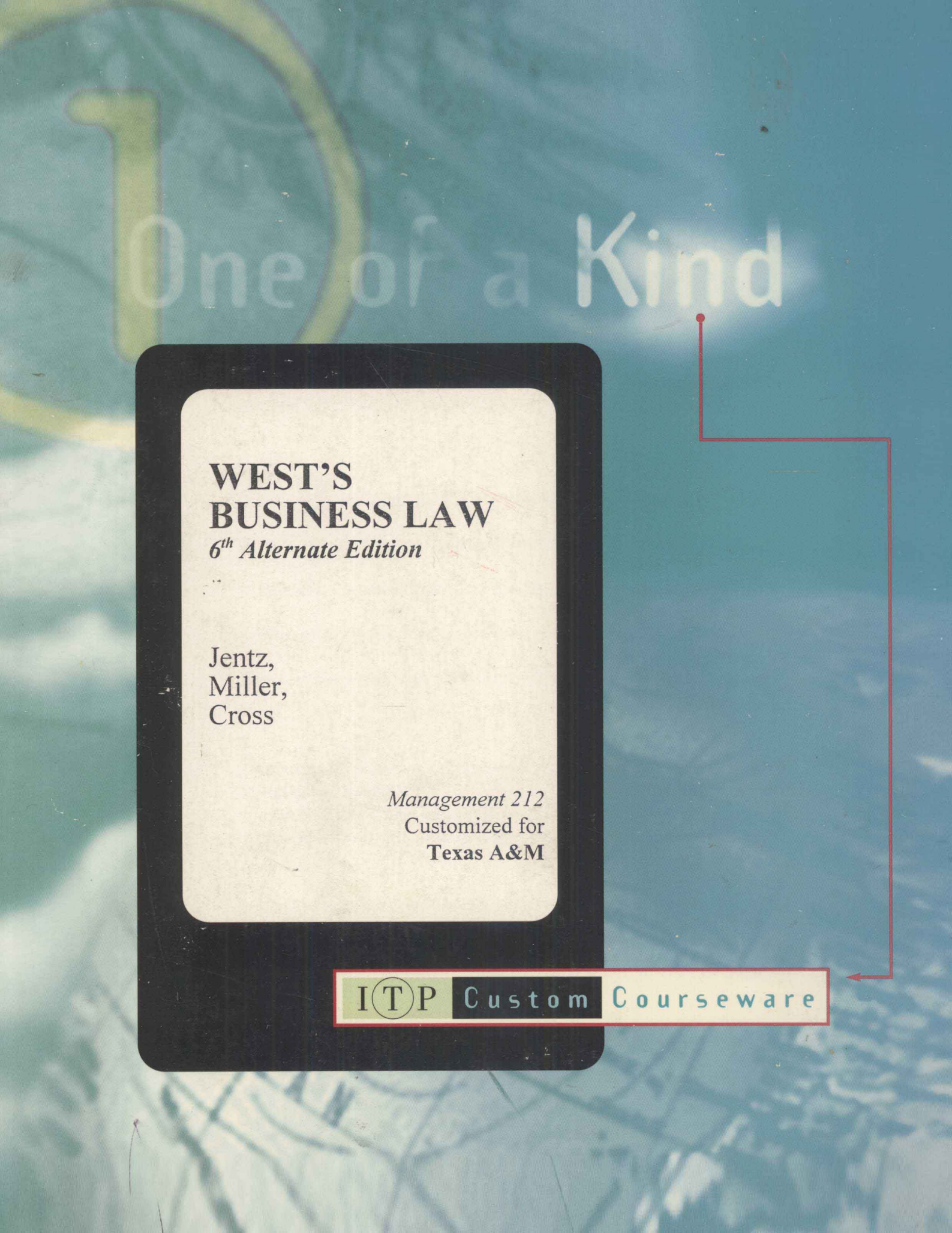

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6th Alternate Edition

Jentz,
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Management 212
Customized for
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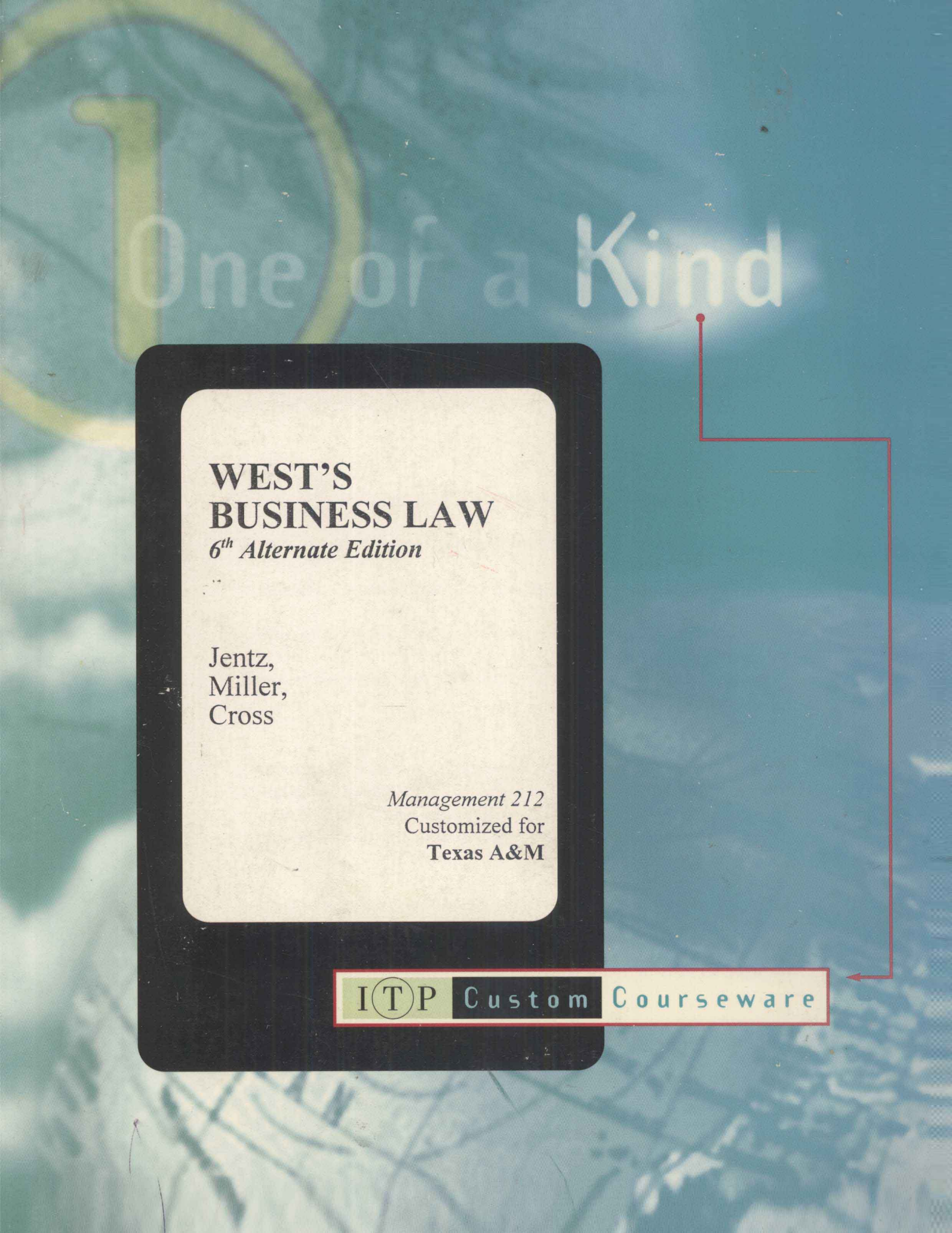

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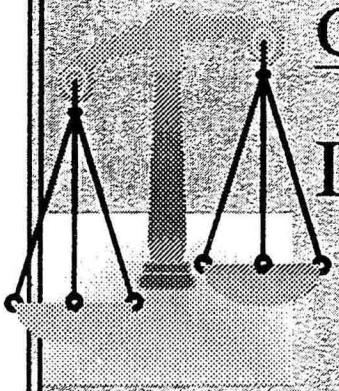

CHAPTER 1

INTRODUCTION TO LAW AND LEGAL REASONING

Civilized societies require order and some degree of certainty. The law generates both. If any society is to survive, its citizens must be able to determine what is legally right and legally wrong. When citizens believe that a legal wrong has occurred, they must have some idea of how to seek redress. The law provides such a vehicle.

In this introductory chapter, we first look at the nature of law in general. We then look at the history and sources of American law. A major source of American law is the *common law* that originated in medieval England. Laws, or statutes, enacted by Congress and the state legislatures constitute another important source of American law, a source generally referred to as *statutory law*. Other sources of American law are *constitutional law*, which is based on the federal Constitution and state constitutions, and *administrative law*. The latter consists of the numerous regulations created by administrative agencies, such as the Food and Drug Administration. Each of these important sources of law will be described in the following pages. Next, because we cite statutes, regulations, and cases throughout this text, we explain how to read citations to these sources of law and how to find them. The chapter concludes with a section on how to read and understand case law, including an annotated sample court case.

SECTION 1

WHAT IS LAW?

There have been and will continue to be different definitions of law. The Greek philosopher Aristotle (384–322 B.C.) saw law as a "pledge that citizens of a state will do justice to one another." Aristotle's mentor, Plato (427–347 B.C.), believed law was a form of social control. The Roman philosopher

Cicero (106–43 B.C.) contended that law was the agreement of reason and nature, the distinction between the just and the unjust. The British jurist Sir William Blackstone (1723–1780) described law as "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong." In America, the eminent jurist Oliver Wendell Holmes, Jr. (1841–1935), contended that law was a set of rules that allowed one to predict how a court would resolve a particular dispute—"the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

Although these definitions vary in their particulars, they all are based on the following general observation concerning the nature of **law:** *Law consists of enforceable rules governing relationships among individuals and between individuals and their society.* In the study of law, often referred to as **jurisprudence,** this very broad statement concerning the nature of law is the point of departure for all legal scholars and philosophers.

