ASPEN COURSEBOOK SERIES

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Legal Reasoning and Legal Writing

EIGHTH EDITION

Law is "one of the principal literary professions" because "the average lawyer in the course of a lifetime does more writing than a novelist."[1]

Good writing skills are essential to a young lawyer looking for a job. Employers will use your writing sample to confirm that you have those skills. A person who supervised 400 lawyers at a major corporation put it this way: "You are more likely to get good grades in law school if you write well. You are more likely to become a partner in your law firm, or receive comparable promotions in your law department or government law office."[2] It really is true that "good writing pays well and bad writing pays badly."[3] Now is the time to learn how to write professionally.

§1.3 Where Law Comes From

Law is primarily rules, which Chapters 2 and 3 explain in detail. Asking where law comes from is the same as asking who makes the rules.

Sources of law can be divided into two categories: one is statutes and statute-like provisions; the other is judge-made law.

Statutes and statute-like materials. Legislatures create rules by enacting statutes. When we say, "There ought to be a law punishing people who text-message while driving," we vaguely imagine telling our state representative about the dangers of distraction behind the wheel and suggesting that she introduce a bill along these lines and persuade her colleagues in the legislature to enact it into law. If the legislature does that, and if the governor approves, the result is a statute. At the federal level, statutes are enacted by Congress with presidential approval. In the first-year of law school, the most statutory courses are Criminal Law (the Model Penal Code) and Contracts (the Uniform Commercial Code).

Statute-like provisions include constitutions, administrative regulations, and court rules. They are not enacted by legislatures, but in some — though not all — ways they are drafted like statutes. In your course on Constitutional Law, you will study the federal constitution. And in your course on Civil Procedure, you will study court rules called the Federal Rules of Civil Procedure.

Judge-made law. Courts record their decisions in judicial opinions, which establish precedents. Under the doctrine of *stare decisis*, those precedents can bind other courts in circumstances explained in Chapter 7. Lawyers

1. William L. Prosser, *English as She Is Wrote*, 7 J. Leg. Educ. 155, 156 (1954).
2. Richard S. Lombard (formerly general counsel at Exxon), remarks reprinted in *Lost Words: The Economical, Ethical and Professional Effects of Bad Legal Writing*, Occasional Paper 7 of the ABA Section of Legal Educ. Admissions to the Bar, at 54 (1993).
3. Donald N. McCloskey, *The Writing of Economics* 2 (1987).

use the words *cases*, *decisions*, and *opinions* interchangeably to refer to those precedents. Finding them is called *researching the case law*.

Courts make law in two ways. One is by interpreting statutes and statute-like provisions, which can be vague or ambiguous. Often we don't know what a statute means until the courts tell us through the judicial decisions that enforce it. When a court *interprets* the statute, it essentially finishes legislature's job. The other method is by creating and changing the *common law*, which is entirely judge-made, for reasons explained in the next section of this chapter.

§1.4 The Common Law

> The past is never dead. It's not even past.
>
> — *William Faulkner*

Courts originally created the common law through precedent, and they have the power to change it through precedent. Before you arrived in law school, you may not have realized that courts are able to create their own body of law, separate from the law made in legislatures. The idea of law created without legislatures seems so counter-intuitive that it needs explanation.

The common law exists because of events that happened over 900 years ago, with consequences for law-making and legal vocabulary that lawyers still encounter daily. In the autumn of 1066, a French duke named William of Normandy got together an army, crossed the English Channel in boats, invaded England, defeated an English army in the Battle of Hastings, terrorized the rest of the country, and had himself crowned king in London. He then expropriated nearly all the land in England and parceled it out among his Norman followers, who became a new aristocracy. And he set about systematically making English institutions, including law, subservient to his will.

Before the Norman Conquest, English law had differed from one place to another based on local custom. In a village, law had been whatever rules people had followed there for generations. In another village, law might be somewhat different because people there had been following somewhat different rules. Law amounted to traditions reflecting community views on what was right and wrong.

For two reasons, William's royal descendants would not allow this to continue. The political reason was that to complete the Conquest, the monarchy centralized power in itself and eventually created national courts with judges under royal control. The practical reason was that a judge of a national court cannot be expected to know the customary law of each locality. Law had to become uniform everywhere. It had to become *common* to the entire country. This common law could not come from a legislature. The modern concept of a legislature — one that could enact law — did not yet exist.

