried for impeachment. When the president of the United States is tried for impeachment, the Chief Justice presides. The **President Pro Tempore**[2] is, specifically, the Senator chosen by the Senate to preside over the Senate when the President of the Senate, the vice president of the United States, is absent.

The presiding officer in the House chosen by the House is the **Speaker of the House**.

THE ELECTION AND REGULATION OF MEMBERS OF CONGRESS

From *out-choose (pick out),* an **election**[1] is, generally, a choice between legal rights. An allusion to the togas of Romans who sought political office, from *white clothes,* a **candidate** is a person who offers him- or herself for a position, or a person who offers him- or herself for public office. The selection of a candidate to govern, **election**[2], is the selection of public officials by the citizens who will be governed by them.

Members of Congress are elected. Senators serve staggered six-year terms, and so about one-third of the Senate is elected every two years. Representatives serve two-year terms, and so the entire House is elected every two years.

Because the number of representatives a state is entitled to varies by the population of the state as a percentage of the population of the country, there is a system for establishing the number of representatives a state is entitled to, and each **congressional district**, which is the territory including the people who are represented by one member of the U.S. House of Representatives. From *appraise,* a **census**, a count of the

number of people and their location, is taken every 10 years. The census is used to determine the number of representatives to which each state is entitled.

From *to part,* to **apportion** is to divide fairly, but not exactly equally. Where a state is entitled to more than one representative, the state's legislature engages in **apportionment**, which is fairly dividing a state or territory by the number of representatives the state or territory is entitled to and creating territories in which there are almost equal numbers of people. The **one-person, one-vote principle** is the principle that apportionment should, as nearly as practicable, make one person's vote worth as much as another person's vote. **Reapportioning** or **redistricting** is making a new apportionment based on a new census or similar change.

Named after Governor Elbridge Gerry, when, in 1812, reapportionment politics in Massachusetts resulted in state senatorial districts that looked like a salamander, **gerrymandering** is apportionment to maximize political advantage, resulting in the creation of territories of unusual shapes.

From *gather in the entrance,* to **lobby** is to try to persuade a legislator or to try to persuade in the manner of persuading a legislator. **Lobbyists** are people in the business of trying to persuade legislators to pass laws favorable to the lobbyist or his or her client or clients. Legislators may listen to lobbyists but may not take a bribe or accept a kickback. A **kickback** is a return of a share of the proceeds of an endeavor, made to induce a person to arrange or permit the endeavor. A legislator is prohibited from participating in **graft**, which is, from *insert into another,* taking advantage of a position of trust to dishonestly obtain money or property such as fraudulently obtaining public money or property by corrupting a public official.

A legislator who engages in illegal activities is subject to expulsion by fellow members of the legislator's house. From *out-driven,* **expulsion**[1] is the permanent deprivation of the privileges of being a member such as the permanent deprivation of the privilege of being a legislator.

MAKING LAW

From *establish,* a **statute** is a law passed by the legislature of the federal government or a state, a law made by legislative action, and what a sovereign legislature makes. From *done,* an **act**[1] is, generally, something done, especially something physically done or an expression of will. A **legislative act** or **act**[2] is a group of related statutes made as a group. **Statutory law**, occasionally referred to as the **written law** as opposed to case law, is law made by a legislature or law from the legislative branch.

A **bill**[1] is a written legal proposition or itemized statement. In law making, a **bill**[2] is a proposed law or a proposed permanent law introduced in a legislature. An allusion to riding a horse through rough terrain, a **rider**[1] is an amendment or attachment to a bill, especially an amendment or attachment to a bill late in the legislative process in the hope it will pass through the legislative process.

From *dissolved* or *final,* a **resolution**[1] is a proposed formal expression of the will of Congress, or of the Senate or House of Representatives alone, which is not a proposed permanent law. A **joint resolution** is a proposed temporary, time-oriented law. A **concurrent resolution** is a proposed administrative, not legislative, statement of Congress. A **simple resolution** or **resolution**[2] is a proposed administrative, not legislative, statement of one house of Congress.

From *cause an act,* **enactment** is the legislative process resulting in the making of a statute or resolution. A bill or resolution includes an **enacting clause**, which is a clause identifying a bill or resolution as an intended legislative act (for example, "Be it enacted by the Senate and House of Representatives assembled"). A bill may call for an **appropriation**[1], which is, from *to take,* a withdrawal of public funds for a specific expenditure.

From *with-put* (put with each other), a **committee** is a relatively small group of people to whom something is referred for a detailed investigation and a recommendation. A bill is sent to the appropriate committees of the House and Senate for a detailed consideration and a recommendation to the whole House and the whole Senate.

If a bill gets out of committee, it is debated in the House and Senate. Traditionally, the Senate recognized the right of an individual Senator or a minority of Senators to **filibuster**, which is, from *spin* and *pirate,* to engage in unlimited debate in the Senate to block legislation or obtain a concession. Today, a filibuster can be ended by **cloture**, which is, from *clot,* upon three-fifths vote of the Senate, limiting debate and other procedural matters of the Senate to 30 hours, thereby halting a filibuster.

An **act**[3] is a bill passed by one house but not by the other house. From *concentrated,* an **engrossed bill** is the final, officially signed copy of an act. To become a law subject to action by the president of the United States, both houses must pass an identical bill. Conflicting acts are sent to a conference committee. From *together-bring,* a **conference committee** or **conference**[1] is a committee of senators and representatives with the task of developing and recommending a bill resolving the differences between conflicting acts so that both the House and the Senate can pass an identical bill. From *write in a roll,* an **enrolled bill** is the final, officially signed copy on parchment of a bill that has been passed by both houses of Congress. An enrolled bill is sent to the president.

From *I forbid,* to **veto**[1] (the verb) is to refuse a proposal or to return without a signature. A **veto**[2] (the noun) is a refusal of a proposal, especially the constitutional right of the president of the United States, within 10 days after a bill is passed by Congress, to formally refuse to sign a bill passed by Congress and return it, preventing the bill from becoming law unless, by a two-thirds vote of both the House and the Senate, the refusal is overridden. From the notion of the president just putting a bill in his pocket and not signing it, a **pocket veto** is the effect of a veto without an actual veto, which results when Congress adjourns before the 10-day period for a veto expires and the president does not sign the bill. A pocket veto cannot be overridden because Congress has adjourned.

The president does not have what some state governors have: a line-item veto. A **line-item veto** is the ability of an executive to refuse a particular part or parts of a proposed law. Like an ordinary veto, a line-item veto can be overridden.

LAW MADE

From *narrow piece,* a **slip law** is a copy of a particular law passed during a session of the legislature. From *sitting,* a **session law** is a bill or joint resolution that has become law during a particular session of Congress, or a law as passed by a legislature.

A statute or other legislation may be later amended. From *out fault,* to **amend** is to alter by adding, modifying, rephrasing, or deleting and an **amendment**[1] is, generally, an alteration by addition, modification, rephrasing, or deletion. An amendment may create new requirements, but the new requirements may not apply where there is a **grandfather clause**, which is a provision that a person or thing already qualified for something need not meet a new requirement. An amendment also may remove requirements. From *back call,* to **repeal** is to delete or take back a statute or other law or to pass a law contradicting or eliminating all or part of an existing law.

From *block (of wood),* a **code**[1] is a topical collection of law or ethics such as a topical collection of statutes. **Codification** is the process of collecting permanent public statutes topically, adding amendments and deleting expired, repealed, or superseded statutes. An individual statute is only prima facie evidence of the law. From *first*

appearing and Latin for *at first sight,* **prima facie** is something accepted on its face but rebuttable. From *laid down,* **positive law**[2] is codified law passed as a statute.

INTERPRETATION AND CONSTRUCTION

One profound truth about the law is that the command of a human sovereign can only be conveyed in human language about which educated people can disagree. **Black and white** is a foolish or misleading phrase suggesting that a text cannot be understood or misunderstood in more than one way. The language of a statute or a legal agreement is often the result of compromise, and so written in an unusual way. To understand a legal text, it is often necessary to **read between the lines**, meaning to discern the meaning of a text by considering what the words indirectly indicate or imply.

From *explain,* to **interpret** is to translate unclear language into clear language or to detect what was said, observed, or meant. From *explanation,* **interpretation** is the process of translating unclear language into clear language or the process of detecting what was said, observed, or meant.

From *drawn in,* **strict interpretation** or, from *of letters,* **literal interpretation** is interpreting language narrowly according to the letters and characters used, making as few inferences as possible about the language. The **letter of the law** is a strict interpretation of the law. From *free,* **liberal interpretation** or, from *fair,* **equitable interpretation** is interpreting language broadly according to what can be inferred about the language beyond the letters and characters used. The **spirit of the law** is a liberal interpretation of the law.

From *build up,* to **construe** is to determine the intent, if any, of the maker of language that does not clearly address a topic, or to build on what was said or observed. **Construction** is the process of determining the intent, if any, of the maker of language that does not clearly address a topic or the process of building on what was said. Construction is required when there is **ambiguity**, which is, from *two ways to lead,* language that can have more than one meaning. From *lie hidden,* a **latent ambiguity** is an ambiguity that was not apparent at the time the language was made or agreed to. From *open,* a **patent ambiguity** is an ambiguity that was or should have been apparent at the time the language was made or agreed to.

Strict construction or **literal construction** is construing language narrowly according to the letters and characters used, making as few inferences as possible about the language. Criminal laws are usually strictly construed. **Liberal construction** or **equitable construction** is construing language broadly according to what can be inferred about the language beyond the letters and characters used. Laws that are **remedial**[2], providing a remedy, are usually liberally construed.

From *of the same kind,* **eiusdem generis** is the rule of legal construction that when general words follow several specific words, the meaning of the general words should be limited to things of the same class or kind as the specific words. For example, referring to "cars, trucks, and similar vehicles" does not include things like boats.

From *expression of one thing is exclusion of another,* **expressio unis est exclusio alterius**, often shortened to **expressio unius**, is the rule of legal construction that the mention of one thing usually implies the exclusion of another thing not mentioned. For example, referring to "red cars" does not include blue cars.

From *on like subject matter,* **in pari materia** is the rule of legal construction that all texts on the same subject should be read together. For example, all statutes concerning vehicles should be read, interpreted, and construed together.

From *known by its associates,* **noscitur a sociis** is the rule of legal construction that the meaning of a word can be known from the meaning of related words. For example, referring to a "defective vehicle, such as a vehicle that does not run or falls apart"

indicates that defective vehicle meant a mechanically defective vehicle, not a vehicle that was mechanically sound but otherwise not fit for the user's purpose.

The **plain meaning rule** is that courts will use the traditional definition of terms used if those terms are not otherwise defined.

KINDS OF LAWS THE CONGRESS CAN MAKE

From *out-count,* an **enumeration** is a specific listing. The **enumerated powers** are the powers of Congress listed in Article I, Section 8, of the Constitution of the United States. Some of the many enumerated powers include general powers like the powers to provide for the common defense and the general welfare; financial powers like the powers to collect taxes, borrow money, and coin money; and the power to make uniform laws of naturalization and bankruptcy.

The powers of Congress include, from *touching,* the **taxing power**, which is the constitutional provision that Congress can lay and collect taxes.

The **Commerce Clause** is the constitutional provision that Congress can regulate commerce with foreign nations and among the several states. The Commerce Clause refers, from *between,* to **interstate commerce**, transactions across state boundary lines, about which Congress can make laws, as distinguished from intrastate commerce. From *inside,* **intrastate commerce** means transactions within a state, about which, as a general rule, Congress cannot make laws.

Until recently, the U.S. Supreme Court interpreted the Commerce Clause broadly to give Congress broad power to make laws *effecting* interstate commence. A common example is **Wickard v. Filburn**, 317 U.S. 111, which is the 1942 case in which the U.S. Supreme Court held that Congress could regulate an *intrastate* commercial activity if, in aggregate, it would have an economic effect on *interstate* commerce. *Wickard* involved quotas on wheat grown for a farmer's own consumption.

The **Necessary and Proper Clause** is the constitutional provision that Congress can make all laws that are needed and appropriate for carrying out the enumerated powers. The Necessary and Proper Clause declares that Congress has **implied powers**, which are, from *involved,* the inherent abilities of Congress to make all laws that are necessary and proper for carrying out the enumerated powers.

Beginning with the Thirteenth Amendment of the Constitution of the United States, many amendments expressly give Congress the power to enforce the amendment by appropriate legislation.

KINDS OF LAWS THE CONGRESS CANNOT MAKE

From *back-drive,* a **retroactive law** is a new law applicable to something in the past. Retroactive laws are usually unfair and illegal, unless they provide a new benefit or remedy not previously available. Before ratification of the Constitution of the United States, legislatures sometimes engaged in the unfair practice of making an act a crime even though it was not a crime when committed. They made an act a crime, decreased the evidence required to prove a crime, or increased the punishment for a crime, after the fact. In Article I, Section 9, Clause 3, and in Article I, Section 10, Clause 1, the framers made such legislation unconstitutional. From *after the deed* or *after the fact,* an **ex post facto law** is an unconstitutional retroactive criminal law or punishment. In the same sections and clauses, the framers also prohibited similar legislation known as a **bill of attainder**, which is an unconstitutional law inflicting punishment on a named person or group without a judicial trial. From *condemn,* **attainder** was, at common law, the infamy caused by conviction for a felony, resulting in a loss of civil rights.

Amendments to the Constitution of the United States sometimes expressly limit the powers of Congress. For example, the First Amendment begins "Congress shall make no law . . ."

CHECKS ON THE EXECUTIVE BRANCH AND THE JUDICIAL BRANCH

The legislative branch also acts as a check on the power of the executive branch and the judicial branch.

Some checks are checks on both the legislative branch and the judicial branch.

From *to see,* **advice and consent** is the power of Congress to approve or reject a person selected by the executive branch to lead an executive department or agency, or to serve in the judicial branch as a judge or justice, and the power of the Senate to approve or reject proposed treaties.

Under Article II, Section 4, **impeachment**[2] from office is the attempted or actual removal from office by the legislative branch of a nonmilitary officer of the executive or judicial branches for a serious crime while in office. To **impeach**[2] from office is to attempt to or actually remove from office a nonmilitary officer of the executive or judicial branches for a serious crime while in office. In the federal government, the House brings **articles of impeachment**, which are the formal grounds charged for impeachment. The Senate holds the impeachment trial. Removal from office requires a two-thirds vote of the senators present.

The grounds for impeachment include "treason, bribery, or other high Crimes and Misdemeanors." Under Article III, Section 3, Clause 1, **treason**[2] under the Constitution is defined as levying war against the United States or adhering to its enemies, giving them aid and comfort, and conviction for treason must be on the testimony of two witnesses to the same overt act or on confession in open court. **High Crimes and Misdemeanors** are misdeeds and abuses of power reasonably regarded as dangerous to government as treason and bribery, and not mere political disagreement or ineffectiveness in office.

From *betrayer,* a **traitor** is a person who commits treason. Treason as defined by the Constitution is similar to **high treason**, the common law crime of killing or overthrowing your king. High treason is distinguished from **petit treason** or **petty treason**, the common law crime of killing your master, or your husband. Although death is a possible punishment for treason, under Article III, Section 3, Clause 2, a punishment for treason cannot be a **corruption of the blood**, which is prohibiting an innocent relative from inheriting property from a traitor because of the corrupt nature of the traitor.

As a check on the executive branch, Article I, Section 8, Clause 11 gives Congress the power to declare war. As a check on the judicial branch, Article I, Section 8, Clause 9 gives Congress the power "To constitute tribunals inferior to the Supreme Court." In other words, Congress creates the federal court system below the U.S. Supreme Court. Congress may also overrule a court precedent by statute (as long as the statute is constitutional).

CHECKS TO WHICH THE LEGISLATIVE BRANCH IS SUBJECT

Legislation by Congress is subject to veto and pocket veto by the president. Legislation by Congress is subject to judicial review by the judicial branch. Judicial review is discussed in Chapter 8.

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- **declaratory provision**
- **declaratory statute**
- **derogate**
- **derogation**
- **desuetude**
- **e-commerce**
- **House of Commons**
- **House of Lords**
- **Parliamentary**
- **positive law**[1]
- **private law**
- **public law**
- **reapportionment**
- **rules of construction**
- **statutory benefits**

Chapter 8

Executive Branch and Judicial Branch

THE EXECUTIVE BRANCH, GENERALLY

From *out-follow* (carry out), **executive** is government primarily concerned with the present. Article II of the Constitution of the United States creates the **executive branch** of the federal government, which is the branch of government that enforces the law and the branch of government that protects and serves society one day at a time. The **president of the United States** or, simply, the **president**[3], is, fundamentally, the person who heads the executive branch of the federal government. The president is the Commander in Chief of the armed forces and of the militia of the several states when in service of the United States. The president is the person with the power to conduct the foreign policy of the United States. The president is the person with the power to make treaties with the two-thirds consent of the Senate and the person with the power to make executive agreements.

From *deal with,* a **treaty**, or, from *together-come,* a **convention**[1], is a formal nation-binding agreement between two countries and a formal nation-binding agreement by the United States of America with a foreign country, which must be consented to by the Senate. An **executive agreement** is a personal agreement by the president of the United States with a foreign country, which does not have to be consented to by the Senate. From *away propose,* to **abrogate** is to do away with a law, to put an end to a law, or to repeal a law, such as to stop abiding by a treaty.

The president is the chief executive officer of the executive departments of the federal government. An **executive department** or **executive agency** is an executive branch governmental entity created to assist the executive and enforce laws in a specialized area of law. The president meets with the **cabinet**, which is, from *private chamber,* the people who head each of the executive departments of the federal government. The president sometimes gives formal directions to subordinates. An **executive order** is a chief executive's formal command and a chief executive's formal exercise of power. From *forth cry out,* a **proclamation** is an official public announcement of action taken by the government.

From *to point,* to **appoint** is to choose and designate who will have a particular office or duties and the **power of appointment**[1] is the power to choose and designate who will have a particular office or duties. An **appointee** is a person who has been appointed. Having the power of appointment, the president is the person who has the power to appoint officers of the federal executive departments, officers or new officers of most federal administrative agencies, and new judges of the federal judicial branch. In choosing and designating appointees, the president designs the kind of government

the president wants to have. Thus, it is appropriate to speak of the executive government under a particular president as, from *to serve,* the president's **administration**[1].

From *instead of,* the **vice president of the United States**, or, simply, the **vice president**[1], an officer of the executive branch, is the president of the Senate with the power to vote only to break tie votes, the person who presides over the Senate except when the president is tried for impeachment, and the person who becomes the president of the United States if, during the president's term in office, the president dies, resigns, is removed, or is unable to discharge the powers and duties of the office.

ELECTION OF THE PRESIDENT AND VICE PRESIDENT

The **Electoral College** is the group of presidential electors who cast the official votes for and elect the president and vice president. A **presidential elector** is a person elected to cast an official vote for president and vice president, and required to cast the first vote according to the popular vote of the region the person represents. The number of presidential electors from each state is equal to the total number of senators and representatives for that state. The **electoral vote** is the official vote for president and vice president expected to be cast or actually cast by the presidential electors in the Electoral College.

EXECUTIVE BRANCH CHECKS ON THE LEGISLATIVE AND JUDICIAL BRANCHES

The executive branch acts as a check on the power of the legislative branch and the judicial branch. The president can veto and pocket veto legislation by Congress. The president appoints new judges of the federal judicial branch. The president can pardon persons convicted by the federal judicial branch.

CHECKS TO WHICH THE EXECUTIVE BRANCH IS SUBJECT

The president's appointments for the heads of executive departments and the appointments for justices of the U.S. Supreme Court have to be done with advice and consent of the Senate. The president, vice president, and other officers of the executive branch are subject to impeachment and removal by Congress. The Chief Justice presides over the impeachment trial of a president. Congress can override a president's veto by a two-thirds vote of both the House and the Senate. Only the Congress can declare war. However, the president may take military action short of a declared war, based on the president's foreign affairs and commander-in-chief powers. Congress can limit the president's ability to take a particular military action by refusing to provide funding for that action. The judicial branch may declare acts of the executive branch unconstitutional.

THE JUDICIAL BRANCH, GENERALLY

From *judge,* **judicial** is government primarily concerned with the past. Article III of the Constitution of the United States creates the **judicial branch**—sometimes referred to as the **judiciary**—of the federal government, which is the branch of government that interprets the law and the branch of government that makes the law by the precedents left in deciding actual cases. The judicial branch acts through courts.

From *fall (of circumstances),* a **case** is a legal controversy, especially a legal controversy that may be, has been, or could have been brought to a court. Generally, **case law**[2], occasionally referred to as **judge-made law**, and occasionally referred to as the

unwritten law as opposed to statutory law, is law from the judicial branch. From *going forward,* **judicial activism** is the willingness of a judge to recognize rights not expressly stated in a constitution, legislation, or other law. From *holding back,* **judicial restraint** is the unwillingness of a judge to recognize rights not expressly stated in a constitution, legislation, or other law.

From *highest,* the federal final appellate court, the highest federal court, and the highest court in the United States is the **United States Supreme Court**, abbreviated **U.S. Supreme Court**, or simply, the **Supreme Court**[1], located in Washington, D.C. In rare cases, such as when a state is a party, the U.S. Supreme Court acts as a trial court.

From *upright,* a **justice**[3] is a judge on an appellate court. The U.S. Supreme Court has a Chief Justice and eight associate justices. The **Chief Justice**[1] or the **Chief Justice of the United States** is the justice of the U.S. Supreme Court who presides over the court, serves as the administrator of the court, serves as the principal administrative officer of the federal judiciary, and presides over the Senate when the president of the United States is tried for impeachment. For the U.S. Supreme Court, an **associate justice**[1] is a justice of the U.S. Supreme Court other than the Chief Justice and a justice of the U.S. Supreme Court who does not preside over the court. A **chief judge** is the justice of a lower federal court who presides over the court.

The attorney who most often argues cases before the U.S. Supreme Court is the **solicitor general**, who is the attorney appointed by the president to assist the U.S. attorney general, especially in arguing cases before the U.S. Supreme Court in which the United States has an interest.

THE LIMITS OF JUDICIAL POWER

The judicial branch of government makes the law by the precedents left in deciding *actual* cases. A real dispute, a nonhypothetical case, is known as a **case** or **controversy**. An **actual case** or **actual controversy** is a definite and concrete dispute between adverse parties amenable to immediate and definitive determination.

In the federal government and in most states, the determination of a hypothetical case by a court would be considered a violation of the separation of powers because only the legislative branch has the power to "dream up" new laws. There are exceptions in a few states. In Florida, for example, the Florida Supreme Court is permitted to give an **advisory opinion**, which is a determination of law based on a hypothetical case, especially a determination of law based on an anticipated actual case. The general prohibition against advisory opinions may be avoided by bringing a **test case**, which is an actual case similar to many potential cases that is intentionally brought to determine the validity or interpretation of a law or legal principle, or an actual case similar to many potential cases that inadvertently determines the validity or interpretation of a law or legal principle.

As a general rule, real judicial power does not exist where there is no real or seriously anticipated dispute, except to rule that a case is moot. From *meeting* (a meeting not needed), **moot** means not actual, there is no real or seriously anticipated legal controversy, a legal controversy no longer exists, a legal controversy no longer needs to be decided, or a pretended legal controversy. In training to become lawyers, law students often practice their skills on such cases. From *jeer* or *jest,* a **mock trial** is the trial of a moot case as an academic exercise, or a simulated trial. Likewise, **moot court** is the argument or appeal of a moot case as an academic exercise, or a simulated appeal.

In addition to the limits of a court imposed by a constitution or statute, courts sometimes exercise their inherent power to limit the kinds of cases they will hear and decide, for reasons of judicial efficiency.

To be brought to a court, a case must be, from *upright,* **justiciable**, meaning a dispute appropriate and feasible for judicial determination. Examples of disputes that

are not justiciable include the resolution of an academic matter, an athletic contest, a game, or the judgment of history. For example, who the best basketball team is should be decided on a basketball court, not in a court.

The person bringing the case to court must have **standing**, which is, from *able to stand,* being a person with the legal right to commence a case, usually a person directly affected by the wrong for which a remedy is sought. Standing is a legally sufficient reason and right to object. From *ready,* the case brought to court must be **ripe** or **ripe for judgment**, meaning a dispute ready for final decision. The **ripeness doctrine** is that a dispute should not be decided in advance of the necessity of deciding it. A case should not be a **political question**, which is, from *of citizens,* a dispute that should be decided by the legislative branch, by the executive branch, or by the people as voters.

CHECKS ON THE LEGISLATIVE BRANCH AND THE EXECUTIVE BRANCH

The judicial branch acts as a check on the power of the legislative and executive branches. For example, the Chief Justice presides over the impeachment trial of a president. The great check of the judicial branch is the power of judicial review. **Judicial review** is the power of a court to review and declare laws or acts of government officials illegal or unconstitutional, if those laws or acts are illegal or violate the Constitution of the United States or an applicable state constitution. ***Marbury v. Madison,*** 5 U.S. (1 Cranch) 137, was the 1803 case in which the U.S. Supreme Court held that it had the power of judicial review over the laws made by Congress and the acts of the president of the United States.

CHECKS TO WHICH THE JUDICIAL BRANCH IS SUBJECT

The president appoints new judges with the advice and consent of the Senate. Judges are subject to impeachment and removal by Congress. The House brings articles of impeachment and the Senate tries the impeachment. Article I, Section 8, Clause 9 of the Constitution gives Congress the power "To constitute tribunals inferior to the Supreme Court." In other words, Congress creates or changes the federal court system below the Supreme Court. The U.S. Supreme Court is the only federal **constitutional court**, which is a court created under a constitution and not created or altered by a legislature.

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- **executive orders and treaties**
- **justiciable content**
- **presidential proclamation**

Chapter 9

Administrative Agencies and Administrative Law

ADMINISTRATIVE AGENCIES, GENERALLY

As a practical matter, as technology advances and society grows more complex, a sovereign's legislative, executive, and judicial branches become increasingly unable to manage all the details of government. The gaps are filled and the details are managed by the branches of government creating specialized government entities and delegating functions to those specialized governmental entities.

From *to serve,* to **administer** is to conduct or to manage. **Administration**[2] is, generally, the conduct of something or the management of something. **Administrative** is related to the conduct of something or related to the management of something.

Generally, from *to serve* and *to do,* **administrative agencies**[1] are executive, legislative, and judicial departments, and independent governmental entities created to make, enforce, and/or interpret laws in a specialized area of the law, and specialized governmental entities. Generally, an **administrative agency**[1] is an executive, legislative, or judicial department, or an independent governmental entity created to make, enforce, and/or interpret laws in a specialized area of the law, and a specialized governmental entity.

From *departure (of a group of people),* a **department of government** or **department**[1] is an administrative unit of government, especially an administrative unit that is part of a branch of government.

Executive departments are, under the executive branch of government, groups of specialists organized to assist the executive in carrying out a function of the executive branch. From *secret entrusted,* a business **secretary**[1] is a person who provides valuable office services to an executive. By analogy to a business secretary, the chief executive of a cabinet-level executive department is known as a **secretary**[2]. (Note, however, that the chief executive of the U.S. Department of Justice is known as the attorney general.)

Legislative departments are, under the legislative branch of government, groups of specialists organized to assist the legislature in carrying out the functions of the legislative branch. Federal examples include the **Library of Congress**, the largest library in the United States, and the **Government Accountability Office (GAO)**, formerly the **General Accounting Office**, the legislative department that prepares government audits for Congress.

Judicial departments are, under the judicial branch of government, groups of specialists organized to assist the judiciary in carrying out the functions of the judicial branch. Federal examples include the **Administrative Office of the U.S. Courts**, the

judicial department that supervises all nonjudicial matters of the federal courts, except for the U.S. Supreme Court, and the **Federal Judicial Center**, the judicial department that conducts research on the operation of the federal courts.

Administrative agencies[2] in the specific sense, or **independent agencies**, are governmental entities distinct from the three branches of government, created to independently make, enforce, and/or interpret laws in a specialized area of the law. An **administrative agency**[2] in the specific sense, or an **independent agency**, is a governmental entity distinct from the three branches of government, created to independently make, enforce, and/or interpret laws in a specialized area of the law.

ADMINISTRATIVE LAW

From *to serve,* **administrative law**[1] is, generally, the law about sovereign management. **Administrative law**[2] is, specifically, the law from or related to administrative agencies, including executive, legislative, or judicial departments, and independent agencies.

The distinction between executive, legislative, and judicial departments and independent agencies is blurred for two reasons. First, they are all required to follow similar procedures. In the federal government, for example, the **Administrative Procedure Act (APA)** is the federal law that requires all federal executive, legislative, and judicial departments, and federal independent agencies, to notify the public of proposed changes in the law, to hold public hearings, and to abide by other standard administrative procedures. Second, the names given to the hundreds of federal and state administrative agencies are confusingly similar, yet widely varied. Generally, an administrative agency, either an executive, legislative, or judicial department or an independent agency, may be known as, from *to serve,* an **administration**[3]; from *to do,* an **agency**[2]; from *that which settles,* an **authority**[2]; from *side of a ship,* a **board**[1]; from *desk having drawers,* a **bureau**; from *entrusted,* a **commission**[1]; from *body,* a **corporation**[1]; from *departure (of a group of people),* a **department**[2]; from *divide,* a **division**[1]; from *establish,* a **foundation**[2]; from *duty,* an **office**; or, from *performance of duties,* a **service**[2]. From *side of a ship,* a **board**[2] is a group entrusted with executive duties and acting for and in the interest of others.

QUASI-LEGISLATIVE FUNCTIONS

From Latin *as if,* **quasi** means like but not actually. **Quasi-legislative** means like the legislature, but not actually being the legislature. Administrative agencies may perform quasi-legislative functions in their specialized area of law.

From *to control by rule,* to **regulate** is to direct or govern; to control; to arrange in proper order, limit, or prohibit that which already exists; or to make a regulation. A **regulation**[1] is, generally, a law designed to control behavior. Because the goal of an administrative agency is to control behavior in a specialized area of law, a **regulation**[2] is a law made by an administrative agency. As law made by the government to control behavior, **regulation**[3] is government control to limit aggregate harm and government control to protect individuals from harm. **Regulatory** means of a regulation, involving regulation, or in the manner of regulation. A **regulatory agency** is an administrative agency that is responsible for the regulation of its specialized area of law. Analogous to enactment by a legislature, **rule making** is the process of making administrative rules and regulations.

From *usefulness,* a **public utility** or **utility** is, in part, a business that provides a basic, essential, or necessary service to the public such as communications, electricity, or water. Public utilities are usually regulated by an agency. From *amount,* **rate making** or **rate fixing** is the process of an administration agency that regulates a public utility by setting the amount that may be charged for a public service. From *price*

list, a **tariff**[1] is a public document setting forth the amount that may be charged for a public service.

QUASI-EXECUTIVE FUNCTIONS

Quasi-executive means like the executive, but not actually being the executive. Administrative agencies may perform quasi-executive functions in their specialized area of law. **Administrative discretion** is the inherent power of an administrative agency or administrative official to exercise judgment, especially within the administrative agencies' specialized area of law. An **administrative order** is a chief administrator's formal command and a chief administrator's formal exercise of power.

An administrative agency is often responsible for making inspections and investigations for violations of specialized laws. An **administrative search** or **regulatory search** is a search by an administrative agency, and a search by an administrative agency as part of a comprehensive regulatory scheme, which usually can be made without a warrant, because probable cause is implied.

An administrative agency is often responsible for issuing licenses. From *permission,* **licensing**[1] is requiring governmental permission to engage in a profession, trade, or activity. Licensing is required in an effort to protect the public from unqualified and incompetent persons working as professionals and tradespersons, or engaging in potentially dangerous activities. The administrative agency or official is the licensor. A **licensor** is the person or entity that grants a license. A **licensee**[1] is a person or entity granted a license or a person or entity that holds a license.

An administrative agency also may keep an official list of those persons or entities the administrative agency governs or regulates. From *write on a roll,* to **enroll** is to formally record or to put on an official list. From *record,* to **register** is to enroll, to make or maintain an official list, to add to or keep your name on an official list. **Registration** is the process of enrolling, the process of making or maintaining an official list, the process of adding to or keeping your name on an official list, or a document indicating presence on an official list. A **registrar** is an official record keeper, a person who takes and keeps enrollments, a person who makes or maintains an official list, or a person who makes a document indicating presence on an official list.

QUASI-JUDICIAL FUNCTIONS

Quasi-judicial means like the judiciary but not actually being the judiciary. Administrative agencies may perform quasi-judicial functions in their specialized area of law. From *to judge,* to **adjudicate** is to make a judicial decision. An **adjudication** is a judicial judgment or decree. Thus, **adjudicatory** is in the manner of making a judicial decision, judgment, or decree. When engaging in quasi-judicial functions, administrative agencies act in adjudicatory fashion.

An **administrative remedy** is an available and meaningful remedy under administrative law. To assure the use and effectiveness of administrative adjudication, courts have developed and legislation often requires the **exhaustion of administrative remedies**, the **exhaustion of remedies**, or the **exhaustion of remedy**, which is the judicial doctrine or statutory requirement that available and meaningful administrative remedies must be pursued before a court will interfere with an administrative process or review an administrative decision.

An **administrative proceeding** is a legal proceeding before an administrative agency. An **administrative hearing** is a formal administrative proceeding at which evidence is presented to determine a fact. A **hearing examiner** is traditionally the presiding officer and decision maker in an administrative hearing. An **administrative law judge (ALJ)**

is, today, the presiding officer and decision maker in a federal administrative hearing and today, in some states, the presiding officer and decision maker in a state administrative hearing. A **hearing officer** is a hearing examiner, an administrative law judge, or the presiding officer in an administrative hearing who recommends a decision.

An **official notice** or **administrative notice** is any notice that due process or a specific law requires an administrative agency to give. An **administrative decision** is the decision of a hearing examiner or administrative law judge or the written explanation of a decision by a hearing examiner or an administrative law judge. As a general rule, administrative decisions may be appealed to the courts. Review of an administrative decision may be **de novo review**, which is a review in which the facts of the case may be determined as if the case was being determined for the first time. From *substance,* **substantial evidence** is evidence accepted as adequate to support a conclusion. The **substantial evidence rule** is the rule that an administrative decision will be affirmed on review if there was substantial evidence to support it.

There are exceptions to the general rule that administrative decisions may be appealed to the courts. For example, the federal government's **Employee's Compensation Appeals Board** is the federal executive department of the U.S. Department of Labor that administers the Federal Employee's Compensation Act, a voluntary compensation act for injured federal employees. Because injured federal employees do not have a right to compensation voluntarily provided by the government, an administrative decision by the Employee's Compensation Appeals Board is final and cannot be appealed.

ACCESS TO GOVERNMENT INFORMATION

The **Freedom of Information Act** (**FOIA**) is the federal law that requires all documents created or held by federal agencies must be made available to the public, unless a specific exception to disclosure applies. An allusion to the light provided by sunshine, a **sunshine law** is a law that requires the meetings and records of governmental entities to be open to the public, unless a specific exception applies. An **official record** is any record made by a government official as a government official.

FEDERAL EXECUTIVE DEPARTMENTS

Here is a collection of frequently mentioned federal executive departments, including all of the federal executive departments represented in the president's cabinet.

The U.S. **Department of Agriculture** (**USDA**) is the federal executive department that improves farming and safeguards the daily food supply.

The U.S. **Department of Commerce** (**DOC**) is the federal executive department that promotes international trade and economic growth. The **National Oceanographic and Atmospheric Administration** (**NOAA**) is the federal executive department of DOC that engages in environmental assessment, prediction, and stewardship. The **National Weather Service** (**NWS**) is the federal executive department of DOC and NOAA that provides weather and climate forecasts, watches, and warnings.

The U.S. **Department of Defense** (**DOD**) is the federal executive department that provides military forces to deter war and keep the peace. The **Pentagon** is the five-sided building in Arlington, Virginia, that is the headquarters of the Department of Defense.

The U.S. **Department of Education** (**DOE**[1]) is the federal executive department that coordinates federal assistance to education. The U.S. **Department of Energy** (**DOE**[2]) is the federal executive department that fosters energy systems that are environmentally and economically sustainable.

The U.S. **Department of Health and Human Services** (**HHS**) is the federal executive department involved with concerns related to human health. The **Food and Drug Administration** (**FDA**) is the federal executive department of HHS that regulates the quality and safety of food, pharmaceuticals, and medical devices.

The U.S. **Department of Homeland Security** (**DHS**) is the federal executive department that protects the nation from attacks and protects the nation's airports and borders.

The U.S. **Department of Housing and Urban Development** (**HUD**) is the federal executive department responsible for programs to meet the nation's housing needs. The U.S. **Department of Interior** or **Interior** is the federal executive department that protects and provides access to the nation's natural and cultural heritage. The U.S. **Department of Justice** (**DOJ**) is the federal executive department that serves as counsel for the nation's citizens, collectively. The U.S. **Department of Labor** or **Labor**, or informally the **Labor Department**, is the federal executive department that fosters, promotes, and develops the welfare of workers.

The U.S. **Department of State** or the **State Department** is the federal executive department that assists and advises the president in the formulation and execution of foreign policy. The federal **Secretary of State**[1] is the chief executive of the U.S. Department of State and the chief foreign affairs advisor to the president of the United States.

The U.S. **Department of Transportation** (**DOT**) is the federal executive department that establishes the nation's overall transportation policy. The **Federal Aviation Administration** (**FAA**) is the federal executive department of the DOT that regulates air commerce and aviation safety.

The U.S. **Department of Treasury** or **Treasury** is the federal executive department that formulates the nation's financial policies, serves as the nation's financial agent, enforces financial laws, and makes coin and currency. The U.S. **Department of Veterans Affairs** (**VA**) is the federal executive department that operates programs to benefit veterans and their families.

SOME FEDERAL INDEPENDENT AGENCIES

The **Federal Communications Commission** (**FCC**) is the federal agency that regulates over-the-air broadcasters, including granting radio and television licenses to avoid interference between stations. The **Federal Reserve System**, loosely referred to in the financial media as the **Fed**[1], is the central bank of the United States that holds the cash reserves of member banks and formulates the nation's monetary policy. The **National Transportation Safety Board** (**NTSB**) is the federal agency responsible for investigating aviation accidents and other major transportation accidents. The **United States Postal Service** (**USPS**) is the federal agency that delivers mail.

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- **administrative agency regulations and rules**
- **administrative codes**
- **INS, inspection laws**
- **license**[1]
- **licensure**
- **regulatory law**

Chapter 10

State and Local Government

STATE GOVERNMENT, GENERALLY

Under the Tenth Amendment of the Constitution of the United States, every state has **police power**, which is the inherent power of a sovereign to make, enforce, and interpret law for the health, morals, safety, and general welfare of the public.

Most states refer to themselves as states. Emphasizing government for the common good, the official name of the state in Kentucky, in Massachusetts, in Pennsylvania, and in Virginia is the **Commonwealth**[1]. Although not required to do so, the states have adopted branches and divisions of government similar to the federal government. For example, every state, except Nebraska, has a bicameral legislature consisting of a **state Senate** or **Senate**[2], a state's smaller, long-view, and upper legislative division, and a **state House of Representatives** or **House**[3], **Assembly**[1], or **House of Delegates**, a state's larger, short-view, and lower legislative division. Nebraska's people formed a unicameral legislature, the **Legislature**[2], symbolic of their unity. A member of the Nebraska Legislature is known as a **Senator**[2]. The name of the state legislature in 19 states is the **General Assembly**. The name of the state legislature in North Dakota and Oregon is the **Legislative Assembly**. The name of the state legislature in Massachusetts and New Hampshire is the **General Court**.

Unlike the federal government, where all laws are made by the legislature, many states permit referendum and initiative. From *brought back,* a **referendum** is referring certain legislation by the legislature to a vote by the people for final approval or rejection. From *begin,* an **initiative** is referring legislation proposed by an established percentage of the population to a vote by the people for final approval or rejection.

The head of the executive branch of a state and the chief executive officer of a state is, from *ruler,* the state's **governor**. The person who becomes governor of a state if, during the governor's term in office, the governor dies, resigns, is removed, or is unable to discharge the powers and duties of the office is known, from *placeholder ruler,* as the state's **lieutenant governor**. Because states have no foreign affairs powers, the **secretary of state**[2] of a state is the state agency primarily responsible for keeping state records, especially the records of corporations incorporated or doing business in the state.

In most states, the **Chief Justice**[2] is the justice of a state's highest court who presides over the court, serves as the administrator of the court, and serves as the principal administrative officer of the state judiciary. In most states, an **associate justice**[2] is a justice of a state's highest court other than the Chief Justice and a justice of a state's highest court who does not preside over the court.

Unlike the federal government, many states permit **recall**[1], which is, from *back-call,* removing an elected public official from office before the normal end of the public official's term, by voting to remove the elected public official from office.

From *bestow a benefit,* **patronage** is giving a benefit or giving support. **Political patronage** is the use of public office to benefit or support relatives, friends, or political supporters, especially giving a public job to a relative, friend, or political supporter. From *relative,* **nepotism** is benefiting or supporting a relative or giving a job to a relative. From *lasting,* **cronyism** is benefiting or supporting a friend or political supporter or giving a job to a friend or political supporter. **Civil service** is employment in a nonelected public job. A **civil service commission** is a government agency that attempts to assure that nonelected employment in public jobs is based on merit and not political patronage.

RELATIONS BETWEEN THE STATES

The **Full Faith and Credit Clause** is the constitutional provision that each state must respect the public acts, records, and judicial proceedings of every other state. Accordingly, **full faith and credit** is the respect each state must give to the public acts, records, and judicial proceedings of every other state. **Freedom of travel** is the general freedom of a citizen of one state to travel to and from any other state and be treated like a citizen of any other state.

LOCAL GOVERNMENT, GENERALLY

From *make fit,* an **enabling act** is a law that gives specific sovereign powers to a local government. Many states have **home rule**, meaning that a general grant of sovereign power has been given to local governments to legislate for themselves. A **charter**[2] is the fundamental law of a local government.

Except in Louisiana, the standard territory of local government in a state is, from *court (domain),* a **county**. In Louisiana, the standard territory of local government is, from *church (domain),* a **parish**. In most states, the standard subterritory of local government is, from *village (domain),* a **township**[1].

The most common name for the legislative and executive power in a county is the **board of commissioners**. A member of a county board of commissioners is a **county commissioner** or, simply, a **commissioner**[3]. In those counties where commissioners primarily perform legislative functions, the chief executive of a county is the **county executive**.

The special local government for a large center of population is, from *citizens,* a **city**; or from *of a city,* a **municipality** or **municipal corporation**. The special local government for a small center of population is, from *enclosure,* a **town**; or, from *country buildings,* a **village**; or, historically, a **wick**. A subdivision of a city or a subdivision of an institution is, from *a place for guarding,* a **ward**[1]. A subdivision of a ward, or a subdivision of a locality for the purpose of voting, is, from *before surround,* a **precinct**; or, from the distance a horse can cover, a **riding**. The most common name for a city's legislature is, from *together call,* a **council**. A member of a council is a **councilman** or a **councilwoman**; or, in some cities (for example, Chicago), from *old prince man,* an **alderman** or **alderwoman**. **Council members** or, in some cities, **alderpeople**, are members of a council. From *major,* the most common name for the chief executive of a city is **mayor**. The next most common name for the chief executive of a city is **city manager**. The most common name for the legislative and executive power in a town or township is **board of trustees**[1]. A member of a board of trustees is a **trustee**[1]. The next most common name for the legislative and executive power in a town or township is **selectpeople**.

From *order-put,* an **ordinance** is a law made by the legislature of a local government, such as a city, town, or village and a law applicable only within the territory of the

local government in which it was made. Historically, an ordinance was also a federal enactment under the Articles of Confederation. Modern ordinances are made for matters of local concern such as local taxation, parking, shortcutting, speeding, and zoning. In some states, a **by-law**[1] is a law made by the legislature of a town and a law applicable only within the territory of the town in which it was made. From *to bind,* to **annex** is to attach to. **Annexation** is when a city, town, or village adds adjacent land to its territory. A **school board** is the local governing body for a school system.

SPECIAL LOCAL GOVERNMENTS

In terms of sovereignty, Congress governs special governments but permits them to have their own local governments.

Named after the explorer Christopher Columbus, the **District of Columbia**, with the abbreviation **D.C.**, is the capital of the United States of America. Named after George Washington, the first president of the United States, **Washington, D.C.**, is the city in the District of Columbia and, loosely, the capital of the United States. Depending on the particular law, sometimes it is treated like a state and sometimes it is not. It has nonvoting representation in the House, but no representation in the Senate.

The lands owned by the United States outside of the states and the District of Columbia are known as the **territories of the United States** or, simply, the **territories**. The current territories of the United States are American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. Emphasizing government for the common good, the official name of the territory in the Northern Mariana Islands and in Puerto Rico is the **commonwealth**[2].

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- **privileges and immunities**
- **republic**
- **republican government**
- **state constitution**
- **state rights**
- **state supremacy**

Chapter 11

The Bill of Rights

THE AMENDMENT PROCESS

From *arrangement* and *out fault,* a **constitutional amendment** or an **Amendment**[2] is an addition or change to a constitution. Article V of the Constitution governs amendments. Amendments may be proposed by a two-thirds vote of each house of Congress or by a **constitutional convention**[2], a meeting for the purpose of amending the constitution, called by Congress. Amendments may be ratified by the legislatures of three-fourths of the states or by constitutional conventions in three-fourths of the states.

THE BILL OF RIGHTS, GENERALLY

From *citizen* and *just claims,* **civil rights**[1] are, generally, an individual's fundamental rights under the law, protected by the government, and the protection of an individual's fundamental rights under the law. A **civil right**, sometimes referred to as a **birthright**, is an individual's fundamental right under the law, protected by the government. They do not have to be protected by private persons. In a narrow sense, **civil rights**[2] are an individual's fundamental rights that are positive in nature because they establish rights. From *freedoms,* **civil liberties** are an individual's fundamental rights that are negative in nature because they prohibit interference with rights.

Many state constitutions written prior to the Constitution of the United States began with a **declaration of rights**, which was a statement of civil rights. For example, the **Virginia Declaration of Rights**, adopted on June 12, 1776, was the first state declaration of rights and the model for declarations of rights in America. The Virginia Declaration of Rights, like the Declaration of Independence, referred to **unalienable rights**, **inalienable rights**, or **natural rights**, which, from *not transferable,* are rights that cannot be taken away, transferred, or surrendered.

In order to get the Constitution of the United States ratified, amendments were proposed to guarantee the fundamental rights of each citizen under the new government. Ratified in 1791, from *list* and *just claims,* the **Bill of Rights** is the first 10 amendments to the Constitution of the United States and the guarantee of the most fundamental civil rights of each citizen of the United States.

Rights can be limited when they conflict with other rights. There is a **balancing test**, which means that a court will measure conflicting rights to decide which rights will prevail and to what extent. The limits placed on rights should not needlessly interfere with those rights. For example, political signs should not be placed where they obscure public road signs, but that does not mean that they should be prohibited altogether. Such a law would be **overbroad**, meaning a bad law prohibiting protected conduct as well as unprotected conduct or a bad law prohibiting lawful conduct as well as unlawful conduct. Overbroad laws are bad because they **chill** or have **chilling**

effects against the exercise of a right, because they cause fear of a legal penalty for lawful conduct.

THE FUNDAMENTAL FREEDOMS

Freedom or **liberty**[1] is the general absence of limits or restrictions. **Liberty**[2] is the enjoyment of freedom. The **fundamental freedoms** are those rights commonly considered to be essential for a good life, liberty, and the pursuit of happiness. The **First Amendment** is the constitutional amendment guaranteeing the fundamental freedoms of religion, speech, press, assembly, and petition of the government. Collectively, the freedoms of religion, speech, press, assembly, and petition of the government are known as the **freedom of expression**. Implicit in the freedom of expression is the **freedom of conscience**, which is the right to believe anything, as desired.

The **freedom of religion** is the general right to worship as desired. The **Establishment Clause** is the First Amendment guarantee that there will be no government religion and that the government will not aid or prefer one religion over another. The **Free Exercise Clause** is the First Amendment guarantee that the government will permit and not oppose religious beliefs and religious practices not generally illegal. The proper scope of these clauses are matters of continual controversy, especially since 1879, when the U.S. Supreme Court wrote in *Reynolds v. United States,* 98 U.S. 145, 164, "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" The phrase **wall of separation between church and state** has become an expression of the controversial view that the framers intended to totally separate religion from American society. Many people disagree. Noting that Thomas Jefferson was a founder but not a framer, they argue that the statement was merely Jefferson's personal opinion, written while he was living in France, 14 years after the Bill of Rights was proposed. See, for example, the dissenting opinion in *Wallace v. Jaffree,* 472 U.S. 38, 91–114 (1985).

The **freedom of speech** is the general right to express thoughts as desired, symbolically, verbally, or in writing. The freedom of speech is not unlimited. Initially, for example, freedom of speech was not deemed to apply to **sedition**, which, from *apart going,* is speech tending to disrupt the government, especially speech advocating the overthrow of the government. Later, the Supreme Court held that sedition was protected speech where speakers did not have the power to put their words into action.

Limits on the freedom of speech have gradually emerged. **Time, place, and manner restrictions**, limits specifying when, where, and in what way speech is allowed, may be applied when unrestricted speech will conflict with the rights of others. As Justice Oliver Wendell Holmes Jr. wrote in *Schenk v. United States,* 249 U.S. 47, 52 (1919): "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic."

From *appraisal,* **censorship** is examining speech to delete or suppress anything deemed objectionable or offensive. To **censor** is to delete or suppress anything deemed objectionable or offense in speech. The standard at which the government can censor speech or punish the speaker is where there is a **clear and present danger** of harm to others such as exposing a military secret. Where a message does not pose a clear and present danger, the law prohibits, from *holding back*, **prior restraint**, which is censorship before a message is published or communicated and the prohibition of publication or communication of a message before publication or communication of the message. From *break,* a **breach of the peace** is conduct menacing the public order. **Fighting words** are words potentially having the effect of force and words in circumstances of unrest that threaten an immediate breach of the peace. Because of the clear and present danger, fighting words are not protected by freedom of speech.

From *worth,* **value** is intrinsic worth or the market price of something. From *filth,* **obscene** means without social value and something that appeals to the prurient interest and lacks serious artistic, literary, political, or scientific value. From *itching,* the **prurient interest** is an unwholesome or morbid interest or desire, especially regarding sex. **Obscenity** is speech without social value and speech that appeals to the prurient interest and lacks serious artistic, literary, political, or scientific value. For example, child pornography is widely regarded as obscene and not protected by the freedom of speech.

From *negative report,* **defamation**[1] is, generally, making a false statement about a person to others and causing harm to the person's reputation as a result. As general rule, but subject to many exceptions, defamation is not protected by freedom of speech. **Freedom of the press** is the general right to print, publish, and circulate thoughts to others, as desired. Copyright law limits press freedom. From *to be together,* an **assembly**[2] is, generally, a gathering of a group of people at the same place. The **freedom of assembly** or **freedom of association** is the general right to gather together with others, as desired. The **freedom of petition** is the general right to present requests to the government and government officials, as desired. The phrase **write your congressman** is both a serious suggestion as to how you may be able to influence legislation and a cynical cliché for making a last-resort attempt to obtain relief from the government.

MILITARY MATTERS; SEARCH AND SEIZURE

The **Second Amendment** is the constitutional amendment guaranteeing no federal interference with state militias by guaranteeing the general right of people to keep and bear firearms. The **Third Amendment** is the constitutional amendment guaranteeing that generally no soldiers will be quartered in a private home without the owner's consent. The **Fourth Amendment** is the constitutional amendment generally guaranteeing freedom from unreasonable searches and seizures, and that no warrants shall issue but upon probable cause, supported by an oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

MISCELLANEOUS FEDERAL PROHIBITIONS

The **Fifth Amendment** is the constitutional amendment generally guaranteeing no federal infamous crime charges without an indictment by a grand jury, no double jeopardy, no self-incrimination, no lack of federal due process, and no taking of private property without just compensation. Double jeopardy is discussed in Chapter 46. Due process is discussed in Chapter 12.

The **Takings Clause** is the part of the Fifth Amendment that states that "nor shall private property be taken for public use" without just compensation. The **Just Compensation Clause** is the part of the Fifth Amendment that states that "without just compensation" private property shall not be taken for public use. Based on the inherent power of a sovereign, from *out stand,* **eminent domain**, or, from *away appropriate,* **expropriation**, is the right of the sovereign or the government to take private property for public use, and the taking for public use. Traditionally, from *open,* **public use**[1] meant for actual use by the public. Today, many courts construe **public use**[2] to mean for any use that contributes to the prosperity of the public. From *intense loss,* to **condemn** is declaring something legally useless or unfit. **Condemnation** is the process of declaring something legally useless or unfit and the process of taking private property for public use. **Just compensation** is the compensation to which an owner is entitled under the Fifth Amendment when the owner's private property is taken for public use and the fair market value of private property taken for public use.

FEDERAL RIGHTS REGARDING CRIMINAL TRIALS

The **Sixth Amendment** is the constitutional amendment guaranteeing the right to trial by jury in a criminal case; the constitutional amendment guaranteeing the rights to a speedy, public, impartial, and local trial in a criminal case; the constitutional amendment guaranteeing the trial rights of notice, confrontation of witnesses, and compulsory process in a criminal case; and the constitutional amendment guaranteeing the right to counsel in a criminal case. In criminal law, the **right to trial by jury**[1] or the **right to jury trial**[1] is the general right to have your criminal case decided by a group of persons under oath given sovereign power to decide disputed facts based on the evidence submitted to them, and the general right to a jury equivalent in scope to the right to a jury that existed at common law, in England in 1791, when the Bill of Rights was ratified.

FEDERAL RIGHTS REGARDING CIVIL TRIALS

The **Seventh Amendment** is the constitutional amendment guaranteeing the right to trial by jury in a civil case at law in federal court, unless the amount in controversy is $20 or less. In civil law, the **right to trial by jury**[2] or the **right to jury trial**[2] is the general right to have your federal civil case at law decided by a group of persons under oath given sovereign power to decide disputed facts based on the evidence submitted to them, and the general right to a jury equivalent in scope to the right to a jury that existed at common law, in England in 1791, when the Bill of Rights was ratified.

NO EXCESSIVE BAIL OR PUNISHMENT

The **Eighth Amendment** is the constitutional amendment guaranteeing bail that is not excessive, fines that are not excessive, and no cruel and unusual punishment. From *unfeeling,* **cruel and unusual punishment** is any punishment or manner of punishment offensive to most ordinary people such as torture or any other treatment beyond the limits of civilized people. The death penalty is not deemed cruel and unusual punishment as long as it is not automatically imposed and not arbitrarily imposed. The Eighth Amendment has been interpreted to apply only to punishment inflicted on convicted criminals and so does not apply, for example, to corporal punishment in schools. From *body,* **corporal punishment** is punishment inflicted on the body of the person punished such as spanking or whipping.

OTHER RIGHTS OF THE PEOPLE

The **Ninth Amendment** is the constitutional amendment guaranteeing that the government will not take away other rights of the people simply because those rights were not listed in the Constitution. The **Tenth Amendment** is the constitutional amendment guaranteeing that the government does not have rights that it was not given because the rights of the people come before the rights of the government.

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- **American Center for Law and Justice (ACLJ)**
- **American Civil Liberties Union (ACLU)**
- **compensation**
- **condemnation proceedings**
- **fundamental individual rights**

Chapter 12

Amendments after the Bill of Rights

AMENDMENTS AFTER THE BILL OF RIGHTS AND BEFORE THE CIVIL WAR

Ratified in 1798, the **Eleventh Amendment** is the constitutional amendment providing that a citizen of another state or foreign country cannot sue a state in federal court without the state's consent. Ratified in 1804, the **Twelfth Amendment** is the constitutional amendment providing that, on their first ballot, electors are to vote for president and vice president as the popular vote demands.

THE CIVIL WAR AMENDMENTS

Before the mid-1860s, from *Slav sold,* a **slave** was a human being owned by another and **slavery** was the ownership of human beings. Before the mid-1860s, slavery was common, especially in the Southern states. Many people opposed slavery on moral grounds and advocated its elimination. From *apart-go,* to **secede** is to withdraw from a country. The **Confederate States of America** or **Confederacy** was the 11 Southern states that, in 1860 or 1861, seceded from the United States and formed a new country in which slavery was permitted. The Northern and Western states that did not secede from the United States in 1860 and 1861 and remained together were known, from *one,* as the **Union**[1]. From 1860 to 1865, the Confederacy and the Union fought the Civil War over several issues, including slavery. From *out-deliver,* the **Emancipation Proclamation** was President Abraham Lincoln's official statement that all slaves in states under Confederate control would be freed as of January 1, 1863. In 1865, the Confederacy surrendered. The Southern states were later readmitted to the Union.

Ratified after the Civil War, the **Civil War Amendments** or **Reconstruction Amendments** are the Thirteenth, Fourteenth, and Fifteenth Amendments, which abolished slavery, granted citizenship to the former slaves, guaranteed every person due process and equal protection, and guaranteed every citizen no denial of the right to vote on account of race, color, or having been a slave. Ratified in 1865, the **Thirteenth Amendment** is the constitutional amendment that abolished slavery and involuntary servitude, except as a punishment for crime for a convicted criminal. From *slavery,* **servitude**[1] is, generally, the condition of being in the service of another. By abolishing involuntary servitude, the Thirteenth Amendment abolished **peonage**, which was, from *foot solider,* involuntary servitude based on financial indebtedness, including **debtor's prison**, which was the imprisonment of debtors until they paid their financial debts.

Ratified in 1868, the **Fourteenth Amendment** is the constitutional amendment granting citizenship to all persons born or naturalized in the United States and guaranteeing every person due process and equal protection. The **Fourteenth Amendment Privileges and Immunities Clause** is the constitutional provision that citizens are entitled to rights that derive from the existence of the federal government, including the right to vote in federal elections, the right to petition the federal government, the right to travel, and any personal right granted by federal law.

The **Fourteenth Amendment Due Process Clause** or the **Due Process Clause**[1] is the constitutional provision that no state shall deprive any person of life, liberty, or property without due process of law. The Fourteenth Amendment Due Process Clause extends the **Fifth Amendment Due Process Clause**, or the **Due Process Clause**[2], which is the constitutional provision that the federal government shall not deprive any person of life, liberty, or property without due process of law. From *duty owed,* **due process of law** or **due process** is the inherent fairness and orderliness of the law; the Fifth and Fourteenth Amendment application of the inherent fairness and orderliness of the law to protect life, liberty, and property; a rational process used to provide fundamental fairness; and fundamental fairness. A **due process hearing** is an administrative hearing that meets the requirements of due process. **Procedural due process** is the requirement that a person be given notice and opportunity to be heard before the sovereign deprives the person of life or permanently deprives the person of liberty or property. It is the right to a fair hearing when challenging nonjudicial sovereign action. **Notice and opportunity to be heard** are the fundamental procedural rights a person has before the sovereign deprives the person of life or permanently deprives the person of liberty or property. From *made known,* **notice**[1] is, generally, communicated or recognized information about a fact or law. **Substantive due process** is the requirement that a law be rationally related to its purpose and the requirement that a law not be arbitrary or capricious. From *to approach two,* **arbitrary** is unreasonable or without a predictable reason. From *whim,* **capricious** is by whim or by chance.

From *into body,* to **incorporate**[1] is to include or to make something applicable in another place. Before the Civil War, the Bill of Rights was deemed to be limitations on the federal government but not the states. After the Civil War, the U.S. Supreme Court adopted the doctrine of **incorporation**[1], which is that under the Fourteenth Amendment Due Process Clause, many but not all of the Bill of Rights are interpreted to be part of due process and applicable to the states. The only rights not incorporated are the Second, Third, and Seventh Amendments; the Fifth Amendment right to a grand jury indictment; and the Eighth Amendment guarantee of freedom from excessive bail.

Generally, a person's rights guaranteed by the Constitution are, from *out-count,* **enumerated rights**, meaning rights specifically listed in the Constitution or its amendments. The U.S. Supreme Court also recognizes **unenumerated rights**, meaning rights not specifically listed in the Constitution or its amendments.

Among the unenumerated rights, the U.S. Supreme Court has recognized that everyone has a **right to privacy** or, simply, **privacy**, which, from *apart,* is the right to be free from unreasonable governmental intrusion into personal matters, the right to be free from unreasonable publicity about personal matters, and the general right to be left alone. Controversy exists as to the scope of the right to privacy. Perhaps the most controversial case in the history of law, ***Roe v. Wade***, was the 1973 case in which the U.S. Supreme Court held, as a matter of privacy, that a pregnant woman generally has a right to terminate her pregnancy by having an abortion. Many people profoundly disagree with the sentiment expressed in the majority opinion's statement that "[T]he unborn have never been recognized in the law as persons in the whole sense." 410 U.S. 113, 162.

From *level,* the **Equal Protection Clause** is the Fourteenth Amendment constitutional provision that no state shall deny to any person within its jurisdiction the equal protection of the laws. **Equal protection of the laws** or **equal protection** is the Fourteenth Amendment

requirement of fair treatment by the government under the law, and fair treatment by the government. An issue of equal protection arises where there is **state action**, meaning an action by the government. As a general rule, if the government is not involved or the law does not require it, fair treatment is not required. **Equal justice under law** is the concept of equal protection and the phrase engraved on the front of the U.S. Supreme Court Building in Washington, D.C. Fair treatment by the government is of particular importance to a member of a **minority**[1], which is an identifiable and disadvantaged group, both numerically and as the object of unfair prejudice.

Separate but equal was the doctrine that separate facilities were equal if they were of equal quality. ***Plessy v. Ferguson***, 163 U.S. 537, was the 1896 case in which the U.S. Supreme Court held that separate public facilities for different racial groups were constitutional if the facilities were of equal quality. While it applied, separate but equal permitted **segregation**, which is, from *separate from the whole,* the isolation of a race or class of people from the rest of society or the division of people by races or classes. ***Brown v. Board of Education of Topeka (I),*** 347 U.S. 483, was the 1954 case in which the U.S. Supreme Court reversed its holding in *Plessy v. Ferguson,* rejected the doctrine of separate but equal, and held that separate public schools were inherently unequal. Thereafter, the U.S. Supreme Court encouraged **integration**[1], which is, from *make whole,* the nonisolation of a race or class of people from the rest of society or the bringing together of people from all races and classes.

From *distinction,* **discrimination** is unequal treatment or the illegal unequal treatment of people entitled to be treated equally. From *group,* a **classification**[2] is a reason, legal or illegal, for unequal treatment. The U.S. Supreme Court has developed three tests for whether or not a person who has been treated according to a classification has been treated equally by the government. From *reason,* the **rational basis test** or **rational basis**[1] is the standard of review for a classification in a law without a suspect or semi-suspect classification. A **rational basis**[2] is a reasonable reason for a classification in a law and a reasonable reason for a classification in a law without a suspect or semi-suspect classification. From *drawn-in examination,* the **strict scrutiny test** or **strict scrutiny standard** or **strict scrutiny** is the standard of review for a suspect classification in a law. A **suspect classification** is an inherently suspicious reason for a classification in a law such as a person's race, color, national origin, or religion. From *together-drive,* a **compelling state interest** or **compelling interest** is a substantial reason for a suspect or semi-suspect classification in a law and a state interest greater than an individual's right. The **intermediate scrutiny test** or **intermediate scrutiny** is the standard of review for a semi-suspect classification in a law. A **semi-suspect classification** is a moderately suspicious reason for a classification in a law such as a person's sex.

Ratified in 1870, the **Fifteenth Amendment** is the constitutional amendment guaranteeing every citizen no denial of the right to vote on account of race, color, or having been a slave.

Each Civil War Amendment gives Congress the power to enforce the amendment by appropriate legislation. For example, the **Civil Rights Act of 1964** is the leading series of federal statutes prohibiting discrimination in education, employment, public accommodations, and voting. A common civil rights action is a **1983 action**, which is a civil rights action brought under section 1983 of Title 42 of the *United States Code* (commonly abbreviated: 42 U.S.C. § 1983) for depriving a person's civil rights under color of law. From *to conceal,* **color of law** or **color of right** or **color** means with apparent but not actual authority.

AMENDMENTS AFTER THE CIVIL WAR AMENDMENTS

Ratified in 1913, the **Sixteenth Amendment** is the constitutional amendment granting the Congress power to tax incomes. Ratified in 1913, the **Seventeenth Amendment** is the constitutional amendment providing that senators are to be elected by

the people and not by a state's legislature, and the constitutional amendment providing that after the death or resignation of a state's senator, and if empowered by the state's legislature, the state's governor can temporarily appoint a new senator. Ratified in 1919, the **Eighteenth Amendment** is the constitutional amendment, later repealed by the Twenty-first amendment, that prohibited the manufacture, sale, transportation, or importation of alcoholic beverages in the United States. The period from 1919 to 1933, during which the Eighteenth Amendment prohibited the manufacture, sale, transportation, or importation of alcoholic beverages in the United States, is known as **Prohibition**[1]. From *support,* **suffrage** is the right to vote and **women's suffrage** is the right of women to vote. Ratified in 1920, the **Nineteenth Amendment** is the constitutional amendment guaranteeing every citizen no denial of the right to vote on account of sex.

Ratified in 1933, the **Twentieth Amendment** is the constitutional amendment that requires Congress to meet and members of Congress to begin their terms at noon on the 3rd day of January and requires the president and vice president to begin their terms at noon on the 20th day of January. Ratified in 1933, the **Twenty-first Amendment** is the constitutional amendment that repealed the Eighteenth Amendment and ended Prohibition. Ratified in 1951, the **Twenty-second Amendment** is the constitutional amendment that provides that no person shall be elected president more than twice and that no person who serves more than two years finishing the term of another president shall be elected president more than once. Ratified in 1961, the **Twenty-third Amendment** is the constitutional amendment granting the District of Columbia electors in the election of the president and vice president. From *a count of hairs,* a **poll** is a place where voters vote. **Poll taxes** were special taxes voters were required to pay in order to vote. Ratified in 1964, the **Twenty-fourth Amendment** is the constitutional amendment guaranteeing every citizen the right to vote for president, vice president, senator, or representative without having to pay any poll or other tax. The phrase **voting rights**[1] usually refers to a citizen's right to vote as guaranteed by the Fifteenth and Twenty-fourth Amendments and the Voting Rights Act of 1965. The **Voting Rights Act of 1965** is the law prohibiting legally irrelevant voting qualifications imposed because of a potential voter's race or color. Ratified in 1967, the **Twenty-fifth Amendment** is the constitutional amendment providing the transfer of power in the event of the president's death, resignation, or temporary incapacity. Ratified in 1971, the **Twenty-sixth Amendment** is the constitutional amendment guaranteeing the right of citizens who are 18 years old or older no denial of the right to vote on account of age. Ratified in 1992, the **Twenty-seventh Amendment** is the constitutional amendment providing that no law, varying the compensation for the service of the senators and representatives, shall take effect until an election of representatives shall have intervened.

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- **abolish**
- **abolition**
- **abolitionist**
- **anti-abortion**
- **anti-choice**
- **anti-life**
- **Equal Rights Amendment (ERA)**
- **penumbra**
- **pro-abortion**
- **pro-choice**
- **pro-life**

Chapter 13

Military, Immigration, and International Law

MILITARY LAW

From *confusion* or *strife,* **war** is conflict or hostility, especially armed conflict or mutual hostility between or among nations. From *agreement* or *tranquility,* **peace** is the absence of conflict or hostility, especially the absence of armed conflict or mutual hostility between or among nations. (From *pleasant pastime,* a **sport** is, ideally, a physical contest without hostility. **Sportsmanship** is being a contestant without hostility.)

From *warlike,* **military law**[1] is, generally, the law about necessity in war. The primary necessity in war, and the primary characteristic of military society, is following military orders. A **military order** or **order**[2] is a military command or a military command invoking the authority of the commander to give the command ("And that's an order!"). From *net,* the **chain of command** is the collective links between commanders and the commanded, created by following military orders.

From *put on the list,* to **enlist** is to voluntarily enter into military service. **Enlistment** is voluntary entry into military service and a special contract to enter into military service. The **selective service system** is the government's system for selecting and forcing citizens into military service, if and when necessary. From *select for a special purpose,* to **draft**[3] (military, the verb) is to select for military service, regardless of the selected person's will and the **draft**[4] (military, the noun) is selection by the government for military service regardless of the selected person's will. From *apart-carry,* to **defer** is to give way or to wait until a later time. A **deferment** is to have given way or to have waited until a later time and to have waited until a later time to draft a person into military service. From *intensely know,* a **conscientious objector** is a person who, due to genuine religious belief, is opposed to participation in war and seeks exemption from a draft, or military service without combat duty. There is no constitutional right to objector status.

From *citizen,* a **civilian** is a person not in military service. The Constitution gives Congress the power to make rules for the government of the military. People who enter military service are sworn to abide by the **Uniform Code of Military Justice** or **military law**[2], which is the special collection of laws that members of the military must obey. See 10 U.S.C. § 891 et seq. Members of the military are subject to the jurisdiction of Article I military courts and give up some constitutional rights such as criticizing the commander in chief. There are many military offenses. From *go away,* **leave** is authorized absence from duty, including authorized absence from military duty. From *away be,* **absent without leave** (**AWOL**) is unauthorized absence from military duty. In military law, from *undo join,* **desertion**[1] is unauthorized absence from military duty with the intent to remain away permanently or the intentional avoidance of

hazardous or important duty. From *revolt,* **mutiny** is acting in concert with others to refuse to obey orders with the intent to override or usurp lawful military authority.

From *court-war,* a **court-martial** is a military trial court, a military trial, and a trial for a military offense or an offense connected to military service. People charged with military offenses are tried before one to six appointed officers who serve as both judges and jurors. A **general court-martial** is the highest court-martial with at least five officers and unlimited military jurisdiction. A **special court-martial** is the intermediate court-martial with three officers and limited military jurisdiction. A **summary court-martial** is the lowest court-martial with one officer and very limited military jurisdiction. **Courts-martial** is the plural of court-martial. A **judge advocate general** (**JAG**) is an attorney in the U.S. military serving as an attorney.

From *respect,* **honor**[1] is the social right to respect or the expression of respect. In military law, **discharge**[1] is the termination of military service. An **honorable discharge** is a formal declaration that a person's military service was without a serious violation of military law. A **dishonorable discharge** is a formal declaration that person's military service included a serious violation of military law.

MARTIAL LAW

From *war,* **martial law** is the law of military necessity, when the civilian government or legal system has broken down due to war, severe social unrest, or a natural disaster. Martial law may be declared when there is an **insurrection**, which is, from *to rise up,* a violent uprising against the government. A **military government** is a government established outside of the United States as the result of military action or war or a government established inside of the United States under martial law.

IMMIGRATION LAW

From *opposite-region* (outlying region), a **country** is a nation and its territory, or a nation's territory. A country includes its **territorial waters**, which are the inland waters of a country and the waters three miles from the coastline of the country, except as divided with another country at the border between the countries.

A **natural-born citizen** is a person born in a country, or born elsewhere but under the protection of that country. From *city inhabitant,* a **citizen** is an inhabitant of a city, a member or subject of a sovereign or country, and a person who owes allegiance to the government and is entitled to its protection. **Citizenship** is the status of being a member or subject of a sovereign or country and giving allegiance to the government and being entitled to its protection. **Dual citizenship** is the status of simultaneously being a member or subject of two sovereigns or countries. From *of one's country,* a **patriot** is a person proud to give allegiance to the government and proud to be entitled to its protection. **Patriotism** is being proud to give allegiance to the government and being proud to be entitled to its protection.

From *from another,* an **alien** is a noncitizen of a sovereign or country. A **legal alien** is a noncitizen of a country with permission to be in the country. A **resident alien** is a noncitizen of a country with permission to permanently live in the country but not yet granted citizenship. Until the late 1900s, a U.S. alien registration card was green in color and was known as the resident alien's **green card**. An **illegal alien** is a noncitizen of a country without permission to be in the country.

Exclusion[1] from a country is denial of entry into a country or denial of entry into a country by force. **Expulsion**[2] from a country is removal from a country or removal from a country by force. An illegal alien may be **deported**, which, from *away carry,* means transferred to another country due to exclusion or expulsion and, usually, returned to

the country from which a person came. **Extradition**[1] from a country is surrender of a person to another country and, usually, surrender of a person to the country from which the person came. From *sanctuary,* an **asylum** is a shelter for an unfortunate person such as a person who is persecuted or insane. As a place, a **political asylum**[1] is a country that accepts people being persecuted in their own country. As a status, **political asylum**[2] is an immigration status available under some circumstances when the party seeking asylum claims political persecution and makes a clear showing of oppression.

From *in-move,* to **immigrate** is to leave the country in which you were born or lived permanently and go to a different country to live permanently. **Immigration** is the movement of persons from one country to another to live permanently and the movement of persons from one country to another to change citizenship. An **immigrant** is a noncitizen who comes into the country to live permanently and a noncitizen who comes into the country to change citizenship. From *nature,* **naturalization** is the process by which an alien becomes a citizen. **Naturalized** means granted citizenship. A **naturalized citizen** is a former alien who became a citizen and a former alien granted citizenship.

INTERNATIONAL LAW

From *between groups,* **international law**[1] is, generally, the law about other sovereign nations. Specifically, **international law**[2] is the agreements nations have regarding their relations with each other. There is no worldwide human sovereign. There are, however, notions of law common to all civilized people.

The **five ways to resolve a dispute without violence** are avoidance, negotiation, mediation, arbitration, and adjudication. International law touches on each of the five. For example, avoidance occurs in international law when nations have no relations.

Most international law is based on negotiation. A **treaty** or international **convention**[1] is a formal nation-binding agreement between two countries and a formal nation-binding agreement by the United States of America with a foreign country, which must be consented to by the Senate. An **executive agreement** is a personal agreement by the president of the United States with a foreign country that does not have to be consented to by the Senate. International law may involve mediation by international organizations. For example, created in 1945 after World War II and located in New York City, the **United Nations** is an international organization of most of the countries of the world formed to promote world peace, security, and economic development. The United Nations exists, in part, to mediate disputes between member nations.

International law occasionally involves arbitration, where nations give authority to decide a dispute to a third party. Authority to decide some international trade disputes has been given by members of the United Nations to the **International Court of Justice**, which is the trial court of the United Nations whose principal location is The Hague, Netherlands. Appeals may be taken to the **United Nations Security Council** or **Security Council**, which is the United Nations body responsible for promoting world peace and is composed of 15 members of the United Nations, including 5 permanent members: China, France, Russia, the United Kingdom, and the United States. There is no pure adjudication in international law because there is no worldwide human sovereign. There is no worldwide supreme court. The International Court of Justice has power only to the extent that nations give their consent. Instead, the last resort for settling disputes between nations is the violence of war. Nevertheless, international law touches on adjudication to the extent that countries have made agreements about the conduct of war between them.

The **law of war** refers to the requirements of international agreements concerning military action. The foremost law of war is the Geneva Conventions. Referring to a treaty signed in Geneva, Switzerland, in 1864, and amended by treaties signed in 1906, 1929,

1949, and 1977, the **Geneva Conventions** are treaties between many countries about the conduct of war between them, providing for the humane treatment of civilians, wounded, and prisoners of war. The Geneva Conventions apply to civilians and to members of a country's military in uniform. Although the Geneva Conventions do not apply to warriors who are not in uniform such as spies and terrorists, the standards of the Geneva Conventions may be adopted for them as commonly accepted standards of humane behavior. **Name, rank, and serial number** is, generally, the only information a prisoner of war is required to give an enemy under the Geneva Conventions. A **war crime** is a significant crime against humanity or a significant violation of the law of war. For example, from *race killing,* **genocide** is killing an entire group of people based on their race or character.

DIPLOMATIC RELATIONS

From *two fold* and *official government document,* a **diplomat** is a sovereign representative in another country or a sovereign representative in an international organization. Most nations have agreed to have diplomatic relations with each other. **Diplomatic relations** means that two nations agree to permit a small number of diplomats in each other's country. Countries with diplomatic relations usually permit some travel in each other's country by citizens of the other country, and some trade.

From *officer of a diplomatic mission,* an **ambassador** is the chief diplomat in a particular country or the chief diplomat in a particular international organization. An ambassador usually lives in an **embassy**, which is, from *office of a diplomatic mission,* a small territory in another country, usually the size of a large private residence or office building, that is permitted to be a sovereign's territory in another country. U.S. marines guard U.S. embassies. From *attached,* an **attaché** is a diplomat attached to an embassy.

An allusion to permission to pass through a port, a **passport** is a government document that identifies one of its citizens to a foreign government. From *seen*, a **visa** is a government document or symbol that certifies that a foreign passport has been examined and approved and permits entry into the country. Countries commonly impose a **customs duty** or **duty**[2], a tax on an import or an export, especially a tax on an import. A **tariff**[2] is a system of taxes on imports or exports or, in the United States, a tax on an import. People entering the country may be required to go through a **customs inspection** or **customs**[2], which is, from *customary,* an inspection for contraband or items subject to a customs duty. From *sneak,* to **smuggle** is to secretly take something out of a country or to secretly bring something into a country, especially to attempt to avoid or defeat a customs inspection.

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- **airman**
- **anarchy**
- **Army**
- **Coast Guard**
- **coastguardsman**
- **guardsman**[1] (coastguardsman)
- **guardsman**[2] (national guardsman)
- **import**
- **military commission**
- **marine**
- **Marines**
- **nation**
- **National Guard**
- **national guardsman**
- **Navy**
- **sailor**
- **soldier**

Part Four

Civil Law: Status Issues

Chapter 14

Family Law: Generally and Marriage

FAMILY LAW, GENERALLY

From *household,* **family law**, or, from *of a household,* **domestic law**, is the law governing social status or the status of people. A **family**[1] is, generally, a group of people with a common affiliation and, traditionally, a group with relations by blood or marriage. **Domestic** is related to a family or related to family matters. **Family court**[1] or **domestic relations court** is a court or a division of a court devoted to family law matters. A family court is a court of equity. From *to decide,* a **decree**[1] (the noun, generally) is an equity court order, a final decision of a court of equity, a judgment of a court of equity, a final decision in a matter of equity, or a judgment in a matter of equity.

From *with a woman,* **married** means in the status of marriage. From *one,* **single** means not in the status of marriage. Generally, from *with a woman,* **marriage**[1]; from *mother state,* **matrimony**[1]; or from *pledge,* **wedlock**[1] is the state-recognized legal union of one man and one woman for life, unless terminated by death or a court. The person to whom a person is or was married, during their marriage, is, from *solemn promised,* that person's **spouse** or **marriage partner**.

SINGLE PERSONS

From *human being,* a **natural person** is an actual human being and not merely a person or entity recognized by law. (Corporations are artificial persons and are discussed in Chapter 27). From *bring forth,* a **natural parent** or **parent**[1] is a person who, with a person of the opposite sex, procreates a natural person, and is the mother or father of a child. A natural person is born of a **mother**, a female parent, and a **father**, a male parent. From *offspring,* a **natural child** or **child**[1] is a human being born of particular parents. From *parentless,* an **orphan** is a child whose parents are dead. From Latin *parent of the country,* **parens patriae** is the sovereign as the protector of people unable to care for themselves. (Guardianship and conservatorship are discussed in Chapter 21.)

A **name**[1] is the identifying designation of a natural person, usually given by the natural person's natural parents. Traditionally, a name consists of a **given name**, a person's distinctive first and middle names, and, from *above name,* a **surname**, a person's family-indicating last name. A person's given name is sometimes known as the person's Christian name because Christians have a tradition of giving a person the name of a saint as the person's first or middle name, or both. From *another time,* an **alias** is another name by which a person is known, beyond a person's actual or first-known name.

A person's child or children, and their children, are sometimes known, from *out-go,* as the person's **issue**[1]. The children born of a particular married couple are known as **issue of marriage**. **Died without issue**, a **failure of issue**, or a **want of issue** means not having a child; or not having a surviving child or children, or their children.

From *lawful,* **legitimate**[1] generally means legal or right. From *not lawful,* **illegitimate**[1] generally means illegal or wrong. **Legitimacy** is the situation in which a mother and father are married to each other at the time of their child's birth, were married during gestation, or were married subsequently. **Illegitimacy** is the situation in which a mother and father are not married to each other at the time of their child's birth, were not married during gestation, and were not married subsequently. In most states, when a child is conceived during marriage, the husband is presumed to be the child's father. A **legitimate child** or a **legitimate**[2] is a child born when the child's parents are married to each other, were married during gestation, or married subsequently. An **illegitimate child**, an **illegitimate**[2], a **nonmarital child**, or, from *barn born,* a **bastard**[1] is, today, a child born when the child's parents are not married to each other, were not married during gestation, and are not married subsequently. Traditionally, born when the child's parents are not married to each other is known as being **born out of wedlock**. Traditionally, from *barn born,* a **bastard**[2] was a child born out of wedlock.

Parentage means being a parent. **Paternity**, a parent–child relationship, is the quality of being a parent and the establishment of parentage. Paternity is, usually, the establishment of a particular man as the natural father of a child or, occasionally, the establishment of a particular woman as the natural mother of a child. A **paternity action**, a **paternity proceeding**, a **paternity suit**, an **affiliation proceeding**, or, traditionally, a **bastardy proceeding** is a proceeding or lawsuit to establish parentage, or not. It is, usually, a proceeding or lawsuit to establish a particular man as the natural father of a child, or not. It is, occasionally, a proceeding or lawsuit to establish a particular woman as the natural mother of a child, or not. A **paternity test** is evidence of paternity from a comparison of the blood and/or genes of the alleged parent and the child. **Human Leukocyte Antigen testing**, with the abbreviation **HLA testing**, is a certain blood test used as a paternity test. From *supposed,* **putative** means alleged or supposed. A **putative father** or **alleged father** is a man alleged or supposed to be a child's father.

From *under-propose,* a **surrogate** is a person who acts for another. **Surrogate motherhood** is when a woman hosts a fertilized egg of another woman or is artificially inseminated and agrees to forgo parental rights to the child born as a result. A **surrogate parent** is not a parent but a person who acts as a parent for the parent. From Latin, **in loco** means in place of. From *in place of the parent,* **in loco parentis** is the status of a person or entity who acts as a parent for the parent such as a babysitter, teacher, or school.

A **birth certificate** is the official record of a natural person's date and place of birth and parentage.

From *to choose,* to **adopt** is to accept something not originally your own as your own and to accept a child not originally your own as your own. **Adoption** is the process by which a person who is not a person's natural parent becomes the person's legal parent. A **legal parent** is another, not the natural parent of a person, granted parental rights over the person. An **adoptive father** is a man who becomes a person's legal parent. An **adoptive mother** is a woman who becomes a person's legal parent. An **adoptee** is a person who has a legal parent and a person who has been adopted. An **adopted child** or **child**[2] is a minor who has a legal parent and a minor who has been adopted. **Agency adoption** is using an agency, either government or private, but government-regulated, to facilitate the adoption process. **Private adoption** is adopting parents acting on their own behalf or with the assistance of a third-party intermediary.

From *food* and *nourish,* a **foster child** is a minor child not raised by the minor child's natural or adoptive parents. A **foster parent** is a person not the natural or adoptive parent of a minor child who raises the minor child and a person court appointed, usually temporarily, to raise another person's minor child.

From *of the greater number,* **majority,** or **age of majority**, **legal age**, or **full age**, is the age when the law generally recognizes a natural person's right to exercise his or her own rights and be responsible for all of his or her own actions, the age of adulthood. Today, the age of majority is 18. A higher legal age may be required for particular activities such as purchasing alcoholic beverages. A natural person usually has all legal rights and responsibilities by the traditional age of majority, 21. From *of the lesser number,* **minority**[2] or, *of baby time,* **infancy** is the period of a person's life prior to reaching the age of majority or the period of a person's life prior to emancipation or marriage. From *lesser,* a **minor**[1]; from *of youth,* a **juvenile**[1]; or from *baby*, an **infant**[1] is, specifically, a natural person who has not reached the age of majority or a child who has not reached the age of majority. From *grown up,* an **adult** is a natural person who has reached the age of majority or a child who has reached the age of majority.

Generally, from *out-deliver,* when a person is **emancipated**[1], the person is freed from the control of another. In family law, a minor is **emancipated**[2] when the minor is freed from parental control and responsibility. A minor is automatically emancipated from parental control when the minor becomes an adult. Under circumstances of forced maturity, a court may order emancipation before a minor reaches the age of majority. Thus, **emancipated**[3] means legally declared an adult and legally declared an adult as the result of marriage or similar adult circumstance.

Where minors are involved, family law and criminal law can overlap. **Juvenile delinquency** refers to minors committing serious criminal acts. Thus, a **juvenile delinquent** or **juvenile offender** is a minor who has committed a serious criminal act. Juvenile delinquency is often the result of child abuse and neglect. From *away use,* to **abuse** is to misuse, to use wrongly, to use excessively, or to injure. **Child abuse** is misusing a minor child, using a minor child wrongly, using a minor child excessively, or injuring a minor child. **Child abuse reporting acts** are laws that require certain professionals, public officials, and others to report any evidence or suspicion of child abuse. Required reporters commonly include doctors and teachers. From *not select,* to **neglect**[1] is to leave alone, to not care, to not care for, or to fail to fulfill a duty of care. **Child neglect** is to leave a minor child alone, to not care about a minor child, to not care for a minor child, or to fail to fulfill a duty of care for a minor child. Most states have a separate **juvenile court**[1] (not an adult, specifically), which is a separate court or division of a court devoted to cases of juvenile delinquency, custody of orphans, child abuse, and child neglect. When a juvenile near the age of majority has allegedly committed a crime while engaged in an adult activity, and the juvenile court transfers the juvenile's case to an adult court for trial, it is said that the juvenile is being **tried as an adult**. A **youthful offender** is a child or young adult criminal processed through juvenile court.

MARRIAGE AND MATRIMONY

One of the canon law concepts that became part of English and American law is the concept of **marriage**[2] or **matrimony**[2] or **wedlock**[2], which is, loosely, the legal union of one man and one woman for life. From *married,* **marital** means marriage-related or related to marriage. Most Christians believe that marriage is, from *intensely sacred,* a **sacrament**, which is, generally, a divinely created sign of holiness. Thus, **marriage**[3] or **matrimony**[3] or **wedlock**[3] is the church-recognized legal union of one man and one woman for life, unless terminated by death or a church-recognized annulment.

From *make nothing,* to **annul** is to make void. Thus, **annulment of marriage** or **annulment**[1] is the voiding of a marriage, the proceeding to declare that an apparent marriage is void because the parties were not validly married. A **decree of annulment** or **annulment**[2] is the formal declaration that an apparent marriage is void because the parties were not validly married. From *fortify,* a **ground** is a recognized reason or a legal reason. One church-recognized ground for annulment is that both parties did not enter into marriage as a sacrament.

Since the Middle Ages, the civil law concept of marriage has gradually departed from the church concept of marriage. Church recognition of the status of marriage was replaced in civil law by state recognition of the status of marriage and states permitted courts to terminate the civil status of marriage for grounds other than annulment.

Recently, the fundamental concept of marriage as being the union of one man and one woman has been challenged by those who contend that two persons of the same sex should be permitted to be married. Recognized in Massachusetts and in some foreign countries, **same-sex marriage** is the state-recognized legal union of two men, or two women, for life, unless terminated by death or a court. The majority of society is opposed. Many people regard the redefinition of marriage as a **sacrilege**, which is, from *sacred taken,* the deliberate violation of something sacred. The people in many states have voted to prohibit same-sex marriage. Instead of redefining marriage, some states may recognize a generic civil law union. A **civil union** is a state-recognized legal union of two persons for life, unless terminated by death or a court.

MARRIAGE REQUIREMENTS

From *supposed,* a **putative marriage** is an alleged or supposed marriage that may be valid or void. From *forth-carried,* a **purported marriage** is an alleged or supposed marriage that is void. To be validly married without parental consent, a person must be an adult, emancipated, or at or above the **age of consent**, which is the minimum age at which the state permits a person to marry without parental consent and the minimum age at which a person can consent to sexual intercourse. A person who is **nonage**, unemancipated, and below the age of consent must obtain parental consent to marry.

To be validly married, a person cannot be already married. From *on the foot*, an **impediment** is a hindrance to making a contract. Being married is an impediment to another marriage. It is illegal to marry another person when you are already married because, from *one marriage,* **monogamy**, having one spouse at a time, if any, is required. From *two marriages,* **bigamy** is the crime of knowingly attempting to have two spouses at the same time. A **bigamous marriage**, a purported marriage as the result of bigamy, is void. If an act of bigamy succeeds, the result is, from *many marriages,* **polygamy**, which is the crime of knowingly having two or more spouses at the same time. Traditionally and loosely, a woman eligible for marriage was known, from French *woman single,* as a **femme sole**, meaning a woman who is single, divorced, or widowed.

To be validly married, in many states, a couple cannot be too-closely related by blood. Medical research has indicated that the risk of some birth defects can be avoided if parents are not too-closely related by blood. From *not pure,* **incest** is the purported marriage of people too-closely related by blood, sexual intercourse by people too-closely related by blood, or the crime of sexual intercourse by people too-closely related by blood. The traditional standard of too-closely related by blood is second cousins or closer, where, from *second together mother's sister's child,* a **second cousin** is a great-grandchild of a person's great-grandparent, other than the person; or a person with a common great-grandparent.

A couple desiring to marry must obtain a **marriage license**, which is state permission to marry. From *proclamations,* **banns** are public announcements. Although not

required in most states today, under canon law, a couple desiring to marry has to wait for the publication of **marriage banns** or **banns of matrimony**, which is the publication of the planned marriage of a couple, so that other people can learn about a planned marriage and stop the marriage if they know of a reason (such as bigamy or incest) why the couple should not be married. Traditionally, a couple desiring to marry also had to take and pass a **blood test**, a medical test traditionally given to couples desiring to marry, to avoid the transmission of disease. Blood tests were eliminated when it was determined that they did not efficiently detect or prevent the transmission of disease.

Not required by American law, but a common custom, a **dowry** is, from *gift act,* the property a woman brings to her husband by their marriage or a gift a man gives to or for his wife for consent to her marriage. The gift of an engagement ring is a dowry.

From *formalize,* to **solemnize** is to perform a formal ceremony to make something official and **solemnized** is to have performed a formal ceremony and made something official. Marriage usually requires the **solemnization of marriage** or **solemnization**, or, from *pledging,* a **wedding**, which is a formal ceremony to make a marriage official, a formal ceremony before a representative of the state indicating the firm and voluntary intent of each person to be married to the other person, and, traditionally, a formal ceremony before a representative of God indicating the firm and voluntary intent of each person to be married to the other person.

From *ritual,* a **ceremonial marriage** is a solemnized marriage. From *letter granting power,* a **proxy**[1] is, generally, a person who has received specific authority from another to act or speak for the other or a written specific authority from another to act or speak for the other. A **proxy marriage** is a ceremonial marriage in which an agent represents one party who cannot be present. In a few states, from *come together,* a **covenant marriage** is a marriage in which the parties agree to counseling before the marriage and during the marriage to resolve problems and for which there are only a few grounds for divorce such as a two-year separation.

A **civil ceremony** is a wedding before an authorized representative of the state such as a judge, a mayor, or the captain of a ship at sea. A **religious ceremony** is a wedding before a religious leader who also serves as the representative of the state.

From *shame,* a **sham marriage**, a purported marriage as a jest or joke, for pretend, or for some illegal purpose, is void. A **shotgun marriage**, a purported marriage as the result of force or the threat of force, is void.

A **marriage certificate** or **certificate of marriage** is a document that is evidence of a marriage, prepared by the religious leader or the representative of the state before whom the marriage took place.

At common law, a marriage was sometimes recognized without a wedding or compliance with other legal formalities. From *together dwell,* to **cohabit** or **cohabitate** is to live together. Abolished in most states but recognized in a few, a **common-law marriage** is a marriage not based upon a formal ceremony, but based upon a man and a woman, each competent to marry, agreeing to cohabitate as if married, holding themselves out as being married, and regarded by others as being married.

DURING MARRIAGE

The person to whom a person is or was married, during their marriage, is, from *solemn promised,* that person's **spouse** or **marriage partner**. A marriage partner is not a person's business partner, unless made so like any other business partner.

Spousal means about the person to whom a person is or was married, or about the marriage partner. Except in a same-sex marriage, from *housemaster,* a **husband** or, historically from the Latin word for *man,* a **vir** is a male spouse during the marriage, the person to whom a woman is married during their marriage, and a man who has

a living wife. Except in a same-sex marriage, from *woman,* a **wife** or, historically in Latin, an **uxor** is a female spouse during the marriage, the person to whom a man is married during their marriage, and a woman who has a living husband. The phrase **et vir** means "and husband" and the phrase **et uxor**, abbreviated **et ux.**, means "and wife."

Traditionally, a married woman takes the surname of her husband. Thus, from *unmarried,* a **maiden name** is a woman's surname before her first marriage. Today, some married women add their husband's surname to their maiden name and some married women just keep their maiden name.

The main civil benefit of marriage is **consortium**, which is, from *with partner,* the right to the companionship, cooperation, affection, and aid of the spouse, including conjugal rights. From *together-join,* **conjugal rights** are the rights of spouses from the status of marriage, including a confidential intimate relationship, joint property rights, legal cohabitation, and legal sexual relations. **Loss of consortium** is the absence or removal of the companionship, cooperation, affection, and aid of a spouse. When a person's spouse is injured or killed, the person may be able to sue and collect damages for loss of consortium.

During a marriage, the husband and the wife are expected to support each other and their children. From *up-carry,* to **support** is to furnish the money or means needed to meet a person's basic needs or to provide for a person's basic needs such as food, clothing, and shelter. In the sense of support, from *hand-hold,* **maintenance**[1] is a person's basic needs or provision for a person's basic needs such as food, clothing, and shelter.

During a marriage, communications between spouses are covered by the spousal privilege. **Spousal privilege** or **marital communications privilege** or **marital privilege** or **husband-wife privilege** is the privilege held by each spouse, except in legal actions between them, to refuse to disclose confidential communications between them during a legal marriage. The privilege encourages communication and confidence between spouses.

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- **emancipation**
- **equitable adoption**
- **grandchild**
- **grandparent**
- **judgment nisi**
- **miscegenation**
- **parental**
- **terminate**
- **Uniform Parentage Act**

Chapter 15

Family Law: Marriage Termination

MARRIAGE TERMINATION, GENERALLY

Natural termination of marriage is by death. From *woman,* a **widow** is a female spouse whose husband has died and a woman who survived her husband. A **widower** is a male spouse whose wife has died and a man who survived his wife. Unnatural termination is by annulment, divorce, or dissolution. From *out of,* an **ex** is a former something. Traditionally, from *former husband,* an **ex-husband** is a male spouse, after the marriage, and the person to whom a woman was married, after their marriage has terminated, and from *former wife,* an **ex-wife** is a female spouse, after the marriage, and the person to whom a man was married, after their marriage has terminated.

Annulment of marriage or **annulment**[1], the voiding of a marriage, is the proceeding to declare that an apparent marriage is void because the parties were not validly married. A **decree of annulment**, an **annulment decree**, or an **annulment**[2] is the formal judgment declaring that an apparent marriage is void because the parties were not validly married. A **valid marriage** is a marriage not subject to annulment. A **voidable marriage** is an apparent marriage subject to annulment. A **void marriage** is a marriage obviously not a valid marriage or an apparent marriage that has been annulled.

Generally, from *divert,* **divorce**[1] and, from *apart-loosen,* **dissolution**[1] are the terminating of a valid marriage or the termination of a valid marriage. Specifically, **divorce**[2] or **absolute divorce** is the termination of a valid marriage for a fault or ground arising during the marriage, where the spouses do not agree about the division of their property rights or do not agree about the care of the minor children of their marriage, if any, and the proceeding to terminate a valid marriage for a fault or ground arising during the marriage where the spouses do not agree about the division of their property rights or do not agree about the care of the minor children of their marriage, if any. In a divorce, the court decides if the marriage will be terminated, how the spouses' property rights will be divided, and how the minor children of their marriage, if any, will be cared for. From *intensive test,* a **contested divorce** is a divorce in which a defense is raised. An **uncontested divorce** is a divorce in which no defense is raised. A **decree of divorce**, a **divorce decree**, or a **divorce**[3] is the formal judgment declaring that a valid marriage is terminated, how the court has decided that the spouses' property rights will be divided, and how the court has decided that the minor children of their marriage, if any, will be cared for.

A **ground for divorce** is a recognized reason for divorce or a legal reason for divorce. Until the 1900s, the only grounds were based on **fault**, which is misconduct or conduct below a standard. One of the spouses had to be found at fault because that spouse engaged in marriage-related misconduct, known as **marital misconduct**.

A common ground for divorce was and is adultery. From *corrupt,* **adultery**, voluntary sexual intercourse by a married person outside of marriage, is the abolished common-law crime of a married person having voluntary sexual intercourse with someone who is not that person's spouse and, as a ground for divorce, includes an unmarried person having sexual intercourse with someone who is married and voluntarily participates. An **adulterer** is a married person who commits adultery. The **corespondent** or **co-respondent** is another respondent to a petition and, in an action for divorce on the ground of adultery, the person with whom the spouse allegedly committed adultery.

A common ground for divorce was and is, from *unfeeling,* **cruelty**, which is the unnecessary infliction of mental or physical pain. For example, **extreme cruelty** or **mental cruelty** is behavior or conduct by a spouse that makes continuation of the marriage unbearable. A common ground for divorce was and is, from *not potent,* **impotence**, which is the physical inability to have sexual intercourse. Impotence is not the same as **sterility**, which is, from *barren,* the physical inability to beget or bear a child. A common ground for divorce was and is, from *undo join,* **desertion**[2], which is, in family law, the unjustified cessation of cohabitation with your spouse or, generally, the abandonment of marital duties. Named after a poem by Lord Tennyson, in which a shipwrecked husband returns home but conceals himself in order to not interfere with his wife's remarriage, an **Enoch Arden law** is a law that provides as a ground for divorce the unexplained absence of a spouse for a long and continuous period of years. A common ground for divorce was and is **nonsupport**, which is the willful failure to provide for the basic needs of a spouse or a minor child. Nonsupport is also the crime of willfully failing to provide for the basic needs of a spouse, a minor child, or a person under your care.

From *back charge,* **recrimination** is pointing out in equity the wrongs of the accuser and the common-law defense to a divorce that the spouse seeking the divorce had engaged in conduct that was a ground for divorce, and so was actually at fault or equally at fault. At common law, if both parties were at fault, a divorce would not be granted. From *together wink,* **connivance** is secret cooperation in an illegal act and the common-law defense to a divorce that the spouse seeking the divorce fraudulently consented to conduct alleged to be a ground for divorce.

In the late 1900s, **no-fault divorce**[1] emerged, meaning divorce for a ground not based on the fault of one of the spouses. For example, a no-fault ground for divorce might be **incompatibility**, **irreconcilable differences**, **irremedial breakdown of marriage**, **irretrievable breakdown**, or **living separate and apart for one year**, regardless of the reason why.

No-fault divorce emerged out of the concept of dissolution of marriage. From *apart-loosen,* **dissolution of marriage** or **dissolution**[2], sometimes confusingly referred to as a **no-fault divorce**[2], is the termination of a valid marriage, for any reason, where the spouses agree to terminate their marriage, agree about the division of their property rights, and agree about the care of the minor children of their marriage, if any, and the court approves; and the proceeding to terminate a valid marriage, for any reason, where the spouses agree to terminate their marriage and agree about the division of their property rights, and agree about the care of the minor children of their marriage, if any, and seek court approval. A **decree of dissolution**, a **dissolution decree**, or a **dissolution**[3] is the formal consent judgment declaring that a valid marriage is terminated, how the spouses agree that their property rights will be divided, and how the couple agrees that minor children of their marriage, if any, will be cared for.

Before no-fault divorces and dissolutions became common, spouses often sought divorces in states or countries with short waiting periods or easy grounds for divorce. For example, a person could become a citizen of Nevada in six weeks and obtain a

divorce on the ground of incompatibility. A **foreign divorce** is a divorce in a state or country that is not the usual residence of a spouse. A **bilateral foreign divorce** is a divorce in a state or country that is not the usual residence of a spouse, in which both spouses appear and give the court jurisdiction. An **ex parte foreign divorce** is a divorce in a state or country that is not the usual residence of a spouse, but in which only one spouse appears, and so the court's decree is subject to a challenge for lack of jurisdiction.

Instead of an annulment voiding a marriage or a divorce or dissolution terminating a valid marriage, it is also possible to obtain, from *apart prepare,* a **legal separation**, a **separation**, a **separation of spouses**, or a **limited divorce**, which is maintaining a marriage but requiring the spouses to live separate and apart, and the proceeding to maintain a marriage but requiring the spouses to live separate and apart. From *again make friendly,* **reconciliation** is a resolution of differences or the resumption of cohabitation by spouses who had been living separate and apart.

THE DIVISION OF MARITAL PROPERTY

In family law, a **property settlement** is the division of marital property in the process of the unnatural termination of a marriage.

Common-law property is property under the common-law doctrine that the separate property of the parties to a marriage is merged together by the marriage, as the parties become legally one. It is still the presumption in most states that the longer a marriage lasts, the more the separate property of the parties to the marriage becomes jointly owned, unless it was clearly understood to be "his" or "hers."

The marital property law in Arizona, California, Idaho, Nevada, New Mexico, Texas, Washington, and Wisconsin, **community property** is law under which property acquired during marriage, except property acquired by gift or inheritance, is "community property" owned equally by each spouse and property acquired by gift or inheritance and property acquired before marriage is "separate property" owned individually by each spouse. In some states, notably New York, a similar result is achieved by **equitable distribution**, which is the distribution of all property acquired during the marriage on a fair basis, considering the length of the marriage and the contributions of each party.

A **separation agreement** is a written agreement about the division of marital property and the care of minor children of the marriage while an action to terminate the marriage is pending in court and a written agreement about the division of marital property and the care of minor children of the marriage, often incorporated, with little or no changes, in a divorce decree or a dissolution decree.

As part of the division of marital property, until the late 1900s, it was common for the court to award alimony. From *nourishment* or *sustenance,* **alimony** or **permanent alimony**, now more commonly referred to as **spousal support**, is money or property paid by one spouse to the other spouse for the financial support of that spouse after the termination of their marriage or during a legal separation. This money or property was designed to replace the financial support the spouse would have received if the marriage had continued. An important consideration for a court in deciding whether or not to award alimony or spousal support is the earning capacity of the spouses. **Earning capacity** is the general capacity of a person to earn money. The payment of alimony was common where the husband had been employed for many years while the wife met the domestic needs of their family for many years without being employed. The ex-husband would be ordered to pay alimony to support the ex-wife until the ex-wife died, remarried, or was able to support herself. Today, when both the husband and the wife are likely to be employed or employable, and able to

support themselves, it is more common for a court to make a division of property that does not include spousal support. A court may order the division of retirement benefits. A **qualified domestic relations order** (**QDRO**) is a retirement account's legal documentation requirement for ultimate distribution. **Temporary alimony** or **alimony pendente lite**, now more commonly referred to as **temporary spousal support** or **spousal support pendente lite**, is money or property paid by one spouse to the other spouse for the financial support of that spouse during the time an action to terminate their marriage, or for legal separation, is pending in court. **Separate maintenance** is spousal support and child support during a legal separation.

Recognized in a few states, notably California, **palimony** is money or property paid by a nonmarital partner to the other nonmarital partner for the financial support of that nonmarital partner after the end of a contract, not for sexual services, but for a marriagelike relationship without marriage.

To avoid a dispute about the division of property in the event of the termination of their marriage, the parties to a marriage may agree, usually before their marriage, to a division of some or all of their marital property in the event of the termination of their marriage. In Latin, **ante** means *before*. In Latin, **nuptial** means *related to marriage*. **Antenuptial** or **prenuptial** or **premarital** means before marriage. An **antenuptial agreement**, a **prenuptial agreement**, a **prenuptial contract**, a **premarital agreement**, a **premarital contract**, or a **marital agreement**[1] (before marriage) is an agreement by the parties to a marriage, made before their marriage, dividing some or all of their marital property in the event of the termination of their marriage. A **marital agreement**[2] (during marriage) is an agreement by the parties to a marriage, made during their marriage, dividing some or all of their marital property in the event of the termination of their marriage. An antenuptial agreement is not an anti-nuptial agreement. In Latin, **anti-** means *against*. An **anti-nuptial agreement** would be an agreement against marriage or an agreement not to marry. An anti-nuptial agreement is contrary to a general public policy favoring marriage. In civil law, a person may agree not to marry a specific person, but a person may not agree to give up the general right to marry.

THE CARE OF MINOR CHILDREN OF THE MARRIAGE

From *guarding* and *keeping,* **custody** is having the care and control of a person or property or to be under another person's care and control. Ordinarily, from birth, minor children of a marriage are automatically placed in the custody of their parents. If one parent dies, minor children remain under the custody of the surviving parent. When a marriage is unnaturally terminated, the spouses must agree, or a court must decide, who will have **child custody** or the **custody of children** or **legal custody**, which is the care and control of a minor child or the care and control of minor children. The **best interest of the child** is the premier concern in every family law matter.

From *join,* **joint** means together, combined, or united. **Joint custody** is shared custody of a minor child by both parents after the termination of their marriage. **Divided custody** or **split custody** is custody of a minor child part of the time by one parent and the remainder of the time by the other parent. **Primary custody** is custody of a minor child most of the time or for the most important matters. **Sole custody** is custody of a minor child all of the time (subject to visitation rights). **Temporary custody** is custody while a case is pending in court or custody until custody is next determined.

From *come to or go to,* **visitation** or, redundantly, **visitation rights**, is the right of a parent or other person, when without custody, to meet with a minor child at specific times as agreed or consented to by the parent or other person with custody or as decreed by a court.

The noncustodial parent is usually required to pay child support. Traditionally, **child support**[1] was money or property paid by the noncustodial parent to the custodial parent to meet the basic needs of a minor child of their marriage. Because many disputes arose as to whether child support was properly paid, including when people lied that it had been paid and when people lied that it had not been received, most states have created state or county child support agencies to oversee the collection and payment of child support. Today, **child support**[2] is money or property paid by the noncustodial parent to a child support agency for payment to the custodial parent or another person to meet the basic needs of a minor child of their marriage. From *to behind,* **arrears** is that which is unpaid and due to be paid. **In arrears** is behind in paying that which is due. A person who fails to pay child support that is due is in arrears.

WRONGS AGAINST FAMILY RELATIONSHIPS

At common law, there were several lawsuits that could be brought for wrongs against family relationships. Referring to having feelings soothed, **heart-balm statutes** were statutes that provided lawsuits for wrongs against family relationships. Today, however, most states have passed **anti-heart-balm statutes**, which are statutes that abolish lawsuits for wrongs against family relationships.

From *under-lead,* **seduction** is the lawsuit, abolished in most states, of inducing a chaste unmarried person, by deception such as flattery or a promise of marriage, to engage in sexual intercourse. **Breach of promise to marry** is the lawsuit, abolished in most states, for failure to fulfill a promise to marry. From *from another,* **alienation**[1] generally means separation. **Alienation of affections** is the lawsuit, abolished in most states, for malicious interference with a marriage without justification or excuse. Alienation of affections was abolished due to the expansion of the grounds for divorce and due to the potential for abuse by blackmailers and extortionists. **Criminal conversion** is the lawsuit, abolished in most states, for adultery with a person's spouse. From *into fire,* **enticement of a spouse** is the lawsuit, abolished in most states, of intentionally diminishing the marital relationship of another by encouraging a spouse to leave his or her spouse's home or by harboring a spouse and encouraging the spouse to stay away from his or her spouse's home. **Enticement of a child** is the lawsuit, abolished in most states, of intentionally interfering with a person's custody over a child by abducting the child, by encouraging the child to leave the person with custody, or by harboring the child and encouraging the child to leave the person with custody.

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- **joint custodial arrangements**
- **libel**
- **libellant**
- **libellee**
- **marital estate**
- **marital property**
- **noncustodial parent**
- **Parental Kidnapping Prevention Act**
- **petition for the dissolution of marriage**
- **physical custody**
- **uncontested dissolution**
- **Uniform Child Custody Jurisdiction Act**
- **void ab initio**

Chapter 16

Property: Ownership and the Estate System

PROPERTY, GENERALLY

From *special,* **property**[1] is, generally, the law governing ownership or the status of things. **Property**[2] is something capable of being owned and something over which the law permits a person or entity to have a right of dominion and control. From *ownership,* **dominion** is the right to enjoy and dispose of as desired and the right to do with as you wish. From *utilize,* **use** is the right to enjoy the benefits of property, the enjoyment of the benefits of property, and beneficial or equitable ownership. From *thing held,* **possession** is dominion and control over property. From *holder,* a **possessor** is a person or entity that currently has or controls property. From *active,* **actual possession** is the immediate current control over property. From *together-pile,* **constructive possession** is the power and intent to have current control over property, without immediate control. A **possessory interest** is a right to control land to the exclusion of others.