SECTION 2

SCHOOLS OF JURISPRUDENTIAL THOUGHT

The court opinions in this book show that judges often refer to logic, history, custom, or philosophy in making their decisions. These opinions also show that when different judges—for example, a trial court judge and a reviewing court judge—examine the same case, they sometimes arrive at different conclusions about how the law should apply. That judges differ in their philosophies of law should come as no surprise to Americans. We frequently read or hear about the differences in legal philosophy among United States Supreme Court justices, especially when a significant, controversial case—such as one relating to abortion—is before the court. Part of the study of law, or jurisprudence, is discovering how different approaches to law affect judicial decision making.

Legal philosophers and scholars frequently disagree on what the proper function of law should be, and their disagreements have produced different schools of jurisprudence, or philosophies of law. The three most influential schools of legal thought are described below.

THE NATURAL LAW SCHOOL

The oldest and one of the most significant schools of jurisprudence is the **natural law school.** Those who adhere to the natural law school of thought believe that government and the legal system should reflect universal moral and ethical principles that are inherent in human nature.

Because natural law is universal, it takes on a higher order than positive, or conventional, law. It was this higher law to which the international tribunal of judges at Nuremburg appealed when convicting Nazi war criminals of "crimes against humanity" at the end of World War II. Although these "criminals" may not have disobeyed any positive law of their country and may have been merely following their government's (Hitler's) orders, they were deemed by the tribunal to have violated a natural law that transcends any particular country's written laws. The natural law school of thought encourages individuals to disobey conventional, or written, laws if those individuals believe that the laws are in conflict with natural law. Protesters who felt that America's involvement in Vietnam (1964–1973) was wrong, for example, used natural law as their reason to violate written laws when they protested America's war effort.

In essence, the natural law tradition presupposes that the legitimacy of conventional, or positive, law derives from natural law. Whenever it conflicts with natural law, conventional law loses its legitimacy and should be changed.

THE POSITIVIST SCHOOL

At the other end of the spectrum is the **positivist school.** Those who adhere to this school believe that there can be no higher law than a nation's **positive law**—law created by a particular society at a particular point in time. In the positivist view, the significance and finality of positive law are greater than in the natural law tradition. Essentially, from the positivist perspective, the law is the law and must be obeyed. Whether a particular law is bad or good is irrelevant. The merits or demerits of a given law can be discussed, and laws can be changed—in an orderly manner through a legitimate lawmaking process—but as long as a law exists, it must be obeyed.

The Legal Realists

Legal realism, which was a popular school of legal thought in the 1920s and 1930s, left a strong imprint on American jurisprudence. The legal realists were in a sense rebels. They were rebelling against some of the common assumptions of the legal theorists and jurists of their time. One such assumption was that judges, at least ideally, apply the law impartially, logically, and uniformly. The legal realists believed that each judge is influenced by the beliefs and attitudes unique to his or her personality. They also believed that each case is attended by a unique set of circumstances. That is, no two cases, no matter how similar, are ever exactly the same. Therefore, judges should tailor their decisions to take account of the specific circumstances of each case, rather than rely on some abstract rule that may not relate to those particular circumstances. Judges should also consider extralegal sources, such as economic and sociological data, in making decisions, to the extent that such sources illuminate the circumstances and issues involved in specific cases.

Section 3

THE COMMON LAW TRADITION

Because of our colonial heritage, much of American law is based on the English legal system. A knowledge of this tradition is necessary to an understanding of the nature of our legal system today.

In 1066, the Normans conquered England, and William the Conqueror and his successors began the process of unifying the country under their rule. One of the means they used to this end was the establishment of the king's courts, or *curia regis*. Before the Norman Conquest, disputes had been settled according to the local legal customs and traditions in various regions of the country. The king's courts sought to establish a uniform set of customs for the country as a whole. What evolved in these courts was the beginning of the **common law**—a body of general rules that prescribed social conduct and applied throughout the entire English realm.

Courts developed the common law rules from the principles behind judges' decisions in actual legal controversies. Judges attempted to be consistent. When possible, they based their decisions on the principles suggested by earlier cases. They sought to decide similar cases in a similar way and considered new cases with care, because they knew that their decisions would make new law. Each interpretation became part of the law on the subject and served as a legal **precedent.** Later cases that involved similar legal principles or facts could be decided with reference to that precedent.

In the early years of the common law, there was no single place or publication in which legal opinions could be found. In the late thirteenth and early fourteenth centuries, however, decisions of each year were gathered together and recorded in *Year Books*. These books were informal, containing only notes of cases made by lawyers and law students, and were not organized according to different legal topics. They were not official reports, did not include every case, and sometimes did not report cases until two or three years after the cases had been decided. Nevertheless, the *Year Books* were useful to lawyers and judges. In the sixteenth century, the *Year Books* were discontinued, and other reports of cases became available.

The Doctrine of *Stare Decisis*

The practice of deciding new cases with reference to former decisions, or precedents, eventually became a cornerstone of the English and American judicial systems. It forms a doctrine called ***stare decisis***[1] ("to stand on decided cases"). Under this doctrine, judges are obligated to follow the precedents established within their jurisdictions.

The doctrine of *stare decisis* performs many useful functions. It helps the courts to be more efficient, because if other courts have carefully reasoned through a similar case, their legal reasoning and opinions can serve as guides. *Stare decisis* also makes the law more stable and predictable, because if the law on a given subject is well settled, someone bringing a case to court can usually rely on the court to make a decision based on what the law has been.

