



21世纪法学规划教材

# 法律英语

(第二版)

LEGAL ENGLISH

何家弘 编



法律出版社

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## 内容简介

本书是美国西北大学法学博士，中国人民大学教授、博士生导师何家弘先生编写的一本高水准的法律英语教材。

全书分二十二课，分别讲述法律制度、法律职业、法律教育、司法系统、宪法、行政法、刑法、民权法、合同法、侵权法、财产法、公司法、保险法、商法、税法、环境保护法、家庭法、知识产权法、民事诉讼程序、刑事诉讼程序、证据规则、世贸组织规则等。本书课文直接取自美国法律材料，语言地道，内容原汁原味。

本书最突出的特点是实用性强，在课后练习中，作者设置专题讨论、案例分析、模拟谈判、法庭辩论，以及案情摘要和法律备忘录等常用法律文书的写作练习，并附有法庭常用英语和中外合资企业合同英文参考样本。这些都对提高学生的英语表达能力和法律实务能力极有裨益。作为本书附录的辛普森案庭审模拟练习和建立中外合资企业的合同谈判练习，是两个综合性的模拟练习。

第二版除新增两课外，还在每一课开篇增设“背景”一栏，以中文介绍了和课文主题相关的背景知识，提纲挈领，言简意赅。



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Legal English

| 第二版 |

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## 出版说明

二十多年前,当中国改革开放开始勃兴,法律和法律教育开始再度崛起之时,法律出版社便以精诚态度和极大力度服务于中国的法律教育。针对不同阶段的读者,本社陆续推出多种系列的法学教材,迄今已达数百种。高等学校教材、教学参考书为其中主要部分。而历年来逐步推出的“八五”、“九五”及正在推出的“十五”国家级规划教材,更为重点。长期以来,“法律版”的众多教材,颇受学林瞩目。在此,我们深深感谢读者和作者对我们的信任。

进入 21 世纪以来,中国法律教育在取得长足发展的同时,也积极酝酿和展开改革举措,培养高素质的现代法律人才成为法律教育的重要目标。为此,本社应时而动,力求从教材的品种上、内容上、形式上实现更大突破,为新一代法律人学取专业知识提供更好读本。

就高等学校教材而言,我们立足两种进路:全面革新既有教材,或推出全新教材。革新既有教材,意在选取已出版教材尤其是“八五”、“九五”规划教材中的精品,从内容到形式全面更新、修订,重新整合,使这些长盛不衰的法律教育财富,以崭新面目,继续服务于新读者。推出全新教材,则或为推出“十五”规划教材,或约请优秀作者撰写新作,精阐原理,结合实践,关注前沿,努力创造出新世纪的新经典。优秀作者,或为老一辈与盛年名家,或为新生代才俊。或革新,或全新,这些教材在 21 世纪呈现崭新风采,并同享规划教材之盛,因之统为一名:“21 世纪法学规划教材”。

我们深信,中国的法律教育事业将在改革和发展中不断壮大;我们承诺,本套“21 世纪法学规划教材”,以及本社所有法律教育图书都将在发展中不断更新和超越。本着竭诚为法律和法律教育服务的发展服务,竭诚为读者服务之宗旨,我们愿更加敬业,与广大读者和作者一起,共同创造法治事业及法律教育事业的美好未来。

法律出版社  
2004 年 1 月

## 编者简介

何家弘,男,满族,1953年出生于北京;曾经在“北大荒”务农8年并在北京当过两年建筑工人;后考入大学攻读法律,在中国人民大学获得法学学士学位和法学硕士学位,在美国西北大学获得法学博士(SJD)学位;现任中国人民大学法学院教授、诉讼法学博士研究生导师(证据学方向和侦查学方向),曾入选北京市跨世纪学术带头人、北京市优秀中青年法学家;中国作家协会会员;国际犯罪文学作家协会会员。其撰写或主编的主要著作有:《同一认定——犯罪侦查方法的奥秘》、《中美检察制度比较研究》(英文版)、《外国犯罪侦查制度》、《新编证据法学》、《证据调查实用教程》、《外国证据法选择》、《当代美国法律》、《检察证据教程》、《刑事审判认证指南》、《电子证据法研究》、《刑事证据制度改革研究》、《域外痴醒录》、《法苑杂谈》、《黑蝙蝠·白蝙蝠——证据的困惑》,以及以“洪律师”为主人公的推理小说《疯女》、《人生黑洞——股市幕后的罪恶》、《人生误区——龙眼石之谜》、《人生怪圈——神秘的古画》(其中,《神秘的古画》和《疯女》已经被翻译成法文,分别于2002年1月和2003年1月在法国出版)。大众文艺出版社于2003年4月出版了“何家弘精品系列”,共5卷,其中,法学论文一卷,杂文随笔一卷,外国案例一卷,推理小说两卷。此外,何家弘还主持编辑了《证据学论坛》(已出版6卷)和《法学家茶座》(已出版3辑)。



## 第二版前言

2000 年的初秋,我作为中国大学教授代表团的成员来到风景如画的日内瓦,与世界贸易组织和联合国贸发会等国际机构的官员和专家就中国“入世”等问题进行交流和会谈。在那两周的时间内,我的感受颇多,其中之一就是进一步认识到,中国太需要熟悉法律而且精通外语的人才了。一方面,虽然目前在中国能讲一口流利英语的人不在少数,但是懂专业而且外语好的人却为数不多,而在法律界能够熟练使用外语的人则更如凤毛麟角;另一方面,随着中国的“入世”,随着中国与外国在涉及法律的领域内的交流和往来日益频繁,我们对“法律+外语”的复合型人才的需求也在增长。因此,在法学教育中加强法律英语的教学确实具有特别重要的现实意义。

学英语难,学法律英语则是难上加难。其实,不仅中国人以为难,外国人也以为难,甚至连一些以英语为母语的国家的人都会把法律英语称为“外语”。笔者以为,法律英语之所以难学,原因主要有三:第一,在法律英语中有许多生僻的词汇,这些专业术语往往是人们在日常生活中不会使用的,甚至是很难谋面的;第二,有些法律词汇本身虽然不算生僻,或者说,组成这些法律词语的字都是人们所熟知的,但是放在法律语言环境中,其含义却与日常用义大相径庭,使得圈外人读之或听之时,总感到一头雾水;第三,传统的英语法律学者在撰写文章和法律文书时往往喜欢咬文嚼字,甚至使用极长的语句和极晦涩的古语,似乎非此不足以显示其驾驭法律语言的能力,而这种语句往往会使不熟此道的人在阅读时甚感吃力。不过,近年来,在美国的法学教育中,也有学者在极力推广“简明英语”。

学习法律英语,必须以相关的法律知识为基础。因此,要想达到预期的效果,讲授法律英语的教师必须在英美法律制度的领域内有较深的造诣,而学生则必须在学习英语的同时也要认真研习英美国家的法律制度。虽然这提高了教与学的难度,但是就一门课程而言,却可收到“一石两鸟”(to kill two birds with one stone)的成效。而这也正是笔者编辑本教材之宗旨。

《法律英语》自 1997 年由法律出版社出版以来,已经被许多法律院校采用为教授专业英语的教材,并且受到了教者和学者的欢迎。该书已多次重印的事实,即为证明。然而,笔者在教学过程中也发现了一些问题,并收集了一些修改意见。这次



法律出版社决定将该书纳入新近推出的“高等学校法学教材”系列,为我修订该教材提供了一个很好的契机。

此次修订,我主要增补了“知识产权法”和“世贸组织规则”两课,同时对一些资料进行了更新。法律出版社的编辑则对该书的版式进行了重新设计,使之更便于教学,并给人耳目一新的感觉。在修订过程中,法律出版社的袁方女士和中国人民大学的姚永吉先生帮助我收集了增补课文的资料,黄丽娟小姐则承担了“补充读物”的翻译工作。在此,我谨对他们表示诚挚的谢意。

何家弘

2003年3月于北京痴醒斋

## 编写说明

《法律英语》是为高等法律院校法学专业的本科生和研究生编写的专业英语教材。编者根据自己在美国学习法律的体会和在国内讲授法律英语的经验,将专业外语教学中“用专业学外语”和“用外语学专业”这两种方法有机地结合起来,在内容设计上既照顾到外语学习的规律,又照顾到法律学科的体系,从而可以使学生收到“一石两鸟”的学习效果。

本书共设 20 课,包括法律制度、法律职业、法律教育、司法系统、宪法、行政法、刑法、民权法、合同法、侵权法、财产法、公司法、保险法、商法、税法、环境保护法、家庭法、民事诉讼程序、刑事诉讼程序、证据规则。每课内容包括课文、背景情况、注释、练习和补充读物五部分。课文和补充读物的选材十分广泛且形式多样,其中既有法典和判例,也有文章和讲稿。编者还对原材料进行了一定的编辑和修改,以适应本教材的需要。本书还有三个附录,即模拟练习、补充读物参考译文和词汇表。

本书最突出的特点是实用性强。每课的练习中都有专门为该课内容设计的讨论和模拟练习,以提高学生的英语表达能力和涉外法律实务能力。其中的专题讨论、案例分析、模拟谈判、法庭辩论以及案情摘要和法律备忘录等常用法律文书的写作练习都有很强的实用性。此外,该书在附录中还设计了两个综合性模拟练习:一个是根据轰动一时的辛普森案设计的整个审判过程的模拟练习;一个是建立中外合资企业的合同谈判练习。练习后面还附有法庭常用英语、法官给陪审团的指示范例、中外合资企业合同英文参考样本和《中华人民共和国中外合资经营企业法实施条例》英译本,以便学生参考。

于钦建、王文河、任新萍、刘希明、刘昊阳、李凌波、武咏、张文进、张桂勇、曹爱莲、虞英倩等人参加了本书补充读物的翻译工作,编者在此谨表谢忱。

编者  
1997 年 5 月



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## LESSON ONE

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# Legal System 法律制度

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### Background 背景

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自从哥伦布(Christopher Columbus)于1492年航行至美洲之后,大批欧洲人便开始拥向这片“新大陆”。不过,人们通常把第一批英国定居者(the first English settlers)于1607年到达弗吉尼亚(Virginia)的詹姆斯顿(Jamestown)视为美国法律制度历史的起点。美国法制史可以大体上分为两个时期,即英属殖民地时期(the Period of the English Colonies)和美利坚合众国时期(the Period of the United States)。虽然美国的法律制度是在英国法律传统的基础上形成和发展起来的,但是在近四百年的历史进程中,美国的法律制度也形成了一些不同于英国法律制度的特点,如公诉制度(public prosecution)等。

美国属于普通法系(Common Law Legal System)国家,其法律制度有两个基本特点:其一是以分散制(decentralization)为原则;其二是以判例法(case law)为主体。美国除联邦政府外,还有州政府、县政府、市政府、镇政府等等,而且这些政府都是相互独立的,各自在其管辖范围内享有一定的立法权和执法权。因此,有人说美国是“一个有许多政府的国家”(a country of many governments);而美国的法律体系则是一个“零散的无系统”(fragmental no-system)。诚然,美国现在也有很多成文法(written law)或制定法(statutory law),但是其法律制度仍是以判例法为主体的。换言之,“遵从前例”(stare decisis)仍然是美国司法活动中最重要的原则之一。以上两点对于理解美国的法律制度具有重要意义。

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**Text 课文**

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**Part One**

The United States is at once a very new nation and a very old nation. It is a new nation compared with many other countries, and it is new, too, in the sense that it is constantly being renewed by the addition of new elements of population and of new States. But in other senses it is old. It is the oldest of the “new” nations—the first one to be made out of an Old World colony. It has the oldest written constitution, the oldest continuous federal system, and the oldest practice of self-government of any nation.

One of the most interesting features of America's youth is that the whole of its history belongs in the period since the invention of the printing press. The whole of its history is, therefore, recorded: indeed, it is safe to say that no other major nation has so comprehensive a record of its history as has the United States, for events such as those that are lost in the legendary past of Italy or France or England are part of the printed record of the United States. And the American record is not only comprehensive; it is immense. It embraces not only the record of the colonial era and of the Nation since 1776, but of the present fifty States as well, and the intricate network of relationships between States and Nation. Thus, to take a very elementary example, the reports of the United States Supreme Court fill some 350 volumes, and the reports of some States are almost equally voluminous: the reader who wants to trace the history of law in America is confronted with over 5,000 stout volumes of legal cases.

No one document, no handful of documents, can properly be said to reveal the character of a people or of their government. But when hundreds and thousands of documents strike a consistent note, over more than a hundred years, we have a right to say that is the keynote. When hundreds and thousands of documents address themselves in the same ways, to the same overarching problems, we have a right to read from them certain conclusions which we can call national characteristics.

**Part Two**

The American legal system, like the English, is methodologically mainly a case



law system. Most fields of private law still consist primarily of case law and the extensive and steadily growing statutory law continues to be subject to binding interpretation through case law. Knowledge of the case law method as well as of the technique of working with case law therefore are of central importance for an understanding of American law and legal methodology.

The Common Law is historically the common general law — with supremacy over local law—which was decreed by the itinerant judges of the English royal court. The enforcement of a claim presupposed the existence of a special form of action, a writ, with the result that the original common law represented a system of “actions” similar to that of classical Roman law. If a writ existed (in 1227) a claim could be enforced; there was no recourse for a claim without a writ, the claim did not exist. This system became inflexible when the “Provisions of Oxford” (1258) prohibited the creation of new writs, except for the flexibility which the “writ upon the case” allowed and which later led to the development of contract and tort law.

The narrow limits of the forms of action and the limited recourse they provided led to the development of equity law and equity case law. “Equity”, in its general meaning of doing “equity”, deciding *ex aequo et bono*, was first granted by the King, and later by his Chancellor as “keeper of the King’s conscience”, to afford relief in hardship cases. In the fifteenth century, however, equity law and equity case law developed into an independent legal system and judiciary (Court of Chancery) which competed with the ordinary common law courts. Its rules and maxims became fixed and, to a degree, inflexible as in any legal system. Special characteristics of equity law include: relief in the form of specific performance (in contrast to the common law award of compensatory damages), the injunction (a temporary or final order to do or not to do a specific act), the development of so-called maxims of equity law which permeated the entire legal system and in many cases explain the origin of modern legal concepts. However, equitable relief regularly will lie only when the common law relief is inadequate. For instance, specific performance for the purchase of real property will be granted because common law damages are deemed to be inadequate since they cannot compensate the buyer in view of the uniqueness attributed to real property.

As the common law, equity law became part of American law either through judicial acceptance or through express statutory provision. Today, both legal systems have been merged in many American jurisdictions (beginning with New York in



1848), with the result that there is only one form of civil suit in these jurisdictions as well as in federal practice. Only few States continue to maintain a separate chancery court. Nevertheless, the reference to the historical development is important because, on the one hand, it explains the origin and significance of many contemporary legal concepts (for instance the division of title in the law of property) and, on the other hand, it is still relevant for the decision of such questions whether, for instance, there is a right to a trial by jury (only in the case of common law suits, in other cases only before the judge). In addition, the differentiation will determine whether the “ordinary” common law relief of damages applies or whether the “extraordinary” equity remedy of specific performance is available.

“Case law” describes the entire body of judge-made law and today includes common law and equity precedents. In imprecise and confusing usage the terms “common law” and “case law” are often used synonymously, with the term “common law” in this usage connoting judge-made law in general as contrasted with statutory law. “Case law” always connotes judge-made law, while “common law” in contrast—depending on the meaning intended—describes either the judge-made law in common law subject matters or, more extensively, all judge-made law.

## Notes 注释

【1】Legal system: 法律制度或法律体系或法系

【2】…at once… 同时;既……也(又)……如: The book is at once interesting and instructive. 该书即有趣又有教益。

【3】…and it is new, too, in the sense that it is constantly being renewed by the addition of new elements of population and of new States. ……同时,它(美国)因新人口成分和新州的加入而持续更新,在此意义上,它也是新国家。

【4】…the first one to be made out of an Old World colony. ……第一个从旧大陆殖民地脱胎而出的国家。Old World 指与美洲新大陆(New World) 相对而言的东半球旧大陆,尤指欧洲。

【5】America's youth: 美国的年青性,美国建国初期。

【6】…for events such as those that are lost in the legendary past of Italy or France or England are part of the printed record of the United States. ……因为象在意大利、法国或英国过去的传说中湮没的那种事件则是美国有文字记载之历史的一部分。

【7】…the intricate network of relationships between States and Nation. ……各州与联邦之间错综复杂的关系。

【8】the reports of the United States Supreme Court: 联邦最高法院判例汇编。



【9】stout volumes: 巨册;厚册。

【10】...strike a consistent note: 敲击出始终如一的音调。

【11】binding interpretation: 有约束力的(法律)解释。

【12】itinerant judges of the English royal court: 英国皇家法院的巡回法官。

【13】writ: (以君主名义发出并加盖政府印章的)令状;法院令状;诉讼启始令。

【14】The enforcement of a claim presupposed the existence of a special form of action, a writ, with the result that the original common law represented a system of “actions” similar to that of classical Roman law. 某项诉讼请求的强制执行是以法院令状这种特殊诉讼行为形式之存在为前提的,而这就使最初的普通法表现为由类似于古罗马法的“诉讼行为”所构成的体系。

【15】...there was no recourse for a claim without a writ, the claim did not exist. ....没有法院令状(为前提)的诉讼请求就没有追索权,因而该诉讼请求也不存在。

【16】Provisions of Oxford: “牛津条例”,从贵族议会中推选出的 24 人委员会为限制亨利三世的权力而在 1258 年制定的一部带有宪法性质的法律。

【17】writ upon the case: 本案令状,即法院就具体案件所颁布的令状。

【18】*ex aequo et bono*: (拉丁语)公平且善良。

【19】...Chancellor as “keeper of the king’s conscience”, ....作为“国王良知守护人”的大法官(即上议院议长)。

【20】...relief in the form of specific performance, ....特定履行(或实际履行)方式之救济。

【21】division of title in the law of property: 财产法上的所有权分割。

【22】...while “common Law” in contrast——depending on the meaning intended——describes either the judge-made law in common law subject matters or, more extensively, all judge-made law. ....而“普通法”相对来说则可以指普通法问题上法官制定的法律,也可以在更广范围内指所有法官制定的法律——取决于使用者的用意。

## Exercises 练习

### 1. Questions about the text:

- ① Why is the United States a very new nation?
- ② Why is the United States an old nation as well?
- ③ The record of American history is more comprehensive than those of other major nations in the world, isn't it?
- ④ The American record does not include the records of the present fifty states, does it?
- ⑤ What are the reports of the United States Supreme Court?
- ⑥ What are the important factors, according to the writer's opinion, for understanding American law and legal methodology? And Why?



- ⑦ When did the English common law system become inflexible?
- ⑧ What are the special characteristics of equity law?
- ⑨ How did the common law become part of American law?
- ⑩ There is not any separate chancery court in the federal jurisdiction in the United States, is there?

## 2. Dictation

There are many different legal systems in the world. In fact, every nation's legal system has its own characteristics. However, the degree of difference varies, with some systems bearing more resemblance to others. As a result, the world can be divided into several legal families. Without doubt, the Common Law Legal Family and the Roman Law Legal Family are the most important legal families in the world. The former is also called the English Law Legal Family or the English-American Law Legal Family, while the latter is also called the Civil Law Legal Family or the Continental Law Legal Family.

## 3. Discussion

- ① Topic: What is the best way to study legal English?
- ② Questions:
  - A. Is legal English a knowledge or a skill?
  - B. Which skill among understanding (listening), speaking, reading and writing is the most important one for studying legal English?
- ③ Reference arguments:
  - A1. Legal English is a knowledge because it includes a lot of special information and many technical terms, and it needs understanding and comprehension.
  - A2. Legal English is a skill because it is an ability and a tool of communication, and it needs training and practice.
  - B1. Understanding is the most important skill for studying legal English, because legal English is a knowledge and understanding (listening) is the basis of other skills.
  - B2. Speaking is the most important skill for studying legal English, because legal English is a skill and speaking is the most efficient way to master the skill.
  - B3. Reading is the most important skill for studying legal English, because the main purpose of Chinese people in studying legal English is to read the legal literature in English.
  - B4. Writing is the most important skill for studying legal English, because it is



the most difficult one and it is used very often in legal practice.

④ Instructions:

A. The students are divided into several groups and each group is assigned an opinion for the discussion;

B. The groups discuss the issues separately, and each group elects one speaker for the discussion;

C. The speakers give their arguments in big session, and then other students may add arguments, ask questions or give comments.

### Supplementary Reading 补充读物

The federal entity created by the Constitution is by far the dominant feature of the American governmental system. But the system itself is in reality a mosaic, composed of thousands of smaller units—building blocks which together make up the whole. There are 50 state governments plus the government of the District of Columbia, and further down the ladder are still smaller units, governing counties, cities, towns and villages.

This multiplicity of governmental units is best understood in terms of the evolution of the United States. The federal system, it has been seen, was the last step in the evolutionary process. Prior to its creation, there were the governments of the separate colonies (later states) and prior to those, the governments of counties and smaller units. One of the first tasks accomplished by the early English settlers was the creation of governmental units for the tiny settlements they established along the Atlantic coast. Even before the Pilgrims disembarked from their ship in 1620, they formulated the Mayflower Compact, the first written American constitution. And as the new nation pushed westward each frontier outpost created its own government to manage its affairs.

Before independence, each colony was governed separately by the British Crown. In the early years of the republic, prior to the adoption of the Constitution, each state was virtually an autonomous unit. The delegates to the Constitutional Convention sought a stronger, more viable federal union, but they were also intent on safeguarding the rights of the states.

In general, matters which lie entirely within state borders are the exclusive concern of state governments. These include internal communications; regulations



relating to property, industry, business and public utilities; the state criminal code; and working conditions within the state. Within this context, the federal government requires that state governments must be republican in form and that they adopt no laws which contradict or violate the federal Constitution or the laws and treaties of the United States.

Once predominantly rural, the United States is today a highly urbanized country, and three-quarters of its citizens now live in towns, large cities or their suburbs. This statistic makes city governments critically important in the over-all pattern of American government. To a greater extent than on the federal or state level, the city ministers directly to the needs of the people, providing everything from police and fire protection to sanitary codes, health regulations, education, public transportation and housing.

Their huge size makes the business of running America's large cities enormously complex. Only seven states of the union, for example, have populations larger than that of New York City. It is often said that, next to the Presidency, the most difficult administrative position in the country is that of Mayor of New York.

The federal, state and city governments by no means cover the whole spectrum of American governmental units. The U. S. Bureau of the Census has identified no less than 78, 218 local governmental units in the United States: counties, municipalities, townships, school districts and special districts.

The county is a subdivision of the state usually—— but not always—— containing two or more townships and several villages. New York City is so large that it is divided into five separate boroughs, each a county in its own right: The Bronx, Manhattan, Brooklyn, Queens and Richmond. On the other hand, Arlington County, Virginia, just across the Potomac River from Washington, D. C. , is both an urbanized and suburban area, governed by a unitary county administration.

In most counties, one town or city is designated as the county seat where the government offices are located and where the board of commissioners or supervisors meets. In small counties, boards are chosen by the county as a whole; in the larger ones, supervisors represent separate districts or townships. The board levies taxes, borrows and appropriates money, fixes the salaries of county employees, supervises election, builds and maintains highways and bridges, and administers national, state and county welfare programs.



## Reference Translations 参考译文

宪法所确立的联邦统一体是美国政府系统的最主要特点。但是该系统本身实际上是一个由成千上万个较小单位组成的“拼图”——犹如砌成整体的建筑材料。美国有 50 个州政府和哥伦比亚特区政府,再往下还有县、市、镇和村等较小单位。

这种政府单位的多元化可以通过合众国的演进得到最好的理解。我们所看到的联邦系统是这个演进过程的最后一步。在此系统建立之前有各分立殖民地(后来的州)的政府;再以前还有县和更小单位的政府。早期英国移民所完成的首要工作之一就是为其在大西洋沿岸建立的小块聚居地建立政府单位。甚至在 1620 年英国清教徒们离船登陆之前,他们就已制定了“五月花号公约”,即美国第一部成文宪法。而当这个新国家向西拓进时,每一处边区村落都成立了自己的政府来管理其事务。

在独立之前,每个殖民地都分别接受英国王室的统治。在共和国初期,即宪法通过之前,每州实际上都是一个自治单位。制宪会议的代表们力求建立一个更为强大、更有生命力的联邦政体,但是他们也致力于维护各州的权利。

一般来说,完全发生在州界以内的事务只由州政府处理。这些事务包括州内通讯;有关财产、工业、商业和公用事业的规章;州刑事法典以及州内的工作条件。在这一范围内,联邦政府仅要求各州政府必须采用共和政体的形式,而且其通过的法律均不能抵触或违反联邦宪法或合众国的法律与条约。

美国曾以乡村为主,但今天已成为一个高度城市化的国家,其四分之三的公民现居住于城镇、大城市及其郊区。这一统计数字使得市政府在美国政府的整个结构中占有非常重要的地位。市政府官员在直接服务于人民需要方面较联邦或州官员的程度更广,他们提供从警察和消防到卫生条例、健康规章、教育、公共交通和住房的各种服务。

城市规模之大使得管理美国大城市的事务极为复杂。例如,美国只有七个州的人口多于纽约市的人口。人们常说,除总统职务外,全国最难担任的行政职务就是纽约市长。

联邦政府、州政府和市政府绝不能概括美国所有的政府单位。美国人口调查局曾确认美国地方政府单位的数目不少于 78218 个,包括县、市、镇、学区和特区。

县通常是——但不一定总是——包含有两个以上市镇及若干乡村的州下面的行政区划。纽约市太大,因此分为五个相互独立的自治政区,每区自成一县,即布朗克斯、曼哈顿、布鲁克林、昆斯和里奇蒙德。另一方面,弗吉尼亚州的阿灵顿县——与华盛顿特区仅有波托马克河相隔——则是一个由单一的县政府管理的城区与郊区的结合。

在大多数县内,某个镇或市被指定为县政府所在地。政府办公机构设于此地;县务委员会或县监委会亦在此开会。在小县内,上述委员会在全县范围内统一选出;在较大的县内,委员们则分别代表相互独立的区或镇。该委员会负责征收税款、贷款与拨款、确定县政府雇员的工资、监督选举、建造并维修公路和桥梁以及管理全国、州和县的福利项目。



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## LESSON TWO

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### Legal Profession 法律职业

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#### Background 背景

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美国的法律职业由律师、法官、检察官和法学教师组成。不过,这几种人又都可以称为“律师”(lawyer),而且他们都可以是律师协会(Bar)成员。由此可见,美国法律职业内部的“职业划分”并不象中国及世界上大多数国家那样严格和确定。诚然,这里有语言习惯问题,但它也在一定程度上反映了美国各种法律工作者之间人员变换的频繁性,而且这种变换总以律师为中心。美国的法官一般都从律师中产生,而且他们在担任法官期间仍可保留律师资格,只是不能从事律师业务而已。美国的检察官与律师之间几乎没有任何职业差别。实际上,美国的检察官就被称为律师(attorney)。检察官与律师(我们中国人所熟悉之含义上的律师)之间的区别仅在于前者受雇于政府,后者受雇于私人或自己开业;前者在刑事案件中负责公诉,后者在刑事案件中负责辩护。此外,美国的法学教师一般都是当地的律师。

美国律师之多,在世界上堪称第一。据 1984 年的统计,美国共有 64.9 万名律师,其与人口的比例为 1:364。美国律师多的主要原因是法律在其社会生活中起着非常重要的作用。除各种法律纠纷外,人们从生到死、从结婚到离婚、从生活到工作,往往都需要律师的帮助。有些人几乎事事都要请教律师。诚然,这说明美国人具有很强的法律意识,但也说明美国的许多法律规定过于复杂。一般来说,美国人认为到法院去解决社会生活中的法律纠纷是天经地义的,但这并不等于说美国人喜欢打官司。例如,美国有一个流传颇广的谐音字谜:“有一种套服无人喜欢,是什么?”(There is a kind of suits that nobody likes. What is it?)回答是:“打官司。”(lawsuits.)其实,美国人事事找律师也往往出于无可奈何。因此,美国的律师才得到了各种各样、褒贬不一的外号,如:“租用之枪”(hired guns);“讼棍”(shysters);“职业投刀手”(professional knife throwers);“限用之友”(limited purpose friends);“社会工程师”(social engineers);“社会正义之斗士”(champions for social justice)等。



## **Text 课文**

### **Part One: The Bar**

The regulation of the legal profession is primarily the concern of the states, each of which has its own requirements for admission to practice. Most require three years of college and a law degree. Each state administers its own written examination to applicants for its bar. Almost all states, however, make use of the Multistate Bar Exam, a day-long multiple-choice test, to which the state adds a day-long essay examination emphasizing its own law. A substantial fraction of all applicants succeed on the first try, and many of those who fail pass on a later attempt. In all, over forty thousand persons succeed in passing these examinations each year and, after an inquiry into their character, are admitted to the bar in their respective states. No apprenticeship is required either before or after admission. The rules for admission to practice before the federal courts vary with the court, but generally those entitled to practice before the highest court of a state may be admitted before the federal courts upon compliance with minor formalities.

A lawyer's practice is usually confined to a single community for, although a lawyer may travel to represent clients, one is only permitted to practice in a state where one has been admitted. It is customary to retain local counsel for matters in other jurisdictions. However, one who moves to another state can usually be admitted without examination if one has practiced in a state where one has been admitted for some time, often five years.

A lawyer may not only practice law, but is permitted to engage in any activity that is open to other citizens. It is not uncommon for the practicing lawyer to serve on boards of directors of corporate clients, to engage in business, and to participate actively in public affairs. A lawyer remains a member of the bar even after becoming a judge, an employee of the government or of a private business concern, or a law teacher, and may return to private practice from these other activities. A relatively small number of lawyers give up practice for responsible executive positions in commerce and industry. The mobility as well as the sense of public responsibility in the profession is evidenced by the career of Harlan Fiske Stone who was, at various times, a successful New York lawyer, a professor and dean of the Columbia School of



Law, Attorney General of the United States, and Chief Justice of the United States.

There is no formal division among lawyers according to function. The distinction between barristers and solicitors found in England did not take root in the United States, and there is no branch of the profession that has a special or exclusive right to appear in court, nor is there a branch that specializes in the preparation of legal instruments. The American lawyer's domain includes advocacy, counselling, and drafting. Furthermore, within the sphere broadly defined as the "practice of law" the domain is exclusive and is not open to others. In the field of advocacy, the rules are fairly clear: any individual may represent himself or herself in court but, with the exception of a few inferior courts, only a lawyer may represent another in court. Nonlawyers are, however, authorized to represent others in formal proceedings of a judicial nature before some administrative agencies. The lines of demarcation are less clear in the areas of counselling and drafting of legal instruments, as for example between the practice of law and that of accounting in the field of federal income taxation. However, the strict approach of most American courts is indicated by a decision of New York's highest court that a lawyer admitted to practice in a foreign country but not in New York is prohibited from giving legal advice to clients in New York, even though the advice is limited to the law of the foreign country where the lawyer is admitted. A foreign lawyer may, however, be admitted to the bar of one of the states and may, even without being admitted, advise an American lawyer as a consultant on foreign law.

## **Part Two: Lawyers in Private Practice**

Among these fifteen lawyers in practice, nine, a clear majority, are single practitioners. The remaining six practice in law firms, which are generally organized as partnerships. Four or five of these six are partners and the others are associates, a term applied to salaried lawyers employed by a firm or another lawyer. This trend toward group practice is of relatively recent origin. Throughout most of the nineteenth century law practice was general rather than specialized, its chief ingredient was advocacy rather than counselling and drafting, and the prototype of the American lawyer was the single practitioner. Marked specialization began in the latter part of that century in the large cities near the financial centers. With the growth of big business, big government, and big labor, the work of the lawyer accommodated itself to the needs of clients for expert counselling and drafting to



prevent as well as to settle disputes. The best lawyers were attracted to this work and leadership of the bar gravitated to persons who rarely if ever appeared in court and who were sought after as advisors, planners, and negotiators. Today the lawyer regards it as sound practice to be continuously familiar with clients' business problems and to participate at all steps in the shaping of their policies. Major business transactions are rarely undertaken without advice of counsel.

### **Part Three: House Counsel**

Out of every twenty lawyers, two are employed by private business concerns, such as industrial corporations, insurance companies, and banks, usually as house or corporate counsel in the concern's legal department. The growth of corporations, the complexity of business, and the multitude of problems posed by government regulation make it desirable for such firms to have in their employ persons with legal training who, at the same time, are intimately familiar with the particular problems and conditions of the firm. In large corporations the legal department may number one hundred or more. The general counsel, who heads the office, is usually an officer of the company and may serve on important policy making committees and perhaps even on the board of directors. House counsel remain members of the bar and are entitled to appear in court, though an outside lawyer is often retained for litigation. However, it is the house counsel's skill as advisor rather than as advocate that is a valued asset. Constantly in touch with the employer's problems, house counsel is ideally situated to practice preventive law and may also be called upon to advise the company on its broader obligation to the public and the nation.

### **Part Four: Lawyers in Government**

A parallel development has taken place in government and two out of twenty lawyers are now employees of the federal, state, county, and municipal governments, exclusive of the judiciary. Many of those entering public service are recent law graduates who find government salaries sufficiently attractive at this stage of their careers and seek the training that such service may offer as a prelude to private practice. Limitations on top salaries, however, discourage some from continuing with the government. The majority serves by appointment in the legal departments of a variety of federal and state agencies and local entities. The United States Department of Justice alone employs more than two thousands, and the Law



Department of the City of New York more than four hundreds. Others are engaged as public prosecutors. Federal prosecutors, the United States attorneys and their assistants, are appointed by the President and are subordinate to the Attorney General of the United States. State prosecutors, sometimes known as district attorneys, are commonly elected by each county and are not under the control of the state attorney general. As a rule, lawyers in government are directly engaged in legal work, since law training is infrequently sought as preparation for general government service. However, a small but important minority that constitutes an exception to this rule consists of those who have been appointed to high executive positions and those who have been elected to political office. Though the participation of lawyers in government has declined recently, for two centuries lawyers have made up roughly half of the Congress of the United States and of the state governors. These figures bear out the comment of Chief Justice Stone that, "No tradition of our profession is more cherished by lawyers than that of its leadership in public affairs."

## Notes 注释

【1】legal profession: 法律职业或律师职业或律师界

【2】the Bar: 原指法庭中将公众与法官、律师及其他诉讼参与人分隔开来的一种隔板,后来才用于通指法律职业或律师职业。“Bar Association”一词通译为律师协会。

【3】lawyer: 律师;法律工作者。此外,“attorney”、“attorney-at-law”、“counsellor”、“counsellor-at-law”等词一般也都指律师,而且在词义上没有什么区别。

【4】...be admitted before the federal courts upon compliance with minor formalities. ....在办完一些无关紧要的手续之后即可获准在联邦法院执业。

【5】A lawyer's practice is usually confined to a single community for, although a lawyer may travel to represent clients, one is only permitted to practice in a state where one has been admitted. 一个律师的开业范围通常仅限于一个地区,因为,尽管律师可以代表其当事人到其他地区办理事务,但是一个人只能在其获准开业的州内从事律师业务。

【6】to practice law: 开业做律师;从事律师业务;律师执业

【7】Harlan Fiske Stone: 哈兰·菲斯克·斯通(1872—1946)从哥伦比亚大学法学院毕业之后曾一度同时教学和做律师。1910年至1923年,他担任哥伦比亚大学法学院院长。1924年,他被任命为司法部长(即总检察长,U.S. Attorney General)。1925年,他被任命为联邦最高法院法官,并于1941年接替查尔斯·伊万斯·休斯(Charles Evans Hughes)担任最高法院首席大法官(Chief Justice)。

【8】barrister and solicitor: 英国的开业律师分为两种:诉讼律师和非诉律师。前者又译为大律师或出庭律师,其有资格出席法庭审判并代理诉讼;后者又译为律师或诉状律师或事务律师,



其只能担任案件的诉讼准备工作和从事非诉讼律师业务。

【9】...within the sphere broadly defined as the "practice of law", .....在广泛地被人们称为“律师实务”的范围内。

【10】advocacy: 出庭辩护; 代理诉讼

【11】A foreign lawyer may, however, be admitted to the bar of one of the states and may, even without being admitted, advise an American lawyer as a consultant on foreign law. 然而, 一名外国律师可能被某一州的律师协会接纳为成员, 而且, 甚至可以在未被接纳的情况下作为外国法律顾问而向美国律师提供咨询。(美国最高法院在 1973 年曾裁定州要求被接纳为律师协会会员者必须是美国公民的规定为违宪。此外, 纽约州法院于 1979 年曾裁定要求本州律师协会会员必须居住于本州的规定为违宪。不过, 美国的大多数州仍要求其律师协会会员必须为本州居民。纽约州还允许按“法律顾问”注册的外国律师提供与纽约州或美国联邦法律以外的其他法律有关的咨询。此处的关键是在本州“注册”。未在本州获得“注册”的外国律师不得向本州的客户提供法律咨询。当然, 如果咨询对象是本州律师, 不是客户, 则要求不甚严格。)

【12】single practitioners: 单独开业者。

【13】...law practice was general rather than specialized, .....律师业务是一般化的而非专业化的。

【14】...leadership of the bar gravitated to persons who rarely if ever appeared in court and who were sought after as advisors, planners, and negotiators. ....律师界的领导人物多为那些极少出庭——如果确曾出庭的话——的人和那些作为顾问、计划者和谈判者而深受欢迎的人。

【15】House counsel: 专职法律顾问, 指受雇于某公司企业而非独立开业的律师。亦可称为 corporate counsel, 公司或团体法律顾问。

【16】...exclusive of the judiciary. ....不包括法官。

【17】...seek the training that such service may offer as a prelude to private practice. ....寻求这种工作可以提供的锻炼作为私人开业的前奏。(美国检察人员的平均工作年限仅为 4 至 5 年, 其原因之一就是到检察机关工作的法学院毕业生在积累了一定的审判经验之后便转去私人开业了。)

【18】state prosecutor: 美国各州检察官的名称并不相同, 较为多见的有“state attorney”(州检察官或州律师)、“district attorney”(地区检察官或地区律师)、“prosecuting attorney”(起诉检察官或公诉律师)等。

【19】However, a small but important minority that constitutes an exception to this rule consists of those who have been appointed to high executive positions and those who have been elected to political office. 然而, 构成对此规则之例外的虽少但很重要的一小部分人包括那些被任命担任高级行政职务的人和那些被选举担任政治性官职(通过政党竞选产生的官职, 如总统、州长和国会议员等)的人。

【20】These figures bear out... 这些数字证明了.....

【21】No tradition of our profession is more cherished by lawyers than that of its leadership in public affairs. 在我们职业的传统中, 没有一个能像其担任公共事务领导的传统那样受到律师们的钟爱。



## Exercises 练习

### 1. Questions about the text:

- ① What are the basic requirements for admission to practice law in the United States?
- ② The Multistate Bar Exam is a national Bar examination in the United States, isn't it?
- ③ An American lawyer, generally, can not practice in the states other than the state where he has been admitted, can he?
- ④ What activities is a lawyer permitted to engage in besides practicing law?
- ⑤ Who is Harlan Fiske Stone?
- ⑥ American legal profession does not have the distinction between barristers and solicitors, does it?
- ⑦ Why are there greater needs for specialized law practice now than in the nineteenth century?
- ⑧ What is the percentage of house counsels in American legal profession?
- ⑨ Is a house counsel a lawyer working for a household?
- ⑩ Why do law graduates go to work for government for a period of time?

### 2. Dictation

The personnel of the prosecutorial system in the United States include both federal prosecutors and local prosecutors. In addition, assistant prosecutors at both the federal level and the local level are the most important part of the prosecutorial profession.

The basic qualification for a prosecutor in the United States is that he or she must be a member of the bar in that jurisdiction. In other words, all the prosecuting attorneys, including federal attorneys and local attorneys, the chief of a prosecutor's office and the assistants, should have had a law degree and passed the Bar Examination in the jurisdiction.

### 3. Discussion

- ① Topic: Do you want to be a judge or a lawyer?
- ② Reference arguments:
  - A. I want to be a judge, because judges play the most important role in the legal system; they are the most powerful figures in legal process; they are impartial; they



are respected in society; and they are the symbol of justice.

B. I want to be a lawyer, because the lawyer's job is more interesting and challenging; the lawyer's work is more creative and active; the lawyers can help people directly; and the lawyers can make a lot of money.