From *right to possession,* **ownership** or, from *take possession,* **seisin**[1] is the general right to possess, enjoy, and dispose of property as desired, including the general right to exclude others from the possession, enjoyment, and disposition of property. From *possessed,* **owned** or **seized** means having or having had the general right to possess, enjoy, and dispose of as desired, including having or having had the general right to exclude others from the possession, enjoyment, and disposition of property. From *possessor,* an **owner** or person **seized of** is a person or entity with the general right to possess, enjoy, and dispose of an item or piece of property as desired and a person or entity with the general right to exclude others from the possession, enjoyment, and disposition of property. From *owned land,* **domain** is ownership of land or ownership of property by one person or entity. **Co-ownership**, **concurrent ownership**, or **joint property** is property currently owned by two or more persons or entities.

From *(leave) at the power of (another),* to **abandon** is to knowingly end one's claim or right to property or to surrender one's property or rights to another. Thus, **abandoned** means having had the knowing end of one's claim or right to property or having surrendered one's property or rights to another.

TYPES OF PROPERTY, GENERALLY

From *status,* an **estate** is a collection of the property rights of a person or entity at one time or over a period of time. From *to hold,* **tenancy** is the right to possess or own an estate, especially the right to possess or own an estate subordinate to another interest in the property. From *holder,* a **tenant**[1] is, generally, a person who has a right

to possess or own an estate, especially a person who has a right to possess or own an estate subordinate to another interest in the property.

From *open space,* **land** is a portion of the earth, particularly a portion of the soil near the surface of the earth, and extending down to the center of the earth and up a reasonable distance into the sky. From *holding,* a **tenement**[1] is, generally, property of a permanent nature. From *bereavement,* a **hereditament** is anything that can be inherited, generally anything that is not public property or a personal right or privilege. **Lands, tenements, and hereditaments**, a collective term, is land and everything related to land that could be inherited. If only due to its location, all land is unique, and so of inherent value. From *actual,* **real** is of objective existence or of inherent value. From *of a person,* **personal** is of subjective existence or of value to a person. **Real property** or **realty** is property that is land and physical things permanently attached to land, or ownership of immovable things. **Personal property** or **personalty** is property other than land and things permanently attached to land or ownership of movable things. From *attachment,* a **fixture** is a physical thing that is permanently attached to land. **Real estate** is a collection of property rights in land and fixtures.

From *touchable,* **tangible** means having physical substance. **Tangible property** is property rights in physical things. **Tangible personal property** is property rights in physical things other than land and things permanently attached to land. From *not touchable,* **intangible** means not having physical substance, or abstract. **Intangible property** is property rights in abstract things and property rights that can only be represented by a tangible document. From *understanding-special,* **intellectual property**[1] is, specifically, rights claimed in intangible property such as inventions, expressions, identifying marks, and business information. Chapter 30 discusses **intellectual property**[2] generally, the law about rights in human creations, including patents, copyrights, trademarks, and trade secrets, and other related law.

Public property is property owned by the sovereign, property owned by the government, or property shared with everyone. **Public land** or **public domain**[1] is land possessed or owned by the government. The federal government owns most of the land in the western United States. A **commons**[2] or **public park** is land the government has set aside for a public use. **Private property** is property owned by a person or entity other than the sovereign or the government and property not shared with everyone.

THE ESTATE SYSTEM, GENERALLY

After the Norman Conquest in A.D. 1066, William the Conqueror declared that all land in England was his, and fully established feudalism. From *payment for property,* **feudalism** was the land system in which a king or other landowner gives rights to land in exchange for services to the kingdom or the landowner. From *loaf guardian* and *master,* a **lord** was a person who gave rights to land in exchange for services and, from *servant,* a **vassal** was a person who gave services in exchange for rights to land. From *since purchasers,* **Quia Emptores** was the statute in A.D. 1290 that ended feudalism below the king by giving landowners the power to transfer to a transferee the landowner's land and duties to a lord. Feudalism was replaced with alienation. From *estrangement,* **alienation**[2] is the transferability of property and the voluntary and absolute transfer of title and possession from one person or group to another.

From *together say,* a **condition** is, in part, a requirement related to a possible future fact or event, the occurrence of which triggers a legal obligation or removal of a legal obligation. A **condition precedent** is, in part, a possible future fact or event that must occur before a legal obligation is imposed. A **condition subsequent**[1] is, generally and in part, a possible future fact or event after a legal obligation is imposed that removes the legal obligation. An important fact about the real property system that developed

in England from A.D. 1066 is that an estate may be an **estate upon condition**, which is an estate whose existence depends on the occurrence or nonoccurrence of a condition. As a general rule, however, a condition on property must not be a **restraint on alienation**, which is a restriction on the ability to transfer rights in property.

The crucial fact about real property is that the principal measure of ownership is time. As a general rule, William did not give his knights ownership of land, from *continuity,* **in perpetuity**, forever into the future. Instead, he granted ownership of land conditionally, so that his knights owned only a **property interest** or **interest**[1] in land, a right in property. They had an interest in the land only so long as they or their future generations served the king. If they failed to serve the king, their interest in the land returned to the king. In effect, the knights owned a **present interest** in land, the right to possession, enjoyment, and use in the present, and the king owned a **future interest**, the right to possession, enjoyment, and use in the future, if and when the condition occurred.

As a general rule, kings after William did give land in perpetuity. From *feudal,* a **fee**[1] is land. From *uncomplicated,* **simple** is without restrictions on inheritance. From *without condition,* **absolute** is without conditions or complete. The greatest estate in land became, from *land without condition* or *land uncomplicated,* the **fee simple absolute**, the **fee simple estate**, the **fee simple**, or the **fee**[2], which is an estate in land without condition and an estate in land consisting of both the present interest and the future interest.

From *across-carry,* to **transfer** is to remove from a person or place and to move to another person or place. From *promise,* a **grant** is a transfer of property ownership to another, to formally give or transfer property to another, or to formally give in to another such as to yield to a request. From *back-keep,* a **reservation**[1] is, generally, to grant less than the full amount of land or full estate owned and to retain what is not granted. From *documented right,* a **patent**[1] is a government grant of land in fee simple. A **land grant** is a government grant of land without compensation. A government **reservation**[2] is land set aside by the government for a special purpose such as a military base or a park. An Indian **reservation**[3] is land set aside by the federal government for an Indian or Native American community.

From *promisor,* a **grantor**[1] is, generally, a person who transfers ownership of property. From *promisee,* a **grantee** is a person to whom ownership of property is transferred. From *back-turn,* to **revert** is to return to the origin or to return to the grantor. The technique of a grantor, like a king or queen, making a grant that transfers to a grantee ownership of property in estates (blocks of ownership rights measured by time, with conditions that could cause them to revert) was established and eventually brought to America. The system of estates in land, developed in England since A.D. 1066, is known as the **estate system**.

PRESENT INTERESTS AND FUTURE INTERESTS

Present interests include freehold estates and nonfreehold estates. From *free,* a **freehold estate** or a **freehold** is an estate relatively free of conditions; an estate of uncertain duration, at least as long as the life of the present owner; and an estate expected to be held long enough so that it is fair for the government to tax the owner of the present interest rather than the owner of the future interest. At common law, **seisin**[2] was holding a freehold estate. A **nonfreehold estate**, a **nonfreehold**, a **leasehold estate**, or a **copyhold**[1] is an estate burdened by conditions; an estate of certain duration, not longer than the life of the present owner; and an estate not expected to be held for long, so that it is fair for the government to tax the owner of the future interest rather than the owner of the present interest. At common law and until abolished in England

in 1922, a **copyhold**[2] was land granted to a peasant for agricultural services, where a steward recorded the transaction on rolls kept in the lord's manor and the steward gave a copy of the record to the peasant-tenant.

An **estate of inheritance**, a **fee estate**, or a **fee**[3] is a freehold estate extending beyond the life of the owner, and so a freehold estate that can be inherited by the owner's heirs. Again, the greatest estate in land is the **fee simple absolute**, the **fee simple estate**, the **fee simple**, or the **fee**[2], which is an estate in land without condition and an estate in land consisting of both the present interest and the future interest. The ownership of the grantee potentially lasts in perpetuity, subject only to eminent domain (discussed in Chapter 11), zoning (discussed in Chapter 18), and taxation (discussed in Chapter 22). Historically, "**and his heirs**" was the phrase that had to be included in a grant to create a fee simple because it was assumed that an estate for life was intended and that a fee simple was not intended. The words were known as **apt words**, meaning, from *fitted,* words suitable under the circumstances. The words were deemed **words of purchase**, which are words describing to whom the estate is granted. Today, it is assumed that a fee simple is intended. The words are deemed **words of limitation**, which are words defining the estate granted.

An estate that can be defeated by a condition is a **defeasible estate**. From *off the end,* to **determine** is to bring to an end. A **fee simple determinable**, a **determinable fee**, a **fee simple conditional**, or a **conditional fee** is an estate in which the grantee's ownership continues unless a "so long as" condition occurs, and if so, ownership automatically reverts to the grantor. From *closely follow,* a **condition subsequent**[2] is, specifically, a "but if" condition and an event after an agreement that ends a duty of performance. A **fee simple subject to a condition subsequent** is an estate in which the grantee's ownership continues unless a "but if" condition occurs, and if so, ownership reverts to the grantor if the grantor enforces that right in court. From *complete,* a **fee simple subject to an executory limitation** is an estate in which the grantee's ownership continues unless a condition occurs, and if so, ownership transfers to a third person named by the grantor in the original grant.

From *end of a rope,* a **fee tail** or **fee tail estate** is an estate in which the grantee's ownership continues so long as each succeeding grantee is a descendant of the grantee, and if not, ownership reverts to the grantor. **Heirs of the body** or **and heirs of his body** or **and heirs of her body** are a person's physical issue and a phrase traditionally used in a grant creating a fee tail. At common law, fee tails were encouraged, and so the **Rule in Wild's Case** was that a gift to a person and his children, where the person had no children at the time of the gift, is construed as a fee tail. Today, it's a life estate to the person with a remainder to the children.

The freehold estate that is not an estate of inheritance, a **life estate** or **tenancy for life** is an estate in which the grantee's ownership continues until the grantee dies, at which time the grantee's ownership either reverts to the grantor or transfers to a third person named by the grantor in the original grant. From *for the life of another,* a **life estate pur autre vie** or **estate pur autre vie**, a life estate for the life of another, is an estate in which the grantee's ownership continues until another person named by the grantee dies, at which time the grantee's ownership either reverts to the grantor or transfers to a third person named by the grantor in the original grant. A **life tenant** is the owner of a life estate. The **measuring life** is the life upon which the existence of a life estate depends.

The nonfreehold estates, also known as leasehold estates, are leases. From *let (have),* a **lease**[1] (the noun) or **lease agreement** is an agreement by which exclusive possession of property is granted while ownership is retained and a contract to exclusively use property for a substantial period of time, but not own it. From *away-put,* a **demise** is a transfer of an estate, especially a nonfreehold estate. An **estate for years**, a **lease**

for years, or a **tenancy for years** is an estate in which the grantee's ownership continues until a stated period of time has elapsed, after which ownership reverts to the grantor. A **periodic tenancy**, a **periodic estate**, or a **periodic lease** is an estate in which the grantee's ownership continues until the end of a stated period of time and is renewed automatically until either the grantor or the grantee gives notice otherwise, after which ownership reverts to the grantor. A **tenancy at will**, an **estate at will**, or a **lease at will** is an estate in which the grantee's ownership continues until either the grantor or the grantee gives some notice otherwise, then ownership reverts to the grantor.

The **preceding estate** is the present interest before a future interest. A **shifting interest** is a future interest that follows termination of the preceding estate. A **springing interest** is a future interest arising out of the preceding estate.

The future interests that revert to the grantor are the possibility of reverter, the right of reentry, and the reversion. The **possibility of reverter** is the future interest that reverts to the grantor after a fee simple determinable. The **right of reentry** is the future interest that reverts to the grantor after a fee simple subject to a condition subsequent. From *back-turn,* the **reversion**, **reversionary interest**, or **reversionary future interest** is the future interest that reverts to the grantor after a fee tail, a life estate, or a nonfreehold estate.

The future interests that transfer to a third party are the executory interest and the remainder. The **executory interest**, an interest that may result from occurrence of a condition, is the future interest that transfers to a third party after a fee simple subject to an executory interest. From *back-stay,* the **remainder**[1] or **remainder interest** is the future interest that transfers to a third party after a life estate. A **remainderman** is a person who owns a remainder.

From *happening,* **contingent** is expected but conditional. An **expectancy**, a **contingent interest**, or a **contingent estate** is an interest that is expected but conditional. At common law, it was not transferable, but today, in most states, it is transferable. A **contingent remainder** is a future interest that transfers to a third party but is dependent on a condition other than termination of the present interest. The **destructibility of contingent remainders** is the common law rule that a freehold contingent remainder that does not vest until after termination of the preceding estate, is destroyed. From *to clothe,* to **vest** is to become unconditional or to become certain. **Vested** or **fixed** is unconditional or an unconditional right to property. A **vested interest** or **vested estate** is an unconditional or fixed interest in property, which inherently includes the right to transfer it. A **vested remainder** is a future interest that transfers to a third party and is not dependent on a condition other than termination of the present interest. From *away with clothes,* to **divest** is to lose or to surrender an unconditional right to property. **Divested** is a right to property lost or surrendered.

A present or future interest can be transferred to a group of people (for example, a transfer to the children of a person). An **interest subject to open**, an **interest subject to partial defeasance**, or an **interest subject to partial divestment** is an interest in which the group to which it is transferred may increase or decrease (for example, another child may be born or a child may die). From *expectation,* **abeyance**, in expectation of the law, is when there is no presently existing person in whom a freehold estate vests such as while awaiting a child's birth.

A **merger**[2] of estates is the absorption of a lesser estate in a greater estate when the two estates vest in the same person at the same time or the absorption of an equitable interest in a legal interest when the two interests vest in the same person at the same time. A merger-like rule created in A.D. 1324, but now abolished in most states, is the **Rule in Shelley's Case**, which is that a conveyance of a life estate and a remainder in the heirs of the life tenant merge to become a conveyance of a fee simple in the life tenant.

From *to quicken,* an **acceleration**, a premature vesting, is the shortening of the time within which a future estate will vest and the sooner-than-expected enjoyment of an estate or right. For example, a sooner-than-expected termination of a present interest will result in a sooner-than-expected vesting and enjoyment of the future interest.

From *over-take,* to **occupy** is to be in possession or live in or on something, with or without the right to do so; or to be in possession without ownership. An **occupant** is a person who is in possession or lives in or on something, with or without the right to do so; or a person in possession without ownership. When a person is in possession of land without an estate (besides possession), the person is an occupant. **Occupancy** is the status of having an occupant. From *against-stand,* to **oust** is to dispossess or exclude a person from property. An **ouster**[1] is, generally, a dispossession or exclusion of a person from property. From *right of a third party,* **jus tertii** is the doctrine that a person seeking to oust a possessor must do so on the strength of the person's own better title and cannot rely on the title of a third party. If the owner does not challenge an occupant's right to possession, the occupant's possession may eventually be regarded as ownership of the estate abandoned by the owner.

THE RULE AGAINST PERPETUITIES

A grantor is the master of his or her grant. A grantor can transfer his or her property with conditions, and so exercise control on the use of land far into the future. How far into the future can a grantor control the future from the past? The **rule against perpetuities** is, generally, the time limit within which private interests in property must be created or transferred in the future and the common law rule is that "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the date of the creation of the interest." The **fertile octogenarian** is the common law legal fiction under the rule against perpetuities that a woman may conceive and give birth in her 80s. The legal fiction has been modified or eliminated in many states. The rule against perpetuities applies only to private interests in property. For public charities, it is still possible to have some **dead-hand control**, which is the management of property according to the desires of a long-deceased grantor.

ADVERSE POSSESSION

Ordinarily, land ownership comes from a grant from the previous landowner or as the result of the previous landowner's death. Ordinarily, where there are complete records, land ownership can be traced back to a grant from the sovereign. The exception is the landowner losing dominion over the land. A **holdover tenant** is a person who had possession under a lease and stayed when the lease expired. From *beyond-go,* a **trespasser** is, in part, a visitor who entered on land owned or occupied by another without express or implied consent or without a privilege. From *press down,* a **squatter** or, from *against-holder,* an **adverse possessor** is a trespasser who refuses to leave and claims to own the land. From *out-throw,* to **eject**, to dispossess, is to bring an action to have a holdover tenant, a trespasser, or a squatter removed from your land. **Ejectment**, an action to dispossess, is the action to have a holdover tenant, a trespasser, or a squatter removed from your land. A **statute of limitations**[1] is the time within which an action may be brought after it arises, after which it cannot be brought. From *against the thing held,* **adverse possession**[1], reverse ejectment, is when an owner loses the right to eject a squatter because of the expiration of the statute of limitations and the squatter becomes the owner.

In its more common sense, **adverse possession**[2] is ownership-claiming possession, open occupation of land without ownership or the owner's permission, and possession that is actual, continuous, open, hostile, exclusive, notorious, and for the statutory period. **Open**[1] is visible, not concealed, or in public view. From *of an enemy,* **hostile** is with the character of an enemy, but **hostile possession** is merely possession with a claim of ownership against all others. From *known,* **notorious possession** is possession that is noted, possession that is generally known or recognized, and possession that is not secret. The statutory period of adverse possession is the statute of limitations for ejectment, traditionally 20 years. From *attaching,* **tacking**, adding to another, is the adding together the periods of adverse possession of successive adverse possessors to achieve the statutory period of adverse possession.

THE DESCRIPTION OF LAND

From *piece,* a **parcel** is any particular piece of land. In reasoning, from *before send,* a **premise** is a proposition that leads to a conclusion. Where a parcel of land is the premise, **premises** are a parcel of land and things related to that land such as structures on that land. **Demised premises** are the parcel of land and things related to that land that have been transferred, especially as a nonfreehold estate.

From *stretch,* a **tract** or **tract of land** is a large parcel of land. A **subdivision** is a division of a parcel or tract of land into two or more smaller parcels. From *down write,* a **legal description** or **land description** is a description of the physical limits of a parcel or tract of land, recognized as adequate in the law. There are three generally recognized methods of describing the physical limits of land: the metes and bounds (a description of all of its boundaries), the rectangular survey (a description of its rectangle in the rectangular survey system), and the recorded survey (its lot number in a recorded plat).

From *run,* a **course** is a direction. From *measure,* a **mete** is a distance. From *limit,* a **bound** is a limit of content. A **boundary** is the extent of a limit of content or the physical limit of land. A **boundary line** is the practical line formed by a boundary. A **landmark** is a visible mark on land. From *to remind,* a **monument** is a landmark unlikely to move or be moved. **Metes and bounds** is the method of describing the land by describing the courses and distances of each boundary line that encloses the land, and doing so by reference to landmarks on or near each boundary line.

From *oversee,* to **survey**[1] (the verb) is to determine the boundaries and character of a parcel of land. A **survey**[2] (the noun) is a report of the boundaries and character of a parcel of land. In the late 1700s, the Congress ordered surveys of the land west of the original 13 states. The **rectangular survey system** or the **government survey system** is the division of land into rectangles on lines generally running north-south and east-west, as the result of surveys ordered by the government since the late 1700s. From *arrange,* a **range** is a group of rectangles in the rectangular survey system. The first range was surveyed from the **point of beginning**, which is a monument near the point where the Ohio-Pennsylvania border meets the Ohio River. From *mid day (line),* a **meridian** is a line generally running north-south in the rectangular survey system. From *foundation line,* a **base line** is a line generally running east-west in the rectangular survey system. From *village (domain),* a **township**[2] is, specifically, a six-mile or five-mile square of land created by the intersection of meridians and base lines. From *cut,* a **section**[2] of land, a subdivision of a township (of land), is a one-mile square of land equal to 640 acres.

From *flat,* a **plat** or **plat map** is a survey map of a tract of land, especially a recorded survey map of a tract of land. From *portion,* a **lot** or **plot** is a subdivision of a tract of land, especially a numbered subdivision of a tract of land. A **plat book** or **lot book** is a collection of plats.

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- **abandonment**
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- **defeasible**
- **disseised**
- **entail**
- **estate in land**
- **estate tail female**
- **estate tail male**
- **estate tail special**
- **fealty**
- **fee simple defeasible**
- **fee tail female**
- **fee tail male**
- **fee tail special**
- **feudal**
- **indefeasible**
- **in fee**
- **infeudation**
- **landowner**
- **mesne lord**
- **mesne profits**
- **nonpossessory interest**
- **possess**
- **real property ownership**
- **subinfeudation**
- **tenant in fee simple**

Chapter 17

Property: Title to Land and Land Transfers

TITLES, LIENS RELATED TO REAL PROPERTY, AND DEEDS

From *inscription,* **title**[1] is ownership, legal evidence of ownership, or an instrument that is legal evidence of ownership. From *to keep,* **holding**[1] is having title and possession. From *to hold,* **tenure**[1] is, generally, the right to hold.

From *put barrier,* an **encumbrance** or **incumbrance**, a burden on title or a charge on property, is a lien, a lease, or any other claim or restriction on property, diminishing the value of owning the property. From *bind,* a **lien** is a claim or charge on property to secure payment of an unpaid debt or performance of an obligation. A **mechanic's lien** is a lien securing payment for labor or materials furnished to build or repair property. A **waiver of lien**[1] is a release of a lien.

From *with road,* a **conveyance** is the transfer of title to land from one person or group to another, or the instrument that transfers title to land from one person or group to another. To **convey** is to transfer title to land from one person or group to another. **Words of conveyance** are words indicating intent to transfer title from one person or group to another such as "convey,… "grant,… or "transfer.…

From *come together,* a **covenant** is a formal promise. From *break,* to **breach**[1] is to break a formal promise. From *a doing,* a **deed**[1] is, generally, something physically done. From *to witness,* to **attest** is to certify or to assure that something is true. From *out-follow,* to **execute**[1] generally means to complete, **executed**[1] generally means completed, and **execution**[1] generally means completion. From *small picture* or *mark,* a **seal**[1] is, generally, a physical impression on an instrument to attest to its execution such as embossment of the paper or, traditionally, an impression on wax. At common law, a **deed**[2] was a covenant made in an instrument executed under seal, especially a covenant to transfer ownership of land. A common-law deed was, from *in tooth* (notch), an **indenture**[1], which is, generally, both a property transfer and a contract or an instrument representing both a property transfer and a contract. Today, a **deed**[3] is an instrument that transfers ownership of land, an instrument that conveys a freehold estate in land from a grantor to a grantee, and an instrument representing ownership of a freehold estate in real property (subject to recording). A contract to transfer land is a separate instrument.

From *with constellation* (worth an examination of the stars), **consideration**[1] is, generally, the exchange of something of value for something of value. A deed is usually given for consideration. From *given thing,* a **gift**[1] is, generally, an intentional transfer from a transferor's generosity and a voluntary transfer made without consideration. A **deed of gift** is a deed given without consideration. Today, a deed requires a writing,

the identities of the parties, words of conveyance, a legal description of the land, and the signature of the grantee.

A deed customarily includes a **title reference**, which is an indication of from whom the grantor received ownership of the property. From Latin *to have thus,* the **habendum**, the **habendum clause**, or the **to-have-and-to-hold clause** is the provision in a deed that defines the estate or interest granted and usually begins with the phrase, from Latin **habendum et tenendum**, "to have and to hold…. Some states require an **affidavit of value**, which is an affidavit in the deed of the price or value of the land transferred. A deed also may be acknowledged. From *admitted knowledge,* **acknowledged**, made with an affidavit of execution, is a word of art meaning signed under oath before two witnesses and a notary public or other appropriate government official.

To pass title, a deed must be delivered and accepted. From *away free,* **delivery**[1], the making of a transfer, is, generally, the voluntary transfer of possession or title to property. **Delivery**[2] of a deed is the physical transfer of the deed to the grantee with the intent to sever control. From *to take,* **acceptance**[1], the taking of a transfer, is, generally, the voluntary taking of offered possession or title to property. **Acceptance**[2] of a deed is the physical taking of the deed offered by the grantor with the intent to take control. From *away proclaim,* a **dedication** is a conveyance of land by a private grantor as a gift and its acceptance by or on behalf of the public.

From *authorization,* a **warrant**[1] is, generally, an assurance or guarantee of quality or validity. A **warranty deed**[1], a **deed of warranty**, or a **deed of covenant** is a deed with covenants by the grantor to assure the grantee about possession, ownership, and title to the land. Covenants in deeds must be express. To **run with the land** is to continue in existence with the land, and so applicable to successors. A **covenant running with the land**, or a **covenant appurtenant**, is a covenant that continues in existence with the land and is applicable to successors. **Personal covenants** are covenants that do not run with the land and covenants that are breached only at the time of conveyance. Personal covenants of ownership include the covenant of seisin, the covenant of the right to convey, and the covenant against encumbrances. The **covenant of seisin** is the promise that the grantor has possession under a claim of ownership, not as a trespasser or adverse possessor, and so is able to deliver possession. The **covenant of right to convey** is the promise that the grantor has ownership and so is able to convey the property. The **covenant against encumbrances** is the promise that the land is free of liens, leases, and restrictions on use, unnoted in the instrument. **Real covenants** are covenants that run with the land and covenants that are breached when a third party interferes with a grantee. The **covenant of quiet enjoyment** is the promise that the grantor or the grantor's successors will not disturb possession. The **covenant of general warranty** is the promise that the grantor has good title and will defend the title against all claims. The **covenant of further assurances** is the rare promise that the grantor will do all acts reasonably necessary to protect the grantee's interest.

A **general warranty deed**, a **warranty deed**[2], or a **full covenant and warranty deed** is a deed with both personal and real covenants related to ownership and a deed with covenants by the grantor that the grantor has possession, ownership, and good title; can convey the property with no unnoted encumbrances; will not disturb the grantee; will defend the title against all claims; and, perhaps, will protect the grantee's interest.

A **special warranty deed** or **limited warranty deed** is a deed with only personal covenants related to ownership. It is a deed with covenants that the grantor has possession and ownership, can convey the property with no unnoted encumbrances, and will defend the title only against claims through the grantor.

From *free* and *clear,* to **quit**[1] is, specifically, to release or to relinquish. **Free and clear** means without anyone else having an interest or without an encumbrance. A **quitclaim deed**, a **deed of quitclaim**, a **deed of release**, or a **deed without covenants** is a

deed without covenants that only conveys the grantor's interest in the property, if any; and a deed giving away any interest the grantor has in the property.

A **bargain and sale deed** is a contract or deed without covenants, given for consideration, which only conveys the property and its use. From *to stop,* **estoppel by deed** is the doctrine that after-acquired title passes to the grantee, and the doctrine that if a grantor purports to convey by warranty deed a freehold the grantor does not own, title later acquired by the grantor works to the benefit of the grantee.

RECORDING

From *active,* **actual notice** is direct positive notice. From *together-pile,* **constructive notice** is not actual notice, but notice accepted in the law as a substitute. **Recording acts** are property laws that provide a way to note, preserve evidence, and give constructive notice of property interests and transactions. The **county recorder** or **registry of deeds** is the public official or agency for the preservation of evidence and constructive notice of a property interest or transaction.

A deed or encumbrance may not be effective with regard to third persons unless it is made a public record, thereby providing at least constructive notice to the third persons. From *restore heart (memory),* to **record**[1] (property or transaction, the verb) is to note and preserve evidence of a property interest or transaction with the appropriate public official or agency. **Recording** is noting and preserving evidence of a property interest or transaction with the appropriate public official or agency. The **record**[2] (property or transaction, the noun) or **public record** is the noted and preserved evidence of a property interest or transaction with the appropriate public official or agency.

From *lawsuit suspended,* **lis pendens** is a pending lawsuit, the policy that, pending the outcome of a relevant lawsuit, nothing should change. A **notice of lis pendens** is a recorded public notice that a lawsuit is pending, especially a lawsuit that may affect title to property.

The Latin phrase **bona fide** means in good faith. A **bona fide purchaser** (**BFP**) or **bona fide purchaser for value** (**BFPV**) is a person who buys for consideration, without knowledge or notice of an adverse claim to the property. From *superior* thing, a **priority**[1] is, generally, a preference among many things. Four types of statutes provide for priority of recorded ownership. From *running,* **race**[1] is priority for the first to record. From *make known,* **notice**[2] is priority for the last BFPV without notice. **Race-notice** is priority to the first BFPV without notice to record. From *favor,* **grace-notice** is priority, after a grace period, to the last BFPV without notice.

A **title search**, a **title examination**, or a **search**[1] is a search of public records to discover the legal evidence of ownership of a particular property and encumbrances on that property. A **title searcher** is a person who performs a title search. A **grantor index** or **grantor-grantee index** is an index of recorded conveyances by the name of the grantor. A **grantee index** or **grantee-grantor index** is an index of recorded conveyances by the name of the grantee. A **chain of title** is a record of title indicating coherent successive conveyances, ideally from the original transferor or government patent to the current transferee. The **rundown** is a search of the grantor index to confirm or find defects in the alleged chain of title. A **title report** is a report of the results of a title search or a report listing the encumbrances on a parcel of land. From *away-draw,* an **abstract**[1] is, generally, a summary of each item resulting in a complete history in an abbreviated form. An **abstract of title** or **abstract**[2], a complete history of ownership in abbreviated form, is a summary of each public record of an interest in, or encumbrance on, a particular property.

Another system of recording is **registered land** or the **Torrens system**, which is the recording of land titles only after a proceeding is held to assure that the person recording the title has good title, except for encumbrances noted on a certificate of title.

MARKETABLE TITLE

Encumbrances may include attachments, easements, homestead rights, inchoate dower, judgment liens, leases, liens, mortgages, taxes, timber rights, and water rights. The law permits title to be encumbered so a creditor does not have to confront a property owner who refuses to pay a debt related to the property. Instead, the debts can be collected from the property when the owner attempts to transfer the property or dies or when the property is sold by court order.

Marketable title, **good title**, or **clear title** is title relatively free from encumbrances; title free from current litigation, defects, and doubts; and, as defined by statute, title sufficiently free from defects such that it is reasonably safe to be sold. **Unmarketable title** or **defective title** is title not relatively free from encumbrances; title not free from current litigation, defects, and doubts; and, as defined by statute, title not sufficiently free from defects such that it is reasonably safe to be sold. **Bad title** is title clearly insufficient to convey the property. A **cloud on title** is any public record of an encumbrance where, if an action were brought under it, the owner would be required to offer evidence to defeat the action. A **quiet title action** is an action in equity to determine all claims against a particular property. To **quiet title** is to bring a quiet title action, to bring an action that will have the effect of a quiet title action, to attempt to achieve an out-of-court settlement of all claims against a particular property, or to achieve an out-of-court settlement of all claims against a particular property. **Title insurance** is insurance covering the risk of purchasing land with unmarketable or defective title.

THE ORDINARY TRANSFER OF REAL PROPERTY

From *grant,* to **give** is to make an intentional transfer of property from generosity. A **gift**[1] is, generally, an intentional transfer from a transferor's generosity and a voluntary transfer made without consideration. From *to deliver,* to **sell** is to transfer property or provide services for money or other valuable consideration, to transfer property or provide services for a price, or to vend. A **sale** is a transfer of property or providing services for money or other valuable consideration or a transfer of property or providing services for a price. A **seller** is a person who sells. From *to get,* to **buy** or, from *to acquire,* to **purchase** is to acquire property or receive services for money or other valuable consideration or to acquire property or receive services for a price. A **buyer** or **purchaser** is a person who buys or purchases. From *to sell,* to **vend** is to transfer title to property for money or other valuable consideration or to transfer title to property for a price. A **vendor** is a seller of title to property, especially a seller of title to land. A **vendee** is a buyer or purchaser of title to property, especially a buyer or purchaser of title to land.

From *in clothes,* an **investiture** was a common law conveyance ceremony. From *delivery of ownership,* **livery of seisin** was the common law conveyance ceremony in which the grantor gave a twig or a piece of turf to the grantee.

Today, where the transfer of real property is a gift, the grantor need only execute a deed in favor of the grantee and deliver and record the deed. Where the transfer of real property is not a gift, the transfer of real property is usually accomplished by an escrow. The property, land, and consideration are turned over to a neutral third party who makes the exchange when both the vendor and the vendee can be satisfied. From *scrap,* an **escrow**, a deposit with a neutral party, is an arrangement in which a neutral third party agrees to hold documents, money, and other property and dispose of that property according to the happening of conditions as agreed to by the original two parties. An **escrow agent** is the neutral third party in an escrow. An **escrow account** is

a separate account into which an escrow agent deposits money. **In escrow** means a deposit in an escrow or held in an escrow account. An **escrow contract** is an agreement for a deposit with a neutral party.

The modern equivalent of investiture, a **real estate closing**, a **closing**[1], or a **real estate settlement** is the completion of a real estate transaction by the execution of the deed and related documents, payment of the purchase price and related expenses, and delivery of the deed and related documents. Related documents may include, for example, a property survey, a mortgage, a mortgage note, a property insurance policy, a title insurance policy, and a closing statement. A **closing statement**[1] is the final financial summary of a real estate closing.

To get to an escrow and closing, the vendor and vendee first need to make a **purchase agreement** or **contract for sale of land**, which is an agreement to purchase property by paying the full purchase price to the vendor in exchange for the immediate transfer of title to the vendee. A purchase agreement should be distinguished from the dangerous **land contract** or **land sale contract**, which is an agreement to purchase property by making installment payments to the vendor, but title does not transfer to the vendee until all installments are paid in full. Potential vendees are usually tempted to enter into a land contract when, because of having poor credit, they are unable to obtain a loan to pay the full purchase price. However, the vendee assumes the risk of being unable to make all of the installment payments and of having nothing of real value to show for any payments made. Other contract provisions also may be unfavorable to the vendee. A better course for most potential vendees who are currently unable to obtain a loan is to enter into a **lease with option to purchase**, which is a lease accompanied by the right for a period of time to make a purchase agreement. Ordinarily, payments under a lease are less than installment payments under a land contract, and by demonstrating the ability to make payments under a lease during the period of the option, a vendee may persuade a lender to make a loan with similar payments for the full purchase price.

In negotiating the price for land in a purchase agreement, a potential vendor and the potential vendee, and a person or entity giving or loaning money to the potential vendee, will commonly rely on one or more appraisals. From *to price,* to **appraise** is to estimate the value of property. An **appraisal** is an estimation of the value of property. An **appraiser** is a professional who estimates the value of property or a disinterested person who makes an objective estimate of the value of property. **Fair market value** or **market value** is the price property would bring in the ordinary course of trade between willing buyers and willing sellers; or the price at which a property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and both having reasonable knowledge of the relevant facts.

To get to a purchase agreement, a potential vendor and a potential vendee usually need the assistance of a real estate broker or a real estate agent. From *middleman,* a **broker** is a person who, for a commission or fee, brings together potential buyers and sellers and negotiates contracts between them. A **real estate broker** is a person who, for a commission or fee, brings together potential buyers and sellers of real estate and negotiates purchase agreements between them. A **real estate agent** is a person acting on behalf of a real estate broker and the real estate broker's clients.

Unless it is clearly agreed otherwise, a real estate broker or real estate agent is a **seller's agent**, who is a broker or agent acting on behalf of the seller or a broker or agent acting on behalf of the vendor of real estate. A **listing agreement** is an agreement between a seller and seller's agent about the brokerage services provided, including how and when the seller's property will be listed for sale and the seller's agent's commission. A **buyer's agent** is a broker or agent acting on behalf of the buyer or a broker or agent acting on behalf of the vendee of real estate. A **dual agent** is a broker or agent acting on behalf of both the seller and the buyer, with the consent of both

parties, or a broker or agent acting on behalf of both the vendor and vendee of real estate, with the consent of both parties. From *opposite of closure,* a **disclosure statement** is a statement of any information that the law requires to be made known or revealed. A real estate agent may be required to disclose whether he or she is representing the buyer or seller.

The **Fair Housing Act** is the federal law that prohibits practices that deny real estate or housing to anyone because of their race, color, national origin, or religion.

MORTGAGES

In most real property transactions, the vendee does not currently have sufficient money to pay the entire purchase price. Most vendees seek a loan from another person or entity to pay all or part of the purchase price. The lender will usually require a right to the property if the vendee fails to repay the loan. Unlike a land contract, however, as the vendee makes payments on a loan, the **equity in the property** or **equity**[2], the value of the property not needed to pay encumbrances, belongs to the vendee.

From *without care,* **security**[1] is, generally, something providing assurance or protection. In finance, **security**[2] is protection from the risk of loss. In finance, from *with* and *of the side,* **collateral**[1] is access to something of value given as security for access to something else of value. If necessary, the something of value can be accessed and sold or used to cover all or part of the financial loss.

From *solemn promise,* a **pledge**[1] (generally, the noun) is, generally, a deposit or promise of property as collateral or security for a debt. **Collateral security** is that which has been pledged. From *proposition,* to **hypothecate** is to pledge property as security without turning over possession of it or to promise property as security. The classic hypothecation is a mortgage. From *dead pledge,* a **mortgage** or **mortgage deed** is a written pledge of real property in the event of failure to pay a debt, with the intent that the pledge dies because the debt is paid, or, simply, the pledge of land as security for a loan.

A **mortgagor**, the maker of a mortgage, is the borrower, debtor, or obligor who makes the pledge of real property in the event of a failure to pay a debt. A **mortgagee**, best remembered as the **mortgagee bank**, the receiver of a mortgage, is the lender, creditor, or obligee that receives the pledge of real property in the event of a failure to pay a debt. The **title theory of mortgages**, the **common-law theory of mortgages**, the **title theory**, or the **common-law theory** is the theory that a mortgage conveys title to the mortgagee[a]a conditional fee granted by the mortgagee on the condition of payment of the debt. A **defeasance clause** is a mortgage clause providing that the mortgagee's title is voided when the mortgagor pays the debt. The **lien theory of mortgages**, the **equitable theory of mortgages**, the **lien theory**, or the **equitable theory** is the theory that a mortgage does not convey title to the mortgage but is a lien against the property. A **purchase-money mortgage** is a mortgage given to obtain the money needed to buy the mortgaged property.

Notice that a mortgage is not the loan secured by the mortgage. A **mortgage loan** is a loan secured by a mortgage. The mortgage is the pledge of security for the loan. The loan is usually in a separate instrument. A **promissory note**[1] or **note**[1] is, generally, a written promise to pay money. A **mortgage note** is a written promise to pay money accompanied by a pledge of land as security for the promise to pay.

Mortgage insurance is insurance covering the risk of the failure to pay a debt accompanied by a pledge of land as security for the promise to pay. The **Federal Housing Administration** (**FHA**) was a federal agency that was created in 1934 to encourage home ownership and whose duties where transferred to the Department of Housing and Urban Development in 1965. An **FHA loan** is a special mortgage loan for first-time homebuyers backed by government mortgage insurance. **Private mortgage insurance** (**PMI**) is mortgage insurance not provided by the government.

As a matter of finance more than law, there are many different types of mortgage loans. A **fixed-rate mortgage** is a mortgage loan with an interest rate that does not change. A **variable-rate mortgage** or **flexible-rate mortgage** is a mortgage loan with an interest rate that changes with or in step with some other measure such as the interest rate the Federal Reserve Board charges member banks. A **graduated-payment mortgage** is a mortgage loan with payments that gradually increase, based on the assumption that the borrower's ability to pay also will gradually increase. A **balloon mortgage** is a mortgage loan with a large final payment, based on the assumption that the borrower will come into money or refinance before the large final payment is due. A **home equity loan** is a mortgage loan that uses the mortgagor's equity in a home as collateral for a line of credit. A **reverse mortgage** is a mortgage loan in which the debt owed to the mortgagee increases because the mortgagee makes payments to the mortgagor. A reverse mortgage is used to allow elderly people to gradually convert their equity in property into regular income, by gradually surrendering the equity to the mortgagee.

Ordinarily, if a mortgagor sells the mortgaged property, the mortgage loan to the mortgagee is paid off from the proceeds of the sale, discharging the mortgage. Nevertheless, a purchaser from a mortgagee may agree to purchase the property **subject to mortgage**, meaning subject to the mortgagee's rights. One step further, an **assumption of the mortgage**, a **mortgage assumption**, or a **mortgage take-over** is when the purchaser of already-mortgaged property agrees to make the mortgagor's payments, leaving the mortgagor liable if the purchaser fails to make the mortgagor's payments.

An **acceleration clause** is a provision providing for premature vesting such as a provision in a contract or mortgage loan that upon failure to make a payment when due, the entire indebtedness becomes due. Used to avoid an assumption of the mortgage, a **due-on-sale clause** is a provision in a mortgage loan that the entire indebtedness becomes due when title to the property vests in a person other than the mortgagor.

A **mortgage assignment** is when a mortgagee transfers the mortgagee's rights to a new mortgagee. As a general rule, after receiving notice of the mortgage assignment, the mortgagor must make the payments on the mortgage loan to the new mortgagee.

More than one mortgage may be placed on a property, unless there is a mortgage that is a **closed-end mortgage**, which is a mortgage that prohibits further borrowing on the property without the consent of the mortgagee. A **second mortgage** or **junior mortgage** is a mortgage placed on already-mortgaged property. The **first mortgage** or **senior mortgage** is the mortgage that was on a property before a second mortgage or junior mortgage. The second mortgage or junior mortgage applies to the equity in the property after the first mortgage or senior mortgage is applied.

Upon final payment of the debt for which a mortgage was given, the mortgagee is satisfied and the mortgage is discharged. The mortgagee is required to provide a recorded **satisfaction of mortgage** or **mortgage discharge**, which is a mortgagee's separate instrument, or notation on the mortgage, indicating that the mortgagee has been satisfied and that the mortgage is discharged.

THE FORCED TRANSFER OF REAL PROPERTY

From *out-shut;* to **foreclose** is to terminate a property right to compel payment of a debt, after the debtor fails to make one or more required payments. Generally, a **foreclosure**[1] is a lawsuit to terminate a property right to compel payment of a debt, after the debtor fails to make one or more required payments. As to a mortgage, a **foreclosure**[2] is an equity action to compel payment of a debt by the forced sale of mortgaged property and use of the proceeds to pay the mortgagor's debt. A **foreclosure decree** is a court order to sell mortgaged property and use the proceeds to pay the mortgagor's debt.

From *back-buy,* to **redeem** is to repurchase or to regain possession by paying the price. **Redemption** is repurchasing or regaining possession by paying the price. The **equity of redemption** is the right of a mortgagor to regain possession of the property during a foreclosure by paying the amount due and the related costs before the completion of the lawsuit. In some states, a mortgagor has a statutory **right of redemption**, which is the right of a mortgagor to regain possession of the property after a foreclosure by paying the amount due and related costs before the property is sold.

Similar to foreclosure, a court may issue a **writ of execution**[1] (forced sale), which is a written court order to sell property of a judgment debtor and use the proceeds to pay the judgment lien. A **judicial sale** is the court-ordered sale of property in which the proceeds of the sale are used to pay a debt or debts of the person or entity whose property is sold. A **sheriff's sale** is a judicial sale by a public auction held by the sheriff or a sheriff's deputy. A **foreclosure sale** is a judicial sale due to a foreclosure.

A **sheriff's deed** is a deed granted by a sheriff upon a sheriff's sale. A **tax deed** is a deed granted upon a tax sale. In some states, a **tax certificate** is a document giving a tax sale purchaser the right to receive a tax deed if the taxpayer does not pay the taxes due within a specified period of time. When the proceeds of a judicial sale are not sufficient to pay the debt or debts of the person or entity whose property is sold, the creditor may obtain a **deficiency judgment** or **deficiency decree**, which is a judgment or decree for the debt still due after a judicial sale.

Bypassing a formal foreclosure and judicial sale, a mortgage loan may contain a **power-of-sale clause**, which is a provision in a mortgage loan that upon the mortgagor's failure to pay the debt, the mortgagee may sell the pledged property without involving a court. A **mortgagee's foreclosure sale** is a sale of property under a power-of-sale clause.

Encumbrances on the property sold at a judicial sale or a mortgagee's foreclosure sale are paid according to their **priority**[2], which is the established level of preference for the payment of debts from an asset or assets of a debtor. The **priority of liens** or **priority**[3] is the established level of preference for the payment of liens from the property of the debtor. A **prior lien** or **superior lien** is a lien in a higher class or first in time, and so the first to be paid from an asset or assets of a debtor. From *under-arrange,* a **subordination agreement** is an agreement that a particular debt will have a lower priority. From *arrange in order,* to **marshal**[2] is to gather and arrange in order. **Marshalling of liens** is to notify all lien holders of a foreclosure, to determine the validity and priority of their liens in one action, to obtain the best price for the encumbered property, and to give all lien holders a fair chance to collect at least some of the debt owed them.

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- **color of title**
- **conveyancing**
- **defeasible title**
- **Domesday Book**
- **enfeoff**
- **equitable lien**
- **executed deed**
- **execution sale**
- **feoffment**
- **fiduciary**
- **fiduciary deed**
- **hold**
- **judgment lien**
- **partial release**
- **record owner**
- **statute of frauds**
- **statutory lien**
- **subordination**
- **tax lien**
- **tax sale**
- **title insurance policy**

Chapter 18

Property: Other Rights and Responsibilities

ADDITIONS TO PROPERTY AND SUBTRACTIONS FROM PROPERTY

From *to seek,* to **acquire** is to gain property by any means, including to buy, to be given, to find, or to gain by addition or increase. From *approach,* an **accession** is an addition or increase in property from any source. From *grow larger,* an **accretion** is an addition or increase in property from a natural source. From *cause profit*, an **improvement** is an increase in property value from human effort such as building, paving, and landscaping that does more than merely repair, replace, or restore the property to its original condition.

From *to beat,* to **abate** is to decrease or reduce or to end. An **abatement**[1] of property is a decrease or reduction or a decrease or reduction in property from any source. From *away-gnaw,* **erosion** is the natural decrease to land caused by the destructive effect of water, wind, or other substance. A holder of less than a fee simple may not commit **waste**, which is, from *desolate,* an unreasonable use, neglect, or destruction of land by a rightful possessor that substantially decreases the value of the land for a future holder. From *use up,* **wear and tear** is the ordinary use of land that is not waste.

RIGHTS INHERENT IN THE FREEHOLD OWNERSHIP OF PROPERTY

From *open space,* **land** is a portion of the earth, particularly a portion of the soil near the surface of the earth and extending down to the center of the earth and up a reasonable distance into the sky. In Latin meaning *from the heavens all the way to the center of the earth,* **a coelo usque ad centrum** was the common law view, before invention of the airplane, that the owner of land owned everything from the heavens to the center of the earth. Today, **air rights** are the rights to the area a reasonable distance into the sky above the surface of the earth. Air rights are limited by **navigable airspace**, which is, from *ship-drive,* the sky above the surface of the earth in which aircraft are permitted to fly.

From *fruit of nature,* **fructus naturales** is that which grows on land naturally such as timber. From *necessary,* **estover** is the right of a tenant to use timber on the premises for necessary purposes such as fencing and firewood. From *fruit of labor*, **fructus industriales** is that which grows on land as the result of labor such as crops. From *in throw,* **emblement** is the right of a tenant of agricultural land to harvest crops planted by the tenant, even if the tenancy has expired.

From *seashore,* **littoral** is related to the coast or shore of an ocean, sea, or lake. From *riverbank,* **riparian** is related to the bank of a river or stream. **Riparian land** is land beside a river or stream. A **water right** is a right of a riparian owner to water from a river or stream. In most states, the **riparian rights doctrine** is the doctrine that all riparian owners have equal rights to the reasonable use of water flowing past their land. In some western states, the **prior appropriation doctrine** is the doctrine that the first riparian owner to put water to beneficial use may do so even though it decreases or ends the flow to others. From *ship-drive,* **navigable waters**[1] are waters that can be navigated by commercial vessels, and so owned by the government. A riparian owner owns only to the bank of a navigable river or stream.

From *above face,* **surface water** is rainwater on the surface of land or any moisture on the surface of land. Surface water may not be unnaturally channeled to harm the land of another. **Wetlands** are lands with a large amount of surface water such as swamps and tidal flats. From *under earth,* **subterranean waters** are any water below the surface of land. From *through strain,* **percolating water** is water below the surface of land not in a definite channel. In most states, an owner is entitled to only the amount of subterranean water reasonably necessary to satisfy the owner's needs.

RIGHTS AND RESPONSIBILITIES DIRECTLY RELATED TO NEIGHBORING PROPERTY

From *to end,* to **abut** is to adjoin, to border, to reach, or to touch. From *to join,* **adjoining land** is land abutting the land in question. **Adjoining landowners**, **abutting owners**, or **abutters** are the owners of adjoining land. From *side,* **lateral support** is the right to have land supported by adjoining land. From *under lie,* **subjacent support** is the right to have land supported by the earth below the surface.

From *causing to hook,* an **encroachment** is an unlawful and gradual intrusion upon the authority or property of another. A **party wall** is a wall dividing property between adjoining landowners.

From *back draw,* a **restriction** is a limitation on the use of property. In property law, from *to carry (a load),* a **burden**[1] is a restriction on the use of land such an easement, restrictive covenant, or zoning.

From *put at ease,* an **easement** is an express or implied privilege of a person to use the land of another for a limited purpose. From *back-keep,* a **reservation**[4] is an easement retained in a grant of land. From *attached,* **appurtenant** or **appurtenance** is that attached to something else such as a right or privilege attached to certain land. An **easement appurtenant** is an easement attached to certain land that is owned by anyone who owns the land. From *master,* the **dominant estate** or **dominant tenement** is the land that benefits from an easement. From *servant,* the **servient estate** or **servient tenement** is the land that is burdened by an easement. From *large,* **in gross** means at large. An **easement in gross** is an easement that is owned by a particular person. An easement in gross only has a servient estate. A **public easement** is an easement enjoyed by the public in general, or a dedication. An **affirmative easement** is an easement that permits an act to be done on the servient estate. A **negative easement** is an easement that prohibits an act to be done on the servient estate. An **easement of light and air** is a negative easement that prohibits the use of land so as to cause an obstruction of light and air.

From *path,* a **way** is a passage or path. A **right of way** is an easement of passage, a right of passage, a right to proceed before another, or property over which there is an easement or right of passage. A **highway** is a main or paved right of way. A **public highway** is a public main or paved right of way or a way to land by water. To be useful, all land not owned by the government must have access to a public highway.

An **easement of necessity** or **easement of access** is an easement implied by the law so that all land has access to a public highway.

An easement may be acquired by prescription. By analogy to adverse possession, from *before written,* **prescription**, an easement-claiming possession, is open use of land as a right of way, or for another limited purpose, without ownership or the owner's permission and possession that is actual, open, notorious, and for the statutory period. Prescription does not need to be continuous, hostile, or exclusive. A **prescriptive easement** or **easement by prescription** is an easement acquired by prescription.

From French *profit to take,* a **profit à prendre** or **profit**[1] of land is a privilege to take the soil, contents of the soil, or other natural things from the land of another such as gravel, minerals, and wild game. In civil law as opposed to common law, a **usufruct** is, from *use enjoyment,* the right to use the property of another, as long as the nature of the property is not altered. A **usufructuary** is a person with a usufruct.

RESPONSIBILITIES INDIRECTLY RELATED TO NEIGHBORING PROPERTY

Land use may be limited by promises made in the deed by which the land was acquired. From *come together,* a **covenant** is a formal promise. A **covenantor** is a person who makes a formal promise. A **covenantee** is a person who receives a formal promise. Covenants in deeds must be express. To **run with the land** is to continue in existence with the land, and so is applicable to successors. A **covenant running with the land** or a **covenant appurtenant** is a covenant that continues in existence with the land and is applicable to successors. To run with the land, a covenant must **touch and concern** the land, meaning to benefit or burden the use or value of the land, be intended to run with the land, and the parties must be in **privity**, which is, from *private relationship,* a direct relationship between parties creating a mutuality of interest. An **equitable servitude** or **servitude**[2] is a land use restriction enforced by a court of equity despite a lack of privity because the grantee had actual or constructive notice of the restriction.

When a grantor creates a subdivision, the grantor often requires the same covenants of all the subdivision grantees. Common covenants include promises to not build structures in certain areas of the property, to fence or not fence certain portions of the property, and to not use the property to engage in certain neighbor-unfriendly businesses.

From *back draw,* a **restrictive covenant** is a formal promise to restrict the use of land or a formal promise to not sell or transfer the property to certain people such as a formal promise to not sell or transfer the property to people of a certain race. Restrictive covenants that discriminate on the basis of race are unconstitutional and unenforceable.

The government also may limit the use of the land. **Land use regulation** is government control of the use of land to limit aggregate harm and government control of the use of land to protect individuals from harm. Government control of land includes zoning laws, health and safety laws, and criminal and other general laws.

From *belt (area),* a **zone** is a designated district within which only permitted structures or uses of the land may exist. As an exercise of the police power of the government to protect the health, morals, safety, or general welfare of a community, a local government may engage in **zoning**, which is the public regulation of a community by dividing it into designated districts within which only permitted structures or uses of the land may exist; and regulation of land use for the public good. A **zoning ordinance** is the local legislation that divides the community into designated districts within which only permitted structures or uses of the land may exist.

A **zoning board** is a local administrative agency that administers a zoning ordinance. The zoning board usually tries to follow a **master plan**, which is a general long-term plan for a large effort or project such as the general long-term plan for the orderly development of a community. A zoning ordinance usually permits a **nonconforming use**, which is a use of land that lawfully existed when the zoning ordinance was enacted and may continue after the zoning ordinance takes effect. In cases of hardship after the zoning ordinance is enacted, the zoning board may grant a **variance**[1], which is an exception from the application of a zoning ordinance.

The enforcement of zoning laws, and the enforcement of health and safety laws related to the use of land, is often aided by requiring building permits, certificates of inspection, and/or certificates of occupancy. A **building permit** is a government license to construct a permanent structure on particular land. The structure must be built according to a **building code** or **code**[2], which is government standards for the construction or repair of structures so that they are reasonably fit and safe. If people will live in the structure, the requirement is **habitability**, which is the quality of being reasonably fit and safe for occupancy. During and/or after construction or repair, the structure will be inspected for compliance. A **certificate of inspection** is a document attesting that construction or repair of a structure is in compliance with the building code. A **certificate of occupancy** is a document attesting that a structure is reasonably fit and safe for occupancy.

From *intense loss,* to **condemn** is declaring something legally useless or unfit. Property that is **condemned**[1] is property declared unsafe for human occupancy. A **health code** or **code**[3] is government standards for practices that keep people reasonably safe from disease and illness. If a structure falls below the standards of the building code or its use falls below the standards of the health code, and if the necessary repairs, clean up, and/or changes in practice are not made, the property may be condemned.

GRANTING ONLY THE USE OF LAND

From *allow,* to **let** is to grant only the use of land, to lease, or to license. Leases are discussed in the next section. From *permission,* to **license**[2] (land agreement, the verb) or, from *let go,* to **permit**[1] (the verb) is to make an agreement or give permission by which a personal right to nonexclusive possession of property is granted for a limited purpose, while ownership is retained, or to make a contract or give permission to the personal nonexclusive use of property for a short period of time for a limited purpose, but not to own it. A **license**[3] (land agreement, the noun) or **permit**[2] (the noun) is an agreement or permission by which a personal right to nonexclusive possession of property is granted for a limited purpose while ownership is retained or a contract or permission to personal nonexclusive use of property for a short period of time for a limited purpose, but not to own it.

From *note,* a **ticket**[1] is a receipt for the granting of a license. A **licensor** is the person or entity that grants a license. In property law, a **licensee**[1] is a person or entity granted a license or a person or entity that holds a license. From *to bar,* a **toll**[1] is a charge or consideration for the use of the property of another, especially a charge or consideration for the use of roads, bridges, tunnels, or other similar public property.

LANDLORD–TENANT LAW

Landlord–tenant law is the law about leases and related matters. From *away-put,* a **demise** is a transfer of an estate, especially a nonfreehold estate, which is a lease. From *let (have),* to **lease**[2] (the verb) or, from *render,* to **rent**[1] (the verb) is to make an agreement by which exclusive possession of property is granted while ownership is retained

or to make a contract to exclusively use property for a substantial period of time, but not to own it. A **lease**[1] (the noun), **lease agreement**, or **rental agreement** is an agreement by which exclusive possession of property is granted while ownership is retained and a contract to exclusively use property for a substantial period of time, but not to own it. **Rent**[2] (the noun) is the consideration for a lease or the amount of the periodic consideration for a lease.

A **landlord** or **lessor** is an owner of land who grants a lease or a person who acts on behalf of the owner of land with regard to a lease. From *to hold,* **tenancy** is the right to possess or own an estate, especially the right to possess or own an estate subordinate to another interest in the property. A **tenant**[1] is, generally, a person who has a right to possess or own an estate, especially a person who has a right to possess or own an estate subordinate to another interest in the property. A **tenant**[2] or **lessee** is a person who receives a lease or a person who has or had a lease. An **indenture**[2] is a lease signed by both the lessor and the lessee. A **deed poll** is a lease signed only by the lessee.

An **estate for years**, a **lease for years**, or a **tenancy for years** is an estate in which the grantee's ownership continues until a stated period of time has elapsed, after which ownership reverts to the grantor. A **periodic tenancy**, a **periodic estate**, or a **periodic lease** is an estate in which the grantee's ownership continues until the end of a stated period of time and is renewed automatically until either the grantor or the grantee gives notice otherwise, after which ownership reverts to the grantor. A **tenancy from year to year** or **year-to-year tenancy** is a periodic tenancy for a period or periods of one year. A **tenancy from month to month** or **month-to-month tenancy** is a periodic tenancy for a period or periods of one month. A **tenancy at will**, an **estate at will**, or a **lease at will** is an estate in which the grantee's ownership continues until either the grantor or the grantee gives some notice otherwise, then ownership reverts to the grantor.

From *to mark,* to **assign**[1] a lease is for a tenant to transfer all of the tenant's rights under a lease. An **assignment**[1] of a lease is all of the tenant's rights under a lease transferred by the tenant. From *under let,* to **sublease**[1] (the verb) or **sublet** is for a tenant to transfer some but not all of the tenant's rights under a lease. A **sublease**[2] (the noun) or **underlease** is some but not all of the tenant's rights under a lease transferred by the tenant. A **subtenant** is a person who has a sublease.

A **holdover tenant** or **tenant at sufferance** is a person who had possession under a lease and stayed when the lease expired. **Tenancy at sufferance** or **holdover tenancy**, the tenancy not created by agreement, is the tenancy created when a person who had possession under a lease stays when the lease expires.

Tenants have two major rights based on covenants that are express or implied by law. **Quiet enjoyment** is the right of a tenant to use the leased premises free from unnecessary interference by the landlord or a person claiming superior title. From *authorization,* a **warranty**[1] is a promise of the truth or a proposition of fact on which the promisee can rely. The **warranty of habitability** is an express or implied covenant that the leased premises are reasonably fit and safe for occupancy. A **tenement**[2] is a permanent but relatively inferior dwelling.

From *empty,* to **vacate**[2] is to empty or leave a place. Grammatically, **vacated**[2] means emptied or left a place, **vacating**[2] means emptying or leaving a place, and **vacatur**[2] means the emptying or the leaving of a place. **Vacant** means empty.

If a tenant does not pay the rent or vacate the premises when the lease expires, the tenant may be forced to leave. From *out-driven,* **expulsion**[3] is removal from a place by force or the threat of force. From *together-pile,* **constructive** is not actual, but treated in law as a sufficient substitute. From *out-conquer,* **eviction** is the physical or constructive expulsion of a tenant from premises by the assertion of superior title or the

lawsuit for expulsion of a tenant from premises by the assertion of superior title. From *active,* **actual eviction** is the physical expulsion of a tenant from the premises by the assertion of superior title. **Constructive eviction** is not the actual but practical expulsion of a tenant from the premises by the impairment of quiet enjoyment of habitability. From *back exaction,* **retaliatory eviction** is an eviction apparently motivated by the tenant's complaints about the habitability of the premises, which can be illegal.

Before an eviction lawsuit, the landlord is usually required to give prior notice to the tenant. From *clear* and *free,* a **notice to quit** is a notice by a landlord to a tenant to vacate the leased premises unless certain obligations are met.

From *force,* **forcible entry** is the unlawful entry on property in the possession of another by force or threat of force, or by refusal to surrender possession after a lawful demand to surrender. From *away-hold,* a **detainer**[1] is keeping a person from property to which the person has a right. **Forcible detainer** is a detainer by force or the threat of force. An **unlawful detainer**[1] is a detainer by a refusal to return possession after a demand for possession and a repudiation of the rights of a person with superior title. From *without delay,* a **summary proceeding**[1] or **summary remedy** is, generally, a lawsuit with special procedures to relatively quickly decide one or a few issues. The summary proceeding for eviction, where the only or primary issue is possession, is variously known as a **forcible entry and detainer**, an **unlawful detainer**[2], a **summary ejectment**, a **summary process**, or **dispossessory warrant proceedings**. Other issues related to an eviction such as the recovery of damages are usually decided by an ordinary lawsuit.

Generally, a **security deposit**[1] is a pledge of money or other property to secure the performance of an obligation. In landlord–tenant law, a lease may require a **security deposit**[2], which is a pledge of money to secure the payment of rent and other obligations of a tenant. If the tenant fails to pay the rent or meet other obligations, the landlord may recover damages from the security deposit.

LAND WITH MULTIPLE OWNERS OF A FREEHOLD ESTATE

From *separate part,* an **apartment** or **unit** is a set of rooms used as a dwelling. An **apartment building** is a building with multiple apartments or units. A **common area** is any area other than an apartment or unit, related to the apartment or unit, and on the same premises. Some common areas include, in alphabetical order, entrances, hallways, outside walls, parking lots, roofs, sidewalks, swimming pools, utility rooms, and yards.

The tenants in an apartment building may band together to buy out their landlord and become the collective owners of their apartment building. From *together work,* a **cooperative apartment**, a **cooperative**, or a **co-op**, collective ownership of a multi-unit property, is an apartment or unit in which the freehold title to the premises is held by a corporation in which the resident is a shareholder, an apartment or unit in which the freehold title to the premises is held by a business trust in which the resident is a beneficiary, or a corporation or business trust that owns freehold title to premises that are dwellings for its shareholders or beneficiaries. A lease for a co-op apartment is, from *private ownership,* a **proprietary lease**, which is a lease to an owner of the property.

From *together property,* a **condominium** or **condo**, ownership of individual units in a multi-unit property, is an apartment or unit in which the freehold title is held by the resident, but the freehold title to the common areas of the premises is held by all of the residents as tenants in common, and tenants in common who collectively hold freehold title to the common areas of the premises and who individually hold freehold

title to their individual units. A condominium may or may not include ownership of a structure. A **condominium association** is an association of the tenants in common in a condominium that owns and manages the common areas of the condominium.

A **timeshare** or **interval ownership** is freehold ownership of a unit of property for a brief period or periods of time, usually measured in weeks.

PERSONAL PROPERTY, GENERALLY

Real property or **realty** is property that is land and physical things permanently attached to land, or ownership of immovable things. **Personal property** or **personalty** is property other than land and things permanently attached to land, or ownership of movable things.

From *property* and *goods,* a **chattel** is an item of tangible personal property. In French *thing,* a **chose** is a thing either possessed or claimed. A **chose in action** is a thing claimed or an instrument that is evidence of a right to personal property. A **chose in possession** is a thing in possession, especially a thing after a successful lawsuit based on a chose in action.

From *attachment,* a **fixture** is a physical thing that is permanently attached to land. Ordinarily, a fixture is real property. However, a lease of business property often permits or requires removal of a trade fixture. A **trade fixture** is a physical thing that is attached to land to aid in the conduct of a business and deemed to be personal property.

In Latin *wild beasts of nature,* **ferae naturae** are wild, untamed animals, which, when in the wild, are not the property of anyone. From *hunt,* a **chase** is an active attempt to bring someone or something into possession or custody. A person chasing a wild animal has a property right in the chase with which another cannot interfere.

THE TRANSFER OF PERSONAL PROPERTY

From *away free,* to **deliver** is to make a voluntary transfer of possession or title to property. **Delivery**[1], the making of a transfer, is, generally, the voluntary transfer of possession or title to property. **Constructive delivery** or **symbolic delivery** is the transfer of a token or symbol of possession or title to property where an actual transfer would be difficult or impossible such as transferring the key to something opened or operated with a key. **Acceptance**[1], the taking of a transfer, is, generally, the voluntary taking of offered possession or title to property. From *received,* a **receipt** is a written acknowledgment of delivery or payment for property. A **certificate of title** is an official document that is proof of ownership such as a document that is proof of ownership of an automobile, boat, or other similar vehicle.

From *hand over,* a **bailment** is the placement of personal property in the lawful possession of another, not to transfer title, but in trust, according to an express or implied agreement for some special purpose such as its repair and with a duty to account for the property. A **bailor**, a person who makes a bailment, is a person who places personal property in the possession of another for some special purpose and with a duty to account for the property. A **bailee**, a person who takes a bailment, is a person who takes the possession of the property of another for a special purpose and accepts the duty to account for the property.

A **bailment for hire** is a bailment in which the bailor agrees to compensate the bailee. A **gratuitous bailment** is a bailment in which no consideration is expected or paid. A **bailment for mutual benefit** or **mutual benefit bailment** is a bailment in which both the bailor and the bailee benefit from the bailment; for example, where the bailor's property is repaired and the bailee is paid for repairing the property. A **bailment for the sole**

benefit of the bailor is a bailment in which only the bailor benefits; for example, where property is stored with a friend. A **bailment for the sole benefit of the bailee** is a bailment in which only the bailee benefits; for example, where a friend uses property.

From *part with upon assurance,* to **lend** is to part with money or other property on the condition of its return or the return of property of equal value at a fixed time or when demanded. A **loan** is the parting with money or other property on the condition of its return or the return of property of equal value at a fixed time or when demanded. A **lender** is a person who lends or a person who makes a loan. From *give assurance,* a **borrower** is a person to whom a lender lends or a person who receives a loan.

From *solemn promise,* to **pledge**[2] (generally, the verb) is to deposit or promise property as collateral or security for a debt. A **pledge**[1] (generally, the noun) is a deposit or promise of property as collateral or security for a debt. **Collateral security** is that which has been pledged. A **pledge**[3] (specifically, the noun) is a deposit of personal property as collateral or security for a debt. From *pledge,* to **pawn** is to give personal property to another as collateral or security for a loan. A **chattel mortgage** is a promise of personal property as collateral or security for a debt.

From *back pledge,* to **replevy** is to deliver or redeliver personal property to its owner. **Replevin**[1] is the lawsuit for the physical recovery and possession of wrongfully taken personal property.

From *come upon,* a **finder** is a person who discovers the existence or location of a physical thing when its existence or location was unknown. A **treasure trove** is valuable property found in a hiding place when the owner is unknown. The finder of a treasure trove can claim it against everyone except the owner. From *deprived of,* **lost property** is property the owner did not knowingly part with, due to carelessness, inadvertence, or neglect. From *wrongly put,* **mislaid property** or **misplaced property** is property the owner knowingly parted with for later access, but forgot where it was left or put. Lost property and mislaid property remain the owner's property for a reasonable period of time because it has not been abandoned. **Finders keepers, losers weepers** is a childish and incorrect statement of the law of lost property because finders of lost property can keep the property only if it has been abandoned.

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- **abandon**
- **abandoned**
- **abandoned property**
- **abandonment**
- **absentee**
- **alluvion**
- **ameliorating waste**
- **avulsion**
- **detinue**
- **encroach**
- **equitable waste**
- **great pond**
- **landlord's lien**
- **littoral owner**
- **master deed**
- **mutuum**
- **navigable river**
- **navigable stream**
- **permissive waste**
- **prescriptive rights**
- **profit interest**
- **reliction**
- **riparian owner**
- **small pond**
- **tenantable**
- **tortuous bailee**
- **trover**
- **unit deed**
- **usurp**
- **usurpation**
- **voluntary waste**

Chapter 19

Intestate Succession and Wills

ESTATE PLANNING, GENERALLY

An **estate** is, from *status,* a collection of the property rights of a person or entity at one time or over a period of time. A person cannot personally manage his or her estate after his or her death. It is often important to plan the management of that estate.

Beyond the criminal law definition as the recent victim of a homicide, the **deceased** is any person who has recently died, or a dead person or persons in reference to their death. Either way, a **decedent** is, from *departed* and *away-go,* a dead person. A **decedent's estate** is the collection of property rights that a person owns at death or after death and **estate planning**[1] is planning for the transfer of a decedent's estate.

Adults may make a legal declaration before their death regarding how they want their property transferred after their death. From *document,* an **instrument** is a formal legal writing. From *wish,* a **will**[1] is, generally, an instrument declaring the disposition of a person's property after death. Because there may be tax or other advantages for adults to transfer property before death rather than after death, estate planning also refers to the transfer of property in contemplation of death. Thus, **estate planning**[2] is, generally, planning for the transfer of property in contemplation of, or as the result of, death.

The law about property in view of death is usually known as **wills and estates**; **wills, trusts, and estates**; or, loosely, **probate**[1].

INTESTATE SUCCESSION, GENERALLY

From *no made-statement,* **intestate** means without leaving a will or without leaving a will that can be found or reconstructed. When a person dies intestate, the state provides a default estate plan.

In a narrow sense, from *up-go,* **succeed** means to follow in sequence. From *down-roll,* to **devolve** is to pass without any voluntary act by the previous owner. From *to name,* **nomination** is formal suggestion. From *to point,* **appointment** is formal selection. Unlike nomination and appointment, **succession** or **devolution** is the automatic transfer of ownership or powers, by operation of law, to the person next in line. From *without-a-will sequence,* **intestate succession** or **intestate laws** are the state-provided default plans by which a decedent's estate is disposed when the decedent dies without leaving a will, or when there is no applicable provision in a will, and the process by which a person follows in the ownership of an intestate decedent's property.

Traditionally, from *to serve,* an **administrator**[1] is a male appointed to take charge of, manage, and settle a decedent's estate. An **administratrix** is a female appointed to take charge of, manage, and settle a decedent's estate. Today, an **administrator**[2] or a **personal representative**[1] is a person (male or female) appointed to take charge of, manage, and settle a decedent's estate.

The portion of the decedent's estate remaining after all debts, taxes, and expenses are paid is the **net estate**. Traditionally, the statute that provides for the disposition of an intestate decedent's net estate is known as the **statute of descent and distribution**. Traditionally, from *down climb,* **descent**[1] is the transfer of real property after death. From *individually allot,* **distribution** is the transfer of personal property after death or the payment of property to its owner(s).

Traditionally, from *bereaved,* an **heir**[1] is a person entitled to real property by descent. Today, an **heir**[2] or **heir at law** is a person entitled to property by descent or distribution. From *a bereaved,* to **inherit** is to take by descent or distribution, or to take by gift after the giver's death. An **inheritance** is that taken by descent or distribution or that taken by gift after the giver's death. From *bereavement,* a **hereditament** is anything that can be inherited, generally anything that is not public property or a personal right or privilege. From *bereavement tool,* an **heirloom** is anything of sentimental value passed down through generations. From *thoroughly look,* an **expectant heir** is a person who expects to inherit, but may not. From *forward look,* a **prospective heir** is a person likely to inherit. From *before take,* an **heir presumptive** is a person who would inherit if another living person died today. From *to come into view,* an **heir apparent** is a person almost certain to inherit after another living person's death.

From *not inherit,* to **disinherit** is to terminate a potential inheritance. **Disinherited** is when a person expects to inherit or is expected to inherit but does not.

USUAL DESCENT AND DISTRIBUTION

State legislatures have traditionally assumed that most people who die intestate, if they had planned their estate, would have left their property to the so-called **natural objects of one's bounty**, which are the closest members of one's family.

If an intestate leaves a surviving spouse, the surviving spouse is usually entitled to all or a substantial portion of the intestate's net estate. **Statutory heirship** is the claim of a surviving spouse under a statute of descent and distribution. After a surviving spouse, children are usually next to take. If there is neither, the traditional order of preference goes up and down until a successor is found among blood relatives. At some point, the traditional order of preference seeks to determine the nearest blood relative or next of kin. From *step,* the **degree of kindred** or **degree of kinship** is the numerical measure of how far away a relative is related, usually one degree per generation.

The method used in medieval England to determine the inheritance of personal property, and the method used in most states today to determine the inheritance of all property, is the **civil law method**, which is to determine the nearest blood relative among collaterals by finding the closest common ancestor and counting one degree for every generation up from the intestate to the common ancestor and down from the common ancestor to the relative, the lowest number of degrees being considered the nearest relative. The primary method used in medieval England to determine the inheritance of estates, and the method used today to determine inheritance among royalty, is, from *first born,* **primogeniture**, which is the eldest male child has the right to succeed to the estate of an ancestor to the exclusion of siblings and other relatives, with males always favored over females. From *that which falls,* **escheat** is the process by which an intestate's property becomes the property of the state, or a designated agency of the state, when the intestate has no surviving spouse, children, blood relatives, or

other heirs. Escheat is, in effect, a reversion of property to the state when there is no person competent to inherit. Historically, it was the acquisition of land by the state due to the possessor's misconduct.

When two or more people are in an equal degree of relationship to the intestate such as a group of children, each person takes a share of the intestate's net estate as determined by state law. From *by the head,* **per capita**, meaning equally, is when property is divided in equal shares among those who are in an equal degree of relationship to the decedent. From *by roots or stocks,* **per stirpes** or **representation**, by right of representation, is when property is divided in equal shares among those who are in an equal degree of relationship to a decedent, with descendants of a deceased ancestor taking the ancestor's share by representation as if the ancestor had survived the decedent. Per stirpes is usually applied to an intestate's children. **Modified per stirpes** is per stirpes applied however remote the intestate's nearest relatives are.

UNUSUAL DESCENT AND DISTRIBUTION

From *after the father's death,* a **posthumous child** is a child born after the death of its mother or father. If it can be shown that the gestation period of a child began before the death of the child's parent, most states provide that the posthumous child inherits. Many states have generalized the rule to apply to **afterborn heirs**, who are relatives of a decedent who were conceived before the decedent's death but born afterward.

In most states, an adopted child inherits from and through the adoptive parent and does not inherit from or through a natural parent, except where there is a stepparent adoption. In most states, an illegitimate child does not inherit from or through the father unless he marries the mother or acknowledges the child or his paternity is formally proven. A few states recognize a **designated heir**, which is a person declared and appointed an heir under a state statute, either to inherit for or to inherit from the person making the declaration and appointment.

From *from before,* to **advance** is to pay or render before due. An **advancement** is a transfer of property from a person to an expectant heir with the intent that the property be deducted from the expectant heir's inheritance, if any. An **assignment of an expectancy** is when an expectant heir transfers his or her interest in an expected inheritance to another. From *against announce,* to **renounce** is to refuse, to return, or both. From *not claim,* to **disclaim** is to refuse, to pass on, or both. From *against report,* a **renunciation** is a refusal by an heir to take all or part of an inheritance, especially where the inheritance is considered to be "returned" by the refusing heir. A **disclaimer**[1] is a refusal by an heir to take all or part of an inheritance, especially where the inheritance is considered "passed on" by the refusing heir.

WILLS, GENERALLY

From *to prove,* **probate court**[1] is, in most states, the division of a state's courts with jurisdiction over the administration of decedents' estates. If probate court is not avoided, the official ultimately responsible for the disposition of a decedent's estate is the probate court judge. A person who wants his or her estate formally disposed of in a way other than intestate succession must inform the judge. However, the judge doesn't need to know until after the person's death. A **will**[2] is, fundamentally, a formal letter to the probate court judge declaring what the maker wants after death.

Today, a **will**[3] is an instrument declaring the disposition of a person's property after death. From *what one has to say,* **testament**[1] is the Latin word for will. **Last Will and Testament**[1] is the title, in English and Latin, of the then nearest-to-death instrument declaring the disposition of a person's property after death. At early common law, a

will[4] was a written declaration of the disposition of a person's real property after death and a **testament**[2] was an oral declaration of the disposition of a person's personal property after death. At early common law, a **Last Will and Testament**[2] was a combined declaration of the disposition of a person's real property and personal property after death.

From *of making a statement,* **testamentary** means will-related or related to a will. From *made-statement,* **testate** means leaving a will. **Testacy** is the status of having left a will. **Intestacy** is the status of not having left a will.

From *with-a-will sequence,* **testate succession** is the testator-provided plan by which the testator's estate is disposed when the testator dies and the process by which you follow in the ownership of a testate decedent's property. Traditionally, from *statement maker,* a **testator**[1] is a male who makes or has made a will. A **testatrix** is a female who makes or has made a will. Today, a **testator**[2] is a person, male or female, who makes or has made a will.

From *well done to,* a **beneficiary**[1] is, generally, a person who benefits or a person who receives benefits. A **beneficiary**[2] of a will is a person who receives property from a testator's net estate. From *trust person,* a **creditor**[1] of a decedent's estate is a person or entity that receives or is entitled to receive the payment of debts or taxes from a decedent's estate.

From *given thing,* a **gift**[1] is, generally, an intentional transfer from a transferor's generosity, and a voluntary transfer made without consideration. From *grant,* to **give** is to make an intentional transfer of property from generosity. A **testamentary gift** or **gift**[2] is a direction in a will to transfer property to a beneficiary.

From *dispose according to plan,* a **devise**[1] (the noun) is a gift of real property in a will. To **devise**[2] (the verb) is to give a gift of real property in a will. A **specific devise** is a will provision giving a specific item or items, or piece or pieces, of real property to a specific beneficiary or beneficiaries. The abolished **doctrine of worthier title** was the common law doctrine that taking by descent was more honorable than taking by devise, and so a devise that gave an heir exactly what the heir would have received by descent was taken by descent rather than by devise.

Traditionally, from *be about,* a **bequest**[1] is a gift of personal property other than money in a will. Today, a **bequest**[2] is a gift of personal property in a will. From *be about said,* to **bequeath** is to give a gift of personal property in a will. A **specific bequest** is a will provision giving a specific item or items, or piece or pieces, of personal property to a specific beneficiary or beneficiaries.

To **give, devise, and bequeath** is to give a gift of anything in a will or to give a gift of everything in a will.

Traditionally, from *send a representative,* a **legacy**[1] is a gift of money in a will. Today, a **legacy**[2] is a gift of money or other personal property in a will. A **general legacy** is a will provision giving a general amount of money or other personal property from the general assets of a testator's estate. A **specific legacy** is a will provision giving a specific amount of money or a will provision giving a specific item or specific items, or a piece or pieces, of personal property. A **demonstrative legacy** is a will provision giving a general amount of money to be paid from a specifically designated fund or funds.

Gifts and other directions in a will are limited by **public policy**, which is legislatively or judicially established guidelines for the welfare of society, including common sense and decency. For example, from *striker,* a **slayer statute** is a statute that requires a murderer to be treated as having predeceased the victim so the murderer cannot benefit from the murder.

To **name**[2] is to formally identify or to formally suggest. To **nominate** is to formally suggest. In addition to declaring the disposition of property after death, a will is often

used by the testator to name or nominate a person whom the testator wishes to take charge of and administer the testator's estate. Traditionally, from *complete,* an **executor**[1] is a male who a testator or testatrix has named or nominated to take charge of, manage, and settle the testator's or testatrix's estate. An **executrix** is a female who a testator or testatrix has named or nominated to take charge of, manage, and settle the testator's or testatrix's estate. Today, an **executor**[2] or a **personal representative**[2] is a person (male or female) who a testator (male or female) has named or nominated to take charge of, manage, and settle the testator's estate.

From *up-go,* a **successor** is a person or entity that takes the place of another and continues in that other's position or role. A **successor executor** or **successor personal representative** is a person who a testator has named or nominated to take charge of and administer the testator's estate if the executor or personal representative is unable or fails to do so or an executor who follows a prior executor.

WILL REQUIREMENTS

Intent is required for a will. From *of making a statement,* **testamentary intent** is the intent to make a will or the intent to make a will or other instrument effective at or after death. From *hardship,* **duress**[1] is, in civil law, unlawful pressure to act such as force or the threat of force. **Fraud**[1] is deception by intentional misrepresentation or concealment. From *completion,* **fraud in the execution** is deception regarding the character of an instrument. From *in-lead,* **fraud in the inducement** is deception regarding the circumstances in which an instrument is made.

To make a will, a person must have the capacity to make a will. From *healthy,* **sound** means in good condition, whole, without disease, or without defects. **Of sound mind and memory**, **soundness of mind**, or **sound mind** means having a mind that is in good condition, whole, and without disease or defects and a mind having testamentary capacity. From *of making as statement,* **testamentary capacity** is the capacity to make a will, having the capacity to make a will, and the requirement to make a will that a person must (1) know what a will is and that the person is making a will, (2) know the natural objects of the person's bounty, (3) know the general nature and extent of the person's property, and (4) be able to interrelate the person's knowledge and make a coherent plan. In short, testamentary capacity is will, family, property, and plan. From *bright,* a **lucid interval** is a period during which a mentally ill person is thinking normally and may have testamentary capacity. In most states, an **insane delusion**, a belief contrary to all evidence, only invalidates the affected provisions of a will.

In addition to having testamentary intent and testamentary capacity, a testator must not be under the undue influence of another. **Undue influence** is improper pressure or influence resulting in an unnatural act, rather than the exercise of free will. Undue influence affects a **susceptible person**, a person capable of being pressured or influenced, and effectively tricks the susceptible person into doing something he or she would not otherwise do. **Under restraint** is unable to act freely or acting under undue influence.

WILL TYPES

The typical will is an **attested will**, which is, from *to witness,* a witnessed written will. An attested will has many formalities. From *written wholly in one hand,* a **holographic will** is a will completely written, dated, and signed in the testator's handwriting. From *spoken,* an **oral will** or **nuncupative will** is a spoken declaration of a person's testamentary desires, usually limited to personal property. A **soldier's and sailor's will** is a will

with reduced formalities, permitted because of the testator's actual military service or sea duty and presumed inability to make a witnessed written will.

From *join*, a **joint will** is one will that is the will of two persons. From *reciprocal,* a **mutual will** is, pursuant to an agreement, two wills that have identical or reciprocal provisions. A **joint and mutual will** is one will that is the will of two persons and has reciprocal provisions. From *together pull,* a **contract to make a will** is an agreement, for money or other consideration, to make and leave a will leaving all or part of the testator's property to a specified beneficiary.

WILL FORMALITIES AND CUSTOMS

A **valid will** is a will made in accordance with all requirements and formalities. A will may be in separate writings if there is an **integration**[2], which is, from *make whole,* the process by which separate writings are identified and joined as a coherent and consistent whole. From *into body,* to **incorporate**[1] is to include or to make something applicable in another place. Most states permit **incorporation by reference** or **incorporation**[2], which is the technique by which a document by its terms includes the text of another document.

From *thoroughly encourage* (exhort), an **exordium clause** is the customary opening provision in a will indicating that the instrument is the testator's will. From *make public,* a **publication clause** is the customary provision in a will indicating that the will is to be made public after the testator's death. After the exordium clause and publication clause, a will should dispose of all of the testator's property. From *apart place,* a **dispositive clause** is a provision in a will that disposes of some of the testator's property.

After other dispositive clauses, a will may, and should, contain a **residuary clause**, which is a will provision giving away any property remaining after all specific devises, bequests, and legacies, if any, have been made or fail. Traditionally, from *remainder,* the **residue**[1] is the personal property remaining after all specific bequests and legacies have been made or fail. From *back-stay,* the **remainder**[2] is the real property remaining after all specific devises have been made or fail. Today, the **residuary estate**, the **residue**[2], the **remainder**[3], or the **rest, residue, and remainder** is any property remaining after all specific devises, bequests, and legacies have been made or fail.

A testator may make all gifts in a will conditional by making a **conditional will**, which is a will contingent on the occurrence or nonoccurrence of an event or events of independent significance. Most states, however, favor testacy. An apparent condition placed upon a will is usually deemed to be merely a motive or occasion for making a will.

A conditional devise, bequest, or legacy may be made through a **power of appointment**[2], which is, from *to point,* designation of a trusted person as having the power to transfer some or all of a testator's property as the trusted person deems appropriate. A **general power of appointment** is a power of appointment that permits the appointee to transfer property to anyone, including him or herself. A **special power of appointment** is a power of appointment that permits the appointee to transfer property only within established limits. From *suddenly move,* a **springing power** is a power that comes into existence only if a condition occurs. A **springing power of appointment** is a power of appointment that comes into existence only if a condition occurs.

From *in fright* or *by threat,* an **in terrorem clause**, **incontestability clause**, **noncontestability clause**, or **no-contest clause** is a will provision that a gift is made on condition that the beneficiary not contest the validity of the will or a provision in any document made on condition that that the validity of the document not be contested.

A **testimonium clause** or **signature clause** is the customary closing will provision indicating that the instrument has been signed by the testator with the intent to make

it his or her will. Generally, **executed**[1] means completed. When a will is completed, it is executed. **Execution**[2] of an instrument is when a prepared instrument is completed with the necessary signatures. In many states, the testator's signature must be placed at the end of the will. From *under write,* to **subscribe**[1] is to sign at the end of an instrument.

From *to witness,* to **attest** is to certify or to assure that something is true. An **attestation** is a certification or an assurance that something is true. An **attestation clause** is a customary will provision, after the testator's signature, indicating that the instrument has been signed by the witnesses with the intent to certify that the instrument was signed by the testator with the intent and capacity to make it the testator's will and that the required formalities were observed. An **attesting witness** is a witness who intentionally signs and certifies a will. Although not required in most states, **publication**[1] of a will is the testator's oral request to witnesses to sign a will as attesting witnesses and physically presenting the will to them for their signatures. From *unavoidable,* a **necessary witness** is a required attesting witness. From *above the number,* a **supernumerary witness** is an extra attesting witness beyond the required number.

From *at first view* or *on its face,* a **prima facie will** is a will made according to a statute indicating that a will that appears to be valid "on its face" because all formalities appear to have been complied with is entitled to be admitted to probate. Most states are not prima facie will states but do provide for a **self-proved will**, which is a will in which the testator and attesting witnesses have acknowledged their signatures under oath before a notary public and that is generally entitled to be admitted to probate; in other words, a will with affidavits by the testator and attesting witnesses.

WILL INTERPRETATION

From *explanation,* **interpretation** is the process of translating unclear language into clear language or the process of detecting what was said, observed, or meant. For example, **precatory** language or **precatory words** are, from *uncertain,* language that expresses a wish, a hope, or a desire without giving a clear direction as to what the maker of the language wants done. Precatory language is usually advisory and not mandatory.

From *build up,* **construction** is the process of determining the intent, if any, of the maker of language that does not clearly address a topic or the process of building on what was said. From *outside but alongside,* **extrinsic evidence** is evidence outside of the item itself such as evidence of the meaning of a will, besides the will itself.

A will disposes of a testator's **probate property**, which is property a decedent owned at death and property acquired by the decedent's estate. A **nonprobate property** is property in which ownership terminates at the decedent's death.

From *to determine,* to **adeem** is to implicitly revoke. **Ademption** is when a gift fails because the property is not in the testator's estate, or has been substantially changed, at the time of the testator's death. **Ademption by extinction** or **extinction** is when a gift of specific property fails because the specific property is not in the testator's estate because it has been destroyed or transferred to a third person, or has been substantially changed, at the time of the testator's death. **Ademption by satisfaction** is when a gift fails because the property is not in the testator's estate because the testator has already intentionally transferred it to the beneficiary at the time of the testator's death. From *to beat,* **abatement**[2] of a gift, a decrease or reduction in the amount of a gift, is when gifts are reduced or fail because there is not sufficient property in the testator's net estate to make all the gifts designated in the testator's will.

From *at the same time,* **simultaneous deaths** are deaths for which there is insufficient evidence to determine who died first. Statutes requiring a beneficiary to survive the testator by a designated period of time usually avoid the inheritance issues that arise

when there are simultaneous deaths. When related decedents die in a common accident, they are usually treated for inheritance purposes as predeceasing each other.

From *before termination,* a **pretermitted heir** or **pretermitted child** is a child of a testator who is not provided for in the testator's will and not specifically disinherited. A pretermitted heir could be, for example, an **afterborn child**, which is a child born after a will was made. The pretermitted heir is entitled to a share of the testator's net estate.

Generally, from *fall* (into error) or *flight* (of time), a **lapse**[1] is the natural expiration of a right. With regard to wills, a **lapse**[2] is when a beneficiary named in a will is alive at the time the will is made but dies before the testator does. A **lapsed devise** is a gift of real property that has expired because the beneficiary died before the testator. A **lapsed legacy** is a gift of money or other personal property that has expired because the beneficiary died before the testator. An **antilapse statute** is a statute providing that, unless a will provides for another disposition in the event a lapse occurs, a gift to a blood relative that dies before the testator passes to the blood relative's issue, if any.

From Latin *dead hand,* a **mortmain statute** is, in some states, a statute providing that a substantial gift to a religious organization or charity by will is not valid unless the will is executed within a designated period of time before the testator's death.

A **homestead statute** is, generally, a statute that permits a surviving spouse and minor children to live in the mansion house of the testator free from the claims of creditors until the last child reaches the age of majority.

ELECTION AGAINST THE WILL

A spouse or a child may be a **forced heir**, which is a person who, by statute, cannot be disinherited. A **forced share** is the share of a testator's net estate taken by a forced heir. A **family allowance** is a share of a decedent's estate to which the decedent's immediate family is entitled.

Spouses have long had some right to share in the other spouse's estate. In medieval England, the spouses of decedents who owned real property were protected against disinheritance by the existence of marital estates. From *come together,* **coverture** was the common law status of a married woman during which her civil existence generally merged with that of her husband. From *endow,* **dower** is, generally, the traditional right of a surviving wife, after her husband's death, to a life estate in one-third of the real property owned by her husband during their marriage. From *courtesy,* **curtesy** is, generally, the traditional right of a surviving husband, after his wife's death, to all real property owned by his wife during their marriage. Before a spouse's death, dower and curtesy rights are inchoate. From *to begin,* **inchoate** means not yet completed or potential. Upon a spouse's death, a dower or curtesy right is **choate**, meaning completed.

Today, in most states, an **elective share** is a statutory opportunity of a surviving spouse to receive a definite portion of the deceased spouse's estate. The **right of election**, an **election against the will**, or a **spousal election** is the claim of a surviving spouse to an elective share when an estate is administered under a will. Having the right of election, a surviving spouse can be disinherited only to the extent of the elective share. In most states, the surviving spouse's elective share applies to the testator's **augmented estate**, which is, from *to increase,* all the testator's property owned at death, not just the property left in the testator's will.

WILL REVOCATION, REVIVAL, AND AMENDMENT

A will is sometimes said to be ambulatory. From *to walk,* **ambulatory** means capable of being changed or canceled at any time before the maker's death. Because a will takes effect only after death, it may be revoked. From *back-call,* **revoked** means recalled

or canceled before the testator's death. **Revocable** means able to be recalled or canceled. **Revocation** is action by which something is revoked. A will may be revoked by instrument, by physical act, or by operation of law.

A revoked will may be returned to its status as a will by republication or revival. From *again published,* **republication** or **republishing a will** is formal re-execution of a will. From *again live,* **revival** is returning a revoked will to its status as a will such as by executing with the same formalities another instrument that says so. In most states, **dependent relative revocation** is the doctrine that if a testator revokes a will with the intent of making a new will, but does not make a new will or it is deemed invalid, the old will is presumed to be revived before the testator's death.

From *little will,* a **codicil**, a will amendment, is a testamentary instrument that amends the provisions of a will and a testamentary instrument that adds to, changes, modifies, or supplements the provisions of a will.

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- **animus testandi**
- **canon law method**
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- **corporeal**
- **devisee**
- **devisor**
- **disinheritance**
- **distributee**
- **dowager**
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- **general gift**
- **general pecuniary legacy**
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- **incorporeal hereditament**
- **intestate estate**
- **intestate share**
- **legatee**
- **legator**
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- **pecuniary**
- **pecuniary gift**
- **per capita distribution**
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- **predeceased**
- **reciprocal wills**
- **residuary gift**
- **self-prove clause**
- **share and share alike**
- **specific gift**
- **testamentary disposition**
- **testamentary instrument**
- **testate estate**
- **waive a spouse's will**

Chapter 20

Will-Related Documents and Trusts

WILL-RELATED DOCUMENTS

Estate planning[2] is, generally, planning for the transfer of property in contemplation of, or as the result of, death. Documents can be related to wills because they involve alternate methods of transferring a property in contemplation of death. Alternate methods are possible because the law recognizes three periods of time with regard to death. **Before death** is during life and before the moment of death. **At death** is after life and at the moment of death. **After death** is after life and after the moment of death.

A will must be made before death, a will's moment of death conditions are triggered at death, and a will is effective after death. One alternate method is to transfer property at death rather than after death. Property can be transferred at death by co-owner property rights, by contract, or by a trust created before death. Nonprobate property is transferred before death or at death. Probate property is transferred after death. Estate tax generally does not apply before death. Estate tax applies at death and after death. An outright gift is effective before death. Alternate method gifts are effective at death. Testamentary gifts are effective after death.

GIFTS BEFORE DEATH

Generally, a **gift**[1] or, in Latin *gift,* a **donation**, is an intentional transfer from a transferor's generosity and a voluntary transfer made without consideration. A **donor** is a person who makes a gift. A **donee** is a person who receives a gift or a person receiving a gift. A **class gift** is a gift to a group of people, especially a gift to a group of people whose number or specific identities are uncertain at the time of the gift. Generally, to make an **outright gift**, a gift not made as part of a will or trust, a competent donor need only intend to make the gift, intend to have the gift property (or a representative document) transferred to the donee, and have the donee receive the gift. From *away free,* **delivery**[3] of a gift is the process of transferring gift property (or a representative document) to the donee. From *to take,* **acceptance**[3] of a gift is the act of consent to the receipt of a gift by a donee. Some gifts of tangible personal property must be in writing. For example, a **certificate of title law** is a law that provides that the only proof of ownership of an automobile, boat, or other similar vehicle is its proof of ownership document. A **certificate of title** is an official document that is proof of ownership such as a document that is proof of ownership of an automobile, boat, or other similar vehicle.

CO-OWNERSHIP

From *together run,* **concurrent** means to run together or at the same time. **Co-ownership**, **concurrent ownership**, or **joint property** is property currently owned by two or more persons or entities. From *together hold,* **cotenancy** is co-ownership of an estate or co-possession of an estate. A **cotenant** is a co-owner of an estate or a co-possessor of an estate. The underlying estate continues as if a single person owned it. There is no such thing as half an estate. An estate may be co-owned by two cotenants, each owning a half interest.

The forms of co-ownership are often defined by their co-ownership elements. From *oneness,* **unities** are the common law co-ownership elements: possession, time, title, interest, and person. The **unity of possession**, equal access, means that each cotenant has an equal right to possess the whole estate. From *against-stand,* an **ouster**[2] of a cotenant is the wrongful dispossession or exclusion of a cotenant from co-owned property. The **unity of time**, received at the same time, means that the cotenants received their interest at the same time. The **unity of title**, received from the same source, means that the cotenants received their interest from the same source. The **unity of interest**, equal shares, means that each cotenant owns an equal share of the undivided whole estate. An **undivided interest** is owning a share but having an equal right to possess the whole or any part of the whole. The **unity of person**, husband and wife are one, means that husband and wife are merged into one legal entity.

From *to hold in the same manner,* **tenancy in common** is the form of co-ownership in which only the unity of possession is met and the form of co-ownership characterized by the easy transfer of a cotenant's share, during life, or by will after death, separate and apart from any other cotenant. A **tenant in common** is a co-owner of a tenancy in common. From *separate,* **severance**[1] is transfer of a co-ownership interest by a cotenant separate and apart from any other cotenant. A succession of tenancies in common can end only by a merger of all interests in one person. From *parts division,* a **partition** is a court-ordered physical division of property ending co-ownership and a court-ordered termination of the unity of possession.

From *join in holding,* **joint tenancy** or **joint tenancy with right of survivorship** is the form of co-ownership in which the unities of possession, time, title, and interest are met and the form of co-ownership characterized by the loss of ownership upon death and sole ownership by the last surviving cotenant. A **joint tenant** is a co-owner of joint tenancy. Because, by definition, a joint tenant received an equal interest at the same time and from the same sources as the other joint tenant(s), indicating the intent of the grantor to keep the property as a whole, a right of survivorship is implied. From *beyond live,* a **right of survivorship**, with the acronym **ROS**; **with right of survivorship**, with the acronym **WROS**; or **survivorship** is an automatic right to share in a cotenant's share because of surviving the cotenant's death, with the cotenant who survives all other cotenants becoming the sole owner. Because a joint tenancy interest terminates at death, it generally cannot pass to an heir by intestate succession or to a beneficiary by will. A joint tenant may transfer his or her interest during life and the severance of the joint tenancy leaves a tenancy in common.

From *to hold everything,* **tenancy by the entirety** is the form of co-ownership in which all the unities are met and the tenancy characterized by co-ownership by a husband and wife under common law, with right of survivorship. Tenancy by the entirety is ended only by marriage termination or consent.

The marital property law in Arizona, California, Idaho, Nevada, New Mexico, Texas, Washington, and Wisconsin, **community property** is, in part, law under which property acquired during marriage, except property acquired by gift or inheritance, is "community property" owned equally by each spouse, and property acquired by gift or inheritance

and property acquired before marriage is "separate property" owned individually by each spouse. Under community property law, **separate property** is property acquired by gift or inheritance and property acquired before marriage, owned individually by each spouse.

Co-owned bank accounts are an issue in estate planning. When bank account estate planning works as planned, it is convenient. When it doesn't, it is a horror story. If money is put in a bank account held jointly with another and that other person is untrustworthy or encounters legal problems, those problems become the first person's problems as well. The most reliable bank account for estate planning is the **payable on death account** or **P.O.D. account**, which is a contract by which a bank agrees to pay the balance of an account at the owner's death to a designated beneficiary.

INSURANCE CONTRACTS

Generally reflecting the internal policy of an insurance company as to what it will pay on a claim, an insurance **policy**[3] is an insurance contract and a common will-related document. From *to exact a pledge* or *make safe, for payment,* **insurance**[1] is, fundamentally, a contract of protection against a natural risk such as death. (Insurance generally, as a matter of commercial law, is discussed in Chapter 25.)

After a death, large sums of money may be needed to pay funeral bills, debts, and other expenses; to pay taxes; and to support the decedent's survivors, both immediately and for the long term. In addition, a person may want to leave large gifts to friends and relatives. One solution is to purchase life insurance. **Life insurance** is insurance triggered by the death of the insured. From *forward go,* **proceeds**[1] are, generally, the net sum of money derived from a transaction (what one "goes forward" with). **Insurance proceeds** or **proceeds**[2] are the money received from an insurer under an insurance contract. Because insurance is a contract, life insurance proceeds are triggered and transferred at death rather than after death.

A business organized as a partnership terminates when a partner dies. To avoid termination of the business, partners often enter into a **buy and sell agreement**, which is an agreement between partners that when a partner dies, the surviving partner(s) will buy, and the deceased partner will sell, the deceased partner's share of the business. The large sum of money needed to purchase the deceased partner's share usually comes from **business insurance**, which is insurance designed to protect a business from the death or disability of an owner or key employee, or insurance triggered by the death or disability of a business owner or key employee.

Generally, there are two types of life insurance policies: term and whole life. For insurance, a **term**[3] is the time during which an insurance policy is in force. **Term life insurance** or **term insurance**[1] is life insurance that provides benefits only if the insured dies during the time the policy is in force. **Whole life insurance** or **straight life insurance** is life insurance that provides benefits whenever the insured dies. Whole life insurance has a savings component. The policy gradually builds up a **cash reserve** or **cash surrender value**, which is, generally, money that a whole life insurance policy accumulates that the owner of the policy can borrow against or cash in.

In addition to life insurance, a person engaged in estate planning also may obtain **disability insurance**, which is insurance that provides income during a person's incapacity and insurance triggered by the insured's incapacity.

MEDICAID PLANNING

Death often occurs after the onset of physical and mental illnesses associated with old age. Some elderly need nursing home care, but it is expensive and not covered by **Medicare**, the Social Security medical benefit program. Most people confined to a

nursing home quickly exhaust their life savings paying their nursing home bills and so have to apply for **Medicaid**, the U.S. government's medical welfare benefit program. People cannot qualify for Medicaid assistance until they have "spent down" their assets to a poverty level. **Negative estate planning** is spending down a person's assets so that he or she qualifies for Medicaid, but doing so in such a way that as much wealth as possible remains within the person's family or other group of intended beneficiaries.

POWERS OF ATTORNEY

Referring to the power to act for another, a **power of attorney** is an instrument by which a person expressly authorizes another to perform specified acts (not constituting the practice of law) on the person's behalf. A **principal**[1] is a person who makes a power of attorney. An **agent**[3] or an **attorney-in-fact**[2] under a power of attorney is a person who is authorized by a principal to perform specific acts on the principal's behalf. A **general power of attorney** is a power of attorney that grants the agent broad powers to act on the principal's behalf. A **limited power of attorney** or **special power of attorney** is a power of attorney that grants the agent only a few specified powers to perform on the principal's behalf. A **springing power of attorney** is a power of attorney that, by its terms, becomes effective only on the occurrence or nonoccurrence of a designated event.

An ordinary power of attorney terminates when the principal becomes incompetent. From *last-able,* a **durable power of attorney** is a power of attorney that does not terminate when a person becomes incompetent. A **durable power of attorney for health care** or **health care proxy** is a durable power of attorney that gives an agent the power to make medical decisions for an incompetent principal.

Similar to a power of attorney, and related to a will only in that it is a written declaration made in advance, a **living will**, also known as a **directive to physicians**, a **health care declaration**, or a **medical directive**, is, generally, a written declaration that you do not want your life artificially prolonged if you are unable to give directions regarding the use of life-sustaining treatment due to a terminal condition or a permanently unconscious state. An **advance directive** is any document expressing a person's desires and made in advance of a time when the person, though not yet deceased, is unable to speak for him- or herself such as a power of attorney or a living will. An advance directive does not permit a person to engage in assisted suicide. **Assisted suicide** is the crime of helping another person kill him- or herself.

TRUSTS, GENERALLY

From *confidence,* a **trust**[1] is, fundamentally, the formal management of property as an owner by another person according to the original owner's directions. A trust is a legal relationship between the original owner, the manager, and a person or persons who benefit from the relationship. A **settlor**, a **trustor**, a **creator**, or a **grantor**[2] is a person who creates a trust. The term "settlor" originated in medieval England when trusts were often created for use in marriage agreements and other settlements.

A **trustee**[2] is, generally, a person or entity who manages a trust. A **cotrustee** is one of two or more trustees who serve at the same time. A **board of trustees**[2] is a group of trustees such as a group of trustees who direct a nonprofit organization. A **trust company** is a financial institution that provides trustee services. A **trust officer** is a trust company officer that serves as a trustee.

From *well done to,* a **beneficiary**[3] of a trust is a person who receives the benefit of a trust. The beneficiary of a trust may be a class or group of persons, as long as that

class or group is **ascertainable**, which means, from *to certain,* capable of being determined by a third party. If a trust is not created to benefit a charity and does not have definite beneficiaries, it is deemed an **honorary trust**, which is a nonenforceable trust that the trustee may carry out if the trustee so desires.

A **trust**[2] is, generally, the legal relationship created when a settlor transfers property with the intention that it be managed by a trustee for the benefit of a beneficiary and a technique for giving control of property to a person for the use of another. A **trust instrument**, a **trust**[3], a **trust deed**, or a **trust indenture** is the instrument manifesting the intent to create a trust. **Trust administration** or **administration**[4] of a trust is the management of property by a person or entity other than the grantor.

Before 1535, the law courts of England enforced taxes collected on estates as long as the owner had both **legal title**, the deed and the right to transfer property, and **equitable title**, the possession and use of property and the interest of a person who equity regards as the real owner although legal title is in another. Equitable title, the possession and use of property, when distinct from legal title, is also known as a **beneficial interest**, a **beneficial title**, or a **beneficial use**. English lawyers realized that the taxes collected on estates could be avoided by giving away either the legal title or the equitable title, a process known as **bifurcation**, which is the process of dividing and separating ownership of property into two parts, the legal title and the equitable title.

From *he or she who uses,* a **cestui que use**, later known as a **cestui que trust**, is a person for whose use another holds land or other property, a person who benefits from a trust relationship, or, simply, a beneficiary. England's equity courts enforced the promise, the "trust," between the grantor and the legal titleholder that the property would be held for the cestui que use. "Uses" were also created to make a quasi-will of real property or to give the use of land to persons who could not hold legal title, such as minor children.

The tax loophole created by **split title**, bifurcated title, the separation of title into legal title and equitable title, was closed in 1535 with the **Statute of Uses**: "Where one person stands seized of land to the use of another, that other person shall be seized of a like estate as he had in the use." Equitable title was equated with legal title, making equitable title owners subject to taxes. More importantly, bifurcation was permitted to continue, and trusts were born. Trusts now apply to both real and personal property.

A trust must have property to which it applies. A **conveyance in trust** is a conveyance or transfer of property made for the purpose of creating a trust. A **deed of trust** is a conveyance in trust to provide security for the performance of an obligation to pay money or otherwise and a conveyance in trust to serve as a mortgage. From *draw off,* a **derivation clause** is a provision in a deed of trust identifying from whom the settlor obtained the trust property (the mortgagee, while the settlor serves as the mortgagor).

From *body,* the **corpus**[1]; from *thing,* the **res**[1] or **trust res**; from *special,* the **trust property**; from *foundation,* the **trust fund**; from *status,* the **trust estate**; or, from *underthrow,* the **subject matter of the trust** is the property held in trust.

The original trust property, the **corpus**[2], the **trust principal**, or the **principal**[3] is the property initially transferred by a settlor into a trust and property added to that property. The **income**[1] of a trust is the property earned by the trustee's management of the corpus or principal of the trust. From *make rich,* an **endowment** is corpus or principal large enough to support a cause through the income on that corpus or principal. A **foundation**[2] is an organization supported by an endowment, an organization dedicated to charitable purposes, or both. From *bottom layer,* a **founder** is a person who creates an organization, especially a person who creates a foundation.

From *at play,* an **illusory trust** is an invalid trust in which the settlor retains too much control over the trust. A **life insurance trust**[1] is, generally, a trust with life insurance as its trust property.

From *foundation,* **funded** is a trust that currently has sufficient trust property to economically justify its existence. **Unfunded** is a trust that does not currently have sufficient trust property to economically justify its existence.

Sometimes when property is given or left to minor children, creation of a guardianship over the property would be too cumbersome and creation of a trust would be impractical. To solve this problem, most states have adopted statutes such as the **Uniform Gifts to Minors Act** and the **Uniform Transfers to Minors Act**, each of which is an act under which an adult can give small amounts of property to a minor child outside a guardianship and name an adult as the custodian of the property without creating a formal trust relationship. From *guardian* and *keeper,* a **custodian** is a caretaker or a person who cares for the property of a minor child.

KINDS OF TRUSTS

An **active trust** is a trust in which the trustee has some affirmative duty to perform with respect to the trust property. A **passive trust** is a trust in which the trustee has no affirmative duty to perform with respect to the trust property. A **constructive trust** is a trust created by a court as a remedy for injustice. A **resulting trust** or **implied trust** is a trust based on the implied intention of the settlor, where the settlor has transferred property but does not intend the transferee to have equitable title, that if the equitable title is not disposed of (the "result" is that) the property is to be returned to the settlor. A resulting trust usually occurs when an intended trust fails and the trustee simply holds the property for the benefit of the settlor until legal title can be returned.

An **express trust** is a trust expressly intended by the settlor and a trust that is not a constructive trust or a resulting trust. A **private trust** is an express trust that does not state that it has been created for a charitable purpose. A **charitable trust** or **public trust** is an express trust that states that it has been created for a charitable purpose. From *kindness,* to be **charitable** is to benefit, improve, or uplift society as a whole. A **charity** is an organization founded for charitable purposes and not for a profit. From Anglo French *as near as possible,* **cy pres comme possible**, usually shortened to **cy pres**, is the doctrine by which, if a trust's stated charitable purpose is illegal, impossible, or impractical to carry out, a court may order the trust property to be applied to another charitable purpose as near as possible to, or similar to, the stated charitable purpose.

A **private express trust** is an express trust intended by the settlor to benefit a beneficiary or beneficiaries that are not charities. A **precatory trust** is a trust created upon the precatory language of a settlor in a will. From *uncertain,* **precatory** language or **precatory words** are language that expresses a wish, a hope, or a desire without giving a clear direction as to what the maker of the language wants done.

From *of making a statement,* a **testamentary trust** is a trust created in a will. From Latin *between the living,* **inter vivos** means during life. An **inter vivos trust** or **living trust** is an express trust created during the life of the settlor. A living trust might be used, for example, to take property out of the settlor's estate before the settlor's death, to avoid some or all of the federal estate taxes on that property.

A testator who has a living trust may fund or add to it by a provision in the testator's will known as a pour-over. A **pour-over** is a provision in a will making a trust the beneficiary of some or all of the testator's probate property.

From *back-call,* **revocable** is able to be recalled or canceled. **Irrevocable** is not able to be recalled or canceled. A **revocable trust** is a trust that may be recalled or canceled. An **irrevocable trust** is a trust that may not be recalled or canceled.