Departures from Precedent Sometimes a court will depart from the rule of precedent if it

1. Pronounced *ster*-ay dih-*si*-ses.

decides that the precedent should no longer be followed. If a court decides that a ruling precedent is simply incorrect or that technological or social changes have rendered the precedent inapplicable, the court might rule contrary to the precedent. Cases that overturn precedent often receive a great deal of publicity. For example, in *Brown v. Board of Education of Topeka*,[2] the United States Supreme Court expressly overturned precedent when it concluded that separate educational facilities for whites and African Americans, which had been upheld as constitutional in numerous previous cases,[3] were inherently unequal. The Supreme Court's departure from precedent in *Brown* received a tremendous amount of publicity as people began to realize the ramifications of this change in the law.

CASES OF FIRST IMPRESSION Sometimes, there is no precedent on which to base a decision. For example, in 1986, a New Jersey court had to decide whether a surrogate-parenting contract should be enforced against the wishes of the surrogate parent (the natural mother).[4] This was the first such case to reach the courts, and there was no precedent in any jurisdiction to which the court could look for guidance. When deciding such a case, called a "case of first impression," or when there are conflicting precedents, courts may consider a number of factors, including legal principles and policies underlying previous court decisions or existing statutes, fairness, social values and customs, public policy, and data and concepts drawn from the social sciences. Which of these sources is chosen or receives the greatest emphasis will depend on the nature of the case being considered and the particular judge hearing the case.

Although judges always strive to be free of subjectivity and personal bias in deciding cases, each judge has his or her own unique personality, set of values or philosophical leanings, and intellectual attributes—all of which necessarily frame the decision-making process.

2. 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). (Legal citations are explained later in this chapter.)
3. See *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).
4. *In re Baby M*, 217 N.J. Super. 313, 525 A.2d 1128 (1987).

STARE DECISIS AND LEGAL REASONING

Legal reasoning is the reasoning process by which a judge harmonizes his or her decision with decisions that have been made before. When applying, overruling, or creating precedent, judges use many forms of reasoning, including those discussed below.

DEDUCTIVE REASONING Generally, a judge writes an opinion in the form of **syllogism**—that is, deductive reasoning consisting of a major premise, a minor premise, and a conclusion. For example, a **plaintiff** (a suing party) comes before the court alleging *assault* (a wrongful and intentional action, or tort, in which one person makes another fearful of immediate physical harm). The plaintiff claims that the **defendant** (the party who is sued) threatened her while she was sleeping. Although the plaintiff was unaware that she was being threatened, her roommate heard the defendant make the threat. The judge might point out that "under the common law, an individual must be *aware* of a threat of danger for the threat to constitute civil assault" (major premise); "the plaintiff in this case was unaware of the threat at the time it occurred" (minor premise); and "therefore, the circumstances do not amount to a civil assault" (conclusion).

LOGICAL THOUGHT PROGRESSION A second important form of commonly employed legal reasoning might be thought of as a knotted rope, with each knot tying together separate pieces of rope to form a tight length. As a whole, the rope represents a logical progression of thought connecting various points, and the last knot represents the conclusion. For example, imagine that a tenant in an apartment building sues the landlord for damages for an injury resulting from an allegedly dimly lit stairway. The landlord, who was on the premises the evening the injury occurred, testifies that none of the other nine tenants who used the stairway that night complained about the lights. The court concludes that the tenant is not entitled to compensation on the basis of the stairway's lighting. The "pieces of rope" might be stated as follows:

1. The landlord testifies that none of the tenants who used the stairs on the evening in question complained about the lights.

2. The fact that none of the tenants complained is the same as if they had said the lighting was sufficient.
3. That there were no complaints does *not* prove that the lighting was sufficient but proves that the landlord had no reason to believe that it was not.
4. The landlord's belief was reasonable, because no one complained.
5. Therefore, the landlord acted reasonably and was not negligent in respect to the lighting in the stairway.

REASONING BY ANALOGY In the majority of cases, the two methods of legal reasoning discussed above predominate, and it is unnecessary to look beyond them. There is, however, another important form of reasoning that judges use in deciding cases: reasoning by *analogy.*

To reason by **analogy** is to compare the facts in the case at hand to the facts in other cases and, to the extent the *patterns* are similar, apply the same rule to the case at hand. To the extent the facts are unique, or "distinguishable," different rules may apply. For example, in case A, it is held that a driver who crosses a highway's center line is negligent. In case B, a driver crosses the line to avoid hitting a child. In determining whether case A's rule applies in case B, a judge would consider what the reasons were for the decision in A and whether B is sufficiently similar for those reasons to apply. If the judge holds that B's driver is not liable, that judge must pinpoint a policy and explain a rule that is not inconsistent with the rule underlying the decision in case A.

THERE IS NO ONE "RIGHT" ANSWER

Many persons believe that there is one "right" answer to every legal question. The law is not an exact science, however, and in most situations involving a legal controversy, there is no single correct result. Good arguments can often be made to support either side of a legal controversy. Quite often a case does not present the situation of a "good" person suing a "bad" person. In many cases, both parties have acted in good faith in some measure or have acted in bad faith to some degree. Also, legal rules tend to be expressed in general terms, and this means that judges have some flexibility in interpreting and applying the law. Judges can sometimes be very creative in their legal reasoning in the interests of preventing injustice. As indicated above, each judge has his or her own personal beliefs and moral philosophy that shape, at least to some extent, the process of legal reasoning.