③ Instructions:

A. The students are required to individually prepare for the discussion;

B. The students are encouraged to give their personal reasons for their choice;

C. The students are to talk in pairs first, and then to talk in class.

### **Supplementary Reading 补充读物**

The American democratic political system is premised, at least in normative theory, on certain basic values among which the integrity of the individual, liberty, and equality of opportunity are fundamental. The individual omnicompetence view prevailing in the early nineteenth century that anyone could be a lawyer was supported by "national principles of equality and democracy, by the American repudiation of class privileges...". Yet, from the beginning of the history of the United States, a tension existed between these democratic aspirations and ideals and the impulse of the legal profession towards elitism. Writing in 1831, de Tocqueville observed that lawyers belong to the people by birth and interest and to the aristocracy by habit and taste. Lawyers exhibit a taste for formalism, a dislike for arbitrary power and, like the old aristocracy, tend to be conservative and have a natural affinity with the sources of power. The legal profession which developed from this mixed legacy was, and to a large extent still is, a profession characterized by hierarchy, stratification, and homogeneity.

#### **A. Women and Minorities in the Profession**

The American contemporary legal profession was largely constructed between the 1870's and the 1950's and has developed as a self-defining, self-regulating profession. Through the development of local, state, and national bar associations, the promulgation of ethics codes, disciplinary rules and procedures, and the definition and tightening of the entrance requirements to law schools, the legal profession was able to control the supply of lawyers and limit access and entry into the profession. Until the 1960's, the legal profession was overwhelmingly and predominantly white, male,



and in the higher echelons of the professional hierarchy, solidly “WASP” (White, Anglo-Saxon, Protestant). In fact, “for much of our history, lawyer meant ‘White male’. Not a single woman was admitted to the bar before the 1870’s, and precious few blacks”. In 1872, Myra Bradwell, in her challenge to the State of Illinois’ denial of her application to become a member of the bar, was told by the Supreme Court of the United States that the “paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.”

What does the contemporary legal profession look like? What changes have occurred? According to Barbara Curran’s recent study, in the period between 1951—1984, changes in size, age and sex distribution began to occur. The profession is growing in numbers, becoming younger, and increasing in the numbers of women in the profession. The number of lawyers grew from 221,605 lawyers in 1951 to 649,000 lawyers in 1984, an increase of almost 200%. The median age has shifted from 46 years to 39 years. In 1951, the percentage of women lawyers was only 2.5%. By 1984, the percentage of women in the profession had grown to 12.8%.

In terms of impact on the organized bar, Richard Abel has suggested that one possible significance of these changes is that “a very small cohort of elderly white men are governing associations that deeply affect the lives of a very large younger cohort with significant female and minority membership. Since the younger generation of lawyers will not ascend to positions of power for another decade or two, given the strongly gerontocratic character of professional governance, the divergence of interests, styles, and demography between rulers and ruled is likely to generate considerable tension”.

For example, looking at the presence and allocation of women in the large firms reveals that while women associates may account for 30.4% of law firm associates, women account for only 5% of the partners. As Ronald Chester has pointed out, the present influx of women into the profession has not necessarily resulted in women gaining access to “power positions” such as senior partnerships, tenured professorial positions, important judgeships, and upper level government jobs. Until more women hold such power positions, they will not be able to affect “the way the legal profession is run and the criteria it uses for professional advancement”.

James White, in the first national study which looked at the treatment of women in this traditionally maledominated profession, indicated that there was widespread discrimination which was reflected in the payscales of male and female lawyers. “The



conclusion is clear: the males make a lot more money than the females". Although the sex differential in terms of salaries may be becoming less substantial for more recent law school graduates, women still face the problem of subtle and overt sexist treatment and attitudes.

After a 22-month investigation, the New York Task Force on Women in the Courts concluded that gender bias against women litigants, attorneys, and court employees was a pervasive problem in which women must endure a climate of condescension, indifference and hostility. In court, judges have asked embarrassing questions, "What does your husband think about you working here?"; or have treated women lawyers in a condescending and unprofessional manner, addressing them as "young lady", "little girl", "honey", or "lawyerette". This kind of sexist and unprofessional behavior not only undermines the authority and effectiveness of women lawyers, but also undermines the integrity of the legal system.

Although various state commissions on judicial conduct have disciplined judges who have exhibited sexist, blatant and unprofessional behavior on the bench, changes in sexual attitudes and cultural conditioning will require more than formal reprimands of the few individuals who are singled out for disciplinary action.

Compared to the limited gains by women in the profession, the gains for blacks and other minorities are even more limited. According to the 1980 census, the total minority lawyer population was only 4.8% of all lawyers. In 1981, out of a total lawyer population of 574,810 lawyers, black lawyers accounted for only 1.7%. Asians are often not even a focus of statistical studies or identified as a minority subgroup in virtually all of the studies or discussions of the composition of the profession.

In terms of access to the big law firms, how are minority lawyers doing? Or to pose this another way, how are the law firms doing in terms of responding to criticisms of elitism and racism in their hiring practices? Based on a survey of 151 of the 200 largest firms, a 1982 National Law Journal survey revealed that there were no black lawyers at 25 firms, while 86 had no Hispanics. A 1984 National Law Journal survey of 92 of the nation's 100 largest law firms, revealed that blacks represented only 1.5% and Hispanics only 0.65% of the lawyers employed by those firms while the percentage of women had risen to 20.1%. Dennis Archer, president of the Black National Bar Association stated, "It's racism or the good-old-boy network or whatever you want to call it... The lawyers who hire in big firms aren't hiring blacks".



Yet the percentage of minority lawyers hired at the big firms may not tell the whole story. The number of minorities allowed to enter the prestigious partner ranks was even lower. The 1982 National Law Journal survey found that there were no black partners in 106 firms and no Hispanic partners in 133. While the doors may be opening, minorities continue to be relegated to lower positions of power, prestige and economic rewards.

Although the criticisms about the "Old Boy Network" are voiced by many, the institutional forces which maintain it are still present: The professors, judges and senior partners who know the candidates, and whose judgment is sought out and given credence by their counterparts in other institutions, are overwhelmingly white and male. The tendency to recognize intellectual power and unusual capacity for creative scholarship more easily in persons of one's own sex and race and in persons who can be viewed most comfortably as one's proteges is perfectly natural. However, this view reflects the danger of mistaking a value for a "natural" condition.

Furthermore, if participation in public forums on the issue is an indication, the big firms may not necessarily perceive the dismal statistics on minorities and women in the firms as a major problem. In 1985, the American Bar Association (ABA) held a series of public hearings on problems of minorities in the legal profession. Out of 400 law firms invited, only two participated in the hearings. Some of the explanations offered for this lack of response included the inconvenience of timing of the hearings and the belief that since the firms employed few or no minorities, they had little to contribute.

### **B. The Role of the Organized Bar**

From a historical perspective, as Friedman and others have pointed out, the ABA's history has been marked by deep racism and politically reactionary positions. After accidentally admitting three black lawyers in 1915, the ABA restated its settled practice to elect only white men, and that future applicants had to reveal their race to prevent future "mistakes". In 1950 amidst the nation-wide Red baiting and attacks on the political rights of American citizens, the ABA passed a resolution requiring all lawyers to attest to their loyalty with an anti-Communist oath.

The changed position of the ABA can be seen in its efforts in recent decades to exercise a leadership position in efforts to address and redress existing inequities within the profession. For example, the ABA jointly sponsored a Council on Legal



Education Opportunities; established in 1979 the Minorities in the Profession Committee in the Young Lawyers Division; co-sponsored a National Institute of Minority Lawyers in 1981; and in 1984, the ABA created the ABA Task Force to Study the Problems of Minorities in the Profession. The Task Force defined minorities as "members of racial and ethnic minorities unless the context indicates a broader context". After surveying law schools, law firms, bar and minority bar associations, and holding open hearings, the Task Force submitted its report to the ABA Board of Governors with recommendations on January 16, 1986.

The Report concluded that the profession remains largely segregated. The Task Force stated that this is in contradiction to the profession's "long and proud heritage of individual rights and freedoms" and called upon the profession to take affirmative steps towards a more integrated profession. The Task Force recommendation for establishing an additional ABA organizational goal of promoting full and equal participation in the profession by minorities and women was adopted by the ABA Board of Governors. The Board concurred that the American Bar Association, as the national representative of the legal profession, should take a leadership role in providing full and equal educational, professional, judicial and associational opportunities for minorities...

In addition to the traditional organized bar, minority lawyers and teachers have addressed the existing inequalities within the system by working within the ranks of the established bar as well as organizing separate organizations and minority bar associations which have focussed on the needs and concerns of particular constituencies. Some of the major organizations include the National Association for the Advancement of Colored People (NAACP), National Conference of Black Lawyers (NCBL), Puerto Rican Legal Defense and Education Fund (PRLDEF) and the Asian American Legal Defense and Education Fund (AALDEF). In addition to affirmative action work, these minority legal organizations have also been active in Civil Rights litigation, the provision of community legal services, community education projects and law reform.

### **C. Hierarchy in Practice**

Statistically, according to the Curran study, the employment distribution of lawyers in 1980 reflected the following breakdowns. A majority of lawyers, or 68.39% in 1980 were in private practice, with half in "solo" practice. A total of 3.7%



work for the federal government. Only 5% are in the federal judiciary and 10.1% in private industry. Working in education are 1.2%. However, the employment distribution viewed in terms of numbers and percentages does not accurately address the issue of the allocation of power and prestige within these practice areas suggested by the discussion above.

At the top of hierarchy of the private practice world, stands the large elite corporate law firms. In the 1960's, there were 43 law firms which consisted of 50 or more lawyers, with 20 of these firms located in New York City. These giant law factories are growing larger. In the 1980's, these large firms often have hundreds of lawyers, with specialized departments of practice, and have national and often international branch offices. For example, Baker & McKenzie with its firm headquarters in Chicago, has over 500 lawyers and branch offices in 11 cities. In his 1966 study of the New York City bar, Jerome Carlin pointed out that "large firm lawyers have the highest average income, represent the most affluent and highest-status clients, and have most contact with higher levels of the judiciary and government. Individual practitioners and small firm lawyers have the lowest incomes, represent the least affluent and lowest-status clients, and deal largely with lowest-level courts and agencies".

As reflected in the hierarchy of power in the profession, and in the limited presence of women and minorities, the bar was and continues to be highly stratified along race and class lines.

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## Reference Translations 参考译文

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至少从规范理论上讲,美国的民主政治制度是以某些基本价值观念为前提的,其中个人尊严、自由和机会均等是最根本的。19 世纪初期,个人全权的观点非常流行,因而任何人均可成为律师的观点得到了“平等与民主的国家原则以及美国对阶级特权之抛弃”的支持。然而,自合众国建立以来,在民主追求与理想和法律职业中崇尚名流的冲动之间便存在着紧张对立的关系。德托克维拉在 1831 年曾写道,按其出身和利益,律师属于人民;按其习惯和爱好,律师属于贵族。律师表现出对形式主义的喜爱和对专断权力的厌恶,而且他们象传统的贵族一样倾向于保守并与权力渊源有着自然的联系。从这种混合传统中发展起来的法律职业过去是——而且在很大程度上现在依然是——一个带有等级、层次和类聚等特点的职业。

### 一、法律职业中的妇女和少数民族

美国当代法律职业主要形成于 19 世纪 70 年代至 20 世纪 50 年代之间,而且已发展为一个自我限定和自我规制的职业。通过地方、州和全国律师协会的发展,通过职业道德规范、纪律规



则程序的颁行,以及对法学院入学条件的界定与紧控,法律职业得以控制律师来源并限制对该职业的接近与进入。直到 60 年代,法律职业中绝大多数且占绝对优势的人都是男性白人;而在该职业等级系统的高层次上的人都是“瓦斯普”(WASP,即白种、盎格鲁撒克逊、新教徒人)。实际上,“在我们历史的大部分时期内,律师一词都意味着‘男性白人’。在 19 世纪 70 年代以前,律师协会中没有一名妇女,而黑人亦寥寥无几。”1872 年,迈拉·布莱德韦尔由于伊利诺斯州拒绝了她担任律师的申请而提起诉讼,合众国最高法院对她说:“妇女的最高使命就是履行那作为妻子和母亲的崇高且慈祥的职责。”

当代法律职业的状况如何? 发生了什么变化? 根据巴巴拉·柯伦最近的研究,在 1951 年至 1984 年期间,法律职业在规模、年龄和性别分配等方面开始发生变化。法律职业的人数日益增多且日益年轻化,而且其中女性人数也在增长。律师人数从 1951 年的 221,605 人上升为 1984 年的 649,000 人,几乎增加了 200%。法律工作者的平均年龄也从 46 岁下降到 39 岁。1951 年,女性律师仅占法律职业人员总数的 2.5%;到 1984 年,妇女在法律工作者中所占的比例已上升为 12.8%。

理查德·艾贝尔在评论这些变化对律师协会的影响时指出,这些变化的一个可能的意义在于“极少数年长的男性白人控制着律师协会,而这会深深地影响到包括有相当数量的女性和少数民族成员在内的大量年轻律师的生活。由于年轻一代的律师在今后 10 至 20 年内不可能占据掌权的位置以及该组织管理上那突出的老年统治特征,所以在统治者和被统治者之间的不同利益、风格和人数分布就很可能生成相当紧张的关系。”

例如,看一下妇女在大律师事务所的分布情况便可发现,女律师占律师事务所律师总数的 30.4%,而仅占其合伙人的 5%。正像罗纳德·切斯特所指出的那样,现在妇女大量地进入法律职业并不一定导致妇女将获得诸如高级合伙人、终身教授、重要法官以及高级政府官员等“有权力的职位”。在更多的妇女占据这种有权力的职位之前,她们不可能影响到“法律职业的运转方式和职业进步中所使用的标准。”

詹姆斯·怀特在第一份关于在传统上由男人统治的法律职业中的妇女待遇问题的全国性研究报告中指出,男女律师的工资差别反映出法律职业中广泛存在着歧视现象。“结论很明确,男律师的收入远远高于女律师。”虽然近几年来法学院毕业生所面临的男女工资差别并不象过去那么大,但是女律师们仍然要面对那微妙和公开的性别歧视的待遇和态度。

关于法院中妇女问题的纽约专门调研组在 22 个月的调查之后得出如下结论:针对女诉讼人、女律师和女法院雇员的性别偏见是一个广泛存在的问题。在这一点上,妇女必须容忍冷漠、歧视和敌对的氛围。在法庭上,法官经常提出一些令人尴尬的问题,如“你丈夫对你在这工作有何想法?”或者,法官以一种蔑视且非职业化的方式对待女律师,称呼她们为“小姐”、“小姑娘”、“蜜”或“律师娘”。这种性别歧视和非职业化行为不仅降低了女律师的威信,影响了女律师的工作,而且破坏了律师制度的统一性。

尽管各种关于司法行为的州委员会已经对那些在法庭上表现出性别歧视、大声呵斥与非职业化行为的法官做出了纪律处分,但是要改变性别歧视态度及其文化背景则远非处分几个违纪者所能实现的。

与法律职业中妇女那有限的增长相比,黑人和其他少数民族在法律职业中的增长就更为有



限了。根据 1980 年的统计,所有少数民族律师的人数仅占全国律师总数的 4.8%。1981 年,在全国 574,810 名律师中,黑人律师仅占 1.7%。在几乎所有关于法律职业构成的研究或讨论中,亚裔人甚至往往不被作为统计研究的对象,或者不被认定为一个少数民族的亚群体。

少数民族律师进入大律师事务所的机会如何?换言之,大律师事务所在受到有关种族主义和崇尚社会名流的批评之后,在雇人实践中有何反映?1982 年,根据对 200 个最大的律师事务所中的 150 个所做的调查,25 个律师事务所中没有黑人律师;86 个律师事务所中没有拉美裔律师。1984 年,《国家法律学报》对 100 个最大的律师事务所中的 92 个进行了调查,发现黑人律师仅占其律师总数的 1.5%;拉美裔律师仅占 0.65%;但女律师的比例却上升为 20.19%。全国黑人律师协会主席丹尼斯·阿切尔指出,“那是种族主义或老哥们关系网或者无论你称其什么……那些在大律师事务所掌管雇用权的律师就是不雇黑人。”

然而,大律师事务所雇用少数民族律师的百分比尚不足以说明全部问题。获准进入有名气的律师事务所合伙人级别的少数民族律师的比例更低。1982 年的《全国法律学报》调查发现:在 106 个律师事务所中没有黑人合伙人;在 133 个律师事务所中没有拉美裔合伙人。大门可能已经敞开,但是少数民族仍处于权力、名气和报酬较低的位置。

尽管“老哥们关系网”已受到广泛的批评,但是保持这种关系的组织力量依然存在。那些认识候选人而且其评价很受其他机构的同行欢迎和重视的高级合伙人、法官、教授几乎都是男性白人。那种更容易承认与自己同性别或同种族的人或者最适于被视为自己的门徒的人的智力与创造学识之非凡能力的倾向是完全自然的。但是,这种观点反映了错误地把一种价值观作为“自然”条件的危险。

再者,如果参与有关该问题的公众讨论是一种迹象的话,那么大律师事务所未必意识到那些关于妇女和少数民族律师的统计数字是个重要问题。1985 年,美国律师协会举行了一系列关于妇女和少数民族律师问题的听证会。在被邀请的 400 家律师事务所中,只有两家出席了听证会。那些律师事务所对未能出席所给出的解释包括:听证会时间不方便,以及由于其事务所没有或几乎没有雇用少数民族律师所以其相信它们对听证会做不出什么贡献。

## 二、律师组织的角色

从历史观点来看,正如弗里曼和其他学者所指出的那样,美国律师协会的历史是以根深蒂固的种族主义和政治上的反动而著称的。该协会在 1915 年偶然地接纳了三名黑人律师之后即重申了其只选择白人律师的既定方针,并要求未来的申请人必须写明自己的种族以避免再发生类似的“错误”。1950 年,在那场全国性的“赤色”诱惑和攻击美国公民政治权利的浪潮中,美国律师协会通过决议,要求所有律师恪守反共誓言。

人们在过去的十年内可以看到美国律师协会立场的转变,它率先尽力去提出并纠正法律职业中现存的不平等现象。例如,美国律师协会与其他组织共同发起建立了法律教育机会委员会;1979 年在青年律师分会中建立了少数民族律师委员会;1981 年与其他组织共同发起成立了全国少数民族律师学会;1984 年又成立了专门研究法律职业中少数民族问题的美国律师协会专项研究组。这个专项研究组将少数民族界定为:“在种族和民族上属于少数群体的成员,但是在上下文中指明更广范围者除外。”该专项研究组对法学院、律师事务所、律师协会和少数民族律师学会进行了调查并举行了一系列公开的听证会,然后于 1986 年 6 月向美国律师协会董事



会提交了其带有建议内容的报告。

该报告的结论是：法律职业队伍仍处于严重的分裂状态。该专项研究组指出，这与法律职业“长期存在且令人自豪的个人权利与自由遗风”相悖，因此号召法律界人士坚定地走向更加一体化的职业。美国律师协会董事会通过了该专项研究组关于美国律师协会应确立一项附加的该协会组织目标的建议。该组织目标旨在促进少数民族和妇女对法律职业的全面和平等的参与。该董事会认为，美国律师协会作为全国法律职业的代表，应该在为少数民族提供充分且平等的教育、从业、司法和入会等机会上发挥先锋带头作用。

除了传统的律师组织外，少数民族律师和教师也指出了现存制度下的不平等现象。他们一边参加现有律师协会的工作，一边又成立一些独立的组织和少数民族律师协会，其目的是集中考虑某些特别成员组织的需要和关心的问题。这种组织中的主要者包括全国有色人种促进会、全国黑人律师大会、波多黎各人法律辩护和教育基金会和亚裔美国人法律辩护和教育基金会。除确认性诉讼工作外，这些少数民族法律组织还在民权诉讼、社区法律服务之提供。社区教育项目和法律改革等方面发挥积极作用。

### 三、从业律师中的等级制度

根据柯伦的研究报告，1980年律师就业分布情况反映了下述统计性分类。在1980年，大多数或者68.3%的律师在私人事务所工作，其中一半为“单人”开业。3.7%的律师在联邦政府中工作。只有5%的律师在联邦司法系统和10.1%的律师在私人企业中工作。从事教育工作的占1.2%。然而，上述律师就业分布的数字和百分比并不能准确地表明上面讨论中提出的在这些开业领域内权力与名望的分配问题。

在这私人开业世界的等级系统顶端是有名的大公司制律师事务所。在本世纪60年代，律师人数在50人以上的律师事务所有43个，其中20家位于纽约市。这些大型法律工厂仍在扩大。80年代，这些大型律师事务所往往有律师数百人，内设若干专业实务部门，而且有全国性乃至国际性分支机构。例如，贝克和麦肯齐律师事务所有500多名律师，总部设在芝加哥并在11个城市设有分支机构。杰罗姆·卡林在其1966年关于纽约市律师协会的研究报告中指出：“大律师事务所的律师平均收入最高；他们常常代理那些最有钱且最有地位的当事人；而且同高层次的法官和政府官员有着密切的联系。个人开业者和小事务所的律师收入最低，代理那些既无钱又无地位的当事人，而且主要与最低级别的法院和行政机构打交道。”

正如法律职业中的权力等级制度和妇女与少数民族的有限存在所反映的，律师界曾经是而且现在仍然是在很大程度上按照种族和阶层进行划分的。



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## LESSON THREE

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# Legal Education 法律教育

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### Background 背景

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美国的法律教育体制具有一个不同于世界上其他国家的特点,即没有一般意义上的法学本科生。美国法学院的学生都是本科毕业生。换言之,申请入法学院学习者必须已在其他专业领域内获得了学士学位。这反映了美国人注重权利和法律的傳統。他们认为,法律事务涉及人的各种权利和复杂的社会生活,因此从事法律工作的人应该象医生一样,具有比从事其他职业的人更为丰富的学识和经历。从理论上讲,在任何专业领域内获得学士学位的人都可以考法学院;但是在实践中,法学院学生多在政治学(Political Science)、经济学(Economics)、刑事司法(Criminal Justice)、社会学(Sociology)、新闻学(Journalism)等学科获有学士学位。

虽然美国律师协会(ABA)对其认可的法学院有统一的评估标准,但是各法学院在学位设置和课程设置上仍有很大的自主性和灵活性。一般来说,美国法学院设置的学位主要有法律博士(JD,即 Juris Doctor)、法学硕士(LLM,即 Master of Laws)和法学博士(SJD,即 Doctor of Juridical Science)。法律博士学位课程是法学院的基本教育课程,犹如中国及其他国家的法学专业本科课程。法律博士学位的学制一般为三年,其第一年以必修课(Required Course)为主,包括合同法(Contract Law)、侵权法(Tort Law)、财产法(Property Law)、刑法(Criminal Law)、民事诉讼(Civil Procedure)和法律文书写作(Legal Writing)等;第二年和第三年则以选修课(Elective Course)为主,学生可以根据自己的兴趣和意愿从几十门法律课程中选修若干门,但要达到学校规定的学分标准。法学硕士和法学博士的培养属于法学院的研究生教育。攻读法学硕士学位的人必须已经获得了法律博士学位或者在其他国家获得了法学学士学位;其学制一般为一至二年;其学习方式以修课为主,而且法学院一般允许学生以增修一定学分的方式代替毕业论文。攻读法学博士学位的



人一般应已获得了法学硕士或法律博士学位;其学制一般为三至五年;其学习内容主要为撰写学位论文,但法学院院长或其导师也可能要求其选修一定课程或从事一定研究工作。法学院很少开设专门面向研究生的课程,因此研究生多与“本科生”(JD 生)一起听课。

美国法学院的教授在教学过程中较重视对批判性思维(critical thinking)方式的培养,且多采用案例教学法(Case Method)和问答式即苏格拉底式教学法(Socratic Method)。诚然,在美国的法学教授中亦不乏偏爱讲演式教学法(Lecture Method)的“说书人”(story-teller)。

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## Text 课文

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In 1983, over 125,000 law students were studying in more than 170 ABA accredited law schools including public law schools supported in part by government funds; private law schools supported by contributions from individuals and foundation funds; and local or national schools offering full time or part time legal study programs. As virtually the only way to prepare for membership in the legal profession, law schools in the United States fulfill several functions including professional training and socialization of future lawyers and screening and gatekeeping for entrance to the profession. Since there is no central institution where all lawyers practice, the only institutional experience which lawyers have in common is law school.

The criticisms which range from “mild to caustic” of the way in which law schools have carried out these functions and of the functions themselves have been persistent, diverse and rooted in the historical and political development of the profession. These criticisms have focussed on the curriculum and the dominance of the case method; the distribution of power and prestige reflected in the hierarchy within and among the law schools; and the imbalance in terms of women and minorities in the student body and faculty in the law schools.

### Part One: Curriculum and the Case Method

The traditional first-year program offered in virtually all American law schools includes contracts, torts, property, criminal law and civil procedure. Duncan Kennedy has described the traditional first-year curriculum as basically teaching the



ground rules for late 19th century laissez-faire capitalism. The second year and third year course expound the moderate reformist New Deal program and the administrative structure of the modern regulatory state. The peripheral subjects, if they are offered, include legal philosophy, legal history, legal process, and clinical education, a “kind of playground or finishing school for learning the social art of self presentation as a lawyer”.

However, as new areas of the law continue to develop in response to contemporary issues and problems, some law schools have expanded curricula to include courses and clinical programs in environmental law, housing and urban development, women’s rights, health in the workplace, welfare rights and consumer protection. There are also increasing efforts to teach law in interdisciplinary contexts, drawing on other disciplines such as history, psychology, sociology, medicine, and economics.

In teaching the traditional curriculum, law teachers in almost all the law schools use to some extent the case method or the Socratic method. Developed in the 1870’s by Christopher Columbus Langdell at the Harvard Law School, the case method looked to the common law as the source of legal principles and focussed on the teaching of an abstract conception of the law as a science. The legal principles elicited were to be taught divorced from the “grubby world of practice—and also from politics, history, economics, and social contexts”. This narrow formalistic approach was justified on the ground that it taught students how to state, analyze, evaluate and compare concrete fact situations thus developing their powers and skills of analysis, reasoning, and expression.

However, this process of learning “how to think like a lawyer” has been criticized as having an adverse impact both on the students and the quality of future lawyering. Students, law teachers, and others have pointed to the alienation, anxiety, hostility and aggression caused by use of the case method or Socratic method. The narrow and destructive interaction of this dialogue, or often “nondialogue”, contributes to the impairment of the ability to care about other people, a professional unemotionalism and cynicism on the part of law students. And it is not only the law students who suffer from this narrowing of their professional selves. The work of a lawyer involves continuous contacts with clients, associates, other lawyers, judges, witnesses, others affected by the law, and involves the lawyer’s own goals, attitudes, performance, and sense of satisfaction.



## Part Two: Law School Hierarchy

Duncan Kennedy has described the law schools as “intensely political places”, characterized by a “trade-school mentality, the endless attention to trees at the expense of forests.” The law schools function as the institution for “ideological training for willing service in the hierarchies of the corporate welfare state”. In the ranking and evaluation of students, students learn to accept their place in a hierarchy which is presented as just and inevitable and “so prepare themselves for all the hierarchies to follow”. In the law teachers’ modeling of hierarchical relationships with students, colleagues, secretaries and support staff, students learn a particular style of condescension towards perceived inferiors and deference towards perceived superiors. And under the subtle but intense pressure to conform to the “white, male, middle-class tone” set by law faculties which are overwhelmingly white, male, and middle-class, law students adapt, “partly out of fear, partly out of hope of gain, partly out of genuine admiration for their role models”. In these ways, “legal education is one of the causes of legal hierarchy. Legal education supports it by analogy, provides it a general legitimating ideology by justifying the rules that underlie it, and provides it a particular ideology by mystifying legal reasoning. Legal education structures the pool of prospective lawyers so that their hierarchical organization seems inevitable, and trains them to look and think and act just like all the other lawyers in the system”.

In addition to the hierarchy within the law schools suggested by Kennedy, other analyses of the law schools functions and relationship to the profession suggest the existence of a hierarchy among the law schools. The top dozen or so elite law schools occupy a position of power and prestige which is partially reflected in the professional career paths of their graduates and in the “old boy networks” connecting the law schools and the rest of the legal profession. The models of the “law school as the gateway to the American power elite became possible with the New Deal”. Felix Frankfurter’s placement network for the “best and the brightest” into influential public policy positions during the New Deal in the 1930’s was an early example of this kind of network. During his tenure at Harvard and later while on the Supreme Court, Frankfurter developed an “old boy network” which was intimately involved with the placement of many of the “elite” lawyers, all of whom were white and male, into public service. The typical Frankfurter recruit was “a graduate of Harvard Law



School, politically liberal, usually ranked high in his class, and either an obvious product of upper class gentile culture or an obvious product of a radically different culture who was 'comfortable' in the upper class gentile world".

In the current hiring practices of the major law firms and in the competition for judicial clerkships, and in the appointments to law faculties, the graduates of the elite schools continue to have an advantage over graduates of other schools. In a recent study of Chicago lawyers, Zemans and Rosenblum found that lawyers who attended "high-prestige law schools and graduated in the top 20 percent of their classes were much more likely to practice in large firms and specialize in high-prestige fields of law". In terms of appointments to law faculties, 60% of the legal profession's teaching specialists are produced by fewer than 15% of the nation's accredited law schools. These law teacher producer schools are mostly national, located in urban locations, and include schools such as Harvard, Yale, Columbia, University of Michigan, Chicago, New York University, Northwestern University, and Georgetown. If it is true that the full-time faculty of the law schools "have a virtual monopoly on who will and will not enter the (legal) profession" and "on the power to mold future generations", then the existence of a hierarchy among the law schools suggests that an elite group of schools is primarily responsible for staffing the law schools, which in turn produce lawyers for the hierarchies within the profession.

## Notes 注释

【1】ABA accredited law schools: 美国律师协会认可的法学院。要获得美国律师协会的认可,法学院必须达到该协会规定的标准,包括学校设施、图书馆藏书、师生比例、课程安排等。

【2】socialization of future lawyers: 使未来的律师具备社交活动能力。

【3】laissez faire capitalism: 自由资本主义。

【4】New Deal: 新政,即美国总统罗斯福在1933年至1939年期间所实施的旨在加强政府对经济控制的内政纲领。

【5】...kind of playground or finishing school for learning the social art of self presentation as a lawyer. ....一种学习作为律师所应具备的自我表现社会艺术的操练场或精修学校。

【6】Christopher Columbus Langdell: 克里斯托弗·哥伦布·兰德尔(1826—1906),美国著名法学家和法律教育家。他早年当过开业律师,后于1870年到哈佛大学法学院任教并担任院长至1895年。当时美国的法律教育是业余性的,获得法律学士学位没有考试或明确的要求。兰德尔把法律教育提高到正规大学水平,要求学生学习一系列必修课程并通过必要的考试。他还创立了案例教学法,让学生阅读和讨论原始判例,从中找出法学原理。



【7】alienation: 异化(指法学院培养出来的律师与社会公众的离异)。

【8】dialogue: 指这种教学方式下的师生对话。

【9】nondialogue: 指老师一人独讲。

【10】...characterized by a "trade-school mentality, the endless attention to trees at the expense of forests." .....具有“中等专业学校思想水平、且只见树木不见森林”的特征。

【11】The law schools function as the institution for "ideological training for willing service in the hierarchies of the corporate welfare state". 法学院作为“在思想意识上培训学生自愿服务于这共同福利国家的等级制度之中”的机构而发挥作用。

【12】...condescension towards perceived inferiors and deference towards perceived superiors. ....俯就被认为地位低的人而遵从被认为地位高的人。

【13】...provides it a particular ideology by mystifying legal reasoning. ....通过神秘化的法律推论来为其提供一种特定的意识观念。

【14】the "old boy networks": 老同学关系网;老哥们儿关系网。

【15】Felix Frankfurter: 费利克斯·弗兰克福特(1882—1965),美国著名的法学家和大法官。1919年,他曾以法律顾问的身份随威尔逊总统出席巴黎和会。1933年,罗斯福总统实行“新政”时,他曾在立法等问题上向其提供意见。1939年1月,他被罗斯福任命为联邦最高法院大法官,他担任此职务至1962年。

【16】...include schools such as Harvard, Yale, Columbia, University of Michigan, Chicago, New York University, Northwestern University, and Georgetown. ....包括诸如哈佛大学、耶鲁大学、哥伦比亚大学、密执安大学、芝加哥大学、纽约大学、西北大学和乔治敦大学等的法学院。

## Exercises 练习

### 1. Questions about the text:

- ① How many law schools accredited by ABA are there in the United States?
- ② What is the only way to prepare for membership in the legal profession in the United States?
- ③ What are the main functions of law schools in the United States?
- ④ What are the main courses for the first-year students in most of American law schools?
- ⑤ What teaching methods are preferred by most American law professors?
- ⑥ Who is Christopher Columbus Langdell?
- ⑦ What are the merits and demerits of case method in teaching law?
- ⑧ What do law students learn from their teachers' modeling relationships with other people in the law school?
- ⑨ What does legal hierarchy mean?



⑩ What do you think of “old boy networks” in legal profession?

## 2. Dictation

American law teachers, like American judges, serve no formal apprenticeship before their appointment and, like judges, they are often drawn from the practicing bar. Their most common titles are assistant professor, associate professor, and professor. Although graduate law study or a period as a teaching fellow is not uncommon as preparation for a teaching career in law, neither is essential nor even usual. In spite of the practical background of many law teachers, the leading law schools, with few exceptions, demand that the members of their faculties devote their full time to teaching and research and give up the regular practice of law. A striking characteristic of the American law faculty is the independence of even its youngest members of their senior colleagues. One teaches one's own courses and prepares and grades one's own examinations. No faculty member is under the supervision of another, and the academic freedom of each is jealously guarded.

## 3. Discussion

① Topic: Which teaching method is better for law study: case method or lecture method?

② Reference arguments:

A. Case method is better for law study than lecture method, because it can provide practical training of legal skills which are important to lawyers, as well as detailed legal knowledge to the law students. Case method is more suitable to a common law system.

B. Lecture method is better for law study than case method, because it can provide more and clearer legal knowledge to the students. In other words, it is more efficient for giving information. Lecture method is more suitable to a civil law system.

③ Instructions:

A. The students are divided into two groups, and each is assigned an opinion for the discussion;

B. the groups discuss the question separately, and each group elects one or two speakers for the class discussion;

C. the speakers give their arguments in class discussion, and then other students may add arguments, ask questions or give comments. about the issue.



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## Supplementary Reading 补充读物

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### 1. Juris Doctor Program

In the last century, Northwestern, setting the norm in legal education, was among the first of the nation's law schools to require three years of study for a degree in law. Students seeking a Juris Doctor (JD) enter the School of Law in late August and attend the two semesters of the regular academic year for three years.

During the first year of law study, the student follows a course designed to provide an understanding of basic legal principles and concepts and give a solid grounding in the fundamentals indispensable for all branches of the profession. Here the student encounters the grand divisions of private law—property, tort, and contract—as well as criminal law and civil procedure. The year-long program in legal writing focuses on the development of the lawyer's basic skills in the uses of research tools and writing and culminates in the preparation of briefs and presentation of oral arguments in moot court.

In the second half of the first year, the student is required to choose a perspective elective course. The elective may be satisfied by courses in International Law, English or American Legal History, or by one of a group of courses dealing with the relationship of law to the social sciences. Students should see the annual Curriculum Guide for the names and descriptions of specific perspective electives offered each year.

Each entering student is assigned a faculty member and an upperclass student as advisers. This advisory relationship is available in the first year to ease the adjustment to the demands of law study. Thereafter, the faculty adviser becomes guide and mentor as the student plans the work of his or her last two years.

The wide range of electives offered by the School of Law in the second and third years enables students who so wish to attain a degree of concentration. Moreover, seminars often provide opportunities for further exploration of a field in a new context. For example, questions of criminal procedure may be treated in a paper written for the civil liberties seminar or the underpinnings of constitutional law may be studied in a seminar on comparative law or jurisprudence. Perhaps most significant, however, is the opportunity to sample a wide variety of problems in the law and to foster new interests thus discovered. For those courses that have two



sections, the School's policy of scheduling the sections at different times and often in different semesters is intended to permit students to select virtually any combination of elective courses in the last two years.

Other scheduling policies and a prerequisite system facilitate selection of offerings in logical progression and permit adequate preparation for advanced individual work in the programs of the third year.

Additional interdisciplinary opportunities are provided by the option that allows students, subject to certain restrictions, to receive up to six hours of credit toward the JD degree for graduate level courses taken in other schools and departments of Northwestern University.

## **2. Graduate Program**

The graduate program of the School of Law has several objectives: to offer active practitioners and recent law graduates who have demonstrated superior proficiency in the study of law an opportunity to broaden their legal knowledge and engage in research; to provide law teachers and prospective law teachers with facilities for advanced study, research, and writing under faculty guidance; and to offer outstanding graduates of foreign law schools an opportunity to expand their knowledge of American legal processes and to engage in comparative legal research.

The admission of students who have been awarded a first degree in law to candidacy for the degree of Master of Laws or Doctor of Juridical Science is at the discretion of the Committee on Graduate Studies.

The School of Law requires that an applicant whose native language is not English provide satisfactory evidence of proficiency in English. Only those students with Test of English as a Foreign Language (TOEFL) scores in the range of 600 or above will be eligible for admission.

## **3. Degrees**

Two graduate degrees are granted: the degree of Master of Laws (LLM) and the degree of Doctor of Juridical Science (SJD).

**Master of Laws.** The LLM degree is conferred upon students who have obtained a first degree in law from Northwestern University or another institution having equivalent requirements; in unusual cases, this requirement may be waived by a vote of the faculty. Students must fulfill the following requirements: (1) The completion of one academic year of residence in this School, during which time credit must be obtained for not less than 10 semester hours in courses or seminars not previously



counted toward the first degree in law. Students who have not previously taken, for their first degree in law, a course or seminar in the general field of jurisprudence must include such work in their program. Each graduate student's course program is individually planned in relation to the student's choice of a thesis topic. To the extent necessary to establish a background for the research, the Committee on Graduate Study may at its discretion require a graduate student to take course and seminar work in addition to the minimum prescribed above. During their year of residence, graduate students are required to maintain a superior scholarship record. A grade point average of B in classroom work is required for graduation. (2) The completion of a thorough study of some approved legal topic and the presentation of a paper embodying its results. The candidate's thesis must be suitable for publication. The thesis is normally completed during the academic year in residence; it must be completed within two years from the commencement of the academic year of residence. (3) The passing of an oral examination to be prescribed by the faculty.

Doctor of Juridical Science. The SJD degree is conferred upon students who have obtained the degree of Juris Doctor from Northwestern University or another university or college having equivalent requirements for that degree or who have obtained the degree of Bachelor of Laws from another university or college whose requirements for that degree are equivalent to those prescribed by this School for the degree of Juris Doctor and who have fulfilled the following requirements: (1) The completion of one academic year of residence in this School. The time required for the completion of a candidate's work, however, normally runs beyond the period of residence required. (2) The completion of a study to be approved by the faculty or its designated committee. This study shall involve original research and must be completed in such manner, both as to subject matter and literary form, as to be, in the opinion of the faculty, a significant and scholarly contribution to legal science. The study must be completed within five years after the commencement of the candidate's academic year of residence. (3) The completion of other such work, if any, as may be directed by the dean in the particular case. (4) The passing of an oral examination to be prescribed by the faculty.

Faculty policy restricts this degree to candidates who have had substantial experience either in practicing or teaching law and who, through published writings, have given evidence of their capacity for advanced graduate work.



