

Handout 1 *Introduction to Litigation*

What is Litigation?

Individuals, companies, and institutions frequently come into conflict with one another. Many of these conflicts raise no legal issues. For example, two friends may argue about something one of them said about the other. Or a store might open very close to a similar store, and undermine the first store's business. Other times, people come into conflict that *does* involve the law, but they try to resolve the dispute without a lawsuit. But a lawsuit may arise if someone is harmed by the behavior of someone else—an individual or organization—and feels that the harmful behavior violates the Constitution or other laws. Bringing a lawsuit is one way the injured person can seek compensation for the injury, or a change in the harmful behavior. *Litigation*, then, is the legal system's mechanism for resolving disputes.

Types of Litigation: Civil vs. Criminal

There are two basic types of litigation—civil and criminal. *Civil litigation* is the legal system's process for resolving disputes among individuals or groups. It occurs when someone is alleged to violate *civil law*—a set of rules governing people's behavior. Civil litigation has two sides: the *plaintiff*, who feels that he/she has been wronged in some way, and the *defendant*, who the plaintiff alleges committed the wrong. The plaintiff initiates the lawsuit—or *sues*—by filing a complaint against the defendant. In civil litigation, the plaintiff asks the court to order the defendant to remedy a wrong, often in the form of monetary compensation to the plaintiff.

Criminal litigation is the legal system's process for resolving accusations made by the government that an individual (or, occasionally, a corporation) has committed a crime—a behavior that is harmful to society and is for that reason prohibited by the government under criminal law. Criminal litigation also has two sides: the *prosecutor*, a lawyer representing the government (or, as it is sometimes expressed, the people) who initiates litigation, and the *defendant*, who the prosecutor alleges committed the crime. In the modern United States, an individual can never file criminal charges against another person; only the prosecutor, on behalf of the government, can file criminal charges in court. In criminal litigation, the prosecutor asks the judge or jury to find the defendant guilty and punish him/her in some way, often by imprisonment.

Potential Outcomes

One of the most fundamental distinctions between civil and criminal litigation is in the notion of punishment. In criminal litigation, the potential penalty if the defendant is *found guilty*, or *convicted*, of a crime can include a fine, imprisonment, or even the death penalty, which remains the punishment for murder in some states. If the defendant wins, the judgment is called an *acquittal*, or a *not-guilty* verdict.

In contrast, a defendant in civil litigation is *never* incarcerated. Instead, a typical remedy if the defendant is *found liable* (the terms “convicted” or “guilty” are used only for criminal litigation) is a court order to the defendant to pay money damages or to start or stop doing something. A losing defendant in civil litigation often reimburses the plaintiff for losses caused by the

defendant's behavior. The idea of damages is usually not to punish the defendant, but to compensate the plaintiff.

Standards of Proof

The standard of proof is also very different in a criminal case versus a civil case. More evidence is needed to find the accused at fault in criminal cases than to find the defendant at fault in civil ones. To convict someone of a crime, the prosecution must show there is *proof beyond a reasonable doubt* that the person committed the crime. Judges and juries cannot convict someone they believe probably committed the crime or likely is guilty; rather, they must be almost certain. This makes it less likely that an innocent person will be wrongfully convicted and imprisoned. Civil cases, in contrast, usually use looser standards of proof such as “the preponderance of the evidence” standard, which asks if it was “more likely than not” that something occurred in a certain way. The difference in standards exists because civil liability is considered less blameworthy and because civil consequences are not designed to punish, but to repay the plaintiff for loss.