THE COMMON LAW TODAY

The body of law first developed in England and still used today in the United States consists of the rules of law announced in court decisions. These rules of law include interpretations of constitutional provisions, of statutes enacted by legislatures, and of regulations created by administrative agencies. Today, this body of law is referred to variously as the common law, judge-made law, or **case law.**

The common law governs all areas not covered by *statutory law,* which, as is discussed below, generally consists of those laws enacted by state legislatures and, at the federal level, by Congress. The body of statutory law has expanded greatly since the beginning of our nation, and this expansion has resulted in a proportionate reduction in the scope and applicability of the common law. Nonetheless, the common law remains a significant source of legal authority. Even when legislation has been substituted for common law principles, courts often rely on the common law as a guide to interpreting the legislation, on the theory that the people who drafted the statute intended to codify an existing common law rule.

RESTATEMENTS OF THE LAW

To summarize and clarify common law rules and principles, the American Law Institute (ALI) drafted and published compilations of the common law called Restatements of the Law. The ALI, which was formed in the 1920s, consists of practicing attorneys, legal scholars, and judges. There are Restatements of the Law in the areas of contracts, torts, agency, trusts, property, restitution, security, judgments, and conflict of laws. Many of the Restatements are now in their second editions. The *Restatement of the Law of Contracts,* for example, was first published in 1932. Thirty years later, a second edition was undertaken. It was completed in 1979 and is referred to as the *Restatement (Second) of the Law of Contracts* or, more simply, as the *Restatement (Second) of Contracts.*

The Restatements, which generally summarize the common law rules followed by most states, do

not in themselves have the force of law but are an important secondary source of legal analysis and opinion on which judges often rely in making their decisions. We refer to the Restatements frequently in subsequent chapters of this text.

SECTION 4

OTHER SOURCES OF AMERICAN LAW

In addition to the common law, or case law, the courts have numerous other sources of law to consider when making their decisions.

CONSTITUTIONAL LAW

The federal government and the states have separate constitutions that set forth the general organization, powers, and limits of their respective governments. The U.S. Constitution is the supreme law of the land. A law in violation of the Constitution, no matter what its source, will be declared unconstitutional and will not be enforced. The Tenth Amendment to the U.S. Constitution, which defines the powers and limitations of the federal government, reserves all powers not granted to the federal government to the states. Unless they conflict with the U.S. Constitution, state constitutions are supreme within the states' respective borders.

The regulation of interstate commerce is one of the chief ways in which the U.S. Constitution affects business. The constitutional authority to regulate business and other aspects of constitutional law will be discussed in detail in Chapter 5. The complete text of the U.S. Constitution is presented in Appendix B.

Many state constitutions provide for referenda. A *referendum* asks the citizens of a state, or of a political subdivision of the state, to approve or reject a proposal for a new state constitution or amendments to the existing state constitution. Referenda may also ask the citizens to approve or reject a new law enacted by the state legislature.

STATUTORY LAW

Laws passed by the federal Congress and the various state legislatures are called **statutes.** These statutes make up another source of law, which, as mentioned earlier, is generally referred to as **statutory law.** When a legislature passes a statute, that statute is ultimately included in the federal code of laws or the relevant state code of laws (these codes are discussed later in this chapter). The "California Code," for example, refers to the statutory law of the state of California.

Statutory law also includes local ordinances. An **ordinance** is a statute (law, rule, or order) passed by a municipal or county governing unit to govern matters not covered by federal or state law. Ordinances commonly have to do with city or county land use (zoning ordinances), building and safety codes, and other matters affecting the local governing unit. Persons who violate ordinances may be fined or jailed, or both. No state statute or local ordinance can violate the U.S. Constitution or the relevant state constitution.

UNIFORM LAWS No two states in the United States have identical statutes, constitutions, and case law. In other words, state laws differ from state to state. The differences among state laws were even more notable in the 1800s, when conflicting state statutes frequently made the rapidly developing trade and commerce among the states very difficult. To counter these problems, a group of legal scholars and lawyers formed the National Conference of Commissioners (NCC) on Uniform State Laws in 1892 to draft uniform statutes for adoption by the states. The NCC still exists today and continues to promulgate uniform statutes.

Adoption of a uniform law is a state matter, and a state legislature may reject all or part of the uniform law or rewrite it as the legislature wishes. Hence, even when a uniform law is said to have been adopted in many states, those states' laws may not be entirely "uniform." Once adopted by a state, a uniform act becomes a part of the statutory law of that state.