## Reference Translations 参考译文

### 一、法律博士培养方案

在上个世纪中,西北大学法学院是全国首批要求经三年学习才能获得法律学位的法学院之一。这确立了法律教育的标准。那些攻读法律博士(JD)学位的学生在8月下旬入学,然后学习三年,每个正常学年由两个学期组成。

在法律学习的第一年中,学生们按照设计好的课程学习,而这种设计是为了提供对基本法律原则和概念的理解并为学习所有法律分支学科那些必不可少的基本原理奠定坚实的基础。在此,学生接触到私法的主要分支学科——财产、侵权和合同——以及刑法和民事诉讼程序。为期一年的法律写作课程则致力于开发律师在运用研究工具和写作方面的基本技能,并在最后学会准备案情摘要和在模拟法庭上进行口头辩论。

在第一年的第二学期,学生被要求挑选一门展望性选修课程。该选修课可以是国际法,可以是英国或美国法制史,也可以是那一系列涉及法律与社会科学之关系的课程之一。学生们应查看每年的《课程指南》,以获知每年开设的具体展望性选修课程的名称和内容描述。

每位新生会被指定一名教师和一名高年级学生做其指导人。在一年级时得到这种指导关系是为了便于适应法律学习的要求。尔后,那位教师指导人便成为该学生在计划后两年学习时的向导和辅导教师。

法学院在第二年和第三年开设的广泛的选修课程使那些有此意愿的学生可以获得一定程度的定向(集中)。此外,研讨课程往往可以提供从某个新的角度进一步探索某一领域的机会。例如,刑事诉讼程序的问题可能会在为公民自由研讨课撰写的论文中阐述;而宪法的理论基础则可能在比较法或法理学的研讨课中学习。不过,最有意义的大概还是那收集法律领域内各种各样的难题并培养出由此发现的新的兴趣。对那些分为两个部分的课程,本法学院的政策是把那两部分安排在不同的时间而且经常是在不同的学期,从而使学生在后两年中真正可以自主决定其选修课的组合。

其他课程安排政策和一种必备条件制度促使对课程的选修能循序渐进,而且能保证为完成第三年教学计划中的高层次个人学习任务做好准备。

此外还向学生提供交叉学科的学习机会,即学生们可以为其获得法律博士学位而在西北大学的其他院系选修最高为6个学分的研究生课程,但这种选修要受一定的限制。

### 二、研究生培养方案

本法学院的研究生培养方案有几个目标:向那些在法律研究方面已表现出较高悟性的积极实践人员和近期法学院毕业生提供拓展其法律知识面和从事研究的机会;向法学教师或未来的法学教师提供在教授指导下进行高层次学习、研究和写作的便利;以及向外国法学院的杰出毕业生提供拓展其有关美国法律运行的知识和进行比较法学研究的机会。

批准那些已获得第一个法学学位的学生作为法学硕士或法学博士学位候选人学习的权力属于研究生学习管理委员会。

本法学院要求那些母语非英语的申请人提供令人满意的精通英语的证明。只有那些“外语



英语考试”(托福)的成绩在 600 分以上的学生才可以被录取。

#### 学位

本法学院颁发两种研究生学位:法学硕士学位(LLM)和法学博士学位(SJD)。

法学硕士:法学硕士学位的授与对象必须已经在西北大学或其他具备相应条件的机构获得有第一个法学学位;在特殊情况下,本要求可以经过全体教师投票表决后放弃。学生必须完成下列要求:(1)完成一个学年的本院在校学习,在此期间,必须在其攻读第一个法学学位时未曾选修的课程或研讨课程中得到不少于 10 个学期小时的学分。那些在其攻读第一个法学学位时未曾一般在法理学领域内选修过课程或研讨课程的学生必须将此课程包括在其选课方案之内。每个研究生的选课方案都是根据其论文选题单独设计的。在为其研究奠定必要基础的范围之内,研究生学习管理委员会可以在上述基本要求之外再要求研究生选修一定的课程或研讨课程。研究生在校学习的一年期间必须保持较高的学习成绩。课堂学习成绩平均为“良”(B)是毕业所要求的。(2)完成关于某项经批准的法学题目的全面研究,并提交表明其研究成果的论文。该研究生的论文必须适于发表。该论文通常应在一年在校学习期间完成;但它必须在开始在校学习之后的两年内完成。(3)通过法学院所规定的口试(即论文答辩)。

法学博士:法学博士学位的授与对象必须已经在西北大学获得法律博士学位或其他具备该学位相应条件的大学或学院获得法律博士学位,或者在其他大学或学院获得法学学士学位而且其对该学位的要求相当于本法学院对法律博士学位的要求。该授与对象还必须已完成下列要求:(1)完成一个学年的本院在校学习。但是一名研究生完成其学习所需要的时间通常都要超过其在校学习的时间。(2)完成本法学院或其指定的委员会批准的研究工作。该研究工作应包括有创见的研究,而且其完成的方式必须在主题内容和文字形式两方面都被法学院教师们认为是对法律科学的重要学术贡献。该研究必须在开始在校学习之后的五年内完成。(3)完成法学院院长可能依具体情况指定的其他工作,如果有的话。(4)通过法学院所规定的口试(即论文答辩)。

法学院的政策将此学位限于那些已在法律实践或法律教学中积有丰富经验的候选人,而且他们有出版物证明其具备从事高级研究生学习的能力。



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## LESSON FOUR

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# Judicial System

## 司法系统

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### Background 背景

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情况美国法院系统的突出特点是“双轨制”，即由联邦法院和州法院这两个相互独立且平行的体系组成。联邦法院行使美国宪法授与联邦政府的司法管辖权。在刑事领域中，联邦法院负责审理那些违犯联邦法律的刑事案件；在民事领域中，联邦法院负责审理以合众国为一方、涉及“联邦性质的问题”，以及发生在不同州的公民之间且有管辖权争议等种类的民事案件。州法院的司法管辖权较为广泛。按照美国宪法的规定，凡是法律未明确授与联邦法院的司法管辖权，均属于州法院。在实践中，绝大多数刑事案件和大多数民事案件都是由各州法院审判的。

联邦法院是一个统一的系统。它由联邦最高法院(the Supreme Court)、13 个联邦上诉法院(Courts of Appeals)和 95 个联邦地区法院(District Courts)组成。此外还有索赔法院(the Court of Claims)、关税法院(the Customs Court)、关税及专利上诉法院(the Court of Customs and Patent Appeals)等联邦特别法院(Special Courts)。各州的法院系统并不完全相同，但一般也都包括三级法院：基层法院多称为审判法院(Trial Court)或巡回法院(Circuit Court)；中级法院多称为上诉法院(Appellate Court or Court of Appeals)；高级法院多称为最高法院(Supreme Court)，但在纽约等州，高级法院称为上诉法院。许多州也有一些专门法院，如遗嘱检验法院(Probate Court)、青少年法院(Juvenile Court)、家庭关系法院(Court of Domestic Relations)和小额索赔法院(Small Claims Court)等。此外，每个城市还有自己的法院，主要负责审理交通违法、青少年犯罪、家庭纠纷及其他与城市法令有关的案件。

美国的联邦法官都是由总统任命的；各州的法官多经选举产生，但也有些是由地方行政长官(如州长或市长)或地方立法机关(如州议会或市议会)任命的。一般来说，联邦和州最高法院的法官称为大法官(Justice)，上诉法院和审判法院的法官



则称为法官(Judge)。此外,有此基层法院的审判人员还称为治安法官(Justice of the Peace)或司法官(Magistrate)。美国的法官虽没有职称级别之分,但人们有时也会看到“副”(Associate,或译“助理”)法官的称谓。例如,美国联邦最高法院的9名大法官中,除首席大法官(Chief Justice)外,其他8人均可称为副(或助理)大法官(Associate Justice);而一些州审判法院的巡回法官(Circuit Judge)之下也设有副(或助理)法官(Associate Judge)。在美国,一审案件一般由一名法官独立审判,上诉案件则由若干名法官组成合议庭(Collegiate Panel or Collegiate Bench)共同审判。

## **Text 课文**

### **Part One: Courts**

There are fifty-two separate court systems in the United States. Each state, as well as the District of Columbia, has its own fully developed, independent system of courts and there is a separate federal court system. The federal courts are not superior to the state courts; they are an independent, coordinate system authorized by the United States Constitution, Art. III, § 2, to handle matters of particular federal interest. The presence of two parallel court systems often raises questions concerning the relationship of the state and federal systems, presenting important issues of federalism. The United States Supreme Court, composed of nine justices, sits as the final and controlling voice over all these systems.

Although a few states, such as Nebraska, have a two-tiered system, most states, as well as the federal courts, are based on a three-tiered model. That means that for any litigant there will be the opportunity to plead his case before a trial court and then, should he lose, there are two levels of appeal at which he ultimately may succeed. For example, in the federal system the trial court is the United States District Court, of which there is at least one in every state. Many larger states are divided into two, three or even four judicial districts, depending on population, geography and caseload. There are ninety-one districts in the United States and each district court has one judge, or more commonly two or more. After an adverse judgment in the district court, a litigant may appeal to the United States Court of Appeals for the circuit in which the district court is located. There are eleven numbered intermediate appellate courts in the federal system, each including



anywhere from three to ten states and territories. Additionally, there is a Court of Appeals for the District of Columbia, hearing appeals from the federal district court there, and one for the Federal Circuit, taking appeals from various specialized federal tribunals, such as the Claims Court. Each court of appeals has four or more judges who sit in panels of three to review district court decisions, as well as some decisions of administrative agencies. A losing litigant in the court of appeals may, in some cases, be able to obtain review by the United States Supreme Court. Cases in the state courts similarly may proceed through a trial court, a state appellate court, and then the state supreme court. If a federal constitutional question is involved the decision of the state supreme court may be reviewed by the United States Supreme Court. Since 1988, review by the Supreme Court in civil cases is discretionary; virtually all civil appeals as of right to the highest court have been abolished.

Three-tiered systems vary on the role which the highest court plays. The approaches taken reflect differing philosophies with regard to what the highest court should do. For example, in California only criminal cases in which capital punishment has been imposed are appealable as of right to the state supreme court. Similarly, in the federal courts, except in a few very limited circumstances, appeals to the United States Supreme Court are discretionary, by writ of certiorari. The Court decides for itself what are the most important questions that deserve its attention and will refuse to review decisions raising issues that it feels are not as crucial. In this way it supervises the administration of law by the lower courts on an ad hoc basis. At the other end of the spectrum, such as in New York, appeals to the state's highest court are as of right in a great many cases provided for by statute. The primary function of the highest court in New York appears to be to assure that cases are correctly decided. It is necessary to check carefully the statutes of the system in which you are appearing to determine the specific rules regarding review by those appellate courts.

## Part Two: Judges

Fewer than one in twenty of those admitted to practice law is a federal, state, county, or municipal court judge. Except for some inferior courts, judges are generally required to be admitted to practice but do not practice while on the bench. There is so little uniformity that it is difficult to generalize further than to point out three salient characteristics that relate to the ranks from which judges are drawn, to the method of their selection, and to their tenure.



Judges are drawn from the practicing bar and less frequently from government service or the teaching profession. There is in the United States no career judiciary like that found in many other countries and there is no prescribed route for the young law graduate who aspires to be a judge, no apprenticeship that must be served, no service that must be entered. The outstanding young law graduates who act for a year or two as law clerks to the most distinguished judges of the federal and state courts have only the reward of the experience to take with them into practice and not the promise of a judicial career. While it is not uncommon for a vacancy on a higher court to be filled by a judge from a lower court, even this cannot be said to be the rule. The legal profession is not entirely unaware of the advantages of a career judiciary, but it is generally thought that they are outweighed by the experience and independence which American lawyers bring to the bench. Many of the outstanding judges of the country's highest courts have had no prior judicial experience. Criticism has centered instead on the prevalent method of selection of judges.

State court judges are usually elected, commonly by popular vote, but occasionally by the legislature. Popular election has been the subject of much disapproval, including that of the American Bar Association, on the ground that the public lacks interest in and information on candidates for judicial office and that therefore the outcome is too often controlled by leaders of political parties. The situation has been somewhat improved since many local bar associations have undertaken to evaluate the qualifications of candidates and to support or oppose them on this basis.

Since 1937, the American Bar Association has advocated the substitution of a system under which the governor appoints judges from a list submitted by a special nominating board and the judge then periodically stands unopposed for reelection by popular vote on the basis of his or her record. Such a system is now in effect, for at least some judges, in a substantial minority of states. In a small group of states, judges are appointed by the governor subject to legislative confirmation.

This is also the method of selection of federal judges, who are appointed by the President subject to confirmation by the Senate. Even under the appointive system the selection of judges is not immune from political influence and appointees are usually of the President's or governor's own party. But names of candidates for the federal judiciary are submitted to a committee of the American Bar Association and appointment is usually made only with its approval. The office of chief judge or chief



justice is usually filled in the same manner as other judicial offices, although in some states it is filled from among the members of the court by rotation, by seniority of service, or by vote of the judges. The Chief Justice of the United States is appointed by the President, subject to Senate confirmation.

The third characteristic is that judges commonly serve for a term of years rather than for life. For courts of general jurisdiction it is typically four, six, or eight years, and for appellate courts, six, eight, or ten years. Happily, even where selection is by popular election, it is customary to return to office for sitting judges whose service has been satisfactory. In a few state courts and in the federal courts the judges sit for life. Whether on the bench for a term of years or for life, a judge may be removed from office only for gross misconduct and only by formal proceedings. Instances of removal have been rare indeed and only a handful of federal judges have been removed by formal proceedings. The independence of the judiciary is also encouraged by the rule that a judge incurs no civil liability for judicial acts, even if guilty of fraud and corruption. The American Bar Association's Code of Judicial Conduct has been widely adopted as a standard to which judges are expected to adhere. Salaries for the higher judicial offices are usually good although less than the income of a successful private practitioner, the prestige of these offices is high, and the bench has been able to attract many of the country's ablest legal minds. The great names in American law are in large part the names of its great judges.

## Notes 注释

【1】Judicial System: 司法系统(制度);法院系统

【2】the District of Columbia: 哥伦比亚特区(美国东部联邦特区,范围与首都华盛顿市相同。)

【3】...by the United States Constitution, Art. III, § 2, .....由美国宪法第三条第二款所……。该款规定:“司法权应适用于根据本宪法、合众国法律和根据合众国的授权缔结或将要缔结的条约所产生的一切普通法和衡平法案件……”

【4】two-tiered system: 两级(审判)体制。

【5】...should he lose, there are two levels of appeal at which he ultimately may succeed. ....如果他败诉了,那么还有两级上诉,而他最终有可能在这上诉中胜诉。

【6】judicial district: 司法管辖区。

【7】intermediate appellate court: 中级上诉法院。

【8】...virtually all civil appeals as of right to the highest court have been abolished. ....实际上



所有民事案件都作为权利而可以上诉到最高法院的作法已经被废除了。

【9】Three-tiered systems vary on the role which the highest court plays. (各地的)三级审判体制在最高法院所扮演的角色上有所不同。

【10】The approaches taken reflect differing philosophies with regard to what the highest court should do. (各州)采用的作法反映了关于最高法院应发挥什么作用的不同哲理。

【11】writ of certiorari: 调案复审令。

【12】Except for some inferior courts, judges are generally required to be admitted to practice but do not practice while on the bench. 除了某些较低级别的法院外,法官一般都被要求具有开业律师资格,但是在担任法官期间不得开业。

【13】career judiciary: 职业法官。

【14】popular vote: 民众选举;普选。

【15】...the judge then periodically stands unopposed for reelection by popular vote on the basis of his or her record. ....然后,该法官定期参加没有竞争对手的续任民众选举,选举的依据是其工作成绩。

【16】...it is customary to return to office sitting judges whose service has been satisfactory. ....那些工作令人满意的现任法官通常都能连任。

【17】The American Bar Association's Code of Judicial Conduct: 美国律师协会的“法官行为准则”。

【18】private practitioner: 私人开业律师。

## Exercises 练习

### 1. Questions about the text:

- ① How many court systems are there in the United States? And What are they?
- ② The federal courts are not superior to the state courts, are they?
- ③ What is the three-tiered model?
- ④ How many judges generally are there in a federal district court?
- ⑤ What kind of criminal cases is appealable as of right to the state supreme court in California?
- ⑥ Judges are not often drawn from government service, are they?
- ⑦ How are state court judges usually selected?
- ⑧ Why does ABA disapprove the popular election for judges?
- ⑨ What is ABA's suggestion for selecting judges?
- ⑩ How long do judges commonly serve in the United States?

### 2. Dictation

The Supreme Court is the highest court of the United States and the only one



specifically created by the Constitution. A decision of the Supreme Court cannot be appealed to any other court. Congress has the power to fix the number of judges sitting on the Court and, within limits, decide what kind of cases it may hear, but it cannot change the powers given to the Supreme Court by the Constitution itself.

### 3. Discussion

① Topic: Comparison of Centralized and Decentralized Court Systems.

② Reference arguments:

A. Merits and Demerits of Centralized Court Systems: It is easier for a centralized court system to set up a set of uniform standards and policies for trial work nationwide, and to prevent the interference of the local government. However, the centralized court system lacks flexibility and local accountability in trial work.

B. Merits and Demerits of Decentralized Court Systems: It is natural for a decentralized court system to emphasize local responsibility and local suitability in its trial work. However, the decentralized court system also has its shortcomings, such as the inconsistency in application of laws resulting from the different standards and policies applied by different judges.

③ Instructions:

A. The students are required to individually prepare for the discussion.

B. The students are to talk about merits and demerits of centralized and decentralized court systems in pairs.

C. The students are to give their personal preference of the two as well as their reasons in class.

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### Supplementary Reading 补充读物

#### 1. How Are State-level Courts Organized in Illinois?

In 1964, Illinois became the first state in the nation to adopt a truly unified court system—that is, a system with a uniform structure throughout the entire state and with centralized, rather than local, administration and rulemaking. Prior to the 1964 reorganization, Illinois had a variety of different courts, including justice-of-the-peace courts and police magistrate courts. Court unification eliminated all courts at the trial level except the circuit courts, thus creating a single, unified, statewide court system.

Illinois' court system has three levels, with trial, intermediate appellate, and



supreme courts. The vast majority of felony and misdemeanor cases are heard and resolved in the trial—or circuit—courts, the first tier in the system. Circuit courts are responsible for reviewing the facts of a case and rendering a disposition. The second tier in the system is a single, intermediate court of appeals, and the third tier is the Illinois Supreme Court, which can have either original or appellate jurisdiction, depending on the case. While all 50 states have courts of last resort (which Illinois calls the Supreme Court), Illinois is one of only 37 states that have intermediate courts of appeal. The Appellate and Supreme courts in Illinois are responsible for seeing that the law was properly interpreted and applied in particular cases tried in the circuit courts.

Trial courts, which are located in each of the state's 102 counties, are organized into 22 judicial circuits. Most judicial circuits contain several counties; however, in three of Illinois' most populous counties—Cook, DuPage, and Will—the county represents a single judicial circuit.

Within some circuits, responsibilities may be divided between “lower-level” and “higher-level” trial courts. Under Illinois' unified court system, however, this distinction is purely administrative: cases heard in both types of courts are actually heard by the same Circuit Court. Lower-level trial courts are primarily responsible for processing misdemeanor cases, all the way from initial court hearings through trial and sentencing. These courts may also conduct bond and preliminary hearings in felony cases. Higher-level courts, on the other hand, generally conduct felony trials.

As a rule, each felony trial court is presided over by a circuit judge, who is elected to a six-year term by the voters in that judicial circuit. When a circuit judgeship is vacant or newly created, candidates are nominated in partisan primary elections and are elected in the general election. Once the term of a judge who has been previously elected expires, the judge may submit his or her name to the voters, without an opposing candidate, on the sole question of whether the judge should be retained for another six-year term. To be retained, sitting judges must receive affirmative votes from at least 60 percent of those voting on the matter.

The circuit judges in each circuit select from within their ranks a chief judge who, subject to the authority of the Illinois Supreme Court, has certain administrative powers for the circuit. For example, the chief judge has the right to establish general or specialized divisions of the court for administrative purposes.

Each circuit also has a certain number of associate judges, who are usually



limited to duties within the lower-level trial courts. At the beginning of 1988, there were 378 circuit judges and 367 associate judges in Illinois. Approximately 46 percent of the state's circuit and associate judges serve in the Cook County Circuit Court, which is not only the largest judicial circuit in Illinois but also the largest general jurisdiction trial court in the country.

In practice, the difference between higher-and lower-level trial courts depends on the size and complexity of the circuit. In circuits that hear relatively few criminal cases, all proceedings may take place in a single court where both circuit and associate judges preside over their respective functions. In Cook County, on the other hand, court functions and facilities are more strictly defined.

Because of the tremendous volume of cases it handles, the Circuit Court of Cook County is divided into two departments: the Municipal Department and the County Department. The Municipal Department consists of six geographic districts, which are further divided into Criminal and Civil divisions. In the 1st Municipal District, which encompasses the City of Chicago, specialized preliminary hearing courts have been established. Each of these courts concentrates on cases involving particular offenses, such as homicide, auto theft, and sexual assault. In addition, the 1st Municipal District has a preliminary hearing court that deals exclusively with repeat offenders. Generally, the types of criminal proceedings heard in the Municipal Department are either misdemeanor cases or felony preliminary hearings.

Felony cases bound over for trial are heard in the County Department's Criminal Division. These cases are heard at one of three locations: Chicago, Markham, or Skokie. The Criminal Division, in conjunction with the Cook County State's Attorney's Office, also operates the Career Criminal Program, which focuses on the identification and prosecution of habitual offenders. Besides the Criminal Division, the County Department has seven other divisions: the Chancery, County, Domestic Relations, Juvenile, Law, Probate, and Support divisions.

## **2. How Are Illinois' Appellate And Supreme Courts Organized?**

The Illinois Appellate Court is the first court of appeal for all criminal cases except those involving the death penalty (which are automatically appealed directly from the Circuit Court to the Illinois Supreme Court) and those criminal appeals in which an applicable federal or state statute has been held invalid. Either the defense or the prosecution may appeal rulings of the trial court. However, because the law protects a defendant from being tried twice for the same crime, the prosecution



cannot appeal a not-guilty verdict.

The main function of both the Appellate and Supreme courts in Illinois is to ensure that the trial court correctly interpreted the law in a given case. For example, the defense may argue before the Appellate Court that unconstitutionally obtained evidence was admitted by the trial court. The Appellate Court can take one of several actions on such an appeal. It can deny the petition for appeal outright. Or, if the court decides the appeal has merit, it can affirm, reverse, modify, or vacate the original decision, or it can remand the case back to the lower court for reconsideration. In the latter instance, the Appellate Court may order a new trial, but specify that the questionable evidence that had been introduced in the first trial be held inadmissible in the new trial. Under certain limited circumstances, decisions of the Appellate Court can be appealed to the Illinois Supreme Court, the highest court in the state.

The Illinois Appellate Court is divided into five judicial districts. Except for the 1st District, which covers only Cook County, each appellate district includes either five or six judicial circuits. Appellate Court justices are elected to 10-year terms by the voters in their districts in a process similar to that used for Circuit Court judges. As of November 1988, there were 46 justices presiding over the Illinois Appellate Court: 21 in the 1st District, 8 in the 2nd District, 5 each in the 3rd and 4th districts, and 7 in the 5th District.

Seven justices sit on the Illinois Supreme Court. Each Supreme Court justice is elected, in a process similar to that used for appellate and circuit judges, to a 10-year term from one of the five appellate districts: three Supreme Court justices are elected from the 1st District, and one justice is elected from each of the other four districts. Supreme Court justices preside jointly over all cases that come before the Court.

In addition to its role as the state's highest court, the Supreme Court oversees the operations of all subordinate courts in the state. Illinois' courts are administered by the chief justice of the Supreme Court, who is elected by the seven Supreme Court justices. In this administrative role, the chief justice is assisted by the director of the Administrative Office of the Illinois Courts (AOIC). Among its administrative duties, the Illinois Supreme Court sets forth rules for trial procedures and appeals, and can assign additional judges to the Appellate and Circuit courts. Although the lower courts have some degree of autonomy, final authority for their administration and operation rests with the state Supreme Court.



### 3. How Are the Federal Courts Organized in Illinois?

Like Illinois' state courts, the federal court system has three tiers. The lowest tier is made up of the 94 U. S. District courts nationwide, which are organized along state lines. These courts serve as the trial courts of original jurisdiction in federal matters, such as offenses that occur on federal property or that affect interstate commerce, interstate crimes such as drug trafficking, and criminal offenses related to national security. Three U. S. District courts are located in Illinois: the Northern District, which is administratively based in Chicago; the Central District, based in Springfield; and the Southern District, based in East St. Louis.

Judicial candidates for the District Court are nominated by the President and must be confirmed by the U. S. Senate. Their appointments are for life. In addition to these federal judges, U. S. magistrates also serve in the District courts. U. S. magistrates are public civil officers vested with limited judicial powers: they hear cases involving petty offenses, and they conduct preliminary stages of felony cases and some civil matters. U. S. magistrates are appointed by the District Court judges to eight-year terms.

The 12 circuits of the U. S. Court of Appeals constitute the intermediate court of appeal at the federal level. Illinois is located in the 7th U. S. Circuit, which also covers Wisconsin and Indiana. Like candidates for the District Court, judicial candidates for the Circuit Court of Appeals are nominated by the President and must be confirmed by the Senate. They also serve for life. Decisions of the Circuit Court of Appeals can be appealed further to the U. S. Supreme Court, although such appeals are rarely granted.

The U. S. Supreme Court is the highest court in the nation. It hears certain appeals from both state supreme courts (or state appellate courts of last resort) and the U. S. Circuit Court of Appeals. Relying on a set of legal and customary requirements that have evolved over the years, the U. S. Supreme Court exercises wide discretion over whether or not to hear appeals. Historically, the Court has decided cases involving the most important and far-reaching policy questions of the day, based on its interpretation of the U. S. Constitution. The Supreme Court's nine justices—eight associate justices and one chief justice are nominated by the President and are confirmed by the Senate to lifetime appointments on the Court.



## Reference Translations 参考译文

伊利诺斯的州级法院是怎样组成的？

1964 年，伊利诺斯成为全美第一个采取真正的统一法院体系的州。这一体系具有遍及全州的统一结构以及集中的而非地方的行政和决策体制。

在 1964 年重组之前，伊利诺斯有大量的不同法院，包括治安法院和警察法院。法院统一在一审级别上剔除了巡回法院以外所有的法院，创造了一个单一的、统一的、全州范围的法院体系。

伊利诺斯的法院体系有三级：初审法院、上诉法院和最高法院。绝大多数的重罪和轻罪案件是在这一体系的第一级初审或巡回法院听证和判决的，巡回法院负责审查案件的事实并作出判决。体系的第二级是一个中级上诉法院，第三级是伊利诺斯最高法院，它具有案件的初审和上诉审的司法权。全美 50 个州均有终审法院（伊利诺斯称之为最高法院），伊利诺斯是有中级上诉法院的 37 个州之一。伊利诺斯的上诉法院和最高法院负责审查巡回法院在审理具体案件时解释和适用法律是否适当。

初审法院在全州 102 个县都有设置，并分为 22 个司法巡回区，大多数司法巡回区包括几个县，但在伊利诺斯人口最多的三个县——库克县、杜佩支县和威尔县——每个县即为一个司法巡回区。

在某些巡回区，职责由“低级”和“高级”初审法庭分担。在伊利诺斯统一法院体系下，这种区别是纯行政性的，在这两类法庭中审理的案件实际上都是由同一个巡回法院审理的。“低级”法庭一般负责审理轻罪案件，从最初的法庭听证到审理和判刑。这些法庭也可以在重罪案件中决定保释和预审听证。“高级”法庭一般审理重罪案件。

每个重罪初审法庭由一个巡回法官领导，该法官由该司法巡回区的选民选举产生，任期 6 年。当巡回法官职位空缺或新设时，候选人先经本党初选提名，然后参加普选。当先前当选的法官任期届满时，该法官可以向选民提出自己的名字，在没有竞争对手的情况下，寻求连任 6 年。则该在任法官必须至少获得 60% 的选票才能连任。

巡回法官根据其资历推举出一名首席法官，他在伊利诺斯最高法院的权威之下享有一定的行政权力。例如，首席法官有权为行政目的设置一般的或特别的法院分庭。

每个巡回区还有一定数量的副法官，他们通常限于“低级”法院的职责。在 1988 年初，伊利诺斯有 378 名巡回法官和 367 名副法官。大约 46% 的州巡回法官和副法官是在库克县巡回法院工作的，该法院不仅是伊利诺斯最大的巡回法院，也是全美最大的具有一般管辖权的初审法院。

实际上，“高级”和“低级”初审法庭的区分取决于巡回区的大小和复杂程度。在审理刑事案件相对较少的巡回区，所有的程序可以在单一法庭进行，巡回法官和副法官都负责各自的工作。另一方面，在库克县，法院的功能和设施是严格区分的。

由于需处理大量的案件，库克县的巡回法院分为两个部分：城市部和县部。城市部由 6 个地理分区组成，每个区再分为刑事分庭和民事分庭。在包含芝加哥市在内的第一城市分区，设



有专门的预审听证法庭。每个这类法院集中审理涉及特别犯罪如杀人、盗窃和强奸等的案件。此外,第一城市分区有一个专门负责累犯的预审听证法庭。一般情况下,城市部负责的刑事程序包括轻罪的审判和重罪的预审听证。

重罪案件在县部的刑事分庭接受审判。这些案件由芝加哥、马克汉姆或斯考基三个地方之一的法庭审理。刑事分庭与库克县的州检察官办事处共同负责专门的刑事程序,重点针对惯犯的鉴别和起诉。除了刑事分庭外,县部还有7个其它分庭:衡平法庭、县分庭、家庭关系分庭、未成年犯分庭、法律分庭、遗嘱分庭以及抚养分庭。

伊利诺斯上诉和最高法院是怎样组成的?

伊利诺斯上诉法院是除了判处死刑的案件(此类案件自动直接由巡回法院上诉至伊利诺斯最高法院)和可适用之联邦法律或州法律已被判定无效的刑事案件之外所有刑事案件的第一级上诉法院。被告方和公诉方都可以就初审法院的判决提出上诉。由于法律保护被告方不因同一罪行而两度受审,所以公诉方不得就无罪判决提出上诉。

伊利诺斯上诉法院和最高法院的主要工作是保证初审法院正确地在审判中解释法律。例如,被告可以向上诉法院指控初审法院允许使用非法获得的证据。上诉法院就这样一个上诉可能采取的措施如下:它可能驳回不正确的上诉请求;或者如果法院决定接受上诉,它可能肯定、取消、修改或撤消原来的判决;它也可能将案件发回下级法院重审。在最后一种情况下,上诉法院可以命令重审,但限定原审所用的有问题的证据在新的审判中不得采用。在某些明确限定的情况下,上诉法院的判决可以向州最高法院再上诉。

伊利诺斯上诉法院分为五个司法区,除第一区只包括库克县外,每个上诉区包括五—六个司法巡回区。上诉法院法官由其所在区的选民按与巡回法官相似的程序选出,任期10年。在1988年11月,伊利诺斯州上诉法院有46名法官:第一区21名,第二区8名,第三、四区各5名,第五区7名。

伊利诺斯最高法院有7名大法官,按与巡回和上诉法官相似的程序从五个上诉区中选举产生,任期为10年,其中三名最高法院大法官从第一分区选出,其余四个分区各选出一名。最高法院大法官共同审理所有的提交该法院的案件。

除了州最高级的法院这一角色外,最高法院还监督本州所有低级别法院的工作。伊利诺斯各级法院由最高法院首席大法官领导,首席大法官由7位最高法院大法官选出。伊利诺斯法院行政办公室(AOIC)的负责人协助首席大法官处理行政事务。伊利诺斯最高法院有权制定审判程序和上诉的规则,有权给上诉法院和巡回法院分配新增法官。尽管下级法院享有一定程度的自治,但其行政和操作的最终权威全在于州最高法院。

伊利诺斯的联邦法院是怎样组成的?

象伊利诺斯的州法院一样,联邦法院系统也有三级。最低级别由94个全国性联邦地区法院组成,按州系统组建。这些法院是对联邦事务享有初审权的法院,涉及联邦事务的案件,如发生在联邦财产地域上的或者影响州际贸易的犯罪案件,如毒品交易等州际犯罪案件以及与国家安全有关的犯罪案件。伊利诺斯设有三个联邦地区法院:北区,行政区划在芝加哥;中区,在斯普林菲尔德;南区,在东圣路易斯。

地区法院的法官候选人由总统提名,必须经美国参议院批准。他们任职终生。除了这些联



邦法官外,联邦司法官也在地区法院工作。联邦司法官是享有有限司法权力的公共文职官员,他们负责听证涉及轻罪的案件,处理重罪案件的预审阶段工作以及一些民事案件。联邦司法官由地区法院法官任命,任期8年。

美国的12个巡回上诉法院构成了联邦系统的中级上诉法院。伊利诺斯位于第七巡回区,该区还包括威斯康星和印第安纳两州。象地区法院一样,巡回上诉法官候选人也由总统提名,必须经美国参议院批准。他们也任期终生。巡回上诉法院的判决也可以向美国最高法院上诉,尽管这样的上诉很少被接受。

美国最高法院是全国的最高级别法院,它审理从州最高法院(或州终审上诉法院)和美国各巡回上诉法院提起的上诉。美国最高法院根据制定法和多年演变而成的习惯法则,行使广泛的自由裁量权以决定是否接受上诉。从历史上看,法院根据其对美国宪法的解释,判决涉及最重要和广泛的政策问题的案件。最高法院的九名大法官——八位副大法官和一位首席大法官——由总统提名,并经美国参议院批准,任职终生。



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## LESSON FIVE

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# Constitution 宪法

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### Background 背景

英美法系国家中常见的法律分类(Classification of Laws)有三种:第一种是把法律分为普通法(Common Law)和衡平法(Equity);第二种是把法律分为实体法(Substantive Law)和程序法(Procedural Law);第三种是把实体法分为公法(Public Law)和私法(Private Law)。公法包括宪法、行政法、刑法、税法等;私法包括合同法、侵权法、财产法、公司法、家庭法等。在公法中,宪法占有最为重要的地位。虽然美国的每一个州都有自己的宪法,但是人们通常所说的宪法都指联邦宪法。

1777年,美国联邦议会通过了“联邦条例”(Articles of Confederation and Perpetual Union)。这是美国最早的宪法性法律文件。1789年,美国立法机构大陆会议又通过了一部新的宪法性文件,即联邦宪法。这部宪法至今仍然是美国的最高法律。

美国联邦宪法最初只有7条、近8000字,后来又补充了一系列修正案(Amendments)。前10条修正案是作为一个整体——合称为“人权法案”(the Bill of Rights)——于1789年由国会通过,于1791年由11个州批准而生效的。目前,美国联邦宪法共有26条修正案。正因为美国联邦宪法内容简洁、富有灵活性,而且以修正案方式不断完善,所以它才成为世界上“寿命最长”的成文宪法。

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### Text 课文

#### Part One: The Constitution as Supreme Law

The U. S. Constitution, a relatively simple document, is the self-designated “supreme law of the land”. This clause is taken to mean that when state



constitutions, or laws passed by state legislatures or the national Congress, are found to conflict with the federal Constitution, they have no force. Decisions handed down by the Supreme Court over the course of two centuries have confirmed and strengthened this doctrine of constitutional supremacy.

Final authority is vested in the American people, who can change the fundamental law if they wish, by amending the Constitution, or—in theory, at least—drafting a new one. The people's authority is not exercised directly, however. The day-to-day business of government is delegated by the people to public officials, both elected and appointed.

The power of public officials is limited. Their public actions must conform to the Constitution and to the laws made in accord with the Constitution. Elected officials must stand for re-election at periodic intervals, when their record is subject to intensive public scrutiny. Appointed officials serve at the pleasure of the person or authority who appointed them, and may be removed when their performance is unsatisfactory. The exception to this is the lifetime appointment by the President of Justices of the Supreme Court and other federal judges.

Most commonly, the American people express their will through the ballot box. The Constitution, however, does make provision for the removal of a public official from office, in cases of extreme misconduct or malfeasance, by the process of impeachment. Article II, Section 4 reads:

“The President, Vice President, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.”

In such cases, the House of Representatives must vote a bill of impeachment. The public official is then tried in the Senate, with the Chief Justice of the United States presiding at the trial.

Impeachment is considered a drastic measure in the United States. In the past 200 years, only 13 U. S. officials have been impeached: nine judges, an Associate Justice of the Supreme Court, a Secretary of War, a Senator, and a President, Andrew Johnson. (In the case of another President, Richard Nixon, although the House Judiciary Committee recommended impeachment the President resigned before a House vote was taken.) Out of the thirteen cases, only four judges have been convicted and removed from office. State officials are similarly subject to impeachment by the legislatures of their respective states.



In addition to setting forth general political ideas, the Constitution provides the blueprint for the governmental system. The three major articles describe the three branches of the national government—legislative, executive and judicial—each with specific duties and responsibilities. Subjects on which the legislative branch can make laws are set out in considerable detail, although over the years judicial decisions have expanded the scope of congressional activity. The powers and duties of the President, as head of the executive branch, are described. A system of federal courts is outlined, and its relationship to other branches of government is set forth.

### **Part Two: The Principles of Government**

Although the Constitution has changed in many aspects since it was first adopted, its basic principles remain the same now as in 1789:

The three main branches of government are separate and distinct from one another. The powers given to each are delicately balanced by the powers of the other two. Each branch serves as a check on potential excesses of the others.

The Constitution, together with laws properly passed according to its provisions, and treaties entered into by the President and approved by the Senate, stands above all other laws, executive acts and regulations.

All men are equal before the law and are equally entitled to its protection. All states are equal, and none can receive special treatment from the federal government.

Within the limits of the Constitution, each state must recognize and respect the laws of the others.

State governments, like the federal government, must be republican in form, with final authority resting in the people.

The people have the right to change their form of government by legal means defined in the Constitution itself.

### **Part Three: Provisions for Amendment**

The authors of the Constitution were keenly aware that changes would be needed from time to time if the Constitution were to endure and keep pace with the growth of the nation. They were also conscious that the process of change should not be facile, permitting ill-conceived and hastily passed amendments. By the same token, they wanted to assure that a minority could not block action desired by most of the people.

Their solution was to devise a dual process by which the Constitution could be



changed. The Congress, by a two-thirds vote in each house, may initiate an amendment. Or the legislatures of two-thirds of the states may ask Congress to call a national convention to discuss and draft amendments. In either case, amendments must have the approval of three-fourths of the states before they enter into force.

Aside from the direct process of changing the Constitution itself, the effect of its provisions may be changed by judicial interpretation. Early in the history of the republic, in the landmark case of *Marbury vs. Madison*, the Supreme Court established the doctrine of judicial review, which is the power of the Court to interpret acts of Congress and decide their constitutionality. The doctrine also embraces the power of the Court to explain the meaning of various sections of the Constitution as they apply to changing legal, political, economic and social conditions. Over the years, a series of Court decisions, on issues ranging from governmental regulation of radio and television to the rights of the accused in criminal cases, has had the effect of altering the thrust of constitutional law, with no substantive change in the Constitution itself.

Congressional legislation, passed to implement provisions of the basic law, or to adapt it to changing conditions, also broadens and, in subtle ways, changes the meaning of the Constitution. Up to a point, the rules and regulations of the myriad agencies of the federal government may have a similar effect. The acid test in both cases is whether, in the opinion of the courts, such legislation and rules are in conformity with the intent and purposes of the Constitution itself.