TRUST PROVISIONS

A **declaration of trust** is an announcement that a settlor is making him- or herself the trustee of property for the benefit of him- or herself, or another. Discussed in detail in Chapter 23, the **statute of frauds**[1] is, generally, the requirement that certain contracts be in writing to be enforceable. A trust is usually made in writing because the applicable statute of frauds requires that trusts of real property be in writing to be enforceable. From *Matter of Totten,* 1979 N.Y. 112, 71 N.E. 748 (1904), a **Totten trust** is a bank account deemed an informal but valid revocable inter vivos trust.

A trust should not be a **fraudulent conveyance**[1], which is a transfer of property intended to deceive another, especially a transfer of property in an attempt to conceal a debtor's property from a creditor. A will or trust may include a **perpetuities savings clause**, which is a provision stating that all gifts shall be modified to the extent necessary to avoid violation of the rule against perpetuities.

From *expend economically,* a **spendthrift clause** is an express provision in a trust against alienation of any or all of the beneficiary's interest. A **support clause** is an express provision in a trust directing the trustee to transfer only that amount of income or principal necessary for the education and support of the beneficiary. A **discretion clause** is an express provision in a trust directing the trustee to transfer only that amount of income or principal to the beneficiary as the trustee, in the trustee's sole discretion, decides. A **forfeiture clause** is an express provision in a trust that a beneficiary's interest terminates, or the trust automatically becomes a discretionary trust if anyone other than the trustee attempts to transfer that interest.

ESTATE AND ESTATE-RELATED TAX PLANNING

Being related to will-related documents and trusts, estate and gift taxation terms are discussed here. (Taxation is generally discussed in Chapter 22.) Frequent reference is made to the **Internal Revenue Code (I.R.C.)**, which is the collection of federal tax statutes in Title 26 of the United States Code. The **section symbol** or **§** is the symbol for a section. The **Internal Revenue Service (IRS)** is the federal executive department of the U.S. Department of the Treasury that enforces federal tax law and the federal agency that collects most federal taxes. Most states have similar tax laws. **Parallel tax planning** is planning that avoids or reduces both federal and state taxes.

ESTATE TAX

Collectively, estate and estate-related taxes, especially inheritance taxes and estate taxes, are sometimes known as **death taxes**. An **inheritance tax** is a tax payable by a donee on the privilege of receiving property from a decedent at or after the decedent's death. An **estate tax** is a tax payable by a decedent's estate on the privilege of transferring property to another at or after the decedent's death. The formula for computing federal estate tax liability, where there is no federal gift tax liability, is as follows: Gross Estate minus Estate Tax Deductions equals Taxable Estate times Estate Tax Rate equals Gross Estate Tax minus Estate Tax Credits equals Net Estate Tax.

The **gross estate** is, generally, all property, wherever located, in which a decedent owned a beneficial interest at the time of death. **Income in respect of a decedent** is any right to income that was accrued, but not yet received, as of the date of a decedent's death. If the settlor of a trust also serves as its trustee, the trust property is not included in the settlor's estate if the trustee is limited by an **ascertainable standard**, which is a standard capable of being determined by a third party. A **reciprocal trust** is one of two trusts that two taxpayers have agreed to create for each other.

The **reciprocal trust rule** is the doctrine that each settlor of a reciprocal trust should be treated as the settlor of the trust created for his or her benefit.

Under I.R.C. § 2038, a decedent's gross estate includes property transferred by the decedent for less than adequate and full consideration, if the decedent retained (or later acquired) in any capacity the right (to any extent, with any person) to alter, amend, revoke, or terminate the transfer. Thus, a revocable trust does not avoid estate taxes. An outright gift may be made causa mortis. In Latin, **causa mortis** means in contemplation of approaching death. Contemplation of approaching death is usually found when a person is, from *in extremity,* **in extremis**, meaning in extreme circumstances, at the end, or in anticipation of death. A **gift causa mortis** or **gift made in contemplation of death** is a gift that may be deemed to be a gift on condition that the donor dies as generally expected by the donor. As a gift on condition, a gift causa mortis may be a revocable transfer, revoked by the donor not dying in the generally expected manner, and so is included in the donor's estate under I.R.C. § 2038.

In tax law, a **life insurance trust**[2] is an irrevocable trust (to avoid inclusion under I.R.C. § 2038) of a life insurance policy on the settlor's life in which the settlor is not the trustee and does not retain any "incidents of ownership" (to avoid inclusion under I.R.C. § 2042). **Incidents of ownership** are rights like the rights of an owner such as the right to transfer property or change the ultimate beneficiary. From *yearly,* an **annuity** is fixed periodic payments for a length of time or for the life of the person paid. Under I.R.C. § 2039, a decedent's gross estate includes any annuity not deemed to be life insurance, payable to any beneficiary surviving the decedent.

Under I.R.C. § 2040, a decedent's gross estate includes the entire value of property held by the decedent and another in a joint tenancy with right of survivorship or in a joint bank account payable to the survivor. The **consideration furnished test** is the test to be met to avoid the entire value of nonspousal jointly owned property being included in a decedent's estate for federal estate tax purposes. It is also the law that a decedent's estate does not include that portion of the property proven by the decedent's personal representative to have been contributed by a surviving co-owner (and not indirectly by the decedent) as consideration, rather than as a gift to the decedent.

Under I.R.C. § 2041, a lapsed general power of appointment is included in a decedent's estate only to the extent that its value is greater than $5,000 or 5 percent of the aggregate value of the assets or proceeds out of which the exercise of the lapsed power could have been satisfied at the time of the lapse. A **$5,000 or 5 percent power** is a general power of appointment not subject to the federal estate tax.

A decedent's taxable estate is determined by subtracting the decedent's estate tax deductions from the decedent's gross estate. **Deductions in respect of a decedent** are expenses, interest, and taxes incurred, but not yet paid, as of the date of a decedent's death and which are deductible by a decedent's estate for federal estate tax purposes.

Under I.R.C. § 2055, a decedent's estate may deduct certain charitable gifts made during the decedent's life or by will. Wealthy people often make a gift to charity as part of a **split-interest gift**, which is a gift in which the same property is left to two or more beneficiaries such as a life estate followed by a remainder.

A **charitable lead trust** is a trust in which the settlor leaves an income interest to a charity and the remainder to a noncharitable beneficiary. To be deductible, an income interest must be a guaranteed annuity or a **unitrust**, a "unit" trust, which is a right to receive a fixed percentage of the annual fair market value of the property held in trust.

A **charitable remainder trust** is a trust in which the settlor leaves an income interest to a noncharitable beneficiary and the remainder to a charity. A **charitable remainder annuity trust** is a charitable remainder trust that pays a fixed income at least annually, not less than 5 percent of the trust's initial fair market value, to a noncharitable beneficiary, as described in I.R.C. § 664(d)(1). A **charitable remainder unitrust** is a

charitable remainder trust that pays a fixed percentage of income at least annually, not less than 5 percent of the trust's initial fair market value, to a noncharitable beneficiary, as described in I.R.C. § 664(d)(1). A **pooled income fund** is a charitable trust with multiple donors, as described in I.R.C. § 642(c)(5).

Under I.R.C. § 2056, there is a **marital deduction**, which is a provision permitting a decedent's estate to deduct all qualifying property that passes from the decedent to the surviving spouse if the surviving spouse is a citizen of the United States. The policy is to give the first spouse to die a pass and to heavily tax the surviving spouse. The only protection for the surviving spouse is the usual credit against the estate tax.

A **marital deduction trust** is a trust taking advantage of the marital deduction. The most common marital trust, an **A-B trust**, a **bypass trust**, a **credit-shelter trust**, or an **exemption equivalent trust** is a trust that reduces the estate tax on the surviving spouse by using the general credit against the estate tax. The A-B trust is actually two trusts: an irrevocable "A" trust providing income only to the surviving spouse for life, with the remainder to the children or others, and a tax-exempt "B" trust to the surviving spouse after the first spouse dies.

As a general rule and consistent with a policy of heavily taxing a surviving spouse, to be deductible, property passing to the surviving spouse must not be a **terminable interest**, which is an interest that will end upon the occurrence of a definite event. A terminable interest may nevertheless qualify for the marital deduction under I.R.C. § 2056(b)(5), which defines an exception, **qualified terminable interest property (QTIP)**, which is property passing from the decedent in which the surviving spouse has a qualifying income interest for life. A **qualifying income interest for life** is an interest in which the surviving spouse is unconditionally entitled to at least annual payments of all the income from the entire interest (or a specific portion) for life and no person has the power to appoint any part of the property to any person other than the surviving spouse until the surviving spouse's death.

If a surviving spouse is not a citizen of the United States, no marital deduction is allowed. However, under I.R.C. § 2056A, a taxpayer with a noncitizen spouse may make a **qualified domestic trust (QDOT)**, which is, generally, a trust in which at least one trustee is a U.S. citizen or domestic corporation and a noncitizen surviving spouse is entitled to all income, with the result that the income interest to the noncitizen surviving spouse is deductible from the decedent's gross estate.

The **taxable estate** is the gross estate minus estate tax deductions. Since 1976, federal estate tax rates and federal gift tax rates have been the same. The **unified transfer tax** is the combination of the federal estate tax and the federal gift tax such that estate tax rates and gift tax rates are identical. There is a **unified credit**, which is, under I.R.C. § 2010, the general credit taxpayers can take against gross estate taxes and gift taxes. The **state death tax credit** is, under I.R.C. § 2011, the estate tax credit permitted for any estate or estate-related taxes actually paid to any state of the United States, any possession of the United States, or the District of Columbia. A **pick-up tax** or **sponge tax** is a state death tax equivalent to the maximum federal state death tax credit.

Formula clauses are provisions designed to coordinate the unified credit and the marital deduction to take the maximum available unified credit and prevent overuse of the marital deduction. A **unified credit trust** is a trust with a formula or otherwise designed to take the maximum available unified credit to the federal estate tax.

Although estate planning is usually thought of as planning before a person's death, there is **postmortem estate planning**, which is estate planning by an executor or administrator to avoid or reduce estate taxes after the decedent's death. A common postmortem estate planning technique is for a donee to disclaim or refuse a gift from a decedent. Another common postmortem estate planning technique concerns the valuation of a decedent's estate. Ordinarily, a decedent's gross estate is valued at its

fair market value on the date of the decedent's death. However, an alternate valuation is permitted. **Alternate valuation** is, under I.R.C. § 2032, the election of an executor or administrator of a decedent's estate to value the decedent's gross estate as of the alternate valuation date. The **alternate valuation date** is, under I.R.C. § 2032, the date six months after a decedent's death or, if property is distributed, sold, or otherwise disposed of within six months, the date of distribution, sale, or other disposition. **Special use valuation** is, under I.R.C. § 2032A, valuing certain family farm and other closely held business real property at the value of its actual use rather than its fair market value.

GIFT TAX

A **gift tax** is a tax payable by a donor (or the donor's estate) on the privilege of transferring property to another during the donor's life, to the extent that each transfer is made for less than adequate and full consideration in money or money's worth. An easy way to avoid taxes is to give property away before death. Sophisticated estate planners often try to avoid or reduce federal estate taxes by making transfers before death. The federal gift tax applies only to inter vivos transfers. It does not apply to gifts in a **bona fide business transfer**, which is an arm's-length transaction without donative intent.

A donee may disclaim or refuse a gift from a donee. To avoid estate and gift taxation, a disclaimer must be a **qualified disclaimer**, which is, under I.R.C. § 2518, an irrevocable and unqualified refusal to accept any interest in property, which must be made in writing and without having accepted the interest or any of its benefits.

Many people are not aware that there is a federal gift tax because an exclusion usually applies. The **annual exclusion** is the exclusion under I.R.C. § 2503(b), which provides that the total amount of gifts made during a calendar year (as of 2006) does not include the first $12,000 of gifts, not of a future interest, made by a donor to each and every donee during that calendar year. **Gift splitting** or a **split gift** is the technique, permitted by I.R.C. § 2513, by which, during marriage, a spouse, with the consent of his or her spouse, may consent to join in a gift made by the spouse to a third party. As a result of gift splitting, spouses can join together to give each donee $24,000 per year, with no gift tax.

The annual exclusion applies to gifts made in trust if the gift is of a present interest such as a present right to receive income from the trust. A trust for a minor child is deemed a present interest if the trustee is to use the income for the support, education, and benefit of the minor child and the trust complies with I.R.C. § 2503(c). Note, however, that under I.R.C. § 671 et seq., if a trust lasts for 10 years or less, the income from the trust is taxed to the settlor. The taxation is avoided by a **short-term trust** or **Clifford trust**, which is a trust that provides income to a beneficiary for 10 years and a day (or more), followed by reversion to the settlor. The term "Clifford trust" comes from *Clifford v. Helvering,* 309 U.S. 331 (1940).

If the trustee has any powers that render uncertain a beneficiary's present right to receive income from the trust, the settlor is not entitled to the annual exclusion. If a beneficiary had the power to demand immediate possession of income or principal, however, the beneficiary is deemed to have a present interest despite provisions requiring the trustee to accumulate income or defer distribution of the principal. Thus, a common estate planning technique is to create a **demand trust** or **Crummey trust**, which is a trust in which the beneficiaries are given for a short period of time (and expected to lapse) an annual noncumulative power to demand $5,000 or 5 percent of the trust principal, with the result that the settlor is then eligible for the annual exclusion of a present interest and the $5,000 or 5 percent power is not deemed a gift by the beneficiary upon its lapse. **Crummey powers** are the powers given to beneficiaries in a Crummey trust, which are an annual noncumulative power to demand $5,000 or

5 percent of the trust principal. The terms "Crummey trust" and "Crummey powers" come from *Crummey v. Commissioner,* 397 F.2d 82 (9th Cir. 1968), and *Crummey v. Commissioner,* 526 F.2d 717 (9th Cir. 1979).

Note that one time in which it may not be to a taxpayer's advantage to give property outright is when it is **appreciated property**, which is property that has increased in value since it was acquired. Unlike an inter vivos transfer, the basis of property acquired by will or inheritance is stepped up for the donee to the fair market value of the property on the date of the decedent's death (or alternate valuation date). By waiting until the donor's death, the donee avoids paying the capital gains taxes that would have applied if the property were acquired inter vivos.

There are some credits against the gift tax. The **foreign gift tax credit** is, by tax treaty, a credit allowed for gift taxes actually paid to another country.

A **net gift** is a gift for which the donor requires the donee to pay any gift tax. For a net gift, the gift tax is deducted from the value of the gift. If a donee voluntarily pays the gift tax on a gift, the gift tax is not deducted from the value of the gift.

GENERATION-SKIPPING TAX

Because the overall effect of federal estate and gift taxes is to tax the transfer of family wealth at each generation, until 1985 wealthy people could avoid federal estate and gift taxes on an entire generation by leaving property in trust with the income paid to their children for life and the remainder distributed to their grandchildren. Congress closed the loophole in 1985 by enacting a generation-skipping tax. A **generation-skipping tax**, with the acronym **GST**, is a tax on the privilege of transferring property that bypasses a generation in a manner that generally avoids estate and gift taxes. A **generation-skipping transfer** is a transfer to a person two or more generations below the grantor.

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- **revocable inter vivos trust**
- **revocable living trust**
- **several**
- **severally**
- **severalty**
- **skip person**
- **spendthrift trust**
- **spray trust**
- **sprinkling trust**
- **successor trustee**
- **support trust**
- **trustee ad litem**

Chapter 21

Estate Administration

ESTATE ADMINISTRATION, GENERALLY

From *to serve,* **administration**[5] of an estate is the process of disposing of a decedent's estate. From *to prove,* **probate**[2] is a proceeding that permits a representative of the decedent to prove the existence of the decedent's will and transfer the decedent's property according to that will. **Probated** means brought to probate.

Probate court[1] is, in most states, the division of a state's courts with jurisdiction over the administration of decedents' estates. From *under-propose,* a **surrogate** is a person who acts for another. From *parentless,* an **orphan** is a child whose parents are dead. **Surrogate's court**[1] or **orphan's court**[1] is, in some states, the division of a state's courts with jurisdiction over the administration of decedent's estates.

THE DECEDENT'S FAMILY

From *bring forth,* a **natural parent** or **parent**[1] is a person who, with a person of the opposite sex, procreates a natural person, and is the mother or father of a child. A **mother** is a female parent. A **father** is a male parent. **Maternal** is of the mother. **Paternal** is of the father. From *offspring,* a **natural child** or **child**[1] is a human being born of particular parents. **Children** are human beings born of particular parents. A **daughter** is a person's female child. A **son** is a person's male child.

More often than not, after a female child becomes an adult, she becomes the mother of a child or children and, when a male child becomes an adult, he becomes the father of a child or children. These patterns have repeated for centuries such that every person has a long line of parents before them. From *down-climb,* **descent**[2] is parents having children. From *before go,* **ancestors** or, from *up-climb,* **ascendants** are a person's parents and their parents before them. An **ancestor** is your parent, your parent's parent, and so on, or a person from whom you are descended. Ancestors are described in terms of parentage. A **grandparent** is a parent of a parent.

Every person, if they have a child or children, may have a long line of children after them. **Descendants** are a person's children and their children after them. A **descendant** is your child, your child's child, and so on, or a person descended from you. Descendants are described in terms of children. A **grandchild** is a child of a child.

A person's parents and their parents before them, and a person's child or children and their children after them, are a person's **lineal relatives** because they are people related in a direct line of descent. From *rope,* a **line of descent** is all of the people who have descended one from the other from a common ancestor, arranged in order of birth. Because parents can have more than one child, children can be related

through a common ancestor to people in another line of descent. From *with* and *of the side,* **collateral relatives** are people of common ancestry but not in a common line of descent.

From *kinship,* a **sibling** is a child of a person's parents, other than the person. A **brother** is a male sibling. A **sister** is a female sibling. A **niece** is a female child of a sibling. A **nephew** is a male child of a sibling. A **grandniece** is a female child of a niece or nephew. A **grandnephew** is a male child of a niece or nephew.

From *father's sister,* an **aunt** is a female child of a person's grandparent who is not the person's parent, or the sister of a person's parent. From *mother's brother,* an **uncle** is a male child of a person's grandparent who is not the person's parent, or the brother of a person's parent. A **great-aunt** is a female child of a person's great-grandparent and a **great-uncle** is a male child of a person's great-grandparent.

From *together mother's sister's child,* a **cousin** is a grandchild or further descendant of a person's grandparent or further ascendant, other than the person; or a person with a common grandparent or further ascendant. A **first cousin** is a grandchild of a person's grandparent, other than the person; or a person with a common grandparent. A **second cousin** is a great-grandchild of a person's great-grandparent, other than the person; or a person with a common great-grandparent.

From *away-move,* **once removed**, separated by one generation, is a person one generation off of a standard cousin relationship. **Twice removed**, separated by two generations, is a person two generations off of a standard cousin relationship.

All people who trace their natural origin back to a common ancestor are that ancestor's **lineage**. Members of a lineage and all people who trace their natural origin back to a common ancestor are **blood relatives**. The relationship of people who trace their natural origin back to a common ancestor is **related by blood** or, from *together of blood,* **consanguinity**, measured in degrees. Each generation is one degree.

From *family* or *race,* **kin**, **kindred**, or **kinship** is a person's blood relatives, a larger group than a person's blood relatives, or a smaller group than a person's blood relatives. **Next of kin** is the nearest blood relative surviving a decedent or the nearest person of any kind surviving a decedent.

Most people are not closely related by blood. From *a relationship in canon law,* people related to a person's spouse are known as the person's **in-laws**. The relationship of a person to the person's spouse and people related to the person's spouse is **related by marriage** or, from *to border,* **affinity**.

A **mother-in-law** is the mother of a person's spouse. A **father-in-law** is the father of a person's spouse. A **daughter-in-law** is the spouse of a person's son. A **son-in-law** is the spouse of a person's daughter. A **sister-in-law** is a sister of a person's spouse. A **brother-in-law** is a brother of a person's spouse. Other in-laws are usually referred to by their relationship to a closer relative (for example, my mother-in-law's brother).

A **stepparent** is the previously unrelated person a child's parent marries. A **stepmother** is the previously unrelated woman a child's father marries. A **stepfather** is the previously unrelated man a child's mother marries. A **stepchild** is a previously unrelated person who is a child of a spouse. **Stepchildren** are the previously unrelated people who are the children of a spouse. A **stepdaughter** is a previously unrelated person who is a daughter of a spouse. A **stepson** is a previously unrelated person who is a son of a spouse. A **half sister** is a female child of a parent and a stepparent. A **half brother** is a male child of a parent and a stepparent. **Half blood** is the relationship of a person to a half-brother or half-sister, and people with only one common parent. **Whole blood** is the relationship of a person to a brother or sister, people with two common parents, and people with the same parents.

GUARDIANSHIP AND CONSERVATORSHIP

Estate planning and administration often involves a person's ability or lack of ability to care for him- or herself or to manage his or her own property and the appointment of a person to care for another person or that person's property.

From *of his own right,* **sui juris** means of those having legal control over themselves and their property, and so able to act on their own behalf. Be careful to distinguish the term from **sui generis**, which, from *of its own kind or class,* means one of kind or in a class by itself. From *suitable,* a **competent**[1], a person with legal capacity or ability to act, is a person who is able to protect or care for him- or herself or his or her property. **Legal capacity**[1] is, generally, having the legal ability (to do something). From *not suitable,* an **incompetent**[1], a person without legal capacity or ability to act or do, is a person who is unable to protect or care for him- or herself or his or her property because of age, mental or physical incapacity, or other similar disability. **Incompetency** is the status of being incompetent.

A person is usually incompetent because of the person's youth or incapacity. From *contain,* **capacity**[1] or, from *have,* **ability** is having power or having required qualifications. From *not contain,* **incapacity**[1] or, from *not have,* **disability** is lacking power or lacking required qualifications.

From *protection,* **guardianship** and, from *intense keep,* **conservatorship**, are the law that permits court appointment of a competent person to protect and care for an incompetent, to manage the incompetent's property, or both. From *protector,* a **guardian**, a person legally responsible for the protection and care of another, is, in most states, a person court appointed to protect and care for an incompetent and to manage the incompetent's property and, in some states, a person court appointed to protect and care for a minor child and his or her property. From *keeper,* a **conservator** is, in most states, a person or entity with special expertise, court appointed to manage specific property such as a business or, in some states, a person court appointed to protect and care for an adult incompetent and to manage his or her property or a person with special expertise appointed to manage specific property.

In most states, during a child's gestation, each of the child's natural parents becomes a natural guardian of the child. A **natural guardian** is a minor child's natural parent, with inherent authority and responsibility to protect and care for the minor child. When a guardian is not the natural or adoptive parent of the minor child, the guardianship is usually supervised by a probate court. **Letters of guardianship**, a collective term, is the probate court instrument decreeing a person's authority to serve as a guardian.

From *guard* and *watch,* a **ward**[2] is a minor or incompetent person for whom a guardian is appointed. A guardian of a ward's property is considered to be a **fiduciary**, which is, from *trusted,* a trusted legal representative and a person who acts primarily for the benefit of another, upon whom the law imposes special duties of care, confidence, trust, and good faith. As a fiduciary, the guardian may be required to post with the probate court a **fiduciary bond** or **bond**[2], which is a sum of money, or the proceeds of an insurance policy that may be paid to the court and used to reimburse a protected person should that person's fiduciary fail to perform his or her duties faithfully.

A **general guardian** is a guardian protecting and caring for both a ward and the ward's property. A **guardian of the person** is a person court appointed solely to protect and care for a ward, and not the ward's property. A **guardian of the estate** or **guardian of the property** is a person or entity court appointed solely to manage a ward's property, and not the ward's person. From Latin *for the suit,* **ad litem** is for a lawsuit or during a lawsuit. A **guardian ad litem** is a person court appointed to protect the

interests of another involved in a lawsuit and unable to protect him- or herself. A **next friend** is a competent person not a guardian who, out of friendship, protects and cares for an incompetent and a competent adult who as a party files a lawsuit on behalf of a minor.

Guardianship of an adult may be required because the adult has one of the many illnesses associated with old age; suffers from severe physical illness; is mentally ill or mentally retarded; is incarcerated, bedridden, or otherwise unable to get around; is addicted to alcohol or other drugs; or is a **spendthrift**, which is, from *(not) expend economically,* a person who, by gambling, drinking, or other debauchery, spends excessive amounts of money improvidently, wasting away his or her estate.

Unlike ordinary guardianship, **civil commitment** or **commitment**[1] is noncriminal confinement, generally necessary when people are severely mentally ill to the degree that they are a danger to themselves or others. The result is that a person is sent to a state mental institution. A **ward of the state** is a person in the temporary custody of the state pending appointment of a guardian or a person confined to a state mental institution, where in essence the institution has become the person's guardian.

THE DISPOSITION OF DEAD BODIES

Like living human beings, the dead bodies of human beings are not property, and so are not disposed of according to a statute of descent and distribution. However, a dead body is usually considered **quasi-property**, like property but not actual property, for which certain rights and privileges apply. Accordingly, a person may leave directions regarding the disposition of his or her body in a will, in another writing, or in some other way and those directions will be followed if possible and not against public policy. Otherwise, a dead body is usually disposed of by local custom or as required or permitted by law.

In most states, a person is not officially dead until pronounced dead by a doctor. The doctor usually signs a **death certificate**, which is a document officially indicating that a person has died and noting the cause of death. If a person dies unexpectedly, suddenly, or violently, a public official will have the right to investigate the death. From *crown officer,* a **coroner**, or a **medical examiner**, is a public official, ideally an expert in forensic medicine, who has a right to investigate and perform an autopsy on a decedent's body to determine the cause of death, especially if the decedent died unexpectedly, suddenly, or violently. From *with one's own eyes seeing,* an **autopsy** or, from *after death,* a **postmortem examination**, is the dissection of a dead body as necessary to determine the cause of death. From *inquiry,* an **inquest** is a formal judicial inquiry by a coroner or medical examiner to determine the cause of a decedent's death.

The disposition of a decedent's body is often left to the decedent's next of kin. If there is disagreement (for example, two "wives" appear at the funeral home) or if no one steps forward, the probate court, sitting as a court of equity, decides what will be done.

The traditional customary disposition is **burial**, which is disposition of a dead body by placing the dead body in a casket or covering and covering it with earth, allowing natural decomposition. **Burial at sea** is disposition of a dead body by placing it in a covering and casting it into the sea. An increasingly common customary disposition is **cremation**, which is disposition of a dead body by fire, thereby reducing it to ashes mostly composed of bone material. **Donation to science** or **donation to medical science** is disposition of a dead body by giving it for use by medical

students or other scientists in their studies. An **anatomical gift** is a donation of all or part of a dead body.

FORMAL ESTATE ADMINISTRATION

After dealing with the shock of learning about a person's death, and if there is access to the decedent's possessions, an immediate search should be made for the decedent's will, if any, and for any other significant legal documents. From *found,* a quick informal **inventory**, an itemized list of property, also should be made. Otherwise, administration of the estate can usually be postponed until after the funeral or other disposition of the decedent's body, unless the decedent was operating a business.

In any event, the first must-have document to administer an estate is the death certificate. A **provisional death certificate** is a death certificate permitting disposition of the dead body. A **final death certificate** is a death certificate that indicates the cause of the decedent's death and the final disposition of the decedent's body.

The decedent's will and codicils, if any, must be brought to the local probate court. If necessary, a probate court may issue, from *reference to authority,* a **citation**[1], a court order to perform an act, requiring any person in possession of a decedent's will or codicil to bring it in. **Admitted to probate** means initially examined, proved, and validated as a final genuine expression of the decedent's testamentary intent. From *put forward,* a **proponent** is a person who seeks to have a will admitted to probate. From *request,* a **petition for probate** is an application to admit a will to probate.

An application to administer the estate is made. Traditionally, from *complete,* an **executor**[1] is a male who a testator or testatrix has named or nominated to take charge of, manage, and settle the testator's or testatrix's estate. An **executrix** is a female who a testator or testatrix has named or nominated to take charge of, manage, and settle the testator's or testatrix's estate. Today, an **executor**[2] or a **personal representative**[2] of a testator's estate is a person (male or female) who a testator (male or female) has named or nominated to take charge of, manage, and settle the testator's estate.

From *up-go,* a **successor** is a person or entity that takes the place of another and continues in that other's position or role. A **successor executor** or **successor personal representative** is a person who a testator has named or nominated to take charge of, manage, and settle the testator's estate if the executor or personal representative is unable or fails to do so, or an executor who follows a prior executor.

Where a decedent dies intestate, an **administrator**[1] is, traditionally, a male appointed to take charge of, manage, and settle a decedent's estate. An **administratrix** is a female appointed to take charge of, manage, and settle a decedent's estate. Today, an **administrator**[2] or a **personal representative**[1] of a decedent's estate is a person (male or female) appointed to take charge of, manage, and settle a decedent's estate.

A **successor administrator** is an administrator who follows a prior administrator. A **special administrator** is a temporary administrator appointed to serve until a regular executor or administrator can be appointed, particularly where there are legal matters that must be attended to immediately after a decedent's death.

From *executor of his own wrong,* an **executor de son tort** is a person who wrongfully acts as an executor or administrator without authority to do so.

A person appointed by a probate court to administer a decedent's estate usually receives a court instrument decreeing that authority. **Letters testamentary**, a collective term, is the probate court instrument decreeing a person's authority to serve as an executor and administer the testator's estate. **Letters of administration**, a collective term, is the probate court instrument decreeing a person's authority to serve as an administrator and administer the decedent's estate. **Letters of authority**, a collective term, is letters testamentary, letters of administration, or letters of guardianship.

A **bond**[1] is, generally, a written promise to pay money to assure the performance of an act or duty, or an insurance policy. As a general rule, executors, administrators, and guardians are required to post a bond to assure the performance of their duties and protect the estate from theft. Unless required by the probate court, an executor does not have to post a bond if the testator has waived that requirement in the testator's will.

The **reading of the will** was the custom, in the late 1800s and early 1900s, of having the executor's attorney call the testator's beneficiaries and potential heirs together and read the testator's will to them. The custom no longer exists in most states.

The first major duty of an officially appointed executor or administrator is to make a complete and detailed inventory of the decedent's estate and, as necessary, have it appraised. An **estate tax waiver** or **consent to transfer** is a document indicating that the state department of taxation has been notified that an executor or administrator has taken possession of certain property of the decedent. Those who claim that the decedent's estate owes them money or other property must make a claim against the estate. A **creditor's claim** is a claim by a creditor of a decedent against the decedent's estate. A **statute of nonclaim** is a statute of limitations for the making of claims against a decedent's estate after administration of the estate has begun or after the decedent's death.

The transfer of real property usually requires probate court approval. A **certificate of transfer** is an approved administration instrument, essentially equivalent to a deed, that officially transfers ownership of a decedent's property to a beneficiary, heir, or purchaser. An executor or administrator has a duty to account for all money and other property acquired and disbursed on behalf of the decedent's estate. A formal inventory is required. As necessary or required, appraisals of the decedent's property will be made.

Most states require a **final accounting**, which is an accounting required to be filed in the probate court when administration of a decedent's estate is completed. An **interim accounting** or **partial accounting** is each periodic accounting (usually once a year, or as otherwise ordered by the probate court) required to be filed with the probate court until the administration of a decedent's estate is completed. A **first and final accounting** is the one accounting required when no interim accounting or partial accounting was required. (In Alabama, an accounting is not required if it is waived in the decedent's will.)

The administration of a decedent's estate may include probate-related lawsuits. A **will contest** is a lawsuit to challenge the validity of a will or codicil. Where a decedent dies testate, a **will construction action** is a lawsuit to interpret and construe a will or codicil. Where a decedent dies intestate, a **determination of heirship action** is a lawsuit to determine who should inherit an intestate's estate. At common law, personal tort actions were held not to survive the death of the victim. Today, all states have statutes allowing most personal tort actions to survive. Defamation is a notable exception.

A **wrongful death action** is a lawsuit alleging that a defendant's tort was the cause of a plaintiff's death, brought by the plaintiff's legal representative. A **legal representative**[1] is, generally, a person's executor, administrator, guardian, attorney, or equivalent representative. In a wrongful death action, a **legal representative**[2] is an executor, administrator, or family member of a decedent who is entitled to file a wrongful death action. The court must approve any out-of-court settlement of the action.

Ordinarily, a decedent's estate is administered in the state and local probate court jurisdiction in which the decedent was domiciled. From *house dwell,* a person's **domicile** is the place to which, when a person is away, the person intends to return. **Domiciliary administration** is administration of a decedent's property where the decedent was domiciled. However, a decedent may own real property in another jurisdiction. From

around attend to, **ancillary** means secondary, supplemental, or in aid of what is primary. **Ancillary administration** is administration of a decedent's real property located in a jurisdiction other than that in which the decedent was domiciled. An **ancillary administrator** is a person appointed to manage an ancillary administration.

Closing the estate or **closing**[2] (estate) is the last steps in the formal administration of a decedent's estate, generally including distribution of the net estate to beneficiaries or heirs, followed by probate court approval of attorneys' fees, executor's or administrator's fees (if any), and the executor's or administrator's final accounting.

INFORMAL ESTATE ADMINISTRATION

Formal administration of a decedent's estate usually requires the filing of numerous documents with the probate court, the IRS, and the appropriate state or local tax department. Hearings and lawsuits may be involved. As a result, formal administration may be expensive and time-consuming. However, formal administration is not always required. An estate is often relatively small and uncomplicated; not subject to federal, state, or local taxes; and not expected to be involved in a probate-related lawsuit.

Informal administration, **release from administration**, **summary administration**, or **small estate settlement** is a simplified procedure for administering a decedent's relatively small and uncomplicated estate. In an informal administration, generally, the probate court appoints a person to attend to the relatively few matters to be done and then file a simplified final accounting when everything is done.

To avoid the delay, expense, and publicity associated with probate court, some people **avoid probate**, which means to avoid administration of a decedent's estate in probate court. This can be achieved by converting all or almost all of a person's probate property, transferred after death, to nonprobate property, transferred at death. Modern plans to avoid probate, usually involving the use of a living trust, recognize that it may be impossible, at a given moment, to convert some property to nonprobate property. Accordingly, modern plans to avoid probate usually include a **back-up will**, which is a will designed to dispose of any property inadvertently not included in a living trust or other document used to avoid probate.

THE FIDUCIARY DUTIES OF ADMINISTRATORS, EXECUTORS, GUARDIANS, AND TRUSTEES

From *trusted,* a **fiduciary** is a trusted legal representative and a person who acts primarily for the benefit of another, upon whom the law imposes special duties of care, confidence, trust, and good faith. A **fiduciary duty** is a duty imposed on a trusted legal representative or a duty imposed on a person who acts primarily for the benefit of another. A **fiduciary capacity** is a position in which a person is required to act as a fiduciary. A **fiduciary relationship** is a relationship in which one party is required to act as a fiduciary.

The **duty of care**[1] is the special duty imposed on a fiduciary to exercise reasonable care and skill. Fiduciaries are usually selected for their personal qualities. As a result, a fiduciary should delegate only ministerial acts. From *of a servant,* a **ministerial act** is an act to be performed in a prescribed manner and an act that does not involve discretion or judgment. A fiduciary has a duty to take possession of the **fiduciary estate**, which is money and other property to be managed on behalf of another by a fiduciary. A **fiduciary deed** is a deed in which the grantor is a fiduciary.

The **duty to account** is the special duty imposed on a fiduciary to keep accurate records of money and other property managed on behalf of another. In the sense of a fiduciary, from *to count,* an **accounting**[1] is a report of all items of property, receipts,

and disbursements prepared by the person responsible for managing those properties, receipts, and disbursements. A **fiduciary bank account** is a bank account in which the fiduciary's fiduciary relationship is clearly indicated.

From *to clothe,* the **duty to invest** is the special duty imposed on a fiduciary to make the fiduciary estate productive. From *foresight,* the **prudent investor rule** or **prudent person rule** is the rule that a fiduciary may invest the fiduciary estate only in investments that have a reasonable probability of providing a good return of income while preserving the principal. An **approved list** or **legal list** is a statute that enumerates the kind of investments that a fiduciary may make with a fiduciary estate. In managing a fiduciary estate, a fiduciary must avoid **speculative investments**, which are, from *(not) careful thought,* investments in which there is a significant possibility that all or a substantial portion of the investment will be lost.

From *faithful* and *legal,* the **duty of loyalty** or **duty to avoid self-dealing** is the special duty imposed on a fiduciary to act solely for the benefit of the fiduciary estate. **Self-dealing** is taking advantage of your position as a fiduciary for your own benefit rather than for the benefit of the fiduciary estate. Self-dealing is often the result of a **conflict of interest**, which is an incompatible set of personal and professional interests, or a situation, actual or potential, in which a person cannot fulfill a duty without violating another. A **fiduciary's fee** or **commission**[2] is compensation to which a fiduciary is entitled for loyal services, often based on a percentage of the principal or income, or both, of the fiduciary estate.

GO TO THE NET

Visit the *Legal Terminology Explained* Online Learning Center at http://www.mhhe.com/nolfi09 for an expanded index and glossary, including:

- **administration in chief**
- **administrator ad litem**
- **administrator cum testamento anexo**
- **administrator c.t.a.**
- **administrator de bonis non**
- **administrator d.b.n.**
- **administrator de bonis non cum testamento annexo**
- **administrator d.b.n.c.t.a.**
- **administrator pendente lite**
- **administrator with will annexed**
- **administrator w.w.a.**
- **administratrix cum testamento annexo**
- **administratrix c.t.a.**
- **administratrix de bonis non**
- **administratrix d.b.n.**
- **administratrix with will annexed**
- **administratrix w.w.a.**
- **antemortem probate**
- **compos mentis**
- **cum testamento annexo**
- **de bonis non**
- **died without issue**
- **earmarked**
- **earmarking**
- **exception to the inventory**
- **failure of issue**
- **great-grandchild**
- **great-grandnephew**
- **great grandniece**
- **great-grandparent**
- **in litem**
- **issue**
- **legal disability**
- **mental ability**
- **mental capacity**
- **natural person**
- **non compos mentis**
- **non sui juris**
- **physical ability**
- **physical capacity**
- **primary administration**
- **probate code**
- **public administrator**
- **special guardian**
- **tutor**
- **tutrix**
- **Uniform Probate Code**
- **UPC**
- **voluntary administrator**
- **want of issue**
- **ward's estate**
- **wardship**

Chapter 22

Taxation

TAXATION, GENERALLY

From *touching,* **taxation** is the law about the taking of property for public finance and indirect payment for public services. From *portion,* a **share**[1] is, generally, a fair or legal portion. From *out-drive,* an **exaction** is a contribution demanded with severe consequences or the threat of severe consequences. From *a touch,* a **tax**, an exaction of money by the government, is a governmental right to demand or take a share of the property of a person or entity for the general support of the government. Although a tax is usually discussed as a matter of government, its practical effect is to turn the value of some of the taxpayer's property into the property of the government, and so taxation is discussed here as a matter of property law. **Taxable** means subject to a tax. From *out-take,* **tax-exempt** means not subject to a tax. A **taxpayer** is a person or entity that is potentially liable for a tax, a person or entity that is liable for a tax, or a person or entity that pays a tax.

A tax is distinct from a **user fee**, which is a governmental right to demand or take a share of the property of a specific person or entity to pay for a specific product or service provided to the person or entity. Examples include paying for copies of public records and paying for admission to a national or state park.

From *to raise,* to **levy**[1] (assess, the verb) is to impose a tax or to assess a tax. A **levy**[2] (assess, the noun) is an imposed tax or an assessed tax. From *to sit* (and judge), to **assess**[1] is, generally, to determine or estimate the value of something. In tax law, to **assess**[2] is to determine or estimate the value of something and declare or fix the amount of tax on it. An **assessment** is a determination or estimation of the value of something, a determination or estimation of the value of something and a declaration or fixing of the amount of tax on it, or an imposition of property tax based on the value of the property to be taxed. An **assessor** is a public official who makes an assessment.

From *amount,* the **tax rate**[1] is, generally, the tax as a part or percentage of the amount being taxed. From *forward step,* a **progressive tax** is a tax in which the tax rate increases as the amount being taxed increases. From *backward step,* a **regressive tax** is a tax in which the tax rate decreases as the amount being taxed increases.

From *to empty,* **tax avoidance** is the legal arranging of affairs to keep taxes as low as possible or the low payment or nonpayment of taxes without fraud or refusing to pay. From *away-go,* **tax evasion** is the illegal arranging of affairs to keep taxes as low as possible, the fraudulent or willful low payment or nonpayment of taxes, or the crime of fraudulent or willful low payment or nonpayment of taxes.

TYPES OF TAXES

This chapter focuses on federal taxes. Frequent reference is made to the **Internal Revenue Code** (**I.R.C.**), which is the collection of federal tax statutes in Title 26 of the United States Code. The **Internal Revenue Service** (**IRS**) is the federal executive department of the U.S. Department of the Treasury that enforces federal tax law and the federal agency that collects most federal taxes. A state agency that collects most state taxes is usually known, from *back-come,* as a **revenue service**, a **department of revenue**, or a **department of taxation**.

A **direct tax** is a tax on property or income. From *special,* a **property tax** is a tax on the ownership of property, especially a tax on the ownership of real property. **Ad valorem** means according to the value. A property tax is usually an **ad valorem tax** or **value-added tax**, which is a tax according to the value of the property. From *to beat,* an **abatement of taxes** is a decrease or reduction in the tax assessed or paid, or a tax rebate.

From *booty,* **gain** is any kind of increase. From *in come,* **income**[2] is financial gain, economic benefit, or value received. From *death,* **financial loss** or **loss**[1] is financial deficit, economic detriment, or value departed with. An **income tax** is a tax on personal or business financial gain in excess of financial loss or a tax on net income. From *remaining after deductions,* **net income**[1] is, generally, the amount of financial gain in excess of loss. **Net loss** is the amount of financial loss in excess of financial gain. From *freedom,* a **franchise tax** is a state tax imposed on a corporation, which may be either a tax on the net worth of a corporation in the state, like a property tax, or a tax on the net income of a corporation for activity in the state, like an income tax.

From *out-cut,* an **excise tax** or **indirect tax** is a tax on the right to do something. From *sell,* a **sales tax** is a tax on the purchase of items not for resale. From *over tax,* a **surtax** is an additional tax on something already taxed.

A **death tax** is an estate or estate-related tax, especially an inheritance tax or an estate tax. An **inheritance tax** is a tax payable by a donee on the privilege of receiving property from a decedent at or after the decedent's death. An **estate tax** is a tax payable by a decedent's estate on the privilege of transferring property to another at or after the decedent's death. A **gift tax** is a tax payable by a donor (or the donor's estate) on the privilege of transferring property to another during the donor's life, to the extent that each transfer is made for less than adequate and full consideration in money or money's worth. A **generation-skipping tax** (**GST**) is a tax on the privilege of transferring property that bypasses a generation in a manner that generally avoids estate and gift taxes.

INCOME TAX, GENERALLY

Income tax is usually imposed for a **taxable year**, which is a 12-month period for which an income tax is calculated. A **calendar year** is the 12-month period from January 1 to December 31. From *treasury,* a **fiscal year** is any 12-month period used by a business or government as its fundamental accounting period. No longer generally permitted, **income averaging** was, from *mean distribution,* the spreading of income in one year over several years. From *form,* the **tax formula** is the basic computation of income tax, which is Gross Income minus Exclusions, plus or minus Adjustments, equals Adjusted Gross Income, minus Standard Deduction or Itemized Deductions, minus Exemptions, equals Taxable Income, times Tax Rate, equals Tentative Tax, minus Tax Credits, minus Tax Payments, equals Tax Due or Refund Due.

INCOME FOR INCOME TAX

From *large,* **gross** is all, without exception or excuse, or from whatever source derived. **Gross income** is all financial gain from whatever source derived. In tax law, from *out-close,* an **exclusion**[2], an exception from taxation, is a subtraction from gross income, for a financial gain by exception not subject to tax. From *to next,* **adjusted gross income** is gross income minus exclusions, plus or minus adjustments.

Claim of right is the doctrine that a taxpayer must include in gross income all amounts to which the taxpayer claims to be entitled. The taxpayer can later deduct amounts that must be paid back or amounts that were never received. **Assignment of income** is the doctrine that a taxpayer cannot have the taxpayer's income paid to another so that the other person is taxed (at a lower rate). **Constructive receipt of income** is the doctrine that a taxpayer must include as income amounts not actually received, where those amounts are made available to the taxpayer without a substantial condition or restriction on the taxpayer.

From *real existence,* **realization** is the occurrence of a transaction or event sufficient to mark a substantial change in a taxpayer's economic condition and the occurrence of a transaction or event upon which a tax may be imposed. From *event knowledge,* **recognition** is the imposition of a tax upon the occurrence of a transaction or event sufficient to mark a substantial change in a taxpayer's economic condition.

The presumed accounting method and the most common accounting method, the **cash method**, is the accounting method in which something is income when it is actually or constructively received and something is a deduction when it is actually paid. The most common alternative accounting method, the accounting method often used by businesses with a large inventory, is the **accrual method**, the accounting method in which something is income when all events have occurred to fix the right to receive it and something is a deduction when all events have occurred to fix the obligation.

From *get a reward,* to **earn** is to gain by merit, to gain by labor or service, or to gain not by position or status. **Earned income** is financial gain by merit, financial gain by labor or service, or gained not by position or status.

From *to grow,* to **accrue** is to accumulate, to augment, or to come into existence. **Accrued income** is income accumulated but not yet claimed. From *apart carried,* **deferred** is put off to a later time. **Deferred income** or **deferred compensation**[2] is earned income for which tax payment is put off to a later time, especially when the income or taxes will be lower.

From *salt allowance,* a **salary** is an amount earned for taking care of agreed responsibilities, an amount earned for professional or related services, or an amount earned on a yearly basis. From *pledge,* a **wage** is an amount earned by the time worked or quantity produced or an amount earned on an hourly basis. From *entrusted,* a **commission**[3] is a wage earned in an amount based on a percentage of what is done or achieved. A **W-2 Wage and Tax Statement** or **W-2** is the federal tax form on which an employer reports the employee's salary or wages and the amount of tax withheld and turned over to the IRS.

From *margin,* **fringe benefits** are, generally, benefits of employment other than salary or wages that are generally excluded from income for income tax purposes.

For business transactions, financial gain or loss is realized and determined by calculating the difference between the cost of property when it is acquired and the cost of property when it is sold or exchanged. A **sale or exchange** is a disposition of property for its value for something else of value. A **like-kind exchange** is a disposition of property for its value by something similarly of value. From *foundation,* **tax basis** or **basis** is the acquisition value of property for the purpose of calculating financial gain or loss, which is the cost of property when it was acquired or an alternate acquisition

value permitted or required by law. **Carryover basis**, the basis for property acquired by inter vivos gift, is the basis of the person from whom the property was acquired. **Step-up basis** or **stepped-up basis**, the basis for property acquired by testamentary gift or inheritance, is the designated increase in basis, which is fair market value for property acquired by testamentary gift or inheritance. **Substituted basis**, the basis for a like-kind exchange, is the replacement of the basis of the property disposed of with the basis of the property acquired. From *to next,* **adjusted** is corrected or aligned with some standard. **Adjusted basis** is the basis of property plus or minus corrections, such as an addition for a capital expenditure and a subtraction of casualty losses and depreciation.

From *head,* **capital**[1] is, generally, money or other property used for the creation of more wealth. A **capital asset** is property with a long life, except business real property, depreciable property, and inventory. **Capital gain** is gain from the sale or exchange of a capital asset. **Ordinary income** is gain other than capital gain. **Short-term capital gain** is gain from the sale or exchange of a capital asset held for less than one year. **Long-term capital gain** is gain from the sale or exchange of a capital asset held for one year or more and special income that may be subject to a lower tax rate in order to encourage investment. **Capital loss** is loss from the sale or exchange of a capital asset and an amount that reduces the amount of capital gain. **Short-term capital loss** is loss from the sale or exchange of a capital asset held for less than one year. **Long-term capital loss** is loss from the sale or exchange of a capital asset held for one year or more. A **capital gains tax** is a special tax on net long-term capital gain, historically at a lower rate than the tax on ordinary income in order to encourage investment.

INCOME TAX DEDUCTIONS

From *down lead* or *subtract,* a **deduction**[1] is, generally, the taking away of something from something else. (In reasoning, a deduction is making a conclusion from premises.) A **tax deduction** or a **deduction**[2] is a subtraction from adjusted gross income for a tax-rate reduction in tax due, any offset against income, or a takeaway from income. In tax law, **deductible**[1] means capable of subtraction from adjusted gross income for a tax-rate reduction in tax due, capable of being offset against income, or taken away from income.

Carryforward or **carryover** is the use in a future taxable year of deductions or credits that cannot be used to reduce tax liability in the current taxable year. **Carryback** is the use in a past taxable year of deductions or credits that cannot be used to reduce tax liability in the current taxable year. The **tax benefit doctrine** is the doctrine that gross income includes an amount deducted in an earlier taxable year but recovered in a later taxable year, if the deduction in the earlier taxable year resulted in a reduction in tax.

From *item,* to **itemize** is to list or specify something. An **itemized deduction** is a deduction listed or specified by the taxpayer. The **standard deduction** is the default deduction when deductions are not listed or specified by the taxpayer. From *out-pay,* an **expense**[1] (the noun) is, generally, a cost that is fully deductible in the current taxable year. To **expense**[2] (the verb) is, generally, to fully deduct a cost in the current taxable year.

From *track* or *busy,* a **trade or business expense** is a deduction for an ordinary and necessary expense incurred in a trade or business for profit. Unlike a trade or business expense, a **hobby loss** is, from *small horse,* a loss incurred in an activity not engaged in for profit and deductible only to the extent of hobby income. From *misfortune,* a **casualty loss** is a deduction for a loss caused by a sudden, unexpected, or unusual event (such as a fire, storm, theft, or wreck) and not reimbursed by insurance.

A **moving expense** is a deduction for a cost directly related to moving the taxpayer's residence to another sufficiently distant location. A **personal expense** is a family or living cost generally not deductible. A **medical expense** is, generally, an itemized deduction for money actually expended and not reimbursed by insurance, for the diagnosis or treatment of any disease or physical condition affecting a living human body, or for related transportation. From *kindness,* to be **charitable** is to benefit, improve, or uplift society as a whole. A **charitable contribution** is, generally, an itemized deduction for a gift for a charitable purpose.

Unlike an expense, a **capital expenditure** is an expenditure on property that extends the useful life of property beyond the taxable year. Costs not fully deductible in the current taxable year may be depreciated.

From *to price,* to **appreciate** is to be aware of something's value or to gradually or incrementally increase in value. **Appreciation** is awareness of something's value or a gradual or incremental increase in value such as the circumstance of having a fair market value greater than the cost or basis of the property. Appreciation is realized upon a taxable transaction or event. From *down price,* to **depreciate** is to gradually or incrementally decrease in value or to deduct the decrease in the value of an asset due to its consumption, deterioration, or obsolescence. **Depreciation** is a gradual or incremental decrease in value, and a deduction representing the decrease in value of an asset due to its consumption, deterioration, or obsolescence. Consumption here includes exhaustion or use. Deterioration here includes wear and tear. From *fall into nonuse,* **obsolescence** is the process of becoming useless due to advances in technology or society or, simply, the process of becoming out-of-date. From *save from wreck,* **salvage value** is the value or estimated value of property remaining after its consumption, deterioration, obsolescence, or use. **Useful life** is an estimate of the duration of an asset's usefulness to the taxpayer.

Traditionally, in depreciation of an asset, the cost or other basis, less its salvage value, is spread over the asset's useful life. Through annual depreciation charges, the cost is recovered. The theory is that at the end of the asset's useful life, the accumulated depreciation amounts plus salvage value will equal the original cost or other basis.

From *to death,* to **amortize** or to **depreciate straight-line** is to gradually pay a cost or debt by making equal and regular payments or deductions until the cost or debt is paid or to depreciate an intangible asset. **Amortization** or **straight-line depreciation** is the gradual payment of a cost or debt by making equal and regular payments or deductions until the cost or debt is paid, or the depreciation of an intangible asset.

From *to quicken,* **accelerated depreciation** is any method of depreciation that allows larger deductions in earlier years than in straight-line depreciation or any method of depreciation that allows depreciation faster than the asset's useful life. The **Accelerated Cost Recovery System**, with the acronym **ACRS**, is a series of accelerated depreciation methods permitted under federal tax law beginning in 1981. ACRS methods apply without regard to salvage value. From *off fill,* **depletion** is the consumption or exhaustion of a natural resource. A **depletion allowance** is a deduction for an asset subject to depletion such as a mineral, natural gas, oil, or timber.

A **tax shelter** is an investment or transaction designed to give current tax deductions or credits to the investor and trader, and so avoid or defer the payment of taxes. As a general rule, a tax shelter is illegal if the investor or trader's activity is not **at risk**, meaning subject to personal liability for the debts or loss.

From *out-take,* a **tax exemption** or **exemption**[1] is a subtraction from adjusted gross income for having supported a person and a subtraction from adjusted gross income due to age over 65 or blindness. A taxpayer gets an exemption for him- or herself, for his or her age over 65 or blindness, and for each of the taxpayer's dependents, if any. From *from hang,* a **dependent** is, generally, a person who depends upon another for

at least half of the person's financial support for the taxable year and a person for whom a taxpayer can claim an exemption.

TAXABLE INCOME, TAX RATE, AND TENTATIVE TAX

Taxable income or **net income**[2] is adjusted gross income minus deductions and exemptions, and financial gain against which the government demands or takes its share for the general support of the government. In income tax, the **tax rate**[2] is the tax as a part or percentage of taxable income. **Filing status** is the social status of the taxpayer such as single, married, or head of household, identifying the tax rate applied. **Head of household** is the filing status of an unmarried taxpayer, not a surviving spouse, who maintains a home for certain dependents. The **tentative tax** is the result of the application of the tax rate to taxable income and the government's basic demand for the general support of the government. A **tax table** is a set of approved computations of the tentative tax for a given taxable income.

CREDITS AND TAX OR REFUND DUE

From *entrust,* a **tax credit** or **credit**[1] is a subtraction from tentative tax for a dollar-for-dollar reduction in tax due. A **joint credit** is a credit obtained and shared with someone else. An **earned income credit** is a tax credit for low-income workers with dependents, which usually results in a return of most of the tax paid. The **total tax** is the tentative tax after subtraction of tax credits and after addition of any taxes to be collected at the same time. A **tax payment** is any payment toward tax liability, especially any payment toward tax liability before the final computation of the tax.

Withholding is collecting a debt before or as due. For employees, the federal income tax is, in part, a **withholding tax**, which is a tax that is withheld from a payment of income. Employers are required to withhold a portion of their employees' salary or wages and turn over the amount withheld to the IRS. The amount withheld is deemed a tax payment. A **W-4 form** is the federal tax form used by a taxpayer to indicate the number of exemptions the taxpayer claims so the taxpayer's employer can determine the amount of the taxpayer's salary or wages that should be withheld.

Self-employment is earning income without an employer. Self-employed taxpayers are not subject to withholding but generally are required to pay **estimated tax**, which is the payment of a substantial portion of expected income tax before due, usually in quarterly payments, based on the amount expected to be due for the taxable year. **Estimated tax payments** are the required quarterly payments of an estimated tax. A **declaration of estimated tax** is a taxpayer's formal estimate of the taxpayer's estimated tax, usually accompanied by the taxpayer's first payment.

From *owed,* the **tax due**, if any, is the excess of total tax over tax payments, requiring the taxpayer to make a payment for the difference, and the government's share of a person's property, after any payments already made, for the general support of the government. From *back-pour,* a **refund**[1] is, generally, the return of money paid in excess of the obligation, if any. A **tax refund** or **refund**[2], if any, is the excess of tax payments over total tax, requiring the government to return the difference, and the return of money paid in excess of the tax.

TAX RETURNS

From *back-turn,* a **tax return** or **return**[1] is a taxpayer's formal statement of the tax due or refund due, including the amounts involved in the computation of the tax due or refund due. A **joint return** is one tax return for two or more taxpayers,

especially one tax return for both husband and wife. An **amended return** is a tax return that corrects information in an earlier tax return. An **information return** is a communication of information to the government where potential payment of a tax is not required. For example, a partnership files an information return, but its partners pay any tax due.

In tax law, **filing**[2] is transmitting a tax return or information return to the appropriate government agency. The **filing deadline** is the date a tax return or information return is due. For a calendar-year taxpayer, the traditional filing deadline for a federal income tax return is April 15th of the following year. An **extension of time** is an increase in the period of time before something expires or is due to be performed such as an increase in the time to file a tax return. It is not an extension of time to pay the tax.

TAX DISPUTES AND COLLECTION

From *to hear,* an **audit**[1] is, generally, an inspection of accounting or other records, output, and procedures of an organization or person to measure or verify the accuracy or appropriateness of the records, output, and procedures. An **auditor** is a person who makes an audit or a person who is responsible for making an audit. A **tax audit** or **audit**[2] is an inspection, by the IRS or other government tax authority, of the accuracy of a tax return and its computations or an inspection, by the IRS or another government tax authority, for the purpose of assessing a tax where a tax return was not filed.

From *down perform,* a **deficiency** is a shortage or the difference between the amount paid and the greater correct amount due. **Assessment of deficiency** is the formal declaration or fixing of the amount of a tax deficiency by the IRS or other government tax authority. An audit may result in a finding of no deficiency or, rarely, a refund. In most cases, an audit results in the assessment of deficiency, plus penalties and interest. From *punishment,* a **penalty** is a liability or an additional liability imposed as a civil punishment to encourage the performance of an obligation. A penalty may be imposed for failing to file a tax return when due, for failing to make a tax payment when due, or both. From *claim,* **interest**[2] is a charge for the use of the government's money as the result of not paying a tax or penalty when due.

A taxpayer is usually notified of an assessment and given the opportunity to contest the assessment. One option is to pay the tax and sue for a refund of the payment. Refund cases are usually heard in a court of claims or a trial court of general jurisdiction. The other option is to refuse to pay the assessment, contest its amount or validity administratively and in a trial court for tax cases, and, if all or part of the assessment is upheld, pay interest on the amount due. The separate trial court for federal tax cases in which the taxpayer contests the amount of tax assessed, and does not pay the amount of tax assessed and seeks a refund, is the **United States Tax Court** or **Tax Court**[1].

From *trick* or *danger,* a **jeopardy assessment** is an immediate assessment of deficiency and seizure of the taxpayer's property where the IRS or other government tax authority alleges grounds to believe that the taxpayer plans to flee with the property. **Back taxes** are taxes assessed for a previous taxable year or years that have not been paid and remain due. From *to raise,* to **levy**[3] (the verb) is to collect a tax, to seize property and sell it to satisfy a debt, or to seize property and sell it to satisfy a tax debt. A **levy**[4] (the noun) is a collected tax, property seized and to be sold to satisfy a debt, and property seized and to be sold to satisfy a tax debt.

FEDERAL TAX ADVICE AND GUIDANCE

A **revenue ruling** is a published IRS decision applying federal tax law to a given set of facts. A **private letter ruling** is an IRS decision issued to a taxpayer who asks for a decision on the application of federal tax law to a particular set of facts and published without disclosing the identity of the taxpayer or identifying facts. A **revenue procedure** is a published IRS determination of an administrative practice of the IRS.

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- **federal tax**
- **income tax return**
- **internal audit**
- **local tax**
- **outside audit**
- **short year**
- **state tax**
- **tariff**
- **tax sale**
- **taxing**
- **unearned income**

Part Five

Civil Law: Business Issues

Chapter 23

Contracts: Elements and Common Defenses

CONTRACTS, GENERALLY

From *busy,* **business** is the trading of services or things or the routine trading of services or things. **Business law** is the law about trade. Business law may include any relevant area of law, but the most relevant business law is contracts.

From *to bind,* an **obligation**[2] is, generally, a duty imposed or recognized by law. **Obligated**[1] is, generally, having a duty imposed or recognized by law. An **obligor**[1] is, generally, a person who has a duty imposed or recognized by law. An **obligee**[1] is, generally, a person to whom a duty is imposed or recognized by law. A legal obligation may be distinguished or distinct from a **moral obligation**, which is an obligation imposed or recognized by morality, but not necessarily imposed or recognized by secular law.

From *before put,* a **promise** is a declaration of intent to be obligated, a commitment to act or perform, or a commitment to refrain from acting or performing. From *against carry,* to **forbear** is to refrain from acting or performing and **forbearance** is refraining from acting or performing such as refraining from enforcing a legal right for a period of time. From *with-put,* to **commit**[1] is to promise to do something. A **commitment**[2] is to have promised to do something. A **promisor** is a person who makes a promise or commitment. A **promisee** is a person to whom a promise or commitment is made.

From *to please,* to **agree** is to concur or to give mutual assent. An **agreement** is a concurrence of affirmations, a manifestation of mutual assent, or a statement of what has been affirmed or mutually assented. From *together pull,* **contracts** or **contract law** is the law about agreements. A **contract** is at least one enforceable promise between two or more persons, a promise or set of promises creating a duty or set of duties recognized by law, an agreement unchangeable in terms without mutual consent, a legal agreement, or an instrument representing a legal agreement. The **obligation of contract** is the duty recognized by law to perform a contract promise.

Traditionally, the first mentioned party in a contract was known as the **party of the first part** and, traditionally, the second mentioned party in a contract was known as the **party of the second part**. A **third party**[1] or **third person** is a party outside of a two-party contract or a person outside of a two-person relationship.

In Latin, **bilateral** means two-sided. A **bilateral contract** is a contract in which a promise is exchanged for a promise, so that each party is both a promisor and a promisee. In Latin, **unilateral** means one-sided. A **unilateral contract** is a contract in which a promise is exchanged for a performance not a promise, so that one party is the

promisor and the other party is the promisee. A unilateral contract is accepted by beginning and completing the performance sought.

From *mold* and *shape,* **formation** is the creation of something such as the creation of a contract. The main elements of a contract are offer, acceptance, and consideration.

THE ELEMENTS OF OFFER AND ACCEPTANCE

The offer and acceptance that forms a contract must occur at the time, in the manner, and at the place, if any, where the parties intend to be bound. From *attention,* an **intention** is what a person seeks to accomplish through an act or a course of action. A contract is not formed by any preliminary negotiations or tentative intentions that precede it. A **letter of intent**, an expression of the tentative intentions of the parties, is in essence an agreement to agree, but it is not a contract.

From *to bring,* an **offer**, the first element of contract formation, is a definite, objective, and serious proposal to form a particular legal agreement and a manifestation of the intent to create a power of acceptance. An **offeror** is a person who makes an offer. An **offeree** is a person to whom an offer is made.

An offer is distinguished from an **invitation to deal** or an **invitation to negotiate**, which is, from *toward-pleasant,* a manifestation to many, such as general advertising, of the intent to consider offers.

From *back-call,* to **revoke** or, from *away-draw,* to **withdraw** is to recall or cancel. An offer may be revoked or withdrawn before it is accepted. **Revocation of an offer** or **withdrawal of an offer** is the recall or cancelation of an offer, which terminates an offeree's power to accept it.

From *choice,* an **option contract** or **option**[1] is a contract to keep an offer open for a stated period of time and a contract giving a party the choice to form another contract. From *fixed,* a **firm offer** or **option**[2], an irrevocable offer, is an offer kept open for a stated period of time.

An offer is terminated by the death or adjudicated incapacity of either party or by lapse, rejection, or counteroffer. From *fall* (into error) or *flight* (of time), a **lapse**[1] is the natural expiration of a right. If an offer has no stated time limit, the offer will lapse after a reasonable time. For example, an offer made during a face-to-face negotiation usually lapses at the end of the face-to-face negotiation. From *back throw,* a **rejection** is a communication by the offeree denying an offer. From *opposite,* a **counteroffer** is a different offer by the offeree in response to an offer, which is an implicit rejection of the offer. A **conditional acceptance** is a refusal to accept the stated terms of an offer by adding restrictions or requirements to the terms of the offer by the offeree. A **battle of the forms** is what results when, after a series of written counteroffers or conditional acceptances, each party thinks it has a contract on its own terms.

From *to take,* to **accept** is to agree to take or to voluntarily receive. **Acceptance**[4] of a contract is agreement to take an offer or consent to a proposal to form a contract. The **power of acceptance** is the ability of an offeree to create a contract by consenting to a proposal to form a contract.

From *bag* (of letters), **mail** is a system for delivering items among members of a community, especially the government system for delivering items throughout the country. **Mailed** is packaged, addressed, and sent for delivery by mail. A **mailbox** is a receptacle for sending or delivering items by mail. One issue at common law was whether or not a contract was formed when an offeror's revocation was made while an offeree's acceptance was in the mail. Deciding a contract was formed, the courts created the **mailbox rule**, which is the common-law rule that an acceptance is effective when mailed, unless the offer provides otherwise. If the offer does not preclude

acceptance when mailed, the offeror assumes the risk of the acceptance being lost in the mail.

The elements of offer and acceptance are sometimes referred to as the requirement of **mutual consent** or **meeting of the minds**, which is the mutual intent to make a contract with the same understanding of its terms. From *matter* and *other* (other matter), a **material alteration** is a change of consequence, especially a change that changes the legal effect of a document.

From *out-push,* to **express**[1] (the verb, present tense) is to say or to write, or to explicitly declare. **Express**[2] (the adjective) or **expressed** (the verb, past tense) is said or written, or explicitly declared. An **express contract** is a contract in which the offer and the acceptance have been said or written or a contract in which the offer and acceptance have been explicitly declared. The principles of interpretation and construction that apply to statutes and wills also generally apply to express contracts. Ideally, contract language is not imprecise or ambiguous.

One principle that often applies to express contracts, from *against the profferor,* is **contra proferentem**, which is the doctrine that a document or document provision should be interpreted and construed against the party who wrote it because that party had the opportunity to write a more favorable document.

Time is of the essence or **time of the essence** is a phrase used to indicate or suggest that the timing of something is critical, material, or vital and a phrase used in a contract to indicate or suggest that the timing of an act or performance is critical, material, or vital. **On or about** (a certain time) is a phrase used to indicate or suggest that the timing of something is not critical, material, or vital and a phrase used in a contract to indicate or suggest that the timing of an act or performance is not critical, material, or vital. In any event, an act or performance must be within a **reasonable time**, which is a subjective fair amount of time based on the particular facts and circumstances.

From *involve* (by inference), to **imply** is to suggest or exist without saying or writing or to suggest or exist by inference from the circumstances. **Implied** is suggested or existing without saying or writing or suggested or existing by inference from the circumstances. **Implied in fact** is suggested or existing by conduct. Silence is not acceptance unless the offeree has a duty to speak. An **implied-in-fact contract**, a **contract implied in fact**, or an **implied contract**[1] is a contract in which the offer, the acceptance, or both were implied by conduct. From *to be at rest,* **acquiescence** is conduct from which consent may be implied, consent implied by silence, or tacit acceptance.

From *a count,* to **account**[1] (the verb) is to provide a detailed statement of the financial significance of a transaction or transactions. An **account**[2] (the noun, financial statement) or **financial statement** is a detailed statement of the financial significance of a transaction or transactions. An **account**[3] (the noun, contractual relationship) is an established contractual relationship. An **account stated** is an implied-in-fact contract that an account provided by one party is accurate because it was accepted and not objected to or contested by the other party or an express contract that an account is accurate. An **account current** is an account that is open or unsettled and not an account stated.

From *as if,* **quasi** means like but not actually. **Implied in law** is suggested or existing by legal obligation. A **quasi contract**, an **implied-in-law contract**, a **contract implied in law**, or an **implied contract**[2] is not an actual contract based on the intention of the parties but, rather, a contract suggested or existing by legal obligation or a contract created by law as a remedy for injustice. For example, a person who receives a delivery or payment by mistake has a quasi-contractual duty to return it.

A contract is usually implied in law due to **unjust enrichment**, which is the principle that a person who unfairly profits at the expense of another is required to make restitution because in equity and good conscience the person should not keep the unfair profits. In civil law, from *again set up,* **restitution**[1] is restoration of that which was lost or making good, right, or whole.

THE ELEMENT OF CONSIDERATION

From *with constellation* (worth an examination of the stars), **consideration**[1] is, generally, the exchange of something of value for something of value. From *what for what,* a **quid pro quo** is something for something or a this for that. Specifically, **consideration**[2] is the bargaining element of a contract, a legal quid pro quo, something of legal value traded for a performance or promise of performance by another, or a benefit to the promisor or a detriment to the promisee. It is what was bargained for. From *away wear,* a **detriment** is doing something you do not have to do or not doing something you can do.

From *before existing,* a **preexisting duty** is a duty that already existed before a contract was allegedly made, and so is not consideration. For example, you cannot make a valid contract with a police officer to find a criminal while on duty because the police officer has a preexisting duty to find criminals while on duty.

A **lack of consideration** is a promise without consideration. **Mutuality of obligation**, **mutual obligations**, or **mutuality of contract** is the requirement that each party to a bilateral contract give consideration by being bound to perform in some way. In Latin, a **pact** is an agreement. From *naked agreement,* a **nudum pactum** is an agreement with a lack of consideration on one side, and so an agreement that is not enforceable. **Failure of consideration** or **want of consideration** is a promise with consideration that later became worthless, nonexistent, or unperformed.

From *stopped,* **estoppel** is a bar, prohibition, or preclusion arising by equity because it is unfair for a person to deny what the person said or did, events that occurred, or determinations that have already been made. In contract law, **promissory estoppel**, negligence applied to words of promise and foreseeable (by the promisor) detrimental (and so unjust) reliance (by the promisee), is the doctrine that a promise made without consideration may be enforced in equity if the promisor should have reasonably expected the promisee to rely on the promise and if the promise did rely on the promise to the promisee's detriment. The classic example is a promise of a gift such as a farmer's promise to give the farm to a child who stays and works on the farm.

At common law, making a formal promise under seal provided consideration because of the dishonor associated with breaking a formal promise. From *document,* an **instrument** is a formal legal writing. From *small picture,* a **seal**[2] is, specifically, an impression on wax or a wafer attached to an instrument, or an impression made in the instrument itself, attesting to the formal execution of the instrument. In Latin, a **sigilum** is a seal. In Latin *place of the seal,* **locus sigilli**, with the abbreviation **L.S.**, is the place for the seal, which today may be deemed the equivalent of a seal. A **sealed instrument** is an instrument made under seal, as to which a special law may apply such as a longer statute of limitations. **Signed, sealed, and delivered**, slang for done with all legal formalities, is an allusion to a sealed instrument.

From *free,* **gratis** is given or performed without consideration or reward. A **gratuity** is a gift. A **gratuitous promise** is a promise given without requiring consideration, which generally cannot be the basis of an enforceable contract. From *grant,* to **give** is to make an intentional transfer of property from generosity. A **gift**[1] is, generally, an intentional transfer from a transferor's generosity and a voluntary transfer made without consideration.

From *to deliver,* to **sell** is to transfer property or provide services for money or other valuable consideration, to transfer property or provide services for a price, or to vend. A **sale** is a transfer of property or providing of services for money or other valuable consideration or a transfer of property or providing of services for a price.

From *to offer,* to **bid**[1] (the verb) is to offer to buy property or provide services at a specified price or to offer in response to a call for offers. A **bid**[2] (the noun) is an offer to buy property or provide services at a specified price or an offer in response to a call for offers. From *offeror,* a **bidder** is a person who makes an offer to buy property or provide services at a specified price. From *to increase,* to **auction**[1] (the verb) is to publicly sell property for the highest of increasing bids. An **auction sale** or **auction**[2] (the noun) is the public sale of property to the highest bidder. An **auctioneer** is a person who leads an auction. In the typical auction, the auctioneer invites bids, the bidders make bids, the auctioneer decides whether or not to accept the highest bid, and, if the auctioneer decides to accept the highest bid, the auctioneer strikes a hammer and says, "sold." The typical auction is an **auction with reserve**, which is an auction in which the auctioneer retains the right to withdraw the property from sale and so reject the highest bid. An **auction without reserve** is an auction in which the auctioneer must accept the highest bid. In either type of auction, the auctioneer may require a minimum bid and a bidder may revoke a bid before it is accepted. Although also used to describe the making of offers at an auction, **competitive bidding** usually refers to secret bidding to perform a construction or service contract, where after all bids are made, the contract is awarded to the lowest bidder capable of performing the contract.

From *cheat,* to **barter**[1] (the verb) or, from *out-change,* to **exchange**[1] (the verb) is to trade without using money, to transfer property or provide services for consideration in property or services of about equal value, or to transfer property or provide services for other property or services where no price is set. A **barter**[2] (the noun) or an **exchange**[2] (the noun) is a trade without using money, a transfer of property or services for consideration in property or services of about equal value, or a transfer of property or services for other property or services where no price is set.

A **down payment**, the transfer of a small portion of the consideration, is something of value given by a party to another to bind a contract but returnable, or regarded as a partial payment of liability, if the party breaches the contract. Common today only in real estate purchase agreements, and similar to a nonrefundable application fee, from *pledge* and *serious,* **earnest**, the transfer and risking of a small portion of the consideration, is something of value given by a party to another to bind a contract but forfeited if the party breaches the contract. **Earnest money** is money given by a party to another to bind a contract that is forfeited if the party breaches the contract.

THE ELEMENT OR DEFENSE OF CAPACITY

Legal capacity[2], **capacity**[2], or **contractual capacity** is the ability to understand the nature and effect of your acts and the ability to make a contract. As a general rule, for example, a minor child is not legally permitted to make a contract. Making a contract is a serious adult activity. Similarly, a person who is obviously intoxicated or seriously mentally ill cannot make a contract. A mentally ill person can make a contract during a lucid interval.

One exception to the requirement of capacity is that a child can make a contract for **necessaries of life** or **necessaries**, which are, from *unavoidable,* items required for life when the items are not otherwise provided such food, clothing, shelter, and medical care.

Because lack of capacity is technically a defense, if a child does make a contract, the contract is technically not **void**[1] (the noun)—from *empty,* legally nothing. Instead, the contract is **voidable**—legally something but able to be made legally nothing—at the option of the child. Lack of capacity can be overcome by **ratification**[1], which is, from *confirmation,* acceptance of a contract after attaining capacity to do so, including acceptance of a contract made by another or acceptance of an action done by another. The opposite of ratification is **disavowal**, which is rejection of a contract after attaining capacity to do so, including rejection of a contract made by another or rejection of an action done by another.

A **voidable contract** is a contract able to be made legally nothing. To **avoid**, to **disaffirm**, to **vitiate**, or to **void**[2] (the verb) a contract because of your lack of capacity is to make the contract legally nothing. A **void contract** is an apparent contract that is legally nothing or an apparent contract that has been made legally nothing.

THE ELEMENT OF LEGALITY OR THE DEFENSE OF ILLEGALITY

A contract must have a **lawful purpose**, which is a purpose according to law or a purpose that is not criminal or otherwise illegal. **Public policy** is legislatively or judicially established guidelines for the welfare of society, including common sense and decency. An **illegal contract** is a contract that is against public policy. In Latin, **ex turpi contracu action non oritur** means from an immoral contract an action does not arise.

An illegal contract is void and not enforceable if, as to the illegality, the parties are, from Latin, **in pari delicto**, in equal fault. An illegal contract is voidable and enforceable by one party if that party is innocent or less at fault.

To avoid entering into an illegal contract, a contract offer may include a disclaimer. From *not claim,* a **disclaimer**[2] is, generally, a refusal of responsibility and a statement that a claim is not made under the law; for example, "Void where prohibited by law."

From *claim,* **interest**[3] (charge, generally) is money charged for the use of money or compensation for forbearance on a debt. From *interest,* **usury** is an excessive and illegal rate of interest or the practice of charging an excessive and illegal rate of interest. **Usurious** is having an excessive and illegal rate of interest. A **loan shark** is a person who intentionally loans money for an illegal rate of interest and enforces repayment by force.

From *uncertain,* an **aleatory contract** is an agreement where one party's performance depends on the occurrence of an uncertain event or outcome. From *hazard,* a **risk**[1] is an uncertain unfavorable event or outcome, a danger, a hazard, a peril, or a possible loss. In the sense of probability, **risk**[2] is the probability of an uncertain event or outcome, especially the probability of an unfavorable uncertain event or outcome. Traditionally, an aleatory contract was illegal where the risk was a created risk. From *game-play,* a **gamble** is an acceptance of an offer to play for value against the created risk of an uncertain event or outcome. From *game playing,* **gambling**[1] is accepting an offer to play for value against the created risk of an uncertain event or outcome. A **gambling contract** is an aleatory contract in which the risk is a created risk and an aleatory contract where the risk is *not* an actual, natural, and preexisting risk. Traditionally, all gambling contracts were illegal. Today, gambling contracts are legal where gambling is permitted by the government and, at least indirectly, subject to government control and protection. Gambling is legal where it is licensed or taxed

or run by the government, and so a source of revenue for the government. Gambling is also legal where all the profits are used for charitable or public purposes. Aleatory contracts are legal were the risk is an actual, natural, and preexisting risk, as is the case with insurance. When you drive a car on a public road, for example, there is an actual, natural, and preexisting risk that you will accidentally hit another car or that it will hit you.

EVIDENCE OF A CONTRACT

To later help prove that a contract was made, a contract may have one or more witnesses. In this sense, from *knowledge-having,* a **witness**[1] is a person who observes the making of a contract or, where a contract is in writing, a person who attests to the making of the contract by providing his or her signature on the writing.

From *mouth,* an **oral contract** is a contract not in writing, a contract in writing that has not been signed, or a contract difficult to prove without witnesses because of the lack of permanent evidence of it. A **written contract** is a contract in writing, a contract in writing that has been signed, and a contract less difficult to prove without witnesses because there is permanent evidence of it.

From *complete,* to **execute**[1] is to complete, **executed**[1] means completed, and **execution**[1] means completion. An **executed contract** is a written contract that has been completed by the necessary signatures or a contract that has been fully performed. **Executory** is not fully completed but contingent on some event or performance. An **executory contract** is a contract not completed but contingent on some event or performance or a contract that has not been fully performed.

An **e-signature** is an electronic signature and a method of signing an electronic document by the prior establishment of an electronic sequence as a signature.

THE STATUTE OF FRAUDS AS A DEFENSE

From *to force,* **enforceable** is capable of being forced to comply with the obligation. **Unenforceable** is not capable of being forced to comply with the obligation because there is a defense. An **unenforceable contract** is a contract not capable of being used to force compliance with the obligation.

At common law, judges noticed that some lies about oral contracts were easy to believe. It was easy to believe, for example, the allegation that a parent promised to pay a debt of his or her child. Moreover, an ordinary person might not realize that a contract for something inherently valuable such as land should be in writing. First enacted in common-law England in 1677, the **Statute of Frauds** or a **statute of frauds**[2], the statute to prevent common-law frauds, is the requirement that to be enforceable certain contracts must be in writing and signed by the party to be charged and, generally, the requirement that (1) contracts to answer for the debt of another, (2) contracts in consideration of marriage, (3) contracts for the sale of land or affecting an interest in land, and (4) contracts that cannot by their terms be fully performed within one year of their making must be in writing and signed by the party to be charged. The Uniform Commercial Code, discussed in Chapter 25, also requires contracts for a sale of goods for $500 or more to be in writing.

The **party to be charged** is the person to be held liable. Each state has enacted its own version or combination of statutes similar to the 1677 Statute of Frauds. Accordingly, today, the **statute of frauds**[1] is, generally, the requirement that certain contracts be in writing to be enforceable.

The **main purpose rule** is the rule of case law that where the main purpose of a person answering for the debt of another is to further the person's own interest, the statute of frauds does not apply. The statute of frauds also does not apply where there is part performance of an oral contract, full performance of an oral contract, or a quasi-contract. **Part performance** or **partial performance** is performance of some contract duties such that it would be difficult to return to the circumstances before the contract was made.

From *settlement of a debt,* to **finance** means to pay for over a period of time. Because of the statute of frauds, a contract to pay for something over a period of time is usually put in writing. Unlike a **lump-sum payment**, which is one payment of the entire amount, an **installment payment** or **installment** is one of a series of payments under a contract. An **installment contract** is a contract in which one party is required to make a series of payments over time. An installment contract may have an **acceleration clause**, a provision providing for premature vesting, which is a provision in a contract or mortgage loan that upon failure to make a payment when due, the entire indebtedness becomes due. State laws often make acceleration clauses illegal in consumer contracts. A failure to perform an act by the time it is due such as a failure to make a payment or a failure to timely pay a debt is known, from *away wanting,* as a **default**[1].

From *authorized pledge,* a **guaranty** or **guarantee**[1] is a promise or agreement to answer secondarily for the debt, default, or miscarriage of another if performance is not obtained from the other person. A **guarantor** is a person or entity that makes a guaranty. A **guarantee**[2] is a person who receives a guaranty. From *secure,* **suretyship** is the relationship created when a person or entity promises or agrees to answer both primarily and secondarily for the debt, default, or miscarriage of another. A **surety** is a person or entity that promises or agrees to answer both primarily and secondarily for the debt, default, or miscarriage of another. A **bond**[1] is, generally, a written promise to pay money to assure the performance of an act or duty, or an insurance policy. A **surety bond** is a bond given by a surety.

THE PAROL EVIDENCE RULE

From *oral,* **parol evidence** is oral evidence or witness testimony. The **parol evidence rule** is the doctrine that oral evidence is generally inadmissible if it is offered to contradict or modify the terms of a written contract.

As a rule of substantive law, it is presumed that a written contract is an **integration**[3] of the agreement, which is, from *make whole,* a full and final expression of what was agreed to. All oral negotiations or stipulations between the parties preceding or accompanying the execution of a written contract are merged into the written contract.

The presumption of integration is strengthened by a **merger clause**, which is, from *absorb in another,* a provision in a written contract declaring that it is an integration because everything agreed to was put in the agreement. Despite the parol evidence rule, parol evidence is generally admissible to rebut the presumption of integration, to impeach the contract for fraud, or to reform the contract for accident or mistake. The rule does not apply to an unwritten **collateral promise**, which is a promise secondary to the promises in an integration.

From the tradition of putting the contents of a formal document on a single sheet of parchment so nothing could be inserted, the **four corners doctrine** or **four corners** is the doctrine that a document should be interpreted as a whole and the doctrine that extrinsic evidence should not be used to interpret an unambiguous document.

GO TO THE NET

Visit the *Legal Terminology Explained* Online Learning Center at http://www.mhhe.com/nolfi09 for an expanded index and glossary, including:

- **acceptance of services or goods**
- **adequacy of consideration**
- **adequate consideration**
- **against the drafter**
- **avoid the contract**
- **certainty**
- **complete integration**
- **continuing consideration**
- **contract not under seal**
- **contract under seal**
- **defects in formation**
- **detriment incurred**
- **detrimental effect**
- **detrimental reliance**
- **divisibility**
- **empty promise**
- **executory consideration**
- **express acceptance**
- **express consideration**
- **forbearance of a legal right**
- **formal contract**
- **freedom of contract**
- **illusory promise**
- **implied acceptance**
- **informal contract**
- **insufficient consideration**
- **intent of the parties**
- **invitation to treat**
- **irrevocable offer**
- **knowledge of the offer**
- **lapse of time**
- **last in time, first in right**
- **legal value**
- **limitation of acceptance**
- **material term**
- **medicinal side effects**
- **mentally infirm**
- **merger**
- **mirror image rule**
- **modification**
- **mutual assent**
- **mutuality of assent**
- **nonbinding offer, nominal consideration**
- **partial integration, partial performance doctrine**
- **past consideration**
- **prior or contemporaneous agreements**
- **promissory reliance**
- **proper dispatch**
- **severability**
- **sham consideration**
- **signed by the party to be charged**
- **simple contract**
- **solicited offer**
- **subject matter**
- **subsequent agreements**
- **substantial beginning**
- **substantial detriment**
- **sufficient consideration**
- **supervening illegality**
- **supplemental evidence that adds to, but does not contradict, the original agreement**
- **unauthorized means**
- **under the influence**
- **undue enrichment**
- **unfair detriment**
- **voidable obligation**
- **writing to satisfy the Statute of Frauds**

Chapter 24

Contracts: Performance and Other Topics

CONTRACT PERFORMANCE

From *to do,* **performance** is fulfilling an obligation, doing or keeping what was promised in a contract, or the requirement to enforce a contract for the party seeking enforcement to have substantially done what was promised. **Full performance** is doing everything that was promised in a contract.

From *together say,* a **condition** is a requirement related to a possible future fact or event, the occurrence of which triggers a legal obligation or removal of a legal obligation. A **condition precedent** is a possible future fact or event that must occur before a legal obligation is imposed. A **condition subsequent**[1] is, generally, a possible future fact or event after a legal obligation is imposed that removes the legal obligation.

An **escape clause** or **cancelation clause**—a provision providing a condition subsequent, decreasing an obligation—is a provision in a contract that allows a party to avoid performance and liability, especially a provision in a contract that gives a party a period of time in which to have a change of mind and to cancel the contract. From *favor,* a **grace period**, a period without a penalty, is a period specified in a contract after the due date of a payment or other performance during which the payment or other performance is permitted without a penalty. An **escalator clause** is a provision providing a condition subsequent increasing an obligation and especially a provision that provides for an increase in an obligation upon some objective condition beyond the control of the parties such as government cost-of-living statistics.

From *no longer charged,* **discharge**[2] is, generally, extinguishment of a legal duty, removal of an obligation by its fulfillment, or removal of an obligation by law. As to a contract, **discharge**[3] is termination of a contract by performance by all of the parties or removal of the obligation of a party to perform a contract. In contract law, a **release**[1] is a discharge from the parties' performance obligations that acknowledges the dispute but forgoes contractual remedies.

From *appease,* to **pay** is to deliver money to fulfill an obligation or satisfy a claim. A **payment** is a delivery of some or all of the money required to fulfill an obligation or satisfy a claim. From *set forth performance* and *appeasement,* **satisfaction** is fulfillment of a legal duty, fulfillment of an obligation, full payment of a debt, or when a promisee has received the promised performance of the promisor.

BREACH OF CONTRACT

Nonperformance is the failure to fulfill an obligation. From *break,* a **breach**[2] is, generally, a failure to perform as promised or a failure to comply with a legal duty. **Breach of contract** is failure to perform a contract as promised and an action on a contract to recover damages or obtain other remedies to compensate for a party's failure to perform as promised. From *of consequence,* a **material breach** is a substantial breach with the consequence that further performance by the other party is excused.

From *before taken care of,* **anticipation**[1] is performance of an act before it is expected. From *back away by foot,* **repudiation** is an announcement or other indication that you cannot or will not substantially perform as promised or an announcement or other indication that you cannot or will not comply with a legal duty. **Anticipatory breach** or **constructive breach** is a repudiation before performance is expected or required, which the promisee elects to treat as a breach by the promisor.

From *substance,* **substantial performance** is the doctrine that practical performance by a party accomplishing the purpose of the contract, although not full performance, is sufficient performance to permit the party to bring an action for breach of contract. The value of the insubstantial deficiencies in a party's performance may be set off from the party's recovery of damages or other remedies.

In Latin, **ex contractu** means arising out of contract and **ex delicto** means arising out of fault. An **action ex contractu** is an action for breach of a duty arising out of contract, as distinguished from an **action ex delicto**[1], which is an action for breach of a duty arising out of fault such as a tort.

Where a bilateral contract is breached, the party bringing an action for breach of the contract may have to show that it was capable of performing its promise and so not equally to blame. **Ready, willing, and able** is the classic phrase describing a party capable of performing its promise. From *to extend,* a **tender of performance** or **tender**[1] is, generally, an unconditional offer to perform a contract as promised, manifesting the ability to do so. A **tender of payment** or **tender**[2] is an unconditional offer to pay a debt as promised, manifesting the ability to do so. **Legal tender** is coined or paper money that can be used to pay, or offer to pay, a debt or obligation.

OTHER DEFENSES TO A CONTRACT

From *not possible,* **impossibility of performance** or **impossibility** is the defense to a contract that performance has become actually impossible due to the destruction of the subject matter or the death of a necessary person. From *not practical,* **impracticability** or **impracticality** is the modern defense to a contract that performance has become impractical due to an extreme unreasonable unforeseen difficulty, even though not actually impossible. From *in vain,* **frustration of purpose** or **frustration** is the defense to a contract that there is an implied condition in the contract that, if an event beyond the control of the parties occurs that makes a party's intention in making the contract impossible, then the contract is terminated.

From *wrongly take* or *wrongly understand,* a **mistake** is an act or omission arising from ignorance, misconception, or inadvertence. In civil law, a **mistake of fact**[1] is a mistake about a fact material to an event or transaction and a mistake for which equity may provide relief such as rescission or reformation of the contract. In civil law, a **mistake of law**[1] is a mistake about the legal effect of an event or transaction

and a mistake for which equity usually does not provide relief, unless there is a mutual mistake about rights the contract was made to secure. A **mutual mistake** or **bilateral mistake** is a mistake by both parties as to the same material matter and a mistake for which equity will provide relief such as rescission or reformation of the contract. A **unilateral mistake** is a mistake by one party and a mistake for which equity usually does not provide relief, except for correction of clerical errors, where the nonmistaken party caused the mistake, or rescission, where the parties can be restored to their original positions and one party is seeking an unconscionable advantage.

From *deception,* **fraud**[2] is, generally, intentional deception harming another or taking by deception. **Fraudulent** is in the nature of intentional deception harming another. A **misrepresentation**[1] is, generally, a false statement that tends to mislead or deceive. In the sense of deceit, **fraud**[1] is deception by intentional misrepresentation or concealment. As a contract defense, **fraud**[3] is the defense that a contract was the result of a known or recklessly made material misrepresentation or concealment of a material fact that was reasonably relied upon by the defending party to its detriment. From *fact,* **factum** is the act or the deed. From *completion,* **fraud in the execution**, **fraud in the factum**, or **fraud in esse contractus** is deception regarding the character of an instrument. From *in-lead,* **fraud in the inducement** is deception regarding the circumstances in which an instrument is made. Where a contract is the result of fraud, the contract is voidable at the option of the defrauded party. Equity will provide relief such as rescission or reformation of the contract.

From *to condemn,* **reprehensible** is deserving of public condemnation. From *against conscience,* **unconscionable**[1] generally means morally reprehensible. In contract law, **unconscionable**[2] or an **unconscionable contract** means a contract so one-sided that it is unfair to enforce. **Overreaching** is taking unfair advantage of another through the abuse of superior bargaining power, by fraud, or by making contracts that are unconscionable. From *stuck,* an **adhesion contract** or **contract of adhesion** is a one-sided contract offered on a take-it-or-leave-it basis, which may be construed in favor of the party that had little or no bargaining power. Many contracts contain **boilerplate language** or **boilerplate**, which is common or standard language for the type of contract, sometimes in fine print, that may be a source of unfairness. From *away from blame,* an **exculpatory clause**, a provision that excuses a party from liability for certain acts or omissions, also may be a source of unfairness.

From *hardship,* **duress**[1] is, in civil law, unlawful pressure to act such as force or the threat of force. As a contract defense, **duress**[2] is the defense that a contract was the result of unlawful pressure to act such as force or the threat of force, and so the offer or acceptance was not a true manifestation of the intent of the defending party. A threat of lawful conduct is not duress.

From *to (one) heart,* an **accord** is a mutual agreement. **Accord and satisfaction**[1] is, generally, the defense that a disputed contract was terminated by a completed mutual agreement. An **accord and satisfaction**[2] is, specifically, the termination of a dispute or disputed contract by an accepted offer to pay or perform less than that originally demanded and by actual completion of the offer. The accord is the accepted offer to pay or perform less than that originally demanded. The satisfaction is the actual completion of the offer. To deny an accord and satisfaction, or other compromise, a party may indicate that it is acting under protest. From *for witness,* a **protest** is a formal statement that you object to an act about to be performed, being performed, or that has been performed or that you demand the performance of an act not being performed. **Under protest** is a phrase indicating that under an alleged obligation, you are making a payment or performing an act, but you reserve the right to challenge the validity or extent of the obligation.

CONTRACT REMEDIES

From *with weigh out* (balance out), **compensation** is something that makes up for something else or something making whole, or the equivalent or a portion thereof, such as payment for services performed and payment for harm or injury caused. From *loss by injury,* **damage** is harm or injury. In the sense of injury, **loss**[2] is no longer having something you benefited from or reasonably expected to benefit from. **Damages**[1] are harms or injuries or compensation in money the law awards for harm, injury, or loss caused by the legal wrong of another.

From *real,* **actual damages**, **compensatory damages**[1], **general damages**, or **tangible damages** are damages directly and naturally caused by a harm, injury, or loss. From *on (the) fall,* **incidental damages** are damages for expenses related to a claim for actual damages. From *intense result,* **consequential damages** or **special damages** are damages indirectly and not naturally caused by a harm, injury, or loss, and so damages that must be specially pleaded and proved. From *in name only,* **nominal damages**[1] are, generally, a token sum awarded as recognition of the legal wrong of another although only slight harm, injury, or loss was caused.

Rarely awarded in a breach of contract case, from *punishment,* **punitive damages**[1] or, from *example,* **exemplary damages**[1] are, generally, damages beyond actual or nominal damages awarded to punish the wrongdoer's malicious, wanton, or willful conduct and to deter others.

An allusion to an easy flow, from *make liquid or clear,* to **liquidate** is to determine the amount due, to reduce to cash value, to pay, or to settle. **Liquidated damages** are an amount of damages provided for in a contract that the parties agreed in advance would be a reasonable amount in the event of a breach. The amount must be reasonable. If the amount is excessive, it is a penalty and unenforceable.

From *make mild,* to **mitigate** is to lessen or to make less severe. The **mitigation of damages**, the **duty to mitigate damages**, the **rule of avoidable consequences**, or **avoidable consequences** is the rule of case law that a person who has suffered damages must make a reasonable effort to avoid aggravating the harm, injury, or loss, thus increasing the damages. Damages that should have been mitigated may not be recovered.

From *he undertook,* **assumpsit** was the common-law action for damages based on breach of the defendant's promise, not under seal, to do an act or satisfy an obligation. From *as much as deserved,* **quantum meruit** was, at common law, the claim in an assumpsit that, for services performed under an implied promise, the plaintiff should recover what the services were reasonably worth and is, today, the what-the-services-were-reasonably-worth measure of damages under a quasi-contract or implied-in-law contract; for example, the value of services an emergency room doctor provides to an unconscious accident victim whose consent to life-saving medical treatment is implied in law.

From *as much as they were worth,* **quantum valebant** was, at common law, the claim in an assumpsit for goods sold and delivered under an implied promise by the defendant to pay the plaintiff as much as the goods were reasonably worth, and is, today, the what-the-goods-were-reasonably-worth measure of damages under a quasi-contract or implied-in-law contract.

From *state existing,* the **status quo** is the current circumstances or the current positions of the parties. From *state existing before,* the **status quo ante** is the prior circumstances or the positions of the parties at a prior time such as the positions of the parties when a contract was made. From *strike out,* to **cancel** is to terminate, to end, or to remove the effect of something. **Cancelation** is the termination, the ending, or the removal of the effect of something.

From French *back cut,* to **rescind** is to cancel, to cancel an executory contract, or to make the circumstances as if a contract never was. **Rescission** is the cancelation of an

executory contract and the returning of the parties to their original positions or the cancelation of an executory contract and the returning of the parties to the status quo ante. Rescission may occur by the express mutual consent or implicit mutual conduct of the parties or by a decree of a court of equity. One party alone cannot rescind a contract.

From *again form,* to **reform** is to correct or modify. **Reformation** is the correction or modification of the terms of a contract to express what the parties actually agreed or legally agreed. Reformation by a court of equity requires clear and convincing evidence of a mutual mistake or fraud.

Specific performance is the requirement in equity that the party who breached the contract begin or complete performance because the remedy at law, damages, is inadequate due to the uniqueness of the subject matter of the contract and because performance is still possible and a court can oversee it. The classic example is requiring a party that breached a contract to sell land to transfer that land to the purchaser. Because all land is unique, damages are inadequate. Where a court cannot oversee a performance, it may order a **negative injunction**, which is an order preventing a performance for anyone other than the person to whom performance was promised.

ASSIGNMENT AND DELEGATION

Contract rights may be assigned, and contract duties may be delegated, unless they are personal in nature and so a transfer would violate the original parties' intent. From *to mark,* to **assign**[2] is to transfer an interest in property or rights in a contract to another. **Assigned** is having transferred an interest in property or rights in a contract to another. **Assignable** is capable of being assigned. An **assignment**[2] is a transfer of an interest in property or rights in a contract to another.

An **assignor** is a person who makes an assignment. An **assignee** is a person to whom an assignment is made. **Assigns** are all the people who legally take property or rights from a particular person.

From *away send (as a representative),* to **delegate**[3] (the verb, a duty) is to transfer a duty to another or to transfer the duty to perform under a contract to another. A duty can be transferred if it is a **delegable duty**, which is a duty that is not personal or a duty that would not vary materially if performed by another. A **delegate**[4] (the noun, a duty) or **delegatee** is a person to whom a duty has been transferred or a person to whom the duty to perform under a contract has been transferred. A **delegation**[2] of a duty is a transfer of a duty to another or a transfer of a duty to perform under a contract to another. A **delegation of authority** is a transfer of authority to another, which may accompany the delegation of a duty.

From *new,* a **novation** is a substitution of a new party for an original party or successor, with the consent of the other original party or successor. In other words, a novation is an agreement to substitute a new party for an existing party or an agreement to replace an existing party with a new party. A novation discharges the party replaced.

THIRD-PARTY BENEFICIARY CONTRACTS AND SUBROGATION

From *private relationship,* **privity** is a direct relationship between parties creating a mutuality of interest. **Privity of contract** is a direct relationship between contracting parties. As a general rule, privity of contract is required in order to bring an action for breach of contract. The exceptions are third-party beneficiary contracts, subrogation, and products liability.

A bit of a misnomer, a **third-party beneficiary** is a person for whose benefit a promise is made, who, although not a party to the contract, has the right to enforce the contract. A **third-party beneficiary contract** is a contract intended to benefit a third

person. A third-party beneficiary must be an **intended beneficiary**, which is a person intended to benefit from a contract. Third-party beneficiary status does not apply to an **incidental beneficiary**, which is a person not intended to benefit from a contract. A **donee beneficiary** is a person who was made a third-party beneficiary to give the person a gift of the promised performance. A **creditor beneficiary** is a person who was made a third-party beneficiary to pay a debt or fulfill an obligation owed to the person.

From *substitution,* **subrogation** is the substitution of a person for a second person as to a claim or right against a third person, which occurs in equity when the first person pays the claim or satisfies the right for which the third person is primarily liable to the second person. The **subrogor** is the second person in a subrogation whose claim or right against the third person is transferred to the first person. The **subrogee** is the first person in a subrogation who receives the claim or right of the second person against the third person. Subrogation occurs when an insurance company pays the damages of its insured caused by a third person. The insurance company is the subrogee. The insured is the subrogor. The insurance company is subrogated into the claim or right of the insured against the third person.

TYPES OF CONTRACTS

From *away have,* a **debt**[1] is, generally, money, other property, or services owed to another, especially money owed to another. After one party performs a contract obligation, the remaining obligation is often the obligation to pay money. Specifically, a **debt**[2] or **obligation**[3] to pay is a duty to pay money. **Indebted** or **obligated**[2] to pay is having a duty to pay money. From *away possessor,* a **debtor** or an **obligor**[2] is a person who has a duty to pay money or a person who owes money. An allusion to the belief that others will meet their obligations, from *believer,* a **creditor**[2], a **debtee**, or an **obligee**[2] is a person to whom money is owed.

A **fraudulent conveyance**[2] is an illegal contract to convey property of a debtor to another, without adequate consideration, with the intent to delay or defraud creditors by putting the property in the name or the possession of another.

A **bargain** is a voluntary agreement to purchase or exchange specific goods.

C.O.D. means cash on delivery or collect on delivery. A **C.O.D. contract** is a contract requiring the collection of a cash payment on delivery.

An **entire output contract** or **output contract** is a contract in which one party promises to deliver all of its production to the other party who promises to take it. A **requirements contract** is a contract in which one party promises to purchase all of a product it needs from the other party.

A **contractor**[1] is, generally, a person who has agreed to do work for another, especially a construction or repair project. An **independent contractor** or **contractor**[2] is, among other things, a person who has agreed to do work for another while retaining control over the method, means, and manner of producing the result, and so not deemed an employee. A **performance bond** is a bond guaranteeing the performance of a contractor. From *all,* a **general contractor** is a contractor who directly contracts with the party for whom work is to be done and has overall responsibility for the work. From *below,* a **subcontractor** is a contractor who contracts with a general contractor (or another subcontractor) to do part of the work for another and who has responsibility for only that part of the work. A **cost-plus contract** is a contract in which the consideration is the cost to perform and a stated percentage of the cost to perform as profit. Cost-plus contracts are used for construction projects in which the costs cannot be predetermined.

A **severable contract** is a contract that, when breached or deemed invalid, may be considered to be two or more independent agreements expressed in one instrument and so the breach or invalidity of one independent agreement may not affect the other independent agreements.

CONTRACTS AT SEA

Traditionally, a distinct but not complete body of civil law and criminal law developed for commerce and navigation at sea. This law of the sea is known as, from *of the sea,* **maritime law** or, from *chief of the fleet,* **admiralty law**. Maritime law relates to things such as ships, seamen, navigation, and harbors. From *ship-drive,* **navigable waters**[2] are waters that form a continuous highway over which commerce can be carried on with other states and foreign countries. Maritime law covers contracts, torts, and criminal law. For example, from *cast ashore,* a **wreck** is, traditionally, a ship so damaged that it cannot be navigated and, today, any vehicle so damaged that it cannot be operated.

There are no traditional courts or police forces aboard a ship. There is an implicit agreement that the captain of a ship is sovereign aboard the ship, at least until the ship reaches a port. This is, for example, the origin of the traditional power of the captain of a ship to marry people. In criminal law, the captain of a ship can have persons aboard the ship arrested and held in a ship's jail, the **brig**, until the ship reaches a port.

Admiralty is a court having jurisdiction in a case involving maritime law. **Admiralty and maritime jurisdiction** is the jurisdiction of the federal courts over cases exclusively involving maritime law.

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- **ability to cure**
- **adequacy of performance**
- **adequate assurances**
- **adequate compensation**
- **affirmative acts**
- **American rule of attorney fees and costs**
- **anticipatory repudiation**
- **assertion of defenses**
- **benefit**
- **benefit conferred**
- **cancel the contract**
- **consent to a novation**
- **death or incapacity of a party**
- **delegant**
- **delegator**
- **deprived of expected benefit**
- **destruction or loss of subject matter**
- **deterrent effect**
- **discharge of duties**
- **discharged**
- **economic duress**
- **equal bargaining power**
- **exceptions to contract enforceability**
- **excessive and unreasonable cost**
- **excused from performance**
- **expectation damages**
- **express condition**
- **extinguishment of liability**
- **force majeure**
- **general assumpsit**
- **ignore the repudiation**
- **immediate right to commence a lawsuit**
- **incidental or nominal damages**
- **intent to deceive**
- **joint stipulation**
- **limitation of damages**
- **lost profits**
- **mental duress**
- **mutual release**
- **mutual rescission**
- **non assumpsit**
- **objective impracticality**
- **partial breach**
- **performance prevented**
- **physical duress**
- **poor judgment**
- **positively and unequivocally**
- **present obligation**
- **reasonable assignment**
- **reliance**
- **reliance damages**
- **rescission and restitution**
- **restitution damages**
- **retract the repudiation**
- **severability of contract**
- **special assumpsit**
- **speculative damages**
- **statutory authority**
- **substantial compliance**
- **substituted agreement**
- **time for performance**
- **total breach**
- **voluntary destruction**
- **voluntary disablement**
- **voluntary repayment of debt**
- **waiver**

Chapter 25

Commercial Law

COMMERCIAL LAW, GENERALLY

From *with merchandise,* **commercial law** is the law about agreements by a business or the law about agreements for a standard business purpose. Commercial law is the development of contract law to meet the needs of business.

Before 1789, **law merchant** was the common law rules, customs, and practices generally recognized by English merchants and traders. The American standardization of commercial law began in 1789. Congress established federal banks and began to regulate interstate commerce. Over the next century and a half, federal and state statutes and case law resulted in some standardization. However, some inconsistency remained.

Founded in 1892 and located in Washington, D.C., the **National Conference of Commissioners on Uniform State Laws** (**NCCUSL**) is an association of interested persons from every state who draft and propose for adoption statutes on various topics, with the goal of having consistent laws among the states. In 1942, the NCCUSL began a project to integrate its proposed uniform laws related to commercial law. In 1952, the project resulted in the first official text of the Uniform Commercial Code. Amended several times since 1952, the **Uniform Commercial Code** (**UCC**) is the uniform commercial law proposed by the National Conference of Commissioners on Uniform State Laws that has been adopted or substantially adopted in all 50 states and the District of Columbia. Because of its civil law tradition, Louisiana did not adopt the sales and secured transactions articles of the UCC.

Under the UCC, good faith is rewarded. **Good faith**[1] is, specifically, honesty of intention, faithfulness to duty or obligation, and the absence of any intention to seek an unfair advantage or to defraud another. **Bad faith** is dishonesty of intention, unfaithfulness to duty or obligation, and the intention to seek an unfair advantage or to defraud another. From *good faith,* **bona fide** means in good faith, real, true, or without deception or fraud. A **bona fide purchaser for value** (**BFPV**), sometimes shortened to **bona fide purchaser** (**BFP**), is a person who buys for consideration without knowledge or notice of an adverse claim to the property.

Article 1 of the UCC provides that commercial language may be interpreted according to **usage of trade**, **usage of the trade**, or **trade usage**, which is, from *track,* a practice or method of dealing regularly observed and expected to be observed in a particular place, vocation, trade, or industry. Another source of interpretation is **course of dealing**, which is a sequence of previous conduct between the parties fairly regarded as a common understanding for interpreting their words and conduct.

THE SALE OF GOODS BY A MERCHANT

Article 2 of the UCC addresses the sale of goods by a merchant. **Goods** are existing and movable things other than choses in action or investment securities. A **sale of goods** is a transfer of goods for money or other valuable consideration or a transfer of goods for a price. From *trader,* a **merchant** is a person who is in the business of selling goods, a person who deals in goods of the kind sold, or a person who by occupation is held out as having knowledge or skill particular to the goods sold.

From *with shape,* **conforming goods** are goods that satisfy the obligation of the contract. **Nonconforming goods** are goods that do not satisfy the obligation of the contract or are defective. From *take care of,* to **cure** is, by a seller, to deliver conforming goods to replace nonconforming goods, within the terms of the contract. From *to protect,* to **cover**[1] with goods is, by a buyer, to obtain delivery of conforming goods to replace nonconforming goods, after the seller's breach of contract.

A **bill of sale** is an instrument evidencing the transfer of personal property, especially an instrument evidencing the transfer of personal property from a seller to a buyer. A **sale on approval** is a transfer of goods primarily for use, which goods may be returned if the buyer is not satisfied with them. A **sale or return** or, from *with sign,* a **consignment** is a transfer of goods primarily for resale, which goods may be returned if unsold in a reasonable amount of time, or a bailment for resale. Subject to Article 6 of the UCC, a **bulk transfer** is, from *heap,* a transfer of substantially all of a merchant's stock of goods out of the ordinary course of business, for which notice must be given to the merchant's creditors to avoid their being defrauded.

Risk of loss is the financial responsibility for damage or destruction of goods, especially the financial responsibility for damage or destruction of goods during a transfer between a seller and a buyer. Unless a contract provides otherwise, the risk of loss is on the seller until the buyer takes possession.

In sales, from *authorization,* a **warrant**[2] or, more commonly, from *guaranty,* a **warranty**[2] is an assurance or guaranty that a fact is true, upon which the other party can rely, especially an assurance or guaranty of quality of the goods sold. From *break,* a **breach of warranty** is a failure of an assurance or guaranty that a fact is true, or when a thing is deficient according to the terms of a warranty.

A **full warranty** is, under federal law, a warranty for consumer goods in which the seller must replace or repair defective goods without cost to the buyer or refund the purchase price to the buyer. Because of the serious consequences of a breached full warranty, most sellers only give limited warranties. A **limited warranty** is any warranty that is not a full warranty and a warranty that only warrants what it says it does. An **express warranty** is a warranty made by statements of fact or promise or by the showing of samples. An **implied warranty** is a warranty implied from the conduct of the seller or a warranty imposed by law.

Notice, however, that the law permits a seller to engage in **puffing**, which, from *inflating praise,* is making nonfactual statements of belief or opinion such as that a product or service is "good," "wonderful," or "best." A kind of puffing, **seller's talk** is a salesperson's statement of belief or opinion not meant as a representation of fact. Also, use of the phrase "**as is**" means in its current condition and is a statement that the property is sold without any warranty.

At common law, warranties were rarely given. At common law, almost every sale was "as is." From *let him beware,* **caveat** means beware, be warned, caution, take note, or warning. From *let the buyer beware,* **caveat emptor** was the common-law rule that the buyer purchases property at his or her own risk and the modern rule that where the seller has not made a warranty and where no warranty is imposed by law, the buyer purchases property at his or her own risk such as at a sheriff's sale. Occasionally, from

let the seller beware, **caveat venditor** is the observation that there are risks in selling property such as bankruptcy, fire, shoplifting, and so on.