The earliest uniform law, the Uniform Negotiable Instruments Law, was completed by 1896 and was adopted in every state by the early 1920s (although not all states used exactly the same wording). Over the following decades, other acts were drawn up in a similar manner, including the Uniform Sales Act, the Uniform Warehouse Receipts Act, the Uniform Bills of Lading Act, the Uniform Partnership Act, the Model Business Corporation Act (drafted by the American Bar Association), the Uniform Stock Transfer Act, the Uniform Probate Code, and, more recently, the Uniform Status of Children of Assisted Conception

CONCEPT SUMMARY 1.1 Sources of American Law

SOURCE	DESCRIPTION
The Common Law	The common law originated in medieval England with the creation of the king's courts; consists of past judicial decisions and reasoning; and involves the application of the doctrine of *stare decisis*—the rule of precedent—in deciding cases. Common law governs all areas not covered by statutory law.
Constitutional Law	The law as expressed in the U.S. Constitution and the various state constitutions. The U.S. Constitution is the supreme law of the land. State constitutions are supreme within state borders to the extent that they do not violate a clause of the U.S. Constitution or a federal law.
Statutory Law	Laws (statutes and ordinances) created by federal, state, and local legislatures and governing bodies. None of these laws can violate the U.S. Constitution or the relevant state constitutions. Uniform statutes, when adopted by a state, become statutory law in that state.
Administrative Law	The branch of law concerned with the power and actions of administrative agencies at all levels of government. Federal administrative agencies are created by enabling legislation enacted by the U.S. Congress. Agency functions include rulemaking, investigation and enforcement, and adjudication.

Act (also known as the Uniform Surrogacy Act), and the Uniform Prenuptial Agreements Act. The most ambitious uniform act of all, however, was the Uniform Commercial Code.

THE UNIFORM COMMERCIAL CODE (UCC) The Uniform Commercial Code (UCC), which was created through the joint efforts of the NCC and the American Law Institute, was promulgated in 1952. The UCC, at least in part, has been adopted by all states, the District of Columbia, and the Virgin Islands. The UCC facilitates commerce among the states by providing a uniform, yet flexible, set of rules governing commercial transactions. The UCC assures businesspersons that their contracts, if validly entered into, will be enforced. Because of its importance in the area of commercial law, the UCC will be cited frequently in this text, particularly in Unit Three, which covers commercial transactions. The entire text of the latest version of the UCC is presented in Appendix C.

ADMINISTRATIVE LAW

Administrative law consists of the rules, orders, and decisions of **administrative agencies.** Federal administrative agencies are created by Congress through **enabling legislation,** which specifies the name, composition, and powers of the agency being created. For example, the Federal Trade Commission (FTC) was created in 1914 by the Federal Trade Commission Act.[5] The act prohibits unfair and deceptive trade practices. It also describes the procedures the agency must follow to charge persons or organizations with violations of the act, and it provides for judicial review (review by the courts) of agency orders.

Other portions of the act grant the agency powers to "make rules and regulations for the purpose of carrying out the Act," to conduct investigations of business practices, to obtain reports from interstate corporations concerning their business practices, to investigate possible violations of the act, to publish findings of its investigations, and to recommend new legislation. The act also empowers the FTC to hold trial-like hearings and to adjudicate certain kinds of trade disputes that involve FTC regulations.

Although created by congressional legislation, most federal agencies, such as the Food and

5. 15 U.S.C. Sections 45 *et seq.* (Citations to statutes, such as the United States Code, will be discussed later in this chapter.)

Drug Administration and the Environmental Protection Agency, are considered part of the executive branch of government. They are, therefore, under the authority of (and accountable to) the president of the United States. Other agencies, called **independent regulatory agencies,** are not subject to presidential authority—they are independent, and their officials cannot be removed from office without *good cause* (sufficient reason). Because removal requires good cause, independent agency officials are not affected by political changes to the extent that regular agencies are. Their relative independence provides these agencies with some continuity from one presidential term to another. The Securities and Exchange Commission and the Federal Communications Commission are two examples of independent regulatory agencies.

Administrative agencies occupy an unusual niche in the American legal scheme, because they perform functions normally divided among all three branches of the government. Note that the FTC's grant of power incorporates functions associated with the legislative branch of government (rulemaking), the executive branch (investigation and enforcement), and the judicial branch (adjudication). Taken together, these functions constitute what has been termed **administrative process** (the administration of law by administrative agencies), in contrast to **judicial process** (the administration of law by the courts).

Administrative law and procedures, which will be examined in detail in Chapter 45, constitute a dominant element in the regulatory environment of business. Regulations issued by various administrative agencies affect virtually every aspect of a business's operation, including the firm's capital structure and financing, its hiring and firing procedures, its relations with employees and unions, and the way it manufactures and markets its products.

SECTION 5

CLASSIFICATIONS OF LAW

The body of law is huge. To study it, one must break it down by some means of classification. No single classification system can cover such a large mass of information; consequently, those systems that have been devised tend to overlap. Moreover, they are, of necessity, arbitrary in some respects. A discussion of the best-known classifications of law follows.

SUBSTANTIVE VERSUS PROCEDURAL LAW

Substantive law includes all laws that define, describe, regulate, and create legal rights and obligations. For example, a rule stating that promises are enforced only when each party has received something of value from the other party is part of substantive law. So, too, is a rule stating that a person who has injured another through negligence must pay damages.

Procedural law establishes the methods of enforcing the rights established by substantive law. Questions about how a lawsuit should begin, what papers need to be filed, which court will hear the suit, which witnesses can be called, and so on are all questions of procedural law. In brief, substantive law tells us our rights; procedural law tells us how to exercise them.