## Notes 注释

【1】This clause is taken to mean that when state constitutions, or laws passed by state legislatures or the national Congress, are found to conflict with the federal Constitution, they have no force. 这一条款的意思被认为是,当州宪法或者由州立法机关或美国国会通过的法律被发现与联邦宪法相抵触时,它们便无效力。

【2】doctrine of constitutional supremacy: 宪法至上原则。

【3】fundamental law: 基本法。

【4】The exception to this is the lifetime appointment by the President of Justices of the Supreme Court and other federal judges. 在这一问题上的例外是由总统对最高法院大法官及其他联邦法官的终身性委任。

【5】...express their will through the ballot box. ....通过投票选举来表示其意愿。

【6】malfeasance: 渎职行为(罪)。



【7】process of impeachment: 弹劾程序。

【8】Article II, Section 4: 第二条第4款。

【9】...shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. ....因叛国罪、贿赂罪或其他重罪和轻罪而被弹劾并被认定有罪的,应予以免职。

【10】...with the Chief Justice of the United States presiding at the trial. ....由美国(最高法院)首席大法官主持审判。

【11】drastic measure: 严厉措施。

【12】Secretary of War: 国防部长。

【13】Andrew Johnson: 安德鲁·约翰逊(1808—1875),第17任美国总统;于1868年被国会弹劾,但是该弹劾案在众议院以一票之差未获通过。

【14】... although the House Judiciary Committee recommended impeachment the President resigned before a House vote was taken. ....虽然众议院司法委员会建议弹劾,但是总统在众议院投票前辞职了。

【15】Subjects on which the legislative branch can make laws are set out in considerable detail, although over the years judicial decisions have expanded the scope of congressional activity. (联邦宪法中)相当详细地列出了立法部门可以制定法律的事项,尽管多年来的司法决定已扩展了国会(立法)活动的范围。

【16】Each branch serves as a check on potential excesses of the others. 每一部门都作为对其他部门可能滥用职权的制约。这里讲的是三权分立原则 (Separation of Powers) 和制衡原则 (Checks and Balances)。

【17】...stands above all other laws, executive acts and regulations. ....高于其他法律、行政法令和条例。

【18】... must be republican in form, with final authority resting in the people. ....形式上必须是共和制,最终权力归于人民。

【19】They were also conscious that the process of change should not be facile, permitting ill-conceived and hastily passed amendments. 他们还知道这改变的程序不应太容易,不应允许设计不周和仓促通过的修正案出现。

【20】by the same token: 由于同样原因(或理由)。

【21】judicial interpretation: 司法解释。

【22】case of Marbury vs. Madison: 马伯里诉麦迪逊案(1803)。马伯里是亚当斯总统在下台前一天任命的联邦治安法官,但是其委任状未得签发。杰斐逊总统上台后命令其国务卿麦迪逊不再签发该委任状。于是马伯里起诉到联邦最高法院,后败诉。该案的判决确立了美国法院的司法审查权。

【23】judicial review: 司法审查(权)。

【24】constitutionality: 合宪性。

【25】... has had the effect of altering the thrust of constitutional law, with no substantive change



in the Constitution itself. ……都有改变宪法指向的效果,但并未有宪法本身的实质变化。

【26】acid test: 酸度测试;严格检验(标准)。

## Exercises 练习

### 1. Questions about the text:

- ① What is the doctrine of constitutional supremacy?
- ② How can the American people change the U.S. Constitution?
- ③ Why is the power of public officials limited?
- ④ Who has the lifetime appointment in American judiciary?
- ⑤ How do American people express their will through the ballot box?
- ⑥ What is the process of impeachment?
- ⑦ How many judges have been impeached in the past 200 years?
- ⑧ Former President Nixon was not impeached, was he?
- ⑨ What is the principle of separation of powers?
- ⑩ What is the dual process of changing the Constitution?

### 2. Dictation

The Constitution has been amended 26 times since 1789, and it is likely to be further revised in the future. The most sweeping changes were made within two years of its adoption. In that period, the first 10 amendments, known collectively as the Bill of Rights, were added to the Constitution. They were approved as a block by the Congress in September 1789, and ratified by 11 states by the end of 1791.

Much of the initial resistance to the Constitution came not from those opposed to strengthening the federal union, but from statesmen who felt that the rights of individuals must be specifically spelled out. One of these was George Mason, author of the Declaration of Rights of Virginia, which was a forerunner of the Bill of Rights. As a delegate to the Constitutional Convention, Mason refused to sign the document because he felt individual rights were not sufficiently protected. Mason's opposition nearly blocked ratification by Virginia. As noted earlier, Massachusetts, because of similar feelings, conditioned its ratification on the addition of specific guarantees of individual rights. By the time the First Congress convened, sentiment for adoption of such amendments was nearly unanimous, and the Congress lost little time in drafting them.



### 3. Discussion

① Topic: what is the principle of checks and balances?

② Reference points:

A. The U. S. Constitution provides for three equal and separate branches of government. They are executive branch, legislative branch and judicial branch.

B. Each of the three branches is to some extent dependent on the other two and there is a partial interweaving of their functions. For example, the President suggests legislations to the Congress and may veto legislations passed by the Congress; the President appoints federal judges and may grant pardons from punishment for offenses against the United States; the Congress appropriates funds for the executive branch and the judicial branch and may impeach and try members of the executive branch or the judicial branch; the courts may declare any presidential or executive action unconstitutional and may declare Congressional legislation unconstitutional.

③ Instructions: The students shall first talk about the contents of the principle of checks and balances; and then discuss about the merits and demerits of the principle.

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## Supplementary Reading 补充读物

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### Part One

The framers of the Constitution had several clear-cut objectives in mind. They set these down with remarkable clarity in a 52-word, six-point preamble to the principal document.

“We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.”

The problem of building a “more perfect Union” was the obvious issue facing the 13 states in 1787. It was quite clear that almost any union would be more nearly perfect than that which existed under the Articles of Confederation. But devising another structure to replace it involved critical choices.

All the states were covetous of the sovereign powers they had exercised since the breakaway from England 11 years earlier. Balancing “states’ rights” with the needs of



a central government was no easy task. The makers of the Constitution accomplished it by letting the states keep all the powers necessary to regulate the daily lives of their people, provided that these powers did not conflict with the needs and welfare of the nation as a whole. This division of authority is essentially the same today. The power of each state over local affairs—in matters such as business organization, work conditions, marriage and divorce, local taxation, and ordinary police powers—is so fully recognized and accepted that two neighboring states frequently have widely differing laws on the same subject.

Ingenious though the constitutional arrangement was, the controversy over states' rights continued to fester until, three-quarters of a century later, in 1861, a four-year war broke out between the states of the North and those of the South. The underlying issue was the right of the federal government to regulate slavery in the newer states of the Union; northerners insisted the government had such a right, while southerners held that slavery was a matter for each state to decide on its own. The war—known as the Civil War, or the War Between the States—broke out when a group of southern states attempted to secede from the Union, and was fought on the principle of the preservation of the republic. With the defeat of the southern states, and their reentry into the Union, federal supremacy was reaffirmed.

### Part Two

A glance at the organization and provisions of the Constitution will confirm that the idea of separation of powers is central. Article I treats the legislative power and puts it in Congress, a two-house legislature of defined authority. Article II places a largely undefined executive power in a unitary executive, an elected President. Article III locates the judicial power in the Supreme Court, the state courts, and any lower federal courts Congress may choose to create. Article IV then touches in a variety of ways the other great separation of power already mentioned—that between the national government and the states.

As important as the idea of separation, and again serving the function of limited government, is the notion of checks and balances. Legislative power is divided between two houses in substantial part because that power was the most feared, and it was thought their jealousies would cause them to check one another. The President is able (within limits) to veto legislation; legislative bodies must approve appointments and can control executive behavior through denial of funds or impeachment; and so forth. By creating rivalries and jealousies, empowering each



branch to place obstacles in the way of the others' full exercise of their powers, the draftsmen believed they lessened still further the chance that government would pass beyond the people's control.

While the Constitution defines and locates the three characteristic powers of government, it is striking to note that it does not define the government itself. That is to say, it does not define the bureaucracy, the specialist institutions that carry out the specific tasks of public affairs. The first three articles confer the "legislative," the "executive," and the "judicial" powers upon generalist institutions lacking detailed responsibility for particular affairs, that might be imagined to sit at the head of the larger body of government itself. Although one can read between the lines a certain anticipation about the arrangements that would be made, the fact is that very little at all is said about the elements that would make up that larger body. The drafters agreed on a single head of the executive branch, reaching the judgment that unified political responsibility was essential. They did not agree, however, on a form of government beneath him. They left that to congressional definition.

Rejecting a plan that would have specified the cabinet departments in constitutional text, the drafters of the Constitution instead gave Congress authority to define the elements of government by enacting any law "necessary and proper" to carry out its general responsibilities for legislation. Thus, the Constitution is almost devoid of detailed specification of the relationship these elements are to have with the President or Court. The principal constraints on Congress' judgment about what sorts of institutions are proper to create for the varied work of government may be those suggested by the separation of powers idea itself. Each of these generalist institutions—Congress, President, and Court—enjoys an uneasy relationship with the other two and a relationship with the operating bureaucracy that is given character by its own unique function. Very crudely, the Congress passes the statutes that establish the individual elements of the bureaucracy and empower them to act; the President oversees and guides their performance of function under those laws, as a policy or political matter; and the courts assure their adherence to legality.

From the outset (and as almost certainly anticipated) Congress has created a government that is distinct from the President and his personal office. It has vested responsibility for day-to-day administration of the nation's laws in these governmental units rather than in him. Article II provides that the President is to appoint the heads of any Department Congress may create and that he may call on them for



written opinions about matters within their responsibility. Beyond that, it says only that he is to “take care” that the laws are “faithfully executed,” and that all executive authority is vested in him.

If Congress enacts a statute that confers discretion on a particular government official (the usual form), may the President control the way in which she exercises that discretion, substituting his judgment for hers? On the one hand, to say that he may is to flout that part of the law that assigns responsibility for that program to that official. In the current day, at least, that understanding would also place on one person more authority than could possibly be wished. On the other hand, to deny the President’s participation would undo the judgment that there is to be but one chief executive. This would permit Congress to create administrative institutions outside the separation of powers framework. It may be testimony to the difficulty of the problem that 200 years have seen no resolution. Commentators generally recognize both the excessiveness of a presidential claim of universal revisory authority and the need for some form of (lesser) political and legal relationship between the President and the statutorily defined departments, agencies and commissions that actually administer the nation’s laws.

“Separation of powers” may be spoken of, not simply as a political theory for controlling——some would say handcuff-ing——government against a feared tendency to excessive power, but also as a principle of fairness in individual dealings with citizens. Here, one invokes the idea that the one who makes or implements a rule ought not be the same as the one who judges its fair application to particular circumstances. This idea concerns the separation of the judicial power from the executivelegislative, rather than executive and legislative from each other (and the judicial). This notion is rather similar to the fundamental principle of “natural justice” under British common law, that no one ought to be a judge in his own cause.

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## Reference Translations 参考译文

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### 第一部分

(美国)宪法的制定者们心中有几个十分明确的目的。他们在正文之前那由 52 个字、6 个点组成的序言中非常清楚地将其列举出来——

“我们合众国的人民,为了组建一个更为完善的联邦;树立公正;保障国内安宁;建立共同的国防;增进一般福利;以及为我们自己和我们的后代确保自由的赐福;特为美利坚合众国制定并



确立本宪法。”

建立一个“更为完善的联邦”显然是 1787 年摆在 13 个州面前的重要问题。很明显,当时几乎任何形式的联邦都会比根据“联邦条例”而已经存在的联合形式更趋完善。但是设计另一种体制来取代现有者总包含有关键性抉择的性质。

所有各州都仍想拥有 11 年前与英国脱离后一直行使的主权。平衡“各州的权利”与中央政府的需要并非易事。联邦宪法制定者们终于完成了这项任务,其方法是让各州保留其管理人民日常生活所必须的所有权力,但是这些权力不能与整个国家的需要及福利相抵触。这种权力划分在今天仍大体如是。每个州在地方事务——如实业组织、工作条件,结婚和离婚、地方税收以及普通警察权力——上的权力得到如此充分的承认和接受,以致于毗邻两州常对同类事务有大相径庭的法律。

尽管宪法的设计如此明智,但是关于各州权利的争执仍持续了四分之三世纪之久,即直到北部各州与南部各州在 1861 年爆发了一场四年战争之时。根本的分歧在于联邦政府是否有权规制那些新加盟各州的奴隶制:北方人坚持联邦政府应有这种权力;但南方人则认为奴隶制属于各州自行决定的事务。当南方的一些州企图脱离联邦时,那场战争——被称为“内战”或“州际战争”——爆发了,而且是为了维持共和国的原则而进行的战斗。结果是南方各州战败并重新加入联邦,于是联邦至上原则再度得到确认。

## 第二部分

只要一看联邦宪法的结构和条款,就会确认那三权分立(权力分立)的思想居于核心地位。宪法第一条规定了立法权并将其赋与国会——一个权限明确的两院制立法机构。第二条将在很大程度上未加限定的行政权力置于一个单一的行政官员——经选举产生的总统——身上。第三条将司法权力交给联邦最高法院、州法院、以及国会可以决定设立的下级联邦法院。第四条随后从不同方面触及了另一个已经谈到的重大权力分立问题——即全国政府与州政府的权力分割问题。

与三权分立的思想同样重要而且也是服务于有限政府之功能的是制衡的概念。立法权被分给两院,这在很大程度上是因为该权力是最令人担忧的,而且据认为那两院之间的嫉妒心理会促使它们互相制约。总统可以(在一定限度内)否决立法;立法机关批准对官员的任命,而且可以通过拒绝提供资金或弹劾的方式控制行政行为;等等。通过设立对手和猜疑,通过授权每个政府分支可以给其他分支全面行使其权力设置障碍,宪法的起草者们确信其进一步减少了政府会脱离人民控制的机会。

虽然联邦宪法界定并分配了政府的三种特有权力,但是它同时表明其并未界定政府本身。换言之,它没有界定官僚机构——那些完成具体的公共事务性工作的专家机构。宪法前三条把“立法”、“行政”和“司法”权力授与那些不对特定事务负具体责任的“通才”机构,人们可以设想其居于政府自身那较大实体的首脑位置。尽管有人能够从宪法的字里行阅读出某种关于可能做出之安排的预见,但实际上宪法就那较大实体的组分几乎未做任何规定。起草者们同意行政部门设单一首脑,因他们都断定那统一的政治责任至关重要。然而,他们未能就该首脑之下的政府形式达成共识。他们将其留给国会去界定。

宪法起草者们否绝了一项旨在宪法中明确规定内阁各部的方案,相反,他们授权国会通过



颁布为实现其一般立法职责所“必须且适当”的法律来界定政府组成部门。于是,宪法中几乎没有关于这些政府部门与总统或法院之间关系的具体规定。在国会判断什么样的机构是完成各种政府工作所应设立的问题上,对国会的主要制约大概就来自于三权分立思想本身。这些一般化(通才)机构——国会、总统和法院——中的每一个都与另外两个有着颇不轻松的关系以及与运作官僚部门的关系,而官僚部门的特点是由其自己特有的功能所决定的。粗略而言,国会通过法律建立每一个官僚机构并授权其行事;总统作为政策或政治事务来监督和指导它们依据那些立法行使职能;而法院则要保证它们遵守法制。

从一开始(而且正如人们几乎一定会预见的),国会就创立了一个不同于总统及其个人办事机构的政府。它将日常管理国家法律事务的责任赋与这些政府部门,而未赋与总统。宪法第二条规定,总统将任命由国会设立之任何部门的首长,而且他可以要求他们就其各自职责范围内的事务提供书面意见。除此之外,宪法仅规定总统将“关照”法律得到“忠诚的实施”;并说所有行政权力均属于总统。

如果国会颁布一项法律授与某个特定的政府官员以自行决定权(这是通常的形式),那么总统可以控制该官员行使那自行决定权的方式、用其决断代替该官员的决断吗?一方面,说总统可以则等于藐视了法律的那一部分,因为该法律将该项目的责任分给了那位官员。至少在当今,那种理解还会交给一个人多于其可能被希望给与的权力。另一方面,否认总统的参与权又会推翻那只应有一位首席行政官的观点。这会允许国会在三权分立框架之外再设立行政机构。二百年来尚无解决方法,这大概足以证明此问题的难度。评论家们一般都既承认总统要求拥有全面修正权力的主张有些过分,也承认在总统和那些由法律界定而且在实际上执行国家法律的各部、机关和委员会之间保持某种形式(较少)的政治和法律关系是必要的。

“三权分立”可能被视为不仅作为控制——有人会说是桎梏——政府以防滥用权力那可怕趋向的一种政治理论,而且作为公民个人交往中的一种公平原则。在此,人们启用了那种凡制定或实施一项规则者便不应作为该规则在具体情况下适用是否公正之裁判者的观点。这一观点主要关心的是司法权力与行政和立法权力的分离,而不是行政权力与立法权力(和司法权力)相互之间的分离。这一观念很近似于英国普通法中“自然公正”的基本原则,即任何人都不应为了自己的缘故而成为法官。



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## LESSON SIX

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# Administrative Law 行政法

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### Background 背景

美国的法学家认为,行政法是管理政府行政活动的部门法。它规定行政机关可以行使的权力,确定行使这些权利的原则,以及对受到行政行为侵害的人给予法律上的补救。行政法一般被认为是属于公法的范畴,但是在美国,公法和私法之间的区别不像在大陆法系国家中那么严格,因此,美国的行政法案件也由受理私法案件的普通法院审判。

行政法包括实体法和程序法(Procedural Law)的内容。美国行政法研究的主要对象是后者。就联邦一级而言,美国的行政程序法可以追溯至 1789 年的联邦宪法修正案,但是在实质意义上的行政程序法则始于 1887 年为处理铁路工业问题而成立的州际商业委员会。该委员会是美国联邦行政部门中最早的独立规制机构(Independent Regulatory Agency)。20 世纪 30 年代,在罗斯福总统推行的“新政”(the New Deal)时期,各种联邦行政机关如雨后春笋般建立,美国的行政程序法也得到长足的发展。

美国的行政法是由宪法、法律、判例、行政规章等组成的。其中,最为重要的是联邦宪法第五修正案中的正当程序(Due Process)条款和 1946 年的联邦行政程序法(Federal Administrative Procedure Act)。诚然,判例法的作用亦十分重要。

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### Text 课文

General statutory measures that purport to deal with “administrative law” define the scope of their application in terms of three concerns: the procedures employed by “agencies” in effecting “agency action”; judicial (and, to a lesser extent, political) review of those actions; and special procedures relating to the handling and release of



information in the government's possession. Neither a court nor a legislature nor an elected chief executive can be an "agency" under these statutes, although the relationship of courts, legislatures and chief executives with agencies is very much a matter of administrative law concern. Otherwise the concept includes virtually every administrative unit exercising public authority. "Agency action" is also embracively defined. While the provisions of administrative procedure legislation generally deal with the relatively formal procedures of adjudication and rulemaking, as discussed below, federal "agency action" includes any grant, denial, or failure to act upon "the application or petition of, and beneficial to, a person"; under the most recent draft of model state administrative procedure legislation, "agency action" includes "an agency's performance of, or failure to perform, any . . . duty, function, or activity, discretionary or otherwise." Again, the category is virtually as broad as the field of public administration; only traditional criminal law proceedings, traditional civil litigation, and political acts in the strict sense, those indisputably beyond the control of law, are excluded.

It should not be surprising to find the domain of "administrative law" in the legal system so broadly defined. Scholars developed the concept toward the beginning of this century, as public administration grew. As unruly as the developments it sought to capture, it was a grab-bag for all government actions affecting private persons that did not fit comfortably any of the existing structures of legal analysis—either those of the criminal law or of the ordinary civil law as administered by courts. The scholarly view of administrative law has grown, with government, to embrace almost all subjects that can be connected with public administration. Although criminal trials are excluded, many assert that it embraces the exercise of discretion by police officers and prosecutors. Although it excludes an action initiated by the government in federal court to collect a simple debt, it would include that action if begun within an executive body and later brought before courts for enforcement or review. One might have said at the outset that it was sub-constitutional in character, concerned with statutory and customary arrangements of government; yet as the preceding pages make plain, constitutional issues respecting governmental structure and conduct are now important concerns.

In the American framework, a focus on procedural issues provides an analytic structure for generalizing about the central tasks of administrative law: assuring the control as well as the effectiveness of government. Such a focus is needed despite the



recognition that generalizations are made problematic by the diversity of agencies and agency actions, and the close relationship between the substance of any particular agency's responsibility and the procedures it will employ. Talking from the perspective of "administrative law" about the work of the Federal Securities and Exchange Commission (or of the Forest Service, or of a state public utilities commission, or a local building inspector) focuses on its procedures, rather than its particular substantive responsibility for implementing a certain part of federal (or state or local) policy. One assumes, initially, that all agencies employ certain paradigmatic procedures to accomplish their ends and that these agencies have paradigmatic relationships with overseers such as courts who review the end product of these procedures. These paradigmatic procedures and relationships can and do vary to meet the needs of particular situations. Consequently, in dealing with a concrete situation, one must always seek to understand the responsibilities and procedures of the particular agency whose work is at issue. Nonetheless, analysis usefully begins at the paradigms, which are expressed in procedural forms that are not directly a function of the particular agency whose work is under examination.

These paradigms are the focus of the following chapters. It would be wrong to anticipate them here in any detail. The remaining paragraphs of this chapter examine a variety of substantive responsibilities commonly given administrative agencies. For purposes of initial comprehension it may be useful to have the following sketchy models in mind:

**Formal adjudication:** A proceeding strongly resembling a civil trial, conducted "on the record" before an administrative law judge or agency to determine a particular dispute. Formal adjudications are generally characterized by a strict separation of functions within an agency, so that staff responsible for investigation and presentation of the agency's position do not participate in the decision process. The results of formal adjudication are generally reviewed by courts with relatively close attention to the existence of factual and legal support for the outcome.

**Informal adjudication:** Procedures for resolution of a particular dispute that do not require "on the record" hearing. If a hearing format is used, it may be quite informal. But "informal adjudication" is used to describe the taking of decisions by bureaucratic routine—for example, a decision to authorize the use of federal money for the construction of a particular road project. Judicial review is relatively permissive, recognizing considerable discretion in the person acting.



**Formal rulemaking:** A proceeding conducted “on the record” to determine a statute-like norm for future application, for example what proportion of peanuts should be required in a substance to be labeled “peanut butter,” or what is a reasonable rate to be charged for utility services. Formal rulemaking differs from formal adjudication in certain structural arrangements; those responsible for developing and presenting the agency’s analysis at the hearing, for example, are not required to be separated from the decision process as they are in formal adjudications. The character of the hearing and of subsequent judicial review, however, strongly resembles formal adjudication.

**Informal rulemaking:** The ordinary procedure for generating statute-like norms for future application. Its public stages are initiated by a notice of the proposed action; the interested public then has an opportunity to file written comments on the proposal. Oral hearings are optional, although encouraged by some statutes, for example, many connected with environmental, health, and safety rules. On adopting a rule, the agency is under some obligation to explain its basis and purpose. Decision is taken bureaucratically, and judicial review is relatively permissive, although with increasing attention to the existence or not of factual support for rules of importance. A rule once validly adopted has the full force of statutory law on those subject to it.

**Interpretation:** An informal procedure for generating and announcing agency interpretations of applicable norms. Interpretations may be generated internally or in response to a request; ordinarily no procedure is required (although procedures like those for informal rulemaking are often followed). The interpretations do not formally bind persons outside the agency, although they are likely to be regarded as persuasive by the courts. Decision is taken bureaucratically; judicial review may not be directly available and, when available, is generally deferential.

**Inspection:** Direct physical view by a qualified government official, sometimes used as a substitute for adjudication procedures (as, for example, in grading agricultural commodities, or examining the skill of applicants for a driver’s license) but also employed to determine the existence or not of conditions warranting formal administrative action.

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## Notes 注释

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[1] General statutory measures that purport to deal with “administrative law” define the scope of



their application in terms of three concerns: 那些意图涉及“行政法”的一般法定方法将其适用范围界定为三个问题:

【2】agency action: 行政行为;机关行为。

【3】administrative unit: 行政单位(它可以是某个行政机关“agency”的下属部门)。

【4】adjudication: 裁定;判决。

【5】rulemaking: 规章制定。

【6】the most recent draft of model state administrative procedure legislation: 指1981年的“标准州行政程序法”(Model State Administrative Procedure Act)。

【7】discretionary: 自由裁量的;任意决定的。在此句,“discretionary or otherwise”不是与“duty, function, or activity”并列的,而是说明其性质的。

【8】...only traditional criminal law proceedings, traditional civil litigation, and political acts in the strict sense, those indisputably beyond the control of law, are excluded. ....只有传统的刑事诉讼,传统的民事诉讼,以及那些无可争辩地超出法律控制即在严格意义上的政治行为,不在此列。

【9】Scholars developed the concept toward the beginning of this century, as public administration grew. 当上个世纪末公共管理职能增长时,学者们发展了这一概念(即“行政法”)。

【10】...it was a grab-bag for all government actions affecting private persons that did not fit comfortably any of the existing structures of legal analysis——.....它对所有那些影响到私人而且不能恰当地适用于任何现有法律分析结构的政府行为来说是一个百宝囊。

【11】the exercise of discretion by police officers and prosecutors. 由警察和检察官对其自由裁量权的行使。

【12】sub-constitutional: 准宪法性;亚宪法性;仅次于宪法的。

【13】the Federal Securities and Exchange Commission: 联邦证券交易委员会。

【14】paradigmatic procedures: 标准程序。

【15】formal adjudication: 正式裁决。

【16】on the record: 有记录的。

【17】administrative law judge: 行政法法官。

【18】informal adjudication: 非正式裁决。

【19】hearing: 听证(会)。

【20】formal rulemaking: 正式规章制定。

【21】informal rulemaking: 非正式规章制定。

【22】statute-like norm: 准(类)法律规范。

【23】statutory law: 制定法。

【24】interpretation: (规章的)解释。

【25】inspection: 检查;审查。

【26】bureaucratically: 官僚式地(在英语中,“官僚”一词并不一定有贬义)。



## Exercises 练习

### 1. Questions about the text:

- ① What is the scope of administrative law?
- ② A court is not an agency, is it?
- ③ What is "agency action"?
- ④ Why is the domain of administrative law in the legal system defined so broadly?
- ⑤ What are the central tasks of administrative law?
- ⑥ What is the difference between formal adjudication and informal adjudication?
- ⑦ What is the main difference between formal adjudication and formal rulemaking?
- ⑧ What is the difference between adjudication and rulemaking?
- ⑨ What is interpretation in administrative law?
- ⑩ What is inspection in administrative law?

### 2. Dictation

Rulemaking has a broad range of possibilities, from the setting of rates for public utilities such as bus and taxi, to the creation of binding norms to govern private conduct such as smoking and spitting.

Rulemaking procedure has three models: publication model, notice and comment model, and formal hearing model. Publication model is the simplest one among the three, because its only requirement is the publication of notice about the rule. The procedures of notice and comment model begin with the publication of notice about a proposal for rulemaking; then any interested person may submit written comments to the responsible agency for its consideration; the agency's obligation is then to publish with any rule it may decide to adopt a general statement of its basis and purpose. The main elements of a formal hearing model are notice and hearing.

### 3. Rulemaking exercise

- ① Title: Rules of the Classroom
- ② Contents: No smoking; no spitting; no slippers; no littering; no eating; no drinking; etc.
- ③ Instructions:
  - A. The students are divided into three groups: group one represents the



administrative agency——Classroom Management Committee; group two represents the students who are for the rules; group three represents the students who are against the rules.

B. Group one announces a notice about the proposed rules; and then the groups discuss the proposal separately and prepare for a hearing.

C. A hearing is held by the Committee; the students from group two and three give their arguments; and then the Committee make the decision about the rules.

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### **Supplementary Reading 补充读物**

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The fundamental right having greatest relevance to administrative law is expressed in both the Fifth and Fourteenth Amendments, the assurance that no person (here, including artificial persons) may be “deprived of life, liberty, or property without due process of law.” In their procedural aspect, these eleven words are the source of all fundamental claims about fair procedure in our legal system. We have already seen a little about the evolving understanding of these words, in the text above at notes 10 to 14. Here it may be appropriate to give more attention to issues of doctrinal structure.

While the text of the due process clause is extremely general, the fact that it is (uniquely) expressed twice in the Constitution strongly suggests an understanding that its words state a central proposition about the requirements of legal order. Historically, the clause reflects the Magna Carta of Great Britain, both its expression of principles of legality and its particular assurance that all would receive the ordinary processes (procedures) of law. They also echo that country’s seventeenth century struggles for political and legal regularity, and the American colonies’ strong insistence during the pre-Revolutionary period on observance of regular legal order. The requirement that government function in accordance with law is, in itself, ample basis for understanding the stress given these words.

The problems that have arisen under the clause come from the further perception —— steadfastly held since its adoption——that in at least some of the contexts in which government acts, the clause also limits the procedural regimes that the legislature (or the courts or the executive) can choose to employ. Thus, it is not always sufficient for the government to act in accordance with such law as there may be. In some circumstances, citizens may be entitled to have the government observe or offer certain procedures, whether



or not those procedures have been statutorily provided for. A statute denying those (unspecified) procedural protections would be unconstitutional. If, for example, a state were to enact a statute assigning all ordinary common law litigation to a non-judicial body, or permitting an administrative agency to revoke a professional license without providing a rather full opportunity to be heard on the matter, federal courts would surely find those statutes void, as threatening deprivation of life, liberty or property without due process of law.

Thus, the struggle over “substantive due process,” already recounted, circumscribed rather than eliminated the problem of judicial subjectivity in ascertaining the demands of the Constitution. If “due process” refers only or chiefly to procedural subjects, it still communicates very little about what process is “due,” and in what circumstances. Courts not willing simply to accept legislative judgments on that subject are required to go outside the document to find their norms.

This problem first became apparent in the years following the “substantive due process” struggle, first as part of a major constitutional controversy over the problem of “incorporation.” This controversy required the Supreme Court to decide which of the liberties in the Bill of Rights were so fundamental as to restrict the actions of state governments as well as the federal government. Liberties held to be fundamental in this sense were said to have been “incorporated” by the Fourteenth Amendment’s requirement that the states observe “due process of law.” In substantial part, these disputes concerned the meaning of the Fourteenth Amendment’s guarantee of “due process of law” in the context of criminal trials. The federal Bill of Rights contains a number of relatively detailed provisions on the subject of required procedure in criminal cases.

The battle in the incorporation cases, vigorously joined in the late 1940s and lasting until the mid-1960s, was precisely over styles of interpretation. Those arguing for incorporation, in the end largely successful, saw it as a means for containing judicial subjectivity. They believed that the provisions of the Bill of Rights that were to be incorporated had quite definite content, as they were already the subjects of a substantial jurisprudence about their meaning in application to the federal government. The opponents of incorporation were Justices who thought the Fourteenth Amendment’s guarantee of “due process” in criminal trials did not entail a list of specific procedures mirroring the Bill of Rights, but only an assurance of those liberties “indispensable to the dignity and happiness of a free man”——a catalog to be



identified by reference to the Justices' own informed sense of what constituted the needs of civilization. Proincorporationists found this as objectionable as the subjectivity that had underlain the "substantive due process" imbroglio. Importing the provisions of the Bill of Rights, and only those provisions, appeared to offer sufficient certainty of outcome, a freedom from judicial fiat.

No such easy solution was at hand for procedural claims concerning administrative and civil judicial actions, however, since for such proceedings the Bill of Rights was no more detailed than the Fourteenth Amendment. In either case, only the requirement that "due process" be observed was available in the constitutional text. Moreover, both the jurisprudence of fair procedure and the available techniques for resolving questions that might arise were quite undeveloped. Nineteenth century cases, largely challenges to tax assessment procedures, had developed the proposition that determinations turning on individualized facts about the taxpayer or his property required an opportunity for hearing that had some (albeit informal) trial-like characteristics—there must be some opportunity for oral presentation of evidence and argument by the taxpayer before a final determination is made, the Court said, but if such an opportunity was afforded it was permissive about the details.

The constitutional inquiry had two arguably separate elements: whether any procedures at all were "due"; and, if so, just what those procedures were to be. As regulation became more and more prevalent, dispute over the necessity for some form of oral hearing repeatedly arose in varying circumstances. Despite much debate over the question just what procedures that right to hearing entailed, however, little judicial development occurred. The question whether any procedures at all were constitutionally "due" became trapped in a sterile classification of "rights" and "privileges." Deprivation of a "right" was said to require an oral hearing where deprivation of a "privilege" did not. Many important relationships with administrative government, such as licenses or public employment (but not all, and not according to a discernible pattern), fit into the "privilege" category. On the second question, the detailed provisions made for trial-like procedures by enactment of the federal Administrative Procedure Act in 1946 pretermitted for a while the necessity of defining constitutional content for those hearing rights at the federal level. A Supreme Court decision made a few years after its adoption went so far as to suggest that the arrangements it made were what the Constitution required.

The political investigations of the 1950s provided numerous occasions for



consideration of due process issues in both judicial and administrative settings, at the same time as the struggles over “incorporation” were giving emphasis to the problems of and need for exact definition of procedural rights (albeit, there, in a criminal context). Efforts to deprive government workers of their jobs, based on rumors generated by faceless informers, underscored the importance of fair and open procedures to maintaining public trust in government. These loyalty and security hearings also brought into question the (previously) easy conclusion that office-holders, possessors of a mere “privilege,” had no claim to procedural protections. And they emphasized the value, in an administrative context, of procedural protections long associated with Anglo-American criminal trials: the right to have the assistance of counsel; the right to know one’s accuser and the evidence against one; the right to confront and cross-examine that person; the right to have decision based solely upon a record generated in open proceedings; as well as the right to present argument and evidence on one’s own behalf.

Yet, for each case that seemed to demand a detailed procedural prescription, another plainly required flexibility. A legislative investigation of alleged communistic activities could not be undertaken without respecting witness’ claims to procedural safeguards; but the Court would not burden a legislative investigation into civil rights issues with rigid procedural requirements, although the investigation’s conclusions might harm the reputation of witnesses before it in some parts of the country. An aeronautic engineer could not be threatened with loss of access to military secrets on which his profession depended, on the basis of anonymous accusations about his loyalty, without the opportunity to confront the information and his accuser; but a cook on a military installation threatened with loss of access to the installation (and hence that particular job), apparently on the basis of undisclosed concerns about her security status, had in all the circumstances no similar claim. The Court during this period seemed to agree on little, save the proposition that what the Due Process Clause required could only be determined on the basis of all the circumstances of a given case—a view not far distant from “the very essence of a scheme of ordered liberty.”

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### Reference Translations 参考译文

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同行政法关联最大的基本权利表述在第五条和第十四条修正案中,在这两条中确定任何人(在此包括法人)“都不能被剥夺生命、自由或财产。”从程序方面,这 11 个字是法律体系中对



正当程序的所有基本要求的一切来源。我们已经看到了一些对这些字的扩展理解。在此对原文结构加以注意是很适当的。

正当程序条款的内容极为一般,但作为唯一两次表述在宪法中的这一事实却暗示着一种意思,这就是它的这些字陈述了要求法律秩序的中心主张。从历史意义上说,这个法律条文反映了大不列颠的大宪章,无论是对于合法原则的表述,还是它对于一切按普通法律程序办事的特别承诺。它们也是美国 17 世纪为政治和法律秩序斗争结果的反映,也是美国殖民地在革命前期对固定法律秩序坚决主张的反映。政府职能同法律相一致的要求的本身是理解这些句子的充足基础。

由这个条文所产生的问题来自更深远的理解——自其通过之日起就不变地坚持着——即至少在政府行为的某些情况下,该条文还限制了立法机关(或法院或行政机关)可以选择使用的程序。这就是说,政府仅仅依照那可能颁行的法律行动可能还不够。在有些情况下,公民可以有权要政府遵守或提供一定的程序,无论这些程序是否已由法律所规定。否定这些程序的法律条款(不详细)将是违宪的。例如,一个州将制订一法律条款,指定所有一般的普通法诉讼由非审判人员处理或者公诉一个行政官员在没有提供一个充足的听证机会的情况下而吊销一个营业执照,联邦法庭将肯定地发现这些法律无效,就如同威胁剥夺生命、自由或财产而未经正当的法律程序一样。

因此,那已谈及的关于实体正当程序的争论只是限制了而不是消除了在确定宪法要求时的司法主观性的问题。如果“正当程序”仅仅或主要涉及程序问题,那么对于什么是“正当”和在什么情况下才算正当则仍然表达甚少。不愿简单地接受立法机关之判断的法庭被要求到该文件之外去寻找它们的标准。

这个问题在关于“实体正当程序”的争论以后几年内变得明显了。首先,它成为关于“合并”问题合法性的主要辩论的组成部分。这一争论要求最高法院解释在“人权法案”中哪一项自由是如此重要的,以致于它能限制州政府的行为和联邦政府的行为。在这种意义上所被坚持的自由已经被第十四修正案对正当程序的要求所合并。在实质的部分,这些争议关系到第十四修正案对于刑事审判中正当法律程序的保障。联邦“人权法案”包含了许多比较详细的条款,这些条款是关于刑事案件中所要求之程序的问题。

关于合并问题的争论于 20 世纪 40 年代后期蓬勃兴起且一直持续到 20 世纪 60 年代中期,这个争论是有关法律解释的明显典型。那些支持合并而且最终大获全胜的人们将它作为包容审判主观性的手段。他们认为被合并的“人权法案”的条文有十分明确的内容,因为它们已经是可适用于联邦政府的实体性法学的主题。反对合并的是一些大法官,他们认为第十四修正案对刑事审判的正当程序保障并没有引起一系列反应“人权法案”的程序。它不过是对“一个自由人之尊严和幸福的必要的”自由的承诺——是用以给法官根据自己对文明要求的组成进行判断的参考目录。主张合并的人发现这同主观性一样不受欢迎,其仅强调了“实体正当程序”的复杂性。引进“人权法案”的条款——而且只有这些条款——看来提供了对于从法官命令中得到自由这一结果的充分确信。

然而,关于行政和民事法律行为并没有如此现成的容易解决办法,因为对这种诉讼来说,“人权法案”并不比第十四修正案更详细。在任何一种情况下,对于遵守正当程序的要求只有在



宪法内容中得到,而且正当程序的法律制度和可以得到的解决问题的技巧都没得到发展。19世纪的案例向征税程序提出了极大的挑战。它们已经发展了这一法律规定,即那些根据纳税人或其财产的个体情况而裁定的主张要求有听证的机会,这一听证有类似审判的特征——即必须有纳税人的口头证据和争辩,然后才能作出最终的结论。该法院说,如果提供了这种机会,那么细节则可随意。

对宪法的探究有两个相互独立的有争议的要素:是否任何程序都是正当的;如果是这样那么这些程序是什么。由于规则变得越来越普遍,对于某种形式之口头听证是否必要的争议便重复出现在各种情况之下。尽管很多争论都涉及何种程序应有权获得听证,但是却没有出现什么司法上的进展。是否所有程序都在宪法上是“正当的”这个问题在对“权利”和“特许权”的无效分类上陷入了困境。据说剥夺权利要有口头听证,而剥夺特许权则不要求听证。很多同行政管理机关的重要关系,如执照,公共雇佣关系(但并不是全部,而且没有一个明确的模式),都属于“特许权”的范畴。对于第二个问题,由1946年联邦行政程序法的实施所作出的用于类似审判的详细规定曾一度忽略了在联邦水平上对听证权利给出宪法内容上的定义的必要性。最高法院的一个决定是在先实用数年之后才作出的。由于作出前已经适用很广,所以人们说这种安排是合乎宪法的。

20世纪50年代的政治调查为在审判和行政环境下考虑正当程序问题提供了众多的机会。同时,关于合并的争论也将诉讼权利问题和对于诉讼权利明确定义的要求突出出来(诚然,这是刑事上的内容)。对于在匿名控告者的谣言基础上剥夺政府工作人员工作的作法,人们强调了公正和公开的程序对于维护政府在公众中信誉的重要性。那些关于忠诚和保安的听证会也给这个问题带来了简单的结论,即行政机关的负责人和特许权拥有者对诉讼程序保障没有请求权。他们强调英美刑事审判相联系的诉讼程序在行政内容上的价值:获得律师支持的权利;知道控告者和证据的权利;同原告对质和对原告进行交叉盘问的权利;要求只能依据公开程序记录做出决定的权利;以及为自己提供辩护和证据的权利。

然而,对于每一个似乎要求详细的诉讼规定的案件来说,其他的则明白地要求灵活性。对于声称但没有得到证实的政治活动的立法调查,在没有考虑证人对诉讼保障的要求时不能被许诺;但是法庭不愿将严厉的诉讼程序要求赋与对民权问题的立法调查,尽管这种调查结果在本国家的有些地方可能会伤害证人的名声。一个航天工程师不能仅因关于其忠诚的匿名控告就被威胁剥夺其接触那些与其工作有依赖关系的军事秘密的权利,而不给他同控告书和控告人进行对证的机会。但是,基于未讲明的对其保安身份的担忧而对一个在军事设施工作的厨师威胁说他将失去他在该设施的机会(即其具体工作),那么他则明显地在任何情况下也没有相似的要求听证的权利。在这一时期似乎很少能达成一致意见的法庭保留这一主张,即正当程序条款所要求的只有在所给定之案件所有情况的基础上才能决定——一种同“被授权之自由的本质”相差不远的观点。



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## LESSON SEVEN

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# Criminal Law 刑法

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### Background 背景

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美国的刑法主要属于各州的司法管辖权范围。换言之,绝大多数犯罪都受各州刑事法律的管辖。联邦政府只是在涉及民权、税收、邮政、商业等问题上制定了一些刑事法律。此外,针对联邦官员和联邦财产的犯罪也受联邦法律管辖。虽然美国的刑法是在判例法的基础上发展起来的,但是目前美国各州都有自己的刑法典。1962年批准的《标准刑法典》(Model Penal Code)对联邦和各州的刑事法律都产生了重大的影响。

刑法中的主要问题有三个:犯罪(crime)、刑罚(punishment)和刑事责任(criminal liability)。在美国,各州法律中关于犯罪定义和种类的规定并不尽同。一般来说,犯罪可以分为重罪(felony)和轻罪(misdemeanour)两大类。而每一种犯罪又可以分为若干等级,以表明其相对的严重性。刑罚一般都由法官确定。虽然刑法典中没有量刑标准,但是联邦和各州多有指导法官判刑的量刑指南(Guidelines for Sentencing)。美国在1965年废除了死刑(capital punishment),但是在1976年又开始恢复死刑。南部各州恢复死刑较早。纽约州直到1995年才恢复死刑。目前,美国大约四分之三的州的法律规定有死刑,而没有死刑的州主要集中在美国的东部和北部。从1976年至1992年11月5日,美国共有184人在20个州被执行死刑,而在狱中等待死刑的囚犯为2636人。美国的死刑上诉程序十分复杂,而且名目繁多,耗费时间,因此,死囚犯在狱中等待死刑的时间超过20年者屡见不鲜。刑事责任问题中最有代表性也最易产生争议的就是被告人是否有精神疾患(insanity)的问题。在杀人罪等重大刑事案件的审判中,被告方进行“精神不正常辩护”(insanity defense)的作法十分常见。1981年3月发生在华盛顿市的辛克雷企图谋杀里根总统案就是一个绝好的实例。



## Text 课文

### **Homicide**

Homicide is the killing of one human being by another human being. Not all homicides are criminal, however. For instance, a person who kills another in self-defense has committed no crime; it is justifiable homicide. The same is true of the police officer who kills a person to prevent the commission of a forcible felony, such as robbery or burglary, when the killing is a reasonably necessary preventive measure; or when the officer kills a dangerous felon in order to prevent his escape. Then, too, some killings are excusable homicides; for instance, where a person accidentally, and without gross negligence, causes the death of another individual.