A **warranty of title** is an implied warranty that the seller has good title to the goods and no unnoted liens exist. The seller may expressly disclaim the warranty of title. Title to goods obtained in a fraudulent manner is **voidable title**, which is a title able to be made legally nothing. Voidable title can become good title by being transferred to a bona fide purchaser for value.

From *trade-able,* **merchantable** means able to be sold, having at least ordinary quality, or being reasonably fit for the general purposes for which it was made and sold. A **warranty of merchantability** is an implied warranty by a merchant that the thing sold is of at least ordinary quality or reasonably fit or suitable for the general purposes for which it was made and sold. A **warranty of fitness for a particular purpose** is an express warranty by a merchant that the thing sold is suitable for the expressed special purpose of the buyer.

NEGOTIABLE INSTRUMENTS, GENERALLY

Article 3 of the UCC addresses negotiable instruments.

From *minted* and *coins,* **money** or **currency**[1] is, generally, any medium of exchange authorized by the government such as coin or currency. From *wedge* (the shape of a stamping die), **coin** is pieces of metal stamped by the government to designate its value. An allusion to the circulation of money, **currency**[2] is, specifically, paper specially printed by the government to designate its value. From *(money) box,* **cash**[1] (the noun) is ready money, money in hand, or money of immediate value to its possessor. To **cash**[2] (the verb) is to convert to ready money or to liquidate.

Carrying large sums of cash is dangerous, both because of the bulk and because of the risk of theft. Sometimes it is better to have a medium of exchange that has value to only a limited number of persons. The legal solution is **commercial paper**, which is an instrument that represents money or a right to money because the law says so. To be similar to cash, most commercial paper is, from *transfer* or *successfully travel along,* **negotiable**, which means transferable independently and easily according to the law or transferable by delivery or indorsement. A **negotiable instrument** is an instrument that represents money or a right to money and is transferable independently and easily according to the law or a written promise or order to pay money that is signed by the maker and contains an unconditional promise to pay a sum certain of money on demand, to order, or to bearer. **Nonnegotiable** means not transferable independently and easily according to the law or not transferable by delivery or indorsement.

Negotiable instruments include promissory notes and drafts. Negotiable instruments can be made payable on demand, to order, or to bearer. **On demand** means when requested. **Demand paper** is a negotiable instrument payable on demand. **To order** means to the named person or to whomever the right to payment has been assigned when payment is due. **Order paper** is a negotiable instrument made payable to order. **To bearer** means to the person in possession of the negotiable instrument. **Bearer paper** or a **bearer instrument** is a negotiable instrument made payable to bearer.

From *respect,* to **honor**[2] a negotiable instrument is to make payment on a negotiable instrument when presented for payment. To **dishonor** a negotiable instrument is to refuse to make payment on a negotiable instrument when presented for payment.

PROMISSORY NOTES

A **promissory note**[1] or **note**[1] is, generally, a written promise to pay money. Specifically, a **promissory note**[2] or a **note**[2] is a written acknowledgment of a debt and promise to pay money, especially a written promise to pay money that is negotiable if it is signed

by the maker and contains an unconditional promise to pay a sum certain of money on demand, to order, or to bearer. A **maker**[1] is, generally, a person who executes a written promise to pay money. A **comaker** is one of two or more makers of a written promise to pay money. A **cosigner** is a comaker who signs a written promise to pay money to extend credit, creditworthiness, or suretyship to the maker. A **payee**[1] is, generally, a person to whom a written promise to pay money has been made.

A **demand note** is a note payable when promised without any further demand or a note payable when payment is requested. A **time note** is a note payable at the stated particular time. From *ripe,* **maturity**[1] is the date or time when a right comes into existence or the date or time when a commercial paper is due and payable. An **installment note** is a note in which a party is required to make a series of payments over time. A **balloon note** is a note with a large final payment. From *know,* a **cognovit note** or **judgment note** is a promissory note in which the debtor authorizes an attorney to enter a confession of judgment against the debtor, without notice or trial, if the debtor defaults. A **confession of judgment** is consent to an adverse judgment. In many states, cognovit notes are prohibited in consumer transactions.

A **treasury bill** is a promissory note issued by the U.S. Treasury that matures in less than one year. A **treasury note** is a promissory note issued by the U.S. Treasury that matures between one and five years. A **treasury bond** is a promissory note issued by the U.S. Treasury that matures after five years or a corporate bond bought back by the corporation. A **certificate of deposit**, with the acronym **CD**, is a bank instrument that acknowledges a deposit of money and promises to repay the money to the depositor on a certain date with the specified interest.

DRAFTS

In commercial law, from *drawing,* a **draft**[5] or, traditionally, a **bill of exchange** is a written order to another to pay money to a third person or a written order to draw money from an account and pay a third person. A **sight draft** is a draft payable on demand. A **time draft** is a draft payable at the specified time.

From *to pull* (out), to **draw** is to make a draft, to take an advance, or to take money out of an account. A **drawer** or **maker**[2] of a draft is a person who draws a draft or a person who orders another to draw money from an account and pay a third person. A **drawee**, usually a bank, is a person or entity to whom a draft is drawn or a person or entity who is ordered to draw money from an account and pay a third person. An **acceptance**[5] of a draft is an agreement to pay a draft as ordered. A **qualified acceptance** is a conditional or partial acceptance or an acceptance different from the terms of the instrument. An **acceptor** is a person or entity that agrees to pay a draft. A **payee**[2] of a draft is a person originally named to be paid by a draft or a third person to whom another is ordered to draw money from an account and pay.

From *a receipt used to repel forgery or alteration,* a **check**[2] is a draft drawn upon a bank, payable to order, containing an unconditional promise to pay a sum certain of money, signed by the drawer, and payable on demand. A **certified check** is a check containing the bank's assurance that sufficient funds have been drawn to cover payment on demand or an accepted check. A **cashier's check** is a check made by a bank officer and drawn on the bank's own account. Because a cashier's check is a check backed by the financial strength of a bank, it is usually more likely to be paid than a **personal check**, which is a check backed by the financial strength of a person.

Nonsufficient funds (**NSF**) are not sufficient funds in the drawer's bank account, if any, to pay the payee or indorsee the sum certain of money. A **bad check**, a **nonsufficient funds check**, or an **NSF check** is a check for which there are nonsufficient funds or a check that has been dishonored upon presentation because there are nonsufficient

funds. From *beat,* a **bounced check** is a check that has been dishonored upon presentation because there are nonsufficient funds.

From *card-blank,* **carte blanche** is a signed blank instrument that is to be filled out at the discretion of the bearer, or unrestricted authority. A **blank check** is a signed check whose amount is to be filled out at the discretion of the bearer.

A **money order** is a negotiable draft paid upon the credit of an issuer authorized by law to issue negotiable drafts. A **domestic bill of exchange** is a draft drawn and payable in the United States. An **international bill of exchange** is a draft drawn in one country and payable in another.

A **letter of credit** is a written promise by a bank or other issuer, on behalf of its customer or client, to honor demands for payment, as provided in the instrument.

A **document of title** is a document evidencing the right of the possessor of the document to receive, hold, and dispose of the document and the goods it covers such as a bill of lading or a warehouse receipt.

A **bill of lading** is a carrier's itemized receipt of the goods being transported, originally given to the shipper, that evidences the transportation contract and title to the goods being transported. The transportation contract usually provides that the carrier will release the goods only to the person presenting the bill of lading. A **trade acceptance** is a draft attached to a bill of lading, sent to a bank near the buyer of the goods being transported, and ordering the buyer to pay the bank a sum certain of money for the benefit of the seller, after which the bank releases the bill of lading to the buyer.

From *aware* (of an item), a **ware** is an item of tangible personal property of intrinsic value. A **warehouse** is a place for receiving and storing goods or wares. A **warehouseman** is a person engaged in the business of receiving and storing goods or wares in which he or she has no interest. A **warehouse receipt** is a warehouseman's itemized receipt of the goods or wares being stored, which evidences title to the goods or wares being stored.

NEGOTIATION

In commercial law, from *to deal,* to **negotiate**[2] is to transfer commercial paper, to transfer a negotiable instrument, and to deliver or indorse to another. **Negotiation**[3] is the independent and easy transfer of commercial paper or the transfer of a negotiable instrument.

From *to keep,* to **hold** is to have title and possession. A **holder**, usually the transferee of a negotiable instrument, is a person in possession of a document of title or negotiable instrument issued or indorsed to the person or to the person's order, to bearer, or in blank. A **holder for value** is a holder who gave consideration for the negotiable instrument. A **holder in good faith** is a holder who took a negotiable instrument without notice of a defect in its title.

A **holder in due course** or **indorsee in due course** is a holder who is both a holder for value and a holder in good faith, is a bona fide purchaser for value of a negotiable instrument, and is a transferee of a negotiable instrument who, as to enforcing the negotiable instrument, takes the negotiable instrument free of all personal defenses of prior transferees. A holder in due course is only subject to **real defenses**, **absolute defenses**, or **universal defenses**, which are defenses that challenge the validity of a negotiable instrument such as bankruptcy, duress, fraud in the factum, illegality, incapacity, material alteration, and unauthorized signature. A holder in due course is not subject to **personal defenses** or **limited defenses** of prior transferees, which are defenses that challenge what a negotiable instrument was given for, such as breach of warranty, breach of contract, failure of consideration, fraud in the inducement, lack of consideration, nondelivery, and nonpayment.

A negotiable instrument is transferred by delivery or **indorsement**, which is signing the back of a negotiable instrument or attached paper, with or without added words, to transfer the instrument to another. From *lengthening,* an **allonge** is a paper attached to a negotiable instrument on which an indorsement is made. From *put on back,* to **indorse** is to sign the back of a negotiable instrument or attached paper, with or without added words, to transfer the instrument to another. An **indorser** is a person who makes an indorsement. An **indorsee** is a person to whom a negotiable instrument is transferred by an indorsement.

A **blank indorsement** is an indorsement without added words, making the negotiable instrument payable to bearer. A **special indorsement** or a **full indorsement** is an indorsement with added words making the negotiable instrument payable to a particular person or to the person's order such as "Pay to the order of John Doe." A **restrictive indorsement** is an indorsement with added words making the negotiable instrument payable according to a restriction such as "For deposit only." A **qualified indorsement** is an indorsement with added words limiting the liability of the indorser such as "Without recourse." From *back turn,* **recourse** is the ability to take action to satisfy a claim or taking action to satisfy a claim. **Without recourse** means without further rights, that is, the indorsee or holder has no right against the indorser or the indorsee or the holder has no ability to take action against the indorser to satisfy a claim.

From *to make fit,* an **accommodation** is an acceptance of an obligation without consideration or adequate consideration. **Accommodation paper** is a negotiable instrument signed as maker, drawer, acceptor, or indorser, without consideration or adequate consideration, to extend credit, creditworthiness, or suretyship to another. An **accommodation indorsement** is an indorsement, made without consideration or adequate consideration, to extend credit, creditworthiness, or suretyship to the holder.

A **payer** or a **payor** is a person obligated to pay or a person who paid. **Presentment**[1] of a negotiable instrument is a demand for acceptance made to a drawee or a demand for payment made to a payer or payor. From *first,* **primary liability** is an obligation to pay that is absolute and first in priority such as the liability of a maker or accepting drawee. From *second,* **secondary liability** is an obligation to pay only if the person with primary liability does not pay such as the liability of an indorser or surety.

SECURED TRANSACTIONS

From *without care,* **secured** means generally protected against loss, generally covered against loss, or having a security interest. A **secured transaction** is a transaction involving a security interest. A **security interest** is an interest in property that secures the payment of a debt or obligation. A **purchase-money security interest** is a security interest given to obtain the money needed to buy the secured property. A **debt**[2] is a duty to pay money. A **liquidated debt** is a debt the amount of which has been determined or a debt that has been paid. A **secured debt** is a debt secured by a security interest. A **secured creditor** is a creditor to whom a secured debt is owed, a creditor to whom is owed a debt secured by a security interest, and a creditor who has a security interest. A **secured claim** is a claim on the assets of a debtor by a secured creditor.

Unsecured means not generally protected against loss, not generally covered against loss, or not having a security interest. An **unsecured creditor** is a creditor who does not have a security interest.

Some security interests, particularly liens, arise by operation of the common law. From *load,* a **charge**[1] (commercial law, the noun) is a lien. To **charge**[2] (commercial law, the verb) is to impose a lien. From *bind,* a **lien** is a claim or charge on property to secure payment of an unpaid debt or performance of an obligation. A **lien creditor**

is a creditor to whom is owed a debt secured by a lien and a creditor who has a lien. A **waiver of lien**[2] is forgoing the right to payment or performance secured by a lien.

An **artisan's lien** is a lien permitting retention of a work until payment for the labor performed on it. A **factor's lien** is a lien that a factor has on goods consigned to the factor and in the factor's possession for money advanced by the factor and for the factor's commission. A **floating lien** is a lien on the current inventory and accounts of the debtor, including after-acquired inventory and accounts. A **warehouseman's lien** is a lien permitting retention of goods until storage charges have been paid.

A mortgage is a security interest. Mortgages are discussed in Chapter 17.

Article 9 of the UCC governs security interests in personal property and fixtures. A **security agreement** is an agreement that creates or includes a security interest. A **financing statement** is a notice of the existence of a security agreement or a security interest in goods. A **filing law** is a law that requires a document to be filed to be effective or to be effective for a certain purpose. The UCC generally requires the filing of a copy of a security agreement or the filing of a financing statement so that third persons have at least constructive notice of the security interest.

A security interest that is not filed with the appropriate agency cannot be enforced against a bona fide purchaser for value. From *completely perform,* to **perfect**[1] is, generally, to complete, to execute, or to take all the necessary steps to complete something. To **perfect a security interest** or to **perfect**[2] is to take all the necessary steps required to have an enforceable security interest.

Chattel paper is a writing that evidences both a debt and a security interest in specified goods or a writing that evidences both a debt and a lease of specified goods.

From *again possess,* **repossession** is a remedy of a secured creditor to satisfy the obligation of a debtor who defaults, which is to retake possession of the property for which security was given, ideally without a breach of the peace. Permission to repossess the property is usually expressly provided for in the security agreement.

POTENTIAL ILLEGALITY RELATED TO COMMERCIAL TRANSACTIONS

From *other,* to **alter** is to change or to make different. An **alteration** is a change or difference made, especially a change or difference made to an instrument. From *strip,* **spoliation** is the alteration, concealment, or destruction of evidence.

From a machine used in the 1800s to counterfeit money, **bogus** means not in good faith, not real, not true, or with deception or fraud. From *fly a kite,* to **kite** is to obtain money by writing worthless commercial paper, especially to write a check on an account before depositing money in it or to use a series of worthless checks to cover each other. **Check kiting** is obtaining money by writing a worthless check or checks and the theft crime of intentionally obtaining money by writing a worthless check or checks.

From *after,* to **postdate** is to put a date on something that is after the actual date, especially to put any date on commercial paper that is after the actual date the commercial paper was made. From *before,* to **antedate** or **backdate** is to put a date on something that is before the actual date, especially to put any date on commercial paper that is before the actual date the commercial paper was made.

BANKING

From *bench* (of merchants), a **bank** is, generally, a corporation licensed to receive deposits of money, deal in negotiable instruments, and lend money. A **commercial bank** is a general bank permitted to provide a variety of services and make a variety

of investments. A **savings and loan**, or **building and loan**, is a bank whose primary purpose is to encourage thrift and to provide loans for building and buying homes.

An **account**[2] (the noun, financial statement) is a detailed financial statement of the financial significance of a transaction or transactions. An **account**[3] (the noun, contractual relationship) is an established contractual relationship such as between a bank and its customer. A **joint account** is a bank account in two or more names.

From *away put,* a **deposit** is the putting of money or other property in the place where it is to be kept, the putting of money into an account or bank, or the money put into an account or bank. From *away draw,* a **withdrawal**[1] out of an account is the removal of money or other property from the place where it was kept, the taking of money out of an account or bank, or the money taken out of an account or bank. From *two pans,* the **balance**[2] is the difference between two amounts such as the amount of money remaining in an account after adding all the deposits and subtracting all the withdrawals. Balance also refers to no difference between two amounts.

A **loan** is the parting with money or other property on the condition of its return or the return of property of equal value at a fixed time or when demanded. In the sense of money, from *first* or *chief,* **principal**[3] is the original amount of money, the amount of money for which interest is charged or earned, or the amount of a loan from which interest is calculated. From *claim,* **interest**[4] (charge, specifically) is a charge for the use of other money or forbearance on a debt, money paid for the use of other money or forbearance on a debt, or money earned for use of other money or forbearance on a debt.

INSURANCE, GENERALLY

From *to safe,* to **assure** is to make safe, to pledge, to guaranty, or to insure. From *to exact a pledge,* to **insure** is to make safe in exchange for money, to guaranty the safety of something for money, to contract to pay a specified amount if a specified event occurs, or to contract for protection against a natural risk. Fundamentally, **insurance**[1] is a contract of protection against a natural risk. Generally, **insurance**[2] is the benefit of the safety or liability resulting from the exchange of a promise to make safe for money, a contract to guaranty the safety of something for money, or a contract to pay a specified amount if a specified event occurs. Insurance requires an **insurable interest**, which is an expectation of advantage from a relationship with the person or thing, the destruction of which by a natural risk would result in damage or loss.

From *pay for loss,* to **indemnify** is to compensate for damage or loss, to hold harmless, or to insure. To **hold harmless** is to make good or repay in the event of a specified loss. **Indemnity** is the obligation to compensate for damage or loss, the obligation to hold harmless, or the obligation of insurance. **Double indemnity** is the obligation to compensate for twice the amount of damage or loss, which is a common life insurance benefit for accidental death. **Liability insurance**[1] is, generally, insurance for the occurrence of a specified event resulting in liability. **Personal liability** is liability to satisfy a debt, obligation, or judgment from personal assets or liability not covered by liability insurance or other indemnity.

An **insurance company** or **insurance carrier** is a financially sound corporation or similar substantial business permitted to provide insurance. An **insurance agent** is an authorized representative of an insurance company. An **insurance broker** is an intermediary who arranges insurance contracts by connecting buyers of insurance with sellers of insurance, and vice versa, representing either or both.

An **insurer** is an insurance company that contracted to provide protection against a natural risk or the insurance company providing insurance. An **insured** is a person or entity that contracted for protection against a natural risk; the person or entity that owns protection by insurance for which the person or entity can designate the beneficiary; or,

broadly, any person protected by insurance. A **beneficiary**[4] of insurance is the person or entity designated to receive the benefit and proceeds of an insurance policy.

From *before take,* an **insurance premium** or **premium**[1] is a sum or money paid to obtain a contract of insurance. From *forward go,* **proceeds**[1] are, generally, the net sum of money derived from a transaction (what one "goes forward" with). A **benefit** is an advantage derived from an act or transaction. Generally, **benefits**[1] are the advantages derived from an act or transaction. **Insurance proceeds**, **proceeds**[2], **insurance benefits**, or **benefits**[2] are the money received from an insurer under an insurance contract. From *yearly,* an **annuity** is fixed periodic payments for a length of time or for the life of the person paid. An **annuitant** is a person who receives an annuity.

Generally reflecting the internal policy of an insurance company as to what it will pay, an **insurance policy**, a **policy**[4], or an **insurance contract** is an insurance agreement, or an instrument containing an insurance agreement. To **bind** is to obligate or constrain. An **insurance binder** or **binder** is a temporary insurance contract giving temporary protection, pending investigation and issuance of a formal policy, or a document containing a temporary insurance contract. In insurance, a **rider**[2] is an amendment or attachment to an insurance policy.

From *to protect,* to **cover**[2] is to protect against a particular risk. A **coverage** is a particular risk the insurance company is liable for if it occurs. The opposite of coverage, an **exclusion**[3] in insurance is a risk not protected against. **Comprehensive coverage** is coverage of many risks that could be covered separately. A **total loss** is a destruction of property to the extent it cannot be used for its intended purpose or a destruction of property such that it is of little or no value to its owner.

From *call out,* a **claim**[1] is a demand for what a person is owed or entitled to or a demand for what a person is allegedly owed or entitled to. An **insurance claim** or **claim**[2] is a demand for payment as promised under an insurance policy. To make a claim, the insured is usually required to submit to the insurer a **proof of loss**, which is a written statement by the insured of the amount of the loss. In insurance, a **deductible**[2] is the portion of a loss that the insured may be required to pay before the insurance company will pay. A deductible is usually required to discourage frivolous claims.

From *to next,* to **adjust** is to set to the correct amount, to ascertain the extent of a claim, or to settle a claim. An **adjuster**[1] is, generally, a person who sets the correct amount, a person who ascertains the extent of a claim, or a person who settles a claim. An **insurance adjuster** or **adjuster**[2] is an authorized representative of an insurance company who adjusts an insurance claim for the insurance company and an authorized representative of an insurance company who settles an insurance claim for the insurance company.

Modern law requires an insurance company to attempt to settle a claim in good faith. **Insurance bad faith** is an insurance company's frivolous or unfounded refusal to pay the proceeds of an insurance policy and an action to recover for an insurance company's frivolous or unfounded refusal to pay the proceeds of an insurance policy.

A claim for insurance may be denied where the insured made a material misrepresentation in an application for insurance. A **material misrepresentation** is an intentional or reckless false statement about a fact of consequence.

TYPES OF INSURANCE

Life insurance is insurance triggered by the death of the insured. Generally, there are two types of life insurance polices: term and whole life. For insurance, a **term**[2] is the time during which an insurance policy is in force. **Term insurance**[2] is, generally, insurance only for a certain period of time. **Term life insurance** or **term insurance**[1] is life insurance that provides benefits only if the insured dies during the time the policy is in force. **Whole life insurance** or **straight life insurance** is life insurance that provides

benefits whenever the insured dies. Whole life insurance has a savings component. The policy gradually builds up a **cash reserve** or **cash surrender value**, which is, generally, money that a whole life insurance policy accumulates that the owner of the policy can borrow against or cash in. **Burial insurance** is life insurance that specifically covers the cost of a burial and funeral.

Business insurance is insurance designed to protect a business from the death or disability of an owner or key employee or insurance triggered by the death or disability of a business owner or key employee. **Disability insurance** is insurance that provides income during a person's incapacity and insurance triggered by the insured's incapacity. **Business interruption insurance** is insurance covering the loss of business caused by being unable to engage in business for a period of time.

Health insurance is insurance triggered by the occurrence of a medical condition or the need to pay for medical care. A **preexisting condition clause** is a provision in a health insurance policy that excludes from coverage a medical condition that existed when the insurance was purchased.

Fire insurance is insurance triggered by damage to a structure caused by fire or loss of a structure caused by fire. **Flood insurance** is insurance that covers the risk of flood damage or loss. **Casualty insurance** is, generally, any group of insurances that cover risks of sudden damage or loss, other than fire or flood. **Comprehensive insurance** is insurance that covers many risks that could be covered separately. **Homeowner's insurance** is insurance that covers risks common to home ownership such as fire, storm damage, theft, vandalism, and liability to visitors, other than flood. A **homeowner's policy** is an insurance policy providing homeowner's insurance.

Automobile insurance, **car insurance**, or **motor vehicle insurance** is insurance triggered by damage to a motor vehicle due to the fault of another or triggered by liability due to the fault of the insured for personal injury arising out of the operation of a motor vehicle. **Collision insurance** is insurance triggered by damage to a motor vehicle due to the fault of another, as distinct from **motor vehicle liability insurance** or **liability insurance**[2], which is insurance triggered by liability due to the fault of the insured for personal injury arising out of the operation of a motor vehicle. From *all,* an **omnibus clause** is a provision in motor vehicle liability insurance that the insurance covers anyone permitted to drive the motor vehicle. **Financial responsibility** is the law requiring the owner or operator of a motor vehicle to have either substantial financial assets or a minimum amount of liability insurance to provide reasonable protection to others in the event operation of the motor vehicle results in liability to another. **No-fault insurance**[1] is a type of motor vehicle insurance required in some states in which the insurance is triggered by damage to a motor vehicle or liability for personal injury regardless of who is at fault. Generally, **no-fault insurance**[2] is a system under which everyone is required to purchase insurance covering his or her own potential losses, rather than his or her own potential liability.

Malpractice insurance is insurance for a professional triggered by the negligence or misconduct of the professional. **Medical malpractice insurance** is insurance for a doctor or other medical professional triggered by the negligence or misconduct of the doctor or other medical professional. **Legal malpractice insurance** is insurance for a lawyer triggered by the misconduct of the lawyer or an associated legal professional.

Reinsurance is insurance obtained by an insurance company to cover the risk of loss from an excessive amount of claims by those it has insured. A **reinsurer** is an insurance company that provides insurance to another insurance company. To **underwrite** is to insure the fulfillment of an obligation by providing money, by providing insurance, or by the sale of stocks or bonds. An **underwriter** is a person or entity that insures the fulfillment of an obligation by providing money, by providing insurance, or by the sale of stocks or bonds.

Group insurance is insurance provided for a defined group of people such as insurance provided by an employer to all of its employees. **Co-insurance** is insurance that covers only a certain amount or percentage of the insured's loss. Co-insurance is common in health insurance, where the insurance company only pays, for example, 75 percent of the insured's medical expenses, leaving the insured liable for the remaining 25 percent. A **co-pay** is the portion of a loss that is not insured and for which the insured is liable. **Self-insurance** is protection similar to insurance provided by the maintenance of a large fund out of which losses are paid. To the extent permitted by law, a financially sound corporation or similar substantial business may be self-insured rather than having to purchase insurance.

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- **accommodated party**
- **accommodation loan**
- **accommodation maker**
- **accommodation party**
- **accrue**
- **accrued interest**
- **annuity policy**
- **bearer**
- **borrower**
- **collateral note**
- **commercial impracticability**
- **commercial unit**
- **conditional sale**
- **conspicuous limitation or exclusion of warranties**
- **contract to sell**
- **contractual good faith**
- **contribution between insurers**
- **course of performance**
- **demand loan**
- **destination contract**
- **disability clause**
- **double insurance**
- **draft-varying acceptance**
- **duty to resell**
- **existence of the subject matter**
- **F.A.S.**
- **filing**[1]
- **finish or scrap**
- **F.O.B.**
- **F.O.B. (the place of destination)**
- **F.O.B. (the place of shipment)**
- **free alongside**
- **free on board**
- **fungible goods**
- **future goods**
- **good faith dealing**
- **good faith obligation**
- **identification of the goods to the contract**
- **identified goods**
- **identity or quality of the subject matter**
- **indemnification**
- **indemnity insurance**
- **indemnity policy**
- **inspection**
- **insurability**
- **insurable**
- **kiting**
- **lend**
- **lender**
- **marine insurance**
- **market price**
- **nonnegotiable instrument**
- **objection to terms**
- **objectively determinable**
- **perfection of a security interest**
- **predominant factor test**
- **price**
- **price under the contract**
- **private sell**
- **public sale**
- **replacement value**
- **resale value**
- **revocation of a previous acceptance**
- **right to transfer**
- **sales contract**
- **secured note**
- **shipment contract**
- **specialized goods**
- **specific reasons for rejection**
- **spot sale**
- **standards of good faith and fair dealing**
- **substituted goods**
- **successive indorsement**
- **sum certain**
- **tender of delivery**
- **transaction in goods**
- **transfer of interest**
- **umbrella policy**
- **value of the goods as accepted**
- **warrantee**
- **warrantor**

Chapter 26

Agency and Partnership

BUSINESS ORGANIZATIONS, GENERALLY

From *to join with,* the law about forms of business is **business associations**, also known as **business entities** or **business organizations**. The basic forms of business are agency, partnership, and corporation. Corporations are discussed in Chapter 27.

AGENCY, GENERALLY

From *feel together,* **consensual** is with the consent of both parties. From *to do,* an **agency relationship** or an **agency**[3] is a consensual fiduciary relationship created by operation of law, wherein a person voluntarily agrees to act subject to the control of another for a legal purpose on the other's behalf or a consensual relationship wherein a person acts for or represents another. From *to do,* an **agent**[1] is, generally, a representative or a person who acts for another. Specifically, an **agent**[4] is a person who is authorized and consents to act for the benefit of another, subject to the other's control. In agency, from *first* or *chief,* a **principal**[4] is a person who authorizes and consents to have another act for the person's benefit, subject to the person's control. A **third party**[1] or **third person** is a person outside of a two-person relationship such as an agency.

A **principal–agent agency** is a broad agency in which an agent acts in place of a principal and can bind the principal contractually with third parties. In a broad agency, a **principal**[5] is a person who has another act for the person subject to the person's general control. In a broad agency, a **managing agent** or **agent**[5] is a person who acts for or represents another subject to the other's general control or a person who acts for or represents another with a general power to exercise judgment and discretion. An **exclusive agency** is the right to represent the principal or sell the principal's products or services, within a particular market, without competition from another agent of the principal.

From *to devote,* to **employ** is to have another work for you or to have something work for you. A **master–servant agency** or **employment** is a narrow agency in which an agent merely works for a principal and generally cannot bind the principal contractually with third parties or an agency in which an employee merely works for an employer and generally cannot bind the employer with third parties. A **master**[2] or an **employer** is a person who has another work for the person, subject to the person's control over the detail, manner, and method of the physical acts. A **servant** or an **employee** is a person who works for another subject to the other person's control over the detail, manner, and method of the physical acts. A master or employer is usually liable for the acts of a servant or employee in the scope of the master–servant agency or employment.

Agency or employment does not exist where a person is an **independent contractor**, which is a person who has agreed to do work for another while retaining control over the method, means, and manner of producing the result, and so not deemed an employee. Factors in favor of finding that a person is an independent contractor include (1) a contract says so; (2) the person has control over the detail, manner, and method of the physical acts; (3) the person engages in a distinct business or occupation; (4) local custom is to use a contractor; (5) skill is required; (6) the person supplies the tools and the place of work; (7) the person works for a short time; (8) the person is paid by the job and not by time; (9) it is not the regular business of the principal; and (10) the parties believe there is an independent contractor relationship.

PARTICULAR AGENTS AND PRINCIPALS

From *all,* a **general agent** is an agent authorized to conduct all of a business of the principal or all of the businesses of the principal at a particular location. From *particular,* a **special agent**[2] is, generally, an agent authorized to perform a specified act or transaction for the principal. From *under,* a **subagent** is an agent of an agent, including an attorney's paralegal for a client.

A **sale or return**, or a **consignment**, is a transfer of goods primarily for resale, which goods may be returned if unsold in a reasonable amount of time, or a bailment for resale. A **consignor** or a **principal**[6] is a bailor in a consignment who transfers goods for resale. A **consignee**, a **factor**[1], or an **agent**[6] is the bailee in a consignment who tries to resell the goods or a bailee in a consignment who contributes to the resale of the goods.

From *doer,* a **factor**[2] is, generally, an agent or element that contributes to a particular outcome. **Factorage** is the receipt and selling of goods for a commission. From *of belief,* a **del credere agent** is a factor that sells the principal's goods on credit and guarantees the buyer's solvency and payment, entitling the factor to a higher commission.

From *opposite of closure,* a **disclosed principal** is, in a transaction conducted by an agent, a principal for whom the third party has notice of identity. A **partially disclosed principal** is, in a transaction conducted by an agent, a principal for whom the third party has notice of existence but not notice of identity. An **undisclosed principal** is, in a transaction conducted by an agent, a principal for whom the third party does ***not*** have notice. An **undisclosed agency** is an agency with an undisclosed principal.

AGENT AUTHORITY

In the sense of power, from *that which settles,* **authority**[3] is the right and power to do something and the power delegated to another. To **authorize** is to grant the right and power to do something and to delegate power to another.

An **agency in fact** is an agency created by an agreement, with express authority and implied authority, and an agency not created by law such as an agency by estoppel. From *out-push,* **express authority** is explicit oral or written authority given to an agent such as a written power of attorney. From *involve* (by inference), **implied authority** or **incidental authority** is nonexplicit authority inferred from the circumstances to do what is reasonably necessary to accomplish the purpose of the agency. From *to show,* **ostensible** means what appears to be but may not be what it appears to be or is not what it appears to be. From *into sight,* **apparent authority**, **ostensible authority**, or **agency by estoppel** is the rule of equity that a principal who objectively holds out a person as being an agent of the principal, and so causes detrimental reliance by a third person and damages, cannot deny that the person was an agent.

An **apparent agent** is a person a principal objectively holds out as being an agent of the principal.

From *confirm,* to **ratify** means to formally adopt or approve. **Ratification**[2] by a principal is adoption or approval by a principal of the acts of an agent, whether or not the acts were done with authority. An **agency by ratification** is the agency created when an agent acts without authority, but the principal approves of the acts of the agent.

An agency is usually revocable by the principal. An **irrevocable agency** is an agency that cannot be revoked under the terms of an agreement.

LIABILITY FOR THE ACTS OF AN AGENT

From *in place of another,* **vicarious** means experienced through the experience of another or, simply, through another. From *in thought,* to **impute** is to make a person liable vicariously for the act of another, by attribution or legal transfer, because of the relationship between the person and the other, even though the person did not act. **Imputed** means attributed or legally transferred to a person vicariously from the experience of another. **Imputed knowledge** is knowledge attributed or legally transferred to a person vicariously from the knowledge of another. **Imputed negligence** is negligence attributed or legally transferred to a person vicariously from the negligence of another. **Imputed liability** or **vicarious liability**[1] is, generally, liability attributed or legally transferred to a person vicariously from the liability-causing acts or omissions of another.

In Latin *let the superior answer,* **respondeat superior** is the doctrine that a master is vicariously liable for the acts of a servant within the scope of the servant's agency and in furtherance of the master's business and the doctrine that an employer is vicariously liable for the acts of an employee within the scope of the employee's employment and in furtherance of the employer's business. From *aim,* **scope of employment** is the range of activities done by an employee while performing his or her duties as an employee or the range of activities that are a normal risk of the business that the business should bear.

PROPRIETORSHIP

From *private ownership,* **proprietary** means owned by a particular person or entity. A **proprietor**, commonly referred to by the redundant phrase **sole proprietor**, is the sole owner of a business or a person engaged in a business by him- or herself. A **proprietorship**, commonly referred to by the redundant phrase **sole proprietorship**, is a business owned and operated by one person, and not a corporation. The proprietor makes all management decisions, receives all profits, is taxed personally, incurs all losses, and has unlimited liability. The main limitation is that a proprietorship ends when the proprietor dies. The property of the proprietorship passes to the heirs or beneficiaries of the proprietor, who may or may not continue the business. From *practice,* a **sole practitioner** or **solo practitioner** is a person engaged in a profession by him- or herself or a professional whose form of business is a proprietorship.

A **business name** is a name under which a business does business. From *fiction,* a **fictitious name**, an **assumed name**, or a **stage name** is a name that is not the actual name of a person or entity, especially a business name that is not the same as the actual name of the owner of the business. Like other businesses, a proprietorship that uses a fictitious name is usually required to register that name with a government agency to provide third parties with at least constructive notice of the ownership of the business. **Doing business as**, with the acronym **DBA**, **D/B/A**, or **dba**, is a phrase

used to indicate the fictitious name of a business. For example, "John Doe dba John the Plumber" means that the proprietor John Doe is using the fictitious business name John the Plumber.

PARTNERSHIP

While some activities are best performed by one person or entity, other activities are best performed by a team. A common team is one or more persons or entities with product or service expertise, joining with one or more persons or entities with financial power or management expertise. A team may also survive the death of one member.

From *together (take) bread,* a **company**[1] or, from *business,* a **firm** is, generally, a group of people who associate in a business enterprise by forming or maintaining a partnership, a joint venture, or a corporation.

From *sharing relationship,* a **partnership**, historically known as a **co-partnership**, is an association of two or more persons or entities who agree to currently carry on as co-owners of a business for profit or, loosely, a business team. A **partner**, a member of a partnership, is one of two or more persons or entities who have associated and agreed to currently carry on as co-owners of a business for profit or, loosely, a member of a business team. **Co-owners of a business** means that the persons or entities in a partnership are both agents and principals for each other. The partners agree to share the profits and to be personally liable for the losses or liabilities. A partner has **unlimited liability**, which is liability without established bounds. For tax purposes, a partnership is required to file an information return reporting the profits, losses, and the respective shares of the partners, and the partners are taxed individually on their respective shares.

A **partnership agreement** or **articles of partnership** is an instrument evidencing an agreement to form a partnership and an instrument setting out each partner's rights in a partnership and obligations to the partnership. **Tenancy in partnership** is the ownership of an estate in land by a partnership.

From *apart separate,* a **secret partner** is a partner not known to the public but that takes an active part in the business. From *be quiet,* a **silent partner** is a partner that may or may not be known to the public but does not take an active part in the business. From *to sleep,* a **dormant partner** is a partner not known to the public and that does not take an active part in the business. From *in name only,* a **nominal partner** or, from *to show,* an **ostensible partner** is a person whose name appears in connection with a partnership but is not a partner, or was or will be a partner only for a short time.

From *all,* a **general partnership** is an ordinary partnership in which all partners manage the partnership and have unlimited liability. From *bounded,* a **limited partnership** is a special partnership in which one or more partners manage the partnership and have unlimited liability, while one or more partners have no right to participate in the management of the partnership and have liability limited to the amount of capital each contributed to the partnership. A **general partner**, a partnership manager, is a partner who manages a limited partnership and has unlimited liability. A **limited partner**, a partnership investor, is a partner who only contributes capital to a limited partnership and whose liability is limited to the amount of capital contributed.

A **limited liability partnership** (**LLP**), a **registered limited liability partnership** (**RLLP**), or a **registered partnership having limited liability** (**RPLL**) is a special partnership in which all partners manage the partnership but only the partnership as a whole is liable for tort liability or a special partnership in which all partners manage the partnership but only the partnership as a whole is liable for tort or contract liability.

Limited partner interests may be sold in a manner similar to original shares of stock in a corporation. From *under write,* to **subscribe**[2] is to purchase original shares of a

corporation or partnership or to purchase or receive a periodical publication until cancelation or expiration of the purchase, the permission, or the publication. A **subscriber** is a person who has agreed to purchase or has purchased original shares of a corporation or partnership or a person who has agreed to purchase or receive a periodical publication, or has purchased or received a periodical publication, until cancelation or expiration of the purchase, the permission, or the publication. A **subscription** is having purchased original shares of a corporation or partnership or having agreed to purchase or receive a periodical publication, until cancelation or expiration of the purchase, the permission, or the publication. A **subscription right** or **preemptive right** is the right to purchase additional shares of a corporation or partnership, of the same kind already held, if the corporation or partnership issues new shares.

THE RELATIONS OF PARTNERS AMONG THEMSELVES

Partners who manage a partnership have fiduciary duties to each other and other partners. Among other things, they must be loyal to the partnership, act in good faith, hold the profits derived from the partnership in trust, and account for any secret profits.

From *a count,* to **account**[1] (the verb) is to provide a detailed statement of the financial significance of a transaction or transactions. An **accounting**[2] is, generally, an explanation of what was done with the money or other property entrusted to a person. A **formal accounting** or **accounting**[3] is an action in equity for an accounting. A partner may seek a formal accounting from the other partner or partners where the partnership is not terminated, when the partner is excluded from the partnership business, where another partner withholds secret profits, where the right to an accounting is provided for in the partnership agreement, or where equity requires.

Partnership assets are assets of a partnership as distinct from the personal assets of a partner. **Partnership debts** are debts of a partnership as distinct from the personal debts of a partner. An **intangible asset** is an asset that is intangible property, except for a writing, if any, that evidences it. Two intangible assets any business can have, but that are more common with a partnership than with a proprietorship, are going concern value and good will. **Going concern value** is the value of a business being an ongoing enterprise able to generate return on investment. **Good will** is the value of the advantage acquired by a business as a consequence of constant or habitual customers, due to its position or standing in the community, established relationships with customers and suppliers, and the reputation of its products and services; or the value in the fixed and favorable consideration of customers, arising from an established, well-known, and well-conducted business.

TERMINATION OF A PARTNERSHIP

From *apart-loosen,* to **dissolve** is to end. Generally, **dissolution**[4] means the end. The end of a partnership or termination of a partnership is known as **dissolution of the partnership**, **partnership dissolution**, or **dissolution**[5]. A partnership is dissolved by the death, withdrawal, or bankruptcy of a partner other than a limited partner or by a court order.

An allusion to an easy flow, from *make liquid or clear,* to **liquidate** is to determine the amount due, to reduce to cash value, to pay, or to settle. To **liquidate a business** is to assemble and sell the assets of a business and to pay or settle the debts of a business, and so reduce a business to cash value. **Liquidation** is the assembly and sale of the assets of a business and the payment or settlement of the debts of a business, for the reduction of a business to cash value.

From *to turn,* **winding up**[1] is the process of liquidating a dissolved corporation or partnership. The **winding-up period** or **winding up**[2] is the period of time during which a dissolved corporation or partnership is liquidated.

A PARTNERSHIP OF LAWYERS

Lawyers may associate with other lawyers in the practice of law. By associating with other lawyers, lawyers can, among other things, share common expenses and more easily develop specialized practices.

From *legal business,* a **law firm** is, usually, a partnership of lawyers. From *foundation,* a **founding partner** is one of the original partners of a partnership or one of the original partners of a law firm. From *elder,* **senior** means older or primary. A **senior partner** is a partner who, as a result of more time or merit in the partnership, has more management rights or partnership shares than other partners. From *younger,* **junior** means younger or secondary. A **junior partner** is a partner who, as a result of less time or merit in the partnership, has less management rights or partnership shares than other partners. From *to join with,* an **associate** is a person who works for a business and has a small ownership interest in the business, a person who works for a business and has no ownership interest, a lawyer who works for a law firm but is not a partner in the law firm, or a lawyer who is an employee of a law firm.

JOINT VENTURE

From *join,* a **joint venture**, a **co-venture**, or a **joint enterprise**[1] is a business relationship similar to a partnership in which two or more persons agree to share profits, losses, and control of a limited undertaking. Because there is no continuous undertaking, a joint venture is not a partnership. A joint venture is two or more persons coming together for one business purpose, rather than for business in general.

In the sense of a joint venture, from *representatives combined,* a **syndicate** is a group of persons or entities that form a joint venture to undertake something they are unable or unwilling to undertake alone. An **underwriting syndicate** is, generally, a group of investment bankers that undertake to supply a large amount of capital needed for new business.

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- **agency coupled with an interest**
- **associate attorney**
- **business organization**
- **Chinese wall**
- **implied agency**
- **implied ratification**
- **partners**
- **plenipotentiary**
- **power coupled with an interest**
- **primary agent**
- **Revised Uniform Partnership Act**
- **Uniform Limited Partnership Act**
- **Uniform Partnership Act**
- **universal agent**
- **UPA**

Chapter 27

Corporations

CORPORATIONS, GENERALLY

A proprietorship terminates upon the death of the proprietor. A partnership with three or more partners may have or develop some ability to survive the death of a partner, but there is no assurance that a partnership will survive the death of a partner. The human problem is having a business organization assured of surviving the death of a proprietor or partner. The human solution is to create an artificial person that never dies.

From *body,* **corporate** means of a corporation or in the manner of a corporation. A **corporation**[2], with the abbreviation **corp.**, is a legal entity separate and distinct from its associated owners that can sue or be sued in its own name and that has potential perpetual life, ease in raising capital, transferability of shares, limited liability, and centralized management. It is an **artificial person** or **legal entity**, which is a person or entity created by law and granted some but not all of the attributes of a natural person.

From *portion,* a **share**[1] is, generally, a fair or legal portion. In the sense of ownership, a **share**[2] is a portion of something of value, especially a portion of ownership of a corporation or partnership. A **shareholder** is an owner of a portion of something of value, especially an owner of a portion of a corporation or partnership. From *set straight,* a corporation or association **director**[2] is one of a group of overall managers of a corporation or association and an overall manager of a corporation or association.

In the sense of money, from *advance,* a **profit**[2] is, generally, an excess of money or value received over money or value spent, or money received minus money spent. From *apart separate,* a **dividend**, a profit divided and distributed among shareholders, is a portion of the profits of a corporation to which a shareholder is entitled, if and when the directors of the corporation so declare. A shareholder has a right to dividends (if and when declared), a right to vote for directors and vote on major decisions, and a right to a portion in any money remaining after liquidation of the corporation.

From *bounded,* a corporation has **limited liability**, which means liability only to the extent of the assets of the business provided by its owners and no personal liability by others. As a general rule, shareholders are not personally liable for the obligations of a corporation and so can lose only the shareholder's investment in the corporation.

Because of the attractiveness of limited liability, people sometimes wrongfully claim to have formed or maintained a corporation, and have limited liability, to perpetrate a fraud. Like a phony farmer made of straw used to scare away birds, a **strawman** or a **dummy** is a sham entity, person, or thing used to mislead or to accomplish something indirectly. From *senseless,* a **dummy corporation** is a corporation that has no business purpose other than to protect the person behind it from liability or disclosure.

For a corporation to truly exist, the corporation must have substance and the formalities must be observed. **Piercing the corporate veil** or **disregarding the corporate entity** is the doctrine of equity and the process of ignoring an apparent but not actual corporate entity and imposing liability on a person or entity apparently but not actually entitled to limited liability. From *other self,* an **alter ego** is a person's apparent but not actual other self or an apparent but not actual corporate entity ignored when piercing the corporate veil.

FORMATION OF A CORPORATION, GENERALLY

From *by right,* **de jure**, proper, means as a matter of law, as provided by the law, or according to the law. A **de jure corporation** is a corporation formed as provided by the law or a corporation formed according to the law. From *in fact,* **de facto**, defective but sufficient, means as a matter of deed, not as provided by the law but as accomplished in reality by conduct or practice. A **de facto corporation** is a corporation formed by a defective but good-faith attempt to form a corporation as provided by law, colorable compliance, and some use of corporate powers.

In the law of corporations, from *make a body,* to **incorporate**[2] is to combine to form one body or to form a corporation. **Incorporation**[3] is made one body or formation of a corporation. From *forward move,* a **promoter** is a person who undertakes, plans, and causes the formation of a corporation. Formation of a corporation, according to the law, generally requires articles of incorporation, filing of the articles of incorporation, subscription of shares, and an initial meeting of shareholders to elect directors.

ARTICLES OF INCORPORATION AND RELATED MATTERS

From *sections making a body,* **articles of incorporation**, a collective term, is an instrument providing for a corporation by setting out the corporation's name, principal office, purpose, and authorized shares. An **incorporator** is a person who performs the formality of signing the articles of incorporation.

A corporation is required to have a **corporate name**, which is a name that indicates that the business organization is a corporation with limited liability such as a name including the term Corporation, Corp., Company, Co., Limited, or Ltd. From *together (take) bread,* **company**[2], with the abbreviation **Co.**, is, usually, a name suffix that indicates a corporation with limited liability or, sometimes, a name suffix that indicates a partnership. From *bounded,* **limited**, with the abbreviation **Ltd.**, is a name suffix that indicates a corporation or other business with limited liability, especially a corporation formed in England or Canada.

A **domestic corporation** is a corporation incorporated in the state in which it is doing business. A **foreign corporation** is a corporation incorporated not in the state in which it is doing business. Whether a corporation is a domestic corporation or a foreign corporation depends on what state you are in.

A corporation must have a legal purpose. The powers of a corporation are explicitly limited to those conferred by its charter or the statute under which it was created and implicitly limited to the legal means of achieving its legal purpose. A corporation with the maximum possible powers is the corporation whose legal purpose is to do anything a corporation is permitted to do. From *beyond powers,* **ultra vires** means beyond its powers, especially beyond the powers of a corporation or beyond the powers conferred by a charter. An **ultra vires act** is an act beyond the powers

of a corporation or an act beyond the powers conferred by a charter. Ultra vires acts are illegal and can be challenged by a stockholder or interested person. Ultra vires acts may be grounds for the state attorney general to bring an action to terminate a corporation.

A **for-profit corporation**, a **profit corporation**, or a **business corporation** is a corporation whose primary purpose is to make a profit to provide dividends or increased share value for its shareholders. A **not-for-profit corporation** or a **nonprofit corporation** is a corporation whose primary purpose is a social or charitable purpose. From *kindness,* a **charitable corporation** or, from *alms,* an **eleemosynary corporation** is a corporation whose primary purpose is a charitable purpose.

A **public corporation**[1] is a special corporation that has a quasi-governmental purpose but is financially independent. A **private corporation**[1] is an ordinary corporation that does not have a quasi-governmental purpose. A **shell corporation** is a corporation with no active business but is used to achieve some business purpose.

The articles of incorporation are filed with the secretary of state. If no other corporation is using the same corporate name, the secretary of state usually issues a certificate of incorporation. A **certificate of incorporation**, a **certificate of authority**, a corporate **charter**[3], or **articles of organization** is an official instrument indicating the establishment and existence of a corporation with the permission of the state.

STOCK AND STOCKHOLDERS' MEETINGS

From *tree trunk,* **corporate stock** or **stock**[1] is a portion or share of the ownership of a for-profit corporation or a portion or share of the equity of a for-profit corporation. A **stock certificate** or **stock**[2] is an instrument evidencing a portion or share of the ownership of a for-profit corporation or an instrument evidencing a portion or share of the equity of a for-profit corporation. A **stockholder** is a person who owns stock or a person with title to and possession of stock.

Most for-profit corporations are stock corporations. A **stock corporation** is, obviously, a for-profit corporation with stock. The exception is a **nonstock corporation** or **mutual company**, which is a for-profit corporation without stock but, instead, a for-profit corporation owned by members under a membership agreement that confers all rights and liabilities, such as a mutual insurance company or a private club.

A **publicly held corporation** or a **public corporation**[2] is a for-profit corporation in which stock is offered for sale to the public and a corporation that must generally keep its overall financial condition public. A **privately held corporation** or a **private corporation**[2] is a for-profit corporation in which stock is not sold to the public and a corporation that may generally keep its financial condition private. A **close corporation**[1], a **closed corporation**, a **closely held corporation**, or a **family corporation**[1] is, generally, a corporation in which stock is held by a few shareholders (such as members of a family) and not freely traded.

From *head,* **capital**[1] is, generally, money or other property used for the creation of more wealth. From *to clothe,* to **invest** is to place capital where it will create wealth for the person who placed it. An **investment** is the placement of capital where it will create wealth for the person who placed it. An **investor** is a person who places capital where it will create wealth for the person.

Specifically, **capital**[2] is money and other property that is an investment in a business. **Working capital** is cash or other property readily available for use in a business. **Capital stock** is stock representing the money or other property contributed by the initial shareholders to the financial foundation of a corporation.

From *out-go,* a **stock issue** or **issue**[2] of stock is the process in which a corporation authorizes and delivers shares of stock for sale and the shares of stock that a

corporation has authorized and delivered for sale. **Authorized stock** is the amount of stock a corporation may issue as provided by the corporation's governing documents. **Outstanding stock** is the amount of stock held by shareholders and not reacquired by the corporation. **Treasury stock** is the authorized stock issued and reacquired by the corporation. Treasury stock does not earn a dividend nor does it entitle anyone to vote.

From *before take,* a **premium**[2] is, generally, something extra paid for something extra. For stock, a **premium**[3] is a sum of money paid to obtain an option to buy or sell corporate stock. From *choice,* a **stock option** is a right to purchase a stock at a future date at the present price or an established price, which is expected to be lower than the future price. An **employee stock option** is a stock option granted as compensation or incentive compensation to a director, officer, or employee.

From *belonging to all,* **common stock** is ordinary stock by which the shareholder has a right to a dividend if and when declared by the directors and the right to vote on corporate matters. From *before place,* **preferred stock** is special stock in which the shareholder has a definite or priority right to a dividend but, in many corporations, no right to vote on corporate matters.

From *usual amount,* **par** is an established value. **Par value** or **face value** is the stated value of a share of stock. Traditionally, a corporation was required to have assets equal to the par value of its stock. From *water down,* **watered stock**, stock issued as paid in full, but not in fact fully paid for, was illegal. Today, most corporations are not required to have a minimum amount of assets. As a result, most common stock is **no-par stock**, which is stock without a stated value.

A **stockholder's meeting** or **shareholders' meeting** is a meeting of shareholders or stockholders to discuss and vote on corporate matters. An initial shareholders' meeting must be held to elect the corporation's initial directors. Most corporations have an annual shareholders' meeting and special shareholders' meetings as needed. From *yearly,* **annual** is of a year or once a year. An **annual meeting** is a meeting held once a year or a regular meeting of shareholders held once a year.

From *letter granting power,* a **proxy**[1] is, generally, a person who has received specific authority from another to act or speak for the other or a written specific authority from another to act or speak for the other. For shareholders, a **proxy**[2] is a shareholder who has received specific authority from another shareholder to vote or speak for that shareholder or a written specific authority from another shareholder to vote or speak for that shareholder.

The phrase **voting rights**[2] describes the general rights of a shareholder to vote on corporate matters. A **voting trust** is an agreement for the accumulation of the votes of many shareholders, by persuasion or proxy, in an effort to control a corporation.

From *heap,* **cumulative voting** is a system of voting in which each voter gets several votes, all of which can be cast for a single candidate, especially a system of shareholder voting in which each shareholder gets several votes, all of which can be cast for a single candidate for director. Under cumulative voting, a minority can pool their votes to elect at least one minority candidate.

OTHER METHODS OF RAISING CORPORATE CAPITAL

From *without care,* **security**[1] is, generally, something providing assurance or protection. In finance, **security**[2] is protection from the risk of loss. **Securities** are instruments evidencing a secured indebtedness or a right to a portion or share of the profits of a for-profit business or its assets upon liquidation. **Corporate securities** are instruments evidencing a secured indebtedness or a right to a portion or share of the profits of a for-profit corporation or its assets upon liquidation such

as stock certificates, bonds, and notes. An **original issue** is the initial creation or sale of a security.

A **bond**[1] is, generally, a written promise to pay money to assure the performance of an act or duty, or an insurance policy. Among notes, a **bond**[3] is a long-term obligation or promissory note by a corporation or government under which the holder is entitled to interest. A **bondholder** is a person who holds a bond. For bonds, **maturity**[2] is when final payment on a bond is due. A **bearer bond** is a bond that is a negotiable instrument. As related to a bond, an **indenture**[3] is an instrument specifying the rights of a bondholder. Analogous to a bank's certificate of deposit and similar to a bond, a **debenture** is an instrument that acknowledges a debt and promises to pay the debt, especially the debt of a corporation. The holder of a corporate debenture is a creditor of the corporation and entitled to payment before a stockholder upon dissolution.

MANAGEMENT OF A CORPORATION

A corporation may have a corporate seal. A **corporate seal** is a distinctive seal used by a corporation to attest that an instrument is an instrument of the corporation.

During formation or thereafter, a corporation or association, by its shareholders or members, usually adopts regulations or bylaws. In the law of corporations, a **regulation**[4], a **by-law**[2], or a **bylaw** is an internal law of a corporation or association made by its shareholders or members, especially an internal law of a corporation designed to govern the behavior of directors or officers who otherwise manage the corporation.

A corporation is managed by directors elected by the shareholders and officers appointed by the directors. Directors and officers owe fiduciary duties to the corporation.

Again, from *set straight,* a corporation or association **director**[2] is one of a group of overall managers of a corporation or association and an overall manager of a corporation or association. A **corporate director** is an overall manager of a corporation. The **board of directors** or **board**[3] is the group of overall managers of a corporation or association. Traditionally, from *seat* (in the sense of where the power is), the **chairman of the board** is the presiding director at a meeting of the board of directors and the highest-ranking director in a corporation or association. A **corporate resolution** is a formal decision made or adopted by the board of directors, commonly requested by banks for corporate decisions involving banking such as who is authorized to sign a corporate check. The **business-judgment rule** is that a director is not liable for a bad business decision if the decision was an independent and informed decision made in good faith with the honest belief that the decision was in the best interest of the corporation.

From *server,* an **officer**[1] or **official**[2] is, generally, a formal agent or an agent in a position of substantial authority. An **officer**[2] is a day-to-day manager of a corporation or association. A **corporate officer** is a day-to-day manager of a corporation. From *head,* a **chief executive officer** (**CEO**) is the modern name for the highest-ranking officer in a corporation or association. From *head,* a **chief financial officer** (**CFO**) is the modern name for the highest-ranking financial officer in a corporation or association.

From *presiding,* the **president**[4] is the traditional name of the highest-ranking officer in a corporation or association or the modern name of the highest-ranking officer in a major unit of a corporation or association, especially a unit that was once a separate corporation or association. From *substitute,* the **vice president**[2], the substitute president, is the traditional name for the person who becomes president of a corporation

or association if, during the president's time in office, the president dies, resigns, is removed, or is unable to discharge the powers and duties of office. Today, the vice president may be any designated high-ranking officer in a corporation or association who is not the highest-ranking officer.

In Latin meaning *from office,* **ex officio** means by virtue of the person's office or a person who is a member of a group by virtue of the person's office. For example, a bylaw of a corporation may provide that the CEO is a member of the board of directors, even though he or she is not a director elected by the shareholders.

Where it is alleged that the directors or officers of a corporation have failed to fulfill their fiduciary duties to the corporation, a shareholder or shareholders may bring a derivative action. From *draw off,* a **derivative action**, an action by one or more shareholders on behalf of a corporation, is an action based upon an important corporate right that is sought to be enforced by a shareholder or shareholders because of the alleged failure of the directors or officers to act to enforce that right. A **strike suit** is a derisive term for a derivative action of value to the shareholder or the shareholder's attorney but of little merit or value to the corporation or a derivative action perceived as being brought primarily for its nuisance value.

BASIC ACCOUNTING AND RECORD KEEPING

Corporate directors and officers must account to the shareholders and, if the corporation is a publicly held corporation, to the public. The **Sarbanes-Oxley Act of 2002**, with the abbreviation **SOX**, is a law that requires, among other things, that the CEO and CFO of a publicly held corporation personally certify that the corporation's financial statements are accurate.

From *a count,* to **account**[1] (the verb) is to provide a detailed statement of the financial significance of a transaction or transactions. An **accounting**[2] is, generally, an explanation of what was done with the money or other property entrusted to a person. An **account**[2] (the noun, financial statement) or **financial statement** is a detailed statement of the financial significance of a transaction or transactions. An **account**[3] (the noun, contractual relationship) is an established contractual relationship.

An allusion to weighing things on a scale, a **balance sheet**, a financial snapshot, is an accounting of assets and liabilities at a particular time. An **asset** is a financial resource, money, or other property that can quickly be made available for the payment of debts or an amount of money due. **Book value** is the value of an asset as listed on a balance sheet. In accounting, a **liability**[2] is a financial obligation or an amount of money owed. A **sinking fund** is money accumulated or invested to pay a debt or an expected expense. **Net worth** is the excess of assets over liabilities, or assets minus liabilities.

In accounting, a **credit**[2] is money due, or the asset of money due. A **debit** is money owed, or the liability of money owed. An **account receivable** is an amount of money to which a person or entity is due on an account, or the asset of money due on account. An **account payable** is an amount of money to which a person or entity is owed on an account, or the liability of money owed on account.

An **income statement** or a **profit-and-loss statement**, a financial progress report, is an accounting of the gains and losses for a period of time, usually for a year, a half year, or a quarter. **Earnings per share** are the average profit for each share of stock. **Retained earnings** are the portion of the profits that a corporation keeps for operations and capital investments, rather than paying them to shareholders as dividends.

An **annual report** is a report issued once a year or a formal financial statement of a corporation issued once a year. **Form 10-K** is the form on which an annual report must be filed with the Securities and Exchange Commission.

From *short note,* and an allusion to what happened minute by minute, **minutes** are a point-by-point record of a meeting or proceeding, especially a point-by-point record, often required by law or bylaw, of a shareholder's meeting or a board of directors' meeting.

Corporate records are the fundamental records of a corporation such as, generally, a corporation's charter and bylaws, minutes of shareholders' meetings and board of directors' meetings, and corporate accounts and supporting evidence.

TAXATION OF A CORPORATION

From (for) *freedom,* a **franchise**[1] is, generally, a special privilege. A corporation is a type of government **franchise**[2], which is a special privilege conferred by the government that does not belong to citizens generally. Accordingly, a state tax on a corporation is sometimes known as a **franchise tax**. A franchise tax may be either a tax on the net worth of a corporation in the state, like a property tax, or a tax on the net income of a corporation for activity in the state, like an income tax.

A **C corporation** is an ordinary for-profit corporation subject to federal income taxation under Subchapter C of Chapter 1 of Subtitle A of the Internal Revenue Code. An ordinary for-profit corporation is said to be subject to **double taxation**, which is when a corporation is subject to income taxation on its income, while its shareholders are subject to income taxation on dividends and on gain from the sale of its stock.

An **S corporation** or, historically, a **subchapter S corporation** is a special small for-profit corporation subject to federal income taxation under Subchapter S of Chapter 1 of Subtitle A of the Internal Revenue Code and a corporation taxed like a partnership. An S corporation files an information return. Like partners in a partnership, shareholders of an S corporation are taxed on their respective shares of the income of the corporation.

THE TRANSFER OF STOCK AND OTHER SECURITIES

One of the benefits of a corporation is the easy transferability of its ownership by the transfer of corporate stock. As a general rule, a stockholder may sell his, her, or its stock to anyone. The exception is a **close corporation**[2] or **family corporation**[2], which is, specifically, a corporation in which a stockholder who wants to sell his or her stock must first offer to sell the stock to the corporation so ownership of the corporation can be kept in a family or other limited group of people.

To protect the public, the government regulates the sale or transfer of stock and other securities. The **Securities and Exchange Commission** (**SEC**) is the federal independent agency that regulates the public sale of stock and other securities, especially the securities of large corporations. A small corporation is usually exempt from SEC regulation but may have to apply for an exemption. The **Securities Act of 1933** is, generally, the law that requires the sellers of securities to provide objective information to potential investors. The **Securities Exchange Act of 1934** is, generally, the law that requires the regulation of stock exchanges.

When a corporation makes a public offering of securities, it is required to file a prospectus with the SEC and provide a copy to each buyer. From *forward look,* a **prospectus** is a corporate document making required disclosures of business and financial information about the corporation and its offering of securities.

An **insider** is, generally, a person with information not available to the public and, technically, a corporate director, a corporate officer, or a stockholder holding

more than 10 percent of the corporation's stock. **Insider trading** is the crime of buying or selling corporate stock by an insider who profits from his or her access to information not available to the public or by a person intentionally tipped off by an insider.

From *handle cleverly,* **manipulation** is illegal practices intended to mislead investors by artificially affecting the market. For example, from *wipe out,* a **wash sale** is an illegal simultaneous buying and selling of the same stock in order to create the impression of investor interest and attract new investors.

States also may regulate the sale or transfer of stock and other securities. An allusion to the fraud of selling nothing but the sky, **blue-sky laws** are state laws regulating the sale of stock and other securities with the goal of preventing the sale of securities in a worthless enterprise.

From *trading,* the **stock market**[1] is, generally, the market for buying and selling securities. A **stock market**[2] is, specifically, a particular organized market for buying and selling securities. In the sense of a market, an **exchange**[3] is a special market for the buying and selling of something. A **stock exchange** is a special market for the buying and selling of securities.

Located on Wall Street in New York, New York, the **New York Stock Exchange** (**NYSE**) is the largest stock exchange in the United States for buying and selling stock in major publicly held for-profit corporations. The **American Stock Exchange**, with the acronym **ASE** and the abbreviation **AMEX**, is the second largest stock exchange in the United States for buying and selling stock in major public for-profit corporations. A **listed stock** is a stock approved for trading on a stock exchange. An allusion to the color of high-value gambling chips, a **blue chip stock** is a stock in a major publicly held for-profit corporation that has widely accepted products or services and the ability to generate consistent profits.

An **unlisted stock** is a stock not approved for trading on a stock exchange. The **over-the-counter market** (**OTC**) is a market for securities, especially bonds, that are not listed on an exchange. The **National Association of Securities Dealers** (**NASD**) is the association authorized by the SEC to regulate the over-the-counter market. **NASDAQ** is an acronym for the National Association of Securities Dealers Automated Quotations service for the over-the-counter market.

From *middleman,* a **stockbroker** is a person who, for a commission or fee, brings together potential buyers and sellers of stock and other securities and negotiates transactions between them.

A **mutual fund** is the collective shares in an investment company or trust that invests in the securities of other businesses. People usually invest in a mutual fund on the expectation that the professional managers will make better investment decisions. From *carry sheets of paper,* a **portfolio** is a group of securities held by an investor.

CORPORATE FAMILIES

From *bring forth,* a **parent corporation**, a **parent company**, or a **parent**[2] is a corporation that owns all or the majority of the shares of another corporation, its subsidiary. From *behind sit,* a **subsidiary corporation**, a **subsidiary company**, or a **subsidiary** is a corporation in which all or a majority of its shares are owned by another corporation, its parent. A **wholly owned subsidiary** is a corporation in which all of its shares are all owned by another corporation, its parent.

From *to extend,* a **tender offer** is, generally, an offer to buy all the shares of the stock of a corporation, usually at a price greater than the market price. A **holding company** is a corporation whose purpose is to hold the stock of other corporations

and so influence the management of those corporations. From *together form a ball,* a **conglomerate** is a group of corporations in unrelated or loosely related businesses but controlled by one corporation. A conglomerate has the advantages of economy of scale and the general ability to offset a loss in one business by a profit in another.

TERMINATION OF A CORPORATION

A corporation can terminate by its merger into another corporation or by it consolidation with another corporation into a new corporation. From *absorb in another,* a **merger**[1] is, generally, a combination or absorption of things into a single thing. In corporate law, a **merger of corporations** or **merger**[3] is when one or more corporations, which terminate, become part of another corporation, which continues in existence. From *intensely solid-made,* a **consolidation** is when two or more corporations, which terminate, combine to become a new corporation. The surviving corporation acquires the assets and liabilities of the merged corporation or the consolidated corporations, except those assets and liabilities inherently terminated by the merger or the consolidation.

From *apart-loosen,* to **dissolve** is to end. Generally, **dissolution**[4] means the end. The end of a corporation or termination of a corporation is known as **dissolution of the corporation**, **corporate dissolution**, or **dissolution**[6]. **Voluntary dissolution** is the end of a corporation by a vote of the board of directors, approved, if necessary, by the shareholders. **Involuntary dissolution** is the termination of a corporation by the state or by a special vote of the shareholders. **De facto dissolution** is the practical termination of a corporation due to inactivity, insolvency, or liquidation of its assets.

From *to turn,* **winding up**[1] is the process of liquidating a dissolved corporation or partnership. The **winding-up period** or **winding up**[2] is the period of time during which a dissolved corporation or partnership is liquidated.

PROFESSIONAL CORPORATIONS AND LIMITED LIABILITY COMPANIES

Learned professionals are usually not permitted to limit their liability for professional negligence or misconduct. Thus, traditionally, learned professionals could not incorporate their professional businesses and thus formed partnerships. Today, laws usually permit the creation of a **professional corporation** (**PC**), which is a corporation engaged in the business of a learned profession, where, as an exception to limited liability, the corporation is liable for any professional negligence or misconduct.

A modern innovation also has blurred the line between partnerships and corporations. A **limited liability company** (**LLC**) is, generally, a corporation taxed like a partnership but having the limited liability of an ordinary corporation. Instead of regulations or bylaws, an **operating agreement** is an agreement setting out the obligations and rights of the members of a limited liability company or, generally, an agreement setting out the obligations and rights of the relevant parties.

ASSOCIATIONS

From *to join with,* an **association** is a group of persons or entities who have joined together for a common purpose but not for forming a corporation or partnership. From *part of a body,* a **member** is a person or entity who has joined together with others for a common purpose but not for forming a corporation or partnership. Unlike a corporation, an association has no legal existence apart from its members but may be permitted to sue in its own name. Members may agree to have the association led by a board of directors.

Finally, from *together-come,* a **convention**[2] is a large-scale meeting of the members of an association or the personnel of an organization. For example, the formal selection of a national political party's candidate for president of the United States usually occurs at a national convention. As if the result of a large-scale meeting, a **convention**[3] is also a generally accepted custom, practice, or rule.

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- **alter ego doctrine**
- **corporate agent**
- **corporate domicile**
- **entity**
- **financial report**
- **limited liability company manager**
- **limited liability company member**
- **preemptive right**
- **registered bond**
- **subscribe**
- **subscriber**
- **subscription**
- **subscription right**
- **transfer agent**
- **unlimited liability**

Chapter 28

Business Regulation

BUSINESS REGULATION, GENERALLY

From *with merchandise,* **commerce** is the aggregate result of business. From *to control by rule,* **regulation**[3] is government control to limit aggregate harm or government control to protect individuals from harm. From *to control trade by rule,* **business regulation** is the law about commerce, the government control of business to limit aggregate harm, or the government control to protect individuals from harm. Remedies for statutory violations of civil business law may include **civil penalties**, which are, generally, damages or fines imposed as part of a regulatory scheme.

ANTITRUST LAW

An aggregate harm can be caused by the restriction of healthy competition in the marketplace. From *together seek* (as rivals), **competition** is the allocation of resources in which overall economic welfare is maximized because those in need of goods or services can choose what is better for them between two or more suppliers. In short, competition is the ability of potential customers to choose between rival suppliers.

In the late 1800s, a few corporations and trusts began to dominate certain markets. They gathered enough market power to limit production and raise prices, which destroyed competition and harmed the economy. **Antitrust laws**, laws promoting competition in the marketplace, were needed. Since 1890, Congress has passed **antitrust acts**, which are statutory laws that prohibit monopolies and restraints of trade. From *single seller,* a **monopoly** is a business that controls all or nearly all of the supply of a type of product or service in a relevant market, and so is able to control prices or exclude competition. A **restraint of trade** is an interference with free competition that tends to control the market to the detriment of buyers of goods and services. Although some laws may be enforced by private lawsuits, the Bureau of Competition of the Federal Trade Commission and the U.S. Department of Justice generally enforce antitrust acts.

The first major antitrust act, the **Sherman Antitrust Act** or **Sherman Act**, passed in 1890, is the law that makes illegal any contract, combination, or conspiracy in unreasonable restraint of trade and the law that makes illegal unnatural private monopolies and attempts, combinations, or conspiracies to monopolize a market or, simply, the law prohibiting unreasonable monopolization or restraint of trade. The **rule of reason** is the rule of case law that the Sherman Act applies only to unreasonable restraints of trade, not all restraints of trade. From *plunderer,* a **predatory practice** is, in antitrust law, a practice in which a business sacrifices its short-term profits in order to drive out a competitor of the market or otherwise discipline a competitor.

Monopoly power is the power to control prices or exclude competition. **Monopolization** is the willful acquisition or maintenance of monopoly power that is not the result of

growth or development as a consequence of a superior product or service, business acumen, or historical accident. A common remedy sought by the U.S. Department of Justice is divestiture. From *away with clothes,* **divestiture** is the remedy whereby a court orders a company to surrender property or businesses that make or potentially make the company an illegal monopoly. From *card agreement,* a **cartel** is a group of independent corporations that agree to restrain trade to their mutual benefit. A cartel violates U.S. antitrust laws but may exist elsewhere.

From *usefulness,* a **public utility** or **utility** is a business that provides a basic, essential, or necessary service to the public such as communications, electricity, or water. A public utility is also a business that has the characteristics of a monopoly but is permitted to exist with government regulation because having a single supplier is the most efficient method of providing its product or service to the public. A **common carrier** is a public utility in the business of transporting goods or persons for hire. A **waybill** is a list of the freight or passengers transported by a common carrier.

The second major antitrust act, the **Clayton Antitrust Act** or **Clayton Act**, passed in 1914, is the law that specifically prohibits price discrimination, tying arrangements, mergers that lessen competition, and interlocking directorates.

The **Robinson-Patman Act** is the part of the Clayton Act that prohibits price discrimination. **Price discrimination** is the practice of charging different prices to different customers for the same goods, especially the practice of charging different prices to different customers for the same goods where the effect may be to substantially lessen competition or tend to create a monopoly. **Price fixing** is establishing a combination or conspiracy for the purpose and effect of raising, fixing, or depressing the price of a commodity in interstate commerce, regardless of the actual effect on prices. **Horizontal price fixing** is price fixing by those in competition on the same level of distribution such as manufacturers, wholesalers, or retailers. **Vertical price fixing** is price fixing by those in competition on different levels of distribution such as manufacturer, wholesaler, and retailer.

A **tying arrangement** is a sale of one product on the condition that the buyer also agrees to buy another product or to not buy another product from anyone else. An **interlocking directorate** is having one or more common directors on two or more boards of directors of corporations that have allied interests.

CONSUMER PROTECTION, GENERALLY

From *intensive take,* a **consumer** is a person who buys or uses goods and services primarily for personal, family, or household use and a person who usually has limited power or resources with which to combat the oppressive practices of a large business. **Consumer goods** are goods that are bought or used primarily for personal, family, or household use. From *front cover,* to **protect** is to preserve in safety. **Consumer protection laws** are laws designed to generally preserve people in safety from the dangerous or oppressive practices of large businesses.

CREDIT

From *entrust,* **credit**[3] is, generally, recognition of a contribution. In commerce, **credit**[4] is recognition of the ability and willingness of a debtor to pay a debt when due and an agreement to repay a debt at a later date. Credit allows property and services to be sold when the buyer is currently unable to pay the full price but will be over time. A **credit bureau** is company that collects information about a person's financial history and current circumstances, used by customers of the company to decide how much

credit, if any, to extend to the person. A **credit rating** is a numerical estimation of the ability and willingness of a person to pay a debt when due.

A **credit card** is a card indicating an extension of credit, a card generally permitting a person to obtain property and services on credit, and a card generally used by a person to obtain property or services on credit.

Truth in lending acts and **consumer credit protection acts** are, generally, laws that require contracts for the sale of consumer goods involving credit to be written in plain language with the finance charges plainly stated both as an annual percentage rate and as a total amount. A **finance charge** is any payment required for an extension of credit. **Fair credit reporting acts** are, generally, laws that require credit bureaus to fairly report a person's financial history and current circumstances. **Fair credit acts** are, generally, laws that require credit to be granted without discrimination on the basis of sex, race, color, national origin, or religion. An allusion to marking an area of concern on a map, **redlining** is unlawful credit discrimination based on the characteristics of the neighborhood in which the credit applicant resides.

DECEPTIVE PRACTICES

Created in 1914, the **Federal Trade Commission** (**FTC**) is the independent federal agency that enforces laws that prohibit certain business practices that are anticompetitive, deceptive, or unfair to consumers. The FTC may impose **treble damages**, which are three times the amount of actual damages.

Bait and switch, advertising a product that the merchant doesn't desire or intend to sell, is the deceptive practice of advertising a product to bring a customer in, but then intentionally disparaging or limiting the availability of the advertised product to entice the customer to switch to buying a more expensive product.

DEFECTIVE PRODUCTS

The **Magnuson-Moss Warranty Act** is a federal law requiring warranties for consumer products to be written in plain language. From *authorization,* a **warrant**[2] or, more commonly, from *guaranty,* a **warranty**[2] is an assurance or guaranty that a fact is true, upon which the other party can rely, especially an assurance or guaranty of quality of the goods sold.

The **Consumer Product Safety Commission** is the independent federal agency that requires manufacturers to report defects that could create substantial hazards and requires, where appropriate, corrective action with respect to specific substantially hazardous consumer products already in commerce. From *back-call,* **recall**[2] of a product is the announcement or process by which a manufacturer agrees or is required to replace or repair a hazardous consumer product already in commerce.

An allusion to something that leaves a sour taste, a **lemon law** is, generally, a law requiring the seller of a new automobile to repurchase the automobile from the buyer if the new automobile still has a defect after three attempts by the seller to repair the defect.

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- **full warranty**
- **limited warranty**
- **relevant market**
- **unreasonable restraint of trade**

Chapter 29

Bankruptcy

BANKRUPTCY, GENERALLY

When a person honestly acquires more financial obligations than the person has the ability to pay, the legal solution, in equity, is to fairly divide what the person has among those entitled to be paid and to give the person a fresh start.

Bankruptcy[1] is, generally, the law about financial failures. In medieval Italy, the custom of merchants, moneylenders, and traders was to do business from benches in the town market. If a merchant, moneylender, or trader was unable to pay his debts, his creditors would symbolically indicate his financial failure by breaking his bench. From *bench break,* **bankruptcy**[2] is the federal process in which most assets of a debtor are turned over to a court, divided, and distributed to the debtor's creditors and the debtor is given a fresh financial start by having most debts discharged. Simply stated, bankruptcy is the federal process of distributing a debtor's assets among the debtor's creditors.

The **Bankruptcy Reform Act of 1978** is the last major revision of bankruptcy law, which emphasized the ability of a debtor to obtain a fresh financial start. The **Bankruptcy Abuse Prevention and Consumer Protection Act of 2005** is the last major amendment of bankruptcy law, which emphasized the elimination of debtor abuse. The **U.S. Bankruptcy Code** or **Bankruptcy Code** is the code of statutes governing bankruptcy found in Title 11 of the United States Code since October 1, 1979.

From *away possessor,* a **debtor** or an **obligor**[2] is a person who has a duty to pay money or a person who owes money. An allusion to belief that an obligation will be met, from *believer,* a **creditor**[2], a **debtee**, or an **obligee**[2] is a person to whom money is owed.

From *able to dissolve debts,* **solvent** is able to pay debts as they become due or able to meet financial obligations from current assets. From *unable to dissolve debts,* **insolvent**[1] is unable to pay debts as they become due or unable to meet financial obligations from current assets. **Insolvency** is the inability of a debtor to pay debts as they become due or the inability to meet financial obligations from current assets.

Bankruptcy[3] is, loosely, the status of insolvency. Traditionally, a **bankrupt**, an **insolvent debtor**, or an **insolvent**[2] is a debtor unable to pay debts as they become due or a debtor adjudicated by a court as being unable to pay debts as they become due. Because of the stigma associated with the word, Congress in the Bankruptcy Reform Act of 1978 replaced the word "bankrupt" with the word "debtor." A **debtor-in-possession** is, in some types of bankruptcy, a debtor permitted to keep some or all of the debtor's assets.

Attached to each U.S. district court is the **United States Bankruptcy Court** for that federal district, or the **bankruptcy court**, which is the federal court that hears and decides bankruptcy petitions and bankruptcy-related cases.

BANKRUPTCY PROCEDURE, GENERALLY

Before 1978, bankruptcy was **involuntary bankruptcy**, which is a petition by a debtor's creditors to have the debtor's assets turned over to the court, divided, and distributed to the debtor's creditors. In addition to involuntary bankruptcy, the Bankruptcy Reform Act of 1978 permits **voluntary bankruptcy**, which is a petition by a debtor to have the debtor's assets turned over to the court, divided, and distributed to the debtor's creditors. From *request,* a **petition in bankruptcy**, a **petition for bankruptcy**, or a **bankruptcy petition** is the document filed with a bankruptcy court to initiate a bankruptcy. A **debtor's petition** is a petition in bankruptcy filed by the debtor, or a petition for voluntary bankruptcy. A **creditor's petition** is a petition in bankruptcy filed by a creditor, or a petition for involuntary bankruptcy.

From *raise* and *lighten,* an **order for relief** is an order of a bankruptcy court accepting a case. The initial relief to the debtor is the **automatic stay** or **automatic suspension**, which is, from *stop* or *hang,* the routine prohibition of debt collection efforts against the debtor during a bankruptcy. The automatic stay provides a **moratorium**, which is, from *to delay,* a period of time during which a person's obligation is legally postponed. **Relief from the automatic stay** is the permission of the bankruptcy court to engage in a debt collection effort against the debtor during the bankruptcy.

A **trustee**[2] is, generally, a person or entity who manages a trust. A **bankruptcy trustee**, a **trustee in bankruptcy**, or a **trustee**[3] is, generally, the person in bankruptcy who holds the assets of the debtor turned over to the court, liquidates the assets as necessary, and divides and distributes the assets to the debtor's creditors as necessary.

The debtor is required to turn over to the trustee in bankruptcy all assets that are not exempt from the bankruptcy process. From *status,* the **bankruptcy estate** is all assets of the debtor when the bankruptcy petition is filed that are not exempt from the bankruptcy process. From *out-take,* a **bankruptcy exemption**, an **exemption**[2], or **exempt property** is an asset of the debtor not subject to the bankruptcy process. **After-acquired property** is property acquired by a debtor after a bankruptcy petition was filed, which is generally not part of the bankruptcy estate and, so, free from bankruptcy claims.

A **homestead** is a house or other building, and surrounding land, owned and used as a dwelling. **Homestead rights** are personal rights to use a homestead free from the claims of creditors. A **homestead exemption** is an exemption of a homestead from execution and sale by a creditor.

A **schedule in bankruptcy** or a **bankruptcy schedule** is a bankruptcy form on which the debtor lists the debtor's assets or a bankruptcy form on which the debtor lists the debtor's liabilities. The **summary of debts and assets** is the debtor's listing of debts and assets in bankruptcy.

The trustee in bankruptcy can void a transfer of property that is a **preferential transfer**, a **voidable preference**, or a **preference**, which is, from *before place,* when an insolvent debtor, shortly before bankruptcy, pays the claim of one creditor to the exclusion or detriment of other creditors. A **preferential assignment** is a preferential transfer by an assignment for the benefit of one creditor to the exclusion or detriment of other creditors. A **fraudulent preference** is when an insolvent debtor, shortly before bankruptcy, intentionally pays the claim of one creditor to defraud other creditors.

From *call out,* a **claim**[3] is an assertion that something is true or an assertion of a right to money, property, or legal relief. A **claimant** is a person who asserts that something is true or a person who asserts a right to money, property, or legal relief. A **proof of claim** is a signed instrument by which a creditor sets out a claim against the debtor's bankruptcy estate.

The **first meeting of creditors** or a **creditor's meeting** is a meeting at which creditors may question the debtor under oath, make claims against the bankruptcy estate, and elect a trustee in bankruptcy, if the bankruptcy court has not appointed one.

The trustee in bankruptcy divides and distributes the assets of the debtor to the debtor's creditors to the extent possible, according to the priorities provided by bankruptcy law. Secured creditors are usually paid before unsecured creditors. From *without care,* **secured** means generally protected against loss, generally covered against loss, or having a security interest. A **security interest** is an interest in property that secures the payment of a debt or obligation. A **secured creditor** is a creditor to whom a secured debt is owed, a creditor to whom is owed a debt secured by a security interest, and a creditor who has a security interest. **Unsecured** means not generally protected against loss, not generally covered against loss, or not having a security interest. An **unsecured creditor** is a creditor who does not have a security interest.

The **balance of funds** is the money remaining in bankruptcy after paying the secured creditors. **Preferential debts** are debts of a debtor in bankruptcy that are payable before other debts such as wages owed to employees. When there are not enough assets to pay a class of creditors, their shares of the remaining assets are **prorated**, which means divided and distributed proportionally. Creditors with a lower priority receive nothing.

From *no longer charged,* **discharge**[2] is, generally, extinguishment of a legal duty, removal of an obligation by its fulfillment, or removal of an obligation by law. In bankruptcy law, a **discharge in bankruptcy** or **discharge**[4] is removal of the obligations of the bankrupt to perform any scheduled contracts or pay any scheduled debts, except as reaffirmed or required by the bankruptcy court.

A **nondischargeable debt** is a debt that cannot be discharged in bankruptcy such as child support, preferences, taxes, and student loans (in most circumstances).

A bankruptcy may be dismissed for **bankruptcy abuse**, which is any debtor bad faith or abuse as demonstrated by the totality of the circumstances. A **bankruptcy means test** is a test that debtors, above the median income in their state, must meet in order to avoid dismissal of their bankruptcy for bankruptcy abuse.

TYPES OF BANKRUPTCY

Chapter 7 bankruptcy, **Chapter 7**, **straight bankruptcy**, or **bankruptcy**[4] is bankruptcy under Chapter 7 of Title 11 of the United States Code, which is liquidation of the debtor. A bankruptcy liquidation is a settlement of all of the debtor's listed debts. The debtor turns over all nonexempt property. To the extent that any nonexempt property exists, it is distributed to creditors according to the priorities of the bankruptcy law.

Chapter 11 bankruptcy or **Chapter 11** is bankruptcy under Chapter 11 of Title 11 of the United States Code, which is reorganization of a business. From *again organize,* a **reorganization** is a rearrangement of the financial affairs of a business in which the business keeps its assets, negotiates with its creditors, and plans to remain in business.

Chapter 12 bankruptcy, **Chapter 12**, or **family farmer debt adjustment** is bankruptcy under Chapter 12 of Title 11 of the United States Code, which is adjustment of the debts of a family farmer with regular annual income.

Chapter 13 bankruptcy or **Chapter 13** is bankruptcy under Chapter 13 of Title 11 of the United States Code, which is adjustment of the debts of an individual with regular income. An **adjustment of the debts of an individual** is rearrangement of the financial affairs of a person in which the person keeps most assets, negotiates with his or her creditors, and plans to pay his or her debts within five years. A **wage earner's plan** is a plan of a Chapter 13 bankruptcy debtor to pay his or her debts within five years.

A **cramdown** is, generally, a bankruptcy court confirmation of a plan over the objection of secured creditors because the plan is fair and equitable in that the creditors will receive no less than what they would receive in Chapter 7.

THE PAYMENT OF DEBTS WITHOUT BANKRUPTCY

From *to mark,* an **assignment for the benefit of creditors** is an assignment of all of a debtor's property to a trustee to liquidate the property and distribute the proceeds to the debtor's creditors. The result is similar to Chapter 7 bankruptcy.

From *together-put,* a **composition**, a **composition with creditors**, or an **arrangement with creditors** is an agreement between a debtor and two or more of the debtor's creditors that, in exchange for prompt payment, the creditors will accept lesser amounts than those owed in full satisfaction of their claims.

From *back take,* a **receiver** is a person appointed by a court to take charge of property during a legal proceeding, to manage the property, and to dispose of the property as directed by the court. A remedy in equity for the preserving of property, **receivership** is the placement of property with a receiver.

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- **Bankruptcy Act**
- **bankruptcy judge**
- **bankruptcy proceedings**
- **Chapter 9**
- **Chapter 9 bankruptcy**
- **petitioning creditor**
- **solvency**

Chapter 30

Intellectual Property

INTELLECTUAL PROPERTY, GENERALLY

From *understanding-special,* **intellectual property**[2] is, generally, the law about rights in human creations. Specifically, **intellectual property**[1] is rights claimed in intangible property such as inventions, expressions, identifying marks, and business information. It is patents, copyrights, trademarks, trade secrets, and other related law.

From *of a king,* a **royalty**[2] means a payment for the right to acquire or use intellectual property. Royalties may be paid under a **license**[4], which is an intellectual property holder's permission to use the intellectual property. From *permission,* **licensing**[2] is the systematic giving of permission to use intellectual property.

From *in to break* or *to break in,* **infringement**, interference, is unauthorized or unfair use and unauthorized or unfair use of an intellectual property right that may be publicly registered (patents, copyrights, and trademarks). Like robbery on the high seas, **piracy**[1] is the unauthorized or unfair commercial reproduction and distribution of any intellectual property and, loosely, commercial robbery. In the more general sense of wrongful taking, **piracy**[2] is the wrongful taking of an idea or invention.

Public domain[2] is intellectual property not protected by intellectual property law or intellectual property no longer protected by intellectual property law. As a general rule, patents and copyrights become public domain when their terms expire, trademarks become public domain when they are abandoned, and trade secrets become public domain when they are revealed without a breach of confidence.

PATENTS

From *in come,* an **invention** is, generally, the creation of a physical thing or process that is new and useful for a particular purpose and not obvious to a person of ordinary skill in the art. An **inventor** is a person who makes an invention. **Ordinary skill in the art** is the skill of a hypothetical person who thinks along the line of conventional wisdom in the art and not a person who undertakes to innovate by systematic research or extraordinary insight. Whether or not an invention would have been obvious to a person of ordinary skill in the art requires a review of **prior art**, which is knowledge that was publicly known, used by others, or available on the date of invention to a person of ordinary skill in an art, including information in applications for previously patented inventions or published more than one year before the patent application was filed.

From *documented right,* a **patent**[2], pronounced "PAT-ent," is an intangible property right in an invention, protected by a right to sue for infringement. A patent includes the exclusive right of an inventor to control the use of the invention for a period of time. **Patent infringement** is the unauthorized or unfair use of a patent.

The invention-related meaning of the word "patent" must be distinguished from less common meanings. Another meaning of **patent**[1], also pronounced "PAT-ent", is a government grant of land in fee simple. Another meaning **patent**[3], pronounced "PAY-tent," is obvious. Thus, a **patent defect** is a defect that is obvious or a defect likely to be discovered upon a reasonable inspection, as distinguished from a **latent defect**, which is a defect that is not obvious or a defect not likely to be discovered upon a reasonable inspection. Finally, a **patent medicine** is a packaged nonprescription drug that may or may not be protected by a patent or a trade secret but is protected by a trademark.

From *design,* a **device** is an invention or a machine. From (first) *foot soldier,* a **pioneer patent** is a patent in a new art or science or a device like no previous device. The usual patent, a **utility patent**, is a patent for an invention that is a composition, a machine, a process, or a useful article. A **useful article** is an article having a utilitarian function other than appearance or conveying information. A **design patent** is a patent for the invention of the appearance of an article.

The federal agency that examines patent applications and grants or denies patents, and the federal agency that examines trademark applications and grants or denies trademarks, is the **U.S. Patent and Trademark Office** or **Patent and Trademark Office** (**PTO**). **Patent pending**, abbreviated **Pat. Pend.**, is a notice on a product that a patent application has been filed and so a patent may protect the product if and when the patent application is or was granted.

In patent law, an **interference** is, from *between strike,* an adversary proceeding in the Patent and Trademark Office in which it is established who among competing applicants for a patent is the first inventor under U.S. law.

A person who receives a patent, either initially or by assignment, is a **patentee**. **Patent rights** are the rights granted by a patent. The **patent holder** is the person who currently possesses the patent rights. During the patent, the patent holder can exclude others from importing, making, selling, or using an unauthorized product that unfairly uses the patented invention. A **patent agent** is an agent that represents a patent holder.

Patent rights include rights under the **doctrine of equivalents**, which is the doctrine that patent protection covers the patented device and any other device that does the same work in substantially the same way and accomplishes substantially the same result. Thus, making a minor and inconsequential variation is still patent infringement.

There are many defenses to infringement. It is common for an alleged infringer to challenge the validity of the patent. From *before taken care of,* **anticipation**[2], invalidity based on lack of novelty, is the defense that an alleged patent is invalid because the same invention was known or used by others before the patentee invented it.

COPYRIGHTS

A **copyright** is an intangible property right in an expression, protected by a right to sue for infringement. A copyright includes the exclusive right of an artist or author to control the publication of his or her work for a period of time. **Copyright infringement** is the unauthorized or unfair use of a copyright.

From *causer of growth,* an **author** is a person who creates something, a person who has the power to create something, or a person who creates a literary work. A **work of authorship** is a created expression fixed in a perceptible form, and so copyrightable. A **work made for hire** or **work for hire** is an expression created by an employee in the scope of the employee's employment, and so the copyright belongs to the employer, or an expression created under an agreement that the copyright belongs to another such as a contribution to a collective work.

From *of letters,* a **literary work** is, generally, an expression created in verbal or numerical symbols. **Literary property** is the copyright interest of an author in a literary work or the interest of a successor to the copyright interest of an author in a literary work. From *manner,* **moral rights** of an author are, generally, the right of an author to claim or disclaim authorship of a work and the right of an author to prevent distortion, mutilation, or other modification of the author's work.

From *chief builder,* an **architectural work** is the design of a building as expressed in plans and drawings. From *hearing and seeing,* an **audiovisual work** is a series of related images and accompanying sounds ordinarily intended to be shown and heard by the use of a machine. A **motion picture** is an audiovisual work in which the series of related images, when shown in rapid succession, depict motion. From *play,* a **dramatic work** is a theatrical expression consisting of a narrative, dialogue, and/or stage directions and any accompanying music. From *of sight,* a **work of visual art** is, generally, a drawing, a painting, or a sculpture in a limited edition of 200 or fewer numbered consecutively and signed by the artist or, generally, a single photograph signed by the photographer. Copyright protection extends to a **derivative work**, which is, from *draw off,* a work based on a preexisting work and not substantially original.

As a general rule, a copyrightable expression is not created as the result of merely placing information in an **automated database**, which is, from *self-acting,* a body of information organized for use in a computer.

The federal agency that examines copyright applications and registers or denies registration of copyrights is the **Copyright Office of the Library of Congress**. The **basic registration** is the primary copyright record for a particular work. The © or **copyright symbol**, copyright or copyrighted, is the symbol commonly used to indicate that an expression is copyrighted or intended to be copyrighted. **Transfer of copyright ownership** is any transfer of an interest in a copyright greater than a nonexclusive license.

A common defense to copyright infringement is **fair use**, which is an insubstantial and legal use of another's intellectual property and an insubstantial and legal use of another's copyrighted material. A copyright protects an author's expression of facts and ideas but not the facts and ideas themselves.

The concept of copyright infringement is not as broad as **plagiarism**, which is, from *literary thief,* allowing the original work of another to be regarded as one's own. Plagiarism is an academic standard and not a legal standard outside of academia. Plagiarism is a higher standard than copyright infringement because, for example, you can plagiarize a work that is in the public domain.

Copyrighted materials are often licensed for private use only. Infringement comes from unlicensed **public display**, which is, from *unfold,* showing a copyrighted work where the public is gathered or transmitting a copyrighted work to the public.

TRADEMARKS

A **trademark**[1] is, generally, an intangible property right in an identifying mark, protected by a right to sue for infringement or dilution. As defined by Congress, a **trademark**[2] is any word, name, symbol, or device, or any combination thereof, used by any person to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown. See 15 U.S.C. § 1127.

Trademark infringement is the unauthorized or unfair use of a trademark. From *apart wash,* **dilution** is reduction in value due to confusion or reduction in value due to use of a confusingly similar identifying mark. **Trademark dilution** is reduction in the value of a trademark due to confusion or reduction in the value of a trademark due to use of a confusingly similar identifying mark.

As to products, a **trademark**[3] is an intangible property right in an identifying mark used to identify a product, protected by a right to sue for infringement or dilution. As to services, a **servicemark** is an intangible property right in an identifying mark used to identify a service, protected by a right to sue for infringement or dilution.

A trademark or servicemark may be a **logo**, which is, from *sign* and *word,* a graphic symbol that serves as a trademark or a servicemark.

From *distinguished,* **distinctive** is distinguishable, particular, or unique. A **strong mark** is a trademark or servicemark that is distinctive. An **arbitrary mark** is a trademark or servicemark that does not describe or suggest the goods or services marked. An arbitrary mark is a strong mark because it is inherently distinctive. A **collective mark** is a trademark or servicemark used to identify an association or group.

Use in commerce is the use of a trademark or servicemark by displaying it in conjunction with the sale of the product or service. An **amendment to allege use** is an amendment to an intent-to-use application certifying actual use in commerce of the trademark or servicemark. In trademark law, a **drawing** is an exact or substantially exact representation of a trademark for a trademark application. After actual use of a mark, it may become a **registered trademark** or **registered servicemark**, which is a mark formally recognized by the U.S. Patent and Trademark Office.

The ™ or **trademark symbol**, being trademarked or being servicemarked, is the symbol commonly used to indicate that a mark is being used as a trademark or servicemark and the symbol commonly used to indicate that a mark is not yet a registered trademark or a registered servicemark. The ® or **registered symbol**, registered, is the symbol commonly used to indicate that a trademark or servicemark is a registered trademark or a registered servicemark.

A **weak mark** is a trademark or servicemark that is moderately distinctive or losing its distinctiveness. **Abandonment of trademark** is loss of a trademark right due to nonuse or misuse of the trademark or loss of a trademark due to the loss of distinctiveness of the trademark. From *general,* **generic** means of a general kind, of a whole group, or not specific. A **generic term** is a term that describes a general kind or whole group of things and a term that, because of its general nature, is not or can no longer be a trademark.

TRADE SECRETS

From *track* and *apart separate,* a **trade secret** is business information about a unique, lawful, and valuable business formula or procedure that has been and is kept secret, revealed to others only in a confidential relationship, and not otherwise discerned and an intangible property right in secret business information protected by a right to sue for misappropriation. From *wrongfully take as your own,* **misappropriation**[1] of intellectual property is unauthorized acquisition by improper means, unauthorized disclosure, or unauthorized use and unauthorized acquisition by improper means, unauthorized disclosure, or unauthorized use of another's trade secret. Generally stated, the elements of an action for misappropriation are that the plaintiff possessed a trade secret, that the plaintiff had a confidential relationship with the defendant with regard to the trade secret, that the plaintiff disclosed the trade secret to the defendant, and that the defendant disclosed or used the trade secret in breach of the plaintiff's confidence.

A **commercial secret** is a business secret that is not a trade secret. For example, an **open secret** is a secret known by many but not talked about.

From *completely trust,* **confidential**[1] generally means to be kept in confidence or secret. A **confidentiality agreement** or **nondisclosure agreement** is, generally, an express agreement not to reveal confidential information or trade secrets, to the extent

described in the agreement. A **covenant not to compete** is, generally, a contract or contract provision by which one party promises to refrain from conducting business in competition with the other party or promises to refrain from working for a competitor of the other party for a period of time after the termination of the relationship between the parties. In most states, a covenant not to compete must be for a reasonable time, usually not more than one year, and cover no more territory than is reasonably necessary.

TRADE NAMES

From *track,* a **trade name** is a name under which a person or entity does business. The unauthorized or unfair use of the trade name of another person or entity is an example of **unfair competition**, which is using illegal, deceitful, or deceptive methods or representations to gain a business advantage and the tort of using illegal, deceitful, or deceptive methods to gain a business advantage.

Unfair competition includes deceiving the public as to the source of products or services. **Palming off** or **passing off** is, without consent, selling your product or service under the name of another. **Reverse palming off** or **reverse passing off** is, without consent, selling the product or service of another under your name. **Express reverse palming off** or **express reverse passing off** is, without consent, selling the product or service of another under a third name.

BEYOND INTELLECTUAL PROPERTY

An **end user license agreement** (**EULA**) is a contract provided with a product or service, especially computer software or information, purporting to limit the final consumer's property rights in the product or service to that of a licensee according to the terms of the contract. Such contracts are usually used by the provider to claim or retain rights beyond traditional intellectual property rights.

From (for) *freedom,* a **franchise**[1] is, generally, a special privilege. With regard to intellectual property, a **franchise**[3] is a special privilege to use the intellectual property and successful methods of doing business of another. A **franchise agreement** is an agreement in which an owner grants a special privilege to use, to the extent agreed, the owner's intellectual property and successful methods of doing business, usually including the owner's trade name, trademarks, copyrights, and trade secrets.

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- **access**
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- **divisional application**
- **evaluation agreement**
- **exclusive license**
- **exhaustion doctrine**
- **franchisee**
- **franchiser**
- **idea**
- **patentability**
- **patentable**
- **public use**[3]
- **trademark license**
- **transmit**
- **usefulness**
- **visually perceptible copy**

Part Six

Civil Law: Social Issues

Chapter 31

Social Legislation and Environmental Law

SOCIAL LEGISLATION, GENERALLY

Overlapping business law, from *united,* **social legislation** is the law about society. Social legislation often addresses the undesirable effects of business on society. A historic example is **Sunday closing laws**, which were laws restricting business activities on Sunday, the Sabbath day of most Christians. Sunday closing laws and other laws restricting certain activities at certain times for the sake of morality such as the sale of liquor were known as **blue laws** because, in New Haven, Connecticut, they were printed on blue paper. Today, under its police power, a government can mandate a day of rest for most workers. Accordingly, federal and state governments still declare legal holidays.

LEGAL AID

Charitable persons and organizations have supported **legal aid**, which is a system of nonprofit law offices providing civil legal services to indigents. In 1974, Congress created the **Legal Services Corporation**, which is a private, nonprofit corporation established to provide financial support to organizations providing civil legal services to indigents. Government money is appropriated for its support.

PUBLIC HEALTH

There are many laws related to public health. In an extreme situation, for example, public health officials may order a **quarantine**, which is the isolation of an infected person or thing in an attempt to prevent the spread of a dangerous disease. One of the origins of the word dates back to the 1600s, when ships believed to be carrying disease where banned from the port of Venice, Italy, for 40 days.

SOCIAL SECURITY

Social Security[1] is, generally, a series of federal social programs attempting to protect the aged, the disabled, and others from events and illnesses that could exhaust their savings and includes modest old-age insurance, survivors insurance, disability insurance, and medical insurance.

The **Social Security Administration** (**SSA**) is the independent federal agency that manages the Social Security programs. A person's **Social Security number** (**SSN**) is a nine-digit number used to identify the record of earnings of a person for Social

Security. The **Federal Insurance Contributions Act (FICA)** is the federal law that imposes a tax that supports Social Security, or, loosely, the Social Security tax.

Social Security old-age insurance, **Social Security retirement insurance**, or **Social Security**[2] is the federal social program to provide a modest income to people in their mid-60s and older after they retire from work. **Social Security Disability Insurance (SSDI)** is the federal social program to provide a modest income to people covered by Social Security who become disabled. **Social Security Income (SSI)** is the federal social program to provide a minimal income to people not otherwise covered by Social Security who become disabled. **Disability under SSDI and SSI** is the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to last for a continuous period of not less than 12 months.

REGULATING HOURS OF WORK AND PAY

Child labor laws are laws that prohibit minor children from working in certain dangerous jobs and limit the number of hours that minor children may work.

The **Fair Labor Standards Act (FLSA)** is, generally, the federal law that establishes minimum wage, overtime pay, record keeping, and child labor standards for employees who are not exempt managers or professionals. From *out-take,* an **exempt employee** is, generally, a manager or professional employee, and so not covered by the Fair Labor Standards Act. A **nonexempt employee** is, generally, an employee who is not a manager or professional employee, and so covered by the Fair Labor Standards Act. The FLSA does not cover state and local government employees.

Wage and hour laws are laws that establish minimum wage and overtime pay standards for employees who are not exempt managers or professionals. From *pledge,* a **wage** is an amount earned by the time worked or quantity produced or an amount earned on an hourly basis. From *smallest,* a **minimum wage** is the least amount a nonexempt employee can be paid per hour. From *following the rule,* **regular work** is, generally, work by a nonexempt employee not in excess of a standard 40-hour workweek. **Regular pay** is pay at the rate of pay an employer and a nonexempt employee have agreed to for work not in excess of a standard 40-hour workweek. **Overtime work** or **overtime**[1] is, generally, work by a nonexempt employee in excess of a standard 40-hour workweek, for which the nonexempt employee is entitled to a higher rate of pay. **Overtime pay** or **overtime**[2] is, generally, a higher rate of pay to a nonexempt employee for work in excess of a standard 40-hour workweek. **Time-and-a-half** is overtime pay equal to regular pay plus 50 percent of regular pay.

INJURIES AT WORK

Employees need compensation. From *with weigh out* (balance out), **compensation** is something that makes up for something else or something making whole, or the equivalent or a portion thereof, such as payment for services performed and payment for harm or injury caused.

Originally, an employee hurt at work was in a difficult situation. Because of the injury, the employee might be unable to earn a living. Although an employee might bring a lawsuit against his or her employer to obtain compensation for the injury, the employee would routinely lose his or her job and there was no guarantee that the lawsuit would be successful. In most cases, it was difficult to prove that the employer had done anything wrong and the employer could assert the defense of assumption of the risk. In some cases, a **fellow servant**, a co-worker, caused the injury. Based on the defense of assumption of the risk, the **fellow servant rule** was the rule of case law

that an employer was not liable for an injury to an employee caused by the negligence of a co-worker.

Gradually, the fellow servant rule was abolished. At first, legislatures passed **employer's liability acts**, which were laws guaranteeing the right of an employee to bring a lawsuit against his or her employer for injuries sustained in the course of employment and that certain acts of co-workers are not a defense. The **Federal Employer's Liability Act** (**FELA**) is the federal employer's liability act for railroad and certain other transportation employees. The **Jones Act** is the federal employer's liability act for employees at sea.

Nevertheless, problems remained. A seriously injured employee could lose his or her lawsuit and have no compensation for his or her injuries. On the other hand, a seriously injured employee could win his or her lawsuit and put the employer out of business, causing the injured employee's fellow employees to lose their jobs.

The modern solution is to have a state-required insurance program for injured employees. Viewed by employees as a right and viewed by employers as a cost of doing business, **worker's compensation** (employee-view spelling) or **workers' compensation** (employer-view spelling) is, generally, a state-required insurance program, paid by employers' premiums, that provides employees with compensation for certain injuries in the course of employment regardless of fault by the employee or the employer and prohibits employees from bringing lawsuits against their employers for those injuries.

Workmen's compensation is the historical sexist name for worker's compensation or workers' compensation. **Worker's compensation acts** or **workers' compensation acts** are laws providing for the establishment of a state-required insurance program for injured employees. **Worker's compensation insurance** or **workers' compensation insurance** is the state-required insurance used to provide worker's compensation or workers' compensation or the insurance used by an employer who is permitted to be self-insured to provide worker's compensation or workers' compensation.

Worker's compensation covers employees in the zone of their employment. An employee's **zone of employment** is the physical area controlled by an employer, including ingress and egress to the place where an employee works, within which an injury to an employee is compensable under a worker's compensation or workers' compensation law.

Different worker's compensation benefits are provided for different injuries and symptoms. **Temporary partial disability** (**TPD**) is worker's compensation for an injury that temporarily prevents the employee from returning to some of the employee's work. **Temporary total disability** (**TTD**) is worker's compensation for an injury that temporarily prevents the employee from returning to all of the employee's work. **Permanent partial disability** (**PPD**) is worker's compensation for an injury that permanently prevents the employee from returning to some of the employee's work. **Permanent total disability** (**PTD**) is worker's compensation for an injury that permanently prevents the employee from returning to all of the employee's work.

Legislatures have also attempted to reduce the number of injuries at work. From *act of possessing* (a particular employment), an **occupation** is a person's particular employment or workplace. It was noticed that an employee could be susceptible to an **occupational hazard**, which is a risk of employee injury peculiar to a particular employment or workplace. Likewise, it was noticed that an employee could be susceptible to an **occupational disease**, which is a disease that is the result of a particular employment or workplace, usually developing gradually from conditions peculiar to the particular employment or workplace. A good example of both an occupational hazard and an occupational disease is **black lung disease** or **pneumoconiosis**, the breathing disease to which coal miners are susceptible due to the inhalation of coal dust. The **Occupational Safety and Health Administration** (**OSHA**) is the federal

executive department of the U.S. Department of Labor that encourages employers and employees to reduce workplace hazards and implement safety and health programs. OSHA may inspect workplaces for safety and health hazards.

LOSS OF WORK

From *not devoted,* **unemployment** is, generally, the involuntary lack of work, especially the involuntary loss of a job. A person who involuntarily loses his or her job needs compensation until the person can find a new job. **Unemployment compensation** is, generally, a state-required insurance program, paid by employers' premiums, that provides laid-off employees or former employees with modest compensation for a period of time after they are involuntarily unemployed. **Unemployment compensation acts** are laws providing for the establishment of a state-required insurance program to provide unemployment compensation. **Unemployment compensation benefits** are the benefits provided to involuntarily unemployed people under unemployment compensation.

RETIREMENT

From *back-draw,* to **retire**[1] is, generally, to voluntarily withdraw from an activity or employment. Accordingly, **retirement** is the voluntary withdrawal from an activity or employment, especially the last voluntary withdrawal from permanent employment due to old age. Social Security old-age insurance provides only a modest income to retirees. Most people need to save and invest in other ways in order to have a financially secure retirement. Some employers provide retirement plans. A **retirement plan** is, generally, any plan to provide income during a person's retirement. **Deferred compensation**[2] is, generally, any plan to defer current compensation to a future time, especially after the employee's retirement, when the employee is likely to be subject to a lower tax rate.

From *payment* (for past service), a **pension** is usually a monthly payment of money made to a retired person, for a period of time or for life, from a fund of insurance, investments, or both previously contributed to by the person's employer, the person, or both. A **vested pension** is a pension to which an employee has an unconditional right. A **pension fund** is a fund from which a pension is paid. A **pension plan** is a retirement plan designed to create a pension fund from which a pension is provided. A **qualified pension plan** is a pension plan for which the employer is entitled to present tax deductions for contributions to the plan, but the employee does not recognize income until the benefits are paid. A **rollover** is a transfer of funds from one qualified pension plan to another without the recognition of income.

The **Employee Retirement Income Security Act of 1974** (**ERISA**) is the primary federal law regulating employee retirement plans, designed to assure the soundness of the plans and employee access to information about the plans. The **Pension Benefit Guaranty Corporation** is the corporation owned by the federal government that guarantees payment of nonforfeitable pension benefits in covered private defined-benefit pension plans. A **defined-benefit plan** is a pension plan that promises a specified amount of pension benefits. A **defined-contribution plan** is a pension plan that promises that a specified amount will be contributed to the pension fund.

An **employee share ownership plan** or an **employee stock ownership plan**, both with the acronym **ESOP**, is a plan to provide retirement benefits to employees including the ownership of shares of the employer. ESOPs are also sometimes used by employees to save their jobs, by buying the relevant business their employer intends to sell or close.