Exhibit 1–1 classifies law in terms of its subject matter, dividing it into law covering substantive

■ Exhibit 1–1 Subject Matter of Substantive and Procedural Law

The importance of the distinction between substantive and procedural law is more than academic. The *result* of a case may well depend upon the determination that a rule is substantive rather than procedural.

Substantive Law	Procedural Law
Administrative law	Administrative procedure
Agency	Appellate procedure
Bailments	Civil procedure
Commercial paper	Criminal procedure
Constitutional law	Evidence
Contracts	
Corporation law	
Criminal law	
Insurance	
Intellectual property	
Partnerships	
Personal property	
Real property	
Sales	
Sports and entertainment law	
Taxation	
Torts	
Trusts and wills	

■ **Exhibit 1–2 Examples of Public and Private Law**
Public law governs the relationship between persons and their governments. Private law governs the relationships among individuals.

Public Law	Private Law
Administrative law	Agency
Civil, criminal, and appellate procedure	Commercial paper
Constitutional law	Contracts
Criminal law	Corporation law
Evidence	Partnerships
Taxation	Personal property
	Real property
	Sales
	Torts
	Trusts and wills

issues and law covering procedural issues. Most of this text concerns substantive law.

Public versus Private Law

Public law addresses the relationship between persons and their governments, whereas **private law** addresses direct dealings between persons. Criminal law and constitutional law, for example, are generally classified as public law, because they deal with persons and their relationships to government. Criminal acts, though they may involve only one victim, are seen as offenses against society as a whole and are prohibited by governments for the purpose of protecting the public. Constitutional law is frequently classified as public law, because it involves questions of whether the government—federal, state, or local—has the power to act in a particular fashion; often the issue is whether a law, duly passed, exceeds the limits set on the government.

When persons deal with or affect other persons, such as in a contractual relationship, the law governing these relationships is classified as private law. Exhibit 1–2 offers examples of private and public law.

Civil versus Criminal Law

Civil law is concerned with the duties that exist between persons or between citizens and their governments, excluding the duty not to commit crimes. Contract law, for example, is part of civil law. The whole body of *tort law*, which has to do with the infringement by one person of the legally recognized rights of another, is an area of civil law. Tort law will be discussed in Chapter 7, as well as in Chapters 8 and 9.

■ **Exhibit 1–3 Criminal and Civil Law**
An important feature distinguishing criminal and civil law is the legal consequence for the wrongdoer. Violations of criminal laws may lead to fines or imprisonment, or both, whereas violations of civil laws usually involve compensating the person harmed by paying money damages.

Criminal Law	Civil Law
Administrative law	Agency
Antitrust law	Bailments
Constitutional law	Bankruptcy
Criminal law	Business organizations
Environmental law	Commercial paper
Labor law	Contracts
Securities law	Insurance
	Property
	Sales
	Secured transactions
	Torts
	Trusts and wills

Criminal law, in contrast to civil law, is concerned with wrongs committed against the public as a whole. Criminal acts are prohibited by local, state, or federal government statutes. Criminal law is always public law, whereas civil law is sometimes public and sometimes private. In a criminal case, the government seeks to impose a penalty on an allegedly guilty person. In a civil case, one party (sometimes the government) tries to make the other party comply with a duty or pay for the damage caused by failure to so comply. Criminal law is discussed in Chapter 9. Exhibit 1–3 lists some of the areas of law falling within each of these classifications.

SECTION 6

REMEDIES AT LAW VERSUS REMEDIES IN EQUITY

In the early English king's courts, the kinds of **remedies** (the legal means to recover a right or redress a wrong) that the courts could grant were

severely restricted. If one person wronged another in some way, the king's courts could award as compensation one or more of the following: (1) land, (2) items of value, or (3) money. The courts that awarded this compensation became known as **courts of law,** and the three remedies were called **remedies at law.** Even though the system introduced uniformity in the settling of disputes, when plaintiffs wanted a remedy other than economic compensation, the courts of law could do nothing, so "no remedy, no right."

When individuals could not obtain an adequate remedy in a court of law because of strict technicalities, they petitioned the king for relief. Most of these petitions were decided by an adviser to the king, called a **chancellor,** who was said to be the "keeper of the king's conscience." When the chancellor thought that the claim was a fair one, new and unique remedies were granted. In this way, a new body of rules and remedies came into being, and eventually formal courts of chancery, or **courts of equity,** were established.

Equity Courts

The distinction between law and equity courts is now primarily of historical interest, but it is still relevant to students of business law because legal and equitable remedies differ. To seek the proper remedy for a wrong, one must know what remedies are available.

Equity is that branch of law, founded on what might be described as notions of justice and fair dealing, that seeks to supply a remedy when there is no adequate remedy available at law. With the establishment of equity courts, two distinct court systems were created, each having a different set of judges. Two bodies of rules and remedies existed at the same time: remedies at law and **remedies in equity.** Plaintiffs had to specify whether they were bringing an "action at law" or an "action in equity," and they chose their courts accordingly. Only one remedy could be granted for a particular wrong, and even in equity the wrong had to be of a type the court could recognize as remediable.