A killing amounts to a criminal homicide when it is done without lawful justification or excuse. Depending upon certain circumstances it may be either murder or manslaughter.

In the early days of our country, and prior thereto in England, the elements of the crimes of murder and manslaughter were prescribed by court decisions. These decisions came to be known as the "common law". Since then, in most jurisdictions murder and manslaughter have been redefined by the legislatures, either in the form of a separate statute or as a provision of a criminal code.

#### **1. Murder**

According to the common law, murder was the killing of a human being with "malice", and the requirement of "malice" is still found in some present-day statutes and codes. The California Penal Code, for instance, has retained it. That code provides, as did the common law, that

"... malice may be express or implied. It is express when there is manifested a deliberate intention to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

A clear illustration of express malice is a case where one person intentionally pushes another off the side of a mountain. An example of implied malice is where a person fires a rifle at a moving passenger train, just "to scare" the persons aboard or



to display skill at firing a bullet between the cars without hitting anyone. The dangerousness of the conduct would be evidence of "malice" as regards any killing that may be reasonably attributed to such conduct. It would indicate, to a California court or jury, "an abandoned and malignant heart".

The penalty for murder is punishable by death in some states; in others by prison terms extending to "life" or a specified number of years.

#### **(a) Felony-Murder**

Another example of a satisfaction of the element of malice is a killing during the course of a felony such as robbery. Even though a robber's gun goes off accidentally, killing the robbery victim, or a bystander, or a police officer, his conduct of committing such a dangerous crime as robbery satisfies the requirement of malice so that the killing becomes punishable as murder. A similar line of reasoning has resulted in holding co-felons guilty of murder where, in the course of an exchange of shots between robbers and the police, a police officer is accidentally killed by another officer.

Malice may also be attributed to a robber whose partner in the crime intentionally kills someone during the commission of the crime or the attempted escape. Malice on the part of all participants is implied from the dangerousness of the robbery itself; moreover, each robber is considered to act as an agent for the others in accomplishing their objective, including the attempt to escape.

This whole issue of felony-murder stems primarily from the prosecution's interest in seeking the death penalty for such killings. In some of the states which have abolished capital punishment (Wisconsin, for example), the legislatures, out of an understandable desire to punish robbers more severely whenever a killing results, have provided that the punishment for such offenses shall be fifteen years greater than that provided for non-fatal robberies.

#### **(b) Degrees of Murder**

Some states have specified varying penalties for murder, depending upon the circumstances of the killing. A "willful, deliberate and premeditated" killing, such as a poisoning or a killing during the commission of a dangerous felony, may be labeled first degree murder and punishable by death or long imprisonment. Other forms of murder may be of the second degree and punishable with a lesser penalty. According to the common law, however, there were no degrees of murder. Any unlawful killing was either murder or manslaughter.



## 2. Manslaughter

Manslaughter was defined at common law as an unlawful killing of another without malice. It could be either voluntary or involuntary.

Manslaughter, in contrast to murder, is usually punishable by a prison term which may range from one year to ten or fourteen years.

### (a) *Voluntary Manslaughter*

An intentional killing upon "great provocation" and "in the heat of passion" constitutes the crime of voluntary manslaughter. A classic example is the killing by a husband (or wife) who unexpectedly finds his or her spouse in an act of sexual intercourse with another person, or in a situation evidencing impending or immediately concluded adulterous conduct. A killing of the paramour or of the spouse, or both, in such a circumstance would fall within the category of manslaughter because (a) the provocation was great, and (b) the killer was in the "heat of passion".

A killing of this type is treated less harshly than murder, out of consideration for the frailties of human nature. In other words, there is an understanding appreciation that the instinctive reaction of the husband (or wife) in such a situation is to kill or do other serious harm. Nevertheless, there is a feeling that such conduct should be discouraged by a criminal sanction, but one with a penalty considerably less than for the crime of murder.

It is of interest to note that in such paramour killing cases the conviction rate is quite low, primarily because of the willingness of juries to accept occasionally the frequently concocted explanation that the killing was done in self-defense; in other words, the paramour attacked the spouse, who killed his "attacker" only in order to keep from being killed himself. The result of acquittal in such cases is sometimes described in the press as an acquittal by reason of "the unwritten law".

A few states (Texas, New Mexico, and Utah) have tried to simplify the whole matter of paramour killings by legalizing such killings where the paramour is caught in the act. But in those states the privilege does not extend to the killing of the participating spouse!

In applying the test of whether an intentional killing was upon great provocation and in the heat of passion, the question is put to the jury, or to the judge in non-jury cases, as to whether the accused reacted as a "reasonable man". Technically speaking, it is not the



particular sensitivity or temper of the killer that is taken into consideration, but rather an effort is made to determine how a “reasonable man” might have acted under similar circumstances. An illustration of this is a famous English case where a sexually impotent man felt insulted by the remarks of a prostitute with whom he had tried in vain to have sexual intercourse, and he proceeded to kill her. He contended that his sensitivity over his condition should be taken into account in determining whether there was serious provocation for this reaction, but the court held that his conduct was to be judged by the standard of an ordinary, normal “reasonable man”.

**(b) *Involuntary Manslaughter***

Involuntary manslaughter may be described generally as an unintentional killing resulting from gross negligence, or as a result of dangerous unlawful conduct. For example, a person who throws a heavy object from the upper stories of a building into an alley used with some frequency by pedestrians may be guilty of manslaughter if a killing results. Likewise, a motorist may commit manslaughter if he kills a child at a school crossing while travelling at an excessive speed.

A number of states have created a related crime known as “reckless homicide” or “negligent homicide”, for application to killings by motorists who were driving in a reckless or grossly negligent manner. This special kind of homicide legislation was enacted because of the difficulty encountered in convicting motorists for the more revoltingly labeled offense of manslaughter (i. e., the slaughter of a man), which also carried, traditionally, a minimum penalty of one year in the penitentiary. It was thought advisable to categorize such conduct with the less revolting label of reckless or negligent homicide and also to permit the imposition of lesser penalties than the one prescribed for manslaughter. Stated another way, it is better to obtain a reasonable number of convictions carrying relatively light penalties than to get very few convictions carrying heavy penalties. The permissible range of penalties in reckless homicide or negligent homicide statutes is generally a fine up to \$1,000, or incarceration other than in a penitentiary for any period up to one year, or imprisonment in a penitentiary up to five years. (Where the traffic victim of such conduct does not die, another new statutory offense may be invoked——“reckless conduct”.)

The flexibility of penalties in traffic death cases has the effect of encouraging pleas of guilty from offenders, and it results in convictions that might not be secured if a judge or jury had no choice other than a penitentiary sentence or an acquittal.



### 3. Federal Homicide Law

There is no general federal homicide law. There can be none, in fact, since constitutional authority is lacking for Congress to legislate upon the subject, except with respect to killings within a federal territory, in federal buildings or upon other federal property, or killings of federal officials or officers.

#### *Example*

X, without justification or excuse, shoots and kills Y in a Post Office.  
X has committed a federal offense of criminal homicide.

#### *Example*

X, a bank robber fugitive about to be apprehended by an F. B. I. agent, shoots and kills the agent. X is guilty of a federal crime of murder.

### 4. Modern Murder-Manslaughter Legislation

In most states the crimes of murder and manslaughter are covered in state statutes closely patterned after the common law. A trend is now under way, however, to modernize the law. The 1961 Illinois Criminal Code is a good example. In defining murder, for instance, it avoids such language as "malice" and "abandoned and malignant heart", and uses more precise and meaningful terminology.

According to the Illinois Code, a person who kills another individual *without lawful excuse* commits murder (a) if he intended to kill him or do great bodily harm; or (b) if, without intending to kill, it clearly appears that he must have known that his conduct probably would cause death; or (c) if death resulted from *the commission of a very serious crime* like robbery, burglary or rape.

### 5. Capital Punishment

For many years there has been much controversy as to whether capital punishment serves its intended purpose—a deterrent to murder. The issue is still unresolved among researchers on the subject. The capital punishment controversy has become rather academic, however, by reason of the rapid decline in executions in recent years. Although there were 199 executions in 1935, there was only one in the entire United States in 1966, two in 1967 and none in 1968. Yet in each of the latter three years over four hundred persons were under sentence of death.

In addition to an increasing unwillingness to execute murderers who have been



sentenced to death, a legal concept was recently developed and enunciated by the Supreme Court of the United States regarding jury selection in capital cases that will make jury imposition of the death penalty much more difficult to obtain. The Court held that prospective jurors could not be rejected solely because of conscientious scruples against the death penalty. To do so, said the Court, constitutes a deprivation of due process, because the defendant would not then be accorded a trial by a "fair and impartial jury".

Exclusion because of such beliefs alone is permissible only when the prospective juror states that he would not consider setting them aside in the particular case for which he was called for jury service.

### Notes 注释

【1】homicide: 杀人(罪)

【2】self-defense: 自卫;正当防卫。正当防卫还可表述为 necessity in selfdefense; 而 necessity 本身又有紧急避险的含义。

【3】justifiable homicide: 正当杀人

【4】forcible felony: 暴力性重罪

【5】robbery: 抢劫(罪)

【6】burglary: 入室盗窃(罪)

【7】felon: 重罪犯

【8】excusable homicide: 可宽恕的杀人

【9】gross negligence: 严重过失

【10】criminal homicide: 有罪杀人

【11】murder: 恶意杀人;谋杀;凶杀

【12】manslaughter: 非恶意杀人;非预谋杀人

【13】prior thereto in England: 在那时以前的英格兰

【14】element of crime: 犯罪要素(件)

【15】criminal code: 刑法典

【16】malice: 恶意;预谋

【17】the California Penal Code: 加利福尼亚州刑法典

【18】... malice may be express or implied: .....恶意可以是明示的或暗示的。

【19】deliberate intention: 故意

【20】provocation: 挑衅;激怒;刺激

【21】... the circumstances attending the killing show an abandoned and malignant heart. ....该杀人行为的有关情况表明了一颗冷酷邪恶之心。



【22】The dangerousness of the conduct would be evidence of "malice" as regards any killing that may be reasonably attributed to such conduct. 至于那些可以合理地归入这种行为范畴的杀人, 该行为的危险性就是“恶意”的证明。

【23】felony-murder: 重罪恶意杀人

【24】co-felons: 重罪共犯

【25】death penalty: 死刑

【26】non-fatal robberies: 无致命抢劫

【27】degrees of murder: 恶意杀人罪的等级

【28】first degree murder: 一级(恶意)杀人(罪)

【29】imprisonment: 监禁

【30】second degree murder: 二级(恶意)杀人(罪)

【31】voluntary manslaughter: 自愿性非恶意杀人;故意杀人

【32】involuntary manslaughter: 非自愿性非恶意杀人;过失杀人

【33】killing... "in the heat of passion": 激情杀人

【34】adulterous conduct: 通奸行为

【35】paramour: 奸夫;奸妇

【36】frailty of human nature: 人类的意志脆弱性

【37】criminal sanction: 刑事处分;刑罚

【38】conviction rate: 判(定有)罪率

【39】... acquittal by reason of "the unwritten law". ..... 根据“不成文法”作出的无罪判决。

【40】legalizing: 使合法化

【41】privilege: 特许权

【42】in non-jury cases: 在非陪审团审的案件中

【43】sexually impotent man: 无性交能力的男人

【44】... with whom he had tried in vain to have sexual intercourse. .... 他曾徒劳地试图与之性交

【45】unintentional killing: 非故意杀人;过失杀人

【46】school crossing: 学校区的人行横道(汽车司机到此应减至一定限速)

【47】reckless homicide: 疏忽大意杀人(罪)

【48】negligent homicide: 过失杀人(罪)

【49】penitentiary: (罪犯)教养所;监狱

【50】Light (heavy) penalty: 轻(重)刑

【51】incarceration: 监禁;禁闭

【52】statutory offense: 法定罪

【53】pleas of guilty: 有罪答辩(辩护);认罪

【54】... it results in convictions that might not be secured if a judge or jury had no choice other than a penitentiary sentence or an acquittal. .... 它导致了那些如果法官或陪审团只能选择监禁刑



或无罪释放便可能无法得到的有罪判决。

【55】federal homicide law: 联邦杀人罪法

【56】federal offense of criminal homicide: 联邦杀人罪(违反联邦法律的有罪杀人行为)

【57】bank robber fugitive: 银行抢劫逃犯

【58】the 1961 Illinois Criminal Code: 1961 年的伊利诺斯州刑法典

【59】... a person who ... commits murder (a) if ... 一个……的人就是犯了杀人罪,如果(a)

.....

【60】jury selection in capital cases: 在死刑罪案件中陪审员的挑选

【61】imposition of the death penalty: 判处死刑;死刑判决

【62】The Court held that prospective jurors could not be rejected solely because of conscientious scruples against the death penalty. 该法院裁定:即任陪审员不得仅仅因为其反对死刑的良心顾忌而被要求退出陪审团。

【63】To do so, said the Court, constitutes a deprivation of due process...该法院说,这样做就构成了对正当程序(权利)的剥夺.....

## Exercises 练习

### 1. Questions about the text:

- ① What is homicide?
- ② Please give some examples of justifiable homicide.
- ③ What is the difference between murder and manslaughter?
- ④ What is felony-murder?
- ⑤ How many degrees of murder were there, according to the common law?
- ⑥ What is the classic example of voluntary manslaughter?
- ⑦ What is involuntary manslaughter?
- ⑧ What is a federal crime of murder?
- ⑨ What is murder according to the 1961 Illinois Criminal Code?
- ⑩ What legal concept was developed by the U.S. Supreme Court in 1960's?

### 2. Listening comprehension

On March 30, 1981, a young man, John Hinckley, shot President Ronald Reagan in Washington, D.C.. Hinckley was arrested after the shooting by the local police officers and the Secret Service agents. He was first taken to the Washington, D.C., police headquarters, and transported to the FBI field office later. He was formally placed under arrest for violation of the Presidential Assassination Statute.

After prosecution, the defense attorney made an insanity defense, which meant



that Hinckley did the shooting but he was insane. At the trial, psychiatrists for the prosecution testified that Hinckley was sane; but psychiatrists for the defense testified that Hinckley was insane. The FBI agents had obtained some background information, which would be relevant to the issue of insanity defense, through the questioning of Hinckley following his arrest. However, the D.C. District Court ruled that the "background" information could not be used as evidence, because it was the result of an interrogation conducted after Hinckley's request for an attorney, which was a violation of the doctrine of Miranda Warnings. The trial court ruling was affirmed by the D.C. Court of Appeals, and the government took no further appellate action. After deliberation, the trial jury found that Hinckley was insane, in other words, the defendant should not be responsible for the shooting.

### 3. Discussion

① Topic: Issues about Hinckley case.

② Questions:

A. Is Hinckley's shooting of President Reagan a murder?

B. Is Hinckley's shooting a federal crime?

C. What do you think of the doctrine of Miranda Warnings?

D. What do you want to comment on the psychiatrists' testimonies?

E. Should Hinckley be responsible for the shooting? And why?

③ Reference to the doctrine of Miranda Warnings:

On June 13, 1966, the Supreme Court of the United States, in a five to four decision in *Miranda v. Arizona*, established a requirement that before anyone in police custody may be interrogated, the interrogator must advise the suspect that: A. he has a right to remain silent; B. anything he says may be used against him; C. he has a right to a lawyer; and D. if he cannot afford a lawyer one will be provided free. It became known as the doctrine of Miranda Warnings later.

④ Instructions:

The students are required to prepare for the discussion individually, and participate group discussion before the class session.

### Supplementary Reading 补充读物

To understand the nature of the substantive criminal law, we must first explore the basic concepts that distinguish crimes from other violations of the law. To



appreciate the range of the criminal law, we also should be aware of the many different categories of crimes. This chapter examines both of these aspects of the criminal law.

### **The Legal Definition of Crime**

The traditional legal definition of a crime is restated in the statutes of most states. While that restatement varies slightly from jurisdiction to jurisdiction, the definition contained in the California Penal Code is typical:

A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: (1) Death; (2) Imprisonment; (3) Fine; (4) Removal from office; or (5) Disqualification to hold and enjoy any office of honor, trust, or profit in this State.

Several features of this definition help to explain the legal principles underlying the concept of "crime." First, a crime, as a creature of the law, requires an act that violates the law as opposed to violating customs, religious standards, or some other means of social control. There are, however, many acts that violate the law, but are not crimes. Breach of contract, for example, is illegal, yet not ordinarily criminal. To turn an illegal act into a criminal offense, further elements are needed. The California definition also describes a crime as a "public offense". A crime, in other words, is viewed as an illegality against the interests of the public as a whole as opposed to an illegality only against the individual victim of the violation. As we noted in Chapter Two, it is this factor which largely distinguishes the criminal law from the civil law and explains why the judicial enforcement of the criminal law is pursued by a public official (the prosecuting attorney) on behalf of the state. The concept of the crime as an act against the public also explains a third element of the traditional definition—that a crime is an act which may lead to the imposition of punishment.

The California provision lists five different forms of punishment. Each of these is designed to vindicate the interests of the public (largely by preventing future offenses) rather than to compensate the individual victim. As a practical matter, the court's authority to impose the second and third of the mentioned punishments (imprisonment and fine) are the crucial elements in identifying most crimes. The death penalty is limited to a narrow class of homicides which clearly are crimes. The two other categories of punishment, both relating to the holding of public office,



almost always are provided for under laws that also provide for imprisonment or fine. If a question arises as to whether some act prohibited by law is a crime, the court will look to the potential consequences that may be imposed upon the violator. If it finds that imprisonment or a punitive fine may be imposed, it recognizes that the behavior is viewed as an offense against the public and, hence, a crime.

Although the concept of a criminal offense is well established today, this was not always the case. The recognition of a class of illegal acts known as crimes was a product of a gradual historical development. Society made several crucial determinations in accepting the concept of crime, some of which are still being reexamined today. First society had to determine that there were some actions that should be viewed as injurious to the public as a whole rather than just to the individual victim. This decision, in turn, was followed by the conclusion that such actions were appropriately subject to punishment. Finally, various determinations had to be made as to what punishment could legitimately be imposed. A brief review of each of these developments provides further insight into the nature of crime.

### **Historical Development of the Concept of a Public Offense**

Originally, the acts we now view as crimes were torts; in other words, all wrongs were originally considered to be private wrongs. In the early history of the law, the state (in those days represented by the king) did not concern itself with punishing wrongs except those directed against the state, such as treason. In the case of A putting out the eye of B, it was B's responsibility to "get even," which he often did by trying to put out the eye of A. In many societies, not only was it B's responsibility to punish A, it was also the responsibility of all of B's family or kin to see that the damage done to B was punished. Sometimes, under such circumstances, A could not be found, so it became the custom to "get even" by putting out the eye of any one of A's family or kin who could be located. A blood feud developed in which every member of B's family was seeking to avenge B on any one in A's family they could find. Since A's family couldn't be expected to be happy about this, the result often was that everyone in A's family was trying to inflict injury on everyone in B's family. Such feuds could wipe out entire families on both sides.

Feuding was costly in terms of lives and property; it also destroyed the peace of the community. The king did not appreciate either consequence very much. The king saw that he was losing many good soldiers because his subjects were killing each other. So the king took over the right and the responsibility of punishing offenders.



The king said in effect, "If one citizen inflicts an injury on another, the injured party must report it to me, and I will take care of punishing the wrongdoer." Conduct which resulted in injury to one of the king's subjects was declared to be an offense against the king's peace. The action brought against the offender was brought in the king's name. To this day, a crime is seen to be an offense against the "king's peace," although today the king has been replaced by the state. In Texas, every criminal charge, after setting out the offense, ends with the words "against the peace and dignity of the State of Texas."

In many societies, the king also found another significant justification for the treatment of certain illegal acts as offenses against the king. In these societies, the individuals involved began to realize that blood feuds were an extremely unsatisfactory way of settling arguments. The payment of compensation gradually replaced feuding as a remedy for many wrongs. If a man stole a cow, he or his family was entitled to get a cow back from the thief. If the thief had killed the stolen cow, and had no cow at the time of the action, then, after the invention of money, the victim could collect from the thief in money the value of the cow. The king noticed this exchange of money and decided he ought to get some of it for himself. So he not only decided the punishment due the thief for breaking the king's peace, he also required that the thief or his family pay him money. The compensation for the cow went to the owner of the cow, but the fine went to the king. This was the origin of our modern system of fines in criminal cases.

One author sums up the historical development of the notion of "crime" in this way: "The concept of criminal law emerged only when the custom of private vengeance was replaced by the principle that the community as a whole is injured when one of its members is harmed. Thus the right to act against a wrongdoing was, indeed, granted to the state as the representative of the people."

### **The Development of Punishment**

**Early Forms.** Punishments originally consisted of either fines, the infliction of bodily harm (known as corporal punishment), or execution (capital punishment). The primary forms of corporal punishment were branding, flogging, and mutilation. Still another early form of punishment was banishment—exclusion from the community. All of these early forms of punishment have persisted through modern times and are to be found today in at least some parts of the world. In our part of the world, however, many of these early forms of punishment have been completely or



largely eliminated and new forms of punishment have been replaced them.

**Modern Forms of Punishment.** At the time the American colonies broke away from England, over 200 different felonies were recognized under English law, and each of the felonies was subject to capital punishment. Many of the felonies of that period, though capital offenses, were offenses we today would classify as no more than misdemeanors. Eighty percent of the executions were for property offenses, and some involved only petty theft. Executions were public affairs, attended by huge crowds, and often carried out as cruelly as possible. As might be expected, considerable dissatisfaction existed, both in this country and in England, with the heavy use of capital punishment. Courts and juries managed in various ways to avoid the imposition of the death sentence. Judges, for example, had the authority in certain crimes to reduce the sentence in their discretion to a less severe form of corporal punishment (e. g. , flogging).

Another much used form of punishment in England was transportation of convicts to overseas colonies. Certain of the American colonies were populated almost entirely by felons fleeing the harsh punishments of the motherland. (The great insistence on including the Bill of Rights in the Constitution came in large part from such colonists). The American Revolution almost created a crisis in English justice. Temporarily there was no place to send the “banished” convicts—and no place to which the fugitive from that “justice” could flee. The opening up of Australia helped to solve the problem for England. In America, banishment had been employed by the colonies during their early stages of development, but by the time of the revolution, banishment was largely unavailable as a formal sanction (although fugitives still fled to the readily available frontier).

Opposition to the traditional English form of punishments eventually led to an American invention——incarceration in a penitentiary——that became the dominant form of punishment throughout the world. Imprisonment had been initiated substantially before the late eighteenth century, but early imprisonment was used only to retain a prisoner pending trial or to hold vagrants. A new penal philosophy, developed by the Quakers of Pennsylvania, sought to replace corporal and capital punishment with the incarceration of convicted felons for long periods of time in penal institutions called prisons or penitentiaries. The Quakers established these prisons for humane reasons. The good Quakers believed that if a man were confined in solitary confinement, and permitted to meditate continuously upon his sins, he would be



rehabilitated. Though in those early prisons no cruel treatment was permitted, the "Pennsylvania system" unfortunately did not result in rehabilitation of the offender. Instead there was rampant suicide and mental illness among the inmates. The concept of imprisonment attracted considerable attention, however, and it was soon followed in many states. In many jurisdictions, imprisonment was combined with corporal punishment within the prison as a means of keeping "control" over the prisoners.

Just as prisons were the primary development in penology in the 1800's, the use of probation and parole were the primary developments in the 1900's. Both involve supervised control of the convict in a community setting rather than in a prison. Under probation, the convicted person is released into the community under supervised control without first having served any time in a penitentiary. Under parole, the individual first serves a term of imprisonment and then is released for supervised control. Under both procedures, if the individual violates the terms of his supervised control, he can be imprisoned to serve the remainder of his sentence.

In the United States today, imprisonment, probation, and parole are the primary forms of punishment for all but the most petty crimes (where fines remain especially significant). Capital punishment, as we shall see, has been abolished altogether in several states and is available in all others only for a single type of crime (homicide). Corporal punishment also has been abolished. Under certain circumstances, however, solitary confinement is still permitted in prisons. Loss of various rights (e.g., the right to vote) is a quite common punishment, although not viewed as a dominant form of punishment. We will discuss these various forms of punishment at much greater length in Chapter Thirteen. It is important at this stage merely to be aware of the general nature of the punishments used in the past and today. The nature of the various punishments imposed clearly reflects our consistent treatment of crimes as serious, wrongful acts. The severe character of most punishments, even in their modern forms, also underscores the significance of the issues that society faces when it decides to impose punishment on fellow human beings. That decision has been a matter of continuing concern to scholars studying the criminal law, and many books have been written addressed to the two basic issues presented by our use of punishment: "What are the legitimate objectives of punishment," and "What are the moral justifications for imposing punishment"? Differences in the responses that may be presented to both of these issues are extremely important, for how one answers these issues determines, in large part, the



appropriate shaping of the criminal law.

## Reference Translations 参考译文

要了解实体刑法的性质,我们必须探讨把犯罪和其他违法行为区分开来的一些基本概念。要明确刑法的范围,我们还要了解许多犯罪的不同分类。

### 犯罪的法律定义

传统的犯罪的法律定义在许多国家的成文法中都有表述。虽然这些表述在不同的司法管辖区内有轻微的差异,但加利福尼亚州刑法典中的犯罪定义仍很有代表性:

犯罪或公罪是一种侵犯了法律所禁止的或强制性的规定的侵害行为或过失行为。并且,如果被判定有罪,将会附加下例任何一种刑罚:(1)死刑;(2)监禁;(3)罚金;(4)免除公职;或(5)取消在政府中担任和享有任何荣誉职位、托管、或者收益的资格。

这个定义的几个特征可以用来帮助解释“犯罪”这个概念中的法定原则。第一,犯罪作为法律的创造物,需要具备一种侵犯法律的行为,而这法律是禁止侵害习俗,宗教标准和其他社会控制手段的。但是,有一些违反法律的行为,却不是犯罪。例如,违反合同,是不合法的,但不是通常的犯罪。将违法行为归为犯罪,还需要另外一些要素。加利福尼亚州刑法典中的定义也把犯罪描述成“公罪”。换句话说,对照于只针对于单个被害者的违法侵害行为,犯罪总体上可以看作一种危害公共利益的行为。正是这个因素很大程度地把刑法与民法区分开来,并解释了国家公职人员(公诉律师)基于政府利益要求刑法的审判强制权的原因。犯罪,作为危害公共利益行为的这个概念,也解释了犯罪的传统定义中的第三个要素——犯罪是一种可能导致强制性刑罚的行为。

加利福尼亚州刑法典中列举了五种不同的刑罚措施,每一种都是为了维护公共利益(大部分为了预防将来的侵害),而不是集中于单个的被害者。作为一种实践性事物,法庭所具有的采取上述第二种、第三种刑罚措施(监禁和罚金)的权威,在认定大部分犯罪中,是决定性因素。死刑限制于已清楚是犯罪的杀人者很窄的范围内。另两类刑罚措施都与担任公共职务有关,而且它们几乎总是被法律规定可与监禁或罚金这两种措施合并执行。如果有人提出某种被法律禁止的行为是否为犯罪的问题,法庭将考察那可能强加于该违法者的可能性结果。如果发现可能强制采用监禁或惩罚性罚金,表明这种行为应看作是对公共利益的侵害,因此,是犯罪。

虽然刑法中违法的概念已经很好地建立起来,但事情并非总是如此。把一部分违法行为看作是犯罪是历史不断发展的产物。社会在接受犯罪这个概念的过程中做了几个重要的决定,在今天,其中一些一直还在被检验着。首先,社会必须确认有一些行为应当视为对公众总体的侵害,而不是仅针对个人的侵害。依次地,这个决定伴随着这样一个结论,即上述的行为是相应地易受到刑罚的。最后,要做出可以强制于什么样的合法刑罚的不同的判决。对这些发展过程的短暂回顾,将会提供给我们一种洞察犯罪本质的更远的眼光。

### “公罪”概念的历史发展

起初,我们今天认为是犯罪的行为,在过去被认为是非法行为;换句话说,所有罪过在过去都认为是私错。在法律的早期历史中,政府(那时为国王所统治)没有把它自己与刑罚考虑到一起,除非这些行为是直接反对政府的,例如谋反。拿甲挖出了乙的眼睛来说,“复仇”是乙的责



任,他经常会找机会把甲的眼睛也挖出来。在许多社会中,惩罚甲不仅是乙的责任,连乙的所有家属和亲族成员都有责任,设法使甲对乙的伤害受到惩罚。有时,在这种情况下——没有找到甲,就将被抓住的甲的某个亲属或亲族的眼晴挖出来“复仇”,这已成为了一种习俗。这就发展成了这样一场流血的争斗:乙的每一个家庭成员都在寻找机会,在他所能找到的任何一个甲的家庭成员身上为己报仇。因为甲的家庭成员对此也不会甘休,所以,结果往往是甲的每个家庭成员也都在找机会伤害乙的每个家庭成员。这样,这场争斗就将双方两个家族紧紧地纠缠在一起。

从生命和财富上讲,争斗具有很大的消耗,这还损害了社会的和平。国王不愿看到更甚的后果。国王看到他的臣民们正在相互仇杀而失去了许多优秀的战士。所以国王接管了惩罚侵害者的权利和职责。国王郑重地宣布:“如果某位臣民伤害了另一位,受到伤害的一方必须向我报告,然后我将认真地惩罚过错行为者。”产生伤害国王的臣民的结果的行为是明显地对国王的和平的侵犯,对侵犯者采取行动是以国王的名义。到了今天,虽然国王已被政府取代,但犯罪可以理解成是对“国王的和平”的侵犯。在德克萨斯州的每一个刑事起诉中,在找出罪行后,都以这样一句话结尾“威胁了德克萨斯州的和平和尊严。”

在许多社会中,国王还发现了另一种重要的管辖权来处理某种针对于国王的违法行为。在这样的社会中,当事人开始意识到用流血争斗方法来解决冲突是非常不令人满意的方法。他们发现,用赔偿金逐渐取代流血争斗是解决许多问题的一副良药。如果一个人丢了一头牛,他或他的家人有权利从小偷那里牵走一头牛。如果小偷杀了盗得的牛,而在对小偷采取行动时小偷又没有牛,那么,在发明了货币后,受害者可以拿走在货币上和牛相当的价值。国王注意到了这种货币的交换,并且决定他自己应当收取一些。所以国王决定不但要对小偷破坏了国王的和平进行惩罚,并且要求小偷或其家庭成员付给他钱。对牛的赔偿金给了牛的主人,但罚金就归了国王所有。这就是在刑事案件中,我们现代罚金制度的起源。

某位作者是这样总结了“犯罪”概念的历史发展:“当这样一个法则,即对某个社会成员的危害就是对整个社会的伤害取代了报私仇的习俗后,犯罪的概念才出现。这样,对过错者采取行动的权力,理所当然地属于作为人民的代表——政府的手中。”

### 刑罚的历史发展

早期方式:刑罚最早是由罚金,伤害身体的处罚(众所周知的肉体刑)或者死刑组成。肉体刑的最主要形式有鞭笞、烙印和断肢。到后来出现了另一种由社会决定的刑罚——流放。所有这些早期刑罚方式在经历了现代社会后还保存着。在今天,至少在世界一些地区还能见到。然而,在我们这部分社会里,这些早期刑罚方式已经大部会基本消失了,它们已被一些新的刑罚方式替代了。

现代刑罚方式:在美国刚摆脱了英国殖民地的地位时,英国的法律规定了超过 200 项的重罪,并且,每个重罪都会导致判处死刑。许多重罪,即使是死刑,都是些在我们今天的划分标准来看不过是些轻罪的犯罪。80%的死刑是侵犯财产罪,也包括一些小偷小摸。死刑的执行是公众事务,要有大量的人围观,并且在执行时尽可能惨不忍睹。在美国和英国,正如人们会预见到的那样有许多对滥用死刑的不满存在。法庭和陪审团都在尽力地用各种方式来避免宣判死刑。例如,在某些犯罪案件中,法官具有行使其自由裁量权的权力,以尽量使宣判中少一些残酷的体



刑(例如烙印)。

在英国,另一种经常使用的刑罚是将囚犯运送到海外的殖民地。相当多的英属北美殖民地充斥着从英国本土来的逃避酷刑的重犯(坚持要把《人权法案》包括在宪法之中的主张在很大程度上来自这些殖民者)。美国的革命几乎给英国的审判带来一场危机。英国一时没有地方来发送囚犯——而且逃避审判的流亡者也没有地方可以逃避。澳大利亚的开放帮助英国解决了这个问题。在美国的早期发展中,放逐者被殖民地雇佣,但到了美国革命的时候,放逐作为一种常规的处罚已不再可行了(虽然逃亡者还在涌向实际上可以藏身的边界)。

对传统的英国刑罚方式的对立,最终导致了一种美国式的发明——在监狱中进行监禁——它变成了世界流行的刑罚方式。监禁在18世纪晚些时候已经实际上开始了,但早期的监禁只是用于监禁悬而未决案件中的犯人或扣押游民。宾夕法尼亚的教友派信徒发展了一种新的刑罚哲学,即谋求在刑罚场所中长时间监禁重刑犯,用这种方式来代替体刑和死刑,这种场所就是所谓的监狱。教友派信徒出于人道而建立了这些监狱。这些善良的教友派信徒相信,如果一个人被限定在一个孤立的界限内,并且允许不断地默想自己的罪过,他就会自新。虽然在这些早期的监狱中不允许有虐待,但不幸的是,宾夕法尼亚模式并没有取得使犯罪者自新的成果,相反,监狱中却蔓延着自杀和疾病。然而,监狱这个概念还是引起了相当的注意,不久后已有许多州效仿。在许多审判中,监禁也掺杂着在监狱中执行的体刑,来作为一种管束犯人的手段。

就象在19世纪初监狱是刑罚学的首要发展一样,缓刑和假释的应用也是20世纪初刑罚学的首要发展。缓刑和假释都包括将犯人放置于社会中监控起来,而不是投入监狱。在缓刑的情况下,罪犯不用先入狱,而是将其在受到监控情况下放置于社会。在假释的情况下,犯人必须先经过一段时间的监禁后,再放出来并监控起来。在这两个过程中,如果犯人违反监控的规定,将被监禁起来执行剩余的刑期。

今日的美国,对很大一部分的轻微犯罪,监禁、缓刑和假释是刑罚的主要方式(这也是保持罚金制度的重要意义之所在)。死刑,如我们将看到的,在一些州已一同废除了,而在另外的各州中只对一类犯罪还采用(如杀人罪),肉体刑也已被废止。然而,在某些情况下,监狱中依然采用“禁闭”措施。虽然剥夺权利(如选举权)不认为是一种主要刑罚措施,但还是经常采用。在现阶段,重要的是知晓过去和今天采用的刑罚措施的一般本质。各种强制性刑罚措施的性质,明显地影响着我们对作为重大罪错行为——犯罪的一致看法。即使在现代社会中,当决定对同类采用强制性刑罚措施时,大部分刑罚措施中所具有的严厉性特点,也强调了社会所面临的对此的争议的重要意义。这个论断已经成为研究刑法的学者一直关心的问题,他们写了许多著作,论述刑罚使用中的两个基本问题:“什么是刑罚的合法目的?”和“什么是适用刑罚的道德依据?”可能提出的、针对这些争议的各种反响之间的差异是很重要的。因为一个人怎样回答这些问题会在很大程度上决定了其对刑法的恰当规划。



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## LESSON EIGHT

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### Civil Rights Law 民 权 法

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#### Background 背景

美国的民权法是 20 世中期以黑人为主要力量的民权运动的产物。该运动的主要目标是取消种族隔离(racial segregation)和种族歧视(racial discrimination)制度。第二次世界大战期间,美国的国防工业便有禁止种族歧视的规定。二战后,美国军队取消了种族隔离制度。1955 年 12 月 5 日,亚拉巴马州蒙哥马利市的黑人妇女罗莎·帕克斯因在公共汽车上拒绝移到黑人坐位而被捕。黑人群众纷纷为此举行抗议活动。黑人领袖马丁·路德·金博士运用黑人教会的传统力量,使自发的种族抗议转变为一场声势浩大的民权运动。1960 年,在北卡罗来纳州的格林斯伯勒市出现了黑人集体坐进白人饭馆的反种族歧视运动。随后,这一运动席卷美国南部,迫使商店、饭馆、图书馆和电影院等取消种族隔离制度。1963 年 8 月,马丁·路德·金领导了抗议种族歧视的“向首都华盛顿大进军”,使民权运动达到高潮。1964 年,美国国会通过民权法案(the Civil Rights Act),禁止公共设施 and 公共场所所有种族歧视现象,并规定凡坚持设立种族隔离学校的社区,国家将停发其教育经费。

虽然美国是一个宣扬自由和平等的国家,但是种族歧视现象仍然存在。在司法实践中,每年都有很多涉及种族歧视问题的案件,或者说违反联邦民权法律的案件。例如,1991 年 3 月 3 日加利福尼亚州洛杉矶市数名白人警察殴打黑人青年罗德尼·金的案件最终就是以违反民权法律的名义进行的审判。

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#### Text 课文

Cases alleging racial discrimination in the workplace have most often been brought by and against members of different races or ethnic backgrounds. In *Walker*



v. IRS, however, the United States District Court for the Northern District of Georgia recognized a discrimination claim by a light-skinned black employee against her dark-skinned black supervisor under title VII of the Civil Rights Act of 1964. By identifying “race” and “color” as distinct factors upon which a title VII claim may be based, *Walker* took an important step in acknowledging the historic tension between light-skinned and dark-skinned blacks that engenders intraracial discrimination. At the same time, however, the court’s expansion of title VII coverage threatens to undermine that statute’s protection of blacks against more pervasive and damaging forms of discrimination.

Tracy Walker, a light-skinned black woman, worked as a clerk typist in the predominantly black Atlanta office of the Internal Revenue Service (IRS). In November 1985, Walker’s supervisor was replaced by Ruby Lewis, a dark-skinned black woman. Though Walker had enjoyed a very “cordial” working relationship with her former supervisor, her dealings with Lewis were “strained from the very beginning.” Walker alleged that Lewis often reprimanded her for matters that were either “false or insubstantial” and subjected her to a “close scrutiny” not extended to her fellow employees. Walker met with the Equal Employment Office (EEO) program manager for the Atlanta district of the IRS in an attempt to air her grievances. Two weeks later, she was discharged on Lewis’ recommendation.

Walker filed a pro se employment discrimination suit under title VII. She claimed that Lewis was “prejudiced against light-colored skinned blacks” and had subjected her to “invidious discrimination” before her termination. She further alleged that she had been discharged in retaliation for her complaints to the EEO program manager. The case first came before a magistrate, who recommended granting the defendant’s summary judgment motion on Walker’s invidious discrimination claim and denying the defendant’s summary judgment motion on her retaliation claim. On appeal, the district court denied both summary judgment motions.