If the rule is judge-made law, the authority would be judicial precedents that created the rule together with precedents that have enforced it. While enforcing a rule, courts often refine it by working out details about the rule's meaning. If a legislature created the rule, the authority would be a statute and as well as cases that have interpreted the statute. Other types of authority include constitutions, court rules, administrative regulations, restatements, scholarly law review articles, and respected treatises.

Although coerced confessions are forbidden in a general sense by the U.S. Constitution's Fifth Amendment,[1] the specific rules on coerced confessions are in the thousands of precedents[2] interpreting the Fifth Amendment. When you answer the judge's question, you must identify the most important and relevant of them and explain why they support your position.

Of those thousands of precedents, which are the *most* authoritative? How can you identify the very few — perhaps a dozen — that are most likely to influence the judge's decision?

This chapter explains how to choose authority. Before reading the rest of this chapter, however, return to Chapter 1 and review §1.3 (Where Law Comes From) and §1.4 (The Common Law).

§7.2 How Courts Are Organized

Because the United States has a federal system of government, we have two types of court structures — state and federal. Each state has its own courts, enforcing that state's law. And the federal government has courts throughout the country, enforcing federal law. The U.S. Constitution allocates limited responsibilities to the federal government and reserves the rest to the states. As a result, state courts adjudicate a much wider range of claims than federal courts. State courts, in fact, decide the overwhelming majority of cases.

Courts are either trial or appellate. A lawsuit starts in a trial court, which hears witness testimony and examines other evidence. After the trial court decides the case, the losing party can appeal to an appellate court, asking it to reverse the trial court's decision. Some states have only one appellate court. In those states, all appeals from trial courts go straight to the state's supreme court. The federal government and most states have two appellate levels. An appeal from a trial court goes to an intermediate appellate court. From there an appeal goes to the highest court.

1. "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."
2. A Westlaw search for "coerced confession" produces almost 6,000 precedents.

§7.2.1 State Courts

Every state has a trial court of *general jurisdiction*, which tries all cases except those that fall within the *limited jurisdiction* of a specialized trial court. Court names differ from state to state. In most states the general jurisdiction trial court is called the Circuit Court, the Superior Court, or the Court of Common Pleas. Among the specialized courts might be a Family Court, a Juvenile Court, a Small Claims Court, and others.

In some states, such as Pennsylvania and Maryland, the intermediate appellate court hears appeals from every part of the state. In others, such as California, New York, and Florida, the intermediate appellate court is divided geographically into districts, departments, or the equivalent.

Court names aren't consistent from state to state. In California and many other states, the Superior Court is the general jurisdiction trial court. But in Pennsylvania the Superior Court is the intermediate appellate court. In many states, the intermediate appellate court is called the Court of Appeals or a name close to that. But in Maryland and New York, the Court of Appeals is the highest state court. In most states, the highest state court is called the Supreme Court. But In New York, the Supreme Court is a general jurisdiction trial court.

§7.2.2 Federal Courts

The federal court system is organized around a general trial court (the U.S. District Court), a few specialized courts (such as the Tax Court), an intermediate appellate court (the Court of Appeals), and the final appellate court (the U.S. Supreme Court).

The U.S. District Courts are organized into 94 districts. Where a state has only one district, the court is referred to, for example, as the U.S. District Court for the District of Montana. Some states have more than one district court. California has four: the District Court for the Northern District of California (at San Francisco), the Eastern District (at Sacramento), the Central District (at Los Angeles), and the Southern District (at San Diego).

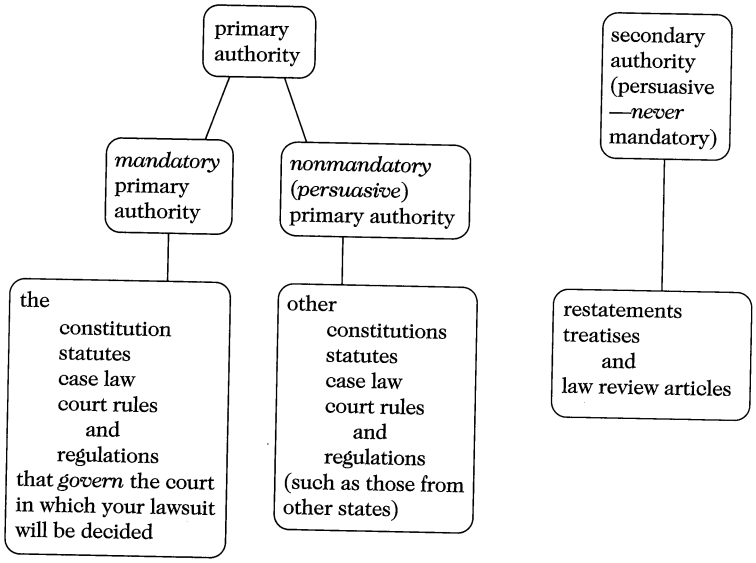
The U.S. Courts of Appeals are organized into thirteen circuits. Eleven of the circuits include various combinations of states. The Fifth Circuit, for example, hears appeals from the district courts in Louisiana, Mississippi, and Texas. There's also a U.S. Court of Appeals for the District of Columbia and another for the Federal Circuit, which hears appeals from certain specialized lower tribunals.