An **individual retirement account** (**IRA**) is a retirement account to which a person contributes, in which limited contributions are deductible and in which income earned

is not taxable until withdrawn from the account. There is a penalty for early withdrawals from the account before age 59½, except in the case of death or disability. An allusion to section 401(k) of the Internal Revenue Code, a **401(k) plan** is, generally, a retirement account to which a person's employer contributes.

ENVIRONMENTAL LAW

From *in circle,* **environmental law** is the law about pollution and pollution control. The **Environmental Protection Agency** (**EPA**) is the independent federal agency that seeks to protect human health and to safeguard the natural environment by regulating and reducing air pollution, water pollution, hazardous wastes, and other threats to the environment. The **National Environmental Policy Act of 1969** (**NEPA**) is a federal law that declared a national policy of protection of the environment and established procedures to be followed in carrying out that national policy. In particular, the NEPA requires an **environmental impact statement** (**EIS**), which is, generally, a detailed statement of environmental effects that a federal agency must make when it takes an action that significantly affects the quality of the environment.

The **Clean Air Act of 1970** (**CAA**) is a federal law providing for the control of air pollution and the attainment of national ambient air quality standards. The **Endangered Species Act of 1973** is a federal law providing a program for the conservation of threatened and endangered plants and animals and the habitats in which they are found. The **Hazardous Materials Transportation Act of 1974** (**HMTA**) is a federal law regulating the transportation of hazardous materials according to regulations and decisions of the U.S. Department of Transportation. Preempting conflicting state laws, the HMTA requires the diamond-shaped placards on trucks indicating the hazardous material being transported. The **Toxic Substances Control Act of 1976** (**TSCA**) is a federal law that provides the EPA with the ability to track and screen industrial chemicals and to ban those that pose an unreasonable risk to human health. The **Resource Conservation and Recovery Act of 1976** (**RCRA**) is a federal law granting the EPA the authority to control the generation, transportation, treatment, storage, and disposal of hazardous waste. The **Clean Water Act of 1977** (**CWA**) is a federal law providing for the elimination of water pollution. The **Comprehensive Environmental Response, Compensation, and Liability Act of 1980** (**CERCLA**), also known as **Superfund**, is a federal law providing for the cleanup of old hazardous waste sites.

In addition to federal environmental laws, there are state environmental laws. For example, from *to play* and *to catch wild animals for sport,* **game laws** are, generally, laws that protect birds, fish, and other wild animals from excessive hunting or fishing. A **game warden** is a police officer that enforces game laws.

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- **certificate of need**
- **minimum wage laws**
- **NAAQS**
- **National Ambient Air Quality Standards**
- **self-employment**
- **self-employment tax**
- **unemployment compensation insurance**

Chapter 32

Labor and Employment Law

LABOR AND EMPLOYMENT, GENERALLY

From *that done,* **work** is, generally, physical effort, mental effort, or both for a particular purpose other than entertainment, recreation, or worship. From *to devote,* to **employ** is to have another work for you or to have something work for you. **Employment** is an agency in which an employee merely works for an employer and generally cannot bind the employer with third parties. **Employment law**[1] is, generally, the law about working for another. An **employer** is a person who has another work for the person, subject to the person's control over the detail, manner, and method of the physical acts. An **employee** is a person who works for another subject to the other person's control over the detail, manner, and method of the physical acts.

In reference to work, from *handle,* **management**[1] is work done in leading an employer. In reference to work, from *work* or *toil,* **labor**[2] is work done in the course of employment. In reference to people, **management**[2] is the directors, officers, or employees leading an employer. In reference to people, **labor**[3] is the nonmanagement employees of an employer. **Labor law** is the law focused on the relationship between labor and management. **Employment law**[2] is, specifically, the law focused on the agency in which an employee merely works for an employer and the rights of an employee.

LABOR LAW, GENERALLY

Until the 1900s, nonmanagement employees generally could not legally engage in **collective bargaining**, or **bargaining collectively**, which is, from *together-gather haggling,* labor joining together and, through an agent, negotiating and contracting with management about the terms and conditions of their employment. From *together contend,* **concerted activity**, conduct engaged in for the purpose of supporting demands such as conduct engaged in for the purpose of supporting demands made in collective bargaining, was also illegal. In particular, from *hit,* a **strike**, a mass refusal to work, was illegal. Collective bargaining, concerted activity, and strikes violated antitrust law. To give labor a voice against management, antitrust laws were amended with labor relations acts.

The **National Labor Relations Act of 1935** or the **National Labor Relations Act** (**NLRA**), popularly known as the **Wagner Act**, was, in 1935, the first major federal labor relations act and is, generally, the primary law that recognizes the right of labor to bargain collectively with management and recognizes the right of labor to strike.

The NLRA is also the law that created the National Labor Relations Board. The **National Labor Relations Board (NLRB)** is the independent federal agency that designates appropriate units for collective bargaining, conducts secret ballot elections, and decides and remedies unfair labor practices by labor and management.

The **Labor-Management Relations Act of 1947**, known as the **Taft-Hartley Act**, was, in 1947, the first major federal labor relations act amending the National Labor Relations Act and is, generally, the law that gave employees the right to speak against unionization, permitted employees to refrain from union activity, prohibited closed shops, and prohibited wildcat strikes. A **wildcat strike** is a strike not authorized by the union or a strike in breach of a collective bargaining agreement. A **strikebreaker** or **scab** is a temporary employee who performs the job of an employee who is on strike.

The **Labor-Management Reporting and Disclosure Act of 1959**, known as the **Landrum-Griffin Act**, was, in 1959, the second major federal labor relations act amending the National Labor Relations Act and is, generally, the law that granted union members special rights of freedom of speech and assembly, required unions to fairly represent their members, and required unions and employers, as a means of avoiding corruption, to publicly report certain organizational and financial information.

UNIONS

A **collective bargaining unit** or **bargaining unit** is a defined group of nonmanagement employees having a common interest, recognized by the NLRB as capable of being organized to bargain collectively with management about the terms and conditions of their employment.

A **representation election** is an election conducted by the NLRB in which the members of a bargaining unit vote whether to be represented by an agent and, if so, by whom. **Certification of a union** is the formal NLRB announcement, after a representation election, that an organization represents the majority of a bargaining unit.

A **labor organization**, a **labor union**, a **union**[2], a **collective bargaining agent**, or a **bargaining agent** is an organization that is the agent of nonmanagement employees organized to bargain collectively with management about the terms and conditions of their employment. From *becoming one,* **unionization** is representation by a union. From *being one,* **unionized** is represented by a union.

From *shed,* a **shop** is a place of business or a place of employment. A **right-to-work law** is a state law that prohibits agreements requiring an employee to join a union. A **closed shop** is a shop in which the collective bargaining agreement provides that all employees must be members of the union in good standing. Closed shops were made illegal by the Labor-Management Relations Act of 1947 and are also illegal under a right-to-work law. A **union shop** is a shop in which the collective bargaining agreement provides that all employees must be members of the union, but nonunion employees may work if they agree to join the union within a specified time, usually 30 days. Union shops are illegal under a right-to-work law. An **agency shop** is a shop in which the collective bargaining agreement provides that all employees are represented by the union regardless of their union membership. Agency shops are illegal under a right-to-work law. An **open shop** is a shop in which the collective bargaining agreement provides that no employees must be members of the union. A **yellow dog contract** is an illegal contract in which an employee promises to not join a union.

From *duty owed,* **dues**[1] generally are payments made by a member of an organization to remain a member of the organization. **Union dues** or **dues**[2] are payments made by a union member to remain a member of the union.

COLLECTIVE BARGAINING AGREEMENTS

A **collective bargaining agreement**, a **collective bargaining contract**, a **labor agreement**, or a **labor contract** is an agreement that is the result of collective bargaining, an agreement between labor and management about the terms and conditions of employment, or an agreement between a union and an employer about the terms and conditions of employment.

A **labor dispute** is a dispute about a collective bargaining agreement or a dispute about union representation. From *cause of pain,* a **grievance** is a formal complaint, especially a formal complaint by an employee or a union that the employer has violated the collective bargaining agreement. Some labor disputes are resolved by arbitration.

When a labor dispute threatens a substantial disruption of commerce, mediation is permitted. The **Federal Mediation and Conciliation Service** is the independent federal agency that assists labor and management in resolving disputes in collective bargaining contract negotiations through voluntary mediation and arbitration services.

UNFAIR LABOR PRACTICES

An **unfair labor practice** is conduct by a union or employer that is unlawful under the National Labor Relations Act as amended. For example, it is an unfair labor practice for the recognized union to refuse to bargain in good faith with the employer, or vice versa. An **unfair labor practice strike** is a legal strike by a union to protest an employer unfair labor practice. A **company union** is the employer unfair labor practice of employer domination or illegal assistance and support of the union.

An allusion to English land agent Charles Boycott (1832–1897), who Irish tenant farmers and others refused to do business with after he refused to lower rents, a **boycott** is a refusal to do business with a particular business to protest and persuade the particular business to change its behavior and the joint action of people who refuse to do business with a particular business to protest and persuade the particular business to change its behavior. A **secondary boycott** is the union unfair labor practice of boycotting another employer to persuade it to refuse to do business with the employer the union is bargaining with.

From *to pierce,* to **picket** is to publicly protest by presence, patrols, and/or placards on or near the property of the person or entity being protested. **Picketing** is publicly protesting by presence, patrols, and/or placards on or near the property of the person or entity being protested. Some forms of picketing are a union unfair labor practice such as mass picketing, violent picketing, picketing a person or entity other than the employer, picketing by a noncertified union, and picketing a health care institution without providing 10 days' notice to the Federal Mediation and Conciliation Service.

Featherbedding is the union unfair labor practice of demanding the employer to make unnecessary work or pay for standby employees, to employ a certain number of union employees. A **hot-cargo agreement** is an agreement by a union with a neutral employer to put pressure on the employer by refusing to do business with the employer. Entering into a hot-cargo agreement is a union unfair labor practice.

THE ENDURING IMPORTANCE OF LABOR LAW

In the mid-1900s, more than 50 percent of all employees in the United States belonged to a union. Today, less than 10 percent belong to a union. Nevertheless, labor law remains important because the decrease in union membership is primarily due to the general acceptance by employers of standard employee rights, coupled with the general desire of employers to avoid having to deal with a union. Mistreated nonunion employees retain the option of attempting to form a union.

EMPLOYMENT LAW, GENERALLY

Historically, it was common for an employer to agree to employ an employee for a specified period of time. Today, except under collective bargaining agreements, it is rare for an employer to agree to employ an employee for a specified period of time.

Today, most employment is **at-will employment** or **employment at will**, which is, generally, employment for an indefinite time that can be legally terminated by the employee or by the employer at any time. An **at-will employee** or **employee at will** is an employee whose employment can be terminated by the employee at any time and an employee whose employment can be terminated by an employer for any reason or no reason, as long as the reason is not illegal.

From *no longer charged,* **discharge**[3] is, generally, extinguishment of a legal duty, removal of an obligation by its fulfillment, or removal of an obligation by law. In employment law, **discharge**[5] is termination of an employment contract by the employer.

EMPLOYMENT DISCRIMINATION

From *distinction,* **discrimination** is unequal treatment or the illegal unequal treatment of people entitled to be treated equally. **Employment discrimination** is unequal treatment in employment or the illegal unequal treatment in employment of people entitled to be treated equally. From *level,* **equal opportunity** is an equal chance without illegal discrimination. **Equal employment opportunity** is an equal chance at employment without employment discrimination. Ideally, an applicant or employee should be judged on **merit**, which, from *deserve,* is ability, quality, worth, or value.

Originally enacted in 1866, **42 U.S.C. § 1981** is, generally, a federal law that prohibits discrimination, including employment discrimination, against a person of color. A **person of color** is a person whose skin color is not "white."

The **Equal Pay Act of 1963** is, generally, a federal law that prohibits unequal pay based on sex. From *with equal,* **comparable worth** is the concept that men and women should be paid equally for work that requires the same skills and responsibilities.

Title VII of the Civil Rights Act of 1964 or **Title VII**, as amended in 1972 and 1978, is, generally, a federal law that prohibits employment discrimination based on race, color, national origin, sex, or religion and prohibits retaliation for making a claim of employment discrimination.

Title VII of the Civil Rights Act of 1964 created an independent federal agency to enforce it. Today, that agency enforces several federal employment discrimination laws. Accordingly, the **Equal Employment Opportunity Commission** (**EEOC**) is, generally, the independent federal agency that enforces federal laws that prohibit employment discrimination based on race, color, national origin, sex, religion, age, or disability. To give the EEOC an opportunity to settle a claim of discrimination, generally a person must obtain a right-to-sue letter from the EEOC before filing a lawsuit. A **right-to-sue letter** is written permission from an administrative agency to file a lawsuit in a matter regulated by the administrative agency. States have similar agencies and requirements.

Race discrimination is discrimination based on a person's race. From *group,* a **race**[2] is a group of people related by ancestry, culture, or a distinctive natural characteristic such skin color. Under federal discrimination law, a person's race is the ancestral, cultural, or distinctive group with which a person identifies.

Sex discrimination is discrimination based on a person's sex. Under Title VII, sex refers to gender, not practices or preferences. The 1978 amendment to Title VII made clear that sex discrimination included pregnancy and childbirth.

From *tire out,* **harassment** is the exercise of authority or power in an unnecessarily offensive or oppressive manner. Sex discrimination includes **sexual harassment**, which

is unwelcome sexual advances and other conduct of a sexual nature made as an explicit or implicit condition of employment; unwelcome sexual advances or other conduct of a sexual nature the submission or rejection of which is used as basis for employment decisions; or unwelcome sexual advances or other conduct of a sexual nature that has the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile, or offensive working environment.

Title VII recognizes some defenses to employment discrimination. An employer may discriminate on the basis of **seniority**, which is, from *elder,* the length of time an employee has been employed, or a preference among employees according to the length of time each employee has been employed. From *in good faith,* a **bona fide occupational qualification (BFOQ)** is a characteristic other than race that is reasonably necessary to the normal operation of a particular business such as an inherent requirement or a matter of authenticity. For example, an educational institution with a religious affiliation may prefer employees of that religion. Similarly, race discrimination may be permitted under the defense of business necessity. For example, a movie producer may prefer a Native American actor to portray a Native American in the movie.

The **Age Discrimination in Employment Act of 1967 (ADEA)**, as amended in 1974, 1978, and 1979, is, generally, a federal law that prohibits employment discrimination based on a person's age from 40 to 69. **Age discrimination** is discrimination based on a person's age.

The **Americans with Disabilities Act of 1990 (ADA)** is, generally, a federal law that prohibits employment discrimination based on a disability. An employer must make reasonable accommodations for an employee with a disability.

REMEDIES FOR EMPLOYMENT DISCRIMINATION

Back pay is the remedy of having the employer pay the unpaid amount of money an employee or a former employee would have earned if he or she were not discriminated against. From *return to status,* **reinstatement** is the remedy of restoring a person to his or her former condition or position and the remedy of restoring a former employee to his or her former job or position or to a similar job or position if the former job or position no longer exists.

From *make firm,* **affirmative action** is the policy, legal requirement, or court-ordered remedy that an organization or an employer take positive steps to increase the number of people from minority groups selected or employed. An **aggressive recruitment program** is affirmative action in the form of making an extra effort to solicit applicants from minority groups. Affirmative action is not having a **quota**, which is, from *share,* requiring a certain number of something such as requiring the selection or employment of a certain number of people from a minority group or minority groups. Critics argue that affirmative action tends to result in de facto quotas. **Reverse discrimination** is the tendency of affirmative action to result in de facto discrimination against people of the majority group or of minority groups already represented.

OTHER EMPLOYMENT LAW

The **Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)** is, generally, a federal law noted for granting former employees the right to continue at their own expense certain fringe benefits (such as health care insurance) provided by their former employers.

The **Family and Medical Leave Act of 1993 (FMLA)** is, generally, a federal law that requires certain employers to provide at least 12 weeks of unpaid leave to an employee to care for a newborn child, to adopt a child, to care for an immediate

family member who has a serious health condition, or to care for the employee's own serious health condition that makes the employee unable to perform the employee's job.

From *to hold,* **tenure**[1] is, generally, the right to hold. In employment law, **tenure**[2], the right to hold a position, is the statutory right of certain civil servants such as public school teachers to hold their positions permanently, subject only to removal for cause or due to economic necessity, and the contract right, traditionally offered to effective college professors, to hold their positions permanently, subject only to removal for cause or due to a financial emergency.

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- **back pay order**
- **concerted protected activity**
- **condition of employment**
- **employee assistance program**
- **labor relations acts**
- **laborer**
- **merit increase**
- **no-strike clause**
- **paternalism**
- **Rehabilitation Act of 1973**
- **worker**

Chapter 33

Torts: Generally and Intentional Torts

TORTS, GENERALLY

Extra-contractual liability, the catchall civil law, and the law about wrongs against individuals are known as **torts**. The word "tort" is from the Latin word spelled "torqueo" or "torquere" meaning "to twist." The word "tort" also was used in common-law England as a general synonym for the word "wrong" (a word also derived from a "twisted" word, "wrung"). Accordingly, from *to twist,* a **tort**[1] is, fundamentally, twisted conduct, especially twisted conduct for which the victim is permitted to bring a lawsuit against the perpetrator. Generally, a **tort**[2] is a civil wrong, in particular, a civil wrong not directly related to social status, ownership, or agreements.

A person or entity that commits a tort is known as a **tortfeasor**, a **perpetrator**[1], or a **wrongdoer**. Conduct that results in the commission of a tort is said to be **tortious**. From *sacrificed,* a **victim**[1] in civil law is a person or entity against whom a civil wrong is committed or a person or entity that has had at least one of his, her, or its rights violated.

In a sense, each tort is nothing more than a specific theory on which a victim can bring a lawsuit. Some states, most notably New York, recognize a general tort theory known as prima facie tort. From *tortious on its face,* **prima facie tort** is an action for conduct that is not another tort and otherwise legal, maliciously intended, without justification, to cause harm, and causing special damages.

ACTIONS AND THEIR ELEMENTS

A court cannot act unless a law is involved. The word "action" originally comes from the Latin word **actio**, which has the law-related meaning a right or cause. In law, an **action**[1] is, generally, when a person has a right or cause involving the law, upon which a court can act. An **action**[2] is, specifically, a recognized right or cause involving the law, upon which a court can act; a request for legal action by a court; and a group of elements entitling a plaintiff to legal relief, if admitted or proven, and if there is no legal defense. A **civil action** or **actio civilis** is a recognized right or cause involving civil law, upon which a court can act, and a request for legal action by a court under civil law. A **cause of action**[1] is, generally, a recognized right or cause for action in the legal sense. **Actionable**[1] generally means that there is a recognized cause of action.

From *rudiments,* **elements** are the definitional and necessary parts of a crime or civil action. From *without which not,* **sine qua non**[1] means that without which the thing cannot be. Each element of a tort is sine qua non. In tort law, a **right of action**[1] is a

recognized tort. In tort law, **actionable**[2] is conduct described in a right of action or conduct recognized as being tortious. In tort law, a **cause of action**[2] is a situation or circumstance in which the events required to have a tort have occurred.

THE CLASSIFICATION OF TORTS

Torts can be classified based on the mental state, if any, required on the part of the tortfeasor to commit the tort. An **intentional tort** is a tort in which the tortfeasor acts intentionally to cause the victim harm. An **unintentional tort** is a tort in which the tortfeasor acts unintentionally but improperly to cause the victim harm. The sole unintentional tort is the tort of negligence, discussed in the next chapter. A **strict liability tort** is a tort in which the tortfeasor acts to cause the victim harm, regardless of the tortfeasor's intent or lack of intent.

THE PURPOSES OF TORT LAW

Tort law has four main purposes: compensation for damages, financial responsibility, deterrence, and avoidance of self-help.

Every tort victim has at least one **injury**, which is, from *without right,* suffering the effects of a wrong, especially suffering the effects of a violation of a legal right. From *with weigh out* (balance out), **compensation** is something that makes up for something else or something making whole, or the equivalent or a portion thereof, such as payment for services performed and payment for harm or injury caused. From *loss by injury,* **damage** is harm or injury. In the sense of injury, **loss**[2] is no longer having something you benefited from or reasonably expected to benefit from. **Damages**[1] are harms or injuries or compensation in money the law awards for harm, injury, or loss caused by the legal wrong of another. A **cap on damages** is a limit on damages established by statute.

From *real,* **actual damages**, **compensatory damages**[1], **general damages**, or **tangible damages** are damages directly and naturally caused by a harm, injury, or loss. From *on (the) fall,* **incidental damages** are damages for expenses related to a claim for actual damages. From *intense result,* **consequential damages** or **special damages** are damages indirectly and not naturally caused by a harm, injury, or loss; and so damages that must be specially pleaded and proved. In tort law, **compensatory damages**[2] are damages designed to restore the tort victim to the same financial position the tort victim was in just prior to the injury; that is, damages designed to make the tort victim whole. From *pertaining to money,* **pecuniary damages**, **economic damages**, or **out-of-pocket expenses** are damages that are readily measurable in money. **Nonpecuniary damages** or **noneconomic damages** are damages that are not readily measurable in money. For example, **pain and suffering** are general damages awarded for conscious physical and mental hurt and misery. From *per day,* the **per-diem argument** is the argument that the plaintiff's damages can be determined by multiplying a figure for the plaintiff's daily suffering by the number of days the plaintiff is expected to suffer. From *pleasure,* **hedonic damages** are general damages awarded for a person's loss of life's pleasure and enjoyment or general damages awarded for the unhappiness of realizing that you will be unable to lead your previous life style in the future. **Loss of consortium** is the absence or removal of the companionship, cooperation, affection, and aid of a spouse.

From *in name only,* **nominal damages**[1] are, generally, a token sum awarded as recognition of the legal wrong of another although only slight harm, injury, or loss was caused. In tort law, **nominal damages**[2] are damages designed to vindicate a tort victim's right to sue, even though actual harm was not suffered as a result of the injury.

Unlike criminal responsibility, **civil liability** means potentially subject to an obligation under a civil law, potentially subject to an obligation for not obeying a civil law, or, simply, liability. From *to bind,* **liability**[1], civil responsibility, means actually subject to an obligation under a civil law or actually subject to an obligation for not obeying a civil law. **Liable**[1], civilly responsible, refers to a person who is or was subject to an obligation because of a civil law or a person who is or was subject to an obligation because of not obeying a civil law. **Liability**[3] for damages is the obligation to pay damages. **Liable**[2] for damages means obligated to pay damages.

The **collateral source rule** is a rule of case law that the plaintiff has a right to recover the full amount of the plaintiff's damages, even though the plaintiff has been reimbursed for those damages by a third person independent of the tortfeasor.

From *punishment,* **punitive damages**[1] or, from *example,* **exemplary damages**[1] are, generally, damages beyond actual or nominal damages awarded to punish the wrongdoer's malicious, wanton, or willful conduct and to deter others. In tort law, **punitive damages**[2] or **exemplary damages**[2] are damages designed to punish a tortfeasor whether or not actual harm has been suffered as a result of the injury.

From *careless,* **reckless** or **recklessly** is acting with a disregard of something important. In civil law, from *ill will,* **malice**[1] is conscious and reckless disregard of the rights or safety of others. In civil law, **malicious**[1] is consciously and recklessly disregarding the rights or safety or others. From *lacking discipline* and *merciless,* **wanton** is recklessly disregarding the consequences of your acts. From *choice,* **willful** is knowing that there is a strong probability of causing harm or, loosely, intentional or deliberate, and not accidental.

Self-help is protection of your person or property by your own actions without resorting to legal processes. Some self-help is legal such as self-defense.

INTENTIONAL TORTS, GENERALLY

All intentional torts involve, from *beyond-go,* a **trespass**[1], which is, generally, a direct wrongful interference with the person or property of another. All intentional torts have at least three elements: intent, wrongful conduct, and causation of harm.

From *attention,* **intent**[1] is, generally, the design, determination, or resolve with which a person acts or the state of mind in which a person seeks to accomplish a result through an act or a course of action. Intent is usually shown indirectly, in that people usually intend the natural and probable consequences of their actions.

Intent[2] is, loosely, the desire to bring about a physical or mental effect upon another by your conduct. In tort law, **general intent**[1] is conduct with substantial certainty that specific effects will occur. In tort law, **specific intent**[1] is conduct designed to accomplish specific effects. In tort law, **transferred intent**[1] or the **transferred intent doctrine** is the doctrine that if a tortfeasor has the intent to commit an intentional tort against one person but causes the consequences of the same tort against another person, or the consequences of another tort against either person, the original intent is transferred and sufficient to commit the resulting intentional tort.

INTENTIONAL TORTS AGAINST A PERSON

In tort law, from *at-leap,* an **assault**[1], causing apprehension, is the intentional tort of causing apprehension of immediate harmful or offensive physical contact with another, without consent or privilege. From *trouble,* a **threat** is a serious declaration of the intent to harm another by a wrongful act. **Apparent present ability** is a situation or circumstance in which it is possible for a threat to be carried out or a situation or circumstance in which it reasonably appears that a threat can be carried out.

In tort law, from *beating,* a **battery**[2], an unconsented touching, is the intentional tort of causing harmful or offensive contact with another without consent or privilege.

From *not genuinely in prison,* **false imprisonment**, undeserved confinement, is the intentional tort of causing the confinement of another without consent or privilege. **False arrest** is an arrest made in an illegal manner or without proper legal authority that may result in liability for false imprisonment.

From *out move* and *apart draw,* **emotional distress** or **mental anguish** is indirect personal suffering caused by the conduct of another. **Intentional infliction of emotional distress** or the **tort of outrage**, outrageous conduct, is the intentional tort of causing severe emotional distress by extreme and outrageous conduct without consent or privilege.

INTENTIONAL TORTS AGAINST PROPERTY

Trespass to land or **trespass**[2], unconsented entry, is the intentional tort of causing entry on land owned or occupied by another without consent or privilege. From *shut,* a **close**[1] is an enclosed parcel of land. From *trespass whereby he broke the close,* **trespass quare clausum freight** was the common-law phrase for trespass to land, meaning that the tortfeasor had entered the domain of another. **Continuing trespass** is trespass to land caused by a tangible object permanently remaining on land owned or occupied by another.

A **trespasser**, a visitor who is not invited and not tolerated, is a visitor who entered on land owned or occupied by another without express or implied consent or without a privilege or a visitor who entered on land owned or occupied by another with consent or privilege but who exceeded the scope of that consent or privilege. In Latin, **ab initio** means from the beginning. From *trespass from the beginning,* **trespass ab initio** is the doctrine that a visitor who enters another's land with consent or privilege, then exceeds the scope of that consent or privilege, is liable for all damages caused from the time of the original entry.

From *property* and *goods,* a **chattel** is an item of tangible personal property. **Trespass to chattels**, stealing or trashing, is the intentional tort of causing interference with the possession or condition of tangible personal property owned or possessed by another without consent or privilege. From *back pledge,* **replevin**[2] is the remedy in which a court orders the return of property to its rightful owner or possessor.

From *intense turn,* **conversion**, keeping or changing, is the intentional tort of causing substantial interference with the possession or condition of personal property owned or possessed by another without consent or privilege.

DEFENSES TO INTENTIONAL TORTS

From *to fortify against,* a **defense**[1] is a legal basis for denying liability or responsibility.

From *together-feel,* to **consent**[1] (generally, the verb) is to agree or to approve. **Consent**[2] (generally, the noun) is agreement or approval, especially agreement with what is done or proposed by another or approval of what is done or proposed by another. As a defense to a tort, **consent**[3] or the **defense of consent** is the agreement or willingness to accept the risks of another's conduct. From *the volunteer suffers no wrong,* **volenti non fit injuria** is the doctrine that no wrong is done to a person who consents.

For a medical procedure, **informed consent**[1] is valid patient consent to a medical procedure, which occurs after the health care provider adequately explains what will be done and the significant risks involved in the medical procedure.

From *special law,* a **privilege**[1] is, generally, a special right. Specifically, a **privilege**[2] is something you may do and not something you must do. In tort law, a **privilege**[3] is a justification for tortious conduct.

From *disciple,* **discipline**[1] is, generally, conforming yourself to established standards or conforming others to established standards. In tort law, **discipline**[2] or the **defense of discipline** is the privilege of a person charged with a duty to control, train, or educate another to use reasonable force to maintain control, maintain a training environment, or maintain an educational environment.

From *to step* or *to attack,* an **aggressor** is a person who starts a fight. The **aggressor rule** is the rule of case law that an aggressor cannot sue for damages caused by a person who was legally acting in self-defense.

Self-defense is the general privilege to use reasonable force to protect yourself from an unlawful aggressor threatening you with serious bodily harm or illegal confinement and the defense that you acted to protect yourself from an unlawful aggressor threatening you with serious bodily harm or illegal confinement. Generally, to successfully raise the defense of self-defense, you must not be the aggressor, you must subjectively and reasonably believe that you are in imminent danger of death or serious bodily harm, and you must use no more force than is necessary to protect yourself. Some states impose a **duty to retreat**, which is an obligation to depart from a dangerous situation if you are able to do so, rather than acting aggressively in self-defense.

Defense of others or **defense of a third person** is the general privilege to use reasonable force to protect another from an unlawful aggressor threatening the other with serious bodily harm or illegal confinement and the defense that you acted to protect another from an unlawful aggressor threatening the other with serious bodily harm or illegal confinement. From *between come,* an **intervenor**[1] is a person who comes to the defense of another.

Defense of property is the general privilege to use reasonable force to protect your property. **Deadly force** is a force reasonably likely to cause death or serious bodily harm. From *remain,* a **dwelling** is a building in which a person usually lives and a building regarded as a person's home. In most states, the use of deadly force to defend property is reasonable only in your dwelling to protect yourself or others. Most states apply what is sometimes known as the **castle doctrine**, which is a reference to the common-law concept that "A man's home is his castle" and today means that there is no duty to retreat from your dwelling. A **spring gun** is a gun rigged to shoot automatically. Because of the danger to innocent persons like firefighters, who have a privilege to go on other people's property, the use of a spring gun is generally illegal.

Recapture of chattels is the privilege to use reasonable force to regain possession of your tangible personal property from a person who has wrongfully acquired possession. Going onto the property of another to engage in recapture of chattels is only permitted when acting in **fresh pursuit**[1] or **hot pursuit**[1], which is, generally, a continuous chase during or a short time immediately following the crime or tort.

Shoplifting is taking goods on display in a store without paying for them. A **shoplifter** is a person who takes goods on display in a store without paying for them. A **merchant** is, in part, a person who is in the business of selling goods. The **merchant's privilege** is the privilege of a merchant to detain for a reasonably short period of time for a reasonable investigation a person who is reasonably suspected of shoplifting.

From *to stay,* **arrest**[1], as a defense, or the **defense of arrest** is the defense that you lawfully seized a suspected criminal to force him or her to answer for a crime or lawfully seized a person to force him or her to appear in court.

From *unavoidable,* **necessity**[1] or **defense of necessity** is, generally, the defense that you were objectively forced by circumstances not of your creation to choose between evils and you chose the lesser or least evil for the greater or greatest good. In tort law, **necessity**[2] is the privilege in an emergency to commit tortious conduct if it is the only means reasonably available to prevent a greater harm. **Public necessity** or the **public necessity defense** is the privilege in an emergency to commit tortious

conduct if it is the only means reasonably available to prevent a greater harm to many people or the public as a whole. It is a complete defense. **Private necessity** is the privilege in an emergency to commit tortious conduct if it is the only means reasonably available to prevent a greater harm to a few people or a private individual. It is an incomplete defense.

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- **actio damni injuria**
- **feasance**
- **intentional**
- **intentional injury**
- **malfeasance**
- **misfeasance**
- **nonfeasance**
- **outrageous conduct**
- **probable consequences**
- **property damage**
- **protection**
- **risk management**
- **substantial certainty**
- **tort law**
- **tort reform law**
- **tortious liability**
- **torts against property**
- **torts against the person**
- **transferred privilege**
- **trespass de bonis asportatis**

Chapter 34

Torts: Negligence and Strict Liability

NEGLIGENCE, GENERALLY

All intentional torts involve a **trespass**[1], which is, generally, a direct wrongful interference with the person or property of another. There was also a common law action for **trespass on the case**, which was an indirect wrongful interference with the person or property of another. Courts gradually realized that indirect harm is not usually intentionally caused because it is usually the result of carelessness. Focus gradually shifted from whether the harm was caused directly or indirectly, to whether the wrongdoer acted intentionally or unintentionally. Trespass on the case was gradually transformed into a tort covering harmful acts that were unintentional but improper.

From *foresight,* **prudent** is careful, cautious, and wise. From *thoughtful,* **reasonable** is having a good reason and thoughts a prudent person would have in a similar circumstance. **Unreasonable** is not having a good reason and having thoughts a prudent person would not have in a similar circumstance.

From *carelessness,* the **tort of negligence** or **negligence**[1] is the tort of unintentionally causing harm and damages by creating an unreasonable risk of harm and the tort of lack of due care. From *anxiety,* **care** is attention, caution, concern, and management for safety. **Due care** is the standard of care established or recognized by the law to protect others from unreasonable risk of harm or the care required under the circumstances. Due care includes **diligence**, which, from *attentiveness* and *carefulness,* is attention to important matters. **Due diligence** or **reasonable diligence** is the attention required by the circumstances such as reasonably checking the background of a person before employing the person in a position of trust.

In the sense of a lack of due care, **negligence**[2], carelessness, is a failure to exercise due care, not doing what a reasonable and prudent person would do, or conduct below a standard of care established or recognized by the law to protect others from unreasonable risk of harm. In tort law, **neglect**[2] is engaging in negligence, being careless, failing to exercise due care, failing to do what a reasonable and prudent person would do, or acting below the standard of care. **Negligent** is to have engaged in negligence or neglect, to be liable due to negligence or neglect, or to have caused liability due to negligence or neglect. In criminal law, **negligent homicide** is the crime of causing the death of a human being by negligence or neglect. The related tort is wrongful death. **Willful neglect** is engaging in carelessness or lack of due care while knowing that there is a strong probability of causing harm or engaging in negligence that is not accidental.

The elements of the tort of negligence are duty, breach, causation, and damages. The **duty**[3] element is that the defendant owed a legal duty to the plaintiff. The **breach**[3] element is that the defendant breached the legal duty to the plaintiff. The **causation**[1] element is that the defendant's breach caused harm to the plaintiff. The **damages**[2] element is that the plaintiff's harm is measurable in money.

DUTY

In tort law, from *obligation,* a **duty**[4] is an obligation of conduct owed to another, the violation of which results in liability. The **duty of care**[2] is the general duty to others established by law, the duty to avoid careless harm to another that a reasonable and prudent person would not cause, or the duty to not cause harm by causing an unreasonable risk of harm. Generally, an **undertaking**, which is acting where you did not otherwise have a legal duty to act, invokes the duty of care. An exception is a **Good Samaritan statute**, which is a statute, or an equivalent judicial doctrine, providing that a person, especially a doctor, is not liable for treatment given to another at the scene of an emergency unless the person's conduct is wanton or willful or the person expects or receives payment and the person is negligent.

The **reasonable person** or, traditionally, the **reasonable man** is a hypothetical person of ordinary knowledge and prudence acting under similar circumstances. The **reasonable person test** or, traditionally, the **reasonable man test**, also known as the **reasonable person standard**, is the standard by which a person is negligent if the person fails to exercise that degree of care that a person of ordinary knowledge and prudence would exercise under like circumstances.

The **degree of care** or **standard of care** is the amount of care required to avoid liability. **Great care** or **utmost care** is the care used in matters of great importance. **Ordinary care** or **reasonable care** is the care used in matters of ordinary importance or the care used by a reasonable person. **Slight care** is the care used in matters of slight importance. In some states, the **sudden emergency doctrine** is the doctrine that a person is held to a lower degree of care in an emergency due to the lack of time for thought and reflection.

From *ahead-see,* **foreseeability** is the concept that people are negligent only where the harm to others caused by their conduct is reasonably foreseeable. **Foreseeable** is knowable, predictable, or able to be anticipated in advance. An **unavoidable accident** or an **unavoidable casualty** is a harm that could not have been reasonably foreseen or prevented.

From *badly practice,* **malpractice** is negligence committed in the practice of a profession or an intentional tort committed in the practice of a profession. **Legal malpractice** is malpractice by an attorney or an agent of the attorney. **Medical malpractice** is malpractice committed by a doctor, nurse, or other medical professional.

Wrongful birth, **wrongful pregnancy**, or **wrongful conception** is a medical malpractice action in which the plaintiffs argue that they sought or used contraception to avoid pregnancy, but because of another's negligence, a child was born. **Wrongful life** is an action by or on behalf of a child born unhealthy, claiming that he or she should not have been born.

BREACH

From *break,* a **breach**[2] is, generally, a failure to perform as promised or a failure to comply with a legal duty. A **breach of duty** or **breach**[4] is a failure to perform a duty or a failure to exercise due care. From *let go,* an **omission** is a failure to act where there is a legal duty to act.

The **degree of negligence** is the amount of negligence required for liability to result. **Slight negligence**, an oversight, is a failure to use great care. **Ordinary negligence** or **simple negligence**, a mistake, is a failure to use ordinary care. **Gross negligence**, recklessness, is a failure to use even slight care. **Criminal negligence** or **culpable negligence** is malum in se carelessness, carelessness that is wrong because it is inherently dangerous or evil, negligence blameworthy enough to be a crime, or an intentional act that a reasonable person would expect to cause harm.

In Latin, **per se** means by itself. From *negligence by itself,* **negligence per se** or **negligence in law**, a special proof of the elements of duty and breach, is negligence as a matter of law, usually found where there has been a violation of a statute that sets a higher standard of care than the general duty of care. Negligence per se does not operate in reverse. Compliance with a statute does not preclude a finding of negligence.

Assured clear distance is a statute that prohibits people from driving a motor vehicle faster than will permit them to stop within a safe distance of a motor vehicle ahead of them. Common in the 1900s, when many people didn't have a motor vehicle, but abolished today, a **guest statute** is a statute prohibiting a nonpaying passenger from suing the driver for injuries sustained in an accident unless the driver was grossly negligent. **Wrongful entrustment** is entrusting a motor vehicle or other thing to a person you know, or should have known, is incompetent to drive it or operate it.

Bad things sometimes happen without any breach of duty. From *to fall,* an **accident**, an unplanned, unforeseen, and unexpected event, is an event that was not intended; it also may be an event for which no person was at fault.

CAUSATION

From *matter,* a **cause**[1] is that which brings about a result, an effort, or a legal action. **Causation**[2] is that which brought about the result, especially, in tort law, a reasonable physical connection between the alleged tortfeasor's conduct with the victim's harm. It requires cause-in-fact and proximate cause.

Cause-in-fact is an indication that a defendant's breach of duty was in, or substantially in, the chain of causation to the plaintiff's harm. From *matter without which not,* **causa sine qua non**, sometimes shortened to **sine qua non**[2], means a cause without which what occurred could not have occurred, or a "but for" cause. Cause-in-fact requires meeting either the but-for test or the substantial factor test. The **but-for test** is whether or not, without the defendant's breach of duty, the plaintiff would have suffered the same harm. The **substantial factor test** is whether or not, in a situation in which there have been multiple independent breaches of duty or other causes, the defendant's breach of duty is a substantial factor resulting in the plaintiff suffering harm.

In Latin, **causa proxima** means a closely related cause. From *causa proxima,* **proximate cause** or **legal causation** is the fairness limitation on causation and the requirement that to commit the tort of negligence, the causing of the harm must be reasonably foreseeable. The proximate cause requirement means that due care only extends to a foreseeable plaintiff.

An allusion to the fact that a particular victim may be more susceptible to injury than the average victim, the **eggshell-skull rule** or **eggshell-plaintiff rule** is the rule of case law that the defendant takes the foreseeable plaintiff as he or she, or his or her property, is found and is liable for all damages caused to the foreseeable plaintiff, even though some of the damages were not foreseeable.

The **rescue doctrine** is the doctrine that the defendant is liable for harm caused to a plaintiff, or to the rescuer of the plaintiff or the defendant, as the result of the rescuer reasonably attempting to come to the aid of the plaintiff or the defendant.

A chain of proximate causation may be broken by a cause that intervenes. An **intervening cause**, a **supervening cause**, or **supervening negligence** is a cause that intervenes and not a cause that was actively operating at the time of the defendant's conduct. From *above sit,* a **superseding cause** is a substantial and reasonably unforeseeable intervening cause that breaks the chain of proximate causation. An **act of God** or, from *a greater force,* a **vis major** is an unpredictable force of nature that may be a superseding cause; a natural event not under the control of a person, for which no person is liable; and an event the reason for which is known only to divine insight.

Suppose a patient was put under general anesthesia before having foot surgery and that the patient came out of the surgery with a dislocated shoulder. How does the patient prove that the cause of the dislocated shoulder was negligence by the doctors or nurses in allowing the patient to fall off the operating table? A special inference of causation is permitted. A special inference of cause-in-fact and proximate cause, in Latin *the thing speaks for itself,* **res ipsa loquitur**, sometimes shortened to **res ipsa**, is an inference from what happened, where the defendant had control over the events that caused the harm, the events that caused the harm do not ordinarily occur without negligence, and the plaintiff did not fail to exercise due care. Some states also require that the evidence of the true facts be more readily available to the defendant. Notice that res ipsa loquitur is not a general doctrine that documents speak for themselves. Documents usually require interpretation and construction.

ACTUAL DAMAGES

The tort of negligence requires a suffering of harm worth suing about. The case must not be a case of **injuria absque damno**, in Latin a wrong without damage. However, the **benefit rule** is the rule of case law that if a defendant's tortious conduct also confers upon the plaintiff a special benefit, the value of the benefit may be considered in mitigation of the plaintiff's damages.

Focused on a particular kind of damages, **negligent infliction of emotional distress** is negligently causing severe mental or emotional distress by conduct that an average person would describe as outrageous such as mishandling a corpse.

DEFENSES TO NEGLIGENCE

The most common defense to negligence is to rebut one or more of the elements. If there is no duty, no breach, no causation, or no damages, there is no liability. Most of the defenses to intentional torts also apply to the tort of negligence.

The traditional affirmative and complete defense to the tort of negligence is **contributory negligence**, occasionally shortened to **contrib.**, which is, from *together bestow,* a lack of due care by the plaintiff. It is conduct by the plaintiff below a standard of care established or recognized by law to protect others from unreasonable risk of harm, which alone or in cooperation with the conduct of the defendant brought about the plaintiff's harm. **Contributory negligence per se** is a plaintiff's violation of a statute making the plaintiff contributorily negligent as a matter of law.

The **last clear chance doctrine**, the **last clear chance**, or the **humanitarian doctrine** is the doctrine that the plaintiff can negate the traditional affirmative and complete defense of contributory negligence by proving that the defendant had a final possible opportunity to avoid causing harm to the plaintiff. **Antecedent negligence** is the doctrine that the defendant is deemed to have had a last clear chance if the defendant's inability to avoid the harm to the plaintiff is due to the defendant's prior negligence.

Historically, as defendants sought to show that plaintiffs were contributorily negligent and plaintiffs sought to show that they were not, or, if they were, the defendants

had the last clear chance, juries in negligence cases developed their own solution to the all-or-nothing conflict. Juries reduced the amount of actual damages they awarded to the plaintiff to the extent they felt that the plaintiff was contributorily negligent. The solution discovered by juries is now the law in most states, known as comparative negligence.

From *with equal,* **comparative negligence** is the system in a negligence case whereby the trier of fact must reduce the amount of actual damages awarded to the plaintiff by the percentage of the plaintiff's contributory negligence, if any, compared to the percentage of negligence of the defendant or defendants.

Historically, some states had **pure comparative negligence**, which is the system in a negligence case where if the plaintiff is contributorily negligent and at least one defendant is negligent, the plaintiff always recovers partial damages even if the percentage of the plaintiff's contributory negligence is equal to or greater than the percentage of negligence of the defendant or defendants. Today, most states have **modified comparative negligence** or **50% comparative negligence**, which is the system in a negligence case where if the plaintiff is contributorily negligent and at least one defendant is negligent, the plaintiff recovers partial damages only if the percentage of the plaintiff's contributory negligence is "less than" (or "less than or equal to") the percentage of negligence of the defendant or defendants.

From *up-taking,* **assumption of the risk** or **assumption of risk** is the affirmative defense that applies where the plaintiff voluntarily encountered a known risk such as the risk of harm being caused to the plaintiff by the defendant's negligence. Assumption of the risk may be express or implied. Even where comparative negligence has been adopted, express assumption of the risk remains a distinct defense.

Implied assumption also remains a distinct defense if it is **primary assumption of the risk**, which is an implied assumption of the risk by a plaintiff because the defendant does not owe a duty to the plaintiff. **Secondary assumption of the risk** is an implied assumption of the risk by a plaintiff where the defendant would otherwise owe a duty to the plaintiff, but the plaintiff's assumption of the risk has caused the defendant's duty to dissipate. Secondary assumption is deemed contributory negligence.

Another defense is immunity. In civil law, from *free from service* or *exemption,* an **immunity**[1] is a negation of liability due to an overriding public policy protecting a special relationship between the plaintiff and the defendant. **Immune** means having a right to immunity. Having roots in the common law concept that "the king can do no wrong," **sovereign immunity** or **governmental immunity** is immunity based on the principle that the government cannot be sued without its consent for performing a function of government. The **Federal Tort Claims Act of 1946** (**FTCA**) is a law by which Congress consented to some lawsuits being brought against the United States, waiving some sovereign immunity. Most states similarly waive sovereign immunity.

Local governments have never had complete sovereign immunity. Local governments generally have immunity when they perform **governmental functions**, which are leadership, planning, policy, and safety functions that are best performed by a public organization. Local governments generally do not have immunity when they perform **proprietary functions**, which are functions that could be performed by a private business for profit as well as by a public organization.

Public official immunity is civil immunity that public officials are often granted for the acts they perform in the course of their public service. **Judicial immunity** is civil immunity that a judge is granted for acts performed in the judge's official capacity. The **fireman's rule** is the rule of case law that a fire fighter injured in fighting a fire may not sue a person whose only connection to the injury is that he or she negligently caused the fire. The **doctrine of charitable immunity** or **charitable immunity** is the civil immunity traditionally granted charitable, educational, and religious organizations

based on a public policy of encouraging charity. With the modern availability of liability insurance for charitable organizations, most states have abolished charitable immunity. Similarly, **intrafamily immunity** is the civil immunity traditionally granted in suits between spouses or against parents. Most states have abolished intrafamily immunity.

OWNERS AND OCCUPIERS OF LAND

Sometimes liability depends on the victim's status. Some states, for example, still apply the traditional common-law duties owed by owners and occupiers of land to people who come on their land, which depend on the status of the visitors as invitees, licensees, or trespassers. A **guest** is a visitor to land or other property, especially a visitor to whom hospitality is extended. A **business invitee**, an **invitee**, or a **business guest**, a visitor who is invited and tolerated, is a visitor who entered on the land of another with express or implied consent for an actual or potential business purpose or a visitor who entered on the land of another because the land is held open to the public for the purpose of their attendance. A **licensee**[2], a **social guest**, a **social guest licensee**, or a **gratuitous guest**, a visitor who is not invited but tolerated, is a visitor who entered on the land of another with express or implied consent, or a privilege, but not for an actual or potential business purpose. A **trespasser**, a visitor who is not invited and not tolerated, is a visitor who entered on land owned or occupied by another without express or implied consent, or without a privilege, or a visitor who entered on land owned or occupied by another with consent or privilege but who exceeded the scope of that consent or privilege.

Landowners generally owe the greatest duty to invitees, who may reasonably expect that the premises have been made safe for them. Because licensees are not invited or expected in the same way, landowners do not owe licensees a duty to keep their land in a reasonably safe condition. Landowners generally owe the least duty to trespassers. As a general rule, a landowner cannot intentionally harm trespassers beyond the privilege to use self-help to remove them and a landowner is only required to reasonably warn a discovered trespasser of dangerous conditions that the landowner is actually aware of. Some states apply trespasser duty to a **bare licensee**, which is a visitor who entered on the land of another with a public privilege such as that of a police officer or firefighter.

Most states also impose a special duty on landowners for trespassing children. **Attractive nuisance** or the **attractive nuisance doctrine** is the doctrine that where a child trespasser is reasonably foreseeable due to an artificial condition a child would not recognize as dangerous, and the benefit of the artificial condition is slight compared to the risk of harm, the landowner must use reasonable care to prevent harm to the child from the artificial condition. For example, a swimming pool should be fencedin.

WRONGFUL DEATH AND SURVIVOR ACTIONS

At common law, the right of a victim or the victim's family to sue for a tort was lost when the victim died. Modern law allows some tort actions to survive the victim.

A **wrongful death** is a death caused by a tort or other wrongful act. A **wrongful death statute** is a statute permitting the personal representative of a deceased tort victim, or the immediate family of the deceased tort victim, to file an action against the tortfeasor for wrongfully causing the deceased tort victim's death. A **survival statute** is a statute permitting some tort causes of action existing before a tort victim's death to survive the tort victim's death and for the damages to be recovered by a deceased tort victim's estate or a statute permitting some tort causes of action to survive the death of the tortfeasor.

JOINT TORTFEASORS

From *join,* **joint** means together, combined, or united. Two or more tortfeasors who act together to cause harm to a victim are known as **joint tortfeasors**. A **joint tortfeasor** is one of two or more joint tortfeasors.

From *together and separately,* **joint and several liability** is liability under which plaintiffs may recover one satisfaction of their damages from any one joint tortfeasor or from any combination of two or more joint tortfeasors. **Joint liability** or **shared liability**, two or more persons obligated, is liability under which two or more joint tortfeasors are collectively liable for the total amount of the plaintiff's damages. From *separate,* **several** or **severally** is separate and apart, ownership by one person or entity, or liability for the entire amount by each defendant. **Several liability**, any one person obligated, is liability under which one joint tortfeasor is individually liable for the total amount of the plaintiff's damages. From *together bestow,* the **right of contribution** or **contribution**, sharing of the burden, is the right of a joint tortfeasor who has paid more than the appropriate fractional share of the plaintiff's damages to reimbursement from the other joint tortfeasors for their fractional shares.

From *relax,* a **release**[2], an abandonment of a cause of action, is an agreement by a plaintiff or potential plaintiff to not attempt to collect damages from a defendant or potential defendant, thereby removing all liability to the plaintiff. From *come together,* a **covenant not to sue**, an abandonment of a lawsuit, is an agreement by a plaintiff or potential plaintiff to not file a lawsuit against a particular defendant or potential defendant, under which the remaining joint tortfeasors, if any, are not released.

Joint tortfeasors should be distinguished from concurrent tortfeasors. From *together-run,* **concurrent tortfeasors** are tortfeasors who act independently at the same time, but not in concert, to cause a victim harm. An example of concurrent tortfeasors is two hunters, not hunting together, each negligently shooting the same person at the same time. Joint and several liability does not apply to concurrent tortfeasors.

VICARIOUS LIABILITY

From *deficiency,* a **fault** is misconduct or conduct below a standard such as an intentional wrong or a lack of due care. The concept of **liability without fault** is liability without having committed any intentional or negligent conduct, strict liability and vicarious liability, or strict liability.

From *substitute,* **vicarious** means experienced through the experience of another or, simply, through another. From *in thought,* to **impute** is to make a person liable vicariously for the act of another, by attribution or legal transfer, because of the relationship between the person and the other, even though the person did not act. **Imputed** means attributed or legally transferred to a person vicariously from the experience of another. **Imputed negligence** is negligence attributed or legally transferred to a person vicariously from the negligence of another. **Imputed liability** or **vicarious liability**[1] is, generally, liability attributed or legally transferred to a person vicariously from the liability-causing acts or omissions of another. Specifically, **vicarious liability**[2] is liability without fault as a result of a transfer of tort liability from the actual tortfeasor to another. **Imputed contributory negligence** is the doctrine that where a plaintiff would be vicariously liable to a defendant for the tortious conduct of a third person, the negligence of the third person is imputed to the plaintiff as contributory negligence, reducing or preventing the plaintiff's recovery of damages from the defendant.

In Latin *let the superior answer,* **respondeat superior** is the doctrine that a master is vicariously liable for the acts of a servant within the scope of the servant's agency and in furtherance of the master's business and the doctrine that an employer is

vicariously liable for the acts of an employee within the scope of the employee's employment and in furtherance of the employer's business. The **borrowed servant rule** is the rule of case law that a borrowing master is liable for the torts committed by a borrowed servant in the scope of his or her employment by the borrowing master, even though the loaning master is paying the servant.

A master or an employer can avoid vicarious liability under respondeat superior by showing that a servant or an employee was on a **frolic and detour**, which is, from *glad like* and *aside-turn,* an unforeseeable personal adventure by a servant that substantially deviates from seeking to advance or further the master's business or an unforeseeable personal adventure by an employee that substantially deviates from seeking to advance or further the employer's business.

A **joint enterprise**[2] is an organization in which, by contract, mutual right of control, or having a common purpose with a pecuniary interest, members are vicariously liable for torts committed in furtherance of the organization. Some states recognize the doctrine of **enterprise liability**, which is the doctrine that if a plaintiff is harmed by a product but cannot identify which of the several manufacturers of the product caused the harm, the plaintiff may sue the group of manufacturers that manufacture virtually all of the product and the defendants may be held jointly and severally liable for the plaintiff's damages. Some states recognize **market share liability**, which is the doctrine that if a plaintiff is harmed by a product but cannot identify which of the several manufacturers of the product caused the harm, the plaintiff may sue the group of manufacturers that manufacture virtually all of the product and the defendants may be held liable for a percentage of the plaintiff's damages equal to the defendant's share of the market.

An **automobile consent statute** is a statute that makes the owner of a motor vehicle vicariously liable for the negligence of anyone who drives the motor vehicle with the owner's consent. Similarly, an owner of a motor vehicle may be held vicariously liable under the **family purpose doctrine**, which is the doctrine that the owner of a motor vehicle is vicariously liable for the negligent operation of the vehicle by members of the owner's household for any nonbusiness purpose.

STRICT LIABILITY

From *drawn in,* **strict liability** or **absolute liability** is liability without fault as a result of committing a tort that does not require fault. The usual reason for strict liability is that an activity is inherently dangerous. From the name of a dice game, a **hazard** is a condition of potential danger. An **inherently dangerous activity**, an **abnormally dangerous activity**, or an **ultrahazardous activity** is an activity in which a high degree of risk of causing harm to others remains despite avoiding intentional wrongful conduct and using the utmost care and precaution. In other words, it is an activity in which danger is unavoidable. **Strict liability for ultrahazardous activities** is the tort of an inherently or abnormally dangerous activity causing harm.

One of the first risks of harm to be deemed by the law to be inherently dangerous, regardless of a person's intent or use of care, was the keeping of animals. **Strict liability for animals** is the tort of a person's animal causing harm.

From *to lack,* **defective** means lacking something essential such as being unsafe (lacking safety). A **defective product** is a product that is unsafe because of its poor design, faulty manufacture, or lack of adequate warnings or a product that, when it leaves the manufacturer's control, is unsafe when used for a purpose for which it was intended or unsafe when used for some other reasonably foreseeable purpose. From *produce,* **products liability**, **product liability**, or **product liability theory** is theories of liability for harm caused by a defective product.

One theory of products liability is breach of contract warranty. Another theory is that the tort of negligence may be used to hold a manufacturer, supplier, or retailer liable for harm caused by a defective product. Another theory is **strict liability for product defects**, **strict products liability**, or **strict tort liability**, which is the tort of placing any product in the marketplace knowing that it is to be used without an inspection for defects and a product defect causes physical harm. **Unavoidably unsafe** are products that are inherently dangerous, but despite their inherent danger, society's need for the products and a lack of reasonable alternatives justify their manufacture. A common example of an unavoidably unsafe product is a prescription drug with unique benefits but that also has unfavorable side effects. If the product is properly prepared and warnings are given, it is not deemed to be defective. Another theory is **strict liability for product misrepresentation**, which is the tort of making a public misrepresentation of a material fact concerning the character or quality of a product and a consumer's reliance on the misrepresentation that caused personal or physical damages.

Strict liability also may be imposed to support public policy. For example, from *small weight* (such as a shot of liquor), a **dram shop act** is a statute imposing strict liability on the seller of an intoxicating beverage where the sale results in harm.

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- **Cardozo test**
- **causal**
- **dangerous instrumentality**
- **discovered trespasser**
- **fragile**
- **foreseeable injury**
- **gratuitous undertaking**
- **imputed knowledge**
- **knowledge of the peril**
- **landowner's duty**
- **legal duty**
- **limiting physical conditions**
- **Lord Campbell Act**
- **objectively reasonable**
- **ordinary person standard**
- **prudent person**
- **pure accident**
- **substantial-cause test**
- **unavoidable cause**
- **undiscovered trespasser**
- **unforeseen circumstances**
- **willful negligence**

Chapter 35

Torts against Valuable Relationships

VALUABLE RELATIONSHIPS AND IMMORAL TORTFEASORS

Torts against reliance, reputation, and propriety are usually committed intentionally but may be the result of negligence. Like strict liability, the focus is on the conduct prohibited, but unlike strict liability, the tortfeasor must be shown to have been at fault, either by intent or negligence, and so the tortfeasor's mental state is still important.

Whereas an intentional tort can be committed as a result of an innocent mistake, negligence is by definition unintentional, and strict liability may be imposed despite the use of the utmost care, there is little to justify deceiving others, harming another person's deserved good reputation, unreasonably prying into private matters, or abusing the legal system. The torts of an immoral tortfeasor can be hard to prove, however, because he or she will claim the lie was the truth, continue to harm a good reputation, contend that private matters are not really private, and abuse the legal system again.

FRAUD, DECEIT, OR MISREPRESENTATION

As a general rule, it is not illegal to say something that is untrue because human beings can simply be mistaken. If we do not rely on the mistakes of others, they cannot cause us harm. But sometimes, as a practical matter, we must rely on what other people say. People who know that their words are being relied upon can deceive others.

A **misrepresentation**[1] is, generally, a false statement that tends to mislead or deceive. From *deception,* a **fraud**[1] is, generally, an intentional deception harming another or taking by deception. A **deceit**[1] is a deception designed to induce a specific harm. In the sense of deceit, **fraud**[2] is deception by intentional misrepresentation or concealment. To **defraud** is to deprive a person of property by deception.

In tort law, **fraud**[4], **deceit**[2], or **misrepresentation**[2] is the tort of causing harm to another by making a false statement that was reasonably relied upon. **Negligent misrepresentation** is the unintentional commission of the tort of fraud because a false statement was made without reasonable grounds for believing its truth or because negligence regarding the truth or falsity of the statement has risen to the level of recklessness. Analogous to the concept of conspiracy in criminal law, from *together strike,* **collusion** is two or more persons agreeing or combining to commit an unlawful act under civil law or to commit a lawful act by means that are unlawful under civil law.

In most states, a fraud victim is entitled to the **benefit of the bargain**, which is the difference between the value represented and the value received. In some states, a

fraud victim is entitled to the **out-of-pocket loss**, which is the difference between the value parted with and the value received.

DEFAMATION

From *repeatedly considered,* **reputation** is the esteem to which a person is held or regarded by others. From *before (ill) report,* **defamation**[1] is making a false statement about a person to others and causing harm to the person's reputation as a result. As general rule, subject to exceptions, defamation is not protected by the freedom of speech.

Defamation[2] is the tort of making a false statement about a person to others and causing harm to the person's reputation as a result, which may be libel or slander. The basic elements of defamation are (1) making a false statement (2) about the plaintiff (3) to others and, (4) if the harm to the plaintiff's reputation is not apparent, actual damages. If the plaintiff is a public official or public figure, the plaintiff also must prove that (5) the defendant's statement was made with actual malice. In civil law, **actual malice**[1] is a known or reckless disregard of the truth.

From *little book,* **libel**[2], a written defamation or a defamation put in writing or in other permanent form, is the tort of defamation committed by making a false statement about a person to others by putting the false statement in writing or in other permanent form and causing harm to the person's reputation as a result. From *scandal,* **slander**, a spoken defamation or a defamation made orally or in nonpermanent form, is the tort of defamation committed by making a false statement about a person to others by making the false statement orally or in other nonpermanent form and causing harm to the person's reputation as a result.

In order for libel or slander to be committed, the defendant must make a **defamatory statement**, with is a false statement of fact about the plaintiff made to others that tends to harm the plaintiff's reputation. A statement of fact is not merely an opinion or parody. Sometimes it is not clear how the defendant's statement is defamatory. For example, "John Doe is a butcher." In defamation law, from *in-lead,* the **inducement** is the extrinsic facts that indicate how a statement is defamatory. For example, John Doe is a chef at a fine restaurant. In defamation law, from *to nod,* **innuendo** is the plaintiff's explanation of how a statement is defamatory. For example, John Doe is a meticulous and sophisticated chef, and not a butcher. In most states, an illegal defamatory statement can only be made against a living person because the tort of defamation does not survive the death of the person allegedly defamed. Defamatory statements do not harm dead people. When people die, their reputation is left to the judgment of history.

In order for libel or slander to be committed, the plaintiff must prove that the defamatory statement was reasonably understood to be of and concerning the plaintiff. From *together speak,* **colloquium** is the extrinsic facts that indicate that a statement refers to a particular person.

In order for libel or slander to be committed, the plaintiff must prove that the defamatory statement was published. In defamation law, **published** means communicated by the defendant to someone other than the plaintiff. From *public-made,* **publication**[2] generally means communication to others. Multiple copies of a publication containing a defamatory statement do not create multiple publications of the defamatory statement. The **single publication rule** is the rule of case law that an entire edition of a book or periodical, or a radio or television network broadcast, is treated as a single publication.

Damages as a result of defamation do not have to be proved if the harm to the plaintiff's reputation is apparent. From *defamatory by itself,* **defamatory per se** or **defamation per se** is a false statement that is inherently defamatory or a false statement that is a serious charge of incapacity or misconduct in words so obvious that

proof of their injurious character can be dispensed with. From *libel by itself,* **libel per se** is a libel that is inherently defamatory. From *slander by itself,* **slander per se** is a slander that is inherently defamatory. Examples of slander per se include accusing someone of being a criminal, having a loathsome disease, or being incompetent in his or her profession.

From *by which,* **per quod** means by something else and not by itself. **Libel per quod** is a libel for which the defamation and damages must be proved or a libel that is not libel per se. **Slander per quod** is a slander for which the defamation and damages must be proved or a slander that is not slander per se.

A **private individual** is a person who does not hold a public office relevant to an alleged defamatory statement, a person who does not act or work in a public environment relevant to an alleged defamatory statement, or a person who is not involved in an event of public interest relevant to an alleged defamatory statement. A private individual does not have to prove that the defendant made the defamatory statement with actual malice.

A **public official** is a person who holds a public office relevant to an alleged defamatory statement. A **public figure** is a person who acts or works in a public environment relevant to an alleged defamatory statement or a person who is involved in an event of public interest relevant to an alleged defamatory statement. A public person has to prove that the defendant made the defamatory statement with actual malice.

New York Times v. Sullivan, 376 U.S. 254, was the 1964 U.S. Supreme Court case that held that a public official plaintiff has to prove that the defendant made the defamatory statement with actual malice.

Gertz v. Robert Welch, Inc., 418 U.S. 323, was the 1974 U.S. Supreme Court case that held that states are prohibited from imposing strict liability for a defamatory statement and held that punitive damages cannot be imposed without proof that the defendant made the defamatory statement with actual malice.

In defamation law, **truth** is a statement that is true and so not defamatory and the complete defense to the tort of defamation that the alleged defamatory statement is true. **Truth is a defense** is an expression of the concept that truth is a complete defense to the tort of defamation. Technically, the plaintiff has the burden of proving that the alleged defamatory statement is false and the defendant is not required to prove that it is true.

Another defense to the tort of defamation is having a privilege to make the alleged defamatory statement. An **absolute privilege** is a privilege that always applies. For example, there is an absolute privilege for statements made during a legal proceeding. A **qualified privilege** is a privilege that applies only if the defendant has not acted wantonly, willfully, or with actual malice. For example, **fair comment** is the qualified privilege to make a statement that may not be true because the statement was what the writer or speaker honestly and reasonably believed to be true.

From *back-draw,* a **retraction** is the incomplete defense to the tort of defamation that a full and formal withdrawal of the defamatory statement was made.

INVASION OF PRIVACY

Everyone has a **right to privacy** or, simply, **privacy**, which, from *apart,* is the right to be free from unreasonable governmental intrusion into personal matters, the right to be free from unreasonable publicity about personal matters, and the general right to be left alone. From *in-go,* **invasion of privacy**, an unreasonable interference with the right to privacy, is one of four torts for an unreasonable interference with the right to privacy, namely, appropriation, false light, intrusion, or disclosure.

From *to take,* **appropriation**[2] is unreasonable use of a person's name, likeness, or personality for the benefit of another or the tort of unreasonably using a person's name, likeness, or personality for the benefit of another without consent to do so. **False light** is unreasonably attributing to a person objectionable views that the person does not hold or the tort of unreasonably attributing to a person objectionable views that the person does not hold without consent to do so. From *in thrust,* **intrusion** is unreasonably peering, probing, or prying into the solitude or private concerns of another or the tort of unreasonably peering, probing, or prying into the solitude or private concerns of another without consent to do so. From *opposite of closure,* **disclosure**[1] is unreasonably revealing private facts about a person that are not matters of legitimate public concern and the tort of unreasonably revealing private facts about a person that are not matters of legitimate public concern without consent to do so.

Truth is not a defense to invasion of privacy. Every invasion of privacy is, by definition, an *unreasonable* interference with the right to privacy without consent to do so.

Federal and state statutes may require certain information to be kept private. For example, the **Health Insurance Portability and Accountability of Act of 1996 (HIPAA)** is a federal law that generally requires health care providers to maintain the privacy of each patient's medical information and medical records, except as consented to by the patient or as permitted by law.

MALICIOUS PROSECUTION AND ABUSE OF PROCESS

Sometimes people try to use the justice system for improper purposes such as revenge. Tort law prohibits using the justice system for improper purposes.

From *ill will,* **malicious prosecution** is the tort of having a criminal action instituted or continued against another without probable cause and the criminal action terminates in favor of the accused. From *away use,* **abuse of process** or **malicious use of process** is the tort of misusing criminal or civil procedures or processes solely for a purpose not intended by the law.

NUISANCE

From *annoyance,* **nuisance**, a bother to others or their property, is the tort theory for recovering damages and/or injunctive relief from the activities of others on their land that are an unreasonable and substantial interference with the use and enjoyment of your land. For example, if your neighbor plays loud music all night, you may be unable to use your land to enjoy sleep. From *nuisance by itself,* **nuisance per se** is a nuisance committed by violating a statute.

A **public nuisance** is an unreasonable and substantial interference with a right common to the general public. A **private nuisance** is an unreasonable and substantial interference with an individual landowner's use or enjoyment of his or her land.

From *to beat,* an **abatable nuisance** is a nuisance that can be reduced or removed. **Abatement of a nuisance** is the self-help privilege that permits a victim to notify a tortfeasor that a nuisance will be removed, to enter on the tortfeasor's land, and to use reasonable force to destroy or remove the nuisance.

INTERFERENCE WITH ECONOMIC RELATIONS

Injurious falsehood[1] is the general name of the tort of making a false statement that causes economic harm to another. **Trade libel**, **trade disparagement**, or **disparagement** is making a false statement about a business, product, or service of another that casts

doubt about the quality of the business, product, or service and the tort of making a false statement about a business, product, or service of another and causing harm to the business or reducing sales of the product or service. Similar to the tort of defamation, truth and privileged speech are defenses. From *away rank,* **disparagement of goods** is making a false statement about the quality of products offered for sale by another. **Slander of title** is making a false statement casting doubt about the property rights a person has in property and the tort of making a false statement casting doubt about the property rights a person has in property. **Injurious falsehood**[2] is, specifically, making a false statement that causes economic harm to another, but not trade libel, trade disparagement, disparagement, or slander of title.

Unfair competition is using illegal, deceitful, or deceptive methods or representations to gain a business advantage and the tort of using illegal, deceitful, or deceptive methods to gain a business advantage. Statutes often prohibit specific kinds of unfair competition. Interference with intellectual property is discussed in Chapter 30. **Interference with contract relations** or **interference with contract** is, generally, the tort of intentionally causing a person to breach his or her contract with the plaintiff. **Interference with prospective advantage** is the tort of intentionally causing a person to avoid a potential economic relationship with the plaintiff for a reason other than to obtain a similar relationship with the person for yourself. **Wrongful discharge** is the tort of discharging an at-will employee for a reason that violates public policy.

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- **immoral tortfeasor**
- **interference with business relations**

Part Seven

Civil Law: Procedure

Chapter 36

Civil Courts and Procedure, Generally

INTRODUCTION

If people cannot resolve their civil disputes out of court, the civil law is applied and contested in courts. There are two distinct systems of procedure: the federal system for federal law or as a more neutral place for major disputes between citizens of different states; and a state system for state law. From *treaty union fall (of circumstances),* a **federal case** is a case involving federal law or a case in a federal court. From *status fall (of circumstances),* a **state case** is a case involving state law or a case in a state court.

From *speak by the law,* **jurisdiction**[1] is power and authority, in particular, the power and authority of a court to hear and decide a particular kind of case or the power and authority of a governmental entity or government official to handle and decide a particular kind of case or legal matter. A **jurisdiction**[2] also refers to a particular legal system, federal, state, or a part thereof. Jurisdiction is discussed in detail in Chapter 37.

CIVIL COURT SYSTEMS, GENERALLY

From *residence,* a **court**[1] is a place where the law is formally decided and applied; that is, a legal meeting place. The civil law is applied and contested in civil courts.

The federal civil court system, like most state civil court systems, is a **three-level court system**, which means a court system with trial courts, intermediate appellate courts, and a final appellate court.

On the first/lowest level of a three-level court system, there are trial courts. A **trial court**[1] is a court that makes a determination of the facts in a case and makes the original application of the law. It generally has **original jurisdiction**, which is the power and authority to initially hear and decide a case in a court system. Because it generally has original jurisdiction, traditionally, a trial court is known, from *unless the first,* as a **nisi prius** court. Unless a court is the first to hear a case, it is not a nisi prius court.

However, some civil cases may initially be heard and decided by an administrative agency or a lower court of limited jurisdiction. As a result, in addition to being a court that makes a determination of the facts in a case, and makes the original application of the law, a civil **trial court**[3] also may be a court that reviews the conduct and decisions of an administrative agency or a lower court of limited jurisdiction. Thus, a trial court may have appellate jurisdiction. **Appellate jurisdiction** is the power and

authority to review a case initially heard and decided elsewhere in a court system, including the power and authority of a court to hear and decide an appeal.

On the second/middle and third/highest levels of a three-level court system, there are appellate courts. From *called upon,* an **appellate court**[1] or **court of appeals**[1] is a court that reviews the conduct and decisions of a trial court, a lower court, or an administrative agency and a court that decides whether the law was properly applied in a trial court, a lower court, or an administrative agency. An appellate court also may have some original jurisdiction.

An **intermediate appellate court** is an appellate court on the second or middle level of a three-level court system. An intermediate appellate court decides whether the law was properly applied in the trial court, but a higher court may review its decision.

A **final appellate court**, a **court of last resort**, or the **high court** is an appellate court on the third or highest level of a three-level court system, an appellate court on the second or highest level of a two-level court system, or, simply, a sovereign's highest appellate court. As a general rule, the decision of a final appellate court is final because there is no higher court to which the decision can be appealed. The exceptions are that a final appellate court can change its own decision and that the federal final appellate court, the U.S. Supreme Court, may review a decision by a state final appellate court involving a matter of federal constitutional law.

Some states (Delaware, Maine, Mississippi, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming) and the District of Columbia, having fewer cases to decide, have a **two-level court system**, which means a court system with trial courts and a final appellate court.

An **inferior court**, **lower court**, or **court below** is a court whose decision can be reviewed by another court. A **superior court**[1] or **higher court** is a court that can review the decision of another court.

A substantial period of a time, noted for administrative purposes, during which a court is open for business or for a certain kind of cases is known as a **term**[3] of the court. A **special term** is any term of court other than an ordinary term of court, or a term of court during which special cases are heard such as equity cases.

FEDERAL CIVIL COURTS

The federal trial court is the **United States District Court**, abbreviated **U.S. District Court**, or, simply, **District Court**[1]. For the purpose of maintaining federal trial courts, since 1912 the United States has been divided into districts. From *detain,* a **district** in the federal court system is the District of Columbia, a territory of the United States, one state, or one division of a state. About half of the states are one federal district, but larger or more populous states are divided into two, three, or four districts, grouping several counties within the state. District names include Central, Eastern, Middle, Northern, Southern, and Western.

There is one U.S. District Court in each federal district. A particular U.S. District Court is referred to by the district it is in (for example, the United States District Court for the Eastern District of Michigan). Each U.S. District Court may have separate locations at which court is held. Attached to each U.S. District Court is the **United States Bankruptcy Court** for that federal district, the court that hears and decides bankruptcy petitions and bankruptcy-related cases.

A **claims court** or **court of claims**[1] is, generally, a court that hears complaints for money owed by the government. The separate trial court for civil cases against the federal government is the **United States Court of Federal Claims** or **U.S. Court of Federal Claims**. The separate trial court for civil cases involving international trade is the **United States Court of International Trade** or **Court of International Trade**.

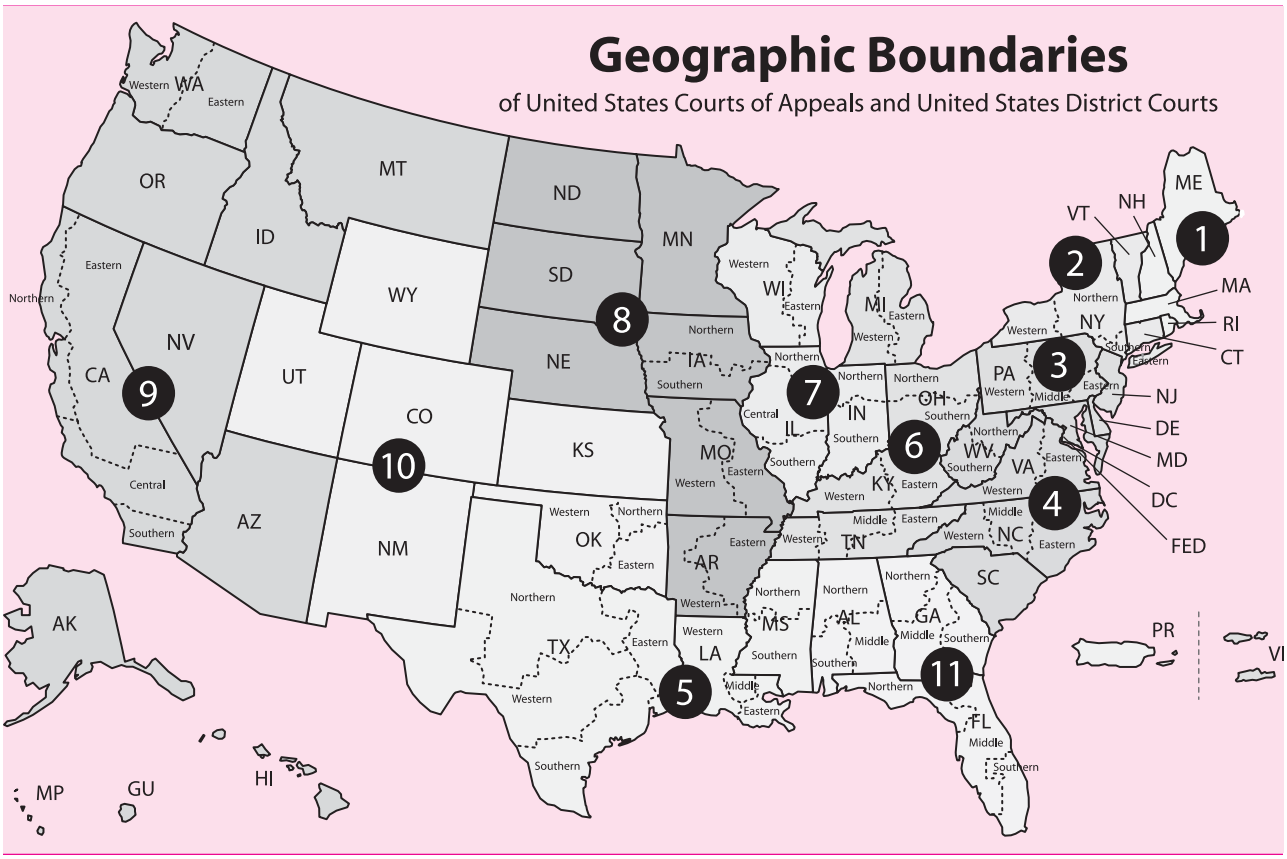

FIGURE 36.1

Geographic Boundaries of the U.S. Courts of Appeals and U.S. District Courts

Source: US courts, www.uscourts.gov/images/CircuitMap.pdf (accessed November 29, 2007).

The separate trial court for federal tax cases in which the taxpayer contests the amount of tax assessed and does not pay the amount of tax assessed but seeks a refund is the **United States Tax Court** or **Tax Court**[1].

The federal intermediate appellate court is the **United States Court of Appeals**, abbreviated **U.S. Court of Appeals**, or, simply, **Court of Appeals**[2] or **Circuit Court**[1].

For the purpose of maintaining federal intermediate appellate courts, the United States is currently divided into 13 circuits. From *around, to go,* a **circuit** in the federal court system is the District of Columbia, one of 11 designated regions of three or more states and territories, or the Federal Circuit. (See Figure 36.1.)

Along with the U.S. Court of Appeals for the District of Columbia, sometimes known as the **D.C. Circuit**, the federal circuit courts of appeals that hear civil and criminal appeals are as follows. The **First Circuit** is the U.S. Court of Appeals for Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. The **Second Circuit** is the U.S. Court of Appeals for Connecticut, New York, and Vermont. The **Third Circuit** is the U.S. Court of Appeals for Delaware, New Jersey, Pennsylvania, and Virgin Islands. The **Fourth Circuit** is the U.S. Court of Appeals for Maryland, North Carolina, South Carolina, Virginia, and West Virginia. The **Fifth Circuit** is the U.S. Court of Appeals for Louisiana, Mississippi, and Texas. The **Sixth Circuit** is the U.S. Court of Appeals for Kentucky, Michigan, Ohio, and Tennessee. The **Seventh Circuit** is the U.S. Court of Appeals for Illinois, Indiana, and Wisconsin. The **Eighth Circuit** is the U.S. Court of Appeals for Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. The **Ninth Circuit** is the U.S. Court of Appeals for Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada,

Northern Mariana Islands, Oregon, and Washington. The **Tenth Circuit** is the U.S. Court of Appeals for Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. The **Eleventh Circuit** is the U.S. Court of Appeals for Alabama, Florida, and Georgia. A particular federal court of appeals is referred to by its circuit (for example, the United States Court of Appeals for the Tenth Circuit). The thirteenth intermediate appellate court, the **United States Court of Appeals for the Federal Circuit**, also known as the **Federal Circuit**, is the special civil intermediate appellate court principally located in Washington, D.C., that hears appeals involving patents, trademarks, customs, and federal claims.

The special civil intermediate appellate court for appeals from the denial of a veteran's claim is the **United States Court of Appeals for Veterans Claims**.

From *highest,* the federal final appellate court, the highest federal court, and the highest court in the United States is the **United States Supreme Court**, abbreviated **U.S. Supreme Court**, or, simply, the **Supreme Court**[1], located in Washington, D.C.

STATE CIVIL TRIAL COURTS

In most states, the civil court system, like the federal court system, is a three-level court system. Because each state is a sovereign, however, they can and do have different names for their courts.

To understand state trial courts, it is useful to distinguish between two kinds of jurisdiction: general and limited. From *all,* **general jurisdiction**[1] is, generally, the power and authority of a court to hear and decide many different kinds of cases, including cases of great importance. From *bounded,* **limited jurisdiction**[1] is, generally, the power and authority of a court to hear and/or decide only a few different kinds of cases or cases of lesser importance. A **special court** is a state or federal court with limited jurisdiction.

A court of general jurisdiction is always a **court of record**, which is a court required to keep a complete written record of its proceedings or a court required to keep a complete written or audio record of its proceedings. An important court of limited jurisdiction is usually a court of record. Because there is a record to be made, a court of record employs court reporters and there is a record that can be referred to on appeal. Many states require all of their courts to be a court of record. A less important court may be a **court not of record**, which is a court not required to keep a written record of its proceedings or a court not required to keep a written or audio record of its proceedings.

State civil trial courts are often limited by their **monetary jurisdiction**, which is the power and authority of a court to hear and decide civil cases involving a minimum or maximum amount of money in controversy. For example, in Ohio and Pennsylvania, the county-based state trial court of general jurisdiction is the **court of common pleas**[1] or, loosely, the **common pleas court**. The court has the power and authority to hear and decide civil cases involving any amount of money. In many states, the city-based state trial court of limited jurisdiction is, from *of a city,* the **municipal court**. In some states, the county-based state trial court of limited jurisdiction is the **county court**. These courts usually have the power and authority to hear and decide only cases involving no more than the maximum amount of money in controversy (for example, $10,000 or less).

In 18 states, the state trial court of general jurisdiction is the **circuit court**[2] (Alabama, Arkansas, Florida, Hawaii, Illinois, Indiana [also has superior courts], Kentucky, Maryland, Michigan, Mississippi, Missouri, Oregon, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Wisconsin). In 15 states and the District of Columbia, the state trial court of general jurisdiction is the **district court**[2] (Colorado,

Idaho, Iowa, Kansas, Louisiana, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Texas, Utah, Vermont [also has superior courts], and Wyoming). In 14 states, the state trial court of general jurisdiction is the **superior court**[2] (Alaska, Arizona, California, Connecticut, Delaware, Georgia, Indiana [also has circuit courts], Maine, New Hampshire, New Jersey, North Carolina, Rhode Island, Vermont [also has district courts], and Washington). In Massachusetts, the state trial court of general jurisdiction is the **trial court**[2] or the **trial court of the commonwealth**. In New York, the state trial court of general jurisdiction is the **supreme court**[2]. A state trial court of general jurisdiction often has separate civil divisions. A **division**[2] is a department of a trial court for certain kinds of cases. Common divisions include a family or domestic relations division and a probate division.

Trial courts are often limited by the kinds of cases they have the power and authority to hear and decide. **Subject matter jurisdiction** is the power and authority to hear and decide cases involving a particular kind of law.

Civil cases may be matters of law or equity. In Arkansas, Mississippi, and Tennessee, the separate trial court for equity cases is the **chancery court**[2].

In New York, the separate trial court for civil cases involving the state and in Ohio, the separate trial court for civil cases against the state is the state **court of claims**[2].

Most states have a trial court or a division regarded as a small claims court. A **small claims court**[1] is, generally, a court with very limited monetary jurisdiction, limited subject matter jurisdiction, and simplified procedures, designed to allow the parties to bring and respond to a minor civil case without the help of an attorney. In small claims court, representation by an attorney is either not required or prohibited.

Besides municipal court and county court, there are many state courts of limited civil jurisdiction with many different names. In one or more states, a state court of limited civil jurisdiction may be the **administrative court**, **city court**[1], **civil court**, **court of common pleas**[2], **court of tax review**, **district court**[3], **environmental court**, **family court**[2], **general sessions court**[1], **justice court**[1], **justice of the peace court**[1], **juvenile court**[3], **magistrate court**[1], **metropolitan court**[1], **orphan's court**[2], **parish court**[1], **probate court**[2], **police court**[1], **small claims court**[2], **state court**[1], **surrogates' court**[2], **tax court**[2], **village justice court**[1], **water court**, or **workers' compensation court**.

In most states, there is a separate court or division of a court devoted to cases of juvenile delinquency, custody of orphans, child abuse, and child neglect usually known as **juvenile court**[1].

STATE INTERMEDIATE APPELLATE COURTS FOR CIVIL APPEALS

Because some states (Delaware, Maine, Mississippi, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming) and the District of Columbia have a two-level court system, they do not have an intermediate appellate court.

Two states have intermediate appellate courts as special extensions of their trial courts. In New Jersey, the state intermediate appellate court is the **Appellate Division of Superior Court**. In New York, the state intermediate appellate court is the **Appellate Division of the Supreme Court.** In New York, the extra state intermediate appellate court is the **Appellate Term of the Supreme Court**.

Two states have an intermediate appellate court just for civil appeals. In Alabama, the state intermediate appellate court just for civil appeals is the **Court of Civil Appeals**. In Tennessee, the state intermediate appellate court just for civil appeals is the **Court of Appeals**[5].

In 28 states, the state intermediate appellate court for all appeals is the **court of appeals**[3]: Alaska, Arizona, Arkansas, California, Colorado, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Texas, Utah, Virginia, Washington, and Wisconsin. In Connecticut and Illinois, the state intermediate appellate court is the **Appellate Court**[2]. In Massachusetts, the state intermediate appellate court is the **Appeals Court**. In Maryland, the state intermediate appellate court is the **Court of Special Appeals**. In Florida, the state intermediate appellate court is the **District Court of Appeal**. In Hawaii, the state intermediate appellate court is the **Intermediate Court of Appeals**. In Pennsylvania, the state intermediate appellate court for civil appeals not involving the state is the **Superior Court**[3] and the state intermediate appellate court for civil appeals involving the state is the **Commonwealth Court**.

In Oregon, the separate intermediate appellate court for state tax cases is the **Tax Court**[3].

STATE FINAL APPELLATE COURTS FOR CIVIL APPEALS

Two states have a final appellate court just for civil appeals. In Oklahoma and Texas, the state final appellate court just for civil appeals is the **supreme court**[3].

In 44 states, the state final appellate court for all appeals is the **supreme court**[4] (Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.) In the District of Columbia, Maryland, and New York, the district or state final appellate court is the **court of appeals**[4]. In Maine and Massachusetts, the state final appellate court is the **supreme judicial court**.

COURT BASICS

From *fall (of circumstances),* a **case** is a legal controversy, especially a legal controversy that may be, has been, or could have been brought to a court. From *forward going,* a **proceeding** is a process by which judicial business is conducted.

The great power of a court is its ability to make law in the process of deciding an actual case. When a court commands something in the process of deciding an actual case, it is the law of the case, unless the court changes its mind or a higher court commands otherwise. Accordingly, an **order**[2] is the command of a court, especially a specific, particular, and/or individualized command of a court. (A court order that never changes becomes a precedent. Its value as "good" or "bad" law is discussed in Chapter 56.)

The phrase **court order** is the phrase used to emphasize that an order is the command of a court and not a military order or some other kind of order. A **writ** is a common-law formal written court order requiring performance or nonperformance of a specified act or an application for a common-law formal written court order requiring performance or nonperformance of a specified act. As discussed in Chapter 37, there were many different common-law writs and some are still used today. A court may make an order that makes something void—legally nothing. To **quash** is to make void, when done by a court.

From *complaining,* the **plaintiff** is the person (individual or entity) who brings a case to a trial court. From *ward off,* the **defendant**[1] is, generally, the person (individual or entity) against whom a case is brought or the person (individual or entity) who responds to a case brought to a trial court. From *part,* a **party** to a case is a plaintiff or a defendant in a criminal case or a plaintiff, a defendant, or an intervenor in a civil case. All of the plaintiffs and defendants in a criminal case or all of the plaintiffs, defendants, and intervenors in a civil case are the **parties** to a case. A party on the other side of the case or a party on another side of the case is an **opponent** or an **adverse party**.

An attorney may represent a party. The **attorney of record** is the current attorney, admitted to the bar of the court or local state, representing a party. From *for this turn,* **pro hac vice** is when a court permits an attorney not admitted to the bar of the court or local state to assist the attorney of record in representing a party.

Cases are brought to court in order to obtain an order of the court that resolves the case. The order of a court that resolves a case, and, especially, the order of a court that resolves a case and is recorded in the court's record of the case, is, from *law say,* the court's **judgment**[1], according to the court's legal conclusion about a legal controversy. Notice that the legal word "judgment" is spelled without an "e" after the "g." In American law, it's "judgment." From the Old French word *jugement,* "judgement" is a gradually disappearing alternative spelling for a nonlegal conclusion.

A party obtains a court order by making a motion for a court order and having the court agree. From *proposal,* a **motion**[2] is a request for a court order or an application for a court order. A motion is "made." To **move** is to make a motion and a **movant** or **moving party** is the party who makes a motion. As a general rule, a motion may be made orally in court to the judge or in writing delivered to the court and filed by the relevant court clerk or judge. The **nonmoving party** is the party who did not make the motion.

If not decided in the normal course of the legal proceeding, a motion may be decided after a formal hearing. A **hearing** is a legal proceeding at which evidence is presented to determine a fact and a separate legal proceeding on an issue that must be resolved before, during, or after the primary hearing, trial, or other legal proceeding.

A court's decision on a motion, a court's decision on an issue, or a court's decision on a matter of procedure is its **ruling**[1], **rule**[2], or how it **ruled**. When a court agrees with a motion and makes it a court order, the motion is **granted** or **sustained**[1]. When a court disagrees with a motion and does not make it a court order, the motion is **denied** or **overruled**[1].

As a general rule, adverse parties are entitled to notice of a motion. From *out of part,* **ex parte** or **ex parte application** means from or for one party. An **ex parte motion** is a motion that can be or is made, granted, or denied without notice to adverse parties. A **praecipe** is a written request for a court order, especially for action by the court clerk, which becomes a written court order, especially for action by the court clerk.

A court may make an order without a motion from a party. From *of itself,* **sua sponte** means on the court's own motion or ruling.

In most cases, a court makes many orders in a case before it makes its judgment. If there is a trial, for example, the court may order someone to appear as a witness. An order is *the law* for that case. There is always an implied court order to be respectful of the court. **Contempt of court**, or simply **contempt**, is failure to obey a court order, especially an act or omission tending to obstruct the orderly administration of justice or an act or omission tending to harm the authority and dignity of the court. **Held in contempt** or **hold in contempt** means accused of having failed to obey a court order or considered as having failed to obey a court order. **Direct contempt** is failure to obey a court order in the presence of the court. **Indirect contempt** is failure to obey a court order outside of the court. **Criminal contempt** is obstructing the orderly

administration of justice. **Civil contempt** is failure to do something ordered for the benefit of another. The court may order a person punished for contempt of court such as by paying a fine or by serving time in jail. A person held in contempt may serve time in jail until he or she agrees to comply with the court order or until he or she has been appropriately punished.

Many of the orders a court must make are routine. As a result, it makes sense for a court to make one order governing many routines applicable to all cases. A **court rule** is a rule of procedure ordered by a court. **Court rules** or **rules of court** are a set of rules of procedure ordered by a court. The procedural rules and unwritten customs that a court follows are known as the **practice of a court** or a court's **practice**[2].

The U.S. Supreme Court has inherent power to make uniform court rules for all lower federal courts. State final appellate courts have inherent power to make uniform court rules for all of that state's lower courts. Lower courts may make local court rules that do not conflict with the court rules ordered by a higher court.

Rules of civil procedure are the rules of procedure applicable in a civil case. The **Federal Rules of Civil Procedure**, abbreviated **Fed. R. Civ. P.**, are the rules of procedure applicable to a civil case in a U.S. district court. Each state has similar rules of civil procedure, many intentionally patterned after the federal rules.

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- **Circuit Court**[3]
- **Court of Claims**[3]
- **dispositive motion**
- **Field Code**
- **local rules**
- **state and federal rules of civil procedure**
- **state supreme court**
- **territorial court**
- **United States Circuit Court**
- **United States Claims Court**
- **United States Court of Customs and Patent Appeals**
- **United States Customs Court**

Chapter 37

Filing a Lawsuit

FILING A LAWSUIT, GENERALLY

The word "action" originally comes from the Latin word **actio**, which has the law-related meaning of a right or cause. In law, an **action**[1] is, generally, when a person has a right or cause involving the law upon which a court can act. An **action**[2] is, specifically, a recognized right or cause involving the law upon which a court can act; a request for a legal solution by a court; and a group of elements entitling a plaintiff to legal relief, if admitted or proven, and if there is no legal defense.

What is sought by an action is, from *intensive heal,* a **remedy** or, from *again straighten,* **redress**, a means of relief from a legal wrong or unfavorable legal circumstances. It is a legal solution that attempts to relieve the harm caused by a violation of the law, including a court doing something about a violation of the law or a court making someone else do something about a violation of the law.

A **civil action** or **actio civilis** is a recognized right or cause involving civil law upon which a court can act and a request for legal action by a court under civil law. A **right of action**[2] generally, a **cause of action**[1], or a **cause**[2] is a recognized right or cause for action in the legal sense. A **cause of action**[3] or a **cause**[3] is sufficient facts to give rise to a right of action. **Actionable**[1] means that there is a recognized cause of action (for what is referred to).

An **action at common law** is an action recognized at common law. A **legal action** or **action at law** is an action like those brought to the law courts of common-law England. An **equity action**, an **action in equity**, or a **bill**[3] is an action like those brought to the equity courts of common-law England.

From *at a court,* a **suit** or **lawsuit** is all the documents necessary to bring a formal civil cause of action in court, a civil case or cause of action in court, and the process of proving or disproving a civil case or cause of action in court. ("Suit" in the sense of a set of dress clothes has its origin in the uniform worn by court officers.)

To **sue** or to **bring suit** means to file a lawsuit. From *carry on a lawsuit,* to **litigate** means to carry on a lawsuit. Thus, **litigation** is the beginning or maintaining of a lawsuit or responding to or continuing to respond to a lawsuit and carrying on a civil case in court. A **litigant**, a **party to a lawsuit**, or a **party to a suit** is a plaintiff or defendant in a lawsuit and a person who is carrying on a civil case in court. **Litigious** means having a propensity for litigation or frequently in litigation.

From *complaining,* the **plaintiff** is the person (individual or entity) who brings a case to a trial court. From *ward off,* the **defendant**[1] is, generally, the person (individual or entity) who responds to a case brought to a trial court by another. In a civil case, from *between come,* an **intervenor**[2] is a person permitted to enter a case in progress. **Intervention**[1] is a proceeding in which a person is permitted to enter a case in progress.

From *sides,* the **parties** are all of the plaintiffs and defendants in a criminal case or all of the plaintiffs, defendants, and intervenors in a civil case. From *side,* a **party** is a plaintiff or defendant in a criminal case or a plaintiff, a defendant, or an intervenor in a civil case. In general, a case may be brought by one person for the benefit of another. From *in name only,* a **nominal party** is the person who as a technical matter brought a case for the benefit of another. The **real party in interest** is the person for whom the case was brought and whose legal rights will be affected by the decision. For example, sometimes a case is formally brought on the authority of the government, but actually brought on the information or instigation of another. From *upon relation* or *upon report,* **ex relatione**, almost always abbreviated **ex rel.**, means brought by the government on the information or instigation of another. For example, "United States ex rel. John Doe versus Richard Roe." The **relator** is the real party in interest in a case brought by the government. On the other hand, from *who as well,* a **qui tam** is an action under a statute that permits the plaintiff to sue for the government as well as for the plaintiff and for which the plaintiff is entitled to part of the damages or penalty, if any, recovered.

Fees charged by a court clerk for the services of the court and the court clerk are known as **court fees**. To file a lawsuit, a plaintiff who is not indigent must pay a **filing fee**, which is a fee charged by a court clerk to open a record for a new case and a down payment toward the routine costs of the case.

THE FORMAL STATEMENT OF THE CAUSE OF ACTION

The modern formal document setting forth a cause for legal relief is a civil **complaint**[1], which is, from *find fault,* the modern pleading setting forth a cause for legal relief and the first pleading filed by the plaintiff with the court, setting out the cause or causes of action against the defendant. It answers the court's first question: "What do you want?" A person filing a civil complaint is sometimes known as the **complainant**[1].

A civil complaint contains many things. From *head,* the **caption** is the header information on a complaint or other pleading, including the title of the case, the court, and the type of document. An allusion to the number of causes of action set out, a **count**[1] is a separate or distinct cause of action set out in a complaint. From *narrative,* a **narratio** is a narration of the basic facts upon which the action is brought.

In secular law, to **pray** is, from *to ask earnestly,* to request legal relief. A **prayer for relief** or **prayer** is the request in a complaint or a petition for legal relief. From *to the damage,* the **ad damnum** is the amount of legal damages sought. The **ad damnum clause** is the clause in the complaint in which the complainant states the amount of legal damages sought.

Although not required in most cases, in special cases such as a lawsuit against a corporation by a stockholder, a complaint may have to be a **verified complaint**, which is a complaint in which the statements of fact have been sworn to under oath.

Traditionally, a **complaint**[2] was the first pleading in a case at law, as distinguished from an equity case. As an equity declaration, a **bill**[4] or a **petition**[1] was the first pleading in an equity case, equivalent to a complaint in a case at law. A **bill quia timet** is a bill to prevent possible future injuries, including a bill to perpetuate testimony. A **creditor's bill** is an equity action by a judgment creditor to discover, make an account of, and obtain property owed by the judgment debtor.

From *requester,* a **petitioner**[1] is a person or party who makes a petition. A **response** is a written answer to a bill or petition. A **respondent**[1] is a person or party who responds to a petition or a person or party responding to a petition. A **corespondent** or **co-respondent** is another respondent to a petition and, in an action for divorce on the ground of adultery, the person with whom the spouse allegedly committed adultery.

From *on fold* (to join), an **application** or a **petition**[2] is, today, a request for legal relief not expected to be opposed. An **applicant** or **petitioner**[2] is a person who requests legal relief and does not expect to be opposed. From *in the matter of,* **in re**, or **in the matter of**, is the phrase used in the title of a case to indicate a request for legal relief concerning one person or entity that is not expected to be opposed.

From *law say,* a **judgment**[2] is the conclusion, resolution, and final court order of a court of law on a matter of law, a court's recorded resolution of a matter of law, the court's record of the resolution of a matter of law, or a decree. From *to decide,* a **decree**[2] is the conclusion, resolution, and final court order of a court of equity on a matter of equity, a court's recorded resolution of a matter of equity, or the court's record of the resolution of a matter of equity. From *back-get,* a **recovery** is the right to relief established by a judgment or decree or the amount of money or other property collected pursuant to a judgment or decree.

EQUITABLE ACTIONS

Equity jurisdiction is the power and authority of a court to hear and decide matters decided by an equity court in common-law England and the power and authority of a court to hear and decide cases where there is no adequate remedy at law. **Preventive jurisdiction** is the power and authority of an equity court to provide a remedy to avert a future wrong.

The nature of an equity court is to be a **court of conscience**. The **conscience of the court** is, from *intensely know,* the ability of a court to resolve a dispute by applying traditional notions of fairness and justice. From *axiom* (greatest premise), a **maxim** is the expression of a traditional notion of fairness and justice. For example, "first in time, first in right" is a maxim similar to the notion of first come, first served. In Latin, **vigilantibus non dormientibus aequitas subvenit** means aid the vigilant, not those who sleep, or equity aids the vigilant, not those who sleep on their rights. One of the most important equity maxims, originally stated as "he that commiteth iniquity shall not have equity," is the **clean hands doctrine** that those who seek equity must do equity. It means an equity court will not aid people who are as unfair and unjust as those against whom they complain. **Unclean hands** or the **doctrine of unclean hands** means a person who has engaged in unconscionable conduct, for whom a court of conscience will not grant relief.

WRITS

From *beyond ordinary,* an **extraordinary remedy** is a remedy not usually available in law or equity such as, today, a writ. A **writ** is a common-law formal written court order requiring performance or nonperformance of a specified act or an application for a common-law formal written court order requiring performance or nonperformance of a specified act. A writ was special because it was unusual for a court to take the time to put an order in writing, thereby making the order undeniable to the person receiving it.

There were many different writs at common law. Some writs are still used today. Writs for the collection and satisfaction of judgments are discussed in Chapter 44.

An **extraordinary writ** is a special writ that can be sought originally from an appellate court and, at common law, a writ sought from the king.

From *you have the body* or *bring the body* the **writ of habeas corpus** or **habeas corpus** is a writ to bring a person being confined before the court for an inquiry into the legality of the person's confinement and the extraordinary writ that can be used to determine the legality of any confinement, custody, or detention, civil or criminal.

From *we command,* the **writ of mandamus** or **mandamus** is a writ compelling a public official to perform a ministerial act and the extraordinary writ that can be used to force a public official to perform a duty. From *of a servant,* a **ministerial act** is an act to be performed in a prescribed manner and an act that does not involve discretion or judgment.

From *away-hold,* the **writ of prohibition** or **prohibition**[2] is a writ to prevent a lower court or tribunal from exceeding its jurisdiction and the extraordinary writ that can be used to determine the jurisdiction of a lower court or tribunal.

From *forward going,* the **writ of procedendo** or **procedendo** is a writ to require a lower court or tribunal to exercise its jurisdiction and continue to judgment and the extraordinary writ that can be used to get a lower court or tribunal to exercise its jurisdiction and continue to judgment.

From *by what authority,* the **writ of quo warranto** or **quo warranto** is a writ that a person or entity does not have the legal right to hold a particular public office, a writ that an entity does not have the legal right to exist, the extraordinary writ that can be used to determine if a person has the legal right to hold a particular public office, or the extraordinary writ that can be used to determine if an entity has the legal right to exist. Quo warranto may be used to determine whether a person was properly appointed or elected to a public office or whether a corporation is recognized by a state.

NOTICE OF A CIVIL CASE, GENERALLY

From *made known,* **notice**[1] is, generally, communicated or recognized information about a fact or law. Notice of a lawsuit is ordinarily accomplished by **actual notice**, direct positive notice, such as by delivering a summons and a copy of the related complaint to those sued. **Personal notice** is notice directly to the person involved.

Generally permitted only when actual notice or personal notice is not possible, **constructive notice** is not actual notice, but notice accepted in the law as a substitute such as posting and notice by publication. From *fasten to an upright timber,* to **post**[1] is to place a notice in a conspicuous place. **Posting** is placing a notice in a conspicuous place on the property involved. **Notice by publication** is publishing a notice in the local newspaper or other approved media for the required amount of time. Publication may be used when a defendant absconds. From *away together-put,* to **abscond** is to clandestinely leave a jurisdiction or to hide to avoid a legal notice or a legal process, especially to clandestinely travel out of a jurisdiction to avoid creditors or criminal prosecution.

SERVICE IN A CIVIL CASE

From *to call* or *under warning,* a **summons**[1] is, in civil law, a written court notice commanding a person to answer a complaint or make a motion, a writ commanding a person to answer a complaint or make a motion, or a writ commanding a person to appear in court as a juror or witness. An **alias summons**[1] is, in civil law, a second writ, perhaps using an alias, commanding a person to answer a complaint or make a motion, or a second writ, perhaps using an alias, commanding a person to appear in court as a juror or witness. From *many times,* a **pluries summons** is the third or subsequent summons made because the first and alias summons have been ineffective. A **Doe defendant** is a defendant whose actual name is not known to the plaintiff and so given a fictitious name like John Doe or Jane Doe in a complaint or summons.

In civil procedure, to **serve**[1] is to formally give a court-related document to a person or to give notice of a court-related document by a permitted alternate means such as by delivery to a person's residence, by registered mail, or by publication.

In civil procedure, a summons is served on the defendant by a law enforcement officer, a court officer, or an ordinary citizen. A **return**[2] is a report of the attempt to serve a court-related document. The return should not be a **false return**, which is a false report that a court-related document was actually served. The Latin word **nihil**, with the abbreviation **nil**, means nothing or a return that a court-related document was not served or could not be served. A **certificate of service** is a signed statement indicating that a copy of a court-related document has been given, mailed, or published to other parties in the case or their attorneys. An **affidavit of service** is a sworn statement indicating that a copy of a court-related document has been given, mailed, or published to other parties in the case or their attorneys.

A **process**[2] is, generally, a formal writing issued by a legal authority. With regard to a summons, a **process**[1] is a summons or a summons and the related complaint; serving a summons or a summons and the related complaint; or the process of serving a summons or a summons and the related complaint. A **process server** is a person who serves a process, a summons, or a summons and the related complaint. In civil procedure, **service of process**[1] or **service**[2] is serving a process, notifying a person that he or she has been sued and that he or she is commanded to answer a complaint or make a motion, or notifying a person that he or she is commanded to appear in court as a juror or witness.

Personal service is actually giving a court-related document to a person. **Service by mail** is giving notice of a court-related document to a person by sending it through the postal service. **Constructive service** is not personal service, but service accepted in the law as a substitute. **Service by publication** is giving notice of a court-related document to a person by publishing it in a local newspaper or other approved media for the required amount of time. **Substituted service** is giving notice of a court-related document to a person by service to a recognized representative of the person.

In civil law, if a defendant has been summoned but does not appear in the case by answering the complaint or making a motion, a default judgment may be entered against the defendant. Default judgments are discussed in Chapter 44.

JURISDICTION AND VENUE, GENERALLY

A lawsuit must be brought to an appropriate court. The appropriate court depends on the location of the plaintiff or plaintiffs, the location of the defendant or defendants, and/or the location of whatever occurred that gave rise to the case. From *back-sit,* a **residence** is a place where a person lives on a reasonably permanent basis. From *house dwell,* a **domicile** is, in part, the place to which, when a person is away, the person intends to return. A person can have many residences but only one domicile. A vague related term is **home**, which is, from *house,* a person's domicile, a person's residence, or a house or other building in which a person primarily lives when not working.

From *speak by the law,* **jurisdiction**[1] is power and authority, in particular, the power and authority of a court to hear and decide a particular kind of case. From *earth around a place,* **territorial jurisdiction** or **jurisdiction**[3] is the geographical extent of the power and authority of a court, governmental entity, or government official.

From *all,* **general jurisdiction**[1] is, generally, the power and authority of a court to hear and decide many different kinds of cases, including cases of great importance. From *bounded,* **limited jurisdiction**[1] is, generally, the power and authority of a court to hear and/or decide only a few different kinds of cases or cases of lesser importance.

In civil law, **general jurisdiction**[2] is, usually, the power and authority of a court to hear and decide civil cases of law or equity regardless of the amount of money, if any, in controversy. In civil law, **limited jurisdiction**[2] is, usually, the power and authority of a court to hear and decide only specific kinds of cases, only cases of

law or only cases of equity, or only cases with a limited amount of money, if any, in controversy.

Subject matter jurisdiction or **jurisdiction of the subject matter** is the power and authority of a court to hear and decide cases involving a particular kind of law. A party cannot consent to subject matter jurisdiction. If a court does not have subject matter jurisdiction over a particular kind of case, the court cannot decide the case.

Monetary jurisdiction is the power and authority of a court to hear and decide cases involving a minimum or maximum amount in controversy. The **amount in controversy** or **jurisdiction amount** is the amount of money or damages the plaintiff reasonably claims to be in dispute, used to determine if a court has monetary jurisdiction.

In Latin, the phrase **in personam** means against the person. **Personal jurisdiction**, **jurisdiction of the person**, **in personam jurisdiction**, **personam jurisdiction**, or **jurisdiction in personam** is the power and authority of a court to hear and decide a case involving a particular person. Generally, to have personal jurisdiction over a person who resides in another jurisdiction, the person must have had minimum contacts with the territorial jurisdiction of the court. **Minimum contacts** are enough contacts by a defendant such that the maintenance of a suit against the defendant does not offend traditional notions of fair play and substantial justice or some act by which the defendant purposely avails itself of the privilege of conducting activities with a state, thus invoking the benefits and protections of its laws. **Long-arm statutes** are state statutes that allow a court, to the maximum extent of minimum contracts, to obtain jurisdiction over a nonresident defendant for a local cause of action affecting local plaintiffs.

Unlike subject matter jurisdiction, a party can consent to personal jurisdiction. If a court does not have personal jurisdiction over a party, but does have subject matter jurisdiction over the kind of case, the court can decide the case if the party consents.

An **action in personam**, an **actio in personam**, or an **in personam action** is an action against a defendant's general assets where the court has personal jurisdiction over the defendant.

In Latin, the phrase **in rem** means against the thing. **In rem jurisdiction** or **jurisdiction in rem** is the power and authority of a court to hear and decide a case involving particular property. An **in rem action**, an **action in rem**, an **actio in rem**, or a **local action** is an action against all persons who have or may have an interest in particular property, but not an action against any particular person. Examples of actions in rem include actions for partition, for foreclosure, or to quiet title.

In Latin, the phrase **quasi in rem** means as if against the thing. **Quasi in rem jurisdiction** or **jurisdiction quasi in rem** is jurisdiction of an action for money damages based on a seizure of property where the court does not have personal jurisdiction over the defendant but does have jurisdiction over the property or over a person indebted to the defendant. A **quasi in rem action** or an **action quasi in rem** is an action for money damages based on a seizure of property or jurisdiction over a person indebted to the defendant. From *thing,* the **res**[2] is the subject matter of an action quasi in rem. An action quasi in rem is ordinarily based on an attachment or a garnishment.

Unlike an in rem action or quasi in rem action concerning land, a **transitory action** is an action not concerning land.

From *complete,* **plenary jurisdiction** is complete jurisdiction over the plaintiffs, the defendants, and the subject matter of the case. From *around attend to,* **ancillary** means secondary, supplemental, or in aid of what is primary. Once a court has jurisdiction, it may exercise **ancillary jurisdiction**, loosely, implied jurisdiction, which is jurisdiction over matters related to matters over which the court has jurisdiction such as when the court requires a defendant to make any claims defendant has against a plaintiff.