The court identified two principal issues: whether color, in addition to race, may form the basis of a discrimination action under title VII, and whether a suit based on color may be brought by one black person against another. On the first issue, the court rejected the defendant’s contention that “race” and “color” must be treated synonymously. Instead, the court linked title VII to section 1981, thus affording title VII a more expansive interpretation of “race” and “color”.

The court observed that according to the Supreme Court’s interpretation, section



1981, the “historical predecessor” of title VII, protects citizens from discrimination on the basis of “race, *color*, or previous condition of servitude” and “was originally enacted to apply to citizens of ‘every race and *color*.’” Moreover, it noted that title VII also includes “color” as a basis for prohibited discrimination and that the “plain meaning of legislation should be conclusive” unless “literal application” would frustrate “the intention of [the statute’s] drafters.”

The court interpreted title VII’s specific references to both “race” and “color” as clear indications of congressional intent to establish the two terms as distinct elements in a title VII claim. To support this interpretation, the *Walker* court cited the Supreme Court’s decision in *St. Francis College v. Al-Khazraji*, in which an Arab university professor alleged that his white employer discriminated against him on the basis of his race. The Supreme Court held in *St. Francis* that although section 1981 “at a minimum reaches discrimination against an individual because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*’ . . . it is not even essential to be physiognomically distinctive” to sustain an action under section 1981.

Once the court determined that discrimination on the basis of color may support a title VII claim, it turned to the narrower issue of whether the statute “allow[ed] a law suit by a light-colored black person against a dark-colored black person.” The court looked again to *St. Francis*, noting that the Supreme Court had previously reviewed the legislative history of section 1981 and found that Congress intended the statute to “apply to all forms of discrimination,” including those acts perpetrated *by whites against* members of other white subgroups, such as “Finns, Gypsies, Basques, Hebrews, Swedes . . . Irish and French.” Reasoning that only an “ethnocentric and naive world view” would suggest that all blacks, unlike whites, “are part of the same subgroup,” the court concluded that “race” and “color” are by no means synonymous for purposes of title VII coverage and that subgroups may exist among blacks as a race. It held that Walker had stated a cause of action for invidious discrimination under title VII.

Although some observers may laud *Walker*’s recognition of discrimination between blacks as a much-needed expansion of title VII, such praise may be misguided. By holding that title VII addresses both intraracial and interracial discrimination, *Walker* may sacrifice Congress’ intent to dismantle institutional racism in the United States for the short-term goal of redressing a sporadic and less



profound form of discrimination.

In *St. Francis*, the Supreme Court expanded the scope of title VII protection by acknowledging that various white subgroups have historically displayed animus toward each other. Until *Walker*, however, courts had not made the same observation about blacks. Observers within the black community have long acknowledged the historic tension between light-skinned and dark-skinned blacks, which has roots in antebellum slave society. Furthermore, commentators on contemporary relations in the black community have noted that the “ubiquitous concern with color” remains embedded in black consciousness. While “the only factor common to *all* Negroes is color,” it has been color that, ironically, has frustrated “intraracial harmony” and has “forever got[ten] in the way of racial solidarity.” *Walker*’s recognition of this historic tension reflects an awareness that, just as discrimination has engendered strife among various white subgroups, prejudice among blacks remains a debilitating factor in the quest for civil rights. *Walker* casts doubt upon traditional notions of the identities of both the victims and perpetrators of discrimination. It acknowledges that such discrimination is pernicious in all forms, whether committed by members of other races or by those within the same race.

By broadening title VII, however, *Walker* represents the most recent dilution of the legislative intent of the Civil Rights Act of 1866 and its progeny. Much of the legislation enacted during Reconstruction addressed discrimination against groups, particularly blacks, rather than individuals. Indeed, the history of section 1981 indicates that the statute was formulated to “eradicate racial discrimination [by whites] against blacks in the making of contracts, specifically in instances of private employment.” *Walker* illustrates the tension in anti-discrimination statutes between reflecting the reality of groups and their historical experiences and effecting broader protection against discrimination. By holding that blacks may be the victims of intraracial discrimination, *Walker* emphasizes the immediate harm caused to individuals, regardless of the perpetrator’s identity, rather than the legislative intent of section 1981 and title VII.

*Walker*’s de-emphasis of the historic and systemic realities from which title VII arose may divert attention from the immediate objects of title VII, section 1981, and the Civil Rights Act of 1866, discriminatory actions by whites against blacks. Discrimination by whites, who have always been the socioeconomically empowered group in the United States, remains far more dangerous and pervasive than that



committed by other blacks, who have typically occupied lower socioeconomic positions and who enjoy relatively little influence in the workplace.

*Walker's* legacy may, therefore, prove to be a double-edged sword for future black litigants. While the court's broad interpretation of title VII may present itself as a boon for blacks who experience intraracial discrimination, it may also prove a bane for those who suffer from the more pervasive problem of institutional racism. The extent to which *Walker* will enable courts to confront discrimination on an individual level without detracting from group redress remains to be seen.

## Notes 注释

【1】Walker v. IRS: 沃克诉国内税收署案

【2】the United States District Court for the Northern District of Georgia: 佐治亚州北区联邦地区法院

【3】title VII of the Civil Rights Act of 1964: 1964年(联邦)权利法案的第七编

【4】a title VII claim: 一个依据(权利法案)第七编提出的诉讼请求

【5】Walker took an important step in acknowledging the historic tension between light-skinned and dark-skinned blacks that engenders intraracial discrimination. 沃克一案在承认产生种族内部歧视的浅黑皮肤与深黑皮肤的人之间的历史性紧张关系问题上迈出了重要的一步。

【6】reprimand: 斥责

【7】... subjected her to a "close scrutiny" not extended to her fellow employees. .... 使她遭受一种其同事均未受到的“严密审查”。

【8】the Equal Employment Office: 同等受雇机会办公室

【9】to air her grievances: 倾诉其冤苦

【10】Walker filed a pro se employment discrimination suit under title VII. 沃克依据第七编规定自己提起了雇用歧视之诉。“pro se”在此意为“自己”或“亲自”，多指当事人不请律师而自己出庭诉讼。

【11】invidious discrimination: 嫉恨式歧视

【12】magistrate: 司法官; 裁判官(在此指联邦地区法官任命的一种司法官员, 其职责主要是处理刑事或民事审判之前的各种动议, 并可在双方当事人同意的情况下主持民事或刑事轻罪案件的审判。)

【13】summary judgment motion: 即决(简易)审判动议

【14】retaliation claim: 关于报复的诉讼请求

【15】on appeal: 在上诉中(在此案中, 对司法官裁定的审理即由地区法官负责。)

【16】synonymously: 同义地(该案被告方认为: “虽然第七编把肤色包括为所禁止之歧视的基础之一, 但是该词一般被解释为与种族同义。”)



【17】section 1981: 指美国法典第 1981 条

【18】condition of servitude: 奴隶身份

【19】... title VII also includes "color" as a basis for prohibited discrimination ... 第七编也将“肤色”包括为被禁止之歧视的一个基础……

【20】plain meaning of legislation: 立法的明确含义

【21】literal application: 按照字面含义的适用

【22】St. Francis College v. Al-khazraji: 圣弗朗西斯学院诉艾尔—卡兹拉吉案(1987 年)

【23】... is genetically part of an ethnically and physiognomically distinctive subgrouping of homo sapiens' ... 在遗传学上是某个依据种族和相貌划分的人类亚群体的部分

【24】legislative history of section 1981: 第 1981 条的立法史

【25】Finns, Gypsies, Basques, Hebrews, Swedes ... Irish and French: 芬兰人、吉普赛人、巴斯克人、犹太人、瑞典人……爱尔兰人和法国人

【26】ethnocentric and naive world view: 种族中心论和朴素世界论观点

【27】Walker may sacrifice Congress' intent to dismantle institutional racism in the United States for the short-term goal of redressing a sporadic and less profound form of discrimination. 沃克一案的判决可能会为了纠正一种偶尔发生且意义不太深远之歧视的短期目标而牺牲国会要粉碎美国传统种族主义的意图。

【28】antebellum slave society: 南北战争以前的奴隶社会

【29】the "ubiquitous concern with color": 对肤色的普遍关注

【30】... prejudice among blacks remains a debilitating factor in the quest for civil rights. ... 黑人之间的歧视仍然是寻求民权之努力中的一个削弱因素。

【31】pernicious: 有害的

【32】dilution: 稀释物

【33】progeny: 后代

【34】Reconstruction: (美国南北战争之后的)重建时期

【35】eradicate: 根除

【36】de-emphasis: 降低重要性

【37】the socioeconomically empowered group: 在社会经济上掌握权力的集团

【38】Walker's legacy may, therefore, prove to be a double-edged sword for future black litigants. 因此,沃克一案的遗产对未来的黑人诉讼者来说可能证明是一把双刃宝剑。

【39】boon: 裨益

【40】bane: 祸根

【41】The extent to which Walker will enable courts to confront discrimination on an individual level without detracting from group redress remains to be seen】沃克判例可以使法官们在不贬低群体矫正效能的情况下在个人层次上抗击歧视的程度仍有待时间的证明。



## Exercises 练习

### 1. Questions about the text:

- ① What is the common form of racial discrimination in the workplace?
- ② What is the case Walker v. IRS about?
- ③ What are the main facts in the case?
- ④ What were Tracy Walker's claims?
- ⑤ What was the magistrate's recommended ruling?
- ⑥ What did the district court do on appeal?
- ⑦ What were the key issues in the case?
- ⑧ Why did the Walker court cite the Supreme Court's decision in St. Francis College v. Al-Khazraji?
- ⑨ What was the court's ruling in Walker case?
- ⑩ What effects of Walker would be on future black litigants in Civil Rights cases?

### 2. Dictation

...

And as we walk, we must make the pledge that we shall march ahead. We cannot turn back. There are those who are asking the devotees of civil rights, "when will you be satisfied?"

We can never be satisfied as long as the Negro is the victim of the unspeakable horrors of police brutality.

...

When we let freedom ring, when we let it ring from every village and every hamlet, from every state and every city, we will be able to speed up that day when all of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics, will be able to join hands and sing in the words of the old Negro spiritual, "Free at last! Free at last! Thank God Almighty, we are free at last!"

from "I Have a Dream"

by Martin Luther King

### 3. Discussion

- ① Topic: Walker v. IRS
- ② Reference to additional facts and laws about the case:



A. The reasons given by the defendant for Walker's termination were: a) tardiness to work; b) laziness; c) incompetence; and d) attitude problems.

B. The court addressed the plaintiff's title VII retaliation claim and found "a statutorily protected participation," "an adverse employment action," and "a causal link between the participation and the adverse employment action." The court therefore reasoned that the plaintiff had established a prima facie case of retaliation under title VII.

C. Section I of the Civil Rights Act of 1866 provides that all citizens "of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."

D. Section 1981 of the U. S. Code provides that "all persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."

E. Title VII of the Civil Rights Act of 1964 provides that "all personnel actions affecting employees . . . shall be made free from any discrimination based on race, color, religion, sex or national origin."

F. In American history, mulattoes, the light-skinned offspring of black and white parents, were generally regarded by white slaveowners as the favored group among slaves. Special privileges and elevated social status caused these light-skinned slaves to identify themselves more with their masters and less with dark-skinned slaves.

G. In 1987, blacks comprised approximately 10.1% of all full-time workers in the United States, but only 6.2% of all full-time managers and professionals.

③ Instructions:

A. The students are divided into three groups: group one is the advocate for Tracy Walker, the plaintiff; group two is the advocate for IRS, the defendant; group three is the judge.

B. The three groups discuss the case separately and select at least two speakers for the debate.

C. The two litigant groups give their arguments in the debate; and then the judge group gives its comments and judgment.



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**Supplementary Reading 补充读物**

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Shortly after Vice-President Lyndon B. Johnson succeeded John F. Kennedy as President, he moved forthrightly to help eradicate a persistent evil in American life: racial discrimination. Mr. Johnson urged the Congress to enact a law, proposed by President Kennedy in 1963, that would insure the voting rights of all Americans; make it a punishable offense to deny anyone entry into hotels, restaurants and other public places solely on the basis of race or religion; speed progress toward racially integrated schools; and provide a means of assuring equal job opportunities for all.

After lengthy debate in the Congress, the bill was passed in 1964 by overwhelming majorities in both Houses. The law is the most sweeping civil rights measure ever enacted and constitutes a landmark in American legislative history. Before signing it, President Johnson broadcast a statement to the American people on July 2, 1964.

**Civil Rights Statement**

... My Fellow Americans: I am about to sign into law the Civil Rights Act of 1964. I want to take this occasion to talk to you about what that law means to every American.

One hundred and eighty-eight years ago this week a small band of valiant men began a long struggle for freedom. They pledged their lives, their fortunes, and their sacred honor not only to found a nation, but to forge an ideal of freedom—not only for political independence, but for personal liberty—not only to eliminate foreign rule, but to establish the rule of justice in the affairs of men.

That struggle was a turning point in our history. Today in far corners of distant continents, the ideals of those American patriots still shape the struggles of men who hunger for freedom.

This is a proud triumph. Yet those who founded our country knew that freedom would be secure only if each generation fought to renew and enlarge its meaning. From the Minutemen at Concord to the soldiers in Viet Nam, each generation has been equal to that trust.

Americans of every race and color have died in battle to protect our freedom. Americans of every race and color have worked to build a nation of widening opportunities. Now our generation of Americans has been called on to continue the



unending search for justice within our own borders.

We believe that all men are created equal. Yet many are denied equal treatment. We believe that all men have certain unalienable rights. Yet many Americans do not enjoy those rights. We believe that all men are entitled to the blessings of liberty. Yet millions are being deprived of those blessings—not because of their own failures, but because of the color of their skin.

The reasons are deeply imbedded in history and tradition and the nature of man. We can understand—without rancor or hatred—how this all happened.

But it cannot continue. Our Constitution, the foundation of our Republic, forbids it. The principles of our freedom forbid it. Morality forbids it. And the law I will sign tonight forbids it.

That law is the product of months of the most careful debate and discussion. It was proposed more than one year ago by our late and beloved President John F. Kennedy. It received the bipartisan support of more than two-thirds of the Members of both the House and the Senate. An overwhelming majority of Republicans as well as Democrats voted for it.

It has received the thoughtful support of tens of thousands of civic and religious leaders in all parts of this Nation. And it is supported by the great majority of the American people.

The purpose of the law is simple. It does not restrict the freedom of any American so long as he respects the rights of others. It does not give special treatment to any citizen.

It does say that those who are equal before God shall now also be equal in the polling booths, in the classrooms, in the factories, and in hotels, restaurants, movie theaters, and other places that provide service to the public.

I am taking steps to implement the law under my constitutional obligation to take care that the laws are faithfully executed.

First, I will send to the Senate my nomination of LeRoy Collins to be Director of the Community Relations Service. Governor Collins will bring the experience of a long career of distinguished public service to the task of helping communities solve problems of human relations through reason and common sense.

Second, I shall appoint an Advisory Committee of distinguished Americans to assist Governor Collins in his assignment.

Third, I am sending Congress a request for supplemental appropriations to pay



for necessary costs of implementing the law, and asking for immediate action.

Fourth, already today in a meeting of my Cabinet this afternoon I directed the agencies of this Government to fully discharge the new responsibilities imposed upon them by the law and to continue to do it without delay, and to keep me personally informed of their progress.

Fifth, I am asking appropriate officials to meet with representative groups to promote greater understanding of the law and to achieve a spirit of compliance.

We must not approach the observance and enforcement of this law in a vengeful spirit. Its purpose is not to punish. Its purpose is not to divide, but to end divisions—divisions which have all lasted too long. Its purpose is national, not regional. Its purpose is to promote a more abiding commitment to freedom, a more constant pursuit of justice, and a deeper respect for human dignity.

We will achieve these goals because most Americans are law-abiding citizens who want to do what is right. That is why the Civil Rights Act relies first on voluntary compliance, then on the efforts of local communities and States to secure the rights of citizens. It provides for the national authority to step in only when others cannot or will not do the job.

This Civil Rights Act is a challenge to all of us to go to work in our communities and our States, in our homes and in our hearts, to eliminate the last vestiges of injustice in our beloved America.

So tonight I urge every public official, every religious leader, every business and professional man, every working man, every housewife—I urge every American—to join in this effort to bring justice and hope to all our people—and to bring peace to our land.

My fellow citizens, we have come now to a time of testing. We must not fail.

Let us close the springs of racial poison. Let us pray for wise and understanding hearts. Let us lay aside irrelevant differences and make our Nation whole. Let us hasten that day when our unmeasured strength and our unbounded spirit will be free to do the great works ordained for this Nation by the just and wise God who is the Father of us all.

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### Reference Translations 参考译文

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当林顿·约翰逊副总统继约翰·肯尼迪担任美国总统之后不久,他就直截了当地采取行动



来协助消除美国社会生活中的痼疾：种族歧视。约翰逊总统促请国会将肯尼迪总统于 1963 年提出的建议制定为法律。该建议要确保所有美国人的投票权；规定仅因为种族和宗教理由而拒绝让他人进入旅馆、饭店或其他公共场所的行为属于可惩罚的犯罪行为；加速实行多种族学生合校；并采取某种措施来保证所有人都有平等就业的机会。

经过长时间的辩论，国会两院于 1964 年以压倒多数通过了这一提案。该法律是所曾颁布的最彻底的民权保护方案，也是美国立法史上的里程碑。在签署该法案之前，约翰逊总统于 1964 年 7 月 2 日向美国人民广播了这个公告。

### 民权公告

……我的美国同胞们：我即将签署 1964 年民权法案，使之成为法律。我愿利用这个机会向你们说明该法律对每个美国人的意义。

188 年前的这个星期，一小批英勇的人士开始为自由而长期斗争。他们立誓献出他们的生命、他们的财产和他们的荣誉，不仅是要建立一个国家，而且还要塑造一种自由理想；不仅要争取政治独立，而且还要争取个人自由；不仅要消灭外国统治，而且还要为人类事务确立正义的准则。

那次斗争是我们历史的转折点。今天在各大洲那遥远的角落里，那些美国爱国者的理想仍然影响着渴望自由人士的斗争方式。

这是一次值得骄傲的胜利。然而，我们国家的创建者们知道，只有每一代人都持续奋斗去不断更新和扩大自由的含义，自由才有保障。从康科德的应召民兵到在越南作战的士兵，每一代人都没有辜负这一重托。

每个种族和肤色的美国人都曾在保卫我们自由的战斗中牺牲。每个种族和肤色的美国人都曾致力于建立一个能提供大量机会的国家。目前，我们这一代美国人业已接受号召，继续在我们的国家内不停地探求正义。

我们相信人人生而平等。然而许多人得不到平等的待遇。我们相信人人应有某些不可剥夺的权利。然而许多美国人不能享受那些权利。我们相信人人有权享受自由。然而有数百万人丧失了这种幸福——并非因为他们自己的失误，而是因为他们的肤色。

这原因深植于历史，传统和人性之中。我们可以理解——既无怨也无恨——这一切是如何发生的。

但是它不能再继续下去。作为我们共和国之基石的宪法禁止它。我们的自由原则禁止它。道义禁止它。今夜我将签署的法律也禁止它。

这项法律是数月来认真辩论和讨论的产物。它是在一年多前由我们热爱的已故总统约翰·肯尼迪提出的。它在参议院和众议院中都得到了三分之二以上两党议员的支持。共和党人和民主党人中的绝大多数都投票赞成之。

这项法律获得了全国各地成千上万个民众领袖与宗教领袖的郑重支持。这项法律也为绝大多数美国人民所支持。

这项法律的目的很简单。它没有限制任何美国人的自由，只要他尊重别人的权利。它没有给与任何美国公民特殊的待遇。

这项法律规定凡是在上帝面前平等的，现在在投票站，在教室，在工厂，在旅馆、饭店、电影



院,以及其他向公众提供服务的场所也将一律平等。

基于宪法赋予我的保证法律得到忠实执行的职责,我将采取各种步骤来实施该法律。

第一,我将向参议院提名勒鲁瓦·柯林斯担任社区关系服务局的局长。柯林斯州长将用其长期卓越地从事公共事务所积累的经验来帮助各社区通过理性与常识解决人际关系中的难题。

第二,我将指定一些杰出的美国人组成一个顾问委员会,协助柯林斯州长完成其任务。

第三,我将要求国会追加拨款以支付实施该法律所需之费用,并要求国会立即采取行动。

第四,今天下午在我的内阁会议上,我已指示政府各部门全力执行该法律赋予他们的新职责,而且要持续执行、不得延误,并随时向我本人报告其进展情况。

第五,我将要求有关官员与具有代表性的团体会晤,以便进一步提高人们对该法律的理解并获得遵守该法律的精神。

我们绝不能用报复精神来执行和贯彻这一法律。它的目的不是惩罚。它的目的不是分裂,而是结束分裂——那些存在太久的分裂。它的目标是全国性的,而不是地区性的。它的目的是要促使人们更坚决地维护自由,更坚定地追求正义,并更加尊重人类的尊严。

我们一定会实现这些目标,因为大多数美国人都是守法公民,他们仅做正确的事情。这就是为什么民权法案首先要依赖于人们的自愿遵守,其次才依赖于地方社区和州保护公民权利的努力。该法律规定国家政府只有在其他机构不能或不愿做此工作时才能涉足此领域。

该民权法案激励我们全体到我们的社区和我们的州、在我们的家里和我们的心中努力工作以消除我们所热爱的美国社会中那最后的非正义残迹。

因此,今夜我敦促每一位公职人员、每一位宗教领袖、每一位商务和专业人员、每一位工人、每一位主妇——我敦促每一位美国人——参加这一努力,以便为我们全体人民带来正义与希望,并为我们国家带来和平。

我的同胞们,我们正面临着一个考验的时代。我们绝不能失败。

让我们堵住那种族歧视的毒泉。让我们祈祷获得明智和理解的心胸。让我们求大同存小异,使我国凝成一体。让我们加快这一天的来临,届时我们的无穷力量与自由精神可以不受约束地用来完成作为众生之父的公正睿智的上帝赋予我们国家的伟大任务。



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## LESSON NINE

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# Contract Law 合 同 法

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### Background 背景

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美国人很少使用与刑法相对应的民法(Civil Law)和经济法(Economic Law)这两个概念,因为无论是作为成文法还是普通法,美国都没有这两个部门法(路易斯安娜州受法国影响而有民法典)。有关民事或经济领域的法律多属于私法的范畴,而且十分零散。其中最主要的法律部门包括合同法、侵权法、财产法、公司法、家庭法、商法等。

在美国,合同法主要是州法律,而不是联邦法律。不过,由于合同法的主要渊源是普通法或判例法,所以各州的合同法大同小异。本世纪以来,美国也出现了一些涉及合同问题的成文法,如“统一商法典”(Uniform Commerical Code)、消费者保护法律(Consumer Protection Statutes)、劳工法(Labor Law)、保险法(Insurance Law)等。虽然各类合同的主体和对象有所不同,但是合同法的一般原则均可适用。总的来说,美国的合同法试图说明在社会交往和经济活动中不同主体之间的交易或约定在什么情况下应由法律保证执行、法院强制执行的限度、以及在违约发生时可以采用的法律补救方法等问题。

按照美国合同法的规定,一项合同成立的基本条件是有约因或对价(consideration),即双方有交换的要求(requirement of exchange),而且一般应有书面形式。如果某项约定对一方来说属于不当得利(unjust enrichment),则该约定不应由法律强制执行。合同的构成(contract formation)主要包括要约(offer)和承诺(acceptance)。如果一项合同的构成中包含有诈欺(fraud)、虚假陈述(misrepresentation)、强迫(duress)、显失公平(unconscionability)等因素,则其亦不应受法律保护。在合同履行(contract performance)的问题上,对合同的解释(contract interpretation)具有特别重要的意义。当合同一方或双方违约(breach)时,美国的合同法倾向于赔偿金(damages)形式的补救方法(remedy)。具体来说,



美国合同法采用的补救方法包括预期赔偿金(expectation damages)、补救协议(agreed upon remedies)和衡平救济(equitable relief)。补救协议又包括预定违约金(liquidated damages)和清偿协议(settlement agreements)。衡平法救济又包括特定或实际履行(specific performance)、强制令(injunction)和恢复原状(restitution)。美国合同法的内容和形式反映了美国的法律传统和社会价值观念。

## Text 课文

Contract, as we will use that term, ordinarily connotes an agreement between two or more persons—not merely a shared belief, but a common understanding as to something which is to be done in the future by one or both of them. Sometimes, the term contract is used also to refer to a document—the set of papers in which such an agreement is set forth. For lawyers, contract usually is used to refer to an agreement that has legal effect; i. e., it creates obligations for which some sort of legal enforcement will be available if performance is not forthcoming as promised. Thus, it will sometimes be necessary to distinguish among three elements in a transaction, each of which can be called a contract: (1) the agreement-in-fact between the parties, (2) the agreement-as-written (which may or may not correspond accurately to the agreement-in-fact), and (3) the set of rights and duties created by (1) and (2). Without trying at this point to state a short but comprehensive definition of law (if that were possible), it is perhaps sufficient to suggest that we will be surveying the ways in which such agreements are made and enforced in our legal system—the role of lawyers and judges in creating contracts, in deciding disputes that may arise with respect to their performance, and in fashioning appropriate remedies for their breach.

In the Anglo-American legal system, a great number of things—both tangible and intangible—are susceptible of “ownership.” A bulldozer, a diamond ring, the Empire State Building, “Gone With the Wind”—all may be the “property” of one person or group of persons, which means that the state will protect the right of the “owner” to use, enjoy, and even consume that thing, to the exclusion of all other persons. The first-year property course traditionally focuses on the detailed rules that in Anglo-American law govern the ownership of “real property” (land and the buildings on it). Later you will have the opportunity to explore bodies of law relating to ownership of other, less tangible, kinds of property such as copyrights, patents,



shares of corporate stock, and negotiable instruments.

Any society that recognizes property rights must also address the question of how it should respond when someone violates those rights. And property rights are not the only kind of individual rights that may need legal protection. Even societies that do not permit private ownership of wealth to the degree that ours does are likely to recognize the personal rights of individuals to be free from certain kinds of conduct such as the infliction of physical injury or other interferences with their individual freedom or dignity. The courses in criminal law and torts deal with different aspects of this question: Criminal law focuses on those violations of personal and property rights that society deems serious enough to be deterred by the threat of severe punishment for their commission (robbery, rape, and murder are obvious examples); tort law considers what remedy should be made available to the individuals so injured. Because of the nature of the conduct regulated, criminal law and tort law overlap to a great degree, but they are not congruent. Many acts are criminal but not tortious, because they are offenses not against individuals but against the state—treason, for example, or tax evasion; others, such as slander, may be tortious but not criminal.

Where does contract law fit into this picture? We have noted already that our society recognizes and protects a variety of types of property and personal rights. Ownership of property ordinarily includes the right to use and consume the thing owned, but in many cases it will be more to the advantage of the owner to transfer, or “convey,” the right of ownership to some other person in exchange for something else of value (money, perhaps, or the ownership of some other property). A piano is more valuable to one who can play it than to one who cannot, and two lots of adjoining real property may be worth much more when combined into one parcel than when held separately. Similarly, the ownership of factory machinery may be much more valuable when it is combined with a right to the work of skilled technicians and laborers, a dependable source of supply of raw materials, and licenses to use patented processes in the manufacturing of goods. Agreements for exchange are the means by which such resources are assembled and put to productive use. Some such agreements call for the immediate and simultaneous exchange of money for goods or services (your purchase of a morning paper, for instance, or of a hamburger or a haircut). Where exchanges of any significant size are concerned, however, it is much more common for both the planning and the performance to be spread over a considerable period of time. The law of contracts is our society’s legal mechanism for protecting



the expectations that arise from the making of agreements for the future exchange of various types of performance, such as the conveyance of property (tangible and intangible), the performance of services, and the payment of money.

Before proceeding to examine contract law in more detail, we should point out here that our description of the relationship between the various “substantive” bodies of law that you will be encountering this year is necessarily an over-simplified one. Legal problems do not always fit neatly into the pigeonholes that legal theorists have created; frequently they raise issues involving more than one body of law. For instance, you will learn in this course that some types of conduct that we call “fraud” can constitute both a breach of contract and a tort. Lease agreements between landlord and tenant have historically been governed by rules of property law, but recently courts have tended to analyze their legal effect more in the manner traditionally applied to contracts. The web of the law may not be quite as seamless as the old saying would have it, but students and teachers alike must beware of falling into the trap of believing that our various legal categories are ironclad and unchanging; they are not.

Having presented our general definition of contract law, we next face the question: where is this law to be found? From what sources——what “authority”——do courts derive the rules of law they apply to decide contract disputes? The types of authority we will consider fall generally into two categories: primary and secondary. Primary authority, commonly viewed by lawyers and judges as “the law” itself, consists of prior judicial decisions (which collectively make up what we call the “common law”) and statutes, ordinances, and the like (expressions of the will of a duly constituted legislative body on a subject within its proper sphere of action). Secondary authority might be very loosely defined as anything else which could appropriately influence a court; the examples we will consider, however, consist mainly of the two principal types of persuasive authority that have had marked influence on the common law of contract: commentary by legal scholars and the American Law Institute’s Restatements of the Law.

With one important exception, the bulk of our contract law is common law——judge-made law, rules distilled from a composite of court decisions in prior cases. Thus, one of your principal tasks this year will be to learn how to read, understand, and apply judicial decisions. You will find at first that they seem to be written in a foreign language; like any technical jargon, legal language is full of strange words



(like *assumpsit* and *quantum meruit*) as well as words that are familiar but appear to be used with an unfamiliar or specialized meaning (like *consideration* and *offer*).

Our judicial system of decision-making is commonly said to be one of “*stare decisis*” —adherence to past decisions, or “precedents.” A precedent is a prior decision with facts sufficiently similar to the case “*subjudice*” —under adjudication — that the court feels obliged to follow it and to render a similar decision. A regime of law based primarily on precedent is commonly justified on two grounds. First, it offers a high degree of predictability of decision, enabling those who so desire to order their affairs in accordance with ascertainable rules of law. Second, it puts a rein on what might otherwise be the natural proclivity of judges to decide cases on the basis of prejudice, personal emotion, or other factors that we might regard as improper grounds for decision. Such a system also will obviously have the characteristic—which may sometimes be a virtue, sometimes a defect—of being static and conservative, generally oriented toward preservation of the status quo.

There will be times, however, when a common law judge concludes that blind adherence to precedent would produce an unjust result in the case presented for decision. There are a number of ways such a result may be avoided. To begin with, a precedent is considered to be “binding” on a court only if it was decided by that same court or by an appellate court of higher rank in the same jurisdiction. Other precedents—from lower courts or from other jurisdictions—are said to be merely “persuasive”. If a precedent of the latter type is in fact unpersuasive, the judge is free to disregard it. If the precedent is not merely persuasive, but binding, it cannot simply be ignored. It may, however, be avoided. If the facts of the present case do not include a fact that appears to have been necessary (“material”) to the earlier decision, the court may “distinguish” the precedent and render a different decision. If the earlier precedent is indeed binding, but is difficult or impossible to distinguish, there is one other way to avoid its effect. If the court of decision is the one that created the precedent (or is a higher court), it can simply “overrule” the earlier decision. (This does not retroactively change the outcome for the parties to that earlier case, but it does change the rule for the case under decision and subsequent similar cases.) Overruling is considered a relatively drastic action and is usually reserved for instances in which the court feels that the rule established by the earlier precedent is simply wrong, i. e., unjust in its general application because either it was ill conceived at the outset or it has been outmoded by later developments.



Historically, contract law developed in the Anglo-American system as common law, rather than by statute. Until this century, the most notable exception to this historical pattern was the “statute of frauds,” which was enacted first in England and subsequently in virtually every American state. This statute requires certain contracts to be evidenced by a signed writing in order to be enforceable in court. As we shall see, the statute of frauds has itself become so overlaid by court decisions that it has more of the quality of common law than of a modern statute. By and large, however, such revisions are rare; even today contract law remains essentially a common law system, except as it is being affected by a remarkable modern statute, the Uniform Commercial Code.

When a court decides a case governed by a statute, its reasoning differs from that used when common law principles are applied. Any court, even the highest court of the jurisdiction, is bound to follow the provisions of a valid statute that apply to the dispute before it. This duty stems from a fundamental political tenet of our society: the legislature has ultimate lawmaking power so long as it acts within the bounds of its constitutional authority. Thus, the legislature may if it wishes modify or eliminate any of the rules of common law. Sometimes, of course, the language of a statute may be subject to differing interpretations; in such cases, courts ordinarily seek to ascertain the legislature’s purpose in enacting it, in order to adopt a construction that will best effectuate that purpose. Sometimes there is “legislative history”—legislative debates, committee reports, etc.—which sheds light on that purpose.

In 1923, the American Law Institute (ALI) was formed. The major project undertaken by this organization was the preparation and promulgation of what purported to be accurate and authoritative summaries of the rules of common law in various fields, including contracts, torts, and property. The first such “Restatement” to be issued—and perhaps the most successful in terms of acceptance and use by the bench and bar—was the Restatement of Contracts, officially adopted by the ALI in 1932. (It had been gradually emerging in draft form over the several years preceding.) The Restatement resembled a statute in form, consisting of “black-letter” statements of the “general rule” (or, where the cases appeared to conflict, the “better rule”). In addition, most sections were supported with at least some commentary and illustrations. None of the ALI Restatements have the force of law, as does a statute or an individual court decision. Although they constitute only secondary authority, the Restatements have in fact proved to be



remarkably persuasive; not infrequently, a court will justify its decision by simply citing and quoting (perhaps with approving discussion) the Restatement's rule on a given point.

Recognizing that contract law had undergone substantial development since 1932, the ALI in 1962 began to prepare a revised version of its Restatement. Finally adopted in full in 1979, the Restatement (Second) of Contracts reflects some shifts in philosophy from the original Restatement. The first Restatement tended to emphasize generalization and predictability, at the expense of diversity and flexibility; the second attempts, with more extended supporting commentary and editorial notes, to acknowledge some of the complexity the first Restatement preferred to ignore and to suggest a freer rein for judicial discretion.

Although they are no more than secondary authority, the Restatements of Contracts have clearly had a powerful effect in shaping judicial views of what the common law of contract ought to be. Perhaps no other secondary authority has had quite that impact on the law, but over the years a variety of published articles, books, and multivolume treatises has been devoted to analyzing, evaluating, and synthesizing the immense body of contract cases that has accumulated in the reported decisions of American courts. Authors of these works have sought to clarify the law, to propose solutions for unresolved issues, and in some cases to argue strenuously and often effectively for legal change. In the aggregate, such legal commentary has been extremely influential in shaping the course of the common law of contract.

## Notes 注释

【1】set forth: 陈述; 阐明

【2】legal effect: 法律效力

【3】... it creates obligations for which some sort of legal enforcement will be available if performance is not forthcoming as promised. ....它设立了当其不按约履行时便可由某种法律强制手段保证实施的义务。

【4】transaction: 交易

【5】agreement-in-fact: 事实协议

【6】agreement-as-written: 书面协议

【7】creating contracts: 创立(制定)合同

【8】... fashioning appropriate remedies for their breach. ....形成对其违约的适当补救。

【9】tangible and intangible: 有形的和无形的



【10】susceptible of ownership: 可以有所有权的

【11】the Empire State Building: 帝国大厦(在纽约市)

【12】“Gone With the Wind”:《飘》

【13】...the state will protect the right of the “owner” to use, enjoy, and even consume that thing, to the exclusion of all other persons. ……国家将保护该“所有人”使用、享受乃至耗费该物的权利,而将所有其他人排斥在此权利之外。

【14】...ownership of other, less tangible, kinds of property such as copyrights, patents, shares of corporate stock, and negotiable instruments. 其他种类不太有形的财产的所有权,如版权、专利权、公司股权和票据权。

【15】Even societies that do not permit private ownership of wealth to the degree that ours does are likely to recognize the personal rights of individuals to be free from certain kinds of conduct such as the infliction of physical injury or other interferences with their individual freedom or dignity. 即使是那些对财产私有权的许可未达到我们这种程度的社会也会承认个人的人身权利不受某种行为的侵犯,如给人造成身体伤害或其他对个人自由或尊严的侵犯。

【16】overlap: 互相重叠;交叉

【17】congruent: 等同

【18】treason: 叛国(罪)

【19】tax evasion: 逃税(罪)

【20】slander: 诽谤

【21】transfer: 转移

【22】convey: 转让

【23】licenses to use patented processes: 使用专利工序的许可证

【24】simultaneous exchange: 同时交换

【25】morning paper: 晨报

【26】legal mechanism: 法律机制;法律手段

【27】lease agreements between landlord and tenant: 房东和房客之间的租赁协议(亦可指其他不动产所有人与承租人之间的租赁协议)

【28】The web of the law may not be quite as seamless as the old saying would have it, but students and teachers alike must beware of falling into the trap of believing that our various legal categories are ironclad and unchanging; they are not. 法律之网可能不像常言所说的那样结实无缝,但是学生们和教师们同样都要谨防坠入相信我们的各种法律分类都是打不破也不能改变的那一陷阱,它们实际上不是那样。

【29】authority: 权威性依据;法源

【30】source: (法律)渊源

【31】primary authority: 首要法源

【32】secondary authority: 次要法源

【33】persuasive authority: 劝导性法源



【34】American Law Institute's Restatements of the Law: 美国法学会的《法律注释汇编》

【35】judicial decision: 司法判决; 法官判决意见

【36】...rules distilled from a composite of court decisions in prior cases. ....从以前案件的各种法官判决意见中抽取出来的规则。

【37】assumpsit: 口头合同; 要求赔偿违约损失之诉讼

【38】quantum meruit: (无合同规定时)按合理价格支付; 合理给付

【39】consideration: 约因; 对价

【40】offer: 要约; 发盘

【41】judicial system of decisionmaking: 司法决策体制

【42】stare decisis: 遵从先例原则

【43】precedent: 判例; 前例

【44】sub judice: 在审判中; 尚未判决

【45】A regime of Law based primarily on precedent is commonly justified on two grounds. 以判例为主要依据的法律制度通常从两方面证明其合理性。

【46】predictability of decision: 判决的可预见性

【47】...enabling those who so desire to order their affairs in accordance with ascertainable rules of law. ....使得那些有此意愿的人可以按照可确定的法律规则处理其事务。

【48】to put a rein on ... 对.....加以控制

【49】natural proclivity of judges: 法官的自然癖向

【50】preservation of the status quo: 保持现状

【51】binding: 有约束力

【52】material: 决定性的; 实质性的

【53】overrule: 推翻

【54】retroactively change: 追溯性地改变

【55】...the statute of frauds has itself become so overlaid by court decisions that it has more of the quality of common law than of a modern statute. ....该诈欺条例本身已添加上了如此多的法官判决意见,以至于它具有的普通法的品质已超过了其现代制定法的品质。

【56】the Uniform Commercial Code 统一商法典

【57】reasoning: 推论; 论证; 推理

【58】This duty stems from a fundamental political tenet of our society: 这一义务产生于我们社会的一条基本政治原则。

【59】the bench and bar: 法官们和律师们

【60】the Restatement of Contracts: 合同法注释汇编, 合同法重述

【61】“black-letter” statements of the “general rule”: 关于“一般规则”的“黑体字”陈述(在此, “黑体字”带有普遍接受之基本原则的含义)

【62】force of law: 法律效力

【63】citing and quoting: 援引和引用, citing 不必用原文; quoting 要用原文。



【64】judicial discretion: 法官的自由裁决权

【65】the reported decisions of American courts: 收入判例汇编的美国法院判决

【66】in the aggregate: 合在一起

【67】Legal commentary: 法律评论

【68】the course of the common law of contract: 有关合同的普通法的发展方向

## Exercises 练习

### 1. Questions about the text

- ① What is a contract?
- ② Please give some examples about tangible things and intangible things.
- ③ What are the individual rights that may need legal protection?
- ④ What acts are criminal but not tortious?
- ⑤ What acts are tortious but not criminal?
- ⑥ Why do people want to convey the right of ownership to some other persons?
- ⑦ What is the function of contract law in our society?
- ⑧ What are the sources of contract law?
- ⑨ What are the differences between judicial opinions and statutory law?
- ⑩ What is the Restatement of Contracts?

### 2. Listening comprehension

Ms. Williams made a series of purchases of household goods from the Walker-Thomas Furniture Co. from 1957 to 1962. These purchases included sheets, curtains, rugs, chairs, beds, mattresses, a washing machine and most recently a stereo set.