The U.S. Supreme Court hears appeals from the U.S. Courts of Appeals. It also hears appeals from the highest state courts where the state court's decision has been based on federal law. But the U.S. Supreme Court's jurisdiction is discretionary. In almost all other appellate courts, the losing party below has a right to appellate review — a right to have to the appellate court decide

whether the lower court's decision should be reversed. The U.S. Supreme Court, however, has discretion to choose which appeals it will hear, and it chooses to hear very few.

§7.3 Types of Authority

Authority is either primary or secondary. You'll be able to follow this discussion more easily if you visualize it this way:



§7.3.1 Primary Authority

Primary authority includes precedent, statutes, constitutions, administrative regulations, and court rules such as the Federal Rules of Civil Procedure. Primary authority is created by legislatures, courts, and other governmental entities that have the *power to make* law. Primary authority is either mandatory or persuasive.

Mandatory authority—which must be obeyed—is primary authority that has been created by *the government whose law controls the outcome of the dispute you are working on.* For example, in a tort case being litigated in an Ohio trial court under Ohio law, mandatory authority would include relevant Ohio statutes and appellate court decisions (and, rarely, the state constitution). *Mandatory authority* and *binding authority* mean the same thing.

Nonmandatory primary authority is primary authority that your court is not required to obey. It might persuade your court even if the court isn't

required to follow it. *Nonmandatory authority* and *persuasive authority* mean the same thing. Nonmandatory precedent is precedent from courts that cannot govern the dispute you are working on. If you represent a client litigating a question of Ohio law, a decision by an Indiana state court on Indiana law is primary authority. But in Ohio it is nonmandatory primary authority. Indiana courts can't create Ohio law.

How can you separate mandatory precedent from nonmandatory precedent? Look at the situation from the perspective of the judge who will rule on the dispute you are working on. Courts to which a losing party can appeal are courts that can reverse the judge's decision. Precedent from those courts is mandatory authority because, if the judge doesn't obey it, the judge's decision will be reversed. The Ohio Supreme Court can reverse other Ohio courts, either directly or indirectly. But the Indiana Supreme Court has no power to reverse an Ohio trial court.

A state's supreme court binds all lower courts in that state. A state's intermediate appellate court binds trial courts under its jurisdiction. If the state has a state-wide intermediate appellate court like the Pennsylvania Superior Court (see §7.2.1), its precedents are mandatory authority in all the state's trial courts because the Superior Court can reverse any of their decisions. If the state has a geographically segmented intermediate appellate court (again see §7.2.1), each part of that court can reverse trial courts only in its part of the state.

In federal courts, the U.S. Courts of Appeals are *coordinate* courts in relation to each other (see §7.2.2). Looking at the country as a whole, one circuit's Court of Appeals has the same rank as every other circuit's Court of Appeals. The Courts of Appeals do not bind each other. In fact, federal law can differ from one circuit to another. For example, the Second and Fifth Circuits have different tests for preliminary injunctions.

Arizona is part of the Ninth Circuit. The Ninth Circuit Court of Appeals can reverse decisions made by a U.S. District Court judge located in Arizona. Thus the Ninth Circuit Court of Appeals' decisions are mandatory authority in Arizona. They are not mandatory in New Mexico, which is in the Tenth Circuit. But if the Tenth Circuit has no precedent on a given issue, the Ninth Circuit's decisions might help a New Mexico federal court to fill the gap (see §7.5).

§7.3.2 Secondary Authority

Secondary authority is not law. It describes the law or explains it. Secondary authority might be persuasive authority, but it is never mandatory.