More than one court or court location may have jurisdiction. From *to come,* **venue** is the place among the courts with jurisdiction where a case should or will be heard and decided, especially the place where a trial is or was held. From *public place,* a **forum** is a meeting place, a court, a particular jurisdiction, or the place in which the litigation occurs. Venue is generally proper in the forum that is most convenient for the majority of the parties and witnesses. From *an inconvenient court,* **forum non conveniens** is the doctrine that a court has discretion to decline to exercise its jurisdiction where there is no reason for the case to be brought or heard there or doing so will create a hardship on the defendants or the witnesses. If venue is more appropriate in another court, a court may order a change of venue.

FEDERAL JURISDICTION AND CONCURRENT JURISDICTION

From *out closed,* **exclusive jurisdiction** is the unique power and authority of a court to hear and decide a particular kind of case and when only one court, governmental entity, or government official has jurisdiction. From *together running,* **concurrent jurisdiction** is when two or more courts have the power and authority to hear and decide a particular kind of case and when two separate courts, governmental entities, or government officials both have jurisdiction.

Federal question jurisdiction is the power and authority of a federal court to hear and decide cases involving the federal law, including all civil actions arising under the Constitution, laws, and treaties of the United States. From *hanging,* **pendent jurisdiction** is the power and authority of a federal court with federal question jurisdiction to hear and decide related state law claims at the same time.

From *varied,* **diversity of citizenship** is when the plaintiffs and the defendants are citizens of different states or territories or, stated negatively, when no plaintiff is a citizen of the same state or territory as a defendant. **Diversity jurisdiction** is the power and authority of a federal court to hear and decide cases between citizens of different states or territories where there is a substantial amount in controversy. As of 2007, the amount in controversy required for diversity jurisdiction is $75,000. (See 28 U.S.C. § 1332.) In theory, diversity jurisdiction prevents the plaintiff from having a state "home court advantage" against a citizen of another state.

From *away move,* **removal** is a federal court with jurisdiction taking over jurisdiction of a case originally filed in a state court. From *send back* or *return,* **remand**[1] means having returned a case to state court that was improperly or untimely removed to federal court.

A **foreign jurisdiction** is a jurisdiction in another state or country or a court or governmental entity in another state or country. **Comity** is, from *friendly,* the judicial courtesy of deference and respect to the laws and judgments of other jurisdictions, although not obligated to do so. For example, a court may honor a civil judgment or decree of a foreign country although not obligated to do so. In criminal law, as a general rule, a federal court will not interfere with a pending criminal prosecution in state court.

From *away hold,* to **abstain** is to decline to exercise an authority, capability, power, or right. In the sense of avoiding premature adjudication, **abstention**[1] is the policy of the federal courts to decline to exercise federal jurisdiction and defer to state court a determination related to federal constitutional law. A proper determination by the state court may make a federal case unnecessary. In the sense of avoiding state-appropriate cases, **abstention**[2] or, from *back-leave,* **relinquishment** is the policy of the federal courts to decline to exercise federal jurisdiction where a determination is more appropriately made by a state court. Abstention is appropriate

where determination of a matter of state law may make determination of a matter of federal law unnecessary.

CONFLICT OF LAWS

From *together strike,* a **conflict of laws** is a situation in which a court must determine which of two different state laws applies in a particular case. Traditionally, a court considered matters such as, in Latin, **lex loci contractus**, the place of the contract and the law of the place of the contract, or, in Latin, **lex loci delicti**, the place of the wrong and the law of the place of the wrong. Modern courts also consider which jurisdiction has the most significant relationship to the case.

As a general rule, state courts apply their own state's procedural law. Federal district courts apply the principles of the state in which they sit. When hearing a matter of state law under diversity jurisdiction, the federal district courts usually apply the state's substantive law. Because of the general uncertainty about how conflict-of-law disputes will be resolved, it is now common for contracts and other instruments to include a **choice of law clause**, which is a clause indicating what state law will apply in the event of a dispute.

IMMEDIATE TEMPORARY RELIEF OR IMMEDIATE RELIEF

From *interrupting,* **interlocutory** means provisional, temporary, and not final. An **interlocutory order** is a court order determining an intermediate issue in a case but not finally resolving the case. As a general rule, an interlocutory order is not appealable until the entire case has been disposed of. However, an interlocutory order that substantially disposes of a case may be treated as a final order and be appealable. Some interlocutory orders involve giving immediate temporary relief to a plaintiff pending the hearing and deciding of the entire case. These interlocutory orders include an order to show cause, an interlocutory decree, a temporary restraining order, and a preliminary injunction.

At common law, when an ex parte plaintiff presented a strong case—such as by presenting a verified complaint, by presenting strong evidence in affidavits, or by presenting strong evidence at an ex parte hearing—suggesting that the plaintiff had a clear right to relief and/or that the defendant did not have defense, the court could issue to the defendant a rule nisi or an order to show cause. From *rule unless,* a **rule nisi** or an **order to show cause** is a court order to argue and/or present evidence why some immediate legal relief, requested by the opposing party and/or contemplated by the court, should not be ordered. The relief will be ordered *unless* the party against whom it is requested or contemplated can successfully argue and/or present evidence why not.

An **interlocutory decree** is a provisional decree or a temporary decree. Common at common law, a **decree nisi** or **judgment nisi** is, in part, a provisional decree or judgment, leaving a period of time during which a party has the opportunity to show cause why the decree or judgment should not become final.

Sometimes it is necessary to impose a continuous or immediate punishment on a wrongdoer, especially when an irreparable harm or an irreparable injury is threatened. From *not repairable,* an **irreparable harm** or an **irreparable injury** is a harm or an injury for which there is no sufficient remedy at law, especially because it is a harm or an injury for which damages are not a sufficient remedy, usually because it is a harm or an injury that if done cannot be undone or repaired.

The legal solution from equity is to issue an injunction. From *impose,* an **injunction** is a stop command, a command requiring a person to stop doing something contrary

to equity, or a must-do command, a command requiring a person to do something the person is obligated to do by equity. From two French words each meaning *stop,* a **cease and desist order** is an injunction prohibiting a person or entity from undertaking or continuing a particular activity or course of conduct.

From *impose,* to **enjoin** is to command in equity, especially to issue a permanent injunction, a preliminary injunction, or a temporary restraining order. **Injunctive relief** is relief in the form of a permanent injunction, a preliminary injunction, or a temporary restraining order.

A **permanent injunction** or **final injunction** is an injunction issued as a part of the court's final judgment or final decree. A **preliminary injunction**, a **temporary injunction**, or an **interlocutory injunction** is an injunction issued after a hearing and effective until terminated before the court's final judgment or final decree or until terminated by the court's final judgment or final decree.

Out of the common-law tradition of a rule nisi or an order to show cause, a **temporary restraining order**, with the acronym **TRO**, or a **restraining order**[1] is a court order granted on the ex parte application of a party, before a hearing, requiring the party to stop some action or intended action and to maintain the status quo until a hearing can be held. Due process requires an adversary hearing to be held promptly after a TRO is issued, giving the party restrained the opportunity to be heard. An order to show cause is issued, directing the party restrained to show cause why a preliminary injunction should not be issued.

Another meaning of **restraining order**[2] is a court order restricting a person's liberty to protect another and/or to avoid unnecessary conflict, especially a court order requiring a person to have no contact with another person and stay away from that person.

GO TO THE NET

Visit the *Legal Terminology Explained* Online Learning Center at http://www.mhhe.com/nolfi09 for an expanded index and glossary, including:

- **case**
- **civil cause of action**
- **commencement of action**
- **commencement of an action**
- **competent jurisdiction**
- **damnum absque injuria**
- **declaration**
- **Doe clause**
- **equitable relief**
- **equitable remedies**
- **ex turpi causa non oritur action**
- **federal question**
- **first pleading**
- **forum shopping**
- **jurisdictional clause**
- **legal remedy**
- **litigants**
- **litigation process**
- **locus**
- **locus delicti**
- **matter**
- **maxim of equity**
- **maxim of law**
- **preliminary hearing**
- **skip tracing**
- **writ of covenant**
- **writ of debt**

Chapter 38

Pleadings and Parties

PLEADING, GENERALLY

From *pleasing (the court),* **pleading**[1], making allegations and denials, is the process by which opposing parties alternately present their contentions in writing, responding as needed to each other's contentions. To **plead**[1] is, generally, to make an allegation or denial or to make a set of allegations or denials.

A **pleading**[2] or **plea**[1] is also a standard motion, especially a formal document and statement of a party setting out the party's causes of action or defenses. Accordingly, in a civil case, to **plead**[2] is to present formal basic contentions or respond to formal basic contentions, to make a pleading, or to file a pleading.

In general, one party makes an **allegation**, which is, from *charge,* an assertion of fact or law of legal significance that may or may not be authentic, accurate, or true. An allegation is an assertion of fact that a party intends to prove or an assertion of fact that an opposing party intends to disprove. Traditional pleading is **fact pleading**, which is a style of pleading that requires you to identify all the facts necessary to allege a valid cause of action. Modern pleading is **notice pleading**, which is a short and plain statement of the allegations in a lawsuit. For the purpose of pleading, some allegations may be on **information and belief**, which is some reason and inference, but not actual knowledge. From *to verify,* an **averment** is an allegation of positive fact, rather than an inference.

The other party admits or denies the allegation, or raises another in defense. Alluding to the avoidance of an adverse judgment despite admitting an allegation, a **confession and avoidance** is admitting an allegation but raising another allegation in defense. In a civil case, to **contest**[1] is, from *intense witness,* to deny an allegation or raise another allegation in defense or to present a defense or resist a lawsuit. From *away say no,* a **denial** is a contradiction of an allegation. A **general denial** is a denial of all allegations. A **specific denial** is a denial of one or more but not all allegations.

A **negative pregnant** is a denial that suggests part of what was alleged. For example, where a person is alleged to have negligently run over the victim with a red car and the person denies negligently running over the victim with a car that was red, the denial suggests negligently running over the victim with a nonred car.

Composed of an allegation of one party and a denial by an opposing party, an **issue**[3] is a disputed point of fact or law. The phrase **at issue** means the point of fact or law in dispute. In most cases, the authenticity, accuracy, or truth of allegations is tested in proceedings before a trial, in a trial, or in proceedings after a trial. As a general rule, before all the evidence is discovered, presented, and tried, a party may engage in pleading in an "either/or" fashion, that is, alleging two possibilities and choosing one later, which is known as **alternative pleading** or **pleading in the alternative**.

Later, the party may be required to make an **election of remedies**, which is making a choice between the alternative remedies the party has pleaded.

Although rare and not required in most cases, in special cases such as a stockholder's suit, a pleading may have to be **verified**, which is sworn to under oath for the purpose of being confirmed as authentic, accurate, or true. From *truth,* to **verify** is to confirm the authenticity, accuracy, or truth of something, especially to confirm the truth of a statement by swearing to it under oath.

A pleading usually begins with a caption. From *against,* **v.** is an abbreviation for versus, meaning against or on the other side. The **title of the case** or **case title** is, generally, the name of the plaintiff or lead plaintiff, followed by a "v.", and followed by the name of the defendant or lead defendant.

From *addition,* a **supplement** or **supplemental** is something added to make up for a deficiency or the passage of time. Pleadings are required to be supplemented, at least before a trial. A **supplemental pleading**, an updating pleading, is a pleading that sets out a cause of action or a defense based on events after the party's last pleading.

ANSWERING THE COMPLAINT

A plaintiff in a civil case begins the pleading process by filing a lawsuit, including a complaint. The modern pleading setting forth a cause for legal relief, a civil **complaint**[1] is, from *find fault,* the first pleading filed by the plaintiff with the court, setting out the cause or causes of action against the defendant. A complaint includes one or more claims. From *call out,* a **claim**[3] is an assertion that something is true or an assertion of a right to money, property, or legal relief. A **claimant** is a person who asserts that something is true or a person who asserts a right to money, property, or legal relief.

From *ward off,* the **defendant**[1] is, generally, the person who responds to a case brought to a trial court by another. A civil **defendant**[2] is a person against whom a complaint has been brought and who is called upon to respond.

If a court has jurisdiction over the defendant and if the defendant has been properly formally notified of the complaint, the defendant is required to respond to the complaint. From *away wanting,* a **default**[1] is, generally, a failure to perform an act by the time it is due such as a failure to make a payment or a failure to timely pay a debt. In civil procedure, a **default**[2] is a failure to respond when required to respond, especially a party's failure to respond to a pleading within the required time.

If a court has jurisdiction over the defendant, the defendant has been formally notified, and the defendant fails to appear or file a pleading when required, the court may enter a default judgment against the defendant. A default also may occur by a plaintiff's failure to appear or file a pleading when required, known, from *he has not pursued,* **non prosequitur**, abbreviated **non pros**. Accordingly, a **default judgment** or **judgment by default** is a judgment rendered against a party for failure to appear or file a pleading when required or a judgment against a defendant who defaulted on a contract obligation. Before entering a default judgment, a court may require the nondefaulting party to prove the amount of damages or show the need for the remedy sought.

From *against swearing,* an **answer** is the pleading filed by the defendant with the court that responds to or resists the cause or causes of action set out in a complaint. At common law, to **plead**[3] was to answer a declaration (a common-law complaint).

A **counterclaim** is a complaint against a party who made a complaint, especially a complaint by a defendant against a plaintiff, which accompanies or is part of the defendant's answer. From *back fold,* a **reply**, in essence an answer to a counterclaim, is the pleading filed by the plaintiff with the court that responds to or resists the cause or causes of action set out in a counterclaim or, if permitted by the court, the pleading filed by the plaintiff to respond to or resist new matter set out in an answer.

THE MERITS OF AN ACTION

From *deserve,* the **merits of an action** are the substance of the causes of action and defenses, rather than the procedure related to the causes of action and defenses. A **meritorious defense** is a defense upon the merits of the action, whether or not successful, or a successful defense to an action. A **judgment on the merits** is a decision based on the substance of the causes of action and defenses, rather than on the procedure related to the causes of action and defenses. A judgment by default is not on the merits.

COMMON-LAW PROCEDURAL DEFENSES

From *to wait,* a **demurrer**, the common-law "so what?" pleading, was the special common-law pleading admitting for the sake of argument the truth of the allegations in a complaint, but asserting that even so, the person making the allegations had no claim for legal relief. Historically, a **plea**[2] was a common-law pleading in equity asserting that the action should be prohibited or dismissed. From *later* (procrastinating), a **dilatory plea** was a common-law plea to contest an action for a reason not based on the merits of the action. A **plea in bar** was a common-law plea that some fact destroyed the action as a matter of procedure such as expiration of the time within which to sue. A **plea in abatement** is a common-law plea to decrease, reduce, suspend, or end an action for a reason not based on the merits of the action such as the death of a party. From *make firm,* an **affirmative plea** was a common-law plea that some fact destroyed the merits of the action such as proof the defendant was not present or involved in what was alleged.

MODERN PROCEDURAL DEFENSES

Most modern procedural defenses are affirmative defenses. Raising another allegation as a defense, an **affirmative defense**[1] is a defense for which the defendant has the burden of proof. It is an even-if defense. Even if the defendant acted wrongfully, if an affirmative defense is pleaded and proven, the defendant is not liable.

Lack of jurisdiction is the defense that the court does not have the power and authority to hear and decide the case. Lack of jurisdiction is a defense that can be raised at any point in a lawsuit, even before pleading. From *into sight,* an **appearance**[1] is showing up in court, either in person or, when permitted, represented by an attorney who shows up in person or the action of an attorney showing up in court to represent a person. A **special appearance** is appearing in court for the sole purpose of challenging the court's jurisdiction, which is not considered consent to the court's jurisdiction.

Insufficiency of process is the defense that the process was not sufficient. **Insufficiency of service of process** is the defense that the service of process was not sufficient.

In civil procedure, from *barrier,* a **bar**[3] is, generally, a prohibition against bringing an action such as a statute of limitations, a statute of repose, laches, res judicata, or claim preclusion. From *an end,* **finality** is the doctrine that courts must efficiently decide disputes to serve present and practical justice and the concept that that there is a practical limit to the extent society can reasonably expend its resources to decide old disputes because evidence is lost when memories fade and people move away or die. Based on finality, a **statute of limitations**[1], the time limit for filing a legal action, is the time within which an action may be brought after it arises, after which it cannot be brought. Different actions have different statutes of limitations. **Accrual of a cause of action** is when a cause of action comes into existence and the statute of limitations begins to run. Accrual of a cause of action for negligence generally occurs when the plaintiff discovers or should have discovered the defendant's negligence. From *to bar,* to **toll**[2] is to stop a statute of limitations from running. From *intense*

stop, **repose** is certain finality. A **statute of repose** is an absolute time limit for filing a legal action, regardless of when the statute of limitations begins to run. Even if a statute of limitations or a statute of repose has not expired, the equitable defense of laches may apply. From *lazy,* **laches** is unfair or unreasonable delay in bringing a claim or lawsuit that prejudices the party against whom the claim or lawsuit is made, and so the claim or lawsuit is prohibited.

Based on the principles of finality and repose, from *stopped,* **estoppel** is a bar, prohibition, or preclusion arising by equity because it is unfair for a person to deny what the person said or did, events that occurred, or determinations that have already been made. **Mutuality of estoppel** is the doctrine that a party cannot raise an issue as to which the other party is estopped. **Direct estoppel**, an issue already decided, is the prohibition of the relitigation of an issue between the parties already decided on the merits in the present action. Similar to direct estoppel, **law of the case**, law already decided, is the doctrine that a determination of law in a proceeding applies throughout all subsequent stages of the proceeding until the proceeding is appealed.

From *side by side,* **collateral**[2] generally means on the side of or secondary to the principal thing. **Collateral estoppel** or **issue preclusion**, an issue previously decided, is the prohibition of the relitigation of an issue between the parties already decided on the merits in a prior action. The criteria are that (1) the issue is identical to the one decided in the prior action, (2) the issue was actually litigated in the prior action, (3) resolution of the issue was essential to a final judgment in the prior action, and (4) the plaintiff had a full and fair opportunity to litigate the issue in the prior action.

From *the thing has been decided,* **res judicata**, **res adjudicata**, or **claim preclusion** is the prohibition against relitigation of an action between the parties already decided on the merits. In the claim preclusion, from *barrier,* a **bar**[4] is the doctrine that prohibits a plaintiff from bringing an action on a cause already decided against the plaintiff on the merits. From *absorb in another,* **merger**[4] of actions is the doctrine that prohibits a plaintiff from bringing an action on a cause already decided in favor of the plaintiff on the merits, except to enforce the judgment.

A civil case may end before its normal termination if the trial court dismisses all the claims in the case. In a civil case, from *away send,* to **dismiss**[1] means to rule that the party making a claim cannot prove the claim or failed to prove the claim and, thus, to remove the claim or the case from court or, simply, to remove the claim or the case from court. In a civil case, **dismissed**[1] means the court ruled that the party making a claim could not prove the claim or failed to prove the claim and thus removed the claim or the case from court or, simply, removed the claim or the case from court. In a civil case, a **dismissal**[1] is the court's having ruled that a party could not prove the claim or failed to prove the claim and, thus, is the removal of the claim or the case from court or, simply, removal of the claim or the case from court. A **dismissal with prejudice** means permanent removal of the case from court. It is adjudication on the merits or equivalent to adjudication on the merits such that a subsequent suit may not be brought on the same cause of action. A **dismissal without prejudice** is nonpermanent removal of the case from court. It is not adjudication on the merits or equivalent to adjudication on the merits, so a subsequent suit may be brought on the same cause of action. From *withdrawn,* a **retraxit** is a plaintiff's voluntary renunciation of the action or a cause of action in open court, treated as a dismissal with prejudice and a decision on the merits.

A **motion to dismiss** is a motion seeking dismissal of a claim or the case from court. A **motion to dismiss for failure to state a claim upon which relief may be granted**, the modern "so what?" pleading, is the modern pleading admitting for the sake of argument the truth of the allegations in a complaint but asserting that, even so, the person making the allegations has no claim for legal relief.

A **motion for judgment on the pleadings** is a motion admitting for the sake of argument the truth of the allegations in the pleadings and asserting that, under those facts and the law, the moving party is entitled to judgment as a matter of law.

It often becomes apparent during pleading that there is no genuine issue as to the material facts and that the only issues in the case are issues of law. When there is no genuine issue of material fact, no trial is necessary and summary judgment is appropriate. From *without delay,* **summary judgment** is a determination before a trial verdict that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. A **motion for summary judgment** or a **motion for a summary judgment** is a motion for a determination before a trial verdict that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. **Partial summary judgment** is a determination before a trial verdict that there is no genuine issue of material fact as to one or more but not all issues in the case and that a party is entitled to judgment as a matter of law as to that issue or those issues.

From *of matter,* a **material fact** is a fact of consequence; in other words, a fact that might affect the outcome of the case. In considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. All reasonable inferences to be drawn from the evidence must be drawn in the nonmoving party's favor. From *spark,* a **scintilla** is a very small amount or a very small amount of evidence. To defeat a motion for summary judgment, the nonmoving party must present more than a scintilla of evidence that there is a genuine issue of material fact.

MOTIONS ABOUT PLEADINGS

In a civil case, a **motion for a more definite statement**, or a **motion for more definite statement**, historically known as a **demand for a bill of particulars**[1], is a motion for amplification or clarification of an opposing party's vague pleading or a motion to have an opposing party state in more detail or with more specificity what is alleged. In a civil case, a **bill of particulars**[1] is an amplification or clarification of a vague pleading, or stating in more detail or with more specificity what is alleged. A **motion to strike** is a motion to remove from a pleading an alleged cause of action or defense clearly without merit or any other material that is immaterial, repetitive, or scandalous.

Leave of court is the permission of a court to take an action otherwise not permitted, especially the permission of a court for an extension of time within which to do something. A **motion for leave of court** is a motion for the permission of a court to take an action otherwise not permitted.

AMENDED PLEADINGS

From *out fault,* an **amendment of pleading** or **amendment**[3] is an addition or change to a pleading, especially to correct an error or misunderstanding. An **amended pleading** is a pleading that has been added to or changed, especially to correct an error or misunderstanding. An amended pleading is sometimes necessary because of a **misnomer**, which is, from *wrong name,* a misleading statement or mistake concerning the name of someone or something such as a mistake concerning the name of a party. From *under the name,* **sub nomine**, abbreviated **sub nom.**, is a phrase used before a name to indicate that the original name was changed to the following name. For example, "Jones sub nom. Smith" means that the name Jones was changed to Smith.

Relation back is the principle that an addition or change is deemed to have occurred when that which was added to or changed was issued, especially the principle that an amendment to a pleading is deemed to have occurred when the pleading was made.

Excusable neglect is the failure to perform a required act due to unusual circumstances justifying the failure to perform, especially a procedural error due to unusual circumstances justifying the error and a procedural error that a court will tolerate until corrected. From *now for then,* **nunc pro tunc** is permission to correct a pleading or take an action after it should have been done and to treat the pleading or action as if it had always been correct and timely done.

MULTIPLE CLAIMS AND MULTIPLE PARTIES

As a general rule, when a plaintiff has several claims against one defendant, or one claim against many defendants, the plaintiff must bring all the claims and defendants together in one lawsuit. **Judicial economy** is the principle that the courts should decide disputes and use judicial resources in an efficient manner whenever it is fair to do so. From *separate,* a **severance**[2] of claims or parties is a separating of the claims or parties in a civil case when it would be unfair or inconvenient to try them together. For example, a court may sever the issue of liability from the issue of damages.

To **join** is to bring together. **Joinder** is bringing together of several causes of action and/or several parties in one action. In general, a party may bring together as many claims as the party has against an opposing party. A party may not engage in **splitting a cause of action**, which is bringing only part of a cause of action in one lawsuit and bringing another part of the cause of action in another lawsuit, except when the subject of the second lawsuit was not due at the time of first lawsuit.

Compulsory joinder is the required joinder of a claim or a party necessary for a fair adjudication of the case. **Permissive joinder** is the optional joinder of claims or parties arising out of the same transactions or occurrences or involved in a common question of law or fact. In a civil case, a **misjoinder**[1] is joining together claims or parties that should not be tried together because they do not arise out of the same transactions or occurrences or are not involved in a common question of law or fact.

From *not out-weight,* an **indispensable party** is a party whose interests will be affected by the case and a party that in equity *must* be joined, even if the joinder will deprive the court of jurisdiction. From *unavoidable,* a **necessary party** is a party whose interests will be affected by the case and a party that in equity *ought* to be joined, but a party that need not be joined if doing so will deprive the court of jurisdiction. From *special,* a **proper party** is a party whose interests will be affected by a case, but a party that in equity need not be joined.

From *group,* a **class action** is an action on behalf of a large group of plaintiffs by one or more representative members of the group or, rarely, a defense on behalf of a large group of defendants by one or more representative members of the group. To have a class action, the group must be so numerous that joinder of all members is impracticable, there must be common questions of law or fact, the claims or defenses must be typical, and the representative member or members must fairly represent the group.

Joinder rules apply to counterclaims. A **compulsory counterclaim** is the required joinder in a counterclaim of claims arising out of the same transactions or occurrences as the claims in the complaint. A **permissive counterclaim** is the optional joinder in a counterclaim of claims not arising out of the same transactions or occurrences as the claims in the complaint.

The result of a successful claim and a successful counterclaim is a **setoff** or **offset**, which is a mutual deduction of the valid separate claims between the parties so that only the difference between the claims applies. A setoff is different than a **recoupment**, which is, from *back-cut,* a mutual deduction on a single claim between the parties so that only the difference after the mutual deduction applies.

A **third party**[2] is a person not directly or initially involved in an action or transaction or a party who is not a plaintiff and not a defendant. A **third-party complaint**, **third-party claim**, or **impleader** is a pleading alleging that a third party is liable for one or more causes of action in a complaint or counterclaim, which is either a pleading by a defendant alleging that a third party is liable for one or more causes of action in the complaint or a pleading by a plaintiff alleging that a third party is liable for one or more causes of action in a counterclaim. A **third-party plaintiff** is a party who files a third-party complaint. A **third-party defendant** is a person against whom a third-party complaint has been filed.

A **cross-claim**, a **cross-claim lawsuit**, or a **cross-action** is a complaint by a defendant against a co-defendant or a complaint by a plaintiff against a co-plaintiff. A **cross-plaintiff** is a party who files a cross-claim. A **cross-defendant** is a party against whom a cross-claim has been filed.

A **bill of interpleader** or **interpleader** is an action in equity by which a person in possession of the property of another, but not sure to which of two or more claimants it is entitled, deposits it with the court, pleads against each claimant, and leaves the determination to the court. A **stakeholder** is a person in possession of the property of another for which entitlement is contested. To **interplead** is to plead, as a stakeholder, against each claimant to the property.

FRIVOLOUS CONDUCT

From *silly,* **frivolous** means clearly lacking in merit or baseless and made without a reasonable and competent inquiry. A **frivolous pleading** is a pleading clearly lacking in merit or a pleading that is baseless and made without a reasonable and competent inquiry.

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- **ad respondendum**
- **allegations**
- **appearance docket**
- **case evaluation**
- **cross-complaint**
- **deny**
- **exhibit (pleading)**
- **facts**
- **frivolous suit**
- **general defenses**
- **general demurrer**
- **general traverse**
- **judicial estoppel**
- **legal issue**
- **order nunc pro tunc**
- **peremptory plea**
- **Rule 11**
- **special traverse**
- **traverse**
- **verification**

Chapter 39

Discovery and Alternatives to Trial

INTRODUCTION

The parties to a lawsuit often conceal as much information about the case as possible, hoping to gain an advantage by surprising their opponents at trial. By the mid-1900s, it was recognized that permitting opposing parties to conceal basic information from each other harmed the legal system. Among other things, time was often wasted proving matters over which there was no dispute and needless complications and delays were caused by the need to respond to unfair surprises.

From *uncover,* **discovery** is the modern formal process of gathering information from an opposing party before a trial and the pretrial procedures by which a party may gain access to information or evidence in the possession of an opposing party.

Discovery generally requires **disclosure**[2], which is, from *opposite of closure,* making known information or evidence requested by an opposing party. Discovery narrows and clarifies the basic issues between the parties. Besides avoiding unfair surprises at trial, the exchange of information and evidence in discovery often results in a settlement, a summary judgment, or a shorter trial.

Discovery is the opposite of **concealment**, which is, from *intensive hiding,* the process of making it difficult or more difficult to gain access to information or evidence that another is entitled to access. From *to strip,* **spoliation** is the alteration, concealment, or destruction of evidence.

THE SCOPE OF DISCOVERY

As a general rule, parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the lawsuit. The information sought in discovery can be inadmissible at trial as long as it is reasonably calculated to lead to the discovery of admissible evidence. Although its scope is broad, discovery should not be a **fishing expedition**, which is asking irrelevant questions in a systematic attempt to obtain information beyond what is relevant.

Notice that the scope of discovery does not include matters that are privileged such as communications protected by the attorney–client privilege. The courts also generally prohibit the discovery of an **attorney's work product** or, simply, **work product**, which is the generally nondiscoverable private work done by an attorney in preparing a case for trial, especially private writings or other evidence of an attorney's legal impressions, theories, or strategies as to a pending or reasonably anticipated litigation. Work product is within the scope of discovery only when the attorney possesses

relevant nonprivileged information that a diligent opposing party could not have created or obtained elsewhere.

INTERROGATORIES

From *between question,* an **interrogatory** is a formal written question from one party to another that must be answered under oath. Accordingly, **interrogatories** are formal written questions from one party to another that must be answered under oath and the discovery method of sending formal written questions to an opposing party that must be answered under oath. To avoid the abuse, modern courts often limit the number of interrogatories that may be sent to an opposing party without leave of the court. Furthermore, interrogatories may be sent only to an opposing party. Interrogatories may not be sent to a witness who is not a party.

DEPOSITIONS

From *down place,* to **depose** is to bear witness, to testify, to remove from power, or to examine a deponent. A **deponent** is a witness who testifies under oath before a hearing or trial. A **deposition**[2] is, specifically, an examination of a witness under oath before a hearing or trial, the written record of an examination of a witness under oath before a hearing or trial, and the discovery method of examining a witness under oath before a hearing or trial. A deposition is not an examination at a hearing or trial, but is an examination pursuant to a court order or pursuant to the rules of a court.

A **deposition on oral examination** or **oral deposition** is the usual deposition in which the deponent responds to questions posed by a lawyer in person. A **deposition on written questions** is the unusual deposition in which the deponent responds to questions posed by a lawyer in writing. From *of well being,* a **deposition de bene esse** is a deposition of a deponent expected to be unavailable at trial and read into evidence at trial if the deponent is unavailable at trial.

The parties, subject to the supervision of the court, arrange a deposition of a party. A witness who is not a party and who does not consent to a deposition can be ordered to appear for a deposition. From *under punishment,* a **subpoena**[1] is, generally, a summons to be a witness and an order of a court or other governmental entity directing a person to appear at or things to be brought to a deposition, hearing, or trial. From *under punishment to testify,* a **subpoena ad tesificandum**, an ordinary **subpoena**[2] to testify, is an order of a court or other governmental entity directing a person to appear at a deposition, hearing, or trial and to testify.

From *under punishment bring with thee,* a **subpoena duces tecum** or, simply, **duces tecum** is an order of a court or other governmental entity directing a person to appear at a deposition, hearing, or trial and bring with him or her certain documents or things and, if necessary, to testify. The subpoena duces tecum or a related document may indicate that only production of the documents or things is required and that the person need not appear and testify. If a person fails to obey a subpoena, the common punishment is that the person is held in contempt of court and a bench warrant is issued for the person's arrest to force the person to appear and testify.

PRODUCTION AND INSPECTION OF DOCUMENTS, THINGS, AND PERSONS

From *forth-bring,* the **production of documents and things** is granting an opposing party the opportunity to view, inspect, and copy relevant nonprivileged documents; providing an opposing party with a copy of relevant nonprivileged documents; granting

an opposing party the opportunity to view, inspect, sample, and test relevant tangible things; and the discovery method of obtaining from an opposing party access to documents and tangible things.

With the widespread use of computers since the late 1900s, many documents now exist only in electronic form. For example, many messages are communicated by **e-mail**, which is electronic mail. The term **electronic discovery**, with the abbreviation **e-discovery**, generally refers to the discovery of electronic documents such as e-mail.

If the physical or mental condition of a party is seriously at issue, a court upon the motion of another party and good cause shown may order the party to undergo a physical or mental examination by a qualified professional. Accordingly, a **physical or mental examination** is the discovery method of obtaining court permission to make a physical or mental examination of an opposing party.

ADMISSIONS IN DISCOVERY

From *to let go,* an **admission**[2] in discovery is an affirmation by a party or witness of the existence of a certain fact. A **request for admission**, a **request for admissions**, or **request to admit** is the discovery method of formally asking an opposing party to affirm or deny an allegation or a material fact.

SANCTIONS AND PROTECTIVE ORDERS

A **motion for an order compelling discovery** or a **motion to compel discovery** is a motion to enforce a right to discovery. From *encouragement,* a **sanction** is a penalty for improper conduct. The court may sanction a party that fails to provide discovery as required. The sanction may range from a fine to an adverse judgment.

On the other hand, a discovery request may seek irrelevant or privileged information or may be unfairly burdensome or expensive to provide. A **motion for a protective order** or a **motion for protective order** is a motion to obtain protection from an abuse of the legal system, especially a motion to obtain protection from an abuse of the right to discovery. A **protective order** is a court order issued to protect a party from an abuse of the legal system, especially a court order issued to protect a party from an abuse of the right to discovery.

PRETRIAL CONFERENCES

Until the mid-1900s, the typical trial judge spent little time preparing for a trial. By the mid-1900s, it was recognized that leaving all trial preparation to the attorneys for the parties was not good for the legal system because matters that the trial judge could help to resolve before trial were not being resolved before trial. By meeting with the parties or their attorneys before trial, the trial judge could help to narrow the issues for trial and serve as an informal mediator between the parties. If the trial judge could arrange a resolution of the case, a trial would not be necessary.

Pretrial[1] is, generally, before trial or preparing for a trial. From *to bring together,* a **conference**[2] is a meeting held to discuss, prepare for, and/or resolve a common concern. In a civil case, most courts now require at least one **pretrial conference**[1] or **pretrial**[2], which is a major resolution or planning meeting between the trial judge and the parties or their attorneys before trial in an attempt to resolve the case without a trial or to resolve matters of procedure before trial. A **pretrial brief** is a brief filed before a trial and a brief used to help argue a point at a pretrial conference.

For example, at a pretrial conference, the court may grant, from *at the threshold,* a **motion in limine**, which is a motion to exclude anticipated evidence as inadmissible

and/or a motion to exclude any reference to anticipated evidence until it is determined to be admissible. If necessary, the court will hold an **evidentiary hearing**, which is a hearing on the issue of the legality of certain evidence and a hearing outside of a trial to determine whether or not the evidence will be admitted during the trial.

A motion in limine is a **pretrial motion**, which is a motion made before trial. A **pretrial stipulation** is a stipulation made before trial. A **stipulation** is, in part, a fact that is formally admitted, agreed to, or conceded by the parties.

It is increasingly common for a trial court to have more than one conference before a trial. Today, a **status conference** or **discovery conference** is one of several meetings between the trial judge and the parties or their attorneys before trial to discuss the progress of pleading, discovery, and negotiations before trial, in an attempt to resolve the case without a trial or to resolve matters of procedure before trial.

A **pretrial hearing** is a hearing held before trial, especially a hearing held before trial when it is necessary or desirable for the court to hear testimony before making its decision on the subject matter of the hearing.

MARKING TIME BEFORE TRIAL

From *hanging* or *suspending,* **pending** means a matter that is awaiting a decision or other resolution. From *while the suit is pending,* **pendente lite** or **lite pendente** is during a lawsuit or contingent on the end or outcome of a lawsuit.

From *place for the accused,* a **court docket** or, simply, a **docket** is a court's formal list or calendar of cases pending before the court or the formal record of proceedings before a court in a particular case. From *place for the accused,* a **trial docket** or **trial list** is a court's formal list or calendar of cases pending for trial before the court. The **docket number** is the serial number given to a case when it is filed in a court.

From *divisions of a year,* a **court calendar** or **calendar**[1], like an ordinary calendar, is a plan of dates and times for the activities of a court. A **trial calendar** or **calendar**[2] is a formal or informal list of the cases to be tried by the court during a particular period of time such as a particular month, week, or day.

A **calendar call** or **docket call** is a court procedure or hearing used to systematically determine the status of one or more cases, especially where a court clerk or the judge orally declares the next case to be heard by the court. Calendar calls are common in busy courts where the parties or their attorneys in several cases are all scheduled to appear at one time. Traditionally, the court hears the first or next case on the calendar in which all of the parties and their attorneys have appeared.

ALTERNATIVES TO TRIAL

Criminal courts encourage plea bargaining to clear crowded criminal dockets. Civil courts encourage alternatives to trial to clear crowded civil dockets. For example, from *without delay,* **summary judgment** is a determination before a trial verdict that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. **Alternative dispute resolution** (**ADR**) is resolution of a dispute by negotiation, mediation, or arbitration rather than by adjudication.

As a matter of judicial economy, the ideal alternative to a trial is an **out-of-court settlement** or, simply stated, a **settlement**, which is an agreement by the parties to resolve their legal dispute without a trial or without further legal proceedings. From *to seat* (to come to rest), a **settlement agreement** is a written agreement memorializing a settlement. A settlement agreement usually includes or is accompanied by a release. From *relax,* a **release**[2], an abandonment of a cause of action, is an agreement by a

plaintiff or potential plaintiff to not attempt to collect damages from a defendant or potential defendant, thereby removing all liability to the plaintiff.

A settlement is usually the result of negotiation. A settlement also may be the result of mediation. From *middle person,* a **mediator** is the neutral third party in mediation. From *make friendly,* a **conciliation** is a mediation-induced resolution of differences. From *friend maker,* a **conciliator** is a mediator who induces the parties to resolve their differences. A **conciliation procedure** is a meeting with a judge or other mediator to encourage the parties to resolve their differences.

Arbitration is resolving a dispute by the decision of a neutral third person given the power to decide the dispute. From *person who approaches,* an **arbitrator** is the neutral third party in arbitration. An **arbitration panel** is several arbitrators, usually three, given the power to vote on and collectively decide a dispute.

By contract before a dispute arises, parties may agree to have certain disputes decided by arbitration rather than adjudication. A court will enforce **compulsory arbitration** or **mandatory arbitration**, which is arbitration required by law or arbitration required by a previous agreement of the parties. An **arbitration clause** is a provision in a contract providing for arbitration of disputes related to the contract.

Binding arbitration is a genuine arbitration in which the decision of the arbitrator must be accepted. **Nonbinding arbitration** is a mediation conducted in the manner of an arbitration in which the decision of the mediator has some moral authority but does not have to be accepted.

In some states, the line between arbitration and adjudication is being blurred with a special kind of compulsory nonbinding arbitration. For cases with relatively small amounts in controversy, some courts have **court-ordered arbitration**, which is requiring the parties to participate in an arbitration proceeding before the parties are permitted to have a trial de novo. Obviously, the party who wins the arbitration has no incentive to seek a trial. The party who loses the arbitration has an incentive to seek a trial, but the party who loses the arbitration is also discouraged by having lost the arbitration, discouraged by the prospect of spending more time and money to go to trial, and discouraged by the potential of losing more as a result of a trial.

A **mini-trial** is an arbitration conducted in the manner of a trial. The arbitrator in a mini-trial is usually a lawyer. Ideally, the arbitrator in a mini-trial is a retired judge. A **summary jury trial** (**SJT**) is a mediation or a partially binding arbitration conducted in the manner of a simple trial before a small jury and designed to give the parties feedback as to what a full jury would likely decide in a full trial.

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- **motion for sanctions**
- **motion to compel**
- **nondisclosure**
- **nonprivileged information**
- **preliminary matters**
- **pretrial memo**
- **pretrial order**
- **pretrial phase**
- **pretrial stage**
- **request for medical examination**
- **request for production of documents**
- **request to produce**
- **submission**
- **supplemental response**
- **trial notebook**
- **trial order**
- **trial schedule order**
- **umpire**
- **video deposition**

Chapter 40

Inside the Courtroom

IN THE COURTHOUSE

From *residence-room,* a **courtroom** is a room in which court is routinely held. A **courthouse** is a building that contains one or more courtrooms. Courthouses also are known as the **halls of justice**. From *vault,* the judge's private office and other rooms adjoining a courtroom are the judge's **chambers**. From *in chambers,* **in camera** means in the judge's chambers, not in open court or not before the jury.

IN THE COURTROOM

The main entrance to a traditional courtroom brings you into the **gallery**, which is, from *porch,* the place in the traditional courtroom where the spectators sit. The gallery is especially important in a criminal case because criminal defendants have the **right to public trial**, which is the Sixth Amendment right of citizens who are criminal defendants to have spectators observe their trial. Spectators at a trial serve as informal witnesses to the fairness or unfairness of the trial, and so inherently encourage a fair trial.

In a traditional courtroom, the **bar**[1] is the low fence that physically separates the trial participants from the spectators.

In a traditional courtroom, the desk where the judge sits is known as the **bench**[1]. Accordingly, in a traditional courtroom, when a judge wants someone to come toward the judge's desk, the judge says to **approach the bench**.

In a traditional courtroom, the raised edge on the front and sides of the bench, which conceals from view any papers the judge may have lying on the bench, is also known as a **bar**[5]. That is why a conference a judge has with lawyers at the bench, ideally out of the hearing of the jury or other persons in the courtroom, especially a conference on the side of the bench away from the jury making it the most difficult for the jury to hear or lip-read what the judge is saying, is known as a **sidebar conference** or, simply, a **sidebar**. Judges use sidebar conferences to discuss with counsel issues of evidence or procedure that should not or need not be heard by the jury or others in the courtroom.

The courtroom bar and the bench bar both explain why judges often refer to whatever is currently before the court as being **at bar.** Thus, judges often refer to the case currently before the court or the case currently being decided—as opposed to any other past, present, or future case—as the **case at bar**.

Counsel tables are, in the traditional courtroom, tables and chairs between the bench and the bar for the parties and their counsel. From *to turn against,* **adverse** means opposed. An **adversary** is an opponent. An **adversary proceeding** is a proceeding in which the parties are adverse or a proceeding involving adversaries. An **adversary**

system is a justice system in which parties may be treated as opponents and a trial is viewed as a contest between opponents. Counsel tables remind us that American trials are based on the **adversarial system of justice**, which is a justice system in which advocates for adverse parties present the best evidence and arguments for their side, in the belief that out of that clash the truth is most likely to emerge before the judge or before the jury.

The adversarial system of justice is the best system of justice for routine cases. However, for complex cases, an arguably better system, used in civil-law countries, is, from *examining,* the **inquisitorial system of justice**, which is a justice system in which an advocate for truth serves as prosecutor and judge and examines all the evidence and arguments in the belief that the truth is most likely to emerge in the advocate or before the jury. Aspects of the inquisitorial system of justice are used in coroners' inquests and in small claims court. The system is arguably better when both parties fail to present the whole truth, and so, without an advocate for truth, the whole truth is unlikely to emerge.

Unlike courtrooms in other countries, an American courtroom does not have a **dock**, which is, from cage, a special place or cage in a courtroom for the accused.

From *meddle with,* to **tamper** is to improperly influence such as by bribery, threats, or giving improper or misleading information. **Tampering** is improperly influencing such as by bribing, threatening, or giving improper or misleading information. From *to place in safety,* to **sequester** is to separate something for its protection and to protect a juror or witness from unfair evidence or tampering. Generally, **sequestered**[1] means separated for its protection and protected from unfair evidence or tampering.

In the courtroom, the **jury box** is the enclosed place where the jury sits during a trial. The jury sits in an enclosed place, sequestered, to make it more difficult for the jurors to be tampered with.

See Figure 40.1 for a diagram of a courtroom.

IN THE JURY ROOM

In the courthouse but outside the courtroom, the **jury room** is the place where the jury usually sits when not needed or wanted in the courtroom and the place where the jury sits to deliberate after they have been instructed to do so. From *entirely-weigh,* to **deliberate** is to debate, reason, and make a decision. **Deliberations** are debating, reasoning, and making a decision. A jury room usually includes at least one attached restroom so that, during deliberations, jurors do not have to leave and risk being tampered with.

WHEN COURTS HAVE PROCEEDINGS

Courts must be open for business as provided either by law or by a higher court, if any. If no set time is provided by law or by a higher court, a court may decide for itself when it is open for business.

Substantial periods of time during which a court is open for business or for a certain kind of cases are usually noted for administrative purposes. A substantial period of a time, noted for administrative purposes, during which a court is open for business or for a certain kind of cases is known, from *boundary,* as a **term**[2] of the court. For example, each term of the U.S. Supreme Court runs from the first Monday in October through the following June. A **session**[2] is a period of time in which a court or other deliberative body is assembled and working.

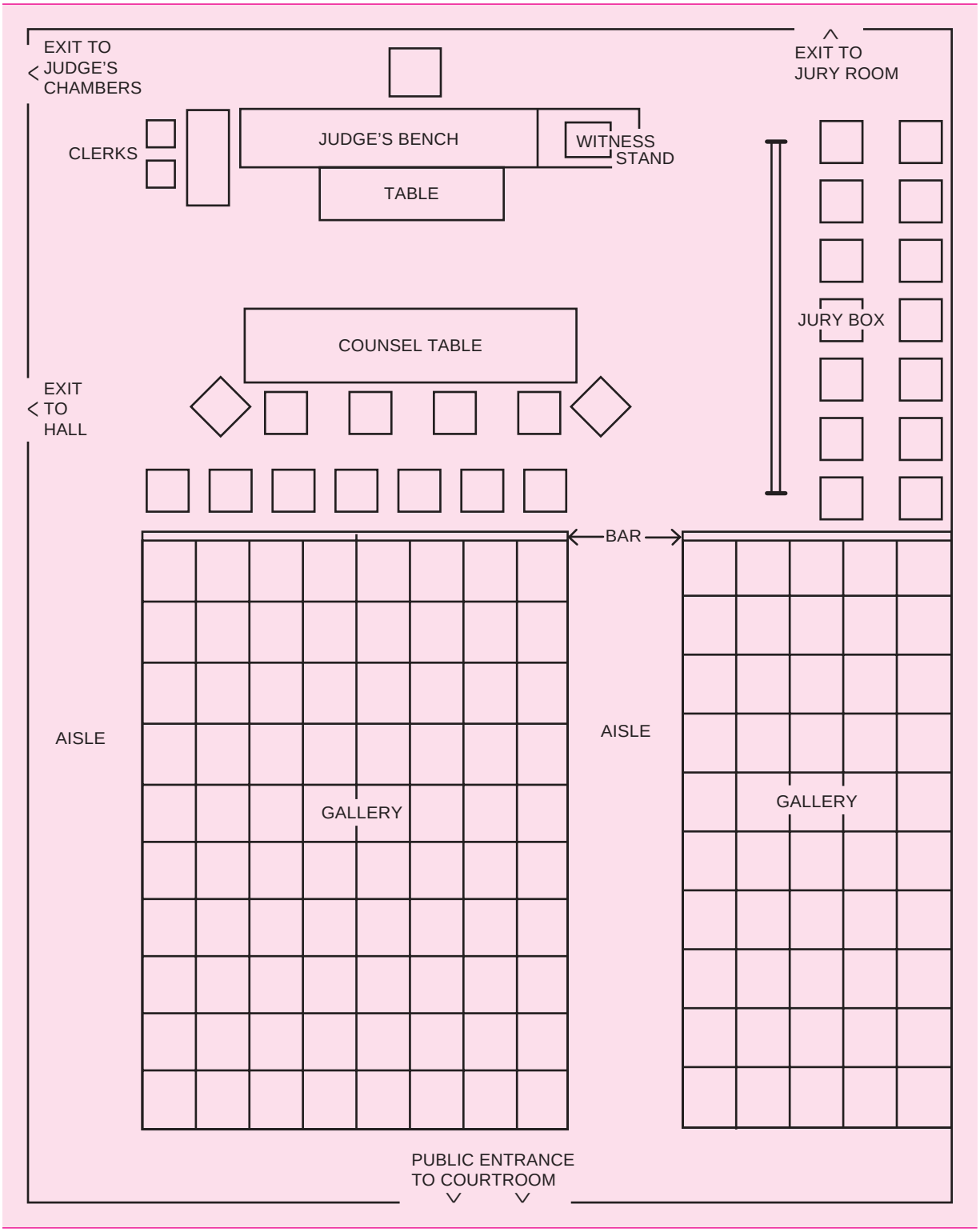

FIGURE 40.1
The Courtroom

From *divisions of a year,* a **court calendar** or **calendar**[1], like an ordinary calendar, is a plan of dates and times for the activities of a court. A **trial calendar** or **calendar**[2] is a formal or informal list of the cases to be tried by the court during a particular period of time such as a particular month, week, or day.

PROCEEDINGS IN THE COURTROOM, GENERALLY

From *together-come,* to **convene** is to commence or to meet together for a trial, hearing, or other legal proceeding.

Oyez (pronounced "oy-yay") means hear ye; oyez and **hear ye** are each a verbal exclamation to pay attention, signaling the beginning of proceedings in a courtroom. The triple cry of "Oyez, oyez, oyez" or "Hear ye, hear ye, hear ye" is proclaimed by a bailiff or other court official.

In the traditional courtroom, on the bench, there is another attention getter. The judge has, from *mallet,* a **gavel**, which is a judge's attention getter, usually a hammer-shaped wooden mallet struck on a block of wood.

Traditionally, a judge demonstrates the formal and serious nature of a proceeding in court by wearing formal clothing. In England, the tradition is to wear a white wig and a black robe. In America, the tradition is to wear a black robe. From *robbed (from an enemy),* a **robe** is a gown worn by a judge in court or a gown worn by a judge when participating in a formal activity.

From *up-raised,* something is **open**[1] when it is visible, not concealed, or in public view. **In open court** is during a trial, hearing, or other legal proceeding in court. Discussions and proceedings in open court are usually presumed to be **on the record**, meaning discussions and proceedings that are to be preserved in the record or discussions and proceedings that are preserved in the record. Sidebar discussions and discussions and proceedings not in open court are usually presumed to be **off the record**, meaning discussions and proceedings that are not to be preserved in the record or discussions and proceedings that are not preserved in the record.

At common law, witnesses testified while standing by the judge in front of the jury. Witnesses unable to stand for long periods of time were permitted to sit in a chair. Gradually, all witnesses were permitted to sit in a chair. The chair where a testifying witness sits is known as the **stand**. Accordingly, in a traditional courtroom, when a witness is called to testify during a trial, the witness is directed to **take the stand**.

A not-currently-testifying witness sits in the gallery or, if sequestered, a non-currently-testifying witness is kept in a room outside the courtroom.

From *to (put off for a) day,* to **adjourn** is to postpone for a reason, to postpone until the next day, or to postpone until the next time. From *go back,* a **recess** is a relatively short adjournment or a short break in a trial, hearing, or other legal proceeding such as a break for lunch. From *hold together,* a **continuance** is a relatively long adjournment or a long break in a trial, hearing, or other proceeding.

The Latin phrase **sine die** means without day or without time. To **adjourn sine die** is to adjourn without setting a day or time for the next meeting or to adjourn for the last time and meet no more such as the last meeting of a particular court, a particular legislative body, or other particular legal entity. For example, every two years, in even-numbered years, in late December, the U.S. House of Representatives adjourns sine die because every two years a new U.S. House of

Representatives is elected and takes office on the third day of January, in odd-numbered years.

From *again-together-come,* to **reconvene** is to recommence or to meet together again to continue a trial, hearing, or other legal proceeding after an adjournment, recess, or continuance.

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- **ad curiam**
- **sequestration**
- **sub judice**

Chapter 41

Jury Trials

INTRODUCTION

A trial with a jury is a **jury trial** or a **trial by jury**.

The **Sixth Amendment** is, in part, the constitutional amendment guaranteeing the right to trial by jury in a criminal case. In criminal law, the **right to trial by jury**[1] or the **right to jury trial**[1] is the general right to have your criminal case decided by a group of persons, under oath, given sovereign power to decide disputed facts based on the evidence submitted to them and the general right to a jury equivalent in scope to the right to a jury that existed at common law in England in 1791 when the Bill of Rights was ratified. A trial does not have to be before a jury. As a general rule, a criminal defendant is only entitled to a trial by jury where the crime with which he or she is charged may be punished by a **loss of liberty**, meaning incarceration. The constitutional right to trial by jury is absolute for crimes punishable by imprisonment of six months or more.

From *give up (a claim),* to **waive**[1] is, generally, to forgo a right or to release another from a duty. A defendant may waive his or her right to a trial by jury. A **jury-waived trial** is a trial in which a jury trial has been waived. Whether or not a party is entitled to a jury trial, a trial without a jury and a trial by a judge alone are known as a **bench trial**, a **nonjury trial**, or a **trial by the court**. In a bench trial, the judge also becomes the trier of fact.

From *sworn group,* a **jury**[1] is, generally, a group of persons, under oath, given sovereign power to decide disputed facts based on the evidence submitted to them such as in a trial in which the law so permits. A **juror** is a person selected and sworn to serve on a jury. From *truth-speak,* a **verdict**[1] is, generally, a lawlike or law-related conclusion. For a jury, a **verdict**[2] is the jury's formal decision. A **jury**[2] is a group that decides the facts and reaches a verdict.

A **trial judge** is a judge that presides over a trial. A **trial jury** or, from *small,* a **petit jury** or a **petty jury** is a public jury that decides the disputed facts in a trial based on the evidence submitted to them and a relatively small jury compared to a grand jury. A criminal jury traditionally consists of 12 jurors in a felony case and six jurors in a misdemeanor case. A grand jury traditionally consists of 23 jurors, but in some states consists of 18 jurors. Originally, a civil jury also consisted of 12 jurors, but today a civil jury usually consists of six jurors, more or less, as provided in the particular jurisdiction.

In a jury trial, the jury decides the facts, except insofar as the judge must decide the facts for preliminary matters. In a bench trial, the judge decides the facts. The **fact finder** or **finder of fact** is the judge in a bench trial, the jury in a jury trial, or the analogous person or group in another legal proceeding and the person or group that decides the disputed facts in a legal proceeding. The rarely used **advisory jury** is a jury

that hears a case when the parties do not have a right to a jury such as an equity case and so the judge is free to accept or reject the verdict. An advisory jury in an equity case decides **framed questions of fact**, which are questions of fact posed by the judge.

POTENTIAL JURORS

From *to come,* **venire** is the process of summoning people to be potential jurors and a **venireman** or **venireperson** is a person who is summoned as a potential juror. A **writ of venire facias** or **venire facias** was a writ directing the sheriff to provide people to be potential jurors. If the number of jurors was insufficient, the court would order the sheriff to go out and round up potential jurors, including any bystanders in or near the courthouse. A **talesman** was a person rounded up by the sheriff to be a potential juror.

Traditionally, people where summoned to be jurors because of their good character. Today, the emphasis is on finding a fair cross-section of the community, and so the selection process is random. Alluding to the best, a **blue ribbon jury**, a jury of prominent members of the community for an important case, is no longer used because it has been held to violate the constitutional right to a jury that is a fair cross-section of the community. From *group,* a **jury pool** is a group from which potential jurors are selected. Today, the most common jury pool is registered voters within the territorial jurisdiction of the court. Traditionally, professionals such as doctors, lawyers, ministers, and teachers were exempt from jury service. Today, exemptions are rare. Although there are many reasons why lawyers should not serve as jurors, including the fact that lawyers did not serve as jurors in England in 1791, lawyers have served as jurors in several states.

From *to ready,* an **array** or, from *jury list,* a **jury panel** or a **panel**[1] is a large group of potential jurors summoned for potential jury service for a period of time such as a month. Today, large groups of potential jurors are selected at random from the jury pool. A **challenge to the array** or a **motion to quash the array** is to challenge the large group of potential jurors summoned at one time as not being a fair cross-section of the community or improperly selected. There are many different systems for selecting jurors. The **one-day trial jury system**, for example, is the system of summoning a new array every business day, and whether or not a person is selected to be a juror that day, the person will not be summoned again for a definite number of years.

SELECTING A JURY, GENERALLY

From *to list,* to **impanel** is to select a jury. **Impaneling** is the process by which potential jurors are selected to serve on a particular jury or, in short, the process of selecting a jury. From *away (from an) accusation* or *away (from a) cause,* **excused** describes a juror or potential juror who is no longer needed in a particular case and is shorthand for excused from further jury service in the case.

Impaneling involves bringing potential jurors into the courtroom. The potential jurors are questioned to determine if they are impartial. Those potential jurors who are not impartial are excused. Those potential jurors who are impartial take seats in the jury box and become the regular members of the jury. A **regular juror** is a necessary juror, in particular a juror who is one of the required number of jurors. After enough regular jurors are selected, the court selects some alternate jurors. An **alternate juror** is an extra juror, in particular a juror who is available to substitute for a regular juror who is excused before deliberation begins. **Impaneled** means the jury and alternate jurors have been selected. Any remaining potential jurors are excused.

QUESTIONING JURORS TO DETERMINE IF THEY ARE IMPARTIAL

From *to speak the truth,* **voir dire**[1] or **voir dire examination**[1] is questioning prospective jurors for apparent unfair bias, interest, or prejudice. The judge and the attorneys for each party (or any party not represented by an attorney) ask the questions.

The judge in any trial, and the jury in a jury trial, should be, from *not one-sided,* **impartial**, which means without unfair bias, interest, or prejudice. From *slant,* **bias** means favoring one side or a preconceived positive opinion. For example, a mother has a natural bias in favor of her child. From *claim,* **interest**[5] means benefiting from one side or a partiality. For example, a person who has placed a bet that one side will win has an interest in seeing that side win. No interest in the sense of partiality is, from *not differing,* being **indifferent**, which means it does not make a difference to the person who prevails. It does not mean not caring. The judge in any trial, and the jury in a jury trial, should care that justice be done. In other words, they should be "disinterested, but not uninterested." From *previous judgment,* **prejudice** is disrespecting one side or a preconceived negative opinion. For example, a person who believes all members of a particular race are inferior has a prejudice against a person of that race.

Where the defendant is well known or charged with widespread crime, or where there is widespread pretrial publicity, it can be difficult to impanel an impartial jury and give the defendant a fair trial in a particular county or district. Accordingly, the defendant may make a motion for a **change of venue**, which is moving a trial to another court with jurisdiction, in another county or district, in order to secure a fair trial.

From *refuse,* to **recuse** is to remove yourself as a judge for apparent unfair bias, interest, or prejudice. **Recusal** is removal of yourself as a judge for apparent unfair bias, interest, or prejudice. Although a party may make a motion asking a judge to recuse him- or herself, known as a **motion for recusal**, a judge generally is on his or her honor to remove him- or herself if he or she knows that he or she has an apparent unfair bias, interest, or prejudice. From *not of the sort to make,* a **disqualified judge** is a judge who cannot serve in a particular case because of a personal interest in the case.

From *accuse falsely,* to **challenge** is to disagree with something or to object to something. From *for reason,* a **challenge for cause** or **objection for cause** is an objection to a prospective juror based on the juror's apparent unfair bias, interest, or prejudice. A juror successfully challenged for cause is not qualified to be a juror.

From *allowing no refusal,* **peremptory** means absolute, final, and not questioned or reviewed. Traditionally, a **peremptory challenge**[1] is an objection to a prospective juror for which the objector does not have to give a reason. Today, a **peremptory challenge**[2] is an objection to a prospective juror for which the objector does not have to give a reason, as long as the reason is not based on race. A juror against whom a peremptory challenge is made may be qualified to be a juror, but his or her service on the jury has been preempted—cut off. Each party is permitted a specific number of peremptory challenges such as six in a murder case, four in a felony case, three in a misdemeanor case, and three in a civil case.

JURY INSTRUCTIONS AND DELIBERATION

During a trial, no one outside the trial process or not otherwise authorized by the trial judge can communicate with a juror about the evidence and issues in the trial. Jurors cannot discuss the evidence and issues in the trial with each other until formal deliberations begin or the trial otherwise ends.

After observing the evidence and arguments presented during the trial, the jury acts **deliberately**, on purpose or with a fixed purpose, namely, to decide the facts of

the case and deliver a formal decision. From *entirely weigh,* to **deliberate** is to discuss, debate, reason, and make a decision. **Deliberation**[1] is discussing, debating, reasoning, and making a decision and a process that allows opinions to change.

From *back-draw,* to **retire**[2] is to be a juror and to leave the courtroom to begin or resume deliberation. Immediately before retiring to begin deliberation, the judge gives the jury instructions as to the relevant law, including how the jury is expected to reach and deliver its decision. Thus, **jury instructions**, **points of charge**, a **jury charge**, or a **charge**[3] is the judge's explanation of the law relevant to the case, given to the jury before the jury begins or resumes deliberation. From *load,* to **charge**[4] is to entrust someone with a duty or responsibility.

The judge also may have to instruct the jury during deliberation when the jury has a question. Occasionally, the jury will reach an impasse and ask the judge if they must continue to deliberate. The court may give a charge similar to the charge approved by the U.S. Supreme Court in the 1896 case of *Allen v. United States,* the **Allen charge** or **dynamite charge**, which is the charge that in most cases absolute certainty cannot be expected; that it is the jury's duty to decide the case if they can conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that if most jurors favor conviction, a dissenting juror should consider whether his doubt was reasonable; and that if a majority favor acquittal, the minority should ask themselves whether they too might reasonably doubt. See 164 U.S. 492.

The judge also may give brief instructions to the jury during the trial. From *to advise,* to **admonish** is to warn, caution, or advise. An **admonition** is a warning, caution, or advice. An admonition is usually included in a **curative instruction**, which is a jury instruction designed to correct a defect or error in trial. For example, the jury may be admonished to disregard improper evidence.

IN THE JURY ROOM

The jury retires to the jury room. In the courthouse but outside the courtroom, the **jury room** is the place where the jury usually sits when not needed or wanted in the courtroom and the place where the jury sits to deliberate after they have been instructed to do so. The jury may be sequestered by being kept together during deliberation and guarded from any tampering while they deliberate.

At the beginning of deliberation, it is traditional and still recommended today that the jury select a presiding member and spokesperson. From *front man,* **foreman** is the traditional name of the person, male or female, selected by a jury to be its presiding member and spokesperson. **Foreperson** is the modern name of the person, male or female, selected by a jury to be its presiding member and spokesperson.

From *to cut,* a **decision**[1] or, from *come upon,* a **finding**[1] is, generally, the decided outcome of a case or issue or, loosely, what was found. A decision or finding is "made."

In a jury trial, the jury's formal decision is, from *truth-speak,* its **verdict**[2]. From *of one mind,* **unanimous** means by the vote of all or in total agreement. Unlike a civil case, in which a verdict is routinely permitted on the agreement of three-fourths or some other percentage of the jurors, in most cases in most states the verdict in a criminal case must be unanimous. A criminal verdict does not have to be unanimous, however, where the state requires a sufficient vote to assure adequate jury deliberation. (See, for example, *Apodaca v. Oregon,* 406 U.S. 404 (1972), establishing the exception.)

A **hung jury** is a jury that cannot agree on a verdict or a jury that cannot agree on a verdict in a reasonable time. A hung jury generally results in a mistrial and a new trial before a new jury. However, the prosecutor in a criminal case may conclude that the defendant is unlikely to be convicted and decide not to prosecute.

In a complicated case, the jury may be required to return a **special verdict**, which is a verdict on each of several issues of fact presenting to the jury, from which the court determines the jury verdict. Its use helps to avoid a **false verdict**, which is a verdict that is obviously unjust because of the manner at which it was arrived such as flipping a coin. A **compromise verdict** is a verdict that is unjust because a juror improperly surrendered his or her opinion such as by selling his or her vote. A **quotient verdict** is a verdict in a civil case that is unjust because the jurors determined damages by adding together what they would individually award and dividing the total by the number of jurors.

A verdict of a jury is **returned**, meaning brought back to court. A jury trial normally ends with the jury's verdict. After the verdict is announced by the foreperson, **polling the jury**, which is the procedure in which each juror is asked about his or her individual decision about the verdict, may briefly extend a jury trial. A party may request polling to resolve suspicion that a juror's decision about the verdict was misrepresented.

A case may be dismissed before the jury begins deliberation, in the form of a directed verdict or judgment as a matter of law. A **directed verdict** or **judgment as a matter of law**, with the abbreviation **JMOL**, is a verdict entered in a jury trial by the court without deliberation by the jury because the facts developed at trial and the applicable laws are such that the court's verdict is the only verdict that could have been reasonably returned by the jury. In a criminal case, a verdict can only be directed for the defendant. A verdict cannot be directed for the prosecution because the defendant has a right to have his or her case tried by the jury.

THE SOVEREIGN POWER OF A JURY

An important aspect of criminal jury trials is little known because it is deemed unfair to instruct, mention, or remind the jury about the full extent of its power. One common jury instruction that alludes to the jury's power is the instruction that the jury has the right to believe or disbelieve, in whole or in part, the testimony of any witness. What happens if the jury disbelieves everyone? The profound truth is that a trial by jury is truly a trial by the jury—and nobody else. If a jury finds the defendant not guilty—for any reason—the defendant is not guilty. The jury's verdict cannot be changed.

Because the jury is given sovereign power, it may engage in **jury nullification**, which is refusing to apply any law or rejecting any evidence in order to reach a verdict that is in accord with the jury's sense of justice, that sends a message about the jury's sense of justice, or both. Suppose, for example, that with premeditation a person kills a known terrorist. If the jury believes that the law is immoral where it makes a moral act a crime, that the prosecution was motivated by a perverted sense of justice, or that the prosecution was motivated by evil, the jury can set aside the law or the evidence, find the defendant not guilty, and send a message about good and evil.

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- **jurors**
- **jury challenge**
- **jury strike**
- **province of the jury**
- **recusation**
- **taleswoman**
- **trier of fact**
- **trier of law**

Chapter 42

Trial, Generally

INTRODUCTION

This chapter discusses trial, both generally and in civil cases. Trial in a criminal case is discussed in Chapter 52. In discussing trials, this chapter discusses the basics of presenting evidence. From *perceptible,* **evidence**[1] is, generally, the law about formal proof. More matters of evidence are discussed in Chapter 43.

From *testing,* a **trial** is the formal determination of the facts and the original application of the law in a case brought to court and/or a formal adversary proceeding to resolve a legal dispute. From *platform,* a **tribunal** is a court before which a trial is held and/or an entity with authority to hold a trial and before which a trial is held. From *of a forum,* **forensic**[1] specifically means related to a trial or evidence.

To **try** is to take a case to trial or to hold a trial. A **certificate of readiness** is, in some states, a document filed with the court to indicate that the parties are ready for trial.

Going into a trial, good attorneys and wise pro se litigants have a **theory of the case**, which is a plausible simple story explaining the circumstances of the case and why a particular party should win the case. For example: "The defendant is not liable because the plaintiff was shot by a third person and not by the defendant." Everything a good attorney or litigant does in handling the case supports his or her theory of the case. From *carry on a lawsuit,* a **litigation position** is a party's theory of the case during litigation or a potential party's theory of the case in anticipation of litigation.

More than one cause of action and more than one issue may be joined in a single case. A severance may be required, however, because it may be inefficient or unfair to try all the claims or all the issues together. From *two,* **bifurcated trial** is a trial in which separate claims or separate issues are tried in separate proceedings.

PROOF, GENERALLY

As a general rule, facts are determined in a trial by the presentation and evaluation of evidence. From *show worthy,* to **prove** means to show with evidence that something is true. From *to lead,* to **adduce** is to present evidence. From *that which proves,* **proof** is evidence that something is true.

From *at first view* or *on its face,* **prima facie evidence** is sufficient evidence, when standing alone, to establish a fact or a cause of action. A **prima facie case** is the presentation of sufficient evidence, unless rebutted or defended against, to establish a cause of action.

From *to carry (a load),* a **burden**[2] is, generally, a duty, restriction, or anything that is oppressive. The **burden of production**, the **burden of going forward with the evidence**, or the **burden to go forward** is the duty to present sufficient evidence to establish a

prima facie case or the duty to present evidence to rebut or raise a defense to an established prima facie case.

The **burden of proof** or **onus probandi** is the duty to present sufficient evidence to substantiate an allegation and overcome contrary evidence as to an issue, to establish a cause of action or an affirmative defense, or the standard of evidence required to establish a cause of action or an affirmative defense. From *strongly urge,* the phrases **burden of persuasion**, **persuasion burden**, and **risk of nonpersuasion** also refer to the duty to present sufficient evidence to substantiate an allegation and overcome contrary evidence as to an issue to establish a cause of action or an affirmative defense. The phrase **degree of proof** also refers to the standard of evidence required to establish a cause of action or an affirmative defense.

The degrees of proof used in civil cases are preponderance of the evidence (for an ordinary case) and clear and convincing evidence (for a case about status).

From *greater weight,* **preponderance of the evidence** is the lowest degree of proof; the burden of proof for an affirmative defense in a criminal case; the burden of proof in an ordinary civil case; in terms of quality and not quantity, the greater weight of the evidence; evidence of sufficient weight to tip the scales of justice in favor of the party; evidence more convincing than the opposing evidence; and leaving a prudent person with a more-likely-than-not belief. "Preponderance of the evidence" should not be thought of in numerical terms, but if you insist, in terms of quality, not quantity, it is more than 50 percent of the total evidence.

From *bright,* **clear** means obvious or easily seen. **Clear and convincing evidence** is the intermediate degree of proof; the burden of proof in a special civil case such as a case involving a person's legal status or an equitable remedy; evidence greater than preponderance of the evidence but less than proof beyond a reasonable doubt; and evidence that is obvious or easily seen, basically satisfied, and leaving a prudent person with a firm belief. "Clear and convincing evidence" should not be thought of in numerical terms, but if you insist, in terms of quality, not quantity, it is about 75 percent of the total evidence. It is evidence that produces in the mind of the trier of fact an abiding conviction that the truth of a factual contention is "highly probable."

Alluding to either preponderance or clear and convincing evidence, **substantial evidence** is, from *ample,* evidence accepted as adequate to support a conclusion.

There are two kinds of facts that don't have to be proved. First, from *to let go,* to **admit**[1] is to voluntarily acknowledge that a fact is true. From *intense yield,* to **concede** is to not contest a fact. An **admission**[4] is, generally, the voluntary acknowledgment that a fact is true. A **concession** is a fact that is not contested. A party or the party's attorney may admit, agree to, or concede a fact and not require an adverse party to prove the fact. A fact that is formally admitted, agreed to, or conceded by the parties and an admission, agreement, or concession that cannot be disregarded or set aside at will is known, from *exact a promise,* as a **stipulation** or, occasionally, as a **judicial admission**. Stipulations help to speed up trials by not requiring formal proof of facts not in serious dispute.

Second, from *made known,* **notice**[1] is, generally, communicated or recognized information about a fact or law. **Judicial notice** is a court's recognition of a reasonably indisputable fact or law without formal proof because it is generally known in the jurisdiction or capable of ready determination from reasonably reliable resources. For example, whether one city is east or west of another city is a reasonably indisputable fact generally known by people in the area or by reading a relevant map.

When proof is required, there are two kinds of evidence: direct and circumstantial. The thing to be proved is usually a fact or event. From *around standing,* **circumstances** are the facts and events that existed immediately before, at the same time, or immediately after the fact or event in dispute. **Direct evidence** is evidence that tends to prove

the fact or event in dispute itself, regardless of the circumstances. For example, a witness who says he or she saw snow falling provides direct evidence that it was snowing. A document is direct evidence of what it says. **Circumstantial evidence** or **indirect evidence** is evidence that tends to prove the fact or event in dispute in conjunction with an inference from the circumstances. For example, a witness who says that there was no snow on the ground before and that there was snow on the ground afterwards provides circumstantial evidence that it was snowing. A document is circumstantial evidence of what was going on when the document was made.

Direct evidence and circumstantial evidence are equally good evidence and both can be used to support the other kind of evidence. Evidence supporting other evidence is known as **corroborating evidence** or, simply, from *intense strengthening,* **corroboration**. To **corroborate** is to provide evidence supporting other evidence.

TESTIMONY

The method of proof that dominates almost every trial is witness testimony. Generally, from *witness statement,* **testimony**[1] or **testimonial evidence** is oral evidence or formal verbal evidence. Specifically, **testimony**[2] is the statement or statements of a witness under oath or affirmation at a deposition, hearing, or trial. To **testify** is to provide testimony, to make a statement under oath or affirmation, or to make a statement when likely to be telling the truth. When an official court reporter is assigned for a trial, the official court reporter makes the official transcript of the testimony given at the trial.

From *knowledge-having,* a **witness**[2] is a person who has direct sensory impressions of a fact or event. For a trial, a **witness**[3] is a person expected to have firsthand knowledge and/or an expert opinion useful to the court and/or the jury in deciding a case, a person called to testify, and a person who testifies about what the person has seen, heard, touched, smelled, tasted, or otherwise observed. From *see*, an **eyewitness** is a person expected to testify about what the person has seen, a person who experienced in real time the actual facts or events, or, simply, a person who saw what happened.

Ordinarily, in a civil case, the parties ask the witnesses they intend to call to the stand to appear in court voluntarily. If necessary, the parties can have the court compel the attendance of a witness by summoning the witness. From *under punishment,* a **subpoena**[1] is, generally, a summons to be a witness and an order of a court or other governmental entity directing a person to appear or things to be brought to a deposition, hearing, or trial. Where a witness is in a foreign jurisdiction, a court may make **rogatory letters**, which is, from *question,* a formal request to a foreign court that the testimony of a witness residing in the foreign jurisdiction be taken as directed by the foreign court and transmitted to the requesting court.

From *suitable,* **competent**[2] or having **capacity**[3] means capable of doing. From *not suitable,* **incompetent**[2] or having **incapacity**[2] means not capable of doing.

To be permitted to testify, a witness must be a **competent witness** or, simply, **competent**[3], meaning a witness who understands the duty to tell the truth (even if the witness does not tell the truth) and has, or appears to have, firsthand knowledge and/or an expert opinion useful to the court and/or the jury in deciding the case.

Although adult witnesses are generally assumed to be competent, some witnesses are not competent. If the competency of a witness is seriously questioned by a party or by the court, the court must determine the competency of the witness.

To test the competency of a witness, in French *to speak the truth,* **voir dire**[2] or **voir dire examination**[2] is questioning a witness to determine if the witness understands his or her duty to tell the truth and has firsthand knowledge and/or an expert opinion useful to the court and/or the jury in deciding the case. The most common voir dire

examination is when a judge questions a prospective child witness to determine if the child witness understands the duty to tell the truth. The terms **voir dire**[3] and **voir dire examination**[3] also generally refer to any testing of witness testimony by the court.

Not permitted to testify, an **incompetent witness** or, simply, an **incompetent**[3] is a witness who does not understand the duty to tell the truth or does not have, or does not appear to have, firsthand knowledge and/or an expert opinion useful to the court and/or the jury in deciding the case.

From *out entice,* to **elicit** means to bring out. As a general rule, the testimony of a witness is brought out, **elicited**, by **examining a witness** or **examination**, which is questioning a witness under oath or affirmation and eliciting the response, or lack of response, of the witness. Witness testimony elicited by questions results in a **colloquy**, which is, from *together speak,* a question-and-answer discussion. Witness testimony also may be spontaneous or, when permitted by the court, presented in a **narrative**, which is, from *relate* or *explain,* a story told by a witness.

To **call a witness** is when an attorney or party requests a witness to take the witness stand or otherwise testify and/or when the court orders a witness to take the witness stand or otherwise testify.

From *straight,* **direct examination**, **direct questions**, or, simply, **direct** is when the attorney or party who called the witness initially questions the witness. From *opposed,* **cross-examination**, **cross questions**, or, simply, **cross**, is when, after direct, an attorney or party who did not initially call the witness questions the witness.

The **American rule of cross-examination** or, simply, the **American rule** is that the scope of cross is limited to what the witness has testified on direct plus, at the court's discretion, additional matters as if on direct. (The American rule is followed in federal courts and in the majority of the states—for example, New York). The **English rule of cross-examination** or, simply, the **English rule** is that the scope of cross is not limited to what the witness has testified on direct. (The English rule is followed in England and in a minority of the states—for example, Ohio).

Redirect examination, **redirect questions**, or, simply, **redirect** is when the attorney or party who called the witness questions the witness again. **Recross-examination**, **recross questions**, or, simply, **recross** is when, after redirect, an attorney or party who did not call the witness questions the witness again. The scope of redirect and recross is limited to the scope of the previous examination.

Because a witness called by an attorney or party will probably give answers favorable to that attorney or party, and so to avoid the witness testifying in a parrotlike fashion, *as a general rule,* on direct or redirect an attorney or party is *prohibited* from asking the witness a **leading question**, which is a question phrased to suggest the answer. "You saw her hit him, didn't you?" is an example of a leading question phrased to suggest that the witness saw a woman hit a man. With a leading question, the witness is tempted to agree to whatever is suggested, regardless of what the witness actually remembers or thinks. Isn't it true that he hit her?

Thus, *as a general rule,* on direct or redirect, an attorney or party is *permitted* only to ask a **direct question**, which is a question not phrased to suggest the answer. "What did you see?" is an example of a direct question not phrased to suggest what the witness saw. The witness is prompted to testify about whatever the witness actually remembers or thinks. It is possible that the witness did not see what happened.

The exceptions to the general rule, when on direct or redirect an attorney or party is *permitted* to ask a *leading question,* are when the judge permits it (1) for preliminary matters or otherwise to save time; (2) because the witness has difficulty concentrating, speaking, or staying on the subject; or (3) because the witness is,

from *of an enemy,* a **hostile witness**, which is a witness called by an attorney or party who will probably give answers unfavorable to that attorney or party because of bias, interest, or prejudice.

Because a witness not called by an attorney or party will probably give answers not favorable to that attorney or party, and so to prompt the witness into testifying about something the witness wants to avoid, on cross or recross an attorney or party is *permitted* to ask a witness a *leading question*.

EXHIBITS AND DEMONSTRATIONS

Demonstrative evidence, evidence other than testimony, is evidence consisting of objects or things that convey information to the judge and/or jury. **Real evidence** is an object directly related to the facts at issue in a trial.

In addition to eliciting testimony, the other methods of proof are presenting exhibits and making demonstrations. Exhibits and demonstrations are the "show" that complements the "tell" of testimony.

From *out hold,* an **exhibit**[1] is physical evidence, tangible evidence, or formal nonverbal evidence. Exhibits include documents, records, and other physical items. An exhibit may be **documentary evidence**, which is, obviously, evidence from a document. Documents are often used as evidence because they are usually regarded as providing at least a partial record of what happened. The **best evidence rule** or **original document rule** is the rule of evidence that to prove the content of a writing, photograph, or recording, presentation of the original writing, photograph, or recording is required, if possible. Notice that the rule is not a general rule requiring the best evidence of any kind. With the exception of a writing, a photograph, or a recording, evidence need only be admissible, not the best available. Suppose that there were two witnesses to an event: one who was one block away and another who was two blocks away. There is no requirement that the witness one block away must be called as a witness. The sole witness may be the witness who was two blocks away.

From *entirely show,* a **demonstration**[1] is showing how something could have occurred or probably occurred. Demonstrations include procedures, events, causes, and effects shown or acted out in or for the court.

Because demonstrative evidence does not speak for itself, it must be authenticated. From *self sufficient,* **authentication** is the process of connecting objects or things with the facts of the case, sufficient to support a finding that they are what they appear to be. Authentication is identification. To **authenticate** is to identify an object or thing as being what it appears to be and to prove that an object or thing is genuine.

An object or thing is usually authenticated by a witness testifying that he or she knows that the object or thing is what it appears to be; that it is the real object or thing relevant to the case. Authentication may require several witnesses to show a chain of custody. An analogy to the links in a chain, **chain of custody** is authenticating an object or thing by showing its safe and unbroken journey, unaltered, from the point of relevancy in the case all the way into the courtroom.

Other methods of authentication include noting the distinctive characteristics of an object or thing and comparing the object or thing with a similar object or thing previously authenticated. Some objects and things are self-authenticating. A common authentication is, from *mark of a person,* a **signature**, which is writing your name or putting your mark on something to authenticate it or give it legal effect such as to affirm the content of a text. From *sure-made,* **certified** means authorized or official and a **certified copy** is a copy of a document certified as a true copy and signed by the person or a clerk in whose custody the original document is entrusted. A **certificate** is a signed statement asserting the truth of the facts stated therein.

OBJECTING TO EVIDENCE

Evidence should be **probative**, meaning tending to prove a relevant fact. From *to let go,* evidence should be **admissible**, meaning fair, probative, and nonprejudicial evidence or evidence permitted to be considered by a jury, court, or other decision maker in deciding the merits of a case. Accordingly, **inadmissible** means unfair, prejudicial, or nonprobative evidence or evidence not permitted to be considered by a jury, court, or other decision maker in deciding the merits of a controversy.

In a trial, the parties present evidence and the court rules whether or not it is permitted to be considered. From *to let go,* to **admit**[2] evidence means that the court rules that an item of evidence is admissible. From *out-close,* to **exclude** evidence means that the court rules that an item of evidence is inadmissible. **Admitted** or **admission**[3] means evidence the court ruled admissible and evidence permitted to be considered in reaching a decision. **Excluded** or **exclusion**[4] means evidence the court ruled inadmissible and evidence not permitted to be considered in reaching a decision.

Although evidence may be inadmissible in theory, it is not actually inadmissible until the court rules that it is inadmissible. Under the **waiver doctrine**, all evidence is admissible unless it is objected to by an adverse party or the court and the court rules that it is inadmissible. Accordingly, the attorney for an adverse party or a pro se adverse party must object to the admission of evidence to have it formally declared inadmissible by the court. From *against throw,* to **object** is to formally disagree or to make an objection. An **objection** is formal disagreement; formal disagreement with something related to a trial or legal proceeding; formal disagreement with the admission of the evidence offered, presented, or potentially being presented in a deposition, hearing, or trial; and a motion for a court order that the evidence being offered is inadmissible.

As a general rule, an objection must be a **timely objection** or **timely**, meaning an objection made when the evidence objected to was being offered.

From *up hold,* to **sustain** is to formally agree, adopt, or support or to declare that an objection or motion is sustained. Generally, **sustained**[2] is formal judicial agreement, adoption, or support; the presiding judge's formal agreement with an objection or motion; or the presiding judge's adoption of an objection or motion. From *higher rule,* to **overrule** is to formally disagree or reject or to declare that an objection or motion is overruled. Generally, **overruled**[2] is formal judicial disagreement or rejection, the presiding judge's formal disagreement with an objection or motion, or the presiding judge's rejection of an objection or motion. **Well taken** is judicial agreement or a judge's agreement with a point of argument. **Not well taken** is judicial disagreement or a judge's disagreement with a point of argument.

Historically, the procedure of objection was **exception**. From *out-take,* to **except** was to object or to take exception. If an exception was **noted**, it meant that the objection was overruled but recorded in the record for a potential appeal. Today, the making of an objection and the court's ruling on the objection, recorded by the court reporter, is sufficient to preserve for appeal the alleged erroneous ruling. **Preserve for appeal** means making an adequate record of an alleged error so that an appellate court can review it. An offer of proof may be made to preserve excluded evidence for appeal.

An **offer of proof** or **proffer** is offering evidence for acceptance by the trial court and review by the appellate court; the party against whom an objection may be sustained, putting into the record and preserving for appeal the evidence that will be offered if the court does not sustain the objection; or the party against whom an objection was sustained, putting into the record and preserving for appeal the evidence that would have been offered if the court did not sustain the objection. In a jury trial, an offer of proof is done outside of the presence of the jury.

Especially before a trial begins, when a party anticipates that another party will offer evidence to which the party objects, the party may make a motion in limine. From *at the threshold,* a **motion in limine** is a motion to exclude anticipated evidence as inadmissible and/or a motion to exclude any reference to anticipated evidence until it is determined to be admissible. In ruling on the motion in limine before a trial, the court, in effect, determines whether the evidence objected to will or will not be admitted during the trial or whether the court will wait until the evidence is offered during the trial to determine its admissibility. If necessary, the court will hold an **evidentiary hearing**, which is a hearing on the issue of the legality of certain evidence and a hearing outside of a trial to determine whether or not the evidence will be admitted during the trial. Motions in limine help to speed up trials and avoid mistrials caused by the jury seeing and hearing inadmissible evidence.

TESTING THE EVIDENCE

Left unchallenged, all evidence that is not inherently incoherent or inconsistent has some **credibility**, meaning its believability or worthiness of belief. The purpose of a trial is to test the quantity of evidence for or against an issue and, more importantly, to test the quality of the evidence, if any, for or against an issue. **Credible evidence** is believable evidence or evidence worthy of belief.

In addition to offering evidence that is contrary to the evidence offered by another party, a party is permitted to confront the evidence offered by another party.

To **discredit** means to reduce the credibility of someone or something. In a criminal case, the defendant has a constitutional right to confront the witnesses against him or her, including the right to cross-examine any adverse witness. In addition to eliciting favorable testimony, where possible, the purpose of cross-examination is to discredit the direct testimony of an adverse witness, where possible.

A witness is most discredited when he or she is impeached. From *hinder,* to **impeach**[2] a witness is to directly attack the credibility of a witness, including to attack a person's perception, sincerity, narration, or memory with regard to the facts or to expose a person's bias, interest, or prejudice. **Impeachment**[2] is directly attacking the credibility of a witness, including attacking a person's perception, sincerity, narration, or memory with regard to the facts or exposing a person's bias, interest, or prejudice. **PIN-M** is a mnemonic for the impeachment attacks of perception, (in)sincerity, narration, and memory with regard to the facts. **BIP** is a mnemonic for the impeachment attacks of bias, interest, or prejudice.

From *truthfulness,* **veracity** is a person's character related to honesty or truthfulness. Veracity is usually impeached by pointing out contradictions, self-contradictions, and acts showing a lack of veracity such as conviction for a crime.

From *again make fit,* **rehabilitation**[1] is an attempt to restore the credibility of a witness who has been discredited or impeached as a witness.

THE ORDER OF TRIAL

The **order of trial** is the order in which a trial proceeds. During a trial, the court may permit a paralegal to sit **second chair**, which is sitting beside an attorney during a legal proceeding and helping the attorney to do anything that might otherwise distract the attorney from his or her advocacy. Examples of second chair activities include readying exhibits, taking notes, and watching the jury. As a general rule, but not in every case, a trial proceeds as follows.

A jury trial begins with the impaneling of jurors. After the jury is impaneled, the jurors are sworn. A bench trial begins, or a jury trial continues, with an oral opening

statement or argument by the plaintiff's attorney or by the plaintiff if not represented by an attorney. The remainder of this section will refer to the plaintiff's attorney or the plaintiff as "the plaintiff."

From *mouth,* **oral** means by mouth or spoken. From *making clear,* an **argument**[1] is, generally, a course of reasoning intended to induce belief. An **oral argument** or **argument**[2] is a spoken argument by an attorney in order to persuade the court or jury to decide the case in the favor of the attorney's client. All arguments to the jury are oral, rather than written, because arguments are not evidence and so should not be overemphasized in comparison to the evidence. From *status,* a **statement** is an allegation of fact, a declaration of fact, or a recital of facts.

An **opening statement** or **opening argument** is an oral statement or argument made by a party's attorney, or by the party if not represented by an attorney, immediately before the attorney's or party's evidence is presented outlining what the attorney or party expects to prove and how the attorney or party intends to prove it. To **open**[2] is to give an opening statement or opening argument.

After the opening statement or argument of the plaintiff, the defense attorney, or the defendant if not represented by an attorney, may make an opening statement or argument, waive it, or defer it until he or she presents evidence. The remainder of this section will refer to the defendant's attorney or the defendant as "the defendant."

At the beginning of the trial or early in a trial, any party may ask that the witnesses be **sequestered**[2], which is separating the witnesses and keeping them out of the courtroom until after they testify to avoid any intentional or unintentional matching or mismatching of their testimony with the testimony of other witnesses.

The plaintiff then begins to present his or her **case in chief**, which is the evidence a party intends to present at the first opportunity to do so, at least the evidence required to make a prima facie case or establish a defense.

The plaintiff calls his or her witness or witnesses. For each witness there is a direct examination. After the direct examination, any further examination may be waived. After the direct examination, there may be a cross-examination. Then there may be a redirect examination. Then there may be a recross examination. Unless further examination is required, the next witness, if any is called. "**No more questions**" and "**your witness**" are each a phrase signaling the end of an examination. "**No questions**" is a phrase signaling the waiver of an examination.

After the last witness has been called and after that witness has been examined by the defense (unless waived), the plaintiff rests its case. To **rest your case** or, simply, to **rest** is to announce that you do not intend to call any more witnesses or to announce that you do not intend to call any more witnesses in the current portion of your case.

At any time during a civil trial, but especially after the plaintiff rests his or her case, the defense may make a motion for a directed verdict or a motion for judgment as a matter of law. A **directed verdict** or **judgment as a matter of law**, with the abbreviation **JMOL**, is a verdict entered in a jury trial by the court without deliberation by the jury because the facts developed at trial and the applicable laws are such that the court's verdict is the only verdict that could have been reasonably returned by the jury.

The court may direct a verdict for the defendant or grant the defendant judgment as a matter of law based on the court's finding that there is **insufficient evidence**, which is less evidence than the minimum required to submit the case to a jury or, in other words, less evidence than is necessary to meet a party's burden of proof.

If the trial continues, the defendant makes his or her opening statement or argument if it was deferred, unless it is waived. The defendant calls his or her witness or

witnesses. For each witness there is a direct examination. After the direct examination, any further examination may be waived. After the direct examination, there may be a cross-examination. Then there may be a redirect examination. Then there may be a recross examination. Unless further examination is required, the next witness, if any, is called. After the last witness has been called, and after that witness has been examined by the plaintiff (unless waived), the defense rests its case.

Next, the plaintiff may present a rebuttal case. A **rebuttal case** or **rebuttal**[1] is the evidence a party presents in response to the opposing party's evidence presented immediately before. The plaintiff calls his or her rebuttal witness or witnesses. For each witness there is a direct examination. After the direct examination, any further examination may be waived. After the direct examination, there may be a cross-examination. Then there may be a redirect examination. Then there may be a recross examination. Unless further examination is required, the next witness, if any, is called.

In theory, the defense may present a rebuttal case to the plaintiff's rebuttal case, and so on, until one party has no more evidence to present or waives doing so.

After the presentation of evidence has ended, the plaintiff presents his or her closing statement, closing argument, or summation, unless waived. The plaintiff may defer part of his or her closing statement, closing argument, or summation until after the defendant gives his or her closing statement, closing argument, or summation, if any.

A **closing statement**[1], a **closing argument**, or a **summation** is an oral statement or argument made by a party's attorney, or by the party if not represented by an attorney, after the evidence has been presented reviewing the evidence and explaining why his or her position should prevail. From *to shut,* to **close**[2] is to give a closing statement, a closing argument, or a summation. After the presentation of evidence has ended and after the plaintiff has presented the nondeferred portion of his or her closing statement, unless waived, the defendant makes his or her closing statement, unless waived. If the plaintiff has deferred a portion of his or her closing statement, the plaintiff gives the remainder, unless waived. The right of the party with the burden of proof to speak first and last when the parties are giving their closing statements, closing arguments, or summations is known as the **right to open and close**.

In a jury trial, the court instructs the jury, which retires, deliberates, reaches a verdict, and returns with the verdict. In a civil case, the verdict of the jury does not have to be unanimous. Depending on the type of case and the jurisdiction, the verdict in a civil case may be by three-fourths, two-thirds, or a majority vote of the jurors voting.

After the verdict in a jury trial, or at the end of a bench trial, the judge either takes the matter under advisement or immediately renders judgment. From *advice,* to **take under advisement** means to consider the arguments and evidence privately, with the intent to announce the judgment or decision at a later time.

If a jury's award of damages to a plaintiff is excessive because it is greater than what any reasonable jury could award, the trial court may grant a defendant's motion for a new trial or a remittitur. From *back-send,* a **remittitur** is a plaintiff's agreement to take a reduced amount of damages, a reasonable amount of damages, instead of having a defendant's motion for a new trial being granted. Generally, a trial court will not set aside or interfere with the verdict of a jury unless it is in such an amount as to shock the conscience of the court or to cause the court to believe that it was the result of sympathy, passion, or prejudice or that the jury, in fixing the amount, were motivated by factors that should not have been taken into consideration by them in arriving at their verdict.

At the other extreme, from *to place* (add), an **additur** is a defendant's agreement to pay an increased amount of damages, a reasonable amount of damages, instead of

having a plaintiff's motion for a new trial being granted. Not recognized at common law, additur is prohibited in federal court. It is deemed to be a violation of the defendant's Seventh Amendment right to a trial by jury "according to the rules of the common law."

GO TO THE NET

Visit the *Legal Terminology Explained* Online Learning Center at http://www.mhhe.com/nolfi09 for an expanded index and glossary, including:

- **admissibility**
- **bifurcated**
- **indicative**
- **indicia**
- **indicium**
- **leading**
- **motion for a directed verdict**
- **rebuttal witness**
- **self-authenticating document**
- **tendering**
- **veracity test**
- **witness locator service**

Chapter 43

Evidence

EVIDENCE, GENERALLY

The rules of evidence apply to both civil cases and criminal cases. The basics of presenting evidence, including burden of proof, judicial notice, circumstantial evidence, testimony and witnesses, and exhibits and demonstrations, are discussed in Chapter 42.

From *perceptible,* **evidence**[1] is, generally, the law about formal proof. The term **criminal evidence** emphasizes the law about formal proof in a criminal case. In the sense of tendency to prove, **evidence**[2] is something from which it can be inferred that a disputed fact or legal conclusion is more or less likely to be true, or, simply, proof. More specifically, **evidence**[3] is testimony, exhibits, and/or demonstrations. In the loose sense, an item of evidence can be **testimony**[3], what a witness says in court; an **exhibit**[2], an actual item displayed in court; or a **demonstration**[2], a re-creation displayed in court.

Generally, from *relieve,* **relevant**[1] is something that alters the probabilities and tends to prove. Generally, **irrelevant**[1] is something that does not alter the probabilities and does not tend to prove. Generally, from *of matter,* **material**[1] is something of consequence or something necessary to prove. Generally, **immaterial**[1] is not something of consequence or not something necessary to prove.

Relevant evidence or, simply, **relevant**[2] is evidence having any tendency to make the existence of a fact of consequence more probable or less probable than it would be without the evidence. **Irrelevant evidence** or, simply, **irrelevant**[2] is evidence not having any tendency to make the existence of a fact of consequence more probable or less probable than it would be without the evidence. **Material evidence** or **material**[2] is evidence of a fact of consequence. **Immaterial evidence** or **immaterial**[2] is evidence not of a fact of consequence. A **material witness** is a witness who knows or possesses material evidence, including a witness with knowledge of a material fact.

From *close up,* **conclusive evidence** is evidence that is incontrovertible or evidence that is arguably incontrovertible. From *not disputable,* **incontrovertible** means not able to be contested or questioned. Most evidence is not conclusive evidence.

Evidence should be **probative**, meaning tending to prove, but evidence should not be probative because of **unfair prejudice**, which is an undue tendency to suggest, based on bias, interest, or prejudice. Evidence should be **admissible** or **competent**[4] meaning fair, probative, and nonprejudicial evidence and evidence permitted to be considered by a jury, court, or other decision maker in deciding the merits of a case. Accordingly, **inadmissible** or **incompetent**[4] means unfair, prejudicial, or nonprobative evidence and evidence not permitted to be considered by a jury, court, or other decision maker in deciding the merits of a controversy.

In a trial, a court admits or excludes evidence. To **admit**[2] evidence means that the court rules that an item of evidence is admissible. To **exclude** evidence means that the court rules that an item of evidence is inadmissible. **Admitted** or **admission**[4] means

evidence the court ruled admissible and evidence permitted to be considered in reaching a decision. **Excluded** or **exclusion**[4] means evidence the court ruled inadmissible and evidence not permitted to be considered in reaching a decision.

From *establish,* a **foundation**[3] is evidence necessary to establish other evidence. From *of well-being,* **de bene esse** means conditionally. **Evidence de bene esse** is evidence admitted conditionally, on the promise to connect up the evidence. To **connect up** evidence is to later show the relevance of evidence admitted conditionally.

Because courts frequently rule on the admissibility of evidence, for the sake of consistency, in the 1970s, the Congress passed and the U.S. Supreme Court adopted the **Federal Rules of Evidence**, with the acronym **FRE**, which are the rules of evidence used in a U.S. district court. The rules have become a model for the rules of evidence in many states.

INFERENCES AND PRESUMPTIONS

From *in-carry,* an **inference** is a deduction or conclusion reached from a given fact. From *before-take,* a **presumption** is an inference required by law. A **rebuttable presumption**, a presumption that generally can be overcome, is a presumption that may be overcome by evidence contrary to the given fact, contrary to the inferred fact, or both. A common rebuttable presumption is that a person who has disappeared without a trace for many years is presumed dead. Evidence that the person was recently seen alive rebuts the presumption. A **conclusive presumption** or **nonrebuttable presumption**, a presumption that generally cannot be overcome, is a presumption that may be overcome only by evidence contrary to the given fact. In effect, a conclusive presumption is a substantive law. For example, at common law, there was a conclusive presumption that a child under the age of seven was incapable of committing a crime. The presumption could be overcome only by evidence that the child was seven years old or older.

Developed under the common law and perfected in the Constitution of the United States, in a criminal case there is a fundamental **presumption of innocence**, also known as **innocent until proven guilty**, which means that a person is innocent of a crime until proven guilty in a court of law.

CHARACTER OR HABIT

From *distinctive nature,* **character** is a person's personality traits or reputation in the community. **Character evidence** is evidence about a person's personality traits or reputation in the community. As a general rule, character evidence is not admissible to show that a person acted in conformity therewith on a particular occasion.

From *dress* or *practice,* a **habit** is a developed invariable response to a particular stimulus. From *intense use,* a **custom** is a group habit and **customs**[2] are group habits. **Habit evidence** is evidence of a developed invariable response to a particular stimulus. Habit evidence is admissible if both the habit and stimulus are proven.

From *manner of operation,* **modus operandi**, abbreviated **M.O.**, is the characteristic method by which a person does something such as the characteristic method by which a criminal commits a crime. Modus operandi evidence may be admissible to the extent the modus operandi has become a habit.

PRIVILEGE, GENERALLY

From *apart separate,* a **secret** is something not generally known. From *completely trust,* a **confidence** is a shared secret or a relationship in which there is or will be a shared secret.

Specifically, **confidential**[2] or **confidential information** is something secret except between a limited number of parties who may know it and have agreed or have a duty to keep it secret and something secret not to be revealed to a party who does not know it and has not agreed or does not have a duty to keep it secret. **Confidentiality** means involving an agreement or a duty to keep secrets. A **confidential relationship** is a relationship in which something is secret except between a limited number of parties who may know it and have agreed or have a duty to keep it secret and a relationship in which something secret is not to be revealed to a party who does not know it and has not agreed or does not have a duty to keep it secret. A **confidential communication** is a communication of something confidential between parties in a confidential relationship.

In the law of evidence, a **privilege**[4] is the right to refuse to disclose confidential information, a confidential relationship, or a confidential communication or the duty to refuse to disclose confidential information, a confidential relationship, or a confidential communication based on a confidential relationship with a person who holds the right to refuse to reveal it. **Privileged** is something to which a privilege applies. The person who holds a privilege may waive the privilege.

Privileged information is confidential information that a person may refuse to disclose because of the confidential circumstances under which it was shared or confidential information that a person has a duty to refuse to disclose because of the confidential circumstances under which it was learned or discovered. A **privileged relationship** is a confidential relationship that a person may refuse to disclose because of the confidential circumstances under which confidential information was shared or a confidential relationship that a person has a duty to disclose because of the confidential circumstances under which confidential information was learned or discovered. A **privileged communication** is a confidential communication that a person may refuse to disclose because of the confidential circumstances under which it was shared,or a confidential communication that a person has a duty to refuse to disclose because of the confidential circumstances under which it was learned or discovered.

PRIVILEGES RECOGNIZED IN MOST STATES

Spousal privilege, **marital communications privilege**, **marital privilege**, or **husband–wife privilege** is the privilege held by each spouse, except in legal actions between them, to refuse to disclose confidential communications between them during a legal marriage. The privilege encourages communication between spouses.

Attorney–client privilege or **lawyer–client privilege** is the privilege held by the client, except in legal actions between them or where a person was an official witness, to refuse to disclose confidential communications made to facilitate the rendition of lawful legal services and made to a person reasonably believed to be a lawyer or lawyer's agent, including a paralegal. The privilege encourages communication between a client, a lawyer, and a lawyer's agent, including a paralegal.

Physician–patient privilege or **doctor–patient privilege** is the privilege held by the patient, except in legal actions between them or where a doctor is required by law to report something, to refuse to disclose confidential communications made to a doctor or doctor's agent to facilitate a medical diagnosis or treatment, unless the doctor is court-appointed. The privilege encourages communication between a patient and a doctor but does not apply to communications made in the preparation for a legal action.

Priest–penitent privilege or **clergy privilege** is the privilege held by a penitent or other person seeking spiritual advice, and held by a person reasonably regarded as a priest or other clergy person, to refuse to disclose confidential communications between them. The privilege encourages communication between a penitent or other

person seeking spiritual advice and a priest or other clergy person such as a rabbi or minister.

Executive privilege is the privilege held by the chief executive of an executive branch of government to refuse to disclose confidential communications within the executive branch if the disclosure could harm the ability of the executive branch to function. The privilege does not apply where it interferes with criminal justice or due process of law.

Classified information or, simply, **classified**, is information an agency of the federal government designated as secret for the purpose of national security. The designation is according to a system of classification generally designed to designate an appropriate level of secrecy. The government generally holds a privilege to keep classified information secret.

SHIELD LAWS

From *shell,* **shield laws** are laws that grant privileges to refuse to reveal information in special specific circumstances. A **rape shield law** is a law that grants a victim of rape or sexual assault the privilege to refuse to testify about his or her sex life prior to the rape or sexual assault, unless an exception to the law, if any, applies. A **journalist's shield law** or a **journalist's privilege** is a law that grants a journalist the privilege to refuse to reveal a confidential source.

EXPERT OPINION

There are two kinds of witnesses: lay and expert. From *people,* a **lay witness** is an ordinary witness expected to have firsthand knowledge useful to the court and/or the jury in deciding a case. Because a lay witness is not an expert, a lay witness is a witness generally prohibited from giving opinion evidence.

From *suppose,* **opinion evidence** is a witness giving his or her general characterization or conclusion about the evidence. A lay witness may give an opinion only where the witness has firsthand knowledge of the underlying facts, the facts that constitute the opinion are so numerous or complicated that they cannot otherwise be adequately described, and the opinion would be helpful to the court and/or the jury. Examples of admissible opinion by a lay witness include time, distance, speed, identity, appearance, health, emotion, intoxication, sanity, handwriting from prior familiarity, and the value of one's own property.

From *experienced,* an **expert witness** is a special witness not expected to have firsthand knowledge but who does have special knowledge useful to the court and/or the jury in deciding a case. Because an expert witness has special knowledge not normally possessed by the average person—as the result of education, training, and/or experience—he or she is a witness permitted to give opinion evidence within his or her expertise. Because an expert usually does not have firsthand knowledge, he or she is permitted to rely on the firsthand knowledge of others in order to give a relevant opinion based on his or her expertise. In particular, an expert may answer a **hypothetical question**, which is, from *under proposition,* a question that assumes facts that may be in evidence and calls for an opinion based on those assumed facts.

To **qualify as an expert** is to sufficiently demonstrate to the court that, as the result of education, training, and/or experience, you have special knowledge useful to the court and/or the jury in deciding the case. The opinion evidence of an expert is known as **expert evidence** or **expert testimony**.

If expert testimony is allegedly based on scientific knowledge, it must meet the **Daubert standard** of evidentiary reliability, which is that, in order to qualify as scientific

knowledge, proposed expert testimony must be supported by appropriate validation, meaning good grounds based on what is known. Scientific implies grounding in the methods and procedures of science and knowledge means more than subjective belief or unsupported speculation and applies to any body of known facts or ideas inferred from such facts or accepted as truths on good grounds. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993).

HEARSAY

Unfair evidence in the nature of rumor, technically an out-of-this-court statement offered to prove the truth of the matter asserted, is known, from *heard-said*, as **hearsay**. For the purposes of hearsay, a statement may be oral or written or nonverbal conduct intended to substitute for an oral or written statement. As a general rule, such secondhand testimony is not admissible.

From *thoroughly make clear,* the **declarant** is the person who made a statement. The main problem with someone other than the declarant presenting what the declarant declared, to prove the truth of the matter asserted, is that the declarant is not subject to cross-examination. Another problem is that the trier of fact cannot observe the demeanor of the declarant while making the statement. Accordingly, a statement that is hearsay is admissible only where there is some other assurance that the statement is true. The statement may be defined as nonhearsay or as an exception to the general rule.

For example, an **admission by a party opponent** is a voluntary admission that is not deemed to be hearsay because the unlikelihood that an opposing party would admit something that is not true is some assurance that it is true.

Sometimes words themselves have a legal effect (for example, acceptance of a contract or defamation) such that whether or not the words were stated, or exactly what was stated, is what is at issue in the case. Moreover, sometimes words are very closely related to what is at issue in the case such as the spontaneous statements of eyewitnesses. From *things done,* **res gestae**, pronounced "rays-JEST-tie," was the traditional exception to hearsay for words so closely related to what is at issue as to be a part of what is at issue. Today, the exceptions to hearsay are more clearly defined.

Some exceptions to hearsay apply regardless of the availability of the declarant to testify at trial. For example, a **present sense impression** is a statement describing or explaining an event or condition while the declarant was perceiving it or immediately thereafter. From *out motion,* an **excited utterance** is a statement relating to a startling event or condition while the declarant was under the stress of the excitement.

Another hearsay exception is for business records. **Business records** are records kept in the ordinary course of business and not created only for use as evidence. The **ordinary course of business** is according to the common customs and practices in the day-to-day operation of a business. In theory, a business record is less likely to be false because it is used in the operation of the business.

Other exceptions among many exceptions provided in Rule 803 of the Federal Rules of Evidence include statements of the declarant's then-existing mental, emotional, or physical condition; statements for the purpose of medical diagnosis or treatment; recorded recollections; records of regularly conducted activity or the absence thereof; public records or the absence thereof; records of religious organizations; statements affecting an interest in property; reputation concerning relevant facts; and statements in ancient documents. From *before-from,* an **ancient document** is an authentic document in existence 20 years or more.

A few exceptions to hearsay apply only if the declarant is unavailable to testify at trial. **Former testimony** is testimony in the same case or in another case if the party

against whom the testimony is offered or a predecessor in interest had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. A **dying declaration** is a statement made by a person concerning the cause or circumstances of what the person subjectively, with firsthand knowledge, believed to be his or her impending death. A **declaration against interest** is a statement against the declarant's financial, moral, or penal interests. A declaration against interest is an exception to hearsay when the declarant is unavailable to testify because most people do not make a declaration against interest unless they believe that it is true. The last specific exception is for a statement of personal or family history.

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- **lay the foundation**
- **relevance**
- **totality of circumstances test**

Chapter 44

Post-Trial and Collection

POST-TRIAL

The original remedy sought by a complainant, applicant, or petitioner or the remedy obtained by a responding or replying party will be finally expressed by the judge in a judgment or a decree. From *law say,* a **judgment**[2] is the conclusion, resolution, and final court order of a court of law on a matter of law, a court's recorded resolution of a matter of law, the court's record of the resolution of a matter of law, or a decree. From *to decide,* a **decree**[2] is the conclusion, resolution, and final court order of a court of equity on a matter of equity, a court's recorded resolution of a matter of equity, or the court's record of the resolution of a matter of equity. From *back-get,* a **recovery** is the right to relief established by a judgment or decree or the amount of money or other property collected pursuant to a judgment or decree.

In the sense of what happened, rather than a person's state of mind, the **disposition** is the final result or status of something. From *apart place,* to **dispose** of is to take the final action with regard to something. A court disposes of a law case with a **judgment**[3], an adjudication with finality, which is the intended final order on an issue or in a law case, the court's formal resolution of a law case, the court's recorded resolution of a law case, and the court's record of the resolution of a law case.

From *no clothes,* a **nonsuit** is a judgment rendered against a plaintiff for failing to proceed with or prove his or her case. From *away wanting,* a **default judgment** or **judgment by default** is a judgment rendered against a party for failure to appear or file a pleading when required or a judgment against a defendant who defaulted on a contract obligation. From *without delay,* **summary judgment** is a determination before a trial verdict that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

From *know,* a **cognovit note** or **judgment note** is a promissory note in which the debtor authorizes an attorney to enter a confession of judgment against the debtor, without notice or trial, if the debtor defaults. A **confession of judgment** is consent to an adverse judgment. Cognovit notes are usually prohibited in consumer transactions.