Each of the items was purchased on an installment plan agreement which Ms. Williams signed. Her last purchase was a stereo unit for \$514. She failed to make the required payments and as a result, the furniture company sought to take back everything she had previously purchased, even though her total outstanding balance before purchasing the stereo set was just \$164.

### 3. Discussion

- ① Topic: Williams v. Walker-Thomas Furniture Co.
- ② Reference information about the case:

A. Ms. Williams has seven children and is separated from her husband. She has a limited formal education and maintains her household with the assistance of public



funds.

B. The installment plan agreement included fourteen contracts and each contained a long paragraph in extremely fine print. Part of that section provided that each payment made by the purchaser would be applied to the entire outstanding balance due. So each payment would actually pay a little bit of each purchased item's balance remaining. The furniture store retained the rights of ownership (title) to each item purchased until the amount due was paid.

C. The total amount of her purchases was \$1,800. Her total payments amounted to \$1,400.

D. Ms. Williams admitted that she had signed the installment purchase contracts but contended that she had not read them before signing.

E. The case was before the Court of Appeals for District of Columbia in 1965.

### ③ Instructions:

A. The students are divided into three groups: group one is the advocate for Ms. Williams, the appellant; group two is the advocate for Walker-Thomas Furniture Co., the appellee; group three is the judge.

B. The three groups discuss the case separately and select at least two speakers for the debate.

C. The two litigant groups give their arguments in the debate; and then the judge group gives its comments and judgment.

## Supplementary Reading 补充读物

I agreed to repair your bike. You agreed to pay me \$50. I repaired your bike. You gave me \$25. I threatened to sue. After all, we did have an oral contract. Is it enforceable? Usually, it is, but the party seeking to enforce it must establish the existence of the contract as well as its actual terms. Naturally, when the parties have no written documents or memoranda about the contract, only oral testimony can be used in court to establish the existence of the terms of the contract. The problem with oral testimony is that parties are sometimes willing to perjure themselves in order to win lawsuits. This led to an early English statute that some contracts must be in writing to be enforceable. This act was known as "an act for the prevention of frauds and perjuries." It became more commonly known as the Statute of Frauds.

Today almost every state has a statute of frauds, modeled after the English act.



The actual name is misleading since it neither applies to fraud nor invalidates any type of contract. Rather, it denies enforceability to certain contracts that do not comply with its requirements. Although the statutes vary slightly from state to state, with certain exceptions they all require the following types of contracts to be in writing or evidenced by a written memorandum:

1. Contracts involving an interest in land;
2. Contracts that cannot by their terms be performed within one year from date of formation;
3. Collateral contracts such as promises to answer for the debt or duty of another and promises by the administrator or executor of an estate to pay a debt of the estate personally, that is, out of his or her own pocket;
4. Promises made in consideration of marriage;
5. Contracts for the sale of goods for more than \$ 500.

A contract calling for the sale of land is not enforceable unless it is in writing or evidenced by a written memorandum. Land is real property and includes all physical objects that are permanently attached to the soil, such as buildings, plants, trees, and the soil itself. The statute of frauds operates as a defense to the enforcement of an oral contract for the sale of land. If S contracts orally to sell Blackacre to B but later decides not to sell, B cannot enforce the contract. Likewise, if B refuses to close the deal, S cannot force B to pay for the land by bringing a lawsuit. The statute of frauds is a defense to the enforcement of this type of oral contract.

The statute of frauds applied not only to the sale of land but also to the sale or transfer of any interest in land. A life estate is an ownership interest in land as security for the repayment of a loan. The transfer of this security interest is also required to be in writing to be enforceable.

An easement is a legal right to use land without owning it. Easements are created expressly or implicitly. An express easement arises when the owner of land expressly agrees to allow another person to use the land. To be enforceable, this agreement must be in writing. Implied easements can arise from past conduct of the parties, and by its nature, implied, such an easement need not be in writing to be enforceable.

A lease is a transfer of possession of real estate for certain periods of time. Most states have statutes dealing specifically with leases apart from the statute of frauds and exempt leases of less than one year from the writing requirement, so that any lease



lasting more than one year must be in writing. Some states extend this period. For example, Indiana allows leases to be oral for up to three years.

Since the statute of frauds is a defense against enforcement of an oral contract for the sale of land or an interest in land, problems arise when an oral contract has been partially performed. If the seller of land conveys title to the buyer, then the buyer's oral promise to pay is enforceable. Conversely, if the buyer has paid part of the purchase price and taken possession of the premises or made permanent improvements to the property, the sellers' oral promise to convey title to the property will be enforceable.

On the other hand, when the purchase price has been paid, but the buyer has not taken possession, the parties can be returned to their original positions, so the courts will usually not grant specific performance. The test of whether specific performance will be granted is whether the parties can be returned to their original positions. If not, the courts will maneuver to find a contract that is enforceable outside the statute of frauds.

Contracts that cannot, by their own terms, be performed within one year from the date the contract is formed must be in writing to be enforceable. Since disputes over such contracts are unlikely to occur until some time after the contracts are made, resolution of these disputes is difficult unless the contract terms have been put in writing.

In order for a particular contract to fall into this category, contract performance must be objectively impossible within a year from the date of contract formation. If the contract, by its terms, is possible (not probable) to perform within the year, the contract is not within the statute of frauds and need not be in writing.

In summary, the test to determine whether an oral contract is enforceable under the one-year rule of the statute of fraud is not whether an agreement is likely to be performed within a year from the date of making the contract. Rather, the question revolves around whether performance within a year is possible. Conversely, when performance of an oral contract is impossible during a one-year period, this provision of the statute of frauds will bar recovery on the oral contract.

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### Reference Translations 参考译文

我同意修理你的自行车。你同意付我 50 美元。我修理了你的自行车。你给我 25 美元。



我威胁说要去起诉。我们毕竟有一个口头合同。它可以强制执行吗？通常来说是可以的，不过那寻求强制执行的一方必须证明该合同及其实际内容的存在。很自然，在当事人没有关于合同的书面文件或备忘录时，在法庭上只能用口头证言来证明合同条款的存在。使用口头证言的难题在于当事人有时自己愿意去做伪证以便赢得诉讼。这就导致了英国早期一项法律的产生，该法律规定某些合同必须有书面形式才可以强制执行。这项法律被称为“预防诈欺和伪证条例”，但后来便通称为“诈欺条例”（或译“反诈欺法”）。

目前，几乎美国的每个州都有按照该英国条例的模式制定的反诈欺法。这个实际名称会使人误解，因为它既不适用于诈欺行为也不使任何种类的合同无效。其实，它只是否定了那些不符合其要求之合同的可强制执行性。虽然各州的反诈欺法略有不同，但是除某些特殊情况外，各州均要求下列合同必须具有书面形式或有书面备忘录佐证：

1. 涉及土地权益的合同；
2. 按合同条款规定不能在订立之日后一年内履行的合同；
3. 附属（担保）合同，如为他人的债务或义务作保的许诺；遗产管理人或遗产执行人同意个人偿还——即自己掏腰包——遗产债务的许诺；
4. 以婚姻为约因的许诺；
5. 价款超过 500 美元之货物的买卖合同。

要进行土地买卖的合同必须以书面形式或有书面备忘录佐证，否则不能强制执行。土地是不动产，而且包括所有固定地附属于该土地的实物，如建筑物、农作物、树木和土壤本身。反诈欺法发挥着抗阻强制执行口头土地买卖合同的功能。假如甲口头约定将布莱克田地卖给乙但后来又决定不卖了，乙不能强制执行该约定。同样，如果乙后来拒绝完成该交易，甲也不能通过起诉来强迫乙支付该土地的价款。反诈欺法就是抗阻强制执行这类口头合同的依据。

反诈欺法不仅适用于土地买卖，而且适用于任何土地权益的买卖或转让。终生财产权是作为返还贷款之担保的一种土地所有权益。这种担保权益的转让也必须有书面形式才能强制执行。

地役权是一种在不拥有某块土地而使用之的法律权利。地役权的设定可以是明示的也可以是默示的。当土地所有人以明确的方式同意让他人使用其土地时，明示的地役权便产生了。要想能强制执行，这个协议必须有书面形式。默示的地役权可以由当事人过去的行为而产生，而且因其性质是默示的，所以这种协议不需要有书面形式来强制执行。

租赁是不动产的占有权在一定时期内的转让。多数州都在反诈欺法之外另有法律专门规定租赁的问题，而且免除不足一年之租赁协议的书面要求，因此任何期限超过一年的租赁协议都必须有书面形式。有些州放宽了这一期限。例如，印第安纳州允许口头租赁协议的期限长达三年。

由于反诈欺法是抗阻强制执行有关土地买卖或土地权益之口头合同的一个依据，所以当一项口头合同已被部分履行时便产生了问题。如果土地出让方已将产权证书交给了买方，则买方的口头付款许诺就是可以强制执行的。反之，如果买方已经支付了部分价款并占有了该地产或者对该产业做了永久性改善，则卖方交付该财产产权证书的口头许诺就是可以强制执行的。

另一方面，如购买价款虽已支付，但买方尚未占有，且双方均可恢复原状，那么法院通常不



会给出特定履行的判决。是否应判决特定履行的标准在于双方当事人能否恢复原状。如果不能,法院则会设法找到一个在反欺诈法之外可以强制执行的合同。

那些按其本身条款规定不能在合同订立之日后一年内履行的合同必须有书面形式才能强制执行。由于关于此种合同的纠纷一般都要在该合同订立之后的某个时间才会发生,所以这些纠纷的解决就十分困难,除非该合同条款已经书面写成。

要将某个具体合同置入这一范畴,从合同订立之日起在一年之内履行该合同必须已无客观上的可能性。如果该合同根据其本身条款可能(不是很可能)在一年之内履行,那么它就不属于反欺诈法规定的范围,因而也不必用书面形式。

总之,确定一项口头合同应否按反欺诈法的一年期规则强制执行的标准不在于一项协议是否会在合同订立之日后一年内履行。其实,问题的核心在于一年内履行是否可能。反之,如果一项口头合同不可能在一年期间履行,那么反欺诈法的这一规定就会禁止就该口头合同的索偿。



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## LESSON TEN

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### Tort Law 侵权法

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#### Background 背景

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英文中的“侵权法”(Tort Law)一词又可译为“民事损害赔偿法”。它主要涉及侵犯他人的人身、财产、名誉、商业等方面权益的民事过错行为。虽然这种过错行为可能具有犯罪行为的性质,但是侵权诉讼与刑事诉讼的目的截然不同。前者的主要目的是赔偿受害人的损失;后者的主要目的是惩罚罪犯。

在美国,侵权法主要属于州法律的范畴,而各州的侵权法并不完全相同。诚然,侵权法主要由判例法组成,但是美国大多数州都有一些独立的法律来解决有关民事侵权行为的专门问题。在联邦法律中,1946年的联邦侵权索赔法(Federal Tort Claims Act)是最主要的一个。

侵权行为可以分为故意侵权行为(intentional tort)、过失侵权行为(negligence or negligent tort)和严格责任侵权行为(strict liability tort);也可以分为人身侵权行为(personal tort)和财产侵权行为(property tort);此外还有宪法侵权行为(constitutional tort)、政府侵权行为(government tort)、夫妻侵权行为(husband-wife tort)、海上侵权行为(maritime tort)、汽车侵权行为(automobile tort)、准侵权行为(quasi tort)等概念。对侵权行为的一般救济方法是对侵权行为所造成的损害予以一定的金钱补偿。在涉及交通事故等领域的侵权赔偿已广泛采用了保险赔偿的方式。

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#### Text 课文

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#### Part One: Introduction

1. The law of torts is still the source of most civil suits in the United States, with



damage claims for automobile accidents taking first place. Many circumstances contribute to this: (a) The plaintiff in an American civil suit is ordinarily entitled to try his claim before a jury which will often—and understandably—rely more on human than on legal considerations, for instance when a child has been injured in an automobile accident or through a defective product of a large enterprise; (b) Compensation and damages include not only the actual loss but also the intangible damage. A plaintiff can therefore often play on the human reaction of the jury: for instance, what is appropriate compensation for a permanent disability such as the loss of a limb? (c) American law permits the participation of the attorney in the plaintiff's recovery (contingent fee) which not uncommonly amounts to 25 to 33 percent of the verdict. As a result of all of these factors, a tort action may be a lengthy proceeding, result in large expenses, for instance through honoraria for experts (which may deter the "small" plaintiff from suing at all), and may end in the award of a very large verdict. It is no longer uncommon that a jury will award a verdict in excess of \$100,000. These conditions have been the touchstone for several reform endeavors which will be discussed in more detail below.

2. Tort law and the law of contracts often overlap since an injured party frequently has the choice between a tort claim (for instance, unauthorized use of property—conversion—or personal injury) and a suit in contract, for instance, in implied contract or, in the case of personal injuries, for breach of warranty. Since the law of torts permits the recovery of intangible damage (which is usually not the case with respect to contract claims), the plaintiff will ordinarily choose the tort claim for personal injuries when the facts so permit.

3. Everyone is liable for his tortious act, in limited form also children (however, parents only then when they acted as the child's agent or did not comply with their duty to supervise), but not the state unless express statutory provision has abolished state immunity.

4. Everyone is protected against tortious acts, including the embryo. The heirs or next of kin may have a damage claim for the intentional or negligent death of their relative or testator (wrongful death action). The statutes of some States provide protection, and a tort claim, to third parties for injuries arising out of the intoxication of the tortfeasor; under these so-called "dram-shop acts", a party injured as a result of the intoxication of the tortfeasor has a claim against him who contributed to the tortfeasor's intoxication.



5. Finally it should be emphasized again that the law of torts is, in the main, State law.

## **Part Two: Intentional Torts**

The case law contains the usual catalogue of intentional torts. For instance: battery, assault, conversion of property, false imprisonment, trespass to personal and real property. Some torts, for instance, alienation of affection have been abolished by statute in many States. Others, such as defamation, have recently been modified significantly through constitutional case law. New torts, unknown to the traditional common law, have also been introduced by the case law; particularly important among them are the torts for invasion of privacy and for products liability.

## **Part Three: Liability for Negligence**

Tort liability for negligence presupposes causality between the negligent act and the injury to person or property. A person is negligent if he has not complied with his "duty of care" and, seen objectively, has not acted as "a reasonable and prudent man." The latter test takes into account the special professional qualification of the tortfeasor. Thus, different criteria apply, say, to an architect than for a construction worker. The case law has given a restrictive interpretation to the concept of "duty of care". The duty must be owed toward the particular plaintiff; there is no duty of care to the public at large. Thus, a lesser duty of care is owed to him who trespasses on property than to an invited guest. Some State statutes go even further and exclude, for instance, a duty of care by the driver of a motor vehicle—toward passengers whom he transports gratuitously (guest statutes). Even if a duty of care exists and has not been observed, the injured party may still not have a claim for compensation. This will be the case, for instance, when he has been guilty of contributory negligence or has assumed the risk. The harshness of the contributory negligence defense, the result of which would not only be a deduction from the compensation but exclude any liability on the part of the tortfeasor, has been softened in some States by adoption of the "comparative negligence" doctrine. It requires that the respective degree of negligence of both parties be determined and compensation assessed accordingly. The bar of the contributory negligence defense to a recovery may furthermore be excluded by the doctrine of the "last clear chance", according to which even the contributorily negligent plaintiff will be compensated if he can prove



that the defendant had the “last clear chance” to prevent the damage.

The extraordinarily complex law of negligence—with its difficulties of proof in a jury trial and the possibility that a jury sympathetic to the plaintiff will let him win despite his contributory negligence but consider the latter in its calculation of damages—today leads to two, sometimes inconsistent, efforts of reform. One would provide for strict liability in many cases, the other would introduce a system of compensation for the injured without regard to fault, resembling a form of insurance. The following section briefly reviews these two trends.

## **Part Four: Tort Law Reform: Strict Liability and “No-Fault”**

### ***a. Strict Liability***

Originally, strict liability existed only in a few special cases, for instance with respect to the maintenance of dangerous animals, defamation, and by way of a rebuttable presumption, known as the doctrine of *res ipsa loquitur*, which deduced fault or negligence from the nature of the thing or act itself, such as defective construction or negligent use.

Beginning with the use of contract law concepts, particularly that of warranty which permits suit either based on contract or on tort and thus obviates the need to show negligence, the more recent case law recognizes strict liability in the area of products liability. This new tort claim no longer derives from contract law notions but has become independent: the liability of a seller today extends to all “dangerous products”, without regard to whether the issue concerns the product itself or its packaging. “Dangerous products” include products “in a defective condition” which are “unreasonably dangerous to the user or consumer or to his property”. In this context, “defective” means that the product does not meet the reasonable expectations of the ordinary consumer concerning the safety of the product. Everyone is protected whom the seller “should expect to be endangered by [the product’s] probable use”. In view of the extensive interstate commerce in the United States, this formula, for all practical purposes, extends protection to the public in general.

### ***b. “No-Fault”***

The trend to strict liability in the area of products liability should be contrasted with another reform endeavor which seeks to find more just solutions for ordinary claims based on negligence, particularly with respect to the great number of automobile accidents. These reform endeavors which are based, in the main, on the



plan of Professors Keeton and O'Connell seek to abolish the fault principle in tort law and to award compensation without proof of fault ("No-Fault") according to insurance principles. This notion has already proved very successful in those States which so far have adopted No-Fault statutes. Experience in those jurisdictions shows that insurance premiums could be lowered while a higher percentage of injured persons could be compensated. Nevertheless, compensation for losses resulting from automobile accidents and products liability remains a problem of overwhelming dimensions: losses amount to over five billion dollars a year but only 800 million dollars in insurance proceeds are available for their compensation. As claims arising out of products liability have steadily increased, the cost of liability insurance (premiums) to manufacturers also increased from \$25 million in 1950 to \$125 million in 1970. Further reform movements, albeit at this time only in their infancy, seek to extend the No-Fault principle to almost all claims, principally to products liability, but also to other kinds of liability such as medical malpractice. In a No-Fault system, a manufacturer agrees—and insures himself accordingly—to grant compensation for certain injuries without proof of fault. "Compensation" in this context means compensation for actual losses, but not for intangible damage. Thus, liability will be limited for the manufacturer and will therefore require a relatively lesser insurance premium to cover the risk. On the other hand, the injured person will be in a better position, compared to traditional tort law, since he will be entitled to receive immediate compensation for his actual loss (expenses, loss of profits or wages) without lengthy litigation or difficult proof of fault.

### Notes 注释

【1】the law of torts: 侵权(行为)法

【2】compensation and damages: 补偿费和损害赔偿金

【3】intangible damage: 无形损害

【4】...play on the human reaction of the jury: .....利用陪审团的人性反应

【5】American law permits the participation of the attorney in the plaintiff's recovery (contingent fee) which not uncommonly amounts to 25 to 33 percent of the verdict. 美国法律允许律师分享原告人所获得的赔偿金(胜诉酬金)。这种酬金达到法院判付金额之25——33%的情况并非罕见。

【6】honoraria for experts: 专家(证人)的酬金

【7】touchstone for several reform endeavors: 若干改革努力的试金石

【8】conversion: 非法占有(他人财产)



【9】implied contract: 默示合同

【10】breach of warranty: 违反保证诺言

【11】...in limited form also children (however, parents only then when they acted as the child's agent or did not comply with their duty to supervise), but not the state unless express statutory provision has abolished state immunity. ....在有限的形式下儿童亦然(但是,父母仅当其作为该儿童之代理人或未能按照其监护义务行事时才负此责任),但国家不在此列,除非法律明文规定取消了国家的豁免权。

【12】embryo: 胎儿

【13】the heirs or next of kin: 继承人或近亲属

【14】testator: 立遗嘱人

【15】wrongful death action: 非正常死亡之诉

【16】intoxication of the tortfeasor: 侵权行为人的醉酒

【17】“dram-shop acts”: “小酒店法令”

【18】...a party injured as a result of the intoxication of the tortfeasor has a claim against him who contributed to the tortfeasor's intoxication. ....作为侵权行为人醉酒之结果而受到伤害的一方有权向那些造成该侵权行为人醉酒的人提出索赔请求。

【19】battery: 殴打

【20】assault: 意图伤害或威胁伤害

【21】false imprisonment: 非法拘禁

【22】trespass to personal and real property: 对动产和不动产权的侵犯

【23】alienation of affection: 破坏他人夫妻关系

【24】defamation: 诽谤

【25】torts for invasion of privacy and for products liability: 侵犯隐私权的行为和产品责任侵权行为

【26】Tort liability for negligence presupposes causality between the negligent act and the injury to person or property. 过失侵权责任以过失行为与对人身或财产的侵害之间的因果关系为前提。

【27】duty of care: 照看义务

【28】seen objectively: 客观来看

【29】a reasonable and prudent man: 一个理性且谨慎的人

【30】Thus, different criteria apply, say, to an architect than for a construction worker. 这样,比方说对一名建筑师就要适用不同于对一名建筑工人的标准。

【31】restrictive interpretation: 限制性解释

【32】Thus, a lesser duty of care is owed to him who trespasses on property than to an invited guest. 这样,(一个人)对于非法进入其土地者所负有的照看义务就小于其邀请的客人。

【33】transports gratuitously: 免费运送

【34】contributory negligence: 共同过失

【35】The harshness of the contributory negligence defense...has been softened in some States by



adoption of the "comparative negligence" doctrine. 共同过失辩护的严格性……已经因一些州采用了“比较过失”原则而得到减弱。比较过失原则又可译为相对过失原则,即通过比较双方的过失来确定双方的责任。

【36】the doctrine of the "last clear chance": “最后明显机会”原则。该原则的内容为:虽然被侵权人有共同过失,但是侵权人有最后明显机会避免该侵害的发生,因此被侵权人不负任何责任。

【37】law of negligence: 过失侵权法

【38】… the possibility that a jury sympathetic to the plaintiff will let him win despite his contributory negligence but consider the latter in its calculation of damages…一个同情原告的陪审团可能会不管原告所具有的共同过失而让其胜诉但是在(陪审团)估算赔偿金时考虑这一因素。

【39】No-Fault: 无过错

【40】rebuttable presumption: 可反驳之推定

【41】the doctrine of res ipsa loquitur: 不言自明原则(res ipsa loquitur 意为“The thing speaks for itself.”)

【42】…obviates the need to show negligence ……消除了证明过失的需要

【43】In this context, “defective” means that the product does not meet the reasonable expectations of the ordinary consumer concerning the safety of the product. 在此,“缺陷”一词意指该产品未达到一般消费者关于该产品安全性能的合理期望标准。

【44】Everyone is protected whom the seller “should expect to be endangered by [the product’s] probable use”. 销售商“应该预见到会由于对该产品的恰当使用而带来危险的”每一个人均受保护。

【45】These reform endeavors which are based, in the main, on the plan of Professors Keeton and O’Connell seek to abolish the fault principle in tort law and to award compensation without proof of fault (“No-Fault”) according to insurance principles. 这些主要建立在基顿和奥康内尔两位教授之方案基础上的改革努力试图取消侵权法中的过错原则并按照保险原则在不要过错证明(“无过错”)的情况下给予赔偿。

【46】insurance premiums: 保险费

【47】insurance proceeds: 保险收益

【48】albeit: 尽管;虽然

【49】medical malpractice: 医务渎职;医生不当行为

【50】actual loss (expenses, loss of profits or wages): 实际损失(花费,收益或工资的损失)

## Exercises 练习

### 1. Questions about the text:

- ① Why is the tort law still the source of most civil suits in the United states?
- ② What is contingent fee?



- ③ Why do the tort law and the contract law often overlap?
- ④ When will parents be liable for their child's tortious act?
- ⑤ What are the so-called "dram-shop acts" about?
- ⑥ What is a intentional tort?
- ⑦ What is the basic factor in deciding tort liability for negligence?
- ⑧ What is the comparative negligence doctrine?
- ⑨ What are the two trends in the tort law development in the United States?
- ⑩ What is the No-Fault principle?

## 2. Dictation

The difference between tort law in the common-law countries and in the civil-law sphere is not in practice as important as it may appear at first sight. Theoretically, the range of application of the abstract provisions in a civil code is much larger than the pigeonhole system of Anglo-American case law. It must be borne in mind, however, that behind the screen of the general terms of a civil code the courts develop a bulk of so-called case law that in many ways resembles its counterpart in the common law. Although the means by which a certain solution to a legal problem is reached may be strikingly different, the results tend to be very much the same under common-Law and civil-law influence.

## 3. Discussion

① Topic: McGuire v. Almy

② Reference information:

A. The trial of the case was in 1937. (See Supplementary Reading of this lesson)

B. Insanity, necessity, and self-defense. What are the relationships amongst insanity, necessity and self-defense? With insanity the compulsion, as it were, comes from within; with necessity it comes from a third person or natural event; with self-defense it comes from the conduct of the plaintiff himself. How should these differences be captured? Will they be captured if we look only at the "reasonableness" of the defendant's conduct in the abstract instead of its reasonableness in relationship to the plaintiff's threat?

C. Other cases of insanity. With Almy compare Mullen v. Bruce (1959), where defendant, being of unsound mind due to alcoholism, assaulted and injured her nurse. The court upheld a judgment for plaintiff under a statute making minors and people of unsound mind liable for compensatory damage they inflict on others, observing that



the statute in question was a codification of the common law.

In *Morriss v. Marsden* [1952], the court held the defendant liable, though insane, for the harm he caused to the plaintiff, the manager of a hotel in which the defendant had a room, by striking him over the head with a blunt instrument. In the course of his opinion, Stable, J. ruled:

I cannot think that, if a person of unsound mind converts my property under a delusion that he is entitled to do it or that it was not property at all, that affords a defence. I can bring an action against him for the recovery of my property, or, if it has been converted and destroyed, for its value. Against that it may be said: "There all you are seeking is restitution, either the return of your property or the equivalent. In this case what is being asked for is damages, which is compensation and involves in a sense some punitive element." On the whole, I accept the view that an intention——i. e. , a voluntary act, the mind prompting and directing the act which is relied on, as in this case, as the tortious act——must be averred and proved. For example, I think that, if a person in a condition of complete automatism inflicted grievous injury, that would not be actionable.

Is it easier to deal with the defense of insanity in cases of conversion of chattels than it is in cases of physical injury? Is the test for liability here the same as that set out by Qua, J. , in *McGuire v. Almy*? Do automatism and insanity raise the same issues?

In *Phillips' Committee v. Ward's Administrator* (1931), defendant, who was insane, shot and killed plaintiff's decedent and was required to pay compensatory damages. And in *Aetna Casualty & Surety Co. v. Porter* (1960), the insured landlord had settled with the estate of a "murdered" tenant on the theory that the landlord was negligent in hiring and retaining the janitor who "murdered" the tenant. The janitor escaped conviction because of insanity; but in this case he was held required to indemnify the landlord's insurance company, in spite of his insanity.

### ③ Instructions:

A. The students are required to prepare for the discussion individually.

B. The students shall do the discussion in pairs and then present their opinions and comments about the case in big session.



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**Supplementary Reading 补充读物**

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**McGuire v. Almy**

297 Mass. 323, 8 N.E.2d 760 (1937)

[Plaintiff was a registered nurse employed to care for defendant, who was insane. On one occasion, when defendant had been breaking up furniture and acting in a rough manner, plaintiff entered the room with defendant to restrain her and take away from her a table leg, so that she would not hurt herself. But defendant deliberately struck plaintiff over the head with the table leg, seriously hurting her. Verdict and judgment for plaintiff. Affirmed. After discussing the Massachusetts precedents on the liability of an insane person for his tortious conduct and finding the point not fully settled, the court continued:]

QUA, J. Turning to authorities elsewhere, we find that courts in this country almost invariably say in the broadest terms that an insane person is liable for his torts. As a rule no distinction is made between those torts which would ordinarily be classed as intentional and those which would ordinarily be classed as negligent, nor do the courts discuss the effect of different kinds of insanity or of varying degrees of capacity as bearing upon the ability of the defendant to understand the particular act in question or to make a reasoned decision with respect to it, although it is sometimes said that an insane person is not liable for torts requiring malice of which he is incapable. Defamation and malicious prosecution are the torts more commonly mentioned in this connection. A number of illustrative cases appear in the footnote. These decisions are rested more upon grounds of public policy and upon what might be called a popular view of the requirements of essential justice than upon any attempt to apply logically the underlying principles of civil liability to the special instance of the mentally deranged. Thus it is said that a rule imposing liability tends to make more watchful those persons who have charge of the defendant and who may be supposed to have some interest in preserving his property; that as an insane person must pay for his support, if he is financially able, so he ought also to pay for the damage which he does; that an insane person with abundant wealth ought not to continue in unimpaired enjoyment of the comfort which it brings while his victim bears the burden unaided; and there is also a suggestion that courts are loath to introduce into the great body of civil litigation the difficulties in determining mental



capacity which it has been found impossible to avoid in the criminal field.

The rule established in these cases has been criticized severely by certain eminent text writers both in this country and in England, principally on the ground that it is an archaic survival of the rigid and formal medieval conception of liability for acts done, without regard to fault, as opposed to what is said to be the general modern theory that liability in tort should rest upon fault. Notwithstanding these criticisms, we think that as a practical matter there is strong force in the reasons underlying these decisions. They are consistent with the general statements found in the cases dealing with the liability of infants for torts. Fault is by no means at the present day a universal prerequisite to liability, and the theory that it should be such has been obliged very recently to yield at several points to what have been thought to be paramount considerations of public good. Finally, it would be difficult not to recognize the persuasive weight of so much authority so widely extended.

But the present occasion does not require us either to accept or to reject the prevailing doctrine in its entirety. For this case it is enough to say that where an insane person by his act does intentional damage to the person or property of another he is liable for that damage in the same circumstances in which a normal person would be liable. This means that in so far as a particular intent would be necessary in order to render a normal person liable, the insane person, in order to be liable, must have been capable of entertaining that same intent and must have entertained it in fact. But the law will not inquire further into his peculiar mental condition with a view to excusing him if it should appear that delusion or other consequence of his affliction has caused him to entertain that intent or that a normal person would not have entertained it.

We do not suggest that this is necessarily a logical stopping point. If public policy demands that a mentally affected person be subjected to the external standard for intentional wrongs, it may well be that public policy also demands that he should be subjected to the external standard for wrongs which are commonly classified as negligent, in accordance with what now seems to be the prevailing view. We stop here for the present, because we are not required to go further in order to decide this case, because of deference to the difficulty of the subject, because full and adequate discussion is lacking in most of the cases decided up to the present time, and because by far the greater number of those cases, however broad their statement of the principle, are in fact cases of intentional rather than of negligent injury.



Coming now to the application of the rule to the facts of this case, it is apparent that the jury could find that the defendant was capable of entertaining and that she did entertain an intent to strike and to injure the plaintiff and that she acted upon that intent. See Am. Law Inst. Restatement: Torts § § 13, 14. We think this was enough.

## Reference Translations 参考译文

### 麦格尔诉阿尔梅案(1937)

[原告是一名负责看护被告的注册护士,被告是一位精神病人。一次,当被告正在粗暴地毁坏家具时,原告进入房间,将其管束起来,并从其手中夺下桌子腿,以免她自伤。被告故意地用桌子腿朝原告头部猛烈打击,造成严重伤害。初审法院作出了有利于原告的判决。上诉法院维持原判。经过讨论马萨诸塞州有关精神病人侵权责任的判例后,发现本案问题尚未完全解决,于是法院继续指出:]

奎法官:经转而考查其他有权威的判例,我们发现本国法院几无例外地认为从最广泛的意义上精神病人对其侵权行为是负法律责任的。总的来说,通常所认为的故意侵权与过失侵权并无区别。法院并不考虑不同类型精神病的影响和被告对特定行为的理解能力以及对其作出合理判断的能力。法院也不考虑其能力程度的影响,尽管有时认为精神病人因为不具备恶意这一要件而对某些侵权行为不应负法律责任。诽谤和恶意之诉是这方面更常见的侵权行为。这类判决更多的是出于公共政策的需要以及被称为流行观点的基本正义的需要,而不是基于逻辑性地将民事责任的基本原则应用于精神病人侵权的特殊案例中去。在他们看来,这种承担法律责任的原则更易督促负责看管被告及被认为有义务保护其财产的人提高注意力。精神病人如果财力允许,应为其看护支付费用,因此,他也应对由其造成的损失负责赔偿。如果对受害人造成损害的精神病人财产丰富,就不应该让他毫无影响地享受舒服的生活而由受害人独自承受损害造成的负担。甚至有人认为法院不愿意将刑事领域中无法避免的用以确定精神能力的困难引入民事诉讼之中。

这些判例所确定的规则已经受到本国和英国某些杰出教科书作者的强烈批评,认为这主要是由于中世纪对行为责任的陈旧认识所致。这种认识刻板而教条,没考虑到过错。这与关于侵权责任应基于过错这一普遍接受的现代理论相违背。尽管存在这些批评,但我们认为作为一种客观事实,作出这些裁判是有其强烈的合理性的。他们与有关未成年人侵权的法律责任的判例中所作的普遍性结论相一致,过错并不是目前承担法律责任的一个共同性要件。而且,该理论最近也不得不从多方面屈服于被称为至高无上的公益需要。最后,人们很难忽视如此众多具有权威性和广泛说服力的判例。

但是现在不需要我们全盘地接受或摒弃这一流行学说。对这一案例,我们完全可以这样认为,一个精神病人对另一个人或其财产故意实施了侵害,如果在同样条件下正常人是负法律责任的,那么精神病人也应该负法律责任。这意味着为了使一个正常人承担法律责任,故意是必



要件,而为了让一个精神病人承担法律责任,他必须能够享有相同的故意,还必须实际享有这种故意。但法律不会细究特定的精神状态以求免除其责任,如果是由于幻觉或其他强迫原因而导致该精神病人去享受该故意或者正常人不会去享受该故意。

我们并非建议这有必要成为一个逻辑终点。如果出于公共政策的需要,精神缺陷的人需在故意过错方面符合外在标准,那么该公共政策最好也要求那些通常被视为过失的错误行为也符合该外在标准,以便与现在看起来流行的观点相一致。我们现在到此为止,因为判决这一案例不需要进一步探讨,因为出于这一问题的难度,因为到目前为止判决的大多数案例还缺乏充分而足够的讨论,而且因为——无论该原则的说明有多广泛——绝大多数案例还是属于事实上的故意而非过失伤害。

现在让我们将责任规则应用于这一案例中,很明显陪审团会发现被告能够具有而且确实具备打击和伤害原告的故意,并且她的行为也是按这一故意实施的。我们认为这已足够了。



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## LESSON ELEVEN

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# Property Law 财产法

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### Background 背景

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美国的财产法根源于英国的封建土地法,因此,财产法在动产(personal or movable property)和不动产(real or immovable property)之间是有区别的。不过,由于动产在现代社会中已多被置于其他民事法律部门的管辖之下,所以不动产仍然是财产法的主要内容。

在美国,财产法具有很浓的地方色彩,因此它比合同法和侵权法具有更大的州际差异。例如,美国的大多数州都不承认共同财产权(community property or common property),但是曾受大陆法系影响的路易斯安那、得克萨斯、新墨西哥、亚利桑那、加利福尼亚、华盛顿、爱达荷、内华达、威斯康星等九个州仍承认共同财产权。按照普通法的分有或独立财产权(separate property)原则,夫妻只能拥有自己所得的财产。而按照共同财产权制度,夫妻可拥有对方所得财产的一半。除各州法律以外,如联邦住房法(Federal Housing Act)等联邦立法也具有财产法的性质。

在美国的财产法领域内,有关财产及财产权的分类很多。除了上面提到的动产与不动产、共同财产权和分有财产权外,常用的还有:私人财产(private property)、公共财产(public property)和国家财产(state property);有形财产(tangible property)和无形财产(intangible property);绝对财产权(absolute property)和有限财产权(qualified property)或特别财产权(special property);他人财产(property of another)、错置财产(mislaid property)和无人认领财产(unclaimed property);以及一般财产权(general property)和著作权(literary property)等。



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**Text 课文**

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**Part One: Introduction**

The law of property is one of the core “institutions” in the American legal system, providing the requisite certainty and stability for planned activity in a free market. As with any institution, internal inconsistencies and paradigms abound. After touching on some of these, the discussion will move toward those tensions which affect privately-owned real property, i. e., as between the individual liberties and the collective obligations conferred through the ownership of land.

The discussion will then shift to the role of government, both as the manager of the institutional machinery and as a frequent independent actor within the institution seeking to further its own policy objectives. The full treatment of this latter role will be deferred to the land use module. Its role as institutional manager will begin with the considerations of property raised during the formation of a governing body of law following the American Revolution, demonstrating the evolution of a body of property law which grew from a rigid doctrine of absolute right to a system of rights and duties which is often adjusted to promote society's goals.

I will then discuss the role of the lawyer within the institution, both as advice-giver and as advocate. Each role has both a private and a public posture. This may or may not be the place for a brief discussion of the professional standards and responsibilities of the legal profession, but in fact, American real estate law frequently utilizes the lawyer's professional standing with regard to, for example, opinions of title and escrow arrangements.

The modern real estate lawyer performs many separate but interrelated activities. The success of the venture for any one participant depends not only on its own relationship to the transaction, but on relationships in other areas of the transaction to which it is not a party. Using a human organism as an analogy, the lawyer often serves as the circulatory system, connecting all of the organs and providing a comprehensive interactive network of rights and obligations. If the architect negotiating a contract with a developer wants to gain assurance that he or she is likely to be paid according to an agreement upon architectural fee schedule, the architect's lawyer can review the construction loan documents between the bank and



the developer to learn about the timing and conditions for drawing down the construction loan to pay such fees. If a potential investor wants to know what his liabilities are if the developer defaults after the completion of construction, his lawyer can obtain this information by reviewing the developer's permanent financing documents. Based on what the lawyer discovers, the investor may demand that the developer may be required to post a performance bond.

If the lawyer is serving one of the principal participants to a real estate transaction—the land owner, the developer, the primary lender—his function is to create contracts, agreements and instruments which faithfully describe the business intentions of the parties and define the conduct expected of the parties by each other and by the law. Careful consideration is given to dispute resolution. If the lawyer represents a secondary party—a supplier or passive investor, the lawyer's main task is to perform "due diligence", which means a careful review of all relevant laws, agreements and documents to assure the client that its decision whether to participate in the transaction is based on accurate information regarding the structure of the transaction and its compliance with legal doctrine and regulatory requirements.

## **Part Two: The Fundamentals of Real Property Law**

There are three major areas in real property law. They are: (a) ownership and other holding devices; (b) covenants, easements and nuisance; and (c) landlord and tenant law.

There are two basic transactions relevant to the transfer of real property: the contract of sale and the security transaction. The discussion regarding contract of sale will be incremental to the basic contracts course material, focusing on those areas which are shaped by the inherent characteristics of real estate. The discussion on the security transaction will cover the forms of security devices, the concepts of secondary financing, the transfer of encumbered property, the remedies of the mortgage holder (or the installment land vendor), including recovery of possession, foreclosure and recovery of a deficiency judgment.

While the laws of property define who or what has a permissible interest in holding, developing and transferring land, land use laws define government's interests in influencing the use of the land. Land use laws, as employed by local governments and interpreted by the courts, provide a system for resolving disputes over competing demands for the use of land. Most modern land use regulatory



systems utilize both proscriptions against certain types and intensity of uses and incentives to encourage certain uses. Those regulatory systems which respond best to a free market can do three things well. First, they possess a mechanism to determine which among competing interests should prevail in a society based upon private property and the mobility of an individual. We will look at the legal issues raised by the clash of economic development with environmental concerns and with historic preservation concerns. Second, they clearly identify who should be responsible for the decision-making and what information the decision-makers need to consider. We will look at the need for public participation. Finally, they provide benchmarks of general principles in order to guide future participants. We will discuss the roles of the U.S. Constitution, state statute and administrative process in achieving these goals.

### **Part Three: The Role of the Lawyer in Real Property Transactions**

Real estate transactions, including representation of buyers and sellers, historically have been a major source of lawyers' work and continue so today. In many real estate sales transactions, however, lawyers are not utilized by the parties, document preparation and other formalities of transfer being performed by the parties themselves or by other service intermediaries such as brokers, lenders, or title insurers. Utilization of lawyers by buyers and sellers of real property is more likely when large amounts of money are involved, in states where lawyers still largely monopolize land title searches and examinations, and in states where unauthorized practice laws as to brokers and other conveyancing intermediaries are relatively strict. Lawyers are almost always involved in real estate sales of commercial or industrial properties, multi-unit residential properties, and more expensive single family residences. With escalating prices of single family residences, it appears that lawyers may be representing buyers and sellers in an increasing percentage of sales transactions as to even moderately priced homes, although often not until after buyers have contracted to buy. There is, however, some evidence that at least in certain localities the role of lawyers in the home-buying process is diminishing.