Secondary authority is produced by people or organizations that might by experts about the law but have no power to create it. The secondary sources most likely to be used as authority are restatements, treatises written by scholars, and articles and similar material published in law reviews. Other types exist, but these three are the ones you are most likely to encounter in the first year of law school.

A restatement is a series of black-letter common law rules organized into sections with supplemental drafters' comments. Restatements are commissioned by the American Law Institute to formulate a consensus view of (restate) the common law. Restatements have an important role in first-year Torts, Contracts, and Property courses, as well as several second- and third-year courses. When a restatement is no longer up-to-date, it is superseded by a second or third version. Thus, the Restatement (Third) of Property replaced the Restatement (Second) of Property.

The authoritativeness of a treatise depends on the reputation of its author and on whether the treatise has been kept up-to-date. Some of the outstanding treatises have been written by Wigmore (evidence), Corbin (contracts), Williston (contracts), and Prosser and Keeton (torts). Some treatises are multivolume works; some are in a single volume; some are hardbound with pocket parts or other annual supplements; and some are in looseleaf binders for easier updating.

Law reviews print two kinds of material: articles, which are written by scholars, judges, and practitioners, and notes and comments, which are written by students. If an article is thorough, insightful, or authored by a respected scholar, it may influence a court and might be strong authority. Only in the most unusual of circumstances does a student note or comment influence a court. But even where law review material will not be influential, it might help you analyze an issue, and its footnotes can help you find cases, statutes, and other authority.

§7.4 The Hierarchy of Authority

Sources of law, both primary and secondary, are ranked so that one can be chosen over another. The following are some of the basic rules for ranking authority:

Mandatory authority always outranks nonmandatory authority. On questions of Ohio law, for example, Ohio statutes and Ohio Supreme Court precedents outrank Indiana precedents as well as restatements, treatises, and law review articles.

Within the same jurisdiction, the separation and allocation of powers causes some mandatory authority to outrank other mandatory authority. A constitution prevails over an inconsistent statute. Either a constitution or a statute prevails over inconsistent case law, court rules, and administrative regulations.

This is basic civics. Constitutions create governments. A legislature, a court, or an administrative agency has only the powers granted by the applicable constitution. Although a state's courts can make common law, the legislature

has a superior power to create law in statutes, and statutes outrank the common law.

Within the same jurisdiction, a decision from a higher court outranks a decision from a lower court—if the higher court has the power to reverse the lower court. See §7.3.1.

Within the same jurisdiction, newer mandatory authority outranks inconsistent older mandatory authority. An Ohio statute enacted last year outranks an Ohio statute fifteen years ago if the two statutes are inconsistent with each other. The newer statute also outranks precedent interpreting the older statute.

If the Ohio Supreme Court overrules one of its own precedents—or if it decides a case in a way that's in somehow inconsistent with one of its own precedents—the new precedent outranks older one.

Some secondary authority is more persuasive than other secondary authority. When secondary authority matters, many courts are most likely to be influenced by a restatement. You can find out whether a state's courts defer to a particular restatement by checking the manner and frequency with which the restatement is cited in the state's decisions. After restatements, the most influential secondary authority will usually be treatises. After treatises will be law review articles if they are thorough and written by scholars with recognized expertise.

§7.5 How to Use Nonmandatory Precedent and Secondary Authority to Fill a Gap in Local Law

A gap can exist when your jurisdiction's case law doesn't have all the legal rules needed to resolve your case. Your court must decide whether to fill that gap and, if it does so, which rule to adopt. Nonmandatory precedent and secondary authority might help your court make those decisions. But be careful. Some gaps can be filled only by a legislature. Sections 1.3 and 1.4 in Chapter 1 explain the difference between court-made common law and law made by legislatures. In addition, §7.1 in this chapter includes a constitutional issue where nearly all the rules have been created through precedent. If an issue is normally reserved to legislatures, your court won't be able to create basic rules filling a gap. That's the legislature's job.

Another type of gap occurs when your jurisdiction has a rule—whether court-made or statutory—but it isn't clear how that rule should be applied to facts like yours. Nonmandatory precedent and secondary authority might help a court decide how to apply the rule. But nonmandatory authority can help only if it comes from a jurisdiction that has the same basic rule your jurisdiction has. If the other jurisdiction's courts enforce a different rule, those precedents won't help your court help your court decide how to enforce your jurisdiction's rule.