From *recite,* to **render** is to officially announce a decision. When a verdict or judgment is officially announced, it is **rendered**, which means a decision officially announced. A **consent judgment** is a judgment to which the parties have agreed before it was rendered and a judgment rendered without an admission of wrongdoing.

A **decree**[1] (the noun) is an equity court order, a final decision of a court of equity, a judgment of a court of equity, a final decision in a matter of equity, or a judgment in a matter of equity. From *to decide,* to **decree**[3] (the verb) is to officially announce a decision in equity. When a decree is officially announced, it is **decreed**, which means a decision in equity officially announced. A **consent decree** is a decree to which the

parties have agreed before it was decreed. A **final decree** is the decree intended to dispose of an equity case or the last decree in a case.

In jury cases, the common verdicts in a civil case are finding the responding parties liable or not liable for each cause of action against them. Where a party is found liable, the verdict will usually include the amount of damages found by the jury.

In civil jury cases, the court may rule that there was no reasonable support for the jury's verdict or that it was contrary to law. In Latin, **non obstante verdicto** means notwithstanding the verdict. Similar to a directed verdict or judgment as a matter of law, a **judgment notwithstanding the verdict**, a **judgment n.o.v.**, a **judgment NOV**, or a **JNOV** is a trial court judgment in a civil case reversing the verdict of the jury because the verdict was against the evidence or because the verdict was contrary to law.

In order for a verdict to have legal effect, the court must formally **enter judgment** or **render judgment** according to the verdict, meaning to record the judgment in the court's records. A **judgment entry** is the record of the judgment in the court's records.

From *out-watch,* to **award**[1] (generally, the verb) is to grant in the resolution of a case and an **award**[2] (generally, the noun) is that which was granted in the resolution of a case. The word **award**[3] (arbitrator) is also used to refer to an arbitrator's resolution of an arbitrated case. From *intensively strengthen,* a **confirmation** is a court order enforcing an arbitrator's award.

As part of a judgment and if provided by a statute, the prevailing party may be awarded attorney's fees. From *before-power,* a **prevailing party** is, generally, a party to a lawsuit that obtains a favorable outcome. A court may base the amount of attorney's fees awarded on a **lodestar**, which is, from *course guide,* the number of hours reasonably expended by an attorney or law firm, multiplied by a reasonable hourly rate.

As part of a judgment, a party that did not prevail may be required to pay **court costs** or, simply, **costs**, which are the incidental expenses a court charges or incurs in the administration of a case such as filing fees, juror fees, witness fees, and transcript fees.

EXECUTION OF A JUDGMENT

In the sense of carry out, to **execute**[2] is to carry out as ordered, to carry out or complete a judgment, or to carry out or complete a sentence of death. In the sense of carried out, **executed**[2] means carried out as ordered, carried out or completed a judgment, or carried out or completed a sentence of death. In the sense of carrying out, **execution**[3] means the carrying out as ordered, the carrying out or completion of a judgment, or the carrying out or completion of a sentence of death.

From *to raise,* to **levy**[3] (collect, the verb) is to collect a tax, to seize property and sell it to satisfy a debt, or to seize property and sell it to satisfy a tax debt. A **levy**[4] (collect, the noun) is a collected tax, property seized and to be sold to satisfy a debt, and property seized and to be sold to satisfy a tax debt. A **levy of execution** or **levy on execution** is the satisfaction of a debt by putting into effect the judgment of a court.

From *thoroughly make clear,* a **declaratory judgment** or **declaratory relief** is the remedy of a judgment that expresses the opinion of the court on a disputed question of law. A declaratory judgment is a unique judgment in that it is generally self-executing. If necessary, a court may enforce its declaratory judgment by providing injunctive relief.

COLLECTION OF A JUDGMENT

A **money judgment** is a judgment ordering one party to pay money to another party. A **judgment debt** is the money owed as a result of a judgment. A **sum certain** is a specific sum, especially a fixed, stated, or settled amount such as a fixed, stated, or settled amount of money.

A **judgment creditor** is a party owed money on a judgment. A **judgment debtor** is a party that owes money on a judgment. A **judgment lien** is a lien that attaches on the real property of the judgment debtor within the jurisdiction of the court. A **creditor's bill** is an equity action by a judgment creditor to discover, make an account of, and obtain property owed by the judgment debtor.

A **personal judgment** is a judgment obtained where the court had personal jurisdiction and a judgment can be collected from the general assets of the judgment debtor. An **in rem judgment** is a judgment obtained where the court had only in rem jurisdiction and a judgment can be collected only from the property over which the court had jurisdiction.

A **proceeding in aid of execution** or a **summary proceeding**[2] is a proceeding against a judgment debtor to discover the property of the judgment debtor that can be garnished or seized to collect the judgment debt, a proceeding in which a judgment debtor is required to testify as to the whereabouts of the judgment debtor's property, or a proceeding to transfer a judgment debtor's property.

A **writ** is a common-law formal written court order requiring performance or nonperformance of a specified act or an application for a common-law formal written court order requiring performance or nonperformance of a specified act. For example, a **writ of prevention** is a writ to prohibit the filing of a lawsuit.

Historically, a **writ of assistance**[1] was a common-law writ authorizing a search for evidence without limits. Today, a **writ of assistance**[2] is a writ to have a summary proceeding to transfer property, especially, in modern practice, a writ to have a summary proceeding to transfer property because the title to the property had been previously adjudicated in favor of another.

A **writ of restitution** is a writ to return or reimburse for the property, possession, and/or other rights taken from a party and so restore the party to the condition the party was in before the party was wronged. **Repossession** is a remedy of a secured creditor to satisfy the obligation of a debtor who defaults, which is to retake possession of the property for which security was given, ideally without a breach of the peace. Permission to repossess property is usually expressly provided for in a security agreement.

Historically, from *you take to satisfy,* **capias ad satisfaciendum**, abbreviated **ca. sa.**, was a writ to take a judgment debtor into custody until the debt was satisfied. Today, a judgment debtor cannot be jailed merely for failure to pay a debt.

A **writ of execution**[2] is a writ to enforce a judgment of a court, especially a writ authorizing a sheriff to seize the property of a judgment debtor in order to enforce the judgment. From *that you cause to be done,* a **fieri facias** is a common-law writ authorizing a sheriff to seize the personal property of a judgment debtor in order to enforce the judgment. From *no goods,* **nulla bona** is the sheriff's return that no property was found in the county that could be seized.

A **writ of possession** or **writ of entry** is a writ to enforce the recovery of possession of land. A **writ of delivery** is a writ to enforce the delivery of chattels. A **writ of seizure** is a writ to take and hold illegal goods such as goods that infringe or interfere with the intellectual property rights of another.

A **writ of attachment** is a writ for the seizure of property, especially a writ for the seizure of property to collect a judgment. From *fasten,* an **attachment** is a legal hold on the property of another and a procedure for the seizure of property, especially a procedure for the seizure of property to collect a judgment. An **attachment lien** is a lien that arises as the result of an attachment. A **prejudgment attachment** is a special attachment granted by a court before judgment and for good cause shown, generally preventing a party from removing or selling a property within the jurisdiction of the court until the disposition of the case. A prejudgment attachment can be dissolved where the party attached provides a **civil bond**, which is a bond posted with the court in a civil case to cover the potential liability of the party.

Generally, the attachment of the property of a debtor in the possession of a third party, **garnishment** is, usually, the collection of a debt by the court-ordered collection of a percentage of the debtor's paycheck or other source of regular income. From *adorn* and *provide,* to **garnish** is, generally, to bring an attachment of the property of a debtor in the possession of a third party or, usually, to collect a debt by the court-ordered collection of a percentage of the debtor's paycheck or other source of regular income. A **garnishee** is a third party in possession of the property of a debtor and court-ordered to collect some or all of the property for the creditor.

In some states, **trustee process** is the process of attaching the property of the defendant in the possession of a third party. In trustee process, the **trustee**[4] is the person possessing the property of a defendant to be attached.

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- **merger in judgment**
- **motion for a new trial**
- **verdict against the evidence**
- **verdict contrary to law**

Chapter 45

Appeals, Generally

APPEALS, GENERALLY

This chapter discusses the basic aspects of appeals, both civil and criminal, and matters distinctive to civil appeals. Matters distinctive to criminal appeals, and corrections, are discussed in Chapter 54.

A judgment, final decree, or final order may be appealed to a higher court, if any. A **final order** or **final judgment** is an appealable order because it is an order that effectively closes the matter or precludes further proceedings. In rare circumstances, an appeal of an order will be permitted prior to a final order, where it may be necessary to meaningfully vindicate a right such as immunity. An **interlocutory appeal** is an appeal prior to entry of a final order by the trial court judge.

From *called upon,* an **appeal**[1] (the noun, generally) is a review, especially a review of the conduct and decisions of a court or other decision maker, by a court or other decision maker with greater sovereign power. From *call upon,* to **appeal**[2] (the verb) is to seek a review. From *again-see,* a **review** is a judicial reexamination of the proceedings of another court or governmental body. An **appeal**[3] (the noun, specifically) is a resort to a higher court to obtain a review of the law and/or facts decided by a lower court. The hearing and deciding of an appeal is **appellate review**. Parties usually have a right to one appeal. Because judges can make mistakes, it is fair that every court be subject to at least one review. An **appeal by right** or **appeal**[4] means a review by right.

Traditionally, for an appeal by right, a party seeking an appeal would ask a higher court to issue to the lower court a **writ of review**, which is a written order to bring up for review the record of the lower court. Today, where there is an appeal by right, a party gives to the courts and other parties a **notice of appeal**, which is a notice that the party is exercising the party's right to appeal.

An appeal to an intermediate appellate court is usually heard by a group of three justices. A group of justices who originally hear an appeal to an intermediate appellate court is known, from *list,* as a **panel**[2]. After an appeal is heard and decided, and upon a party's motion, there may be a rehearing by the panel. From *again-hear,* a **rehearing** is a reconsideration of a case because of an alleged error in making the decision.

From *by the full court,* **en banc** means all the justices on an appellate court. There are usually far more than three justices on an intermediate appellate court. In an important close case, the party who loses on appeal may contend that the only reason the party lost was because the panel was not representative of all the justices. The party who loses on appeal may make a motion for **rehearing en banc**, which is reconsideration of a case before all the justices on an intermediate appellate court. If the panel agrees and grants the motion, all the available justices on the court reconsider the case.

Appeals to high appellate courts are usually at the discretion of the court. A **discretionary appeal** is an appeal that is discretionary with the higher court. From *to be more fully informed* or *to make sure,* **certiorari**[1] is the power of an appellate court to be more fully informed about a case before exercising its discretion to review it. A party seeking to appeal applies for a **writ of certiorari** or **certiorari**[2], abbreviated **cert.**, which is a written order to bring up for discretionary review the record of a lower court. **Certiorari granted**, abbreviated **cert. granted**, means the application of a writ of certiorari was granted. **Certiorari denied**, abbreviated **cert. denied** or **cert. den.**, means that the application for a writ of certiorari was denied.

APPELLATE PROCEDURE

From *made heavier,* **aggrieved** means injured. An **aggrieved party** is a party who is injured, especially the party who is arguably injured by a judgment and so entitled to appeal. From *calling upon,* an **appellant** is the party who appeals, the party appealing, or the party who appealed. The appellant either did not prevail at trial or did not prevail at trial to the extent expected. The **appellee** or **respondent**[2] is the party who responds to an appeal, the party responding to an appeal, or the party who responded to an appeal.

From *poor,* a **pauper** is a poor person or an indigent. A pauper may be excused from the formalities and expenses of an appeal. From *in the manner of a pauper,* **in forma pauperis** is the right to proceed informally and/or without paying court costs and expenses.

In equity cases and at early common law, an appeal of right of a lower court's application of the law was accomplished by the appellate court issuing a **writ of error**, which is a writ ordering a lower court to send up the record for a review of the law, but not the facts, decided by the lower court. The party who brings a case to an appellate court on a writ of error, and the party who appeals on a writ of error, is known as the **plaintiff in error**, including a defendant–appellant. The party who responds to a case in an appellate court on a writ of error, and the party who responds to an appeal on a writ of error, is known as the **defendant in error**, including a plaintiff–appellee.

A **cross-appeal** is an appeal by an appellee, respondent, or defendant in error from the same case or proceeding as that from which the appellant or plaintiff in error appealed. A **consolidated appeal** is an appeal in one proceeding of two or more appeals involving common or similar issues of law and/or fact and joined together on appeal.

While an appeal is pending, the appellant may seek to stop legal proceedings outside of the appellate court. From *you shall desist,* **supersedeas** was the common-law writ commanding a halt in legal proceedings or the bond required of the party that obtained a halt in legal proceedings. Today, from *a stop,* a **stay** is a court-ordered halt in legal proceedings. An **appeal bond** is a bond for the amount of a judgment, required of an appellant when a court stays execution of the judgment pending appeal.

In an appeal, an appellate court reviews the record of the lower court, which must be transmitted to the appellate court. In order to decide an appeal, an appellate court reviews the **record**[3] or **record on appeal**, which is, from *restore heart (memory),* the permanent memorial of the pleadings, proceedings, and evidence in a case. **Certification of the record on appeal** is the assurance by the clerk of the lower court that the record transmitted to the higher court is complete. The appellate court also may require an abstract of the record. From *away-draw,* an **abstract**[1] is, generally, a summary of each item resulting in a complete history in an abbreviated form. The **abstract of record** or **transcript of the record** is a complete history of a case in abbreviated form.

In addition to reviewing the record of the lower court, an appellate court also will consider the arguments of the parties through briefs and, if desired, oral argument.

From *make clear,* an **argument**[1] is, generally, a course of reasoning intended to induce belief. From *short,* a **brief**[1] is, fundamentally, a document containing legal arguments. An **appellate brief**[1], generally, or **brief**[2] is a formal document containing legal arguments about one or more issues in a case. Because concise arguments are usually more persuasive, a brief should usually be relatively brief. In a big, complex, or important case, a brief can be long but relatively brief.

A brief usually includes a summary of the facts, a statement of the questions of law, and the arguments and legal authorities on which the party relies. From *wander,* an **error** is an alleged departure from accuracy or truth or an actual departure from accuracy or truth. From *to mark,* to **assign**[3] is to mark or to define a duty. An appellate court may require the appellant to separately list each **assignment of error**, which is an alleged error of the trial court formally alleged on appeal. A brief with assignments of error will frequently state, for example, that "The trial court erred when it . . ."

The style of a brief tends to expose a **frivolous appeal**, which is, from *broken* or *silly,* a needless appeal of a case in which there is no arguable error. A **clerical error** is a nonjudicial error, an error not from judgment but from inadvertence, and an error that can be simply corrected and does not require a reversal. A **prejudicial error** or **reversible error** is a judicial error, an error from judgment and not from inadvertence, and an error requiring a reversal or remand.

From *completely perform,* to **perfect**[1] is, generally, to complete, to execute, or to take all the necessary steps to complete something. To **perfect an appeal** or to **perfect**[3] is to take all the necessary steps to appeal. **Perfected an appeal** means that all the necessary steps to appeal were taken.

In addition to requiring briefs from the parties, a court may accept briefs from others. From *friend,* **amicable** is friendly and not adverse. From *friend of the court*, an **amicus curiae** is a person who gives information to the court in the manner of a friend, bringing to the court's attention something that may be overlooked. An **amicus curiae brief** or **amicus brief** is a brief submitted to the court by a nonparty to urge a particular outcome for the public good.

After all briefs are filed, the court may hold an oral argument before the court. An **oral argument** or **argument**[2] is a spoken argument by an attorney in order to persuade the court or jury to decide the case in the favor of the attorney's client. **May it please the court** is an impersonal and respectful way to begin an oral argument.

Prior to making a decision, the court may order **reargument**, which is the oral presentation of additional arguments after the court has already heard argument so as to develop any matter the court deems not adequately developed in the prior argument.

JUDICIAL REASONING

Appellate court reasoning is guided by the applicable **standard of review**, which is the measure of when a particular kind of case or issue should be reversed or remanded.

For example, administrative agencies in most matters, and trial court judges in administrative matters, are usually given **discretion**, which is, from *discernment,* the freedom to act or decide on your own and the reasonable exercise of power, especially the power to act or decide on your own. Accordingly, **abuse of discretion** is an unreasonable exercise of power, requiring a reversal or remand, and the standard of review for a case or issue that is a matter of discretion. An abuse also occurs when a decision is clearly unreasonable, arbitrary, or fanciful; when a decision is based on an

erroneous conclusion of law; when a decision maker's findings are clearly erroneous; or when the record contains no evidence on which the decision could have been based.

Clearly erroneous is a definite mistake requiring a reversal or remand and the standard of review that although there is evidence on which the decision could have been based, the reviewing court is left with the definite and firm conviction that a mistake has been committed. A **harmless error** is an error not substantial enough to require a reversal or remand and the standard of review that the decision will not be reversed or remanded unless the appellant suffered substantial harm. A **miscarriage of justice** is a substantial error requiring a reversal or remand. A **plain error** is an error obviously prejudicial or substantially harmful requiring a reversal or remand and the standard of review that the decision will not be reversed or remanded unless there was an error that is obviously prejudicial or substantially harmful.

Precedents from case law usually guide the reasoning of an appellate court. From *under silence,* **sub silentio** means overruling an old precedent by setting a new precedent without discussing or referring to the old precedent. A **case in point** is a previous case like the case at bar. A **case on point** or **on point** is a case that covers an issue implicitly or by analogy, if not explicitly or exactly. From the maxim **nullum simile est idem nisi quatuor pedibus currit**, meaning nothing similar is identical unless it runs on all fours (that is, on all four feet), a **case on all fours** or **on all fours** is a previous case that is the same in all material aspects and so a strong precedent. An allusion to remarkable similarity, a **blue bottle case** is a previous case that is the same even as to immaterial aspects, and so a very strong precedent.

From *come upon,* a **finding**[2] is a conclusion or decision about a matter of fact. From *reason for deciding,* the **ratio decidendi** is the distinction or point on which a case turns. From *principle of conduct,* a **ruling**[2] is an application of a point of law, usually the application of an existing point of law. From *to keep,* a **holding**[2] is a ruling establishing a new point of law. Note, however, there is a general lack of agreement about the meaning of these terms and so most lawyers and judges use these terms interchangeably.

From *thing said,* a **dictum**, the singular of dicta, is an extra comment made by a court in its opinion but not necessary to the decision. From *things said,* **dicta**, the plural of dictum, is extra comments made by a court in its opinion but not necessary to the decision. Due to not being necessary to the decision, a dictum or dicta are not precedent that a later court *must* follow. From *thing said in passing,* an **obiter dictum** is a passing comment made by a court in its opinion but not necessary to the decision. From *things said in passing,* **obiter dicta** is passing comments made by a court in its opinion but not necessary to the decision. Due to having been made in passing by a court, obiter dictum or obiter dicta are not precedent that a later court *can* follow. A **well-considered dictum** or a **considered dictum** is a serious comment made by a court in its opinion but not necessary to the decision. **Well-considered dicta** or **considered dicta** are serious comments made by a court in its opinion but not necessary to the decision. Due to having been seriously considered by a court, a well-considered dictum, a considered dictum, well-considered dicta, or considered dicta are precedent that a later court *may* follow.

APPELLATE COURT DECISIONS

If a significant error or injustice is not found on appeal, then the decision or order reviewed is affirmed. From *make firm* or *make valid,* to **affirm**[2] is to approve the decision or order reviewed. Thus, **affirmed** means approved the decision or order reviewed and **affirmance** means the approving of the decision or order reviewed.

If a significant error or injustice is found on appeal, then the decision or order reviewed is reversed, vacated, and/or remanded. From *contrary* or *opposite,* to

reverse is to disapprove of and change the decision or order reviewed. Thus, **reversed** means disapproved and changed the decision or order reviewed and **reversal** means disapproval and change of the decision or order reviewed. From *empty,* to **vacate**[2] is to set aside or void the decision or order reviewed. Thus, **vacated**[2] means set aside or voided the decision or order reviewed and **vacatur**[2] means the setting aside or voiding of the decision or order reviewed. From *send back* or *return,* to **remand**[2] is to send back to the court or agency reviewed for further proceedings. Thus, **remanded** means sent back to the court or agency reviewed for further proceedings and **remand**[3] means having been sent back to the court or agency reviewed for further proceedings.

De novo means like new, fresh, or a second time as if the first time. A case is often remanded for a **new trial** or **trial de novo**, which is another trial from the beginning. All issues of fact and law are reconsidered as if no prior trial had taken place.

The decision of an appellate court is a **mandate**, which is, from *hand give,* an authoritative order to perform, especially an appellate court order informing a lower court of the appellate court's decision and requiring the lower court to perform as directed or instructed. Common-law mandates included coram vobis and coram nobis. In Latin, **coram** means before. Similar to reversal, from *before you,* **coram vorbis**, **error coram vobis**, or a **writ of coram vobis** is an appellate court writ finding an error of fact made before a lower court and directing the lower court to review its judgment. Similar to remand, from *before us,* **coram nobis**, **error coram nobis**, or a **writ of coram nobis** is an appellate court writ finding an error of fact made before the appellate court and directing a review of its judgment, including additional proceedings in the lower court, if necessary.

Within a short time after an appellate court decision, a party may seek **reconsideration** by the court, which is a court's reexamination of its own decision. Common reasons for reconsideration include an intervening change in the applicable law, the availability of new evidence or an expanded record, and the need to correct a clear error or prevent a manifest injustice.

APPELLATE COURT OPINIONS

In most cases, an appellate court issues an **opinion**, **case opinion**, or **judicial opinion**, which is, from *judgment, supposition,* or *thinking,* a court's written explanation of the reasons for its decision. Ideally, the ideas and reasons given by the court in its opinion help the unsuccessful party to understand and accept why the court decided as it did. From *to be remembered,* a **memorandum opinion** is a brief opinion used by a court where its decision is routine or the reasons for it should be obvious.

Ordinarily, one justice on an appellate court is assigned to write the opinion for the court and the other justices decide whether or not they agree with the decision and opinion. If the other justices agree with the decision and the opinion, they can simply join in the opinion with the justice who wrote the opinion. Whether or not they agree with the decision, if the other justices want to add to the opinion or disagree with the opinion, they may write their own opinions.

From *of the greater number,* a **majority opinion** is an opinion of the court in which a majority of the justices join. From *together run,* to **concur**[1] is to agree or to have the same or a similar opinion. A **concurring opinion** or **concurrence** is an opinion of a justice who agrees with the decision of the court but does not fully agree with the opinion of the court or an opinion of justices who agree with the decision of the court but do not fully agree with the opinion of the court. From *differently think,* to **dissent**[1] (the verb) is to disagree or to have a different opinion. A **dissenting opinion** or a **dissent**[2] (the noun) is an opinion of a justice who disagrees with the decision of

the court or the opinion of justices who disagree with the decision of the court. From *more than one,* a **plurality** is most but not a majority. A **plurality opinion** is the opinion of the court where a majority of the justices agree on a decision, but a majority are unable to agree on the reasoning behind it. In Latin, **per curiam** means by the court. A **per curiam opinion** is an opinion by the court as a group or a joint anonymous opinion of the court.

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- **per curiam decision**
- **perfecting an appeal**
- **reasoning**
- **relevant fact**
- **remanding**
- **reply brief**
- **reversing**
- **vacating**[2]

Part Eight

Criminal Law: Substantive Issues

Chapter 46

Criminal Responsibility and Defenses, Generally

THE TIP OF THE ICEBERG

Law is built on two kinds of law: civil and criminal. Most law is civil law. From *citizen,* **civil law**[2] is, generally, the basic law between individuals (persons or entities) or, simply, law between individuals. A relatively smaller but vital portion of the law is criminal law. From *sinful,* **criminal law**[1] is, generally, the basic law protecting society, the law protecting society from individuals who have become an intolerable danger to society, or, simply, law protecting society. The two kinds of law are the basis for two distinct systems of law enforced by generally similar but different procedures.

Each kind of law consists of two types of law. From *essence,* **substantive law** refers to rights and duties under law, legal rights and duties, or legal substance. From *method,* **procedural law** refers to how law is applied and contested, law applied and contested, or legal procedure. It is the methods commanded for applying and contesting the law. Discussed from this chapter through Chapter 48, **substantive criminal law**, or **criminal law**[2] in the specific sense, refers to rights and duties under the law protecting society. Discussed from Chapter 49 through Chapter 54, **criminal procedure** refers to how the law protecting society is applied and contested.

CRIME, GENERALLY

From *treat with violence,* a **violation**[1] is, generally, an act or omission contrary to law. From *attack,* an **offense** is an act or omission contrary to a criminal law.

From *sin,* a **crime** is an act or omission within a person's control and contrary to a law that protects society by defining antisocial conduct or, simply, a wrong against society. From *fault,* **guilty**[1], generally, means having committed and being responsible for a crime or wrong or having committed and being responsible for the crime charged. From *sinner,* a **criminal**[1] or **malefactor** is a person who has committed a crime and a person who is or was an intolerable danger to society. A **perpetrator**[2] is, generally, a person who did a wrongful act. A **statutory crime** is an act or omission contrary to a statute but not a crime at common law.

From *cause pain,* **punishment** is being made to do something you do not want to do or being deprived of something you want or want to do. From *punishment,* **penal** or **criminal**[2] means related to punishment for a crime. **Penal law** is the law related to punishment for crimes and a **penal code** or **criminal code** is a collection of punishments for crimes such as a sovereign's substantive criminal law. The **Model Penal Code**

(**MPC**) is a criminal code recommended by the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

From *response ability,* **responsibility** is the social obligation to avoid antisocial acts to the extent you are able to do so. **Criminal responsibility** means potentially subject to punishment for not obeying a criminal law. An allusion to society's high level of certainty that a person has committed a crime, a **conviction**[1] means actually subject to punishment for not obeying a criminal law. A person has a conviction "for" a crime. **Convicted** refers to a person who is or was subject to punishment because of not obeying a criminal law. A person is convicted "of" a crime.

The traditional potential punishments for a serious crime include the death penalty, incarceration, and a fine. The **death penalty**[1], the punishment in which a sovereign takes a convicted criminal's life, is relatively rare. The most common punishment for a crime is, from *end* and *payment,* a **fine**, which is the required payment of money to the sovereign or its designated representative as a punishment for a crime.

From *imprison,* to **incarcerate** or **imprison** means to confine a person against the person's will. In the general sense, in Latin, from *in prison,* **incarceration**[1] or, in Old French, from *in prison,* **imprisonment**[1] is confining a person against the person's will and a deprivation of liberty. In the sense of punishment, **imprisonment**[2] or **incarceration**[2] is confining a convicted criminal against his or her will as punishment for a crime and punishment or rehabilitation of a criminal by confinement outside of society. From *confinement,* a **prison** is a federal or state institution for confining convicted criminals outside of society. From *cage,* a **jail** is a local institution for detaining persons for their own safety, for investigation, or for trial and a local institution for confining alleged or convicted criminals outside of society.

GRADING AND CLASSIFYING CRIMES

From *head,* a **capital crime** or **capital offense** is a serious crime punishable by death. A case involving a capital crime or capital offense is a **capital case** or **capital criminal case**. **Capital punishment** is a general reference to the penalty of death.

At common law, a crime was inherently evil and graded as being either a felony or a misdemeanor. From *wickedness,* a **felony**, occasionally referred to as a **high crime** or a **major crime**, is a serious crime generally punishable by incarceration for more than one year or by death. At common law, all felonies were potentially punishable by death. Today, only murder is potentially punishable by death and only where the sovereign permits it. From *wicked,* a person who commits a felony is a **felon**. From *penalty,* to **forfeit** means to automatically lose. As a general rule, convicted felons forfeit some of their legal rights and capacities, including the right to bear arms, the right the vote, the ability to hold public office, the ability to serve on a jury, and the ability to engage in certain licensed professions and trades. From *ill fame,* an **infamous crime** is a felony or other crime that causes infamy such as the forfeiture of legal rights and capacities.

From *wrong demeanor,* a **misdemeanor**, also known as a **minor crime**, is a less serious crime generally punishable by incarceration for one year or less. (Misdemeanors are also all crimes, other than felonies, for which grand jury indictments may be brought.) A person who commits a misdemeanor is a misdemeanant.

Among felonies and misdemeanors, from *vile,* a **crime of moral turpitude** is a crime demonstrating by its baseness, vileness, or great dishonesty the criminal's depravity toward social duties such that the criminal should be disqualified from any public office or professional license. For example, a parent may lose custody of his or her minor children or an immigrant may be deported. Examples of crimes of moral turpitude include bribery, drug trafficking, larceny, and robbery.

Sovereigns gradually created less serious crimes. As a result, crimes may be classified as malum in se or malum prohibita. Latin for *wrong by itself,* **malum in se** means wrong because it is inherently dangerous or evil. Latin for *wrong because prohibited,* **malum prohibitum** means wrong only because it is prohibited.

A **violation**[2] or **minor misdemeanor** is a nonserious crime not punishable by incarceration. A **traffic violation** is a violation of a nonserious vehicle-related crime such as speeding or illegal parking. A person who commits a violation is a **violator**.

In modern times, crimes are sometimes graded by degree. From *step,* a **degree** is a measure of something such as temperature or academic performance. A **degree of crime** is a measure of the seriousness of a crime or a version of a crime. As a general rule, a **first-degree** crime is among the most serious crimes or the most serious version of a crime. As a general rule, a **second-degree** crime is among the next most serious crimes or the next most serious version of a crime, and so on. From *making heavy,* **aggravation** is any circumstance that makes a crime more serious. From *made heavy,* **aggravated** is more serious. From *making mild,* **mitigation** is any circumstance that makes a crime less serious. From *made mild,* **mitigated** is less serious.

THE PURPOSES OF CRIMINAL LAW

The human problem addressed by criminal law is antisocial conduct. The human solution is punishing the guilty. As a result, the primary concern of criminal law is the criminal and society. Criminal law is focused on bad or evil conduct, not dangerous but socially valuable conduct. Although almost everyone has at some time engaged in an antisocial act, as a practical matter, society cannot punish everyone for everything.

As a general rule, criminal law is not really concerned about the **victim**[2], who is, from *sacrificed,* a person against whom a crime is committed. Traditionally, if a victim was harmed by a crime, the victim's only means of recovery was by civil law, especially tort law. Today, the law sometimes grants rights to the victim or the victim's family such as the right to be notified when the criminal who harmed the victim is released from jail or prison. Some states maintain a **victim of crime fund**, which is a fund against which a victim of crime who suffers physical injury can make a claim for related medical and other expenses for which the victim is not compensated by insurance or otherwise.

The mnemonic **RRIDD** stands for the five traditional purposes of criminal law: retribution, rehabilitation, incapacitation, denunciation, and deterrence. From *repayment,* **retribution** is society's punishment and revenge for antisocial conduct and, figuratively, the repayment of the criminal's debt to society created by what the criminal took from society. (As a general rule, personal revenge by a physical act is never legal.)

From *again make fit,* **rehabilitation**[2] is society's attempt to reform a criminal while incarcerated so that he or she is no longer an intolerable danger to society. From *no capacity,* **incapacitation** is society's prevention of a criminal's antisocial conduct by incarceration. From *down proclaim,* **denunciation** or, from *sin making,* **criminalization**, is society's public definition of antisocial conduct, encouraging law-abiding citizens to avoid that conduct. From *away-terrorize,* **deterrence** is society's attempt to discourage antisocial conduct by fear of punishment.

As society changes, occasionally something once considered a crime is no longer considered a crime. **Decriminalization** is changing the law to remove certain conduct from society's public definition of antisocial conduct. For example, a drug may be permitted to be sold "over the counter" whereas before it was illegal to sell the drug without a doctor's prescription.

In a social sense, most people do not have **guilt**, which is, from *fault,* awareness of committing a crime or wrong. From *blamelessness,* **innocence** is unawareness of

committing a crime or wrong. Most people are **innocent**, which means free from guilt or having innocence. An innocent person is not **culpable**, which, from *blame-able,* means blameworthy and responsible.

RECOGNITION OF A CRIME

A **criminal action** or **actio criminalis** is an action for a crime, a recognized right or cause involving criminal law upon which a court can act, and a request for a legal solution by a court under criminal law. Traditionally, an act or omission was a crime if it was a crime at common law, known as a **common-law crime**. Today, the federal government and most states no longer recognize common-law crimes. Today, under the concept that **common-law crimes are abolished**, or **statutory crimes**, conduct is a crime only if it has been specifically made a crime by Congress or a state legislature. Several specific crimes, including common-law crimes that are nevertheless the source of modern crime terminology, are discussed in Chapters 47 and 48.

For the sake of discussing criminal responsibility and defenses, in this chapter two sample modern crimes will be used as examples. As everyone knows, from *take in stealth,* to **steal** is to take wrongfully (or, as in baseball, to take in the manner of taking wrongfully). Most states have a simple modern crime of **theft**, which is knowingly taking or controlling personal property to deprive the owner thereof without the owner's express or implied consent or, simply, stealing. Most states also have a simple modern crime of **robbery**[1], which is, by force or threat of force, knowingly taking or controlling personal property to deprive the owner thereof without the owner's express or implied consent or, simply, stealing by force.

THE ELEMENTS OF A CRIME

An action is a group of elements entitling a plaintiff to legal relief if admitted or proven and if there is no legal defense. From *rudiments,* **elements** are the definitional and necessary parts of a crime or civil action. From *without which not,* **sine qua non**[1] means that without which the thing cannot be. In criminal law, if a person has not committed every element of a crime, the person has not committed the crime. In other words, each element of a crime is sine qua non. The prosecution in a criminal case must prove every element of a crime beyond a reasonable doubt.

Theft, for example, has the elements of (1) knowingly (2) taking or controlling personal property (3) to deprive the owner thereof (4) without the owner's express or implied consent. If an owner forgets to take his or her personal property and you, being a good person, knowingly (1) take the personal property (2) without the owner's consent (4) to return the personal property to the owner, you have not committed theft because element (3) does not apply.

Changing the fact pattern, if you did deprive the owner of the personal property, element (3) would apply and you would have committed theft. However, you would not have committed robbery because robbery has another element that theft does not have, namely, (5) acting by force or threat of force.

Notice that modern theft is a lesser-included offense of the offense of robbery. A **lesser-included offense** is an offense whose elements are inherently proved as the result of proving another offense with more, or more severe, elements. If a person is accused of both robbery and theft and all the elements of robbery are proven except acting by force or threat of force, the person has not been proven to have committed robbery, but has been proven to have committed the lesser-included offense of theft.

From *the body of the crime,* **corpus delicti** is some objective evidence of the commission of a crime by a human being. In the case of theft, the corpus delicti is that

some property has been taken. If nothing has been taken, there cannot be a theft. The issue of corpus delicti often arises in cases of **homicide**, which is, from *man killing,* the generic term for a human being killing another human being. If there is no objective evidence that a human being has been killed—such as a dead body—then there cannot be a homicide. Furthermore, a dead body may not be enough if there is no objective evidence that there was a killing by another human being, instead of by a natural cause.

A CRIMINAL ACT

From *done,* an **act**[1] is, generally, something done, especially something physically done or an expression of will. At least one element of every crime is at least one notable act. Every crime has, from *guilty act* or *guilty thing,* an **actus reus** or **criminal act**, which is a guilty act or deed. From *a doing,* a **deed**[1] is, generally, something physically done.

From *with-put,* to **commit**[2] is, generally, to act to the extent that your direction becomes clear. To **commit**[3] a crime is to engage in a criminal act. **Committed**[1] is, generally, having acted to the extent your direction became clear. To have **committed**[2] a crime is to have engaged in a criminal act. From *completely carry out,* to **perpetrate** is to do a wrongful act. Thus, it is appropriate to refer to a person who committed a criminal act as a **perpetrator**[1] or **perp**, which is, generally, a person who did a wrongful act.

The guilty act or deed may be possession of something people are not permitted to possess. The guilty deed may actually be an **omission**, which is, from *lack of action,* a failure to act where a person is required to act. It is criminal for a lifeguard to let a swimmer drown when the lifeguard was aware and could have prevented the drowning.

A CRIMINAL INTENT

Most crimes also have, as at least one element, a notable state of mind. Every crime with a notable state of mind has, from *guilty mind,* a **mens rea**, which is a guilty state of mind or a culpable state of mind.

Generally, the mens rea elements of crimes may be having certain knowledge, having certain purposes, or both. From *knowledge,* **scienter** is guilty knowledge or prior knowledge of the operative facts. From *with knowledge,* **knowingly** means with relevant knowledge. From *entirely weigh,* **deliberately** means on purpose or with a fixed purpose. From *aim* and *of purpose,* **purposely** is as an act of will and not accidentally. Notice that mens rea no longer exists where there is a **renunciation**[2], which is, from *against report,* the voluntary abandonment of a criminal purpose prior to actually committing the crime.

From *attention,* **intent**[1] is, generally, the design, determination, or resolve with which a person acts or the state of mind in which a person seeks to accomplish a result through an act or a course of action. Intent is usually shown indirectly, based on the concept that people usually intend the natural and probable consequences of their actions. Intent is not the same thing as motive. From *(reason for) motion,* **motive** is a reason for a person's intentional act. Motive is not an element of any crime, except a hate crime. However, having a motive is evidence of having intent.

Criminal intent or **criminal**[3] is the intent to commit a crime. In criminal law, **general intent**[2] is the intent to act as you acted, regardless of the result. In criminal law, **specific intent**[2] is the intent to act as you acted to achieve a specific result.

A **legal fiction** is an assumption in law that something is true, whether or not it is true in reality. In criminal law, **transferred intent**[2] is the legal fiction that if a person intends to make someone a victim but accidentally harms another, the person's original intent applies to the actual victim.

From *together run,* to **concur**[2] in time is to happen at the same time. The **concurrence of act and intent** is the implicit element of every crime that the guilty act or deed must happen at the same time as the guilty state of mind, if a state of mind is required. A **strict liability crime** is a crime for which no mens rea is required.

PARTIES TO A CRIME

Two or more persons may commit a crime or a person may commit a crime with the help of another person before or after the crime. A **co-defendant** is one of two or more defendants against whom one action has been brought.

A person who has not actually and directly committed a crime but who has helped another person do so can be treated as equally or partially responsible for the crime as the person who actually and directly committed the crime. From *help* or *support,* to **aid** is to help, especially by assisting or supporting. From *cause to bite,* to **abet** is to help, especially by encouraging or instigating. To **aid and abet** is to help another commit a crime. **Aiding and abetting** is helping another to commit a crime.

From *most important,* a **principal**[7] is, in criminal law, a person who actually or constructively commits a crime. Traditionally, a **principal in the first degree** is a person who actually commits a crime, especially the most important act or omission. Traditionally, a **principal in the second degree** is a person who constructively commits a crime by being present and aiding or abetting the principal in the first degree. For example, a principal in the first degree is the person who actually goes into a bank and robs it and a principal in the second degree is the person who does not go in the bank but rather waits with the get-away car or serves as the lookout.

From *a confederate,* an **accomplice** is a person helping a criminal and present during the commission of the crime and a person equally responsible for a crime as the principal criminal. From *accomplice,* an **accessory** is a person helping a criminal before or after, but absent during, the commission of the crime and a person less responsible for a crime than the principal criminal. An **accessory before the fact** is a person helping a criminal before, but absent during, the commission of the crime and a person who helps a criminal plan a crime. An **accessory after the fact** is a person helping a felon after, but absent during, the commission of the crime and a person who helps a felon avoid responsibility after a crime. From *make easy*, **facilitation** is the statutory crime of aiding and abetting a person who intends to commit a crime but does not commit the crime.

ATTEMPT, CONSPIRACY, AND SOLICITATION

From *to try,* **attempt** is the separate crime of making a substantial step, beyond preparation, toward the commission of a crime. Prosecution for an attempt usually occurs when a person fails to commit the crime toward which the substantial step was made.

From *together breathe,* **conspiracy** is the separate crime of two or more persons agreeing or combining to commit an unlawful act under criminal law or to commit a lawful act by means unlawful under criminal law. A **conspirator** is a person involved in a conspiracy and a **co-conspirator** is another person involved in a conspiracy.

Before imposing criminal liability for conspiracy, many states require, from *open* and *evident,* an **overt act** by one of the conspirators, which is an observable act manifesting the intention to commit a crime. An overt act need not itself be an illegal act. A defense to further criminal liability, unique to conspiracy, is, from *away-draw,* **withdrawal**[2], which is separation of a conspirator from the criminal activity and communication of that separation to the remaining co-conspirators.

From *rouse,* **solicitation**[1] is, generally, the crime of unsuccessfully inviting or requesting another to commit a felony or to commit a misdemeanor harming the public welfare.

DEFENSES TO A CRIME, GENERALLY

From *to fortify against,* a **defense**[1] is a legal basis for denying liability or responsibility. There are three types of defenses to a crime: rebuttals, justifications, and excuses. From *back-hit,* **rebuttal**[2] is, generally, defeat of an obligation; from *just-made,* **justification**[1] is, generally, suppression of an obligation; and from *away-cause,* **excuse**[1] is, generally, release from an obligation.

REBUTTING A CRIME

The first way to defeat a crime is to challenge its validity. Citizens are entitled to reasonable notice of what society has made a crime, without having to guess whom the crime applies to or what is prohibited. **Void for vagueness** is the defense to a crime that an ordinary person cannot reasonably understand what conduct is prohibited by the law creating the crime. The **void-for-vagueness doctrine** is the doctrine that the law must define a crime with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. The void for vagueness defense is based on the concept of procedural due process. The defendant must show that overly broad language misled the defendant. The defense is effective against crimes that do not have a well-established meaning. **Facial invalidity** means a law that is void on its face. **Void on its face** means a law that is invalid because it obviously prohibits legally protected conduct.

The second way to defeat a crime is to challenge its applicability. To **rebut** means to refute, to oppose, or to provide answering evidence. The most basic defense to any crime is **rebuttal**[3] or **rebutting the charge**, which is showing that one or more of the elements of the crime are not true or have been not been proven beyond a reasonable doubt; in other words, refuting or opposing one or more elements of the crime or, simply stated, providing answering evidence. A special rebuttal for which the prosecution must be notified before trial, **alibi**, is, from *elsewhere,* the assertion that the defendant was elsewhere when the crime was committed and so could not have committed the crime.

The third way to defeat a crime is to have already been tried for it and having already rebutted it, justified it, been excused from it, or been convicted of it. From *trick* or *danger,* **jeopardy** is the danger of conviction and punishment for a crime when a person is put on trial. In a jury trial, jeopardy attaches when the jury is sworn. In a bench trial, jeopardy attaches when the presentation of evidence begins. The Fifth Amendment provides in part that "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . ." From *trick* or *danger,* **double jeopardy** or **former jeopardy** means once already in jeopardy and the general constitutional right to not be tried or punished twice for the same offense. A necessary exception to double jeopardy is the **Ball doctrine** that a defendant who successfully appeals a guilty verdict can be retried unless the reversal was due to insufficient evidence, because otherwise an appellate court would be afraid to reverse a guilty verdict and possibly let a guilty person go free. See *Ball v. United States,* 163 U.S. 662 (1896).

Finally, although this chapter is a discussion of substantive criminal law, there is a procedural defense that is appropriately mentioned here because it defeats the obligation of all crimes except murder. From *an end,* **finality** is the doctrine that courts must efficiently decide disputes to serve present and practical justice and the concept that there is a practical limit to the extent society can reasonably expend its

resources to decide old disputes because evidence is lost when memories fade and people move away or die. Based on finality, a **statute of limitations**[1], the time limit for filing a legal action, is the time within which an action may be brought after it arises, after which it cannot be brought. In criminal law, a statute of limitations is an absolute time limit, regardless of when it was discovered, for bringing an action after it arose. However, certain circumstances such as absence from the state will stop the running of a statue of limitations. From *to bar,* to **toll**[1] is to stop a statute of limitations from running.

JUSTIFYING A CRIME

From *just-make,* to **justify** is to explain why something apparently unlawful should be accepted as lawful. **Justifiable** is apparently unlawful but accepted as lawful or apparently unlawful but capable of being accepted as lawful. A **justification**[2] is a just reason why something apparently unlawful should be accepted as lawful.

Self-defense is the general privilege to use reasonable force to protect yourself from an unlawful aggressor threatening you with serious bodily harm or illegal confinement and the defense that you acted to protect yourself from an unlawful aggressor threatening you with serious bodily harm or illegal confinement. Generally, to successfully raise the defense of self-defense, you must not be the aggressor, subjectively and reasonably believe that you are in imminent danger of death or serious bodily harm or illegal confinement, and use no more force than is necessary to protect yourself. Some states impose a **duty to retreat**, which is an obligation to depart from a dangerous situation if you are able to do so rather than acting aggressively in self-defense.

Defense of others or **defense of a third person** is the general privilege to use reasonable force to protect another from an unlawful aggressor threatening the other with serious bodily harm or illegal confinement and the defense that you acted to protect another from an unlawful aggressor threatening the other with serious bodily harm or illegal confinement.

Defense of property is the general privilege to use reasonable force to protect your property. **Deadly force** is a force reasonably likely to cause death or serious bodily harm. From *remain,* a **dwelling** is a building in which a person usually lives and a building regarded as a person's home. In most states, the use of deadly force to defend property is reasonable only when you're in your dwelling and, actually or constructively, also protecting yourself or others. Most states apply what is sometimes known as the **castle doctrine**, which is a reference to the common-law concept that "A man's home is his castle" and that today means that there is no duty to retreat from your dwelling.

From *to stay,* **arrest**[1], as a defense, or the **defense of arrest** is the defense that you lawfully seized a suspected criminal to force him or her to answer for a crime or lawfully seized a person to force him or her to appear in court.

From *unavoidable,* **necessity**[1] is, generally, the defense that you were objectively forced by circumstances not of your creation to choose between evils and you chose the lesser or least evil for the greater or greatest good.

From *together-feel,* to **consent**[1] (generally, the verb) is to agree or to approve. **Consent**[2] (generally, the noun) is agreement or approval, especially agreement with what is done or proposed by another or approval of what is done or proposed by another. As a defense to a crime, **consent**[4] is the defense that the alleged victim's agreement or approval refutes an element of the crime. From *intense gift,* to **condone** is to forgive or to overlook. **Condonation** is forgiveness by the victim or overlooking by the victim. Unlike consent, condonation is not a defense.

EXCUSING A CRIME

An **excuse**[2] is, specifically, a reason for forgiving or overlooking a violation of an obligation. **Excusable** is a violation of an obligation capable of being forgiven or overlooked.

Criminal capacity is the ability to appreciate the criminal nature of an act. In criminal law, **lack of capacity**[1] is the defense that because you were asleep or in a similar medical condition not self-induced or because you were an immature child, you lacked the ability to appreciate the criminal nature of your act. At common law, a child under the age of seven was deemed incapable of committing a crime. A child age 7 to 14 was presumed incapable and child over the age of 14 was presumed capable.

From *in poison,* **intoxication** is the altered state of mind caused by the excessive consumption of a mind- or mood-altering drug, especially alcohol. **Involuntary intoxication**, intoxication without your knowledge or against your will, is the defense that you acted as you did because you were intoxicated without your knowledge or against your will. **Voluntary intoxication**, intoxication with your knowledge and not against your will, is not a defense to a general intent crime but is a defense that refutes the element of specific intent in a specific intent crime because you were intoxicated with your knowledge and not against your will.

In criminal law, an **affirmative defense**[2] is a defense that the alleged criminal must prove by a preponderance of the evidence because the defense alleges additional facts only within the defendant's knowledge, and so it is fair to require the defendant to produce the evidence of the additional facts.

From *hardship,* **duress**[3] is, in criminal law, the affirmative defense that you were forced to act as you did because another person forced you or threatened you with imminent death or serious bodily harm. In most states, duress does not excuse killing another human being.

From *put in a trap,* **entrapment** is the affirmative defense that a law enforcement officer induced you to commit a crime you were not otherwise disposed to commit. Entrapment exists where the idea of committing a crime originated with the law enforcement officer. Entrapment does not exist where a law enforcement officer merely provides an opportunity to commit a crime.

From *wrongly take* or *wrongly understand,* a **mistake** is an act or omission arising from ignorance, misconception, or inadvertence. In criminal law, a **mistake of fact**[2] is the affirmative defense that your honest mistake about a fact refutes a mens rea element of the crime. In criminal law, a **mistake of law**[2] is not a general defense to a crime but is the affirmative defense that your honest mistake about a law refutes the knowledge-of-the-law element, if any, of the crime.

From *ignorantia legis non excusat,* **ignorance of the law is no excuse** means that a person is presumed to know the law and if a crime is not void for vagueness, then a person has no excuse for not knowing what is a crime. The rare exception is if a law was not properly published such that even a lawyer could not reasonably find it.

From *not sound,* **insanity**[1] is the legal concept of a severe mental illness or condition causing a lack of competence or guilt. The **insanity defense** or **insanity**[2] is the affirmative defense that you are not responsible for the crime charged due to severe mental illness or a condition causing a lack of competence or guilt. The common-law test of insanity, from an old English case, was the **M'Naughten rule** that a person is not responsible for a crime if, because of a mental disease or defect, the person did not understand what he or she was doing or that what he or she was doing was wrong.

Insanity also may involve an **irresistible impulse**, which is the legal concept of a severe mental illness or condition causing an uncontrollable urge to act. Being **insane** means having a severe mental illness or condition causing a lack of competence or guilt.

INCOMPLETE DEFENSES

A **complete defense** is a defense that fully answers the action against the defendant and a defense to a crime that, if successful, means that the defendant is not guilty and not subject to punishment. An **incomplete defense** is a defense that does not fully answer the action against the defendant and a defense to a crime that, if successful, means that the defendant may still be found guilty, but of a lesser crime and/or deserving of a less severe punishment.

Diminished capacity or **diminished responsibility** is the incomplete affirmative defense that, due to a mental state or mental illness that did not cause a lack of guilt but does refute the mens rea element of the crime, you are only guilty of a lesser crime.

Civil disobedience is the incomplete affirmative defense that, without committing any other offense, you, on principle, refused to obey a law to protest its unfairness and social undesirability. You should not engage in civil disobedience unless you have no alternative and you are prepared, on principle, to suffer the full punishment for the crime.

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- **animo**
- **animus**
- **animus furandi**
- **criminal statute**
- **Durham rule**
- **federal offense**
- **illegal scheme**
- **inchoate offenses**
- **innocent until proven guilty**
- **instrumentality of crime**
- **presumption of innocence**
- **probable consequences**
- **regulatory offense**
- **statutory offense**

Chapter 47

Crimes against Persons

PRIMARILY TOUCHING OR HARMING A PERSON

A **crime against a person** is antisocial conduct primarily touching or harming a person or the legal system, rather than primarily taking or harming a person's property. The common-law felonies against a person were murder, mayhem, robbery, rape, prison breach (escape), and rescue of a felon. Today, there are many statutory crimes, and so a complete list of all the crimes of a sovereign can only be made by studying the statutes of that sovereign. Crimes associated with an area of civil law are discussed with that law.

HOMICIDE

From *man killing,* **homicide** is the generic term for a human being killing another human being. From *departed,* the **deceased** is the recent victim of a homicide, any person who has recently died, or a dead person or persons in reference to their death. Regardless of when death occurred, a **decedent** is a dead person. A **felonious homicide** or, loosely stated, a **felony murder**[1] is a homicide committed while committing a felony.

A homicide is not necessarily a crime. It may be a **justifiable homicide** or an **excusable homicide**, which is a homicide for which there is a valid justification or excuse. For example, from *fetus killing,* **feticide** is the killing of a fetus, especially where the fetus is, from *capable,* **viable**, meaning capable of being born alive. From *amiss appear,* **abortion** is the unnatural termination of a pregnancy. At common law, abortion was a crime. Morally, many people believe that abortion is crime. But as discussed in Chapter 12, in 1973 the U.S. Supreme Court held, as a matter of privacy, that a pregnant woman generally has a right to terminate her pregnancy by having an abortion.

From *dark,* an **atrocity** is an act that is outrageously wicked, vile, or cruel. From *race killing,* **genocide** is killing an entire group of people based on their race or character. From *murderer intoxicated with hashish,* **assassination** is killing a public official or other politically important person. From *witness,* a **martyr** is a person killed because of his or her beliefs.

At common law, from *betrayal,* **treason**[2] was the crime of killing or overthrowing your king or master. From *lofty betrayal,* **high treason** was the common-law crime of killing or overthrowing your king. From *small betrayal,* **petit treason** or **petty treason** was the common-law crime of killing your master or your husband.

From *wife killing,* **uxorcide** is killing your wife. From *child killing,* **infanticide** is killing a child soon after birth. From *father killing,* **patricide** is killing your father. From *mother killing,* **matricide** is killing your mother. From *brother killing,* **fratricide** is killing your brother. From *sister killing,* **sororicide** is killing your sister.

At common law and morally, from *self-killing,* **suicide** is the crime of killing yourself. Today, the law is focused on the issue of **assisted suicide**, which is the crime of helping another person kill him- or herself. Assisted suicide may involve the controversial act or practice of **euthanasia**, which is, from *good death,* the act or practice of terminating a life with the motive of ending pain and suffering. Some states have **right-to-die laws**, which are laws that explicitly permit dying people to refuse extraordinary medical treatment to keep them alive.

MURDER AND MANSLAUGHTER

From *unlawful killing,* **murder** is killing another human being with malice aforethought. **Malice aforethought** is the state of mind to do a wrongful act without justification or excuse, immediately before and during the act, or, simply, evil intent before the act. A **murderer** is a person who commits murder.

In criminal law, **malice**[2] is, from *ill will,* the state of mind to do a wrongful act without justification or excuse or, simply, evil intent. In criminal law, **malicious**[2] is acting with the state of mind to do a wrongful act without justification or excuse or, simply, acting with evil intent. In criminal law, **actual malice**[1] is intent to kill or intent to do serious bodily harm. **Implied malice** is having a depraved heart or committing or attempting to commit a felony. Precisely stated, a **felony murder**[2] is killing another human being as the result of committing or attempting to commit a felony. The **felony-murder rule** is the law that it is murder to kill another human being as the result of committing or attempting to commit a felony.

First-degree murder, **premeditated murder**, or **aggravated murder** is the planned killing of another human being with malice aforethought or a murder with premeditation or deliberation. From *before consider,* **premeditation** or **prior calculation and design** is prior consideration and planning. **Deliberation**[2] is having a fixed purpose or carrying out a fixed purpose. **Lying in wait** is concealing yourself along the victim's path to kill when the opportunity arises.

Second-degree murder is the unplanned killing of another human being with malice aforethought or a murder without premeditation or deliberation.

At common law and in some states, the **year-and-a-day rule** is the requirement that for an act allegedly causing the victim's death to be deemed murder, the victim must die within one year and a day of the act.

From *man killing,* **manslaughter** is the unlawful killing of another human being without malice aforethought. It may be voluntary or involuntary. From *of will,* **voluntary** is done by choice and, from *not of will,* **involuntary** is not done by choice.

Voluntary manslaughter is the intentional killing of another human being without malice aforethought, but in a heat of passion provoked by the deceased. A **heat of passion** is a sudden and extreme state of mind like desperation, fright, rage, or terror. An **adequate provocation** is a provocation that causes a heat of passion in a reasonable person. A **crime of passion** is a crime committed in the heat of passion.

Involuntary manslaughter is the unintentional killing of another human being without malice aforethought, but with criminal negligence, or while committing or attempting to commit a misdemeanor. **Criminal negligence** is, in part, malum in se carelessness—carelessness that is wrong because it is inherently dangerous or evil; for example, pointing a real gun at someone. **Misdemeanor manslaughter** is the unintentional killing of another human being while committing or attempting to commit a misdemeanor. The **misdemeanor-manslaughter rule** is the law that it is involuntary manslaughter to unintentionally kill another human being while committing or attempting to commit a misdemeanor.

GENERAL CRIMES OF PHYSICAL HARM OR THREAT

From *trouble,* a **threat** is a serious declaration of the intent to harm another by a wrongful act. In criminal law at common law, **assault**[2] was, from *at-leap,* the common-law crime of unlawfully threatening to apply physical force to the person of another, wrongfully threatening to strike another, or, simply, threatening an unconsented touching. In criminal law at common law, **battery**[2] was, from *beating,* the common-law crime of unlawfully intentionally applying physical force to the person of another, wrongfully striking another, or, simply, an unconsented touching.

At common law, a person who threatened to strike another and then did so committed both assault and battery. Because of the close relationship between assault and battery, the crimes were often referred to together. As a result, the phrase **assault and battery** came to mean common-law assault, common-law battery, or both. Today, in criminal law, assault has often become the preferred term for what was common-law battery and menacing has often become the preferred term for what was common-law assault. This is not true in every state, so study how the terms are used in your state. Several states—South Carolina, for example—do not follow the modern trend.

Both at common law and today, an **assailant** is a person who commits an assault. According to the modern trend, the crime of **assault**[3] is the crime of unlawfully intentionally applying physical force to the person of another, the crime of wrongfully striking another, or, simply, a criminal unconsented touching. From *threatening,* **menacing** is the crime of unlawfully threatening to apply physical force to the person of another, the crime of wrongfully threatening to strike another, or, simply, criminally threatening an unconsented touching.

An **aggravated assault** is a particularly fierce or reprehensible assault such as an assault causing serious bodily harm or an assault with a deadly weapon. A **deadly weapon** is any item capable of causing death or serious bodily harm because of what it is or how it is used. Aggravated assault replaces the common-law crime of mayhem. From *mad,* to **maim** is to cause a person to lose or severely injure a part of his or her body. **Mayhem** was the common-law crime of maliciously maiming a person, rendering the person less able to fight in the king's army.

Similar to assault and menacing, **stalking** is, from *walk in stealth,* the crime of repeatedly following, harassing, and threatening a person and placing the person in fear of death or serious bodily harm. A **stalker** is a person who commits stalking.

From *take in stealth,* to **steal** is to take wrongfully or to take in the manner of taking wrongfully. A combination of stealing and assault and battery, robbery is a crime against both persons and property. From *steal from,* **robbery**[2] was the common-law crime of larceny by violence or putting another in fear. Larceny is discussed in Chapter 48. The modern crime of **robbery**[1] is, by force or threat of force, knowingly taking or controlling property to deprive the owner thereof without the owner's express or implied consent or, simply, stealing by force. **Armed robbery** is robbery with a firearm or other deadly weapon. A **robber** is a person who commits robbery. Robbery on the high seas is known as **piracy**[3]. From *sea robber,* a **pirate** is a person who commits piracy.

Similar to robbery but with a different threat, modern **extortion**[1] is, from *out twist,* the crime of taking property with consent induced by making a wrongful threat of force or by using other illegal coercion or fear. For example, **loan sharking** is loaning money at an illegal rate of interest. Using threats, coercion, or fear to collect on an illegal loan is extortion. Historically, **extortion**[2] was the common-law crime of a public official corruptly collecting an excessive or unauthorized fee or a public official forcing someone to give a bribe. An **extortionist** is a person who commits extortion.

A particular kind of extortion, from *bad tribute* (payment to outlaws for "protection"), **blackmail** is the crime of taking property with consent induced by threatening to reveal something derogatory about a person that would disgrace or ruin the person if made public. A **blackmailer** is a person who commits blackmail.

From *away led,* **abduction** is, generally, the wrongful taking of a person by force, fraud, or persuasion and moving the person to another place. Modern **kidnapping**[1] is the crime of unlawfully abducting or detaining a person against the person's will. At common law, **kidnapping**[2] was, from *child snatching,* taking a person from the person's own country and sending the person to another country. From *release price,* a **ransom** is money or something else of value demanded or paid for the release of a kidnapped person.

SEX CRIMES

From *cut into male and female,* **sex crimes** are crimes involving unwanted or unnatural activity between male and female.

From *flesh,* **carnal knowledge** is sexual intercourse, including the slightest penetration of the woman by the man. From *seize,* **rape** was the common-law crime of having carnal knowledge of a woman, other than your spouse, by force and against her will. A **rapist** was a person who committed rape. Most states have replaced the crime of rape with the gender-neutral crime of **sexual assault**, which is the crime of having sexual intercourse with a person against that person's will.

Statutory rape was the common-law crime of having carnal knowledge of a woman under the age of consent. Today, states usually make statutory rape a special version of sexual assault. A few states have replaced the crime of statutory rape with the gender-neutral crime of **unlawful sexual intercourse**, which is the crime of sexual intercourse with a person under the age of consent.

Sexual battery, **sexual conduct**, or **sexual imposition** is, usually, a modern sex crime less serious than sexual assault.

From the perversion for which the Dead Sea city of Sodom was noted, **sodomy** is a crime against nature. A **crime against nature** is a crime such as bestiality or unnatural sexual intercourse. From *beast,* **bestiality** is sexual intercourse with an animal. Because sodomy was the common-law complement to the crime of rape, **unnatural sexual intercourse** is sexual contact between persons not married and other than between the penis and vulva such as between the penis and anus, the mouth and penis, or the mouth and vulva. Today, most states have decriminalized sexual contact between consenting adults.

VICE CRIMES

From *evil habit,* **vice crimes** are crimes involving immoral acts that, if generally permitted, would gradually degrade society. The classics are prostitution and gambling.

From *before stand* and *offer for sale,* **prostitution** is the crime of selling your body for sexual intercourse or sexual activity. A **prostitute** is a person who sells his or her body for sexual intercourse or sexual activity. From *procure,* to **pander** is to cater to another's desire or lust. **Pandering** is the crime of inducing another to be a prostitute. A **panderer** or, from *seductive,* a **pimp** is a person who arranges prostitution. From *rousing,* **solicitation**[2] is the crime of asking or encouraging another to engage in prostitution. **White slavery** is the federal crime of transporting women across the U.S. border or a state border for the purpose of prostitution. Prostitution is illegal in every state except in designated areas in Nevada.

Closely related to prostitution because there is little difference between selling your body to dramatize sexual intercourse or sexual activity and the actual activity, from

description of prostitution, **pornography** is materials depicting sexual intercourse or sexual activity and appealing to the prurient interest. From *itching,* the **prurient interest** is an unwholesome or morbid interest or desire, especially regarding sex.

At common law, the creation, possession, or distribution of pornography could be a crime. Until the 1900s, all creation and distribution of pornography was a crime if the pornography also lacked serious artistic, literary, political, or scientific value because it was then regarded as obscenity and not protected by the freedom of speech.

During the 1900s, **adult pornography**, materials depicting sexual intercourse or sexual activity by adults, and appealing to the prurient interest, began to be regarded as having some serious artistic, literary, political, or scientific value and so were protected by the freedom of speech. However, **child pornography**, materials depicting sexual intercourse or sexual activity by a child, and appealing to the prurient interest, is not regarded as having serious artistic, literary, political, or scientific value and so the creation and distribution of child pornography is criminal and not protected by the freedom of speech.

From *game playing,* **gambling**[2] was the common-law crime of setting up or wagering money or property upon a created risk, usually described as running or playing a game of chance for money. **Illegal gambling** is the modern crime of running a game of chance for money where all of the profits are not used for charitable or public purposes.

A crime at common law, but not under the secular law of the United States, from *to speak ill of,* **blasphemy** is the crime of speaking against or ridiculing God, established religion, or sacred things.

From *routine user of abusive language,* **common scold** is the abolished common-law crime of being a woman who is a habitual gossip.

A crime in some states in the 1900s, from the ancient Roman arches under which prostitutes solicited, **fornication** is sexual intercourse between an unmarried man and an unmarried woman or sexual intercourse between any man and an unmarried woman.

A crime at common law designed to stabilize the English workforce, **vagrancy** is, from *wander,* the crime of wandering from place to place without a visible means of support and without a lawful objective or purpose. A **vagrant** is a person without a visible means of support or without a fixed place to live. Similarly, **loitering** is, from *lurking,* lingering or remaining in a place without an apparent reason. Loitering is often associated with illegal activity, but if it is not actually associated with illegal activity, it is not illegal.

CRIMES AGAINST GOOD GOVERNMENT AND PUBLIC ORDER

The ultimate crime against good government is treason. Because treason may involve homicide, it is discussed above under homicide. Because constitutional law defines it, treason is also discussed in Chapter 7. Graft is also discussed in Chapter 7.

From *bread given to a beggar,* a **bribe** is something of value given or received to corruptly influence the performance of an official duty. **Bribery** is the crime of giving a bribe or taking a bribe. From *together put,* **compounding a crime** is the separate crime of agreeing not to prosecute a crime in exchange for money or other consideration. **Extortion**[2] was the common-law crime of a public official corruptly collecting an excessive or unauthorized fee or a public official forcing someone to give a bribe.

Disorderly conduct has no standard definition but is, generally, the crime for any annoying acts that disturb the peace, disturb those who see or hear them, or endanger the health and safety of the community. Examples of disorderly conduct include exhibitionism, fighting, public intoxication, and using offensive language.

At common law, **unlawful assembly**[1] was, from *to together (meet),* the meeting of three or more persons for an unlawful purpose, which could cause a riot or result in violence. Modern **unlawful assembly**[2] is a meeting for an unlawful purpose beyond the scope of freedom of assembly such as parading without a permit and blocking traffic.

CRIMES AGAINST THE LEGAL SYSTEM

From *against-stand,* **resisting arrest**[1] is the common-law crime of physically opposing a lawful arrest. If an arrest is lawful, there is no right to self-defense. Resisting a lawful arrest is dangerous and foolish.

From *away from swearing,* modern **perjury**[1] is deliberately giving a false, incomplete, or misleading statement under oath or affirmation or, simply stated, lying under oath or affirmation. "False, incomplete, or misleading" is the opposite of the truth, the whole truth, and nothing but the truth.

Modern perjury combines **perjury**[2], the common-law crime of lying under oath in a judicial proceeding, and **false swearing** or **false oath**, the common-law crime of lying under oath but not in a judicial proceeding such as in an affidavit.

From *underhandedly equip,* **subornation of perjury** is procuring another to deliberately give a false, incomplete, or misleading statement under oath or affirmation or, simply stated, procuring another to lie under oath.

From *imitation,* **counterfeit**[1] (the noun) is not real but made to appear real. From *imitate,* to **counterfeit**[2] (the verb) is to make to appear real something not real and to make and pass as real phony paper money or other phony things with the intent to defraud another. From *imitating,* **counterfeiting** is making to appear real something not real and the crime of making and passing as real something that is not real but appears to be real, especially paper money and other valuable things.

From *make in a hard material,* to **forge** is to intentionally make or alter a writing to commit a fraud against another or to counterfeit or deceitfully arrange genuine things to intentionally create an erroneous or false impression. **Forgery** is intentionally making or altering a writing to commit a fraud against another or the counterfeiting or deceitful arrangement of genuine things to intentionally create an erroneous or false impression. From *speak* or *turn out,* to **utter** is to put forth and to put in circulation. **Uttering** is the crime of putting forth a forgery (perhaps forged by a different person) as genuine with the intent to defraud another.

From *wrongly view,* **misprision** is observing or knowing about, and concealing, a serious crime in which you did not participate. **Misprision of felony** was the common-law misdemeanor of observing or knowing about, and concealing, a felony in which you did not participate. Today, a misprision crime, if any, usually includes an element of taking an affirmative step to conceal the crime.

From *get out of your cape* (and leaving your pursuer with just your cape), **escape** or, as it was called at common law, **prison breach** is, from *prison break out,* the crime of leaving or fleeing lawful imprisonment without permission.

From *against build* or *block,* **obstruction of justice** is the crime of impeding a person from seeking justice or impeding a person who has the power and duty to administer justice, including a police officer, court reporter, judge, juror, or witness. Narrowly construed at common law, it is now broadly construed to include common-law crimes like rescue of a felon and embracery. From *(putting) in your arms,* **embracery** was the common-law crime of attempting to bribe or otherwise corrupt a juror. From *keep up,* **maintenance**[2] was the common-law crime of unauthorized interference in a lawsuit to help one party win, whether or not that interference would result in personal profit.

TRAFFIC CRIMES

Traffic laws are designed, in part, to avoid harm to persons caused by the misuse of public roads. Here are just a few of the many crimes related to traffic.

A **driver's license** is, generally, government permission to operate a motor vehicle on public roads. **Unlawful operation** is the crime of operating a motor vehicle on a public road without a valid driver's license. From *careless,* **reckless driving** is remarkably careless or incompetent driving likely to be the opposite of wreckless driving.

Hit and run or **leaving the scene of an accident** is, generally, the crime of being involved in a motor vehicle accident and not stopping to give basic information about yourself to others involved in the accident.

Driving while intoxicated, with the acronym **DWI**, and **driving under the influence**, with the acronym **DUI**, is, generally, the crime of operating a motor vehicle while impaired due to being under the influence of alcohol or other drugs. An **implied consent law** is a law under which drivers suspected of driving under the influence are presumed to have consented to testing of the alcohol content of their blood. If a driver suspected of driving under the influence does not submit to alcohol-content testing, the driver may lose his or her driving privileges.

From *imprudent person,* **jaywalking** is the crime of walking across the middle of a busy city street rather than crossing at an intersection. **Joyriding** is the crime of taking the motor vehicle of another, without permission, and using it for a short time.

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- **barratry**
- **champerty**
- **crimen falsi**
- **Mann Act**

Chapter 48

Crimes against Property

PRIMARILY TAKING OR HARMING PROPERTY

A **crime against property** is antisocial conduct primarily taking or harming a person's property, rather than primarily touching or harming a person or the legal system. Many crimes against property are white-collar crimes. An allusion to the traditional dress shirt of a businessperson, a **white-collar crime** is a crime based on corruption, dishonesty, or fraud and often committed by businesspersons and public officials of otherwise high social status.

This chapter discusses many but not all crimes against property. The common-law felonies against property were larceny, burglary, and arson. Today, there are many statutory crimes, and so a complete list of all the crimes of a sovereign can only be made by studying the statutes of that sovereign. Crimes associated with an area of civil law are discussed with that law.

TAKING OR HARMING PROPERTY WITHOUT DECEPTION

Owners of property have a general right to possess their property or to permit whom they choose to possess that property. Taking or harming property interferes with its possession by the owner or by a person with the owner's permission. From *take in stealth,* to **steal** is to take wrongfully or to take in the manner of taking wrongfully.

Addressing the possession of property taken by stealing, the felony of **larceny** was, from *theft,* the common-law crime of taking and carrying away the personal property of another without consent with the specific intent to steal it. Eventually, larceny was divided by the value of the thing taken. From *large theft,* **grand larceny** is the felony of stealing personal property of great value and, from *small theft,* **petit larceny** or **petty larceny** is the misdemeanor of stealing personal property not of great value.

From *away carrying,* **asportation** is the element of carrying away the personal property of another and includes the slightest movement of the property. Larceny included taking by **breaking bulk**, meaning the opening of a container in which property is held. By including the breaking of bulk, larceny covered the modern crime of **vandalism** or **malicious mischief**, which is the crime of an intentional partial destruction, but not a total taking, of the personal property of another. The word "vandalism" is from a stereotype of the Vandals, a Germanic tribe that in the 300s and 400s invaded Western Europe. The word "mischief" refers to playful but bad behavior.

Larceny also covered the act of **sabotage**, which is the destruction of personal property for the purpose of interfering with normal business or government. The traditional origin of the word "sabotage" is from France in the early 1900s when striking workers threw sabots—shoes—into their employers' machines, causing damage.

The common-law felony of **arson**[1] was the willful and malicious burning of the dwelling of another. From *remain,* a **dwelling** is a building in which a person usually lives and a building regarded as a person's home. The dwelling was distinguished from the **curtilage**, which is, from *courtyard,* the land and buildings around a dwelling. Thus, it was arson to burn down a house but not to burn down a barn.

Broadening the common-law concept of arson to cover all wrongful burning, **statutory arson** or **arson**[2] is the modern crime of burning or similarly destroying any personal property or building, including your own when done in an attempt to collect insurance. An **arsonist** is a person who commits arson. Although arson appears in this chapter because it always causes harm to property, please note that it also often causes harm to persons. Fire is extremely dangerous, both to people in a burning building and to firefighters who must attempt to rescue people in a burning building and put the fire out.

The common-law felony of **burglary** was, from *break in,* the common-law crime of breaking into and entering a dwelling at night with the specific intent to commit a felony. **Breaking and entering** are two of the elements of burglary, namely, the use of force, however slight, to gain entry, then going in. Breaking and entering included **constructive breaking**, which is gaining entry by deception. The **night** or **nighttime** is in the dark after sunset and before sunrise, when, without moonlight or artificial light, the face of another cannot be discerned.

Broadening the common-law concept of burglary to cover any dangerous entry at any time, **statutory burglary** or **unlawful entry** is the modern crime of wrongfully entering or remaining in the real property or structure of another to commit any crime.

TAKING OR HARMING PROPERTY WITH DECEPTION

From *deception,* **fraud**[1] is, generally, intentional deception harming another or taking by deception. To **defraud** is to deprive a person of property by deception.

Addressing the possession of property taken by fraud, **larceny by trick** was, from *deceptive thing,* the common-law crime of taking the personal property of another by consent fraudulently induced with the intent to defraud. Larceny by trick covered the classic **confidence game**, **con**, or **swindle**, which is a double-deception scheme in which a person by deception gains the confidence of the victim, then by deception takes the victim's money or other property by taking advantage of the confidence gained. A **conman**, a **con-woman**, or a **swindler** is a person who cons or swindles another. The word "swindler" is from a word for giddy—a characteristic of a stereotypical cheater.

Addressing lawfully having possession of property but keeping it by fraud, **embezzlement** was, from *secretly carry off,* the common-law crime of the fraudulent conversion of the money or personal property of another by a person already in lawful possession of it. For example, if a cashier takes money from a customer, puts it in the cash register, and then takes it, that's larceny because the money was last lawfully in the possession of the store. But if a cashier takes money from a customer and puts it straight into the cashier's pocket, that's embezzlement because the money was last lawfully in the possession of the cashier with the consent of the store.

From *to take as your own,* to **appropriate** is to make something your own or to set something apart for a particular use. To **misappropriate** is to wrongfully make something your own or to wrongfully set something apart for a particular use. The general crime of **misappropriation**[2] or **misapplication of property** is the crime of wrongfully converting any property, by any means, to a use not permitted by the owner of the property. The specific crime of **defalcation** is, from *deduction,* the crime of a person entrusted with money failing to turn the money over to another when it is due.

From *false show,* a **pretense** is an inadequate, insincere, or unsupported claim. Addressing the taking of ownership by fraud, **larceny by false pretenses**, **false pretenses**, or **criminal fraud** is the crime of obtaining the real or personal property of another by making a relied-upon false statement of a past or present fact with the intent to defraud. A classic example of false pretenses is falsely claiming to be an elderly person's grandchild and accepting gifts from the elderly person on that basis.

Mail fraud is the modern crime of using postal services to take money, other property, or services by deception. **Wire fraud** is the modern crime of using electronic communications to take money, other property, or services by deception.

MODERN THEFT

Combining the common-law crimes of larceny, larceny by trick, embezzlement, and false pretenses, most states have a simple modern crime of **theft**, which is knowingly taking or controlling personal property to deprive the owner thereof without the owner's express or implied consent or, simply, stealing. A **thief** is a person who steals or a person who has stolen.

Shoplifting is taking goods on display in a store without paying for them. A **shoplifter** is a person who takes goods on display in a store without paying for them.

Addressing those who wrongfully benefit from theft crimes also deters theft. **Receiving stolen property** or **receiving stolen goods** is the common-law crime of receiving stolen property, subjectively knowing that the property has been stolen, and receiving the property with wrongful intent. Wrongful intent in receiving stolen property is intending to do anything other than to try to return the property to its true owner or try to catch the thief. An allusion to providing a thief with the practical *defense* of lack of possession of the stolen property, a **fence** is a person who receives stolen property to sell it or otherwise dispose of it for profit.

THE POSSESSION OF ILLEGAL PROPERTY

The government can prohibit the possession, manufacture, transportation, sale, or distribution of property that is inherently harmful to society or harmful to society if not properly used. From *against proclamation,* **contraband** is something that is not permitted to be possessed. Items commonly deemed to be contraband include counterfeit money, explosives, illegal drugs, and untaxed liquor. The government can take possession of property that is contraband precisely because it is illegal for its last private owner to possess it. From *to the treasury,* to **confiscate** is to take private property without just compensation, especially to take private property without just compensation because it is contraband.

Criminal possession of an item of contraband may include **constructive possession**, which is the power and intent to have current control over property without immediate control. Criminal possession does not require the immediate presence or immediate control of the item. For example, the driver of a car may be considered to be in constructive possession of whatever is in the glove compartment.

The enforcement of possession laws often catches dealers in contraband. A **dealer** is a person who acquires personal property in order to sell it at a profit. A dealer is likely to possess a large amount of whatever the dealer is selling. From *trade,* **trafficking** is the unlawful manufacture, transportation, sale, or distribution of contraband.

There are many laws concerning the legal and illegal possession of firearms. One common firearm-related possession crime is **carrying a concealed weapon**, which is carrying a weapon where it cannot be seen without having permission to do so.

The most common contraband in society today is illegal drugs. **Drugs** are, generally, chemicals that cause changes in a person's mind or body, especially those chemicals that may cause a harmful effect. **Controlled substances** are drugs for which availability is restricted or outlawed in a general effort to ensure their effective use, to avoid their abuse, and to avoid their being the cause of useless addiction. **Drug trafficking** is the unlawful manufacture, transportation, sale, or distribution of a controlled substance.

ILLEGAL BUSINESS

As a general rule, the criminal law is focused on individual wrongdoing harming society. As a result, law enforcement tends to deal with criminals one at a time. The focus on individuals inherently leaves a weakness. Criminals have noticed that if they can work together in groups and help each other, they can engage in more crime and make it more difficult for law enforcement to stop them. Also, criminal organizations can serve as an alternative government where the actual government is weak or despised.

Organized crime is when criminals join together to make crime their business. The most infamous criminal organization, the **Mafia**, is, collectively, the criminal organizations whose roots can be traced to the organized crime that developed on the Italian island of Sicily. In the 1600s, when Sicily was governed by Spain, groups of families refused to cooperate with the oppressive actual government and sought to engage in self-government. The organized families, which the Spanish authorities regarded as unruly mobs, became the Mafia. As a result, the favorable term **family**[2] (from *household*) and the unfavorable terms **mobsters** and **mob** (from *rabble*) are used today to describe any group engaged in organized crime. The term **mafia** has also become generic and describes any criminal organization, regardless of the race or national origin of its members, that is similar to the Mafia.

In the 1960s and 1970s, Congress addressed the existence of organized crime in the United States. Congress concluded that the fundamental crime committed by organized criminals was most similar to common-law **racketeering**[1], which is the common-law crime of conspiracy to commit extortion. As discussed in Chapter 47, the modern crime of extortion involves making money by making threats and using illegal coercion and fear. The word "racketeering" is probably from a combination of "rack" (a torture device) and "racket" (a ball-hitting device held in the palm).

The **Racketeer Influenced and Corrupt Organizations Act**, with the acronym **RICO**, is the 1970 federal law prohibiting organized crime by prohibiting involvement in a pattern of racketeering activity. Thus, modern **racketeering**[2] is the crime of being involved in a conspiracy to commit a pattern of extortion activities, including any supporting crimes and activities such as the providing of "protection," loan sharking, illegal gambling, prostitution, drug dealing, kidnapping, and murder.

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- **attempted arson**
- **computer fraud**
- **purloin**
- **purloined**

Part Nine

Criminal Law: Procedure

Chapter 49

Criminal Courts and Procedure, Generally

INTRODUCTION

After enforcement by law enforcement agencies and officers, criminal law is applied and contested in courts. The reader should first read Chapter 36, Civil Courts and Procedure, Generally, before reading the rest of this chapter. For the sake of brevity, this chapter, Criminal Courts and Procedure, Generally, does not repeat the definitions of terms that apply to both civil and criminal courts.

There are two distinct systems of criminal procedure: the federal system for federal criminal law and, in each state, a state system for state criminal law. Although they are distinct, sometimes both the federal system and a state system will have concurrent jurisdiction over a particular kind of case or legal matter. Federal law is usually supreme over state law, and so a federal court or federal governmental agency may take jurisdiction away from a state court or state governmental agency. That is not always what happens, however, as a federal court or federal governmental agency may defer to a state court or state governmental agency as a matter of policy, especially where the state court or state governmental agency has already taken substantial actions to hear, handle, or decide a particular case or legal matter.

Except for changes of venue in order to assure having an impartial jury, jurisdiction and venue issues arise more often in civil cases than in criminal cases. Most crimes occur in one place such as in one city, and so the proper jurisdiction and venue are obvious. Where a crime begins in one place and ends in another, both places usually have jurisdiction. Venue is often placed in the court with jurisdiction that is most convenient to most of the witnesses.

CRIMINAL COURT SYSTEMS, GENERALLY

The criminal law is applied and contested in criminal courts. Although some criminal courts hear and decide only criminal cases, most courts that hear and decide criminal cases also hear and decide civil cases. The federal criminal court system, like most state criminal court systems, is a three-level court system. On the first/lowest level of a three-level court system, there are trial courts. In general, in a criminal case, the trial court determines whether or not a person has violated the criminal law. If the person has violated the criminal law, the trial court decides what the person's punishment will be. On the second/middle and third/highest levels of a three-level court system, there are appellate courts. An intermediate appellate court is an appellate court on the second or middle level of a three-level court system. A final appellate

court, a court of last resort, or the high court is an appellate court on the third or highest level of a three-level court system, an appellate court on the second or highest level of a two-level court system, or, simply, a sovereign's highest appellate court. Some states and the District of Columbia, having fewer cases to decide, have a two-level court system, which means a court system with trial courts and a final appellate court.

FEDERAL CRIMINAL COURTS

The federal trial court is the **United States district court**, abbreviated **U.S. district court**, or, simply, **district court**[1].

Created by the Foreign Intelligence Surveillance Act (FISA) of 1978, the **Foreign Intelligence Surveillance Court**, also known as the **FISA Court**, is a special federal court consisting of 11 district court judges designated by the Chief Justice that hears applications and grants orders permitting foreign intelligence surveillance and a court of review, consisting of three judges designated by the Chief Justice.

The federal intermediate appellate court is the **United States court of appeals**, abbreviated **U.S. court of appeals** or, simply, **court of appeals**[2] or **circuit court**[1].

The special criminal intermediate appellate court for appeals in cases involving persons subject to the Uniform Code of Military Justice is the **United States Court of Appeals for the Armed Forces**.

From *highest,* the federal final appellate court, the highest federal court, and the highest court in the United States is the **United States Supreme Court**, abbreviated **U.S. Supreme Court** or, simply, the **Supreme Court**[1], located in Washington, D.C.

STATE CRIMINAL TRIAL COURTS

In most states, the criminal court system, like the federal court system, is a three-level court system. Criminal law and procedure is a matter of law, not equity, and so only law courts are discussed in this chapter. A court not of record is prohibited from imposing a fine or imprisonment or punishing for contempt of court unless the accused pleads guilty or no contest. If an accused pleads not guilty or not guilty by reason of insanity, a court not of record will transfer the case to a court of record.

In criminal cases, **general jurisdiction**[3] is, usually, the power and authority of a court to hear and decide both misdemeanor and felony cases, including murder cases. In criminal cases, **limited jurisdiction**[3] is, usually, the power and authority of a court to hear and decide only misdemeanor and lesser cases and, sometimes, the power to initially process felony cases. For example, in Ohio and Pennsylvania, the county-based state trial court of general jurisdiction is the **court of common pleas**[1] or, loosely, the **common pleas court**. In many states, the city-based state trial court of limited jurisdiction is, from *of a city,* the **municipal court**. In some states, the county-based state trial court of limited jurisdiction is the **county court**. In Ohio, for example, all alleged adult criminals are brought to a municipal court or a county court. If the alleged adult criminal contends that he or she is not guilty of a felony or a misdemeanor beyond the limited jurisdiction of the municipal court or county court, the alleged adult criminal's case is transferred to the court of common pleas.

The transfer of a case or person from a court of limited jurisdiction to a court of general jurisdiction, or any time a person is ordered held for trial or further proceedings, is known as **bind over** or **bindover**. Having been transferred from a court of limited jurisdiction to a court of general jurisdiction, or having been ordered held for trial or further proceedings, an alleged criminal is said to have been **bound over** or **boundover**.

In 18 states, the state trial court of general jurisdiction is the **circuit court**[2]. In 15 states and the District of Columbia, the state trial court of general jurisdiction is the

district court[2]. In 14 states, the state trial court of general jurisdiction is the **superior court**[2]. In Massachusetts, the state trial court of general jurisdiction is the **trial court**[2] or the **Trial Court of the Commonwealth**. In New York, the state trial court of general jurisdiction is the **supreme court**[2].

Besides municipal court and county court, there are many state courts of limited criminal jurisdiction with many different names. In one or more states, a state court of limited criminal jurisdiction may be the **administrative adjudication court**, **alderman's court**, **city court**[2], **county recorder's court**, **court of common pleas**[3], **criminal court**, **district court**[4], **family court**[3], **general sessions court**[2], **justice court**[2], **justice of the peace court**[2], **juvenile court**[4], **magistrate court**[2], **mayor's court**, **metropolitan court**[2], **parish court**[2], **police court**[2], **state court**[2], **town court**, **traffic court**, or **village justice court**[2].

From *of youth,* a **juvenile**[2]; from *lesser,* a **minor**[2]; or from *baby,* an **infant**[2] is, generally, a young person who is not an adult. In most states, there is a separate criminal and family law court for young persons who are not adults, usually known as **juvenile court**[2]. **Juvenile delinquency** refers to minors committing serious criminal acts. Thus, a **juvenile delinquent** or **juvenile offender** is a minor who has committed a serious criminal act. A **youthful offender** is a child or young adult criminal processed through juvenile court.

STATE INTERMEDIATE APPELLATE COURTS FOR CRIMINAL APPEALS

Because some states (Delaware, Maine, Michigan, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia, and Wyoming) and the District of Columbia have a two-level court system, they do not have an intermediate appellate court.

Two states have intermediate appellate courts as special extensions of their trial courts. In New Jersey, the state intermediate appellate court is the **Appellate Division of Superior Court**. In New York, the state intermediate appellate court is the **Appellate Division of the Supreme Court**.

Two states have an intermediate appellate court just for criminal appeals. In Alabama and Tennessee, the state intermediate appellate court for criminal appeals is the **court of criminal appeals**[1].

In 28 states, the state intermediate appellate court for all appeals is the **court of appeals**[3]. In Connecticut and Illinois, the state intermediate appellate court is the **Appellate Court**[2]. In Massachusetts, the state intermediate appellate court is the **Appeals Court**. In Maryland, the state intermediate appellate court is the **Court of Special Appeals**. In Florida, the state intermediate appellate court is the **District Court of Appeal**. In Hawaii, the state intermediate appellate court is the **Intermediate Court of Appeals**. In Pennsylvania, the state intermediate appellate court for criminal appeals is the **Superior Court**[4].

STATE FINAL APPELLATE COURTS FOR CRIMINAL APPEALS

Two states have a final appellate court just for criminal appeals. In Oklahoma and Texas, the state final appellate court just for criminal appeals is the **Court of Criminal Appeals**[2]. In 44 states, the state final appellate court for all appeals is the **supreme court**[4]. In the District of Columbia, Maryland, and New York, the district or state final appellate court is the **court of appeals**[4]. In Maine and Massachusetts, the state final appellate court is the **supreme judicial court**.

CRIMINAL COURT BASICS

The plaintiff in a criminal case is always the sovereign whose criminal laws have allegedly been violated. As a result, the plaintiff in a criminal case is referred to as **the government**, **the state**, **the people**, or **the commonwealth**, as appropriate, according to the tradition of the sovereign.

The defendant is the person against whom a case is brought or the person who responds to a case brought to a trial court. From *charged*, **alleged** means asserted but not necessarily authentic, accurate, or true. In a criminal case, the **defendant**[3] is a person alleged to have committed one or more crimes. In other words, the defendant is an alleged criminal.

From *pursue,* **prosecution**[1] or to **prosecute** is, generally, to move a case toward resolution. In criminal law, a **prosecution**[2] is a formal attempt to prove in court and obtain a judgment declaring that the defendant has committed one or more crimes. The plaintiff in a criminal case is always a prosecutor, a district attorney, or a solicitor, as the local representative of a sovereign, seeking a judgment declaring that the defendant has committed one or more crimes. From *load a weapon,* a **charge**[5] (the noun) or **criminal charge** is a crime upon which a prosecution is attempted, a crime of which a person is accused, and an accusation of a crime.

From *against-cause,* the **accused** or **defendant**[4] is an alleged criminal charged with a crime or a person facing a charge. A **defense**[2] is the formal attempt to show that it cannot be proven in court that the defendant has committed a particular crime.

From *fault,* **guilty**[2] (judgment) is the judgment of a court that the accused committed and is responsible for the crime charged and the judgment declaring that the prosecution has proven that the defendant has committed a particular crime. **Not guilty**[1] is the judgment of a court that the prosecution did not prove beyond a reasonable doubt that the accused committed and is responsible for the crime charged and the judgment declaring that the prosecution has not proven that the defendant has committed a particular crime.

Many of the orders a court must make are routine. As a result, it makes sense for a court to make one order governing many routines applicable to all cases. A court rule is a rule of procedure ordered by a court. **Criminal rules** are court rules for criminal cases.

Rules of criminal procedure are the rules of procedure applicable in a criminal case. The **Federal Rules of Criminal Procedure**, abbreviated **Fed. R. Crim. P.** or **FRCP**, are the rules of procedure applicable to a criminal case in a U.S. district court. Each state has similar rules of criminal procedure, many intentionally patterned after the federal rules.

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- **Circuit Court**[3]
- **United States Circuit Court**
- **United States Court of Military Appeals**

Chapter 50

Search, Seizure, and Arrest

TO PROTECT AND SERVE

From *front cover,* to **protect** is to preserve in safety. From *be useful,* to **serve**[2] is to help as needed. In general, law enforcement officers **protect and serve** society, meaning that they preserve society in safety and help the members of society as needed.

To protect and serve, it is often necessary to investigate. From *on the footstep* or *track,* to **investigate** is to inquire into and find the facts or evidence. As an agent of the government, a law enforcement officer has **investigatory powers**, which are the powers to investigate violations of the law for the protection of society. A law enforcement officer often becomes an **investigator**, which is a person who inquires into and discovers the facts. **Investigation**[1] is, specifically, inquiry to find the facts or evidence.

In general, law enforcement officers enforce the law by observing people, by looking for evidence of a violation of the criminal law, by gathering evidence against those people who appear to have violated the criminal law, and by bringing those people who appear to have violated the criminal law to court to answer for their apparent crimes.

From *on the footsteps,* **investigation**[2] is, generally, inquiry into past and present circumstances. From *go about,* **search**[2] is, generally, looking for evidence. From *claim for court,* **seizure**[1] is, generally, gathering evidence. From *to stay back,* **arrest**[2] is, generally, depriving a person of his or her liberty by lawful authority and bringing a person to court to answer for something.

THE FOURTH AMENDMENT, GENERALLY

In general, from *authorization,* a **warrant**[1] is an assurance or guarantee of quality or validity. By a government, a **warrant**[3] is governmental authority to perform an act such as to make a payment from the government treasury. In criminal law, a **warrant**[4] is a writ assuring governmental authority to make a search, seizure, or arrest and directing that it be done and a writ authorizing a search, seizure, or arrest and directing that it be done.

Before the American Revolution, British officers enforcing British taxes on exports from the American colonies often obtained a **writ of assistance**[1], which was a common-law writ authorizing a search for evidence without limits. As a practical matter, a writ of assistance permitted British officers to make unreasonable searches and seizures anywhere in the American colonies at any time. The British abuse of investigatory powers was a factor leading to the adoption of the Fourth Amendment of the Constitution of the United States, which protects a person's reasonable expectation of privacy.

The **Fourth Amendment** is the constitutional amendment generally guaranteeing freedom from unreasonable searches and seizures and that "no Warrants shall issue,

but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." An **unreasonable search and seizure** is a search or seizure that violates a person's reasonable expectation of privacy and violates the requirements of the Fourth Amendment.

Probable cause is reasonably trustworthy information of specific facts and circumstances sufficient to assure another person that there is good reason to believe that a crime has been committed or that something is at a particular location. To get a warrant, law enforcement officers must present reasonably trustworthy information, supported by affidavits, to a detached neutral magistrate and persuade him or her to issue a warrant. A **detached neutral magistrate** is a judicial officer not involved in law enforcement such as a judge or magistrate. In determining whether there is probable cause, the magistrate should use the **totality of the circumstances test**, which is looking at all the circumstances rather than any particular factors.

From *hidden,* **clandestine** is secret or in secrecy. An **informer** or **informant** is a person who clandestinely provides information about wrongdoing to a law enforcement officer. In obtaining a warrant, a law enforcement officer does not have to disclose the identity of an informer as long as sufficient evidence is presented as to why the informer's information is believed to be trustworthy.

To be valid, a criminal warrant must not be a **general warrant**, which is an unconstitutional warrant that does not particularly describe the place to be searched or the persons or things to be seized.

In Latin *as if,* **quasi** means like but not actually. **Quasi-criminal** means like a crime but not actually a crime. The Fourth Amendment applies to both criminal and quasi-criminal cases. For example, if a government employee loses his job because he has been arrested for a crime, the civil matter of the loss of his employment is quasi-criminal because it is based on the government's contention that he committed a crime.

OBSERVING PEOPLE

A **subject** is a person observed. From *over-watch,* **surveillance** is continuous observation or clandestine observation. **Electronic surveillance** is continuous observation by electronic means or clandestine observation by electronic means.

From *up look at,* **suspicion** is the thought that something may be a fact but without sufficient evidence to be sure. **Suspicious** is causing the thought that something may be a fact but without sufficient evidence to be sure. To **suspect**[1] (the verb) is to have a suspicion or to be suspicious. A **suspect**[2] (the noun) is a person under suspicion, especially a person under suspicion of having committed a crime.

LOOKING FOR EVIDENCE

Specifically, a **search**[3] is looking for particular evidence, looking for a particular person or thing, or prying into hidden places for something concealed.

A search is always legal when made with a valid search warrant. A **search warrant** is a writ assuring government authority to examine a particular place and take particular things and directing that it be done and a writ authorizing the examination of a particular place and the taking of particular things and directing that it be done. A **valid search warrant** is a warrant issued after a genuine showing of probable cause.

A **warrantless search**, a search made without a warrant, may be legal depending on the circumstances.

A legal warrantless search can be made when it is a **search incident to an arrest**, which is a search of a person being arrested and the area in the person's immediate control. A legal warrantless search also can be made when what is searched for is in

plain view, meaning that what is searched for is readily observable to a person in a place the person is lawfully entitled to be. The observation may be with any of the five common senses—seeing, hearing, touching, smelling, or tasting—with common enhancements (for example, using a flashlight).

A search warrant is not required when a person consents to a search without a warrant or where it is impossible or unwise to obtain a warrant. A person with equal rights to occupy a place such as a roommate also can consent to a search.

From *fully formed,* a **perfect crime** is a crime that a criminal apparently gets away with because evidence of the crime or who committed the crime is not found or a crime that a criminal believes that he or she will get away with because evidence of the crime of who committed the crime will not be found. Sometimes arrogance or guilt causes a criminal to confess to a perfect crime. Sometimes persuading a criminal to consent to a search leads to evidence of the crime. The fictional detective Colombo used the arrogance of perfect-crime murderers against them, by finding evidence against them in searches they consented to because they had to act as if they had nothing to hide.

Special issues of consent arise when a search is by **eavesdropping**, an allusion to being where rain drops from the eaves, which is a non–communicating party's monitoring of a communication by communicating parties. A **wiretap** or, from a microphone that looks like an insect, a **bug** is an electronic device used to eavesdrop on and/or record the electronic or oral communications of others. **Wiretapping** or **bugging** is using an electronic device to eavesdrop on and/or record the electronic or oral communications of others. In *Katz v. United States,* 389 U.S. 347 (1967), the Court held that any means of electronic surveillance is a search if the subject of the surveillance has a reasonable expectation of privacy. Special warrants are required for searches and seizures by wiretapping without a communicating party's consent. In most states, one party to a communication can consent to the wiretapping of the communication. In some states, all parties to a communication must consent to the wiretapping of the communication.

GATHERING EVIDENCE

From *take possession,* to **seize** is to take suddenly and by force or the threat of force. Specifically, a **seizure**[2] is a taking of contraband or evidence suddenly and by force or the threat of force. During a lawful search, law enforcement officers can seize contraband and other evidence of a crime and a person if there is sufficient evidence or authority for an arrest.

As the result of a seizure of property, the owner of the property is dispossessed and the property is taken into government custody. As the result of a seizure of a person, the person arrested is taken into government custody. From *guarding* and *keeping,* **custody** is having the care and control of a person or property or to be under another person's care and control. From *dam up,* to **impound** is to take and retain the property of a person over whom you have custody such as things on the person of someone who is arrested that he or she is not permitted to retain while in custody.

BRINGING SUSPECTED CRIMINALS TO COURT

To **arrest**[3] or to **place under arrest** is, specifically, to lawfully seize a suspected criminal to force him or her to answer for a crime, to lawfully seize a person to force him or her to appear in court, or to lawfully seize a person for his or her own protection.

From *upon seize,* to **apprehend** or **take into custody** is to place a person in custody or to make an arrest. From *against-stand,* **resisting arrest**[2] is physically opposing the force of an arrest. Unless an arrest is clearly unlawful, the wisest course for a person being arrested is, from *overtly give up,* to **surrender**, which is to deliver or release yourself or your property in response to a legal demand for it.

An arrest is always lawful when made according to a warrant. An **arrest warrant** is a writ assuring government authority to seize a particular person and directing that it be done and a writ authorizing the seizure of a particular person and directing that it be done. A **warrantless arrest** is an arrest without a warrant. As a general rule, a person cannot be lawfully arrested without a warrant, but there are exceptions.

A warrantless arrest cannot be made in a private residence unless there are exigent circumstances. From *urgency,* an **exigency** is an emergency situation excusing noncompliance with a procedure. **Exigent circumstances** are emergency situations or conditions excusing noncompliance with a procedure such as a "now or never" situation for which there is no time to get a warrant; for example, arresting a terrorist before he or she detonates a bomb.

A warrantless arrest can be made when a law enforcement officer is in **hot pursuit**[2] or **fresh pursuit**[2], which is when a law enforcement officer is physically chasing after a criminal suspect and when a law enforcement officer may cross into another jurisdiction to make an arrest for a felony.

A warrantless arrest for a felony may be made only when the arresting officer has information or knowledge of facts reasonably calculated to induce a belief that a felony has been committed and that the person arrested committed the felony. A warrantless arrest for a misdemeanor may be made only when it is committed in the view of the arresting officer. Arrests are not made for violations or minor misdemeanors.

When suspected criminals are not arrested but there is a need to force them to appear in court to answer for their apparent crimes, a law enforcement officer will issue, from *reference to authority,* a **citation**[2], which is a written law enforcement notice commanding the person to whom it is given to appear in court to answer for the alleged crime or to pay the applicable fine. If the person does not appear in court or pay the applicable fine, a warrant may be issued for the person's arrest. From *note,* a **ticket**[2] is a citation given for violation of a traffic law. It is a complaint and a summons.

A **citizen's arrest** is a warrantless arrest made by a person other than a law enforcement officer with authority to make the arrest. In most states, an ordinary citizen can make a warrantless arrest only with probable cause to believe that a felony has been committed by the person arrested and that person did commit the felony.

From *away-hold,* **detention** is, generally, restraining a person for a legal purpose or, generally, keeping a person in custody for a legal purpose. For example, a person may be detained for further investigation where probable cause has already been established or detained for trial where the person is not released on bail.

A **stop** is a short detention. To **frisk** or to **pat down** is to make a quick examination by hand of a person's outer clothing to detect by touch if the person is carrying a concealed weapon. **Reasonable** means, in part, having a good reason or thoughts a prudent person would have in a similar circumstance. A degree of evidence less than probable cause, a **reasonable suspicion**, is facts and circumstances that would cause a prudent person to have the thought that something may be a fact. A law enforcement officer may make a **stop and frisk**, also known as a **Terry stop**, which is a limited detention and a search of a person's outer clothing for a concealed weapon upon a reasonable suspicion that the person may be armed and dangerous. See *Terry v. Ohio,* 392 U.S. 1 (1968).

THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

To **incriminate** is to use something to infer someone's criminal guilt, to allow the inference of someone's criminal guilt, or to involve someone in an inference of criminal guilt. **Self-incrimination** or, from *intense utterance,* **confession** is admitting your criminal guilt or making a statement from which it can be inferred that you are guilty of a crime. Compelled self-incrimination or confession is prohibited by the Fifth Amendment, which provides that no person "shall be compelled in any criminal case to be a witness against himself." The prohibition applies to the states under the Fourteenth Amendment. Thus, **privilege against self-incrimination** is the constitutional right to not be compelled in any criminal case to be a witness against yourself.

Because anything you say other than "not guilty" may be something from which it can be inferred that you are guilty, and so be used against you, you have the right to remain silent. The **right to remain silent** is the right to not be compelled to speak or testify when you are facing a criminal charge.

You are not required to remain silent. A **privilege**[2] is, specifically, something you may do and not something you must do. To **waive**[2] is, specifically, to intentionally and voluntarily give up or not insist upon a known right, claim, or privilege and a **waiver**[2] is, specifically, an intentional and voluntary giving up or not insisting upon a known right, claim, or privilege. You have a **right to testify**, which is the right to waive your right to remain silent and to speak or testify when you are facing a criminal charge.

The phrases **taking the Fifth** and **pleading the Fifth Amendment** mean invoking the Fifth Amendment privilege against self-incrimination.

To negate the privilege against self-incrimination, the prosecution may grant the person immunity. From *free from service* or *exemption,* **immunity**[2] or **immunity from prosecution** is, generally, a prosecution guarantee that a person will not face a criminal charge. **Testimonial immunity** or **use immunity** is a guarantee that a person's testimony will not be used against the person when he or she faces a criminal charge. **Transactional immunity** is a guarantee that a person will not face a criminal charge for any transaction about which the person testifies.

Remember that the privilege against self-incrimination only concerns a person's statements. Physical exemplars may be taken of a person who is being investigated or has been arrested. From *example,* an **exemplar** is an item of physical evidence of a person such as a photograph, a fingerprint, a blood sample, a hair sample, a handwriting sample, a voice sample, or a DNA sample. From *writing in wood,* **booking** is the routine law enforcement procedure of recording basic information about, and taking exemplars from, a person who has been taken into custody. An allusion to a cup that looks like a face (where the handle is the nose), a **mug shot** is a standard photograph of a person taken into custody. A reference to the impressions left by fingertips, **fingerprints** are records of the unique pattern of ridges on a person's fingers and thumbs, or on other parts of a person's body. **DNA** is an acronym for deoxyribonucleic acid, which is the substance that contains a person's unique genetic code. A **DNA sample** is biological evidence of a person's DNA such as a swab of the person's saliva.

A **lineup** is placing a criminal suspect in a line with a group of persons of similar appearance to see if a witness can identify the criminal suspect as the person who committed the crime. The results are evidence if the lineup is not unduly suggestive. A **show up** is an individual meeting between a criminal suspect and a witness.

From *between questions,* **interrogation** is when a law enforcement officer questions a criminal suspect. **Custodial interrogation** is when a law enforcement officer questions

a criminal suspect who is in custody or detained in any significant way and not free to leave. ***Miranda v. Arizona*** was the 1966 case in which the U.S. Supreme Court held that the right to remain silent and the right to counsel were so important that, before a custodial interrogation, a criminal suspect had to be warned of his or her right to remain silent and right to counsel. The **Miranda warnings** are that "Prior to any [custodial] questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." See 384 U.S. 436, 444.

In effect, Miranda warnings makes the consent of a criminal suspect who consents to speak or testify **informed consent**[2], which is, generally, consent upon reasonably full notice of the relevant circumstances and possible consequences.

Self-incrimination is often referred to as a confession. To be legal evidence, a confession must be voluntary and not compelled by coercion. From *together-keep,* **coercion** is any unnatural compulsion forcing a person to do something, especially physical torture. From the third level of Freemasonry requiring an intense test, the **third degree** is the use of serious mental or physical torture to obtain a confession or other information. Giving Miranda warnings does not make a confession legal if unlawful coercion is subsequently used to obtain the confession.

From *multiple graphs,* a **polygraph** or **lie detector** is a machine that records multiple physiological changes in a person—such as heart rate, respiration, and perspiration—that are believed to be involuntary and reliably associated with a person's attempt to be deceptive. Although effective with many people, a polygraph is not effective with everyone. For example, a **pathological liar** is a person who believes that his or her lies are true. As a result, and as a general rule, polygraph evidence is often useful in a criminal investigation, but it is not legal evidence in court.

THE SIXTH AMENDMENT RIGHT TO COUNSEL

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." The **right to counsel** is the constitutional right of an accused to have the assistance of a lawyer in a criminal case and the right to have the assistance of a lawyer when you are facing a potential loss of liberty.

An accused is entitled to counsel, if requested, at a critical stage in a criminal prosecution. A **critical stage** is a stage in a criminal prosecution in which the substantial rights of the accused may be affected by the absence or presence of counsel and includes custodial interrogation if counsel is requested; initial appearance or arraignment; a lineup after formal charges have been made; trial; probation or parole proceedings if there is a resentencing or fundamental fairness requires; or the first appeal.

You are not compelled to have counsel. You have a **right to self-representation**, which is the right to waive your right to counsel and the right to represent yourself.

Gideon v. Wainwright, 372 U.S. 335, was the 1963 case in which the U.S. Supreme Court held that the Sixth Amendment right to counsel applied to the states through the Fourteenth Amendment and that if an accused could not afford counsel, the state had to appoint and pay for counsel for the accused.

From *in need,* an **indigent** is a person who is financially poor and a person who is unable to afford counsel. An **appointed counsel** is an attorney appointed to represent an indigent or an incompetent person. A **public defender** is an attorney paid by the government to serve as an appointed counsel or an attorney paid by an indigent-assisting, nonprofit organization working full time as an appointed counsel.

THE ENFORCEMENT OF RIGHTS RELATED TO CRIMINAL PROSECUTIONS

To deter law enforcement officers from disregarding a person's constitutional rights, the U.S. Supreme Court has established the exclusionary rule. From *out-close,* the **exclusionary rule** is the constitutional rule of evidence that evidence gathered by law enforcement officers in violation of a person's constitutional rights or gathered as the result of illegal law enforcement conduct cannot be used against the person in a criminal or quasi-criminal case unless it is otherwise admissible. Inherent in the exclusionary rule, the **fruit of the poisonous tree doctrine** is that evidence gathered as the result of illegal conduct cannot be used against a person in a criminal or quasi-criminal case (except to impeach untruthful testimony) unless the evidence also was gathered as the result of conduct not tainted with illegality.

Good faith[2] generally means with the intent to do the right thing. The **good faith exception to the exclusionary rule** is the limited exception to the exclusionary rule that law enforcement officers acted in good faith to protect a person's constitutional rights, but an error was made by others resulting in the evidence being obtained illegally; for example, the magistrate forgot to sign the search warrant.

From *down push,* to **suppress** is to keep out, stop, exclude, or hide an actually existing thing. Thus, **suppression** or the **suppression of evidence** is keeping out, stopping, excluding, or hiding illegally obtained evidence from a trial, hearing, or other legal proceeding. **Illegally obtained evidence** is evidence gathered as the result of a violation of a person's constitutional rights.

Before or during a trial, the defendant may make a **motion to suppress**, which is a motion to keep out, stop, exclude, or hide illegally obtained evidence. A **hearing** is a legal proceeding at which evidence is presented to determine a fact and a separate legal proceeding on an issue that must be resolved before, during, or after the primary hearing, trial, or other legal proceeding. An **evidentiary hearing** is a hearing on the issue of the legality of certain evidence and a hearing outside of a trial to determine whether or not the evidence will be admitted during the trial. A **suppression hearing** is an evidentiary hearing in which the issue is the suppression of illegally obtained evidence and a hearing outside of a trial to determine whether or not evidence allegedly illegally obtained will be suppressed during the trial.

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- **expectation-of-privacy test**
- **fruit of the poisonous tree**
- **Katz expectation-of-privacy test**
- **open-fields doctrine**
- **pen register**
- **probable cause for a search**

Chapter 51

Charged with a Crime

A CRIMINAL ACTION

While a law enforcement officer collects evidence and makes an arrest, the prosecutor evaluates the case. If the prosecutor believes the case has merit, the prosecutor takes the case to court. An ordinary citizen also may inform the prosecutor of evidence of a crime and ask the prosecutor to take the case to court.

Courts cannot take any action on a case unless a law is involved. Specifically, an **action**[2] is a recognized right or cause involving the law upon which a court can act, a request for a legal solution by a court, and a group of elements entitling a plaintiff to legal relief if admitted or proven and if there is no legal defense. A **right of action**[2] generally, a **cause of action**[1], or a **cause**[2] is a recognized right or cause for action, in the legal sense. From *substance,* **matter** is the subject of an action to be dealt with, after the action has been brought to court.