Courts of equity had the responsibility of using discretion in supplementing the common law. Even today, when the same court can award both legal and equitable remedies, such discretion is often guided by so-called **equitable maxims.** Equitable maxims are propositions or general statements of rules of equity that courts often invoke. Listed below are a few of the maxims of equity.

1. *Whoever seeks equity must do equity.* (Anyone who wishes to be treated fairly must treat others fairly.)
2. *When there is equal equity, the law must prevail.* (The law will determine the outcome of a controversy in which the merits of both sides are equal.)
3. *One seeking the aid of an equity court must come to the court with clean hands.* (Plaintiffs must have acted fairly and honestly.)
4. *Equity will not suffer a right to exist without a remedy.* (Equitable relief will be awarded when there is a right to relief and there is no adequate remedy at law.)
5. *Equity regards substance rather than form.* (Equity is more concerned with fairness and justice than with legal technicalities.)
6. *Equity aids the vigilant, not those who rest on their rights.* (Equity will not help those who neglect their rights for an unreasonable period of time.)

The last maxim is worthy of discussion. It has become known as the equitable doctrine of **laches,** and it can be used as a **defense** (an argument raised by the defendant to defeat the plaintiff's cause of action or recovery). The doctrine arose to encourage people to bring lawsuits while the evidence was fresh. What constitutes a reasonable time, of course, varies according to the circumstances of the case. Time periods for different types of cases are now usually fixed by **statutes of limitations.** After the time allowed under a statute of limitations has expired, no action can be brought, no matter how strong the case was originally.

Equitable Relief

A number of equitable remedies are available. Three of them—specific performance, injunctions, and rescission—are briefly discussed here. These and other equitable remedies are discussed in more detail at appropriate points in the chapters that follow. As a general rule, courts today will not grant these equitable remedies unless the remedy at law (in the form of money **damages**) is inadequate.

Specific Performance When courts of law and equity were still separate, a plaintiff might come into a court of equity asking it to order a

■ **Exhibit 1–4 Procedural Differences between an Action at Law and an Action in Equity**

Procedure	Action at Law	Action in Equity
Initiation of lawsuit	By filing a complaint	By filing a petition
Decision	By jury or judge	By judge (no jury)
Result	Judgment	Decree
Remedy	Monetary damages	Injunction, decree of specific performance, or rescission

defendant to perform within the terms of a contract. A court of law could not issue such an order, because its remedies were limited to payment of money or property as compensation for damages. A court of equity, however, could issue a decree of **specific performance**—an order to perform what was promised in a contractual agreement. This remedy was, and still is, only available when the dispute before the court involves a *contractual* transaction.

A court today will usually grant the equitable remedy of specific performance when the remedy at law (money damages) is not an adequate remedy. For example, if a seller **breaches** (fails to perform as promised) a contract for the sale of a unique item—such as a work of art, a classic antique car, or a parcel of land—money damages may be inadequate. Because the buyer could not obtain that unique item anywhere else, the court may order the seller to perform the contract as promised.

INJUNCTIONS If a person wanted to prevent the occurrence of a certain activity, he or she would have to go to the chancellor in equity and ask that the person doing the wrongful act be ordered to stop. The order is called an **injunction.** An injunction is usually an order to a specific person, directing that person to do or to refrain from doing a particular act.

For example, assume that your neighbor has several dogs that stay out in your neighbor's yard all night and bark ceaselessly. You have tried in vain to convince your neighbor to keep the dogs in at night or otherwise cure the noise problem. Finally, you petition the court for an injunction. In effect, you ask the court to *enjoin* your neighbor from letting the dogs stay out at night, thereby disrupting the peace by their barking.

RESCISSION Sometimes the legal remedy of the payment of money for damages is unavailable or inadequate when disputes occur over agreements. In such cases, the equitable remedy of rescission may be appropriate. **Rescission**[6] is an action to undo an agreement—to return the parties to their *status quo* prior to the agreement. If rescission is granted, all duties created by the agreement are abolished. If, for example, a person is fraudulently induced to enter into a contract and the fraud is discovered before any performance under the contract takes place, the innocent party might seek to rescind the agreement.

A contract might also be rescinded if the parties were mistaken as to the subject matter of the contract. For example, assume that Daron has two automobiles, one worth $5,000 and the other worth $10,000. Daron wants to sell the car worth $5,000 and tells his friend, "I'll sell you my car for $7,000." The friend, believing that the contract is for the $10,000 car, agrees to purchase it for $7,000. Upon learning of the mistake, either party might seek to have the contract rescinded.

THE MERGING OF LAW AND EQUITY

During the nineteenth century, most states adopted rules of procedure that resulted in combined courts of law and equity—although some states, such as Arkansas, still retain the distinction. Today, a plaintiff or a petitioner in equity (the person bringing the action) may request both legal and equitable remedies in the same action, and the trial court judge may grant either or both forms of relief.

Despite the merging of the courts, it is still important to distinguish between actions at law and actions in equity. As mentioned, the primary importance is in the remedy sought. Vestiges of the procedures used when the courts were separate still exist. Today, differences in procedure depend on whether the civil lawsuit involves an action in equity or an action at law. Exhibit 1–4 is illustrative and applies to most states.

6. Pronounced reh-*sih*-zhen.