The Same Conduct Can Produce Civil and Criminal Liability

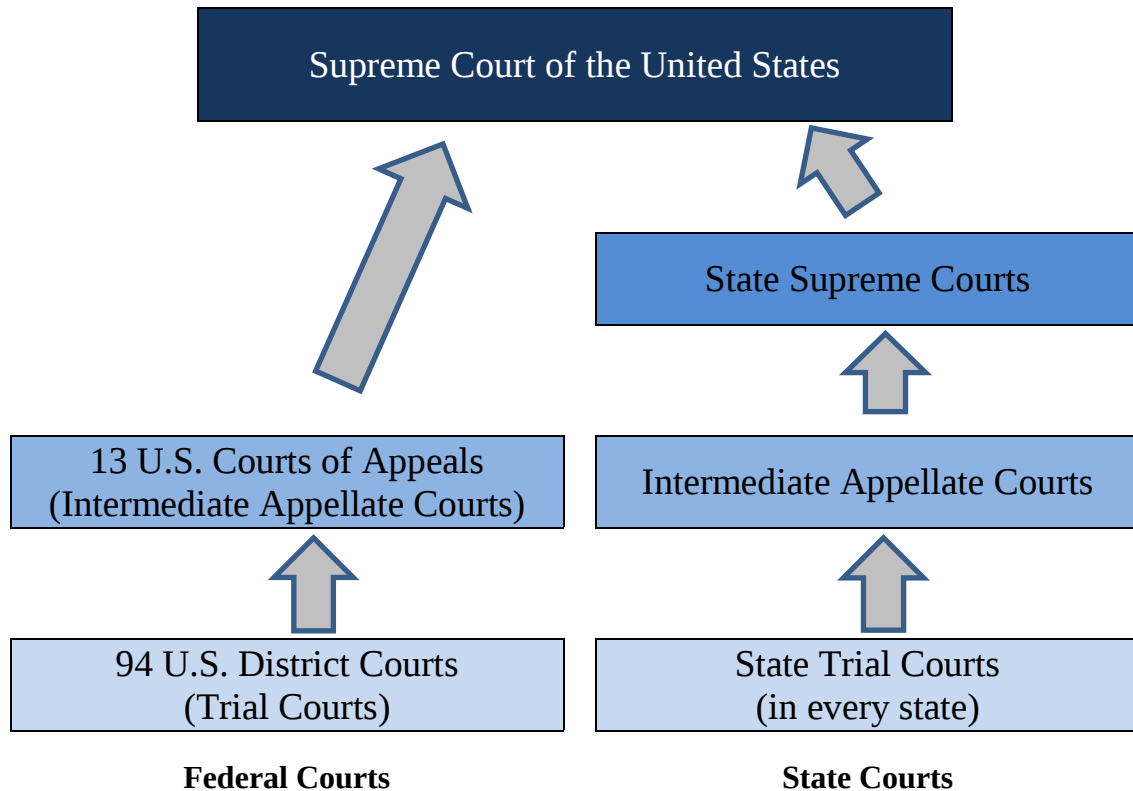
Murder, theft, and robbery are common examples of crimes that, if committed, can result in criminal litigation. Alternatively, divorce proceedings, property disputes, and personal injury claims are all examples of disputes that civil litigation can help resolve. Unlike these standard examples, some conduct is not so easily identifiable as either criminal or civil. In fact, although criminal and civil cases are treated very differently, the very same conduct can result in *both* criminal *and* civil liability. In other words, someone can violate the criminal law *and* the civil law at the same time! For instance, say you intentionally take your friend’s iPhone, without his or her permission, and refuse to give it back. In doing so, you would have committed a crime known as *theft*. As a consequence of committing theft, you might be *punished* by criminal penalties—including community service or even jail time. At the same time, you would have also committed a civil law violation known as *conversion*—an obscure way of saying that you took something that didn’t belong to you. As a consequence of committing conversion, you would be required to give the iPhone back to your friend or pay him the price of the phone. In the civil context, the goal is to *compensate* your friend for the *injury* that you caused him—in this case, the injury of losing his iPhone.

The Court System

Every state has its own court system. In addition, there is a federal court system, which is for the entire country. Lawsuits can be filed in either state or federal court. Typically, state courts hear criminal and civil cases regarding state law. Federal courts hear cases involving federal law. In certain circumstances, however, a federal court may preside over questions of state law, and vice versa. Each system has its own procedural rules, but the basic structure of the litigation process is the same.

Courts are hierarchical. Cases begin in state or federal *trial courts*. If one of the parties loses their case, they can usually appeal to an intermediate *appellate court*, the next highest level. In state court litigation, parties may be able to appeal next to the state supreme court. The U.S. Supreme Court is the nation’s highest court. It can only decide questions of federal law. For

questions about state law, the state supreme courts are the top layer. This diagram illustrates the relationship between these systems:



Types of Disputes: Factual vs. Legal

Litigation can concern *factual disputes*, *legal disputes*, or both. A factual dispute occurs when the parties disagree about what has happened. In *Brown v. Board*, if the school district had disagreed that the schools were segregated, that would have been a factual dispute. However, the issue in *Brown v. Board* was a legal dispute—a disagreement about the legal significance of the facts. Since the parties agreed that the schools were segregated, the court was called upon to determine whether such segregation violated the Fourteenth Amendment of the Constitution. The *Brown v. Board* case raised a legal, not a factual, dispute.

The Pros and Cons of Litigation

Litigation serves many purposes. It can force defendants who have violated the law to stop and compensate those they have harmed. In addition, the possibility of litigation and the penalties that may come from it encourage others to follow the law. Litigation can draw attention to a problem, and help people to organize politically to solve it. Finally, litigation is a way for the values underlying the law to be articulated, reinforced, and worked out in new situations.

At the same time, litigation is frequently criticized. The main criticisms are:

- Expense. Plaintiffs, if they win, typically pay between 30% and 40% of their recovered damages to their lawyers. Defendants typically pay lawyers by the hour—and there can

be many hours. Even defendants who eventually win suits against them have often spent a great deal of money to defend.

- Delay. Lawsuits can take a great deal of time.
- Unduly broad threat. The prospect of lawsuits may induce potential defendants to avoid particular kinds of beneficial activities. For example, some analysts think that doctors are less likely to be obstetricians, because lawsuits are particularly prevalent in that area of medical practice. (The evidence on this point is mixed.)
- Diversion. Lawsuits may divert the parties from other less expensive and perhaps more effective kinds of solutions to their disputes.