From *sin,* a **crime** is an act or omission within a person's control and contrary to a law that protects society by defining antisocial conduct or, simply, a wrong against society. A crime is a cause of action. A **criminal action** or **actio criminalis** is an action for a crime, a recognized right or cause involving criminal law upon which a court can act, and a request for a legal solution by a court under criminal law. A criminal action is a **legal action** or **action at law** because it is an action like those brought to the law courts of common-law England. A criminal action is an **action ex delicto**[2], which is an action arising from fault.

In criminal law, a **prosecution**[2] is a formal attempt to prove in court and obtain a judgment declaring that the defendant has committed one or more crimes. From *against cause,* to **accuse** or, from *load,* to **charge**[6] (crime, the verb) is to contend that someone has committed a crime or an offense. A **charge**[5] (crime, the noun) or **criminal charge** is a crime upon which a prosecution is attempted, a crime of which a person is accused, and an accusation of a crime. An **accuser** or **complainant**[2] is an alleged victim of a crime or a person acting on the alleged victim's behalf who asks the prosecutor or district attorney to bring a charge. The **accused** or **defendant**[4] is an alleged criminal charged with a crime or a person facing a charge.

From *find fault,* to **complain** is to make or file a complaint. Instead of a common-law declaration, a **criminal complaint**, a **complaint**[3], or an **accusation** is the formal writing setting out the facts constituting the crimes with which an accused is charged or what an accused is charged with. Depending on the jurisdiction, a criminal complaint may be a separate document, a document that accompanies or is part of an indictment or an information, or a document whose place is taken by an indictment or an information. In federal court and in most cases, a criminal complaint is a preliminary charge whose place is taken by an indictment or an information.

An **accusatory instrument** is a formal writing that accuses a person of a crime such as a criminal complaint, indictment, or information. An accusatory instrument may have counts. Generally, from *calculation,* a **count**[1] is a separate or distinct statement of a cause of action or the part of a formal writing that contains a separate or distinct statement of a cause of action. In criminal law, a **count**[2] is a separate or distinct charge.

INDICTMENT

For federal cases, the Fifth Amendment of the Constitution of the United States provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." States may have a similar provision, but it is not constitutionally required.

From *list,* a **bill**[1] is a written legal proposition or itemized statement. From *dictate (a message),* an **indictment** or **bill of indictment** is a formal written accusation of a crime submitted by a prosecutor to a grand jury for its acceptance and a formal written accusation of a crime that has been submitted to a grand jury by a prosecutor and accepted. An accepted indictment is taken to a judge and filed in court.

A jury that represents the opinion of the community as to whether or not there is probable cause to bring a criminal charge, a **grand jury** is an indictment jury and a jury that decides whether the evidence of crime presented by a prosecutor warrants the indictment and trial of the accused. A grand jury traditionally consists of 23 jurors; "grand" refers to a relatively large jury compared to a trial jury, which traditionally consists of 12 jurors. In some states, a grand jury consists of 18 jurors. To protect those who are investigated but not indicted, **grand jury secrecy** is the principle that grand jury proceedings are secret, except that those who testify before a grand jury may publicly describe their own testimony.

Marked on an indictment after its consideration by a grand jury, **true bill**, for the written legal proposition, is the conclusion of a grand jury that the evidence of a crime presented by a prosecutor warrants the indictment and trial of the accused or, simply, an accepted indictment. Marked on an indictment after its consideration by a grand jury, **no bill**, against the written legal proposition, is the conclusion of a grand jury that the evidence of a crime presented by a prosecutor does not warrant the indictment and trial of the accused or, simply, a rejected indictment.

The phrase **indict a ham sandwich** is a slang expression indicating that an overzealous prosecutor, by clever and selective presentation of evidence, can convince a grand jury to indict anyone or anything. As a matter of legal ethics, the role of a prosecutor is to seek justice and not merely convictions. **Prosecutorial discretion** is the discretion given to a prosecutor, in view of his or her duty to seek justice and not merely convictions, to decide whether or not to prosecute a particular instance of alleged crime. A **special prosecutor** is a prosecutor created by a sovereign legislature or appointed by a court when it is believed that an ordinary or regular prosecutor may not be in a political position or have the resources necessary to seek justice.

Rare today, in criminal law a **presentment**[2] is a written accusation of crime by a grand jury acting on its own initiative without the participation of a prosecutor.

INFORMATION

When the law does not require an indictment by a grand jury, a felony or misdemeanor criminal action may be brought by an information. From *into form,* an **information** is a formal written accusation of a crime signed by a prosecutor but not submitted by a prosecutor to a grand jury. An information may be used if the right to an indictment is waived. An information is filed in court.

When the accused has been arrested prior to an indictment or when a prosecution is brought by an information, the accused may have a right to a preliminary hearing if the charge is a felony or as provided by law. From *before threshold,* **preliminary** means coming before something such as coming before trial. A **preliminary hearing**[1], a **probable cause hearing**, or a **preliminary examination** is a proceeding in which the prosecutor is required only to present enough evidence for the court to find that there is probable cause to believe that a crime has been committed and committed by the accused. As a general rule, in a preliminary hearing, a defense attorney is permitted only to question the witness or witnesses called to testify by the prosecutor. Because a preliminary hearing is a public proceeding, unless there is a serious issue of probable cause or a serious need to discover information about the case, a defense attorney will usually recommend that the accused should waive the right to a preliminary hearing.

NOTICE OF A CHARGE

When a charge is made, it is necessary to bring the accused to the court. From *into sight,* to **appear** is, as a party, attorney, or witness, to come to court as asked, ordered, or required. **Appearance**[2] is, as a party, attorney, or witness, coming to court as asked, ordered, or required. If a defendant is under arrest or in custody, the defendant is simply brought to the court. For felonies and most misdemeanors, after an indictment or an information is filed, and if the defendant is not already in custody, the court may issue a warrant for the defendant's arrest.

For violations, some misdemeanors, or felonies when an arrest warrant is not issued, and if the defendant is not already in custody, the defendant may be called to court by a summons. From *to call* or *under warning,* a **summons**[2] is, in criminal law, a written court notice commanding a person to appear in court to answer a complaint, a writ commanding a person to appear in court to answer a complaint, or a writ commanding a person to appear in court as a juror or witness. The summons must be given or otherwise communicated to the defendant.

An **alias summons**[2] is, in criminal law, a second writ, perhaps using an alias, commanding a person to appear in court to answer a complaint or a second writ, perhaps using an alias, commanding a person to appear in court as a juror or witness.

In procedure, to **serve**[1] is to formally give a court-related document to a person. In criminal law, a summons is usually served on the accused by a law enforcement officer such as a marshal or sheriff. A **return**[2] is a report of the attempt to serve a court-related document. The person directed to serve a court-related document reports whether or not the court-related document was actually served. In criminal law, **service of process**[2] or **service**[3] is serving a process, notifying a person that he or she has been accused of a crime and commanded to appear in court to answer a complaint or notifying a person that he or she is commanded to appear in court as a juror or witness. A **process**[2] is, generally, a formal writing issued by a legal authority. Accordingly, the two processes for bringing a criminal defendant to court are an arrest warrant and a summons.

A **voluntary appearance** is when a person appears in court without having been served with a summons. A **compulsory appearance** is when a person appears in court after being served with a summons. In criminal law, if a defendant has been summoned but does not appear and answer by plea, a warrant is issued for the defendant's arrest.

From *fleeing,* **flight** is any leaving or self-concealment to avoid prosecution, arrest, or legal process. From *run away,* a **fugitive from justice** or, in short, a **fugitive** is a person sought by the law to answer for a crime, to be punished for a crime, or to be called as a witness, who knowingly engages in flight, especially a convicted criminal who has escaped from incarceration.

Where there has been flight by an accused to another state, extradition may be required. From *sanctuary,* an **asylum state** is the state that has custody of a person accused in another state. The **demanding state** is the state that has accused a person in another state. Among states, **extradite** is, from *out-deliver,* to seek the surrender of an accused by the asylum state to a demanding state. Among states, **extradition**[2] is the surrender of an accused by the asylum state to a demanding state. An **extradition hearing** is a hearing in the asylum state to determine whether there is probable cause for the surrender of an accused to the demanding state. To **waive extradition** is to waive the right to contest your extradition from the asylum state to the demanding state.

FORMAL NOTICE OF A CHARGE

The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." Although there is a tradition of informally notifying a person of the charge when he or she is arrested or summoned, the formal notice comes in an initial appearance or arraignment. An initial appearance or arraignment also may involve the issue of bail. Bail is discussed in detail later in this chapter.

An **initial appearance** is the first appearance of an accused before a judge, at which the accused is informed of the charge and bail, if any, is set. When a person is arrested without a warrant, an initial appearance is required without delay at the first reasonable opportunity. An initial appearance may be a separate proceeding, the first part of a preliminary hearing, an arraignment long before trial, or, for violations such as traffic offenses, an arraignment held immediately before trial.

After an accusatory instrument is filed, an arraignment is held. From *to speak,* to **arraign** is to accuse of a wrong and to require an accused to answer for the wrong. An **arraignment**, the formal charging of a crime and formal answering for a crime, is the proceeding at which the accused is brought into court, formally charged with a crime, given a copy of the accusatory instrument, informed of basic constitutional rights, directed to plead, and set up on bail, if any, if bail has not already been set.

PLEADING IN A CRIMINAL CASE

From *pleasing (the court),* **pleading**[1], making allegations and denials, is the process by which opposing parties alternately present their contentions in writing, responding as needed to each other's contentions. To **plead**[1] is, generally, to make an allegation or denial or to make a set of allegations or denials.

The purpose of pleading is to take the general legal controversy inherent in any case and determine in an orderly way what the parties agree upon and what the parties actually dispute. Composed of an allegation of one party and a denial by an opposing party, an **issue**[3] is, from *out-go,* a disputed point of law or fact. The phrase **at issue** means the point of law or fact in dispute. From *thing done,* a **fact** is an actual existing circumstance or an actual occurred event. A **factual issue** or **question of fact** is a disputed point of fact. A **legal issue** or **question of law** is a disputed point of law. From *(point of) strife,* a **contention** is an assertion or a denial.

From *charge,* to **allege** is to make a legal assertion of law or fact. An **allegation** is an assertion of fact or law of legal significance, which may or may not be authentic, accurate, or true, especially an assertion of fact that a party intends to prove or an assertion of fact that an opposing party intends to disprove. When an opposing party denies an allegation, an issue, a disputed point of law or fact, is identified.

As discussed in Chapters 37 and 38, there are several pleadings in civil law. In criminal law, there are only a few. The pleading of a criminal case plaintiff is the

accusatory instrument. A criminal charge contains within itself the important allegations of the prosecutor, namely, the commission of the elements of the crime charged. The pleading of a criminal case defendant is the defendant's **plea**[3], which is the defendant's formal answer to a charge. There are four pleas in a criminal case: guilty, not guilty, not guilty by reason of insanity, and no contest.

From *fault,* **guilt** is awareness of committing a crime or wrong. Generally, **guilty**[1] means having committed and being responsible for a crime or wrong or having committed and being responsible for the crime charged. The plea of **guilty**[3] or **guilty plea** is the plea of an accused that he or she committed and is responsible for the crime charged. If an accused pleads guilty and the court accepts the guilty plea as knowingly and voluntarily made, the accused's case proceeds to sentencing. Sentencing is discussed in Chapter 53.

Named after a case in which a defendant pled guilty to a lesser offense to avoid the risk of the death penalty, an **Alford plea** is a guilty plea entered into pursuant to an agreement but in which the defendant does not admit guilt. See *North Carolina v. Alford,* 400 U.S. 25 (1970). Plea bargaining is discussed later in this section.

Generally, **not guilty**[2] is not having committed or not being responsible for the crime charged. The plea of **not guilty**[3] or **not guilty plea** is the plea of an accused demanding the prosecution to prove beyond a reasonable doubt that the accused committed and is responsible for the crime charged. From *silent,* **mute** means without speech or a person who is without speech. **Standing mute** is being unable or unwilling to give a plea when directed to do so. When an accused stands mute, the court will enter a plea of not guilty.

From *not sound,* **insanity**[1] is the legal concept of a severe mental illness or condition causing a lack of competence or guilt. Generally, **not guilty by reason of insanity**[1] means having committed but not being responsible for the crime charged due to severe mental illness causing a lack of guilt. The plea of **not guilty by reason of insanity**[2] is the plea of an accused that the accused committed but is not responsible for the crime charged due to severe mental illness causing a lack of guilt.

From *I do not wish to contend,* the plea of **nolo contendere** or **no contest** is the plea of an accused that denies guilt but admits the acts charged, leaves the judgment of guilt to the court, and requests the court to proceed to sentencing. A plea of nolo contendere or no contest is not a plea of guilty, and so cannot be used against the accused as an admission of fault in a related or subsequent civil case.

In juvenile court, the concept of being guilty is deemphasized and reform of the juvenile is emphasized. The **plea of true** or **true**[1] is, in many states, the juvenile court name for a plea of guilty and the **plea of not true** or **not true**[1] is, in many states, the juvenile court name for a plea of not guilty.

After a plea is made and before sentencing, a plea may be changed. A **change of plea** is a knowing and voluntary substitution of one plea for another.

From *place for the accused,* a **court docket** or, simply, a **docket** is a court's formal list or calendar of cases pending before the court or the formal record of proceedings before a court in a particular case. From a *place for the accused,* a **trial docket** or **trial list** is a court's formal list or calendar of cases pending for trial before the court. The **docket number** is the serial number given to a case when it is filed in a court. When a large number of people are accused of crime, a court's docket may be filled.

As a practical matter, a prosecutor often has more cases to prosecute than the prosecutor or court has resources. Also, as to a particular accused, the prosecutor may have stronger evidence of one crime but weaker evidence of another. For the accused, the uncertainty associated with being charged with a crime may be intolerable.

To dispose of a criminal case without a trial, a prosecutor and a defense attorney may engage in **plea bargaining**, which is negotiating an agreement in which the prosecutor

will abandon or reduce a charge or recommend reduced punishment in exchange for the accused pleading guilty to a particular charge or, simply, negotiating less punishment in exchange for a guilty plea. A **plea bargain** or **plea agreement** is an agreement in which the prosecutor will abandon or reduce a charge or recommend reduced punishment in exchange for the accused pleading guilty to a particular charge or, simply, an agreement for less punishment in exchange for a guilty plea. A plea bargain must be on the record, the trial judge has discretion whether or not to approve the agreement, and, if a guilty plea is accepted, the sovereign must abide by its agreement.

Although an indictment or an information has been filed, a prosecutor may decide not to continue the prosecution, usually because of plea bargaining or because of a lack of expected evidence. From *not wishing to prosecute,* **nolle prosequi**, abbreviated **nolle pros.** or **nol. pros.**, is a prosecutor's formal abandonment of a charge or the formal entry in the record that the prosecutor has abandoned a charge. To **drop a charge** is, for a prosecutor, to abandon a charge.

DEFENSES IN A CRIMINAL CASE

A plea of not guilty indicates that the accused is going to make the prosecution prove its case beyond a reasonable doubt and that the accused may raise a defense.

In criminal law, a **defense**[2] is the formal attempt to show that it cannot be proven in court that the defendant has committed a particular crime. A **defense**[3] is a response denying the validity of the plaintiff's case such as a response denying the occurrence of one or more elements of the alleged crime. An **affirmative defense**[3] or **special defense** is, generally, a response establishing a fact not in the plaintiff's case; a response, regardless of the validity of the plaintiff's case, that establishes a fact to legally avoid judgment against the defendant. In criminal law, to **contest**[2] is, from *intense witness,* to present a defense or to resist a prosecution.

As a general rule in a criminal case, unlike a civil case, the defendant is not required to inform or notify the prosecutor what defense or defenses the defendant intends to rely upon at trial. The main exceptions are the defenses of alibi and insanity. In criminal law, procedural defenses are raised by making a motion.

The first possible procedural defense is lack of jurisdiction. For example, the court must have personal jurisdiction over the defendant. **Personal jurisdiction**, **in personam jurisdiction**, or **jurisdiction in personam** is the power and authority of a court to hear and decide a case involving a particular person. As a general rule, a state has no jurisdiction over a person who has never been in or acted in that state. Accordingly, a defendant or a defendant's attorney may make a **special appearance**, appearing in court for the sole purpose of challenging the court's jurisdiction, which is not considered consent to the court's jurisdiction. A **general appearance** is appearing in court for any reason other than to challenge the jurisdiction of the court over the defendant.

Another possible procedural defense is to challenge the adequacy of the accusatory instrument. For example, in criminal law, **misjoinder**[2] is joining together charges that should not be tried together because they arise out of separate transactions. From *double,* **duplicity** is two things where there should be one and **duplicitous**[1] is, generally, having two things where there should be one. A pleading is **duplicitous**[2] if there is an improper joining in the same count of two or more distinct causes of action.

Another possible procedural defense is expiration of the applicable statute of limitations. A **statute of limitations**[2] is a law requiring a certain kind of charge or action to be brought within a specified period of time. Statutes of limitation are created because of the practical difficulty of fairly resolving old disputes (for example, witnesses don't remember or die) and/or because of the unfairness of changing circumstances that

have been relied upon for a long time (for example, ownership has changed several times). In most states, there is no statute of limitations for murder.

RELEASE OF AN ACCUSED FROM CUSTODY BEFORE TRIAL

One reason why criminal suspects are arrested is to force them to answer for their apparent crimes. As a general rule, an accused is entitled to be released from custody before trial if it can be reasonably assured that the accused will appear for trial.

From *burden for release from jail,* **bail**[1] is, generally, the release of an accused from custody before trial upon reasonable assurance that the accused will appear in court when required. If reasonable assurance cannot be given that the accused will appear in court when required, then the accused is not entitled to bail. From *away-hold,* a **detainer**[2] is a writ or instrument authorizing the keeping of a person in custody.

The reasonable assurance usually involves money or property, but not necessarily. From *knowing an event,* a **recognizance** is an obligation of record entered into before a court or its clerk. **Personal recognizance** is bail in which the accused promises before the court or its clerk to appear when required under the routine compulsions of contempt of court, paying a fine, and being the subject of an arrest warrant for failure to appear. **Release on recognizance**, with the acronym **ROR**, and usually described as the **release of the accused on his or her own recognizance**, is personal recognizance or bail in which the accused promises to appear and abide by any conditions under the compulsion of having to pay a specific sum of money for failure to appear.

From *without care,* **security**[1] is, generally, something providing assurance or protection such as money or property that a person agrees to give up if he or she does not live up to the promise to appear in court when required. From *fasten to an upright timber,* to **post**[2] means to leave money or property in the custody of another as security. As security, **bail**[2] is money or property posted with a court to ensure that the accused will appear in court when required and money or property that the court will keep if the accused does not appear in court when required. An allusion to skipping over a step, to **jump bail** is to post bail with a court but not appear in court when required. If an accused jumps bail, the court will issue a bench warrant for the accused. From *the desk of a judge,* a **bench warrant** is an arrest warrant issued by the court for itself to lawfully seize a person to force him or her to appear in court.

The court sets the amount of bail after considering the crime charged, the character of the accused, and the risk that the accused will not appear in court when required. **Flight risk** is the risk that an accused will engage in leaving or self-concealment to avoid prosecution, arrest, or legal process. The amount of bail must be reasonable because the Eighth Amendment provides that "[e]xcessive bail shall not be required." **Excessive bail** is an amount of bail set at a figure higher than is reasonably calculated to fulfill the purpose of reasonably assuring that the accused will appear in court as required. If no amount of bail will reasonably assure that the accused will appear in court as required, then the accused is not entitled to bail.

A **bond**[1] is, generally, a written promise to pay money to assure the performance of an act or duty, or an insurance policy. A **cash bond** is posting the full amount of bail with the court, with the agreement that the full amount will be refunded if the accused does not jump bail. A **percent bond** is posting a percentage of the full amount of bail with the court with the agreement that the full amount will be due if the accused jumps bail and the agreement that a fee will be deducted from the amount refunded if the accused does not jump bail. A **property bond** is posting title to property of a value covering the amount of bail, with the agreement that the amount of bail will be recovered from the property if the accused jumps bail.

A **bail bond** is a written promise by a person other than the accused to pay a certain sum of money to a court if the accused does not appear in court as required. A **bail bondsman** is a person in the business of posting bail bonds for a fee. The accused or another pays the bondsman a nonrefundable fee for posting a bail bond and the accused signs a contract consenting to being arrested, taken into custody, and returned, with little or no protection from unreasonable searches and seizures, by the bondsman or a person hired by the bondsman. From *bonus,* a **bounty hunter** is a person hired by a bail bondsman to arrest, take into custody, and return an accused who jumps bail. Because a bounty hunter is not a public officer, but instead a private agent whose powers are based on the consent given in a bail bond contract, a bounty hunter may engage in what, for a public law enforcement officer, would be an unreasonable search and seizure.

PREPARATION FOR TRIAL

To stand trial, a criminal defendant must be **competent to stand trial** because a criminal defendant is entitled to be meaningfully present at trial and able to aid in his or her defense. **Sanity** means to be of sound mind. If necessary, a **competency hearing** or **sanity hearing** is held, which is a hearing to determine whether or not an accused is sane and so competent to stand trial. A person found to be not competent to stand trial is usually committed to an institution for the mentally ill.

In criminal law, a **demand for a bill of particulars**[2] is a defense motion to have the prosecution state in more detail or with more specificity what occurrences of crime are alleged against the defendant. In criminal law, a **bill of particulars**[2] is a statement in more detail or with more specificity of what occurrences of crime are alleged against the defendant.

Traditionally, a party had no access to information or evidence in the possession of an opposing party before trial. Today, a party is entitled to some **discovery**, which is, from *uncover,* the modern formal process of gathering information from an opposing party before a trial and the pretrial procedures by which a party may gain access to information or evidence in the possession of an opposing party. The concept of discovery does not fully apply in a criminal case because of the privilege against self-incrimination. From *back and forward,* a common theme in criminal law is **reciprocal discovery**, which means that to be constitutional, any right to discovery must be the same for both parties. For example, if the prosecutor is entitled to a list of witnesses from the defendant, the defendant is entitled to a list of witnesses from the prosecutor.

Nevertheless, a prosecutor has a special discovery duty because of the prosecutor's duty to do justice, not merely to seek convictions.

From *blame,* to **inculpate** is to tend to show that a person has committed a crime. From *away from blame,* to **exculpate** is to tend to show that a person has not committed a crime. **Inculpatory evidence** or **inculpatory** is evidence that tends to show that a person has committed a crime and **exculpatory evidence** or **exculpatory** is evidence that tends to show that a person has not committed a crime.

Brady v. Maryland was the 1963 case in which the U.S. Supreme Court held that a prosecutor must disclose to the accused any exculpatory evidence in the possession of the prosecutor. See 373 U.S. 83. **Brady evidence**, exculpatory evidence in the possession of the prosecutor, is any evidence in the possession of the prosecutor that is favorable to the accused and related to guilt or punishment and evidence in the possession of the prosecutor that must be disclosed to the accused. For example, a prosecutor cannot suppress a witness statement indicating that the witness thought she saw a person other than the accused commit the crime.

From *together-bring,* a **conference**[2] is a meeting held to discuss, prepare for, and/or resolve a common concern. In criminal law, a **pretrial conference**[2] is a conference of

the judge, prosecutor, and defense attorney before trial for discovery, for working out a plea bargain if possible, and/or for reviewing other matters related to the trial such as the admission or suppression of evidence.

For a trial, it is necessary to bring witnesses to court. The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." The **right to compulsory process** is the general constitutional right of a criminal defendant to have the court order a person with relevant knowledge to appear in court and be a witness. The right to compulsory process applies only to competent and material witnesses, subject to the court's process, whose testimony will be admissible.

The common compulsory process, from *under punishment,* a **subpoena**[1] is, generally, a summons to be a witness and an order of a court or other governmental entity directing a person to appear or things to be brought to a deposition, hearing, or trial. From *under punishment to testify,* a **subpoena ad tesificandum**, an ordinary **subpoena**[2] to testify, is an order of a court or other governmental entity directing a person to appear at a deposition, hearing, or trial and to testify. From *under punishment bring with thee,* a **subpoena duces tecum** is, in part, an order of a court or other governmental entity directing a person to appear at a deposition, hearing, or trial and bring with him or her certain documents or things and, if necessary, to testify. The subpoena duces tecum may indicate that only production of the documents or things is required and that the person need not appear and testify. If a person fails to obey a subpoena, the common punishment is that the person is held in contempt of court and a bench warrant is issued for the person's arrest to force the person to appear and testify.

Generally, from *separate,* **severance**[3] is the act of separating one thing from another. Before a trial, there needs to be agreement about what the trial will be about. An accused may be accused of more than one crime and may be accused of committing some crimes alone and other crimes with others. **Severance of actions** or **severance**[4] is the choice of the charge or charges on which an accused will be tried in a given trial or by a given jury, so that only related charges with related accuseds are tried in one trial or by one jury. Because severance is necessary, an accused facing several charges may have more than one trial.

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- **actio**
- **action**[1]
- **alias**
- **capias**
- **capias ad audiendum judicium**
- **capias ad respondendum**
- **ca. resp.**
- **writ of capias**

Chapter 52

Trial in a Criminal Case

THE TRIAL RIGHTS OF A CRIMINAL DEFENDANT

The reader should first read Chapter 40, Inside the Courtroom; Chapter 41, Jury Trials; and Chapter 42, Trial, Generally, before reading this chapter. For the sake of brevity, this chapter, Trial in a Criminal Case, avoids repeating the definitions of terms that apply to both civil and criminal trials. A criminal defendant has many rights discussed in previous chapters, including the right against self-incrimination, the right to remain silent, the right to testify, the right to counsel, the right to self-representation, the right to compulsory process, the right to public trial, and the right to jury trial.

A criminal defendant has a **right to a speedy trial**, which is the Sixth Amendment right to a trial within a reasonable period of time. However, it is not a right to trial in any particular amount of time. A **speedy trial** is a trial free from arbitrary delays or unusually oppressive delays. The factors considered are the reason for the delay, the length of the delay, the prejudice to the defendant, and any waiver.

A criminal defendant has a **right to presence at trial**, which is the Fifth Amendment, Sixth Amendment, and Fourteenth Amendment right to be present at your trial. A criminal defendant may waive the right, either formally, by a formal waiver, or informally, by attempting to disrupt the trial. A disruptive criminal defendant may be bound and gagged. From *in absence,* **in absentia** means the person is or was not present. A **trial in absentia** is a trial in which the defendant is or was not present.

A criminal defendant has a **right to confrontation**, which is the Sixth Amendment right to face and question under oath a witness against you.

A criminal defendant has a **right to due process**, which is the Fifth Amendment and Fourteenth Amendment right to fairness and orderliness in a proceeding that may deprive you of life, liberty, or property. Simply put, the defendant has a right to be tried by a real court, not a kangaroo court. An allusion to the random jumping around, a **kangaroo court** is a court, judge, and/or jury that is biased, not disinterested, or prejudiced against a party or that routinely disregards the rights of a party.

A criminal defendant has a **right to a fair trial**, which is the Sixth Amendment and Fourteenth Amendment right to a criminal trial by an impartial decision maker where the crime was allegedly committed. From *without moral stain,* a **fair trial** is an impartial formal determination of the facts and an original application of the law in a case brought to court. In a case of great public interest, the court may impose a **gag order**, which is, from *suffocate,* a court order that the parties, their attorneys, and other specified participants are not to comment about the merits of the case before or during the trial.

If a trial becomes unfair, the court may declare a mistrial and order a new trial. From *bad test,* a **mistrial** is the termination of a trial because of an error so severe as to require a new trial or the termination of a trial because of an event making it

no longer possible to have a fair trial. A mistrial often occurs when jurors are unable to agree on a verdict. Other possible causes include jury tampering, a witness dying before cross-examination, a felony in front of the jury, a natural disaster, a terrorist attack, and so on.

PROOF, GENERALLY

The degrees of proof used in criminal cases are beyond a reasonable doubt (for a crime) and preponderance of the evidence (for an affirmative defense).

The highest degree of proof, the burden of proof of a crime in a criminal case, and the prosecution's burden of proof for every element is **beyond a reasonable doubt**[1]. Traditionally, **beyond a reasonable doubt**[2] was defined as to a moral certainty, where a **moral certainty** meant proof jurors would rely upon in matters of great importance to themselves. Modern cases indicate that "beyond a reasonable doubt" should not be defined because it means no more or less than what is says. For the sake of explaining the legal terminology, however, **beyond a reasonable doubt**[2] can be further defined as entirely convinced, fully satisfied, or leaving a prudent person with no realistic ground for not believing. "Beyond a reasonable doubt" should not be thought of in numerical terms, but if you insist, in terms of quality, not quantity, it is about 95 percent of the total evidence. "Beyond a reasonable doubt" is not beyond all possible doubt. Reasonable doubt is not imaginary doubt. For example, the tiny chance that the ceiling above you is going to collapse while you read this sentence—something you can imagine but do not believe—is not a reasonable doubt.

From *greater weight,* **preponderance of the evidence** is the lowest degree of proof; the burden of proof for an affirmative defense in a criminal case; the burden of proof in an ordinary civil case; in terms of quality and not quantity, the greater weight of the evidence; evidence of sufficient weight to tip the scales of justice in favor of the party; evidence more convincing than the opposing evidence; and leaving a prudent person with a more-likely-than-not belief. "Preponderance of the evidence" should not be thought of in numerical terms, but if you insist, in terms of quality, not quantity, it is more than 50 percent of the total evidence.

Judicial notice is a court's recognition of a reasonably indisputable fact or law without formal proof because it is generally known in the jurisdiction or capable of ready determination from reasonably reliable resources. Judicial notice is not conclusive on the jury in a criminal case because trial by jury means that the jury has the power to find any defendant not guilty.

Direct evidence and circumstantial evidence are equally good kinds of evidence and both kinds of evidence can be used to support the other kind of evidence. The only exception is that, in a criminal case, where the burden of proof is beyond a reasonable doubt, when circumstantial evidence alone is relied on to prove an element of the crime, the circumstances must be entirely consistent with the defendant's guilt and wholly inconsistent with any rational hypothesis of the defendant's innocence.

THE ORDER OF TRIAL

A criminal trial is similar to a civil trial. A jury trial begins with the impaneling of jurors. After the jury is impaneled, the jurors are sworn. A bench trial begins, or a jury trial continues, with an oral opening statement by the prosecutor, unless waived. After the prosecutor makes an opening statement, the defense attorney, or the defendant if not represented by an attorney, may make an opening statement, waive it, or defer it until he or she presents evidence. At the beginning of the trial or early in a trial, any party may ask that the witnesses be sequestered.

The prosecutor begins to present his or her case in chief. The prosecutor calls his or her witness or witnesses. For each witness there is a direct examination. After the direct examination, any further examination may be waived. After the direct examination, there may be a cross-examination. Then there may be a redirect examination. Then there may be a recross examination. Unless further examination is required, the next witness, if any, is called. After the last witness has been called, and after that witness has been examined by the defense (unless waived), the prosecution rests its case.

After the prosecution rests, the defense will almost always make a motion for a directed verdict or a motion for judgment as a matter of law. The motion must be made and argued outside of the presence of the jury. The defense will argue that the prosecution has not proven its case beyond a reasonable doubt. Upon a finding of insufficient evidence, the court may direct a verdict for the defendant or grant the defendant judgment as a matter of law.

If the trial continues, the defense attorney, or the defendant if not represented by an attorney, makes his or her opening statement if it was deferred, unless it is waived. The defense attorney, or the defendant if not represented by an attorney, then calls his or her witness or witnesses. For each witness there is a direct examination. After the direct examination, any further examination may be waived. After the direct examination, there may be a cross-examination. Then there may be a redirect examination. Then there may be a recross examination. Unless further examination is required, the next witness, if any, is called. After the last witness has been called, and after that witness has been examined by the prosecutor (unless waived), the defense rests its case.

The prosecutor may present a rebuttal case. In theory, the defense may present a rebuttal case to the prosecutor's rebuttal case, and so on, until one party has no more evidence to present or waives the further presentation of evidence.

After the presentation of evidence has ended, the prosecutor presents his or her closing statement, closing argument, or summation, unless waived. The prosecutor may defer part of his or her closing statement, closing argument, or summation until after the defendant gives his or her closing statement, closing argument, or summation, if any.

After the presentation of evidence has ended, and after the prosecutor has presented the nondeferred portion of his or her closing statement, closing argument, or summation, unless waived, the defense attorney, or the defendant if not represented by an attorney, makes his or her closing statement, closing argument, or summation.

If the prosecutor has deferred a portion of his or her closing statement, closing argument, or summation, the prosecution gives the remainder, unless waived. In other words, the prosecutor has the right to open and close.

In a jury trial, the court instructs the jury, which retires, deliberates, reaches a verdict, and returns with the verdict.

After the verdict in a jury trial or at the end of a bench trial, the judge renders judgment. If the defendant is found guilty, sentencing begins.

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- **Confrontation Clause**
- **right to compulsory process**
- **right to public trial**
- **right to testify**

Chapter 53

Verdicts and Sentencing

VERDICTS AND SENTENCING, GENERALLY

From *to cut*, a **decision**[1] or, from *come upon,* a **finding** is, generally, the decided outcome of a case or issue or, loosely, what was found. A decision or finding is "made."

In a jury trial, the jury's formal decision is, from *truth-speak,* its **verdict**[2]. The jury's verdict is **returned**, meaning brought back to court. A jury trial normally ends with the jury's verdict. After the verdict is announced by the foreperson, **polling the jury**, the procedure in which each juror is asked about his or her individual decision about the verdict, may briefly extend a jury trial. A party may request polling to resolve suspicion that a juror's decision about the verdict was misrepresented.

In a bench trial, the court makes the **decision**[2], which is the court's conclusion about the outcome of the case. The court's decision is sometimes referred to as its verdict because in a general sense **verdict**[1] means a lawlike or law-related conclusion. From *to judge,* to **adjudge** or to **adjudicate** is to make a judicial decision. **Adjudicating** is making a judicial decision. In the specific sense, an **adjudication**[2] is a judicial judgment or decree.

After the jury's verdict or the court's decision, if the defendant has been found guilty of a crime, sentencing is held. From *teaching,* **sentencing** is the process of making a formal declaration or statement of a criminal's punishment. To **sentence**[1] (the verb) is to declare or state a criminal's punishment. A **sentence**[2] (the noun) is the declaration or statement of a criminal's punishment.

In the sense of what happened, the **disposition** is the final result or status of something. From *apart place,* to **dispose** of is to take the final action with regard to something. A court disposes of a law case with a **judgment**[3], an adjudication with finality, which is, specifically, from *law say*, the intended final order on an issue or, in a law case, the court's formal resolution of a law case, the court's recorded resolution of a law case, and the court's record of the resolution of a law case. From *recite,* to **render** is to officially announce a decision.

In a criminal case, the judgment includes the decision on the defendant's guilt and, if found guilty, the defendant's sentence. A **conviction**[2] is a judgment of guilt.

THE EARLY END OF A CRIMINAL TRIAL

A criminal trial may come to an early end if the trial court declares a mistrial. A **mistrial** is the termination of a trial because of an error so severe as to require a new trial or the termination of a trial because of an event making it no longer possible to have a fair trial. Because the defendant has not received a *fair* trial, after a mistrial the defendant can be retried on the same charges without violating double jeopardy.

A criminal trial also may come to an early end if the trial court dismisses the case. Generally, from *away send,* to **dismiss**[2] means to formally deny or cancel, **dismissed**[2]

means formally denied or canceled, and **dismissal**[2] means formal denial or cancelation. In a criminal case, to **dismiss**[3] means to rule that the defendant cannot be proven guilty beyond a reasonable doubt, terminate the charge, and remove the case from court or, simply, remove the case from court. As to a criminal case, **dismissed**[3] means the court ruled that the defendant could not be proven guilty beyond a reasonable doubt, terminated the charge against the defendant, and removed the case from court or, simply, removed the case from court. As to a criminal case, a **dismissal**[3] is the court's having ruled that the defendant could not be proven guilty beyond a reasonable doubt, having terminated the charge against the defendant, and having removed the case from court or, simply, removal of the case from court.

The dismissal of a case in a criminal jury trial is usually a directed verdict. A **directed verdict** or **judgment as a matter of law**, with the acronym **JMOL**, is a verdict entered in a jury trial by the court without deliberation by the jury because the facts developed at trial and the applicable laws are such that the court's verdict is the only verdict that could have been reasonably returned by the jury. In a criminal case, a verdict can only be directed for the defendant. A directed verdict for the defendant in a criminal case is sometimes called a **judgment of acquittal**. A verdict cannot be directed for the prosecution because the defendant has a right to have his or her case tried by the jury.

The court may direct a verdict for the defendant when there has been a variance. From *changing,* a **variance**[2] in proof is a discrepancy between what was charged or alleged and what was proved or attempted to be proved. The court may direct a verdict for the defendant when there has been a **fatal variance**, which is a material and substantial variance. In a criminal case, a fatal variance is when the defendant did not have fair notice of what to defend against or was exposed to double jeopardy.

VERDICTS IN A CRIMINAL CASE

From *of one mind,* **unanimous** means by the vote of all or in total agreement. In most cases in most states, a jury verdict in a criminal case must be unanimous. A criminal verdict does not have to be unanimous where the state requires a sufficient vote to assure adequate jury deliberation. A **hung jury** is a jury that cannot agree on a verdict or a jury that cannot agree on a verdict in a reasonable time. A hung jury is a common reason for a mistrial. In a complicated case, the jury may be required to return a **special verdict**, which is a verdict on each of several issues of fact presented to the jury from which the court determines the jury's verdict.

The three common verdicts in a criminal case are guilty, not guilty, and not guilty by reason of insanity. From *fault,* **guilt** is awareness of committing a crime or wrong. A verdict of **guilty**[4] or **guilty verdict** is the verdict of a jury that the accused committed and is responsible for the crime charged. A verdict of **not guilty**[4] or **not guilty verdict** is the verdict of a jury that the prosecution did not prove beyond a reasonable doubt that the accused committed and is responsible for the crime charged. From *not sound,* **insanity**[1] is the legal concept of a severe mental illness or condition causing a lack of competence or guilt. A verdict of **not guilty by reason of insanity**[3] is the verdict of a jury that the accused committed but is not responsible for the crime charged due to severe mental illness causing a lack of guilt.

JUDGMENTS IN A CRIMINAL CASE

A **finding of fact** or **conclusion of fact** is the resolution of a disputed point of fact. A **conclusion of law** or **finding of law** is the resolution of a disputed point of law. A verdict is the jury's findings of fact. In a jury trial, the judge adds the conclusions of

law. In a bench trial, the judge makes both the findings of fact and the conclusions of law.

The three common judgments in a criminal case are guilty, not guilty, and not guilty by reason of insanity. A judgment of **guilty**[2] is the judgment of a court that the accused committed and is responsible for the crime charged and the judgment declaring that the prosecution has proven that the defendant has committed a particular crime. A judgment of **not guilty**[1] is the judgment of a court that the prosecution did not prove beyond a reasonable doubt that the accused committed and is responsible for the crime charged and the judgment declaring that the prosecution has not proven that the defendant has committed a particular crime.

From *blamelessness,* **innocence** is unawareness of committing a crime or wrong. Besides not having committed the crime charged, not guilty is not **innocent**, which is free from guilt or having innocence. Not having committed the crime charged is sometimes known as **actual innocence**. From *from-loosen,* to **absolve** is to free from all debt, obligation, or responsibility. Secular courts (courts that do not decide matters of religion) do not give **absolution**, which is a judgment declaring that a defendant is innocent.

From *clear* and *free,* to **quit**[2] is, generally, to clear or free something from something else. To **acquit** is to clear or free from an accusation or charge or to discharge. Accordingly, **acquittal** is the clearing or freeing of an accused from a charge by a verdict or judgment of not guilty, or a discharge. An acquittal is, from *no longer charged*, a **discharge**[6], which is a release from the obligation to face a charge or an acquittal.

From *off onus,* to **exonerate** is to free from an allegation of responsibility or to free from an allegation of criminal responsibility. **Exonerated** is freed from an allegation of responsibility or freed from an allegation of criminal responsibility.

A judgment of **not guilty by reason of insanity**[4] is the judgment of a court that the accused committed but is not responsible for the crime charged due to severe mental illness causing a lack of guilt. A person judged not guilty by reason of insanity is usually committed to an institution for the mentally ill.

In juvenile court, the concept of guilty is deemphasized and reform of the juvenile is emphasized. There is no jury. The **judgment of true** or **true**[2] is, in many states, the juvenile court name for the judgment that the juvenile is guilty and the **judgment of not true** or **not true**[2] is, in many states, the juvenile court name for the judgment that the juvenile is not guilty.

After a judgment is entered, the defendant may make a motion for a new trial or other motions contesting the validity of a judgment. A new trial may be ordered in the rare case of genuine **newly discovered evidence**, which is material evidence in existence during a trial of which a party was unaware until after the trial and which would probably produce a different result in a new trial.

SENTENCING

At common law, from *to place,* **allocution**[1] was the requirement, after a verdict of guilty, that the judge ask the defendant if the defendant had anything to say as to why the court should not pronounce the sentence of conviction against the defendant. Modern **allocution**[2] is the requirement, after a verdict of guilty, that the judge ask the defendant if the defendant has anything to say in mitigation of punishment.

Today, for felony convictions or optionally for misdemeanor convictions, the sentencing judge may receive a **presentence report**, which is a personal background and history report on the convicted defendant, prepared by the local probation department or other similar agency, to aid the sentencing judge in giving an appropriate sentence. The sentencing judge may receive a **victim-impact statement**, which is a report on the impact on the victim of the crime committed by the convicted defendant.

Aggravating circumstances are circumstances suggesting that a convicted defendant deserves a more severe sentence. **Mitigating circumstances** are circumstances suggesting that a convicted defendant deserves a less severe sentence. They include **extenuating circumstances**, which are unusual circumstances contributing to the criminal act or wrong over which the defendant had little or no control.

POTENTIAL PUNISHMENTS

Potential punishments for a convicted criminal include the death penalty, incarceration, a fine, a forfeiture, and restitution.

From *out-follow,* to **execute**[1] is, generally, to complete. In the sense of carry out, to **execute**[2] is to carry out as ordered, to carry out or complete a judgment, or to carry out or complete a sentence of death. Generally, **executed**[1] means completed. In the sense of carried out, **executed**[2] means carried out as ordered, carried out or completed a judgment, or carried out or completed a sentence of death. Generally, **execution**[1] means completion. In the sense of carrying out, **execution**[3] means the carrying out as ordered, the carrying out or completion of a judgment, or the carrying out or completion of a sentence of death.

The Eighth Amendment provides that cruel and unusual punishment shall not be inflicted on convicted criminals. From *unfeeling,* **cruel and unusual punishment** is any punishment or manner of punishment offensive to most ordinary people such as torture or any other treatment beyond the limits of civilized people. For example, a common-law punishment deemed cruel and unusual was the common-law punishment for treason, being **drawn and quartered**, which was being dragged to the place of execution, disemboweled while alive, beheaded, and cut into four pieces.

From *become dead,* a **death penalty**[2], a **death sentence**, or a **sentence to death**, a sentence in which a sovereign takes a convicted criminal's life, is relatively rare. In the federal cases and in states that permit it, the death penalty is usually imposed only for murder with aggravating circumstances. It is not deemed cruel and unusual punishment as long as it is not automatically imposed and not arbitrarily imposed.

Where the death penalty is a possible sentence after a jury trial, the jury is retained for a **sentencing hearing**, a hearing to determine the sentence that should be imposed on a convicted criminal, after which the jury can recommend the death penalty or not. To avoid any arbitrariness, the jury must use standards that focus on the defendant and allow for a broad range of mitigating facts. To assure that the beyond-a-reasonable-doubt degree of proof was used, the jury must consider lesser-included offenses.

From *intense loss,* to **condemn** is declaring something legally useless or unfit. Accordingly, a person sentenced for a crime, especially a person sentenced to death, is said to be **condemned**[2], meaning declared useless to society or declared unfit for society.

The most common punishment for a felony is, in Latin *in prison,* **incarceration**[2] or, in Old French *in prison,* **imprisonment**[2], which is confining a convicted criminal against his or her will, as punishment for a crime, and punishment or rehabilitation of a criminal by confinement outside of society. A **mandatory sentence** is a sentence that a court must order as punishment for a specific crime. A **minimum sentence** is the shortest period of incarceration that a court must order as punishment for a specific crime. A **definite sentence** is a sentence of incarceration for a specific or definite period of time. A **life sentence**, **life imprisonment**, or, simply, **life** is a definite sentence of incarceration for the life of the convicted criminal. An **indeterminate sentence** is a sentence of incarceration for an unspecified or indefinite period of time, to be determined later, such as by a prison-governing agency.

When a convicted criminal is convicted of two or more crimes, the convicted criminal's sentences may run concurrently or consecutively. From *together run,* **concurrent** means to run together or at the same time. **Concurrent sentences** are sentences that run at the same time as each other, regardless of when each begins or ends. From *closely follow,* **consecutive** means to closely follow another or in a sequence. **Consecutive sentences** or **cumulative sentences** are sentences that run separately from each other, with one running immediately after another.

An **offense** is an act or omission contrary to a criminal law. Accordingly, an **offender** is a criminal and an **ex-offender** is a criminal no longer subject to punishment. From *back-fall,* a **recidivist** or **repeat offender**[1] is a repeat criminal. A **habitual criminal**, a **habitual offender**, or a **repeat offender**[2] is a criminal subject to longer terms of imprisonment because the criminal has been convicted many times. A **dangerous offender** is a criminal subject to longer terms of imprisonment because the criminal's character and history indicate that the criminal is a substantial danger to others.

The most common punishment for a crime because it can be some or all of the punishment for any crime, including violations, is a **fine**, which is, from *end* and *payment,* the required payment of money to the sovereign, or its designated representative, as a punishment for a crime. Sentencing judges often use the phrase **in lieu of**, which means in place of. Thus, the judge may impose a fine in lieu of incarceration. The Eighth Amendment provides that excessive fines shall not be imposed.

Similar to a fine, a convicted criminal also may be required to pay **court costs**, which are the incidental expenses a court charges or incurs in the administration of a case such as filing fees, juror fees, witness fees, and transcript fees.

From *outside do,* meaning *transgress,* **forfeiture** is the automatic loss of a right or property due to some error, fault, offense, or crime and the government taking property used in the commission of a crime as a punishment for the crime. Forfeiture does not violate the requirement of just compensation because the punishment equals the value of what is forfeited.

Although the primary purpose of criminal law is to protect society, not the victim or victims of a crime, the victim or victims may be given some token consideration in the sentencing of a criminal. Constitutional where the criminal has the ability to pay it, **restitution**[2] is, from *again set up,* the required payment of money and/or the returning of property to the victim or victims of the crime as a punishment for the crime.

LENIENCY IN SENTENCING

From *soften,* **leniency** is easing the punishment for conduct that was prohibited. Sometimes leniency is principled, as in the case of **mercy**, which is, from *reward,* not giving the penalty deserved for a greater just cause. Sometimes leniency is practical, as when there is no room for another prisoner in an overcrowded prison. From *calm* and *mild,* **clemency** is any lenient or merciful act by a sentencing court, by a governor for state crimes, or by the president of the United States for federal crimes.

The most extreme form of leniency, which may be given before, at, or after sentencing, is a pardon. From *forgive,* a **pardon** is a release from any current or future punishment for a crime granted by a sentencing court, by a governor for a state crime, or by the president of the United States for a federal crime.

The common ways a sentencing court is lenient are by ordering life imprisonment instead of the death penalty, by reducing the length of imprisonment from that which the court could order, by giving only a fine, or by reducing the amount of a fine.

A sentencing court may be lenient by ordering a suspended sentence without conditions. From *up-hang,* a **suspended sentence** is a sentence declaring the punishment that could have been ordered but not requiring the incarceration to be served or the

fine to be paid. A suspended sentence is usually given based on the notion that the shock of hearing the punishment that could have been ordered and appears to have been ordered, if leniency was not given, will sufficiently deter a normally law-abiding person from committing a crime in the future.

More often, a sentencing court will put conditions on the person being sentenced in exchange for the sentencing court's leniency. A suspended sentence can be given with conditions. A sentencing court can order punishment up to as much punishment the court is permitted to order but not require some or all the punishment to be carried out as long as the person being sentenced meets conditions. Common conditions in sentencing include obeying the law for a period of time, entering a diversion program, and/or staying away from the victim or victims of the crime for a period of time or permanently.

From *from-turn,* **diversion** or, from *between-come,* **intervention**[2] is an attempt to divert a person from committing crime or other improper conduct and requiring a person to enter and successfully complete an education or health-improvement program such as anger management classes or a drug addiction remission program as a substitute for some or all of the usual punishment for a crime or other improper conduct.

After giving a sentence including incarceration, a sentencing court may be lenient by ordering probation. The conditional release from incarceration by a sentencing court, **probation** is, from *a proving,* the sentencing court not requiring all of the incarceration to be served, as long as the person sentenced complies with conditions for a period of time and the period of time during which a person sentenced must comply with conditions so as to not be required to serve all of the incarceration sentenced. A **probationer** is a person on probation. From *back-call,* probation may be **revoked**, recalled or canceled, if the probationer violates the conditions of the probation. Common conditions of probation include attending meetings with a probation officer, obtaining education or employment, and staying away from the victim or victims for a period of time or permanently.

From *sudden shake,* **shock probation** is probation after a person has been incarcerated for a relatively short period of time. Analogous to a suspended sentence, but further along in the process, shock probation is usually given based on the notion that the shock of being incarcerated for a relatively short period of time will sufficiently deter a normally law-abiding person from committing a crime in the future.

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- **civil verdict**
- **criminal verdict**
- **exoneration**
- **rendered**
- **youthful offender**

Chapter 54

Criminal Appeals and Corrections

INTRODUCTION

The reader should first read Chapter 45, Appeals, Generally, before reading this chapter. For the sake of brevity, this chapter, Criminal Appeals and Corrections, avoids repeating the definitions of terms that apply to both civil and criminal appeals.

CRIMINAL APPEALS

A **stay of execution** is a court-ordered halt in the execution of a judgment, especially a sentence of death.

An **Anders brief** is a brief by a court-appointed defense attorney asking to withdraw from the case because any appeal would be a frivolous appeal. The attorney is required to identify anything in the record that might be appealable. If the court agrees that any appeal would be a frivolous appeal, the attorney is permitted to withdraw. See *Anders v. California,* 386 U.S. 738 (1967).

POST-CONVICTION RELIEF

In an ordinary appeal, the convicted criminal makes a **direct attack**, which is challenging the integrity of a prior judgment in the next highest court in the same court system. An appeal making a direct attack is known as a **direct appeal**.

Even though a convicted criminal was convicted, and even though the convicted criminal's case was reviewed on appeal and affirmed, the convicted criminal may still seek his or her release for reasons not raised on appeal. The convicted criminal may make a **collateral attack**, which is challenging the integrity of a prior judgment in a different court or in a different court system. For example, a person convicted in a state court may challenge that conviction in a federal court as being unconstitutional under the Constitution of the United States. An appeal making an indirect attack is known an **indirect appeal**.

The traditional way to challenge a prior judgment or any other governmental action, civil or criminal, that results in a deprivation of liberty, is to petition for **The Great Writ**, the writ of habeas corpus. From *request,* a **petition**[3] is, generally, a formal written request for official or judicial action. From *you have the body,* the **writ of habeas corpus** or **habeas corpus** is a writ to bring a person being confined before the court for an inquiry into the legality of the person's confinement and the extraordinary

writ that can be used to determine the legality of any confinement, custody, or detention, civil or criminal.

Post-conviction relief is any proceeding similar to a petition for a writ of habeas corpus provided by statute or court rule. Other ways to challenge the integrity of a prior judgment include coram nobis and a late motion for new trial that may nevertheless be considered by the court.

CORRECTIONS

From *cause pain,* **punishment** is being made to do something you do not want to do or being deprived of something you want or want to do. From *punishment,* **penal** or **criminal**[2] means related to punishment for a crime. A **penal institution** is a place for the punishment of crimes. A **correctional institution** is a place for the punishment of crimes, but it is also a place for the punishment of crimes with a title emphasizing the correction or rehabilitation of those being punished. **Corrections** is the modern punishment of crimes, emphasizing the correction or rehabilitation of those being punished.

In Latin *imprison,* to **incarcerate** or **imprison** means to confine a person against the person's will. In Latin, from *in prison,* **incarceration**[1] or, in Old French, from *in prison,* **imprisonment**[1] is, in the general sense, confining a person against the person's will and a deprivation of a liberty. A **prisoner** is a person who is incarcerated or imprisoned and a person deprived of liberty.

In the sense of punishment, **imprisonment**[2] or **incarceration**[2] is confining a convicted criminal against his or her will as punishment for a crime and punishment or rehabilitation of a criminal by confinement outside of society. From *confinement,* a **prison** is a federal or state institution for confining convicted criminals outside of society. A **correctional facility** is a federal or state institution for confining convicted criminals outside of society, but it is also a federal or state institution for confining convicted criminals outside of society with a title emphasizing the correction or rehabilitation of those being confined.

From *with-put,* to **commit**[4] to an institution is to act to the extent of confining a person in an institution. **Committed**[3] is to have acted to the extent of confining a person in an institution or confined to an institution.

Because a **conviction**[2] is, in part, a judgment of guilt, a **conviction**[1] also means actually subject to punishment for not obeying a criminal law. It is an allusion to society's high level of certainty that a person has committed a crime. A person has a conviction "for" a crime. **Convicted** refers to a person who is or was subject to punishment because of not obeying a criminal law. A person is convicted "of" a crime. A **convict** is a person who is or was convicted of a serious crime. From *inside companion,* an **inmate** is a person committed by law to remain in an institution, especially a convict being punished in a penal or correctional institution. An **ex-convict** or **ex-con** is a convict no longer subject to punishment because of not obeying a criminal law.

From *cage,* a **jail** is a local institution for detaining persons for their own safety, for investigation, or for trial and a local institution for confining alleged or convicted criminals outside of society. **Gaol** was how the word jail was spelled in common-law England. Most jails are county institutions run by the county sheriff.

From *small room,* a **cell** is a small room in a jail or prison in which a person is usually confined. A **cellblock** is a group of cells. A **lockdown** is the confinement of people to their assigned cells or rooms as a security measure during an emergency, especially in a jail, prison, or school.

From *repent,* a **penitentiary** is a prison with a title emphasizing the long-term confinement of criminals. Older adults, second offenders, and adults with long sentences are usually sent to a penitentiary.

From *again form,* to **reform** is to correct or modify. A **reformatory** is a prison with a title emphasizing the rehabilitation of criminals. Younger adults, especially first offenders with short sentences, are usually sent to a reformatory. A prison for a juvenile—a young person—is usually known as a reformatory. Historically, a prison and school for a juvenile was known as a **reform school**.

A **workhouse** is a jail for convicted criminals with a title emphasizing the rehabilitation of criminals by labor. A **lockup** is a jail in a police station. A **holding cell** is a temporary jail in a courthouse.

A person sentenced to incarceration for a felony or for consecutive misdemeanor sentences totaling more than one year is usually incarcerated in a prison, penitentiary, or reformatory. A person sentenced to incarceration for one year or less is usually incarcerated in a jail or workhouse.

A **jailhouse lawyer** is not a lawyer but an inmate with legal skills, including from self-study, who is permitted to assist fellow inmates in the preparation of their petitions for post-conviction relief, where no reasonable alternative exists. The constitutional right to be assisted by a jailhouse lawyer was declared in *Johnson v. Avery,* 393 U.S. 483 (1969).

LENIENCY IN CORRECTIONS

From *soften,* **leniency** is easing the punishment for conduct that was prohibited. Sometimes leniency is principled, as in the case of **mercy**, which is, from *reward,* not giving the penalty deserved for a greater just cause. Sometimes leniency is practical, as when there is no room for another prisoner in an overcrowded prison. From *calm* and *mild,* **clemency** is any lenient or merciful act by a sentencing court, by a governor for state crimes, or by the president of the United States for federal crimes.

The most extreme form of leniency, which may be given before, at, or after sentencing, is a pardon. From *forgive,* a **pardon** is a release from any current or future punishment for a crime granted by a sentencing court, by a governor for a state crime, or by the president of the United States for a federal crime. From *not recall,* **amnesia** is loss of memory. Like a loss of memory, **amnesty** is the general nonpunishment or pardon of people who have violated a particular law, usually if some condition is met.

From *a change made,* **commutation** or **commutation of sentence** is a reduction in the punishment for a crime granted by a governor for a state crime or by the president of the United States for a federal crime. A common commutation, the practical equivalent of a pardon, is reducing the incarceration sentenced to time served so that the person incarcerated can be immediately released.

Similar to commutation, the law often permits a sentence to be reduced by **good behavior**, which is a person's compliance with prison rules during the person's incarceration and the reduction of a sentence for a person's compliance with prison rules during the person's incarceration.

Analogous to probation, a prisoner-governing agency may be lenient by ordering parole. Thus, the conditional release from incarceration by a prisoner-governing agency, **parole** is, from *promise,* a prisoner-governing agency not requiring all of the incarceration sentenced to be served as long as the person sentenced complies with conditions for a period of time and the period of time during which a person sentenced must comply with conditions so as to not be required to serve all of the incarceration sentenced. The **parole board** or **parole commission** is the prisoner-governing agency that decides whether or not to grant parole and the conditions of parole. There are state parole boards in each state for state prisoners and a federal parole board for federal prisoners. A **parolee** is a person on parole. Parole may be **revoked**, recalled, or canceled if the parolee violates the conditions of parole.

Common conditions of parole include attending periodic meetings with a parole officer, not possessing a firearm, and not associating with known criminals. A traditional and classic condition of parole, reserved for particularly annoying or despicable criminals, was the condition of leaving the state and never coming back! By compelling a criminal to leave the state, the result was **exile**, which is, from *away-walk,* driving or forcing a person out of, or cutting a person off from, citizenship or residence in a state or country or membership in a group.

From *sudden shake,* **shock parole** is parole after a person has been incarcerated for a relatively short period of time. Analogous to a suspended sentence and shock probation, but further along in the process, shock parole is usually given based on the notion that the shock of being incarcerated for a relatively short period of time will sufficiently deter a normally law-abiding person from committing a crime in the future.

Sentence reduction or parole is prohibited where a person is sentenced to **actual incarceration** or **without parole**, which is a sentence requiring a person to be incarcerated for all of a period of time. For example, a state may require a certain number of years of incarceration for the use of a firearm in the commission of a felony. After that period of time, parole may be available with regard to incarceration for the underlying felony.

From *again imprison,* **reprieve** is a postponement of the execution of a sentence granted by a governor for a state crime or by the president of the United States for a federal crime. A reprieve, especially a reprieve from a death sentence, is granted for humanitarian reasons such as awaiting new evidence or allowing final appeals where there is a reasonable possibility that the person sentenced is actually innocent.

ERASING A CONVICTION

As a general rule, records of arrests and convictions remain in the law enforcement agency and court records forever. There are two exceptions.

Some states require **sealing of records**, which is, from *fasten,* the suppression of the criminal records of juveniles or youthful offenders so that only someone who obtains a court order can examine them.

Many states permit the **expungement of records**, which is, from *out prick,* the destruction of the relatively minor criminal records of a person for good behavior for a period of years. For example, a state may **physically expunge**, physically destroy, arrest and conviction records for a misdemeanor many years ago where the person convicted never again violated the law and is now regarded as a law-abiding citizen. The effectiveness of state expungement laws is limited, however, because a state cannot require federal law enforcement agencies to comply.

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- **petitioner**
- **respondent**

Part Ten

Legal Research and Writing

Chapter 55

Legal Research: Primary Authority

LEGAL RESEARCH, GENERALLY

From *intensive seeking,* **legal research** or, simply, **research** refers to finding law in texts or finding law-related information in texts. From *book writing* or *books written,* **legal bibliography** is the knowledge of how to find the law in books or texts.

The appropriate representatives of a sovereign officially declare what is the law. From *that which settles,* **authority**[3] is the right and power to do something and the power delegated to another. Accordingly, a **legal authority** or **authority**[1] is an authorized declaration of the law such as legislation of a legislature, an order of an executive, or a precedent of a court or a person or entity able to make an authorized or persuasive declaration of the law.

From *first,* **primary authority** is the law itself or the authoritative acts of a sovereign, including the constitution, statutes, executive orders, court decisions, and administrative regulations. From *second,* **secondary authority** is anything not the law itself or any nonauthoritative but potentially persuasive analysis of the law such as a legal encyclopedia or legal textbook.

From *hand give,* a **mandatory authority** or, from *bound,* a **binding authority** is a primary authority that a court must follow such a constitutional statute of the sovereign or a precedent of a higher court of the sovereign. From *strongly urge,* a **persuasive authority** is a primary authority or a secondary authority that a court may follow.

From *refer to authority,* to **cite**[1] (the verb), to refer to authority, is to point out or refer to the location of legal authority. From *reference to authority,* a **citation**[3] or a **cite**[2] (the noun), a reference to authority, is a reference to the location where a legal authority may be found.

A **citation style** is a conventional way to abbreviate and cite legal materials to avoid reader confusion. An allusion to the color of its covers, the **Bluebook** is an abbreviation for the citation style manual entitled *The Bluebook: A Uniform System of Citation,* published by The Columbia Law Review Association, The Harvard Law Review Association, the University of Pennsylvania Law Review, and The Yale Law Journal. **Bluebook style** is the citation style suggested by *The Bluebook: A Uniform System of Citation*. The **ALWD** is the acronym for the Association of Legal Writing Directors, which publishes a citation style manual entitled the *ALWD Citation Manual: A Professional System of Citation*.

After its publication, a legal publication often needs to be supplemented and updated to reflect changes in the law. A law book may be designed to be supplemented and updated by a **pocket part**, which is supplementary and updated pages bound together on a stiff

backing such that the supplementary and updated pages can be inserted into a book by inserting the stiff backing into a sleeve in the inside back cover of the book.

LEGAL PUBLISHING

The government publishes some legal materials. From *made public,* **promulgated** means made official and public. The **U.S. Government Printing Office**, with the abbreviation **G.P.O.**, is the federal executive department that is the primary government publisher of legal materials of the federal government.

Because copyright law does not protect most government legal materials, a private legal publishing industry developed to efficiently provide, for a price, both legal materials prepared by the government and privately created and copyrighted enhancements. The following paragraphs are a brief summary of the companies or company divisions that have been or became either the largest or the second-largest law publisher in the United States since 1900 or the largest or second-largest electronic law publisher in the United States from 1970 to 1994.

Founded in 1876, the **West Publishing Company**, abbreviated **West**[1], was the largest law publisher in the United States from the late 1800s until it was sold to the Thomson Corporation in 1996. Today, **West**[2] or **Thomson-West** is the law publishing division of the Thomson Corporation since 1996. Founded in 1989, the **Thomson Corporation**, abbreviated **Thomson,** is the largest law publisher in the United States since 1996. West was located in St. Paul, Minnesota. Thomson is a foreign company principally based in Toronto, Canada.

Founded in 1882 and officially named "The Lawyers Co-operative Publishing Company," the **Lawyers Co-operative Publishing Company** (**LCP**[1]) was the second-largest law publisher in the United States from the late 1800s until it was sold to a predecessor of the Thomson Corporation in 1989. **Lawyers Cooperative Publishing** (**LCP**[2]) was the legal publishing division of the Thomson Corporation from 1989 to 1996. LCP was located in Rochester, New York. The "Lawyers" portion of the name often erroneously appears as a possessive (Lawyer's or Lawyers'). In references made prior to 1989, the "Co-operative" often erroneously appears as "Cooperative."

Founded in 1970 as a subsidiary of the Mead Corporation, **Mead Data Central, Inc**. (**MDC**) was the largest electronic law publisher in the United States until it was sold to Reed Elsevier in 1994. MDC became the LexisNexis division of Reed Elsevier. Today, **LexisNexis** is the law publishing division of Reed Elsevier. Founded in 1993 and originally officially named "Reed Elsevier plc," **Reed Elsevier** is the second-largest law publisher in the United States since 1996. MDC was originally located in Dayton, Ohio, and moved to the Dayton suburb of Miamisburg in the mid-1980s. Accordingly, LexisNexis is principally located in Miamisburg, Ohio. Reed Elsevier is a foreign company principally based in London, England.

Currently, **Wolters Kluwer** is the third-largest law publisher in the United States. The **Bureau of National Affairs** (**BNA**) is the fourth-largest law publisher in the United States.

There are other common abbreviations of company divisions and subsidiaries that were once separate legal publishers. For example, **Bender** or **MB** is an abbreviation for the former law publisher Matthew Bender & Company, now part of LexisNexis. **BW** is an abbreviation for the former law publisher the Bancroft-Whitney Company, a long-time subsidiary of LCP, now part of Thomson-West. **CCH** is an abbreviation for the former law publisher Commerce Clearing House, Inc., now the tax law division of Wolters Kluwer. **Michie** [pronounced MICKEY] is an abbreviation for the former law publisher The Michie Company, now part of LexisNexis. **RIA** is an acronym for the Research Institute of America, a long-time subsidiary of LCP and now the tax

division of Thomson-West. Named after company founder Frank Shepard, **Shepard's**[1] is an abbreviation of the former law publisher Shepard's/McGraw-Hill, Inc., now part of LexisNexis.

LIBRARIES AND LAW LIBRARIES

From *place with books,* a **library** is an organized collection of books and other media kept for their use. A **law library** is an organized collection of law books and other media kept for their use. Most law school libraries are federal depository libraries. A **federal depository library** is a library that gets copies of federal government publications at little or no cost, and so, by federal law, must be open to the public.

Because it is generally used in public, primary school, and secondary school libraries, most people are familiar with the **Dewey Decimal Classification** system, which is the entirely numerical system of library classification created by Melvil Dewey in 1876. Under the Dewey system, law starts at classification 340.

The largest library in the United States is the **Library of Congress**. The classification system used in most college and law school libraries is the **Library of Congress Classification** system, which is the letter-number system of classification used to organize books and other media in the Library of Congress. **KF** is the Library of Congress Classification for "Law of the United States."

In the Library of Congress Classification system, **class notation** is the beginning main classification letter, any subclassification indicated by additional letters, and a class number assignment (for example, KF 320). Named after its creator, Charles Cutter, a **cutter number** is, after a class notation, the letter-number designation treated as a decimal (for example, .C37). In the Library of Congress Classification system, the **call number** is the place on the shelf where a book may be found, consisting of the class notation, cutter number, and year of publication (for example, KF 320.C37 1990).

In order to arrange a small collection of books and other media such as a personal law library, a person may engage in copy cataloging. **Copy cataloging** is mimicking the cataloging used by an existing library. Copy cataloging can be done by using **Library of Congress Cataloging-in-Publication Data**, which are the results of a program by which manuscripts are sent to the Library of Congress just prior to publication, Library of Congress librarians catalog them, and publishers include the preliminary data for each book, including the call number, on the reverse side of the title page.

The **Superintendent of Documents Classification** is the letter-number system of classification often used for collections of documents in the federal government.

CASE LAW

From *fall (of circumstances),* a **case** is a legal controversy, especially a legal controversy that may be, has been, or could have been brought to a court. From *preceding,* a **precedent** is a preceding similar case or the law established or applied in a preceding similar case. A **case of first impression** is a case without precedent. In such a case, the court looks to analogous cases and uses its inherent judicial power to decide the case. **Case law**[1] is law made by a court in deciding an actual case.

A **landmark case** is a first significant case, usually a case of first impression, decided favorably. A **leading case** is a case with an opinion that reads like a book, laying out all the precedents on an issue, pro and con, and decided favorably. A **local case** is the most recent case from the local jurisdiction, decided favorably.

An **opinion** is, in part, a court's written explanation of the reasons for its decision. A **published opinion** is an opinion that a court has specifically designated for publication or is routinely published and an opinion that need only be referred to so it can

be used in deciding another case. An **unpublished opinion** is an opinion that a court has specifically designated as not for publication or is not routinely published and an opinion for which copies have to be given to the court and opposing counsel to be used in deciding another case.

The conventional way to cite a case is by its title; then by volume, reporter abbreviation, and page; then by its date of decision. A **volume** is a particular book in a series of books or a particular electronic collection in a series of electronic collections. **Court reports** or **reports** are books that collect court opinions or the electronic equivalent of books that collect court opinions. A **reporter** is a set of reports, traditionally a hardbound volume containing judicial opinions. A reporter may have a conventional abbreviation. A **page number** or a **folio** is the number of the page on which the information sought appears or begins. For example, the conventional way to cite the landmark right to counsel case Gideon versus Wainwright is *Gideon v. Wainwright,* 372 U.S. 335 (1963). A **jump cite** or a **pinpoint cite** is a reference to a specific succeeding page, after the first page, of a judicial opinion. For example, in "372 U.S. 335, 337" the reference to page 337 is the jump cite.

A **parallel citation** or a **parallel cite** is an alternate location reference for a judicial opinion; in other words, where a judicial opinion can be found in another reporter. In *Gideon v. Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792 (1963), the alternate locations are 9 L. Ed. 2d 799 and 83 S. Ct. 792. A **string citation** or **string citations** are a series of citations to different cases, separated by semicolons.

Court opinions as issued by a court are public documents and not protected by copyright law. To assure that at least one accurate version is published, however, a court may designate a publishing company as its official reporter. The **official reporter**[1] is the person or entity designated to prepare the official version of the opinions of the court. The **official reporter**[2] or the **official reports** is the reporter designated as containing the official version of the opinions of the court. An **unofficial reporter**[1] is a person or entity not designated to prepare the official version of the opinions of the court. An **unofficial reporter**[2] or **unofficial reports** is a reporter or reports not designated as containing the official version of the opinions of the court.

The publishers of an unofficial reporter usually provide access to the content of an official reporter by star pagination. An allusion to the fact that a star symbol or asterisk (*) is usually used, **star pagination** is the notation of the pagination of one version of a text in another version of the text.

An opinion may be first published as a **slip opinion**, which is an individual court opinion published separately from bound volumes. An opinion may then be published in **advance sheets**, which are temporary pamphlets of court opinions, usually paged in the same way as they will be in the official reporter.

Nominative reporters are reporter volumes compiled by individuals, especially the initial reporter volumes compiled by individuals who covered the U.S. Supreme Court. Later, the court designated the G.P.O. to be the publisher of its official reports. Including and renumbering the nominative reporters, the ***United States Reports***, with the abbreviation **U.S.**[2], is the official reporter for the U.S. Supreme Court.

The ***United States Supreme Courts Reports***, ***Lawyer's Edition***, with the first edition abbreviation **L. Ed.** and the second edition abbreviation **L. Ed. 2d**, is the unofficial reporter for the U.S. Supreme Court originally published by LCP and now published by LexisNexis. The ***Supreme Court Reporter***, with the abbreviation **S. Ct.**, is the unofficial reporter for the U.S. Supreme Court originally published by West and now published by Thomson-West.

The *Supreme Court Reporter* is part of the National Reporter System. The **National Reporter System** is a system of reporters originally published by West and now published by Thomson-West covering all the appellate courts in the United States.

The heart of the system is its **regional reporters**, which are reporters reporting cases from groups of states.

Thomson-West covers the states with seven regional reporters. The ***Atlantic Reporter***, abbreviated **A.** and **A.2d**, is the Thomson-West regional reporter covering Connecticut, Delaware, Maine, Maryland, New Hampshire, New Jersey, Pennsylvania, Rhode Island, Vermont, and the District of Columbia. The ***North Eastern Reporter***, abbreviated **N.E.** and **N.E.2d**, is the Thomson-West regional reporter covering Illinois, Indiana, Massachusetts, New York, and Ohio. The ***North Western Reporter***, abbreviated **N.W.** and **N.W.2d**, is the Thomson-West regional reporter covering Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin. The ***Pacific Reporter***, abbreviated **P.**, **P.2d**, and **P.3d**, is the Thomson-West regional reporter covering Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington, and Wyoming. The ***South Eastern Reporter***, abbreviated **S.E.** and **S.E.2d**, is the Thomson-West regional reporter covering Georgia, North Carolina, South Carolina, Virginia, and West Virginia. The ***Southern Reporter***, abbreviated **So.** and **So. 2d**, is the Thomson-West regional reporter covering Alabama, Florida, Louisiana, and Mississippi. The ***South Western Reporter***, abbreviated **S.W.**, **S.W.2d**, and **S.W.3d**, is the Thomson-West regional reporter covering Arkansas, Kentucky, Missouri, Tennessee, and Texas.

Thomson-West covers the lower federal courts with national reporters. The ***Federal Reporter***, abbreviated **F.**, **F.2d**, and **F.3d**, is the Thomson-West reporter covering the federal courts of appeals. The ***Federal Supplement***, abbreviated **F. Supp.** and **F. Supp. 2d**, is the Thomson-West reporter covering the federal district courts. The ***Federal Rules Decisions***, abbreviated **F.R.D.**, is the Thomson-West reporter that contains decisions of the federal district courts relating to the rules of civil and criminal procedure.

Thomson-West publishes the National Reporter System both electronically and in books. LexisNexis also electronically publishes reporters for all U.S. appellate courts. With the exception of L. Ed. 2d, LexisNexis does not publish reporters in books.

STATUTORY LAW

From *block (of wood),* a **code**[1] is a topical collection of law or ethics such as a topical collection of statutes. The ***United States Code***, with the abbreviation **U.S.C.**, is the official topical collection of federal statutes.

A **title**[2] is a major topical division of a code. A **section**[3] is an organizing subdivision of statutes under each title of a code. In addition to the title of the statute and the date of the code or code supplement, the conventional way to cite a statute is by volume, code abbreviation, section number. For example, title 28 of the United States Code, section 1331, is cited 28 U.S.C. § 1331. The **section symbol** or **§** is the symbol for a section. The **sections symbol** or **§§** is the symbol for sections.

From *to note,* an **annotated code** is a code containing case summaries of how the courts have interpreted each statute. The ***United States Code Annotated***, with the abbreviation **U.S.C.A.**, is the unofficial topical collection of federal statutes originally published by West and now published by Thomson-West. The ***United States Code Service***, with the abbreviation **U.S.C.S.**, is the unofficial topical collection of federal statutes originally published by LCP and now published by LexisNexis. A **casenote** is a case summary in the *United States Code Service* when LCP published it.

To interpret a statute, a court may consider, and so a legal researcher may need to research, its legislative history. From *law bringing,* **legislative history** is committee

reports, floor debates, and other information considered by the legislature in enacting a bill or joint resolution, which may be reviewed by a court in an attempt to determine the intent of the legislature in enacting a statute.

CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW

Similar to an annotated code, an **annotated constitution** is a version of the constitution containing case summaries of how the courts have interpreted each article, section, or amendment. The ***Federal Register***, with the abbreviation **Fed. Reg.**, is the official chronological source of federal regulations. The ***Code of Federal Regulations*** (**CFR**) is the official topical source of federal regulations. Because administrative law frequently changes, administrative law is often published in the form of a looseleaf service. A **looseleaf service** is a legal publication issued in notebook form.

LEGAL RESEARCH METHODS

The **topic method** is the method of legal research whereby if you know the topic you want to search, you can search the law book or other media's table of contents, if any; go to all references; and scan the text for your topic. The **case method**[2] is the method of legal research whereby if you know at least one relevant case, you can search the law book or other media's table of cases, if any, and go to the references. The **statute method** is the method of legal research whereby if you know at least one relevant statute, you can search the law book or other media's code-finding table, if any, and go to the references. The **index method** is the method of legal research using entry terms to search the law book or other media's index, if any, and go to the references. From *off-draw (all),* an **exhaustive search** is a search through every source.

GO TO THE NET

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- ***ALWD Citation Manual***
- **bibliographic**
- **case reporters**
- **defendant/plaintiff table**
- **embedded citation**
- **looseleaf binder or pamphlet service**
- **neutral citation**
- **official reporters**
- **precedential value**
- **primary sources of law**
- **short form citation**
- **signals**
- **table of cases**
- **TAPP Rule**
- ***The Bluebook: A Uniform System of Citation, 18th ed.***
- **unofficial reporters**
- **unpublished case**

Chapter 56

Legal Research: Secondary Authority

THE ENHANCEMENT OF CASE LAW

A typical judicial opinion contains about 3,000 words. To help a legal researcher quickly determine if a particular case discusses a topic in which the legal researcher is interested, a legal publisher may prepare and publish with each opinion a brief summary of the opinion. A **case law summary**[1] or **case summary** is, generally, a summary of a judicial opinion prepared by an editor employed by a legal publishing company.

How persuasive a case summary is depends on the ability of the editor and the quality of the environment in which the editor was working when the case summary was made. From *without delay,* **summary** has at least four different meanings: quickly or without delay, condensed in time or detail, a faithful explanation or representation, or a mere example or sample. A good summary is a faithful explanation of the law.

From *together see,* a **synopsis** is a short paragraph summary of an entire judicial opinion and the name of a case law summary prepared by an editor for West or Thomson-West. A **case law summary**[2] is, specifically, a brief discussion of an entire judicial opinion consisting of posture, overview, and outcome paragraphs and the name of a case summary prepared by an editor for LexisNexis.

An allusion to its customary placement at the top or "head" of a page, a **headnote** is a brief summary of a point of law in a judicial opinion. A headnote is usually classified to a legal taxonomy as part of the process of creating an index to the law. From *course of study,* a **syllabus** is an official court-prepared summary or list of headnotes in a judicial opinion.

CASE FINDERS

Cases usually occur and are reported **chronologically**, which is, from *time study related,* in or by real-time sequence. The basic problem in legal research is that legal researchers usually want to find cases **topically**, which is, from *subject related,* by subject or by part of a subject.

One way to find cases topically is to use an index. From *pointer,* an **index** is an A-to-Z list that refers a reader to the location of concepts in a book or other text by short entries and page references. From *enter,* an **entry** is a word or phrase used in an index to note key concepts, words, and phrases in the text indexed. From *back-carry,* a **reference**[2] in an index is a page number in an index indicating the location in the text at which key concepts, words, or phrases appear. A **cross-reference** is a reference in an index to another entry.

From *arrange,* a **digest**[1] is a specialized index of reported cases or a case summary used as an entry in a specialized index of reported cases. Instead of A–Z organization, a digest uses an outline or taxonomy of the law. Instead of an entry, a digest uses a **digest paragraph**, which is a case summary used as an entry in a digest. Instead of a reference, a digest provides a citation.

The **Key Number System®** is the West taxonomy of the law. The **Search Advisor™** is the LexisNexis taxonomy of the law. A **topic**, a part of a subject, is a division or item in an outline or taxonomy of the law. A **Key Number®** is a numerical designation of a line in a West topic outline. A **descriptive word index** is an index of outline or taxonomy topics.

CASE COLLECTIONS

Another way to find cases topically is to use a collection. From *to note,* to **annotate** is to note or to mark up. **Annotated** means with a careful editorial compilation of the authorities on a point of law or fact. **Annotation**[1] is, generally, the method of finding cases noted in a special collection of the cases on a point of law or fact.

Specifically, an **annotation**[2] is a special collection of the cases on a point of law or fact, especially a special collection of the cases on a point of law or fact published by LCP, the Thomson Corporation, or Thomson-West. Published since 1919, ***American Law Reports***, with the abbreviation **A.L.R.** and the acronym **ALR**, is the leading series of collections of cases on a point of law published by LCP, the Thomson Corporation, or Thomson-West.

The parts of an ALR annotation include the following. The **Total Client Service Library**, with the acronym **TCSL**, was the marketing slogan of LCP for its national law book sets, which were thoroughly cross-referenced with each other. The **TCSL Box** is the part of an ALR annotation that provides cross-references to other publications published by LCP, the Thomson Corporation, or Thomson-West. From *shape,* the **scheme** is the detailed logical section-numbered outline of an ALR annotation. The **Jur table** is the "Table of Jurisdictions Represented" in an ALR annotation. From *extent,* the **scope** is the part of an ALR annotation that states the purported contents of the annotation. From *to refer,* the **related matters** is the part of an ALR annotation that lists similar annotations, along with a sample of law review articles and treatises on the point annotated.

The **practice pointers** is the part of an ALR annotation that contains "useful hints" on how to handle a case involving the point annotated. A **setout** is a paragraph sketch of a case in an ALR annotation.

From *above sit,* a **superseding annotation** is an annotation that replaces another annotation. From *addition,* a **supplementing annotation** is an annotation that provides additional cases on a point already annotated.

The best annotation is an **exhaustive annotation**, which, from *off-draw (all),* is an annotation collecting every case on the point of law or fact annotated. How persuasive an annotation is depends on the ability of the editor and the quality of the environment in which the editor was working when the annotation was made.

CITATORS

Good law is precedent with authority because it is not overruled, reversed, vacated, or otherwise discredited precedent. Because of human nature and time, good law may lose its authority and become bad law. **Bad law** is precedent without authority because

it is overruled, reversed, vacated, or otherwise discredited precedent. Precedent can lose its value in a number of ways. It may be overruled by a higher court or by a statute. A court may overrule its own precedent. A precedent also may be left alone to die, whether distinguished away by other courts, overwhelmed by contrary precedent, or simply forgotten. To check the status of a case as good law or bad law, use a citator. From *reference to authority,* a **citator** is a book or other medium that primarily lists legal citations indicating when a case has been cited in another case. A **cited case** or a **target case** is a case being cited by another case. A **citing case** is a case that makes a reference to the cited case.

Named after its inventor Frank Shepard, ***Shepard's Citations*** or **Shepard's**[2] is a book or an electronic database of tables, now published by LexisNexis, listing all the citing cases for a cited case. A **statute edition of *Shepard's Citations*** is a volume of *Shepard's Citations* that lists all the citing cases for a statute or ordinance.

To **Shepardize**, to **check the citations**, or to **cite check** is to review all the citing cases for a case to make sure that the cited case is not bad law or to help find other cases like the cited case or to review all the cases cited in a brief or other legal writing to make sure that the brief or other legal writing does not cite bad law or to help find other cases like the case cited to use in a reply or a revision.

KeyCite™ is an electronic database of tables, now published by Thomson-West, listing all the citing cases for a cited case.

Based on a citation file created by ALR editors in preparing ALR annotations, **Auto-Cite** was, from *automated,* the first electronic case history citator, originally published by LCP and now published by LexisNexis. A **case history** is the path a legal controversy has taken through the court system.

LEGAL ENCYCLOPEDIAS AND OTHER STANDARD TEXTS

From *general education,* an **encyclopedia** is a comprehensive work, usually a narrative summary, that covers all of the subjects within a particular branch of knowledge or all branches of knowledge. A **legal encyclopedia** is an encyclopedia that covers the law.

In Latin, **corpus juris**[1] means the body of law. ***Corpus Juris***[2], with the abbreviation **C.J.**[1], was the name of the first general legal encyclopedia published by West. In Latin, **secundum** means next or second. From *the body of the law second,* ***Corpus Juris Secundum***, with the abbreviation **C.J.S.**, was the second edition of the general legal encyclopedia published by West. After Thomson acquired West, it began to deemphasize *Corpus Juris Secundum* and encourage the use of *American Jurisprudence, Second Edition*.

From *all the law of America,* ***American Jurisprudence***, with the abbreviation **Am. Jur.**, was the name of the first general legal encyclopedia published by LCP. ***American Jurisprudence, Second Edition***, with the abbreviation **Am. Jur. 2d**, was the second edition of a general legal encyclopedia published by LCP and is the primary general legal encyclopedia published by Thomson-West.

In Greek, from *of words,* a **lexicon** is a collection of words or a group of words, not necessarily legal words, because it is in Latin, not Greek, that **lex** means law or legal. From *writing about words,* **lexicography** is the art of making a lexicon, especially the art of making a dictionary. From *collection of words,* a **dictionary** is a useful collection of words or phrases, especially a book or the electronic equivalent containing an alphabetical list of words or phrases, along with information about each word, usually including its spelling, pronunciation, etymology, definitions, forms, and uses. From *true origin,* **etymology** is complete word origin. From *completely limit,* a **definition** is a meaning of a word or phrase.

A **law dictionary** is a dictionary that primarily contains legal words or phrases, especially a book or the electronic equivalent containing an alphabetical list of words or phrases unique to the law, words or phrases often used by lawyers, and ordinary words or phrases with a legal meaning. Unlike ordinary dictionaries, there is no citation-based law dictionary. **Citation-based** is the standard for creating a dictionary in which a fair sample of actual uses of each word or phrase in context are collected, allowing the editor to authoritatively determine whether each word or phrase is current or archaic, and its spelling, etymology, meaning, and usage. Alluding to its original author, Henry Campbell Black, ***Black's Law Dictionary*** is the leading law dictionary in the United States, originally published by West and now published by Thomson-West.

From *treasury,* a **thesaurus** is a book or the electronic equivalent containing words and their synonyms and near synonyms. A **legal thesaurus** is a thesaurus that primarily contains legal words.

From *set straight,* a **directory** is a list of names and certain other information such as addresses, telephone numbers, and the like. A **legal directory** is a guide to lawyers, law firms, and/or governmental agencies. **Martindale-Hubbell** is the short name of the leading national law directory, published by LexisNexis.

From *woven* or *an author's weaving,* a **textbook** is a book that contains the principles of a given subject, useful in the study of that subject. From *to deal with,* a **treatise** is a systematic scholarly discussion of the principles of a given subject, useful in the study of that subject. A **restatement** is a systematic exposition of the common law as if it were a codified statutory code.

Named after teaching tablets with handles used from the late 1400s to the mid-1700s, which held a sheet of paper protected by a sheet of translucent horn, a **hornbook** is one of a series of one-volume treatises for students originally published by West and now published by Thomson-West. Named after the student's perpetual dream of putting an entire subject "in a nutshell" (like your cranium), **nutshells** are a series of short paperback textbooks originally published by West and now published by Thomson-West.

A **casebook** is a law school textbook containing a series of selected cases on each topic to be covered. An allusion to prepared food, a **canned brief** is a summary of a major case in a casebook, sold as a law student aid. **Canned briefs** are summaries of the major cases in a casebook, sold as a law student aid.

A **formbook** or a **form book** is a collection of sample legal documents used by lawyers and paralegals. **Legal forms** are samples of legally effective documents such as contracts, deeds, and wills. **Pleading and practice forms** are samples of documents used in actually litigating a case such as complaints, answers, replies, interrogatories, motions, and judgments. **Trial and practice books** are books that guide a lawyer or paralegal through the proof of contentions at trial, often with samples of litigation aids and trial testimony.

A **periodical** is a work that is published at regular intervals. From *part of the body,* a **house organ** is a periodical for people inside a particular organization.

A **law review** is a scholarly periodical published by a law school. A law review **comment** is an article written by a law professor, by a prominent lawyer, or by an outstanding student that is published in a law review. A law review **note**[3] is a short book, case, or subject review that is published in a law review.

From *daily record,* a **journal** is a writing recording current events. A **law journal** is a legal periodical recording current events. A **bar journal** is a law journal published by a bar association. The ***ABA Journal***, with the acronym **ABAJ**, is the leading legal magazine in the United States, published by the American Bar Association.

EARLY LEGAL RESEARCH TECHNOLOGY

Lawyers and librarians have long been concerned about the space taken up by law books. Before computers became widely available, other means of reducing the physical size of legal sources were tried.

From *very small,* **microforms** are reproductions of printed matter in greatly reduced size. **Microfilm** is reels or cassettes of film containing miniature pictures of printed pages. **Microfiche** is file-card-sized sheets of film containing miniature pictures of printed pages. From *very small law,* **Microlex** was the failed law-books-on-microfiche product created by LCP in 1955. Microlex failed in the marketplace because the microfiche reader was inconvenient to use and because simply saving space wasn't enough to make lawyers give up the advantages of books.

Today, CD-ROMS have generally replaced microforms for the on-site storage of large amounts of legal information. **CD-ROM** is an acronym for Compact Disk with Read-Only Memory.

LEGAL RESEARCH BY COMPUTER

Today, from *network,* the **Internet**, the worldwide public computer network allowing electronic communication and research, is commonly used for legal research. The Internet became widely available in the mid-1990s. For most people before the mid-1990s, being online was a novelty. Originally, **online**[1] meant accessible by a modem-equipped computer using telephone lines. Today, **online**[2] means accessible electronically by any means. A **uniform resource locator** (**URL**) is the precise location reference for a specific document on the Internet.

Created long before the Internet became widely available, **LEXIS** was the first full-text computer-based legal research service, created by Mead Data Central, Inc., in 1973. The origin of the name LEXIS is disputed. In a 1989 trademark infringement case, Mead Data Central, Inc., alleged that its president from 1971 to 1981, Jerome S. "Jerry" Rubin, conceived of LEX meaning "Law" and IS meaning "Information Systems." Prior evidence, however, indicates that LEXIS was a pseudo-acronym for "Legal Information Service" conceived by a New York consulting firm based on market research indicating that people had a favorable reaction to names with an X, such as Exxon. Apparently, after the pseudo-acronym was suggested, meaning was read into the name. Given that "Legal" is an adjective and that "System" best describes a technology, the best after-the-fact meaning is LEX meaning "Legal" and IS meaning "Information System" resulting in LEXIS meaning Legal Information System.

Apparently based on the word "news" and in keeping with the market research indicating that people had a favorable reaction to names with an X, **NEXIS** was the foremost full-text computer-based news-and-business research service, created by Mead Data Central in 1979.

Lexis.com or **Lexis** is the electronic legal research service published by LexisNexis. **Nexis.com** or **Nexis** is the electronic news-and-business research service published by LexisNexis. **LexisNexis.com** is the main website of LexisNexis. Lexis and Nexis are pay services. **LexisONE.com** or **LexisONE** is the limited free legal research Web site published by LexisNexis.

WESTLAW was the computer-based legal research service created by West in 1975. **Westlaw.com** or **Westlaw** is the electronic legal research service published by Thomson-West. **Thomson.com** is the main Web site of the Thomson Corporation. Westlaw is a pay service. **Findlaw.com** or **Findlaw** is the limited free legal research Web site published by Thomson-West.

LEXIS and WESTLAW were originally used for **computer-assisted legal research**, with the acronym **CALR**, which is the use of a computer system to automate the search of physical legal materials, especially books. Computer-assisted legal research has evolved into legal research by computer. Lexis and Westlaw are now regarded as complete systems for legal research by computer, making many books obsolete.

A **citation search** is a computer search made by entering a citation rather than words. From *true law,* **Veralex** was the failed citation search computer-assisted legal research service created by LCP in the mid-1980s. Veralex failed in the marketplace because legal researchers preferred the make-your-own-index power of a word search, as provided by LEXIS and WESTLAW. Moreover, LEXIS and WESTLAW were **user-friendly**, which is a computer system that is easy to use.

A **word search** is a computer search of the words likely to have been used to describe the information sought. As revealed by Mead Data Central, Inc., a word search is made possible by creating an electronic concordance. From *together heart* or *of one mind,* a **concordance**, an index of words, is a literal alphabetical listing of the principal words of a text with precise references to where in the text each word is used.

One way to speed a word search is to avoid searching common words. **Noise words** are a set of commonly used words that cannot be searched on Lexis. **Stop words** are a set of commonly used words that cannot be searched on Westlaw.

From *question,* Thomson-West refers to a word search on Westlaw as a **query**. For both Lexis and Westlaw, from *together-tie,* **connectors** are codes used to indicate the desired logical or numerical relationship among the words used in a word search. From *nearness,* a **proximity search** is a search for one word within a specified number of words from another. **KWIC** is the acronym for the "key words in context" display of the results of a word search on Lexis. **Term mode** is the browsing by search word feature on Westlaw. **Page mode** is the browsing by page feature on Westlaw.

COMPUTER-ORGANIZED RESEARCH

Computer-organized legal research (**COLR**) is the use of a computer system to automate the organization of legal research results. From *word preparation,* **word processing** is the electronic display, correction, and revision of text before printing or use. When research results are organized, there is a **synergistic effect**, which is, from *together work,* the effect of a whole being greater than the sum of its parts.

From *information,* a **datum** is an item of information and the singular of data. From *information,* **data** are a collection of information and the plural of datum. From *beyond,* **metadata** are data about data. From *data-based,* a **database** is a collection of information placed in a computer's memory and capable of being searched by the computer or a collection of information especially organized for rapid computer search and retrieval. From *land* (domain), a **field** is a defined category of information in a database. From *restore heart (memory),* a **record**[4] (database) in a database is a variable item in a database containing the categorical information for each item. From *allot* and *arrange,* to **sort** is to put in alphanumeric order.

From *carry on a lawsuit* and *up carry,* **litigation support** is the organization of case information, particularly from discovery, to aid an attorney in the trial of a case. In litigation support, a **digest**[2] is, from *arrange,* an extraction of significant information from a deposition transcript or other document.

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- **Alert**
- **American Law Institute**
- **annotated version**
- **deposition digest**
- ***Federal Rules Digest***
- **key search terms**
- **key words**
- **manual legal research**
- **new law**
- **prior proceedings**
- ***Prosser on the Law of Torts***
- ***Restatement of Torts***
- **Second**
- **subsequent history**
- **texts**
- **traditional legal research**
- **uniform statute**
- **Westclip**
- **words and phrases**

Chapter 57

Legal Writing

GOOD LEGAL WRITING IS LIKE A GOOD DIAMOND

From *talk* or *tongue,* a **language** is a group of conventional symbols for the expression of ideas. From *scoring,* **writing** is expressing ideas in a visible form using conventional symbols. For *sourced in law scoring,* **legal writing** refers to putting law in writing or law-related writing. The **ABCs of Legal Writing** (Nolfi) are accuracy, brevity, clarity, and style.

The ABCs of Legal Writing are analogous to the qualities of a diamond: carat weight, cut, clarity, and color. From *before take care,* **accuracy** is having no error, conformity to a standard, or conformity to truth. From *short,* **brevity** is use of a few words, or simple words, to make a point. From *bright* and *distinct,* **clarity** is lacking limitation and doubt, easy to see and understand, and having one meaning. From *manner of expression,* **style** is appropriateness, character, and superior quality.

Avoid inaccuracy, verbosity, ambiguity, and shabbiness. **Inaccuracy** is having error, lacking conformity to a standard, or lacking conformity to truth. From *wordiness,* **verbosity** is use of an excessive number of words, or excessively complicated words, to make a point. From *two-ways drive,* **ambiguity** is having limitation and doubt, difficult to see and understand, and having more than one meaning. From *poor dress,* **shabbiness** is inappropriateness, lacking character, and inferior quality.

TYPES OF LEGAL WRITING

From *lesson,* a **document**[1] (the noun) is a coherent writing or a formal writing. A **form** is a model document or a standard document. From *teach,* to **document**[2] (the verb) means to record in writing or to prove with a writing or writings. From *document,* an **instrument** is a formal legal writing. From *drawing,* a **draft**[1] (writing, the noun) means a preliminary version of an instrument. From *select for a special purpose,* to **draft**[2] (writing, the verb) means to write with special knowledge and skill. A client has a lawyer draft an instrument to ensure that it has the desired legal effect. **Execution of an instrument** is completion of an instrument such as by adding the necessary signatures.

From *up-smooth,* to **interpolate** is to alter a text by adding a word or words. From *matter* and *other* (other matter), a **material alteration** is a change of consequence, especially a change that changes the legal effect of a document. **Redacted** is having eliminated information from a document due to privacy or security concerns.

Legal back is a paper or plastic cover traditionally attached to the back of an instrument to protect the instrument from damage, especially when folded in thirds; the back covers both sides. Because files with legal back took up valuable storage space in courts and law offices, courts no longer require legal back on instruments and prohibit legal back on pleadings.

Traditionally, a **legal pad**[1] was a bound pile of detachable 8½″ × 14″ sheets of paper, usually yellow in color, to distinguish a lawyer's notes from documents on white paper. Lawyers used **legal-size paper**, 8½″ × 14″ sheets of paper, to put as much information as possible on one page. As with legal back, because legal-size paper took up valuable storage space in courts and law offices, courts now discourage the use of legal-size paper and encourage the use of **letter-size paper**, 8½″ × 11″ sheets of paper, as the standard. Today, a **legal pad**[2] is a bound pile of detachable 8½″ × 11″ sheets of paper, usually yellow in color.

In business generally, an **executive summary** is a brief and concise summary for a busy executive, especially a brief and concise summary of the key points in a report containing a large amount of information. Likewise, a **lawyer's summary** is a brief and concise summary for a busy lawyer, especially a brief and concise summary of the key facts and relevant law in a case.

From *to be remembered,* a **memorandum of law**, a **legal memorandum**, a **memorandum**, or a **memo** is an informal written discussion of the law applicable to a case, especially an informal written discussion of the law applicable to a case used inside a law firm to report the results of legal research and to fairly discuss the merits of the client's case.

From *short,* a **brief**[3] is, generally, a relatively short written summary or discussion of the facts and law in a case. A **case brief** is a relatively short written summary of a particular reported case, especially a written summary of a particular reported case used in law school or college to prepare for a discussion of the case. The traditional analysis in a case brief is known as **IRAC**, which is an acronym for Issue, Rule, Application, and Conclusion.

From *making clear,* an **argumentative brief** is a relatively short formal written discussion of the facts and law applicable to a case used to persuade a court of the merits of the client's case. A **trial brief** is an argumentative brief prepared for a trial court. Specifically, an **appellate brief**[2] is an argumentative brief prepared for an appellate court.

The phrase **on the brief** means a person who contributes or contributed to the writing of a brief or the name of a person who contributed to writing the brief that actually appears on the brief as a contributing author. The phrase **of counsel** refers to an outside attorney who provides or provided assistance, especially an attorney who assisted in the preparation of a brief but is not an attorney of record in the case.

SOME COMMON ABBREVIATIONS AND ACRONYMS IN LEGAL WRITING

In addition to abbreviations and acronyms noted elsewhere, this section covers other common abbreviations and acronyms used in legal writing.

A.D. is an abbreviation for anno Domini meaning in the year of our Lord or after the birth of Jesus Christ. **A.J.** is an abbreviation for associate justice or an abbreviation for associate judge. **AKA** is an acronym for "also known as." **BTW** is an acronym for "by the way." **C.J.**[2] is an abbreviation for Chief Justice or an abbreviation for chief judge. In Latin, from *and others,* **et al.** is an abbreviation of et alii, meaning "and the others," and an abbreviation of et alius, meaning "and another." In Latin, from *and following,* **et seq.** is an abbreviation of et sequentes or et sequentia, meaning "and the following." **Fed.**[2] is an abbreviation for federal. **FKA** is an acronym for "formerly known as." In Latin, from *in the same place,* **ibid.** is an abbreviation of ibidem, meaning in the same book or resource or on the same page. In Latin, from *the same,* **id.** is an abbreviation of idem, meaning the same author or title or the same item.

J. is an abbreviation for justice or an abbreviation for judge. **J.J.** is an abbreviation for justices or an abbreviation for judges. **J.P.** is an abbreviation for justice of the peace.

NKA is an acronym for "now known as." The **paragraph symbol** or ¶ is the symbol for a paragraph. π, the Greek letter pi, is an abbreviation for plaintiff. **P.J.** is an abbreviation for presiding justice or an abbreviation for presiding judge. The **section symbol** or § is the symbol for a section. The **sections symbol** or §§ is the symbol for sections. Δ, the Greek letter theta, is an abbreviation for defendant. **WRT** is an acronym for "with respect to." **X** is an abbreviation and mark used as a signature by a person who is unable to write his or her name. A witness should record the signer's name next to the "X."

WORDS OF ART

A **word of art** is an ordinary word that also has a technical meaning or an ordinary word that also has a legal meaning. A **term of art** is an ordinary word or phrase that also has a technical meaning or an ordinary word or phrase that also has a legal meaning. For example, "battery" is a word of art. It has an ordinary meaning as a source of electricity. It has a technical meaning in baseball, as the collective word for a pitcher and a catcher. It also has a technical meaning in law, as an unconsented touching.

In addition to words of art noted elsewhere, this section covers other common words of art used in the law and miscellaneous useful foreign words and phrases.

From *make shorter,* to **abridge** is to reduce or to condense. An **abridgment** is something that has been reduced or condensed. From *admit knowledge,* to **acknowledge** is to admit, to confirm, or to make with an affidavit of execution. An **acknowledgement** is an admission, a confirmation, or having made with an affidavit of execution. From *doing,* **acting** means substituting for or temporarily taking the place of. From *for this,* **ad hoc** means for this purpose, for one purpose, or for one time only. From *with greater reason,* **a fortiori** means even more so (according to the same reasoning). For example, if three is too many, four is even more so. From *before the lawsuit started,* **ante litem motam** means before the legal dispute arose or when there was no motive to lie. A **back channel** is a secret informal negotiation paralleling a formal negotiation. A word coined by Marvin Platt, M.D., J.D., **barfunkle**[1] is the question "What does that mean?" The answer to a barfunkle is also a **barfunkle**[2], which is a concise definition in common words.

Black letter law is a clear statement of well-established law. The phrase is an allusion to the law book style of putting a heading or text in boldface because the heading or text states well-established law. A **bright-line rule** is a legal standard that resolves issues in a simple formula-like manner that is easy in application although it may not always be equitable. From *let it be done,* a **fiat** is a command, an order, or a decree, especially an arbitrary command, an arbitrary order, or an arbitrary decree.

From *of a forum,* **forensic**[2] generally means belonging in court or suitable for court. **Good cause** is a sufficient reason for doing something. From *burden,* the **gravamen** is the material or significant part of a cause, complaint, or grievance. **Handholding** is the task of being a permanent liaison between an attorney and the attorney's client. From *below* or *beneath,* **infra** means below, beneath, or ahead in the text. Infra directs the reader forward. From *above* or *before,* **supra** means above, before, or before in the text. Supra directs the reader back. In French, from *in the country,* the phrase **in pais** means outside or handled outside of the normal procedure. A **matter in pais** is a matter of fact not recorded in writing, and so a matter of fact that must be proved by oral evidence, parol evidence, or testimony. From *work,* to **inure** is to take effect, to have effect, to operate, or to benefit.

From *he himself said it,* **ipse dixit** means it was asserted, but the assertion was the only proof. From *by the fact itself,* **ipso facto** means by the nature of the circumstances or situation. **Jane Doe** is a fictitious name of a fictitious, unknown, or unidentified woman or party. **John Doe** is a fictitious name of a fictitious, unknown, or unidentified man or party. In Latin, the phrase **non sequitur** means it does not

follow and refers to an erroneous contention that something causes something else or an erroneous contention that something necessarily follows from something else. The Latin phrase **per annum** means by the year, for the year, or yearly. The Latin phrase **per diem** means by the day, for the day, or daily or the allowance for each day such as the maximum amount of money an employer permits an employee traveling on business to spend each day for food, lodging, or other expenses.

From *for the sake of form,* **pro forma** is the manner in which something will appear if and when it occurs such as a financial statement of a company after a proposed merger, if and when the proposed merger occurs. From *according to the rate,* **pro rata** means according to the established proportion. From *to that extent,* **pro tanto** means to an extent, but no further. From *forward look,* **prospective** means in the future or into the future. From *backward look,* **retrospective** means in the past or into the past. From *it being provided that,* a **proviso** is a condition, a qualification, or a stipulation. From *back and forward,* **reciprocity** is a relationship of mutual courtesy or privilege, where one will do for the other what the other will do for the one. From *reduce to the absurd,* **reductio ad absurdum** is to disprove by showing that the proposition leads to an absurd result.

An allusion to a small fish readily seen among others, a **red herring** is something that appears to be important or relevant but is actually not important or relevant or something added to a situation to appear to be important or relevant in order to distract attention from something that is important or relevant. From *proper time,* **seasonable** means reasonably timely or in a timely manner. The Latin phrase **semper fidelis**, with the abbreviation **semper fi**, means always faithful and is the motto of the U.S. Marine Corps. From *(it was) so,* **[sic]** means as it was actually stated, especially as it was erroneously stated; for example: On her resume she said that she "lead" [sic] the project. From *under let go,* to **submit** is to provide for the judgment of another, to yield to the judgment of another, or to yield to the will of another. The Latin phrase **suppressio veri, expressio falsi** means suppression of the truth is (equivalent to) the expression of falsehood. From *silent,* **tacit** is implied, but not actually expressed.

From *touch lightly,* a **tickler** is a time-management system that reminds the user about deadlines. **Whereas** means introducing what follows, in view of, it being the case that, actually, or when in fact.

LEGALESE

From *legal typical style/vocabulary,* confusing, excessive, or unnecessary use of legal terminology is known as **legalese**. Traditionally, lawyers tolerated the use of legalese. Today, most people agree that legalese should be avoided. Legalese is an example of **prolixity**, which, from *poured out,* is the use of unnecessary acts, unnecessary terminology, or unnecessary things. Many words and phrases used by lawyers in the past can and should be avoided in legal writing today. In addition to other similar words and phrases elsewhere, consider the following.

From *indefinitely,* **ad infinitum** is endlessly or forever. From *in arguing,* **arguendo** means for the sake of argument. The Latin word **ergo** means therefore. In Latin, **in curia** means in court. In Latin, **sub curia** means under law. In Latin, **in custodia legis** means in the custody of the law. From *while the crime is ablaze,* **in flagrante delicto** means in glaring fault.

The Latin phrase **inter alia** means among other things. The Latin phrase was once attractive to lazy writers and typists because it contained fewer letters than the English phrase it stood for. Today, it is better to use the easy-to-understand phrase "among other things." If brevity is needed, try "among others."

From *in whole,* **in toto** means completely, entirely, or as a whole. The Latin phrase **jus habendi** means the right to have something. From *note well,* **nota bene**, with the

abbreviation **N.B.**, means take note of this important text. From *of seed,* **seminal** means most important or fundamental. From *in a series,* **seriatim** means in order or in succession. From *under the rose,* **sub rosa** means covert, private, or secret. The phrase **to wit**, from the Latin word **scilicet**, sometimes abbreviated **ss**, simply means namely. From *face to face,* **vis-à-vis** means in relation to (something else).

USEFUL LEGALESE

A few words and phrases are regarded as legalese but should still be used because they have no better alternative. From *due,* the word **duly** means according to duty, according to law, or in due course. From *without delay,* the word **summarily** means quickly, without a full procedure. The word **whereby** means by which or through which. Perhaps the best example is the word **hereby**, which means doing what is being done by these words or, obviously, by what is done here. The word is easy to understand and there is no better way to say what it says.

Where legalese cannot be avoided, the only solution is to have the legal terminology explained.

GO TO THE NET

Visit the *Legal Terminology Explained* Online Learning Center at http://www.mhhe.com/nolfi09 for an expanded index and glossary, including:

- **a posteriori**
- **a prendre**
- **a priori**
- **active voice**
- **adversarial documents**
- **advisory letter**
- **analysis**
- **apostrophe**
- **appellant's brief**
- **appellee's brief**
- **appendix**
- **argument**
- **audience**
- **authorization letter**
- **bcc**
- **block quote**
- **body (of a brief)**
- **body (of a writing)**
- **brackets**
- **briefing a case**
- **calendaring**
- **case management**
- **cc**
- **certificate of compliance**
- **certificate of interested parties**
- **clichés**
- **closing sentence**
- **collection letter**
- **colloquialisms**
- **colon**
- **comma**
- **complex sentence**
- **compound sentence**
- **conclusion**
- **confirmation letter**
- **conflict**
- **contra**
- **cover letter**
- **criticism**
- **critique**
- **cumulative sentence**
- **dash**
- **deadline date**
- **demand letter**
- **discussion and analysis**
- **editing**
- **efficacy**
- **ellipsis**
- **ensue**
- **exclamation point**
- **flow**
- **header**
- **heading**
- **hyphen**
- **in futuro**
- **in initio**
- **in praesenti**
- **indefinite pronoun**
- **independent clause**
- **indexing method**
- **informative letter**
- **internal memoranda**
- **internal memorandum of law**
- **jurisdictional statement**
- **legal analysis**
- **legal argument**
- **legal jargon**

GO TO THE NET (*Continued*)

- legally significant facts
- letter bank
- letterhead
- medical authorization
- memorandum at the request of a judge
- memorandum in regard to a motion
- memorandum of law to the trial court
- metaphor
- model
- modifiers
- nul tort
- objective
- objective documents
- opinion letter
- parallel construction
- parentheses
- parenthetical phrase
- passive voice
- periodic sentence
- point headings
- position
- precise
- precision
- pronoun ambiguity
- questions presented
- redundancy
- reference line
- reliability
- research memorandum
- restrictive phrase
- retainer letter
- rhythm
- run-on sentence
- salutation
- semicolon
- sentence fragment
- short summary of the conclusion
- signature block
- simile
- simple sentence
- slang
- statement of facts
- statement of the case
- structured enumeration
- subheadings
- subordinate clause
- sufficiency
- table of authorities
- table of contents
- tickler file
- timekeeping
- title page
- tone
- topic sentence
- transactional documents
- transition
- transitional function
- transmittal letter
- unsolicited memorandum anticipating legal issues
- viva voce
- viz
- voice

Index

A

B

C

D

E

F

G

H

I

J

K

L

M

N

O

P

Q

R

S

T

U

V

W

X

Y

Z

Legal Terminology Explained is designed for students and teachers in legal studies, paralegal, and legal assisting programs as well as for programs that overlap the law such as criminal justice. It provides accurate definitions to law-related words and phrases and discusses each word and phrase in a brief narrative among related words and phrases in a logical progression. Visit **www.mhhe.com/nolfi09** for an expanded index and glossary of bonus words and phrases.

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