The excerpt from the ABA Special Committee report that follows describes the steps needed to consummate a routine home purchase and sale financed by a mortgage. Similar procedures are commonly involved in transfers of nonresidential properties, although added steps frequently may be taken in connection with sales of



some kinds of nonresidential land parcels. The ABA report is a position paper on the need for lawyers in residential real estate transactions, as viewed by the practicing bar, and is a response to criticism of the amount of lawyers' fees as an item in overall land sale costs.

## Notes 注释

- 【1】the core “institutions” in the American legal system: 美国法律体系中的核心“部门”
- 【2】requisite certainty and stability: 必需的确定性和稳定性
- 【3】...internal in consistencies and paradigms abound. ....充满了内部的不一致和变形
- 【4】...as between the individual liberties and the collective obligations conferred through the ownership of land. ....如通过土地所有权转让带来的集体义务与个人自由之间的(紧张关系)。
- 【5】manager of the institutional machinery: 公共职能机制的管理者
- 【6】The full treatment of this latter role will be deferred to the land use module. 对这后一种角色的全面论述将留到后面的土地使用模式之处。
- 【7】the American Revolution: 美国革命(即美国独立战争)
- 【8】rigid doctrine of absolute right: 绝对权利的僵硬原则
- 【9】advocate: 辩护人(多指为当事人出庭辩论的律师)
- 【10】Each role has both a private and a public posture. 每种角色都具有为私人和为公众的两种姿态。
- 【11】title and escrow arrangements: 产权和第三者保存契据(指由第三者保存、待所定条件具备后再交付受让人的契据或证书等)之安排
- 【12】Using a human organism as an analogy, 使用人体作个类比
- 【13】circulatory system: 循环系统
- 【14】the architect negotiating a contract with a developer: 与开发商洽谈合同的建筑商
- 【15】agreement upon architectural fee schedule: 依据建筑费率表的协议
- 【16】construction loan documents: 建筑贷款文件
- 【17】the timing and conditions for drawing down the construction loan to pay such fees: 从该建设贷款中逐次提取资金以支付此费用的时间和条件
- 【18】potential investor: 有意投资者
- 【19】default: 不履行义务;拖欠(贷款)
- 【20】permanent financing documents: 常设财务文件
- 【21】performance bond: 履行保证金
- 【22】instruments: 文件;票据
- 【23】dispute resolution: 争议解决(办法)
- 【24】secondary party: 间接当事人;次位当事人
- 【25】passive investor: 消极投资人(指通过购买证券等方式进行投资的人)



- 【26】due diligence: 适当努力
- 【27】holding device: 拥有手段(形式)
- 【28】covenant: 契约
- 【29】easement: 通行权
- 【30】nuisance: 妨害行为
- 【31】security transaction: 担保交易
- 【32】incremental to ...对……的增加
- 【33】security devices: 担保手段(形式)
- 【34】secondary financing: 间接融资
- 【35】encumbered property: 抵押财产
- 【36】mortgage holder: 抵押权人
- 【37】the installment land vendor: 分期付款的土地出售人
- 【38】recovery of possession: 恢复占有
- 【39】foreclosure: 取消赎回权
- 【40】deficiency judgment: 不足额判决
- 【41】competing demands: 竞争性需求
- 【42】proscriptions against certain types and intensity of uses: 针对(土地)使用的某种形式和强度的禁止(措施)
- 【43】incentives: 激励(措施)
- 【44】prevail: 占据主要地位
- 【45】historic preservation: 历史(文物)的保护
- 【46】benchmark: 基本标准
- 【47】formalities of transfer: 过户手续
- 【48】service intermediaries: 服务中介
- 【49】title insurers: 产权保险人
- 【50】...monopolize land title searches and examinations, ...垄断着土地所有权的查索与审验
- 【51】unauthorized practice laws: 有关未经授权之从业活动的法律
- 【52】conveyancing intermediaries: (财产)转让中介
- 【53】multiunit residential properties: 多单元住宅产业
- 【54】escalating price: 增势价格; 递增价格
- 【55】even moderately priced homes: 甚至是中等价格的住宅
- 【56】...although often not until after buyers have contracted to buy. ...尽管这常常要到买主承诺购买之后。
- 【57】diminishing: 下降
- 【58】the excerpt from the ABA Special Committee report: 美国律师协会特别委员会报告中的摘录
- 【59】to consummate a routine home purchase and sale: 完成一项常规性住宅买卖活动
- 【60】nonresidential land parcels: 非住宅地块



【61】a position paper: 一份表明立场的文件

【62】as viewed by the practicing bar: 正如从业律师们所看待的

【63】...a response to criticism of the amount of lawyers' fees as an item in overall land sale costs.  
.....是对有关作为土地销售总成本之一项的律师费数额的批评的一种回答。

## Exercises 练习

### 1. Questions about the text:

- ① There are many internal inconsistencies and paradigms in property law, are not there?
- ② What are the roles of government in the field of property law?
- ③ What has the evolution of property law been since the American Revolution?
- ④ What are the roles of lawyers in the field of property law?
- ⑤ Why does a lawyer often serve as a circulatory system in property transactions?
- ⑥ What can a lawyer do for an architect who is negotiating a contract with a developer?
- ⑦ What is the main task of a passive investor's lawyer in a real estate transaction?
- ⑧ What are the major areas in real property law?
- ⑨ What are the functions of land use laws?
- ⑩ In what kind of real estate transactions is the role of lawyers in creating?

### 2. Dictation:

The economic system of the United States is principally privately owned. This system is often referred to as the "free enterprise system". It should be noted that although the United States operates a system of private enterprise, government has to some extent always been involved in regulating and guiding the American economy. Despite this history of government intervention, individuals in the United States have been able to choose for whom they will work and what they will buy. Traditionally, the system has also been referred to as a "market economy".

### 3. Discussion

① Topic: the Chinese-foreign joint venture

② Reference Information

A. Michigan Automobile Co. (hereinafter referred to as "Michigan Co.")



produces a powerful, efficient 4-Cylinder automobile engine of its own design. A feasibility study has shown that there is great demand for such engines in China, and that there may even be possibilities for export of the engines to Southeast Asia.

B. Beijing Automobile Co. (hereinafter referred to as "Beijing Co."), who cooperated in making the feasibility study, has expressed strong interest in forming a joint venture to assemble and sell automobiles using the Michigan engines.

C. Michigan Co. would like to provide 40 million USD in capital, plus patents, know-how and other technology, and to have control of the joint venture management. Michigan Co. wants to import some equipments and materials from the United States.

D. Beijing Co. would like to provide 20 million USD in capital, plus land, plant and equipment, and to have control of the management. Beijing Co. wants to use Chinese equipments and materials as much as possible.

E. It will need 50 million USD in capital to start the operation of the Joint Venture.

### ③ Instructions

#### A. Role Assignment

All participants will be assigned to one of the following four groups:

Group One: Representatives of Michigan Co.

Group Two: Representatives of Beijing Co.

Group Three: Lawyers from an American law firm.

Group Four: Lawyers from a Chinese law firm

#### B. Planning and Preparation

The four groups will discuss the case separately, and plan for the simulation according to their roles. They may consider the following questions accordingly.

I What are the goals of your group in the negotiation?

II What are the concerns of your client?

III What do you think are the possible concerns of the other side?

IV What are your objectives for the interview or the first meeting?

V What information do you need from your client (or your lawyer)?

VI What information do you need from the other side?

VII How will you get the information?

VIII What information are you prepared to disclose to the other side? And why?

IX What information will you not share with the other side at the meeting? And



why?

X What strategies will you use in the negotiation?

XI What is your agenda for the meeting?

### C. Process

I The representatives of Michigan Co. interview the lawyers from the American law firm; while the representatives of Beijing Co. interview the lawyers from the Chinese law firm.

II The first-round negotiation, attended by the representatives and lawyers from both sides, is held to negotiate about the joint venture and to draft a letter of intent.

III The second-round negotiation, attended by the lawyers from both sides, is held to negotiate over the main terms of the joint venture contract.

The lawyers may use the Model Contract for Chinese-Foreign Joint Ventures (provided in the following "Reference Materials") as the starting point, but both side can shape the terms any way it wants.

If the two sides can reach agreement, a ceremony for signing the contract may be held.

IV A feedback meeting will be held, in which all participants will be required to answer questions about and to make comments on the simulation. III Reference Materials

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## Supplementary Reading 补充读物

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### A. THE BROKERAGE CONTRACT

Initially a seller will enter into a brokerage contract with a real estate agent. In many jurisdictions this contract is not required to be in writing with all of the usual dangers of unwritten contracts. A special peril faced by sellers who have not had the advantage of legal counsel is that they may employ more than one broker and, in the absence of a clear understanding concerning the conditions under which the brokerage fee is earned, the seller may become liable to pay more than one fee.

In practice, a high percentage of brokerage contracts are in writing. A common assumption is that the contract is simple and standardized. In fact, a properly drawn contract will anticipate a number of legal problems of some complexity, such as the right of the seller to negotiate on the seller's own behalf, the effect of multiple listings, the disposition of earnest money if the buyer defaults, the rights of the



broker if the seller is unable to proffer a marketable title, the duration of any exclusive listing and, as already brought out, the point at which the brokerage fee is earned. Most of the terms are negotiable and, in theory, a new contract should be drawn each time a broker is employed.

Standardized forms, where carefully drawn, have certain advantages. There are no objections to form contracts per se, as used by either brokers or other participants in the land transfer transaction. The objections to form contracts are that they may be inappropriate to the particular transaction, badly drawn initially or incorrectly filled in.

Any seller signing such a contract should have it approved by the seller's lawyer before signing. The seller should have the lawyer explain its meaning and be on hand to see that it is properly executed. (It is presumed that if the seller consults a lawyer, the lawyer will advise against entering into any oral agreement.) In other words, the seller needs the traditional legal services embraced in the expression "advice, representation and drafting." The broker needs similar services at one time or another and receives them from the broker's own lawyer as needed. In routine transactions the broker is sufficiently familiar with the details to be able to handle the matter without resort to professional assistance.

## **B. THE PRELIMINARY NEGOTIATIONS**

When the broker has found a potential buyer, negotiations between the buyer and the seller will begin, with the broker acting in the role of intermediary. In some cases the seller will leave to the broker all the work of negotiation and will merely ratify the agreement reached with the buyer.

It is generally thought that neither the buyer nor the seller needs a lawyer in the course of the negotiations. In theory, this assumption is correct because neither party is bound until a written sales contract is signed. In fact, a great deal of trouble can be avoided if both the buyer and the seller consult their own lawyers during the course of the negotiations. If they are to make a pro-per bargain, they must know what to bargain about.

Aside from the question of price, which seems paramount in the minds of both parties, they should consider such problems as the mode of paying the purchase price and the tax consequences resulting therefrom, the status of various articles as fixtures or personal property, the time set for occupancy and the effect of loss by casualty pending the closing.

They can make whatever agreement they want, but they should anticipate all



important questions and be certain a complete understanding has been reached. Failure to do so in the preliminary negotiations may mean, at the time for signing a contract, that they will have to start negotiations all over again. Worse, they may enter into a contract highly disadvantageous to one or the other, so uncertain as to require litigation to determine its meaning, or so ambiguous as to be void for indefiniteness.

### **C. THE COMMITMENT FOR FINANCING**

Before entering into a sales contract, it would be desirable for the buyer to obtain as much of a commitment as possible for necessary financing.

Many lenders, however, refuse to make the necessary inspections, appraisals and credit investigations to make such a commitment until the buyer can exhibit a signed purchase and sale agreement, and many buyers are reluctant to risk losing the property to a higher offer by deferring the execution of the purchase and sale agreement. All of this leads to the common practice of including in the agreement a "subject to financing" clause which should be examined by the lawyers for the parties before the contract is signed.

Finding a willing lender is not part of a lawyer's professional duties. In practice a lawyer, being a person of affairs, may be able to render this service. Legal expertise is exercised when the lawyer advises the buyer about problems the buyer should anticipate in coming to terms with the lender. By way of illustration, the buyer will seldom have any understanding of the potential effect of an acceleration clause. The buyer should know what the legal and practical consequences of such a clause will be. The buyer should also obtain an estimate of the closing costs that will have to be paid and should obtain legal advice as to all items found in the estimate.

The commitment contract between the lender and buyer will normally be prepared by the lender's lawyer. Before it is accepted, the buyer's lawyer should ascertain that it properly anticipates all important contingencies, comports with the oral agreement previously reached and binds the lender.

Normally the lender has much greater financial expertise than the buyer. This advantage may not have been of as much importance formerly as it is today, because the financing of homes has in many instances become extremely complex. For this reason, when dealing with the lender the buyer is in need of legal assistance.

### **D. THE CONTRACT OF SALE**

Once an informal agreement has been reached, the buyer and the seller will enter



into a formal contract of sale. The importance of this document cannot be overemphasized. Once it is signed, the rights and obligations of the parties are fixed. Each transaction is unique and, in theory, a contract should be specially drafted for each.

The interested parties are the broker, the buyer and the seller. The contract should contain an appropriate provision with regard to the broker's commission. The buyer and the seller want assurance that the writing reflects their understanding. If they have not received legal advice during the preliminary negotiations, they will need to know what questions should have been anticipated and whether firm and advantageous provisions are found in the document. When the instrument is executed, their lawyers should be present to assure that the proper formalities are observed to make it binding. Here again the parties need legal services in the form of drafting, advice, and representation.

This need is not avoided by the use of forms. Even if the form is properly drawn, the printed portion may not adequately express the particular agreement made between the parties, or the words used in filling in blanks may distort its effectiveness. As a matter of practice standardized forms are widely used, and it is recognized that this practice likely will continue. It is recommended that local bar associations draft standard forms of sales agreements, and that joint seminars with real estate brokers and others regarding residential real estate transactions be held regularly. Whenever forms are used, any insertion should be carefully checked by the buyer's and seller's lawyers, and the appropriateness of the form for the particular transaction should be determined by the buyer's and seller's lawyers. The buyer and the seller are often unaware of what the contract means, what they should anticipate, and what steps are needed to make the instrument binding. They should be advised by their own legal counsel.

Prior to the time the contract is signed, the buyer and the seller should have detailed advice about many legal aspects of the transaction. For example, they may not be aware of the need to anticipate the question of who bears the loss or damage to, or destruction of, buildings on the premises between the time the contract is signed and the time of closing. They also may be unaware of the existence of such problems as whether the contract so changes the interest of the seller as to affect insurance policies; whether either the buyer or seller, or both, should execute new wills; whether federal and state gift and death tax matters are involved; whether



joint tenancies or tenancies by the entireties will be affected; and the like.

### **E. DETERMINING THE STATUS OF THE TITLE**

After the contract of sale is executed, the state of the seller's title must be determined to the satisfaction of both the buyer and the lender. This is generally the most important legal work connected with the transaction. The initial examination will be made by the lawyer for the buyer, the seller, the lender, or the title insurer, relying upon the official land title records or an abstract thereof, or a title plant maintained by a title insurance company. Where a lawyer's certificate is relied upon, either the lender or the buyer, or both, may desire additional protection in the form of a title insurance policy.

Whoever makes the title examination, the buyer's lawyer should inform the buyer of the limitations, if any, which impair the title. The buyer should also receive formal protection by a written opinion from the lawyer, an owner's title insurance policy, or both. If the buyer applies for title insurance, the buyer's lawyer should negotiate the provisions to be included or excluded from the policy. The lawyer should also make clear to the buyer what the policy means. In particular, the exceptions to coverage contained in the policy should be explained.

The use of standardized exceptions is common to title insurance. They are complex and restrictive and are frequently not understood by the layman.

Each title insurance policy is unique in that it may contain exceptions peculiar to that individual title. The buyer must first be made aware of the existence of these exceptions and must then be made to understand them. If the exception is to a \$ 10,000 mortgage and the buyer sees the provision, the buyer will probably not mistake its meaning. But if the exception is to "all of the conditions and restrictions found in deed of X to Y, recorded in the office of the clerk of the court of Z County, in Deed Book 309 at page 873," the buyer will not, in the first place, realize that the exception is important, or, if the buyer does, will not understand its meaning without assistance from the lawyer.

### **F. THE SURVEY**

Survey problems arise in many transactions, and the lawyers for all parties should inform their clients of such problems. At some time prior to the approval of title the buyer, the lender, or the title insurance company may demand a survey. The primary purpose of the survey will be to find whether the legal description of the land conforms to the lines laid down on the ground. An additional purpose may be to



determine whether structures on the premises violate restrictive covenants or zoning ordinances or constitute an encroachment. When the survey has been completed, the parties should have their lawyers advise them about any legal implications of the surveyor's findings and the scope and extent of the surveyor's certification.

### **G. CURATIVE ACTION**

In some cases curative action is needed to make titles marketable. Any such curative action should be carried out by a lawyer for the seller, the buyer, or the lender. If the curative action is carried out by the lawyer for the seller, it should be checked for sufficiency by the lawyers for the buyer and lender; if by the lawyer for the buyer, by the lawyer for the lender; and if by the lawyer for the lender, by the lawyer for the buyer.

### **H. TERMITE INSPECTION**

In jurisdictions where a termite inspection must be made and a certificate given to the buyer, showing that the premises are free of infestation or damage by termites, the certificate may be ordered by the broker, lender or the lawyer for any of the parties.

In jurisdictions where such certificates are not required, a provision should be added to the contract requiring the seller to provide a current termite certificate by a licensed pest control agency. If there is infestation or damage, the cost of treatment and the cost of necessary repairs of termite-caused damage usually are borne by the seller. The contract should spell out the seller's obligation. A termite clause should be included in all standard form contracts.

### **I. DRAFTING INSTRUMENTS**

Before closing, a lawyer should draft the deed, mortgage and the bond or note secured by the mortgage. As a matter of convenience these papers are commonly drafted by the mortgagee's attorney, although the representative of either of the other parties is equally qualified. Whoever does the work, the product should be examined by lawyers for each of the other two parties and the title insurance company, and they should be advised whether the instruments are effective and create the interests intended.

The drafting of these instruments is sometimes considered merely routine work. This is not true. For example, the description of the parties must be so phrased as to prevent confusion, and the description of the land must be complete and accurate. The importance of the form of warranties is often overlooked. By way of illustration,



if the title is encumbered by equitable covenants or utility easements, either or both may be acceptable to the buyer and lender, but they should be excepted from the warranty.

How title is to be taken should have been provided in the initial contract between the buyer and the seller, and the buyer should be advised as to the tax and other effects of the manner in which title is taken.

Of equal importance are other special agreements reached earlier in the transaction. The controlling law may provide that the deed supersedes prior understandings so that if they are not embraced in the deed they are nullified. Each deed must therefore be examined to determine whether it carries out what has been agreed upon.

### **J. INCIDENTAL PAPER WORK**

The Real Estate Settlement Procedures Act requires the preparation of a settlement statement in virtually all residential real estate transactions. In addition, the Truth-In-Lending form must be filled in and executed. If the mortgage loan is to be insured by FHA, VA or by a private mortgage insurance company, more paper work is required. The required documents are standardized and can be completed without resort to legal expertise. They are part of the financing, rather than the legal aspects of the sale and mortgage. Nevertheless, lawyers are frequently called upon to do this work. With a few exceptions, the government has taken the position that whoever performs these services shall receive no compensation therefor.

### **K. OBTAINING TITLE INSURANCE**

Where a title insurance policy for the buyer is based on the certificate of a lawyer not employed by a title insurance company, the lawyer may make an application for the initial binder and, after closing, send in a final certificate and procure a policy. This is work for which the lawyer normally, and properly, should be paid by the client to the extent the lawyer is not paid for these services as the agent of the title company. The lawyer should not accept compensation from a title insurance company solely for referring business to that company. This is, of course, clearly improper and contrary to the recorded position of the American Bar Association. The Real Estate Settlement Procedures Act specifically prohibits the acceptance of any "kickbacks" from the title insurance company.

### **L. CLOSING**

A closing statement is generally prepared prior to final closing. The statement



may take various forms and is designed to indicate the allocation of debits and credits to the various parties. In some cases it is prepared by a layman, in others by a lawyer. The buyer's and seller's lawyers should make certain their clients understand the nature and amount of all closing costs. The American Bar Association supported the adoption of legislation requiring a uniform closing statement in all government-related mortgage transactions. In addition it is recommended that local bar associations draft uniform closing statement forms for use in all other real estate transactions. Even a standard closing form in itself is not sufficient, unless the parties are assured by their own lawyers of the appropriateness of each item.

Unless there is an escrow closing, a further check of title should be made immediately prior to closing. If this check is not made, it is possible that the parties will be unaware that the title has been impaired between the time of the original examination and the closing date. This further check will generally be carried out by the lawyer, abstractor or title insurance company certifying or insuring title.

The closing is the proceeding at which the parties exchange executed instruments, make required payments, and conclude the formal aspects of the transaction. At this point the buyer, the seller, and the lender should be represented by their own lawyers. They require advice and may need representation if a disagreement arises. They should be assured that the legal documents they exchange create the interests intended, that they receive the protection to which they are entitled and that correct payments have been made to those entitled to receive them.

As a part of the closing, arrangements must be made for insurance, taxes, and other incidents of ownership. Instruments must be recorded and a final check of title made. Disbursements must be made and documents distributed to the parties entitled to receive them. Title insurance policies, where called for, must be procured. If a lawyer handles the closing, the lawyer will attend to all or virtually all of these details.

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## Reference Translations    参考译文

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### 一、居间合同

在不动产买卖的开始,卖方需要和一个不动产经销代理商签订一份居间合同。在大多数司法管辖区内,这一合同往往不要求为书面形式,因而有着口头合同通常所具有的全部风险。那些缺乏法律顾问帮助的卖主往往遇到一种比较特殊的麻烦,即他们会雇一个以上的中间人,而



且由于不了解在何种情形下中间人可以获得佣金,他们有时会不得不付多份佣金。

在实践中,大多数居间合同都采用书面形式。一种常见的误解认为这类合同总是形式简单而且采用标准化格式。但实际上,一份正确制订的合同应当预先写明某些比较复杂的法律问题。诸如:卖者仅能代表卖者本人进行处置的权利;多重上市的后果;若买方违约,定金如何处置;若卖方不能提供可出售的产权证明时,中间人的权利;任何独家上市的期限以及上文提到的,在何种情形下,中间人可以获得佣金。这类合同的大多数条款是需要协商的,而且从理论上讲,每次雇一名中间人都需要与其签订一份新合同。

仔细制订的标准化格式具有一定的好处。就其本身来说,在不动产交易中,中间人和其他各方制订格式合同并无可非议。但对于那些特殊的不动产交易,格式合同就是不可行的了,尤其是在一开始就草率制订或是错误地订立。

任何一个卖方在签订这类合同之前,都应当让他的律师对此进行审查。卖方应当让他的律师向他解释清楚合同的含义,并且监督合同正确订立。(事实证明,如果卖方向其律师咨询,他的律师会建议他不要订立任何口头合同。)换句话说,卖方需要传统所说的那种法律服务,即“建议、代理和制订文件”。中间人有时也需要类似的服务。如果需要的话,他们也可以从自己的律师那里获得此类服务。但在通常的交易中,中间人往往比较熟悉这些合同条款。他们往往不需要什么职业的法律帮助就可以解决问题。

## 二、初步协商

当中间人发现可能的买方时,买卖双方的协商就开始了。这时,中间人就起了居间的作用。在某些情况下,卖方会将所有的工作交给中间人去做,而只在其与买方达成协议后予以认可。

大多数人总认为在协商阶段,无论买方还是卖方都不需要律师。从理论上讲,这种说法是正确的。因为只要书面的销售合同没有签订,各方都不受约束。但实际上,如果买卖双方在协商过程中向其各自的律师进行咨询,就会省掉许多麻烦。他们应当知道自己在为何而协商,这样,他们才能正确地达成协议。

除了价格这一对双方都很重要的问题外,他们还需要考虑以下问题:支付方式以及与之相关的纳税问题;不同形式的附着物和动产的问题;设定占有的时间以及在不动产成交前所造成的财产损失问题。

双方可以根据各自的需要达成协议。但他们应当预先写清所有重要的问题,并且完全理解所达成的协议。如果在最初的协商阶段不能这样做的话,那么双方不得不在签订合同的时候再就一切重新进行协商。更为糟糕的是,如双方订立了一份条款意思不清的合同而对某一方明显不利,那么就不得不通过诉讼来确定其真实含义,或者由于条款规定不清合同被宣告无效。

## 三、关于融资的许诺

对于买方来说,在签订一份不动产销售合同之前,取得一个必要的融资许诺是有好处的。

然而,许多借贷人在买方可以出示一份已签属的购销协议之前,往往拒绝做必要的调查、评估和资格审查以提供此许诺;另一方面,许多买方也不愿承担因合同签订延误而导致该财产被出价更高者买走的冒险。这样,在实践中,合同各方的律师应当在合同正式签订以前仔细审查通常包括在该协议内的“融资条件”条款。

寻找一个借贷人并非买方律师的职责。但作为合同制订实施的参与者,律师在实践中是可



以提供此类服务的。当律师建议买方要注意与借贷人所订条款的含义时,法律建议就派上了用场。这是因为象上边所讲的,买方往往对提前偿还条款的未来效力缺乏认识。而作为买方,他应当知道这一条款在司法和实践上可导致的后果。买方还应估计到他最终要付的费用,并且听取关于估价方面所有问题的法律建议。

买方与借贷人之间的融资许诺合同一般由借贷方的律师起草。但在其为双方接受之前,买方的律师应当确定这一合同已预见到所有可能发生的重要意外事件,并且与双方事先达成且已生效的口头协议一致。

通常,借贷方较买方具有更丰富的金融专业知识。目前由于金融方面的操作变得十分复杂,所以这一优势较从前更为突出。从这种意义上说,当与借贷人打交道时,买方十分需要法律上的帮助。

#### 四、销售合同

一旦买卖双方达成了非正式的协议,那么双方就将订立一份正式销售合同。这一文件的重要性应当予以强调。因为一旦签订了正式合同,各方的权利和义务就被固定下来。每个交易都具有独特性的,而且从理论上讲,每次交易都需要制订一份特殊的合同。

不动产销售合同的利害关系人由中间人、买方和卖方组成。合同还应当具备恰当的条款以注明中间人的佣金问题。买卖双方都希望书面的财产转让书能反映各自的意愿。如果双方在初步协商时未征询法律上的建议,那么这时他们将应知道合同需涉及什么问题,而且真实有益的条款是否在合同中固定地表现出来。在正式签订合同的时候,各方的律师应当到场监督正确履行各项手续,以促成合同生效。在此各方又需要在起草文件、建议和代理等方面获得法律上的帮助。

我们不能因为使用格式合同而忽略对这种帮助的需要。这是因为,即使合同条款制订合理,也不能完全表达各方达成的特别协议,而且,格式合同中填在空处的文字也可能改变其效力。在实践中,标准化格式合同被广泛使用,而且人们认为这一做法还会继续。这里,我们建议应由本地的律师协会来制订合同的标准格式,并由不动产中间商和其他与住宅不动产交易有关的人定期举行研讨会。当使用这种格式合同时,买卖双方的律师要仔细检查填在空格处的插入部分。同时,特别交易所涉及的部分应当由双方律师共同决定。因为买卖双方经常弄不清楚合同的真实意思,无法预见未来,并且不知道采用何种方法使合同具有效力,所以他们应当从各自律师那里获得法律上的建议。

在正式签订不动产销售合同之前,买卖各方应当就交易所涉及的所有法律问题去征询详细的建议。比如:他们也许不能预见,在签订合同之后至买卖最终结束之前这个阶段内,由谁来承担由于房屋破损造成的损失;他们也许还想不到以下这些问题的存在:合同是否在很大程度上改变了卖方的利益以致对保险单产生影响;买方,卖方或买卖双方是否应当按照新的意向去执行合同;合同是否涉及到联邦和州有关赠与和遗产继承的规定;共同租用是否受到影响等等。

#### 五、对于产权状况的确认

在不动产销售合同签订以后,为使买卖双方满意,应当对不动产的产权状况加以确定。这是最重要的一项法律工作,而且与整个交易密切关连。通常是由买方、卖方、借贷方或产权保险方的律师对此进行初步的审查,依据是官方土地产权证书档案或其摘要,或者由产权保险公司



保存的产权书库。如果需要依靠律师的证书的话,借贷方或买方或者双方都可要求以产权证书保险的形式对此加以额外的保护。

无论由谁对产权进行审查,买方的律师都应当将对产权有影响的限制因素通知买方。买方也可以通过律师的书面建议,或是所有者的保险单,或是通过二者来获得通常的保护。如果买方要申请产权保险,那么买方律师就应当就合同条款包含还是排除保险进行协商。同时,律师还应向买主讲明保险的真实意思。特别是对保险单中的例外条款范围应加以解释。

使用标准化的例外条款对于产权保险是很常见的。它们通常是十分复杂而且格式要求严格,对于外行人来说是不易理解的。

对于不同的产权,由于包括特别的例外条款,其保险单是独一无二的。买方首先应当被告知这些例外条款的存在,然后在律师的帮助下,弄清这些条款的含义。如果例外条款为 10,000 美元的抵押,这样买方看到后是不会弄错的。但如果例外条款是这样写的:“所有条件和要求见文契 X 至 Y,记载于 Z 县法院书记员办公室之“文契汇编”第 309 卷第 873 页”,那么买方首先会认识不到例外条款的重要性,或许他认识到了这一点的重要性,但若没有律师的帮助,他是不会明白其含义的。

## 六、实地检查

在许多交易中都会有实地检查的问题,各方的律师都应向其客户说明这一情况。有时在批准产权前,买方、借贷方或产权保险公司会要求进行实地检查。这种检查的主要目的是看合同中对该房产的描述是否与实际相符合。另外一个目的是看该不动产的建筑物是否违反限制性法规或区域规划法令,或构成某种侵占。实地检查结束后,各方应要求其律师说明总的检查结果的法律内涵,以及检查是所出具的证书的范围。

## 七、临时监护行为

在某些情况下,临时监护行为是必须的;这样不动产才可以出售。这种保值行为应由卖方,买方或者借贷方的律师来完成。如果这种行为是由卖方律师完成的,应由买方和借贷方的律师检查其是否已充分完成。如果这种行为是由买方律师完成,则由借贷方律师检查;如果临时监护行为由借贷方律师完成,则由买方律师检查。

## 八、白蚁检查

某些司法管辖区规定必须要对不动产进行白蚁检查,并向买方出示该不动产并未受到白蚁破坏或没有白蚁大量繁殖的证书,中间人、借贷方或其他方的律师可以提出出具证书的要求。

在法律未规定出具该证书的地区,合同中应增加条款要求卖方出具由一个经注册的害虫控制机构所签发的关于白蚁的证书。如果存在白蚁的大量繁殖或白蚁造成的破坏,通常由卖方承担由此引起的必要修理费用。合同中应写明卖方的这一责任。所有标准格式合同都应包括白蚁条款。

## 九、起草合同文本

在整个不动产交易结束之前,应当由一名律师起草合同,抵押单据以及由抵押担保的债券和单据。为方便起见,通常由承受抵押方的律师起草这些文件,尽管任何一方的代表都同样具备起草的条件。但无论哪一方做这项工作,所起草的文件都要由另外两方和产权保险公司进行检查,并向他们说明这些文件是否有效,是否能产生预期收益。



这些文件的起草有时仅仅被当作例行工作。这种看法并不正确。例如,对各方描述的措辞应避免引起迷惑,对于土地的描述须完整准确。担保形式的重要性经常被忽视。应该说明的是,如果合理的法规或公共事业的地役权阻碍了所有权的获得,买方和借贷方可以接受上述的任何一种情况,但这种情况不应包括在担保的范围之内。

买卖双方最初的合同中应对如何取得产权做出说明。卖方应向买方说明取得产权的不同方式以及对纳税和其他方面的影响。

在交易初期达成的协议具有同等的重要性。有管辖权的法律可能规定后达成的条款可取代从前的协议,如果从前的协议与后来的条款不相吻合,则从前的协议失效。所以必须检查每一条款是否与已达成的协议一致。

#### 十、附属文书工作

按照“不动产纠纷解决程序条例”的要求,几乎所有用于居住的不动产交易都需要准备一份纠纷解决声明。另外,还需填写并签属真实借贷表。如果抵押贷款是由联邦住房管理局或私营抵押保险公司提供保险的,那么还需要更多的文书工作。所需文件均为标准化文件,无需法律专业知识即可完成。这些工作与其说是销售和抵押的法律工作的一部分,不如说是融资工作的一部分。尽管如此,律师经常需要做这项工作。于是政府规定,除极少数情况外,这种服务应当无偿提供。

#### 十一、获得产权保险

如果买方的产权保险是以律师证书为基础的,而该律师并非受雇于一家产权保险公司,他可以先申请临时保险单,待整个交易终结以后再以最终确定后的证书取得保险单。只要该律师并不作为不动产保险公司的代理人来提供这项服务,客户就需付给他报酬。律师不能仅仅因为把这个业务介绍给某保险公司而接受保险公司的报酬。这种做法是一种不恰当的行为,而且与美国律师协会在这一问题上的一贯立场相抵触。不动产纠纷解决程序条例特别规定禁止接受产权保险公司的回扣。

#### 十二、成交

交易终结前应准备好成交声明。该声明可采取不同的形式,主要目的在于说明各方的债务和债权分配情况。有时,这种声明是由不具法律专业知识的人准备的;有时则是由律师准备的。买卖双方律师应确信他们的客户了解成交阶段费用的性质和数量。美国律师协会支持在所有与政府有关的抵押交易中采用统一的成交声明。并且建议地方律师协会在所有其他的不动产交易中也采用统一的成交声明。除非有各方律师对于标准声明各项内容是否合适给予确认,否则,即使是标准的声明本身也是不够的。

除了附条件的合同外,在成交前要对不动产进行进一步的检查。如果不进行这样的检查,当事人各方有可能无法意识到不动产会在初次检查与最后成交这段时间内受到损害。这种进一步的检查一般由律师来执行,或者由产权保险公司进行鉴定或保险。

在成交阶段,当事人各方交换已签订且开始生效执行的文件,付款,完成交易。这时,买方、卖方、借贷方应当以他们的律师为代表行使各自职权。如果再发生争议,他们可以从律师处获得建议或要求各自的律师代为处理。通过他们所交换的法律文件应使他们确信这些文件能使他们得到预期收益,他们的权利能得到保护而且款项已通过正确的方式付给应得方。



作为成交阶段的一部分,还需要对保险、税收及产权形式做出安排;记录所有文件并对不动产做最后的检查;付款并将文件分发给有权利得到的当事人;按照要求取得保险单。如果一位律师负责处理成交阶段,他应照顾到以上所有细节。



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## LESSON TWELVE

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# Corporation Law 公 司 法

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### Background 背景

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美国的公司法属于商务企业法(the law of business enterprises)的组成部分,而且它主要是以州法律的形式出现的。由于各州的公司法并不尽同,而且美国在内战之后消除了州际商务限制,所以很多美国人都愿意到那些法律环境优越的州去成立公司。例如,特拉华州的公司法最为宽松,因此美国的很多公司都到该州注册,尽管其商务活动可能根本不在该州。美国法学会于1984年制定的“标准商务公司条例”(Model Business Corporation Act)只得到约一半州的采纳。在联邦法律中,证券法和反托拉斯法等都对公司活动有较大影响。

在英语中,“商务公司”(business corporation)一词不仅包括从事商业和贸易活动的公司,而且包括从事生产、采矿、金融、保险、运输等活动的公司。公司这一概念有多种分类,如公有公司(public corporation)和私有公司(private corporation);独有公司(corporation sole)与合有公司(corporation aggregate);母公司(parent corporation)、子公司(subsidiary corporation)和兄弟公司(brother-sister corporation);营利公司(profit corporation)和非营利公司(nonprofit corporation);公众持股公司(publicly held corporation)和内部持股公司(closely held corporation or close corporation)以及合资公司(joint venture corporation)、空壳公司(shell corporation)等。

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### Text 课文

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#### Part One: Introduction

In the United States, business organizations may be classified into three main



classes: individual proprietorships, partnerships, and corporations. The laws that effect these forms of business enterprise are diverse. There is no single code or statute that governs the U. S. law of business enterprises. Each state prescribes different laws for corporations. The corporate laws of each state are similar but not identical. A listing of some of the categories of laws applicable to U. S. business enterprises are as follows:

### ***Close Corporation Laws***

Several states have adopted Close Corporation Acts that authorize corporations to designate themselves as close corporations, and when so designated such corporations are required to restrict the number and the identity of their shareholders.

### ***Partnerships***

In nearly all states, the formation and structure of partnerships is regulated for general partnerships by the Uniform Partnership Act of 1916 ("UPA") and the Revised Uniform Limited Partnership Act of 1976 (for limited partnerships) adopted by these states with minor deviations.

### ***Corporation Codes***

Corporations have no uniform law. Laws governing corporations are to be found in individual state's business corporation acts. Such acts provide the procedures for formation and decision making for any enterprise that is incorporated under them. There does exist, however, a Model Business Corporation Act of 1984 ("Model Corporation Act"). The Model Corporation Act is followed by only half of the states.

An enterprise does not have to incorporate under the corporation code of the state in which it operates. For example, it is common to find corporations incorporated under Delaware law but having offices and doing business in California. Under the prevailing U. S. rule of conflict of laws, the internal law of the corporation is governed by the statutes and case law of the state of incorporation. Internal matters of a corporation are governed by its own Articles of Incorporation and Bylaws.

### ***Federal Securities Acts***

The U. S. has federal laws regulating securities activities in the United States. The Federal Securities Acts are: the Securities Act of 1933 (the "1933 Securities Act") and the Securities Exchange Act of 1934 (the "1934 Securities Act") and the various regulations issued by the Securities and Exchange Commission (the securities regulating body of the U. S. government), which are a component of American business law. The 1933 Securities Act regulates principally the issuance of new



securities to raise capital for the issuing enterprise while the 1934 Securities Act regulates the mechanisms by which investors buy and sell existing securities.

### ***Blue Sky Laws***

Blue Sky Laws are state securities laws. The federal securities laws preempt the State Blue Sky Laws. The Blue Sky Laws were created to regulate securities industry before the development of federal securities laws. Today they remain in force to suppress violations of securities regulations that are not regulated by the federal securities laws and that are intrastate in nature.

### ***Federal Antitrust Laws***

Antitrust laws are chiefly to regulate market behavior and to encourage competition through the prevention of monopolization and the limitation of restraint of trade.

## **Part Two: Forms of Business**

### ***A. Proprietorships***

Any individual may set up a business alone by obtaining a license to do business from the county in which he or she intends to set up the business. This form of business is called a proprietorship. Unlike corporations and limited liability partnerships no other permission or formality is required and the state corporate division is not involved. Proprietorships are not separate legal entities and are usually found in small retail shops and in service enterprises like consulting firms and insurance agencies. In number, proprietorships are the most common form of enterprise in the United States. They are insignificant, however, in terms of the revenue they generate.

### ***B. Partnerships***

Partnerships, like corporations (and unlike proprietorships) have separate legal entities. A non-U. S. corporation or individual can form a partnership with an individual, a corporation or another partnership doing business in the United States and vice versa. For a partnership to exist there is no requirement that there be a written partnership agreement. Normally, however, a written partnership agreement should be entered into. A partnership can arise simply out of the acts of the partners particularly if they hold themselves as partners to the general public. In situations where there is no partnership agreement the relationship between the parties is determined by the terms of the Uniform Partnership Act ("UPA") which has been



adopted by all the states. The UPA sets out the rules for determining whether or not a partnership exists. For example, the receipt by a person of a share of profits of a business is a prima facie evidence that the recipient of the profits is a partner in the business. (Unless, of course there is another good reason for doing so, i. e. , salary. ) However, the fact that two or more persons own property in common does not itself create a partnership between co-owners.

There are two types of partnerships: general partnerships and limited partnerships.

### **1. General Partnerships**

When two or more individuals set up a business enterprise together as co-owners of the enterprise and do not organize themselves as a corporation they have formed a "partnership". There are no formal requirements for the formation of a partnership and businessmen may be "partners" in the eye of the law without knowing it. Unless there is a partnership agreement which spells out the terms of the partnership, partners share equally in the assets and liabilities of the partnership upon the dissolution of the partnership.

In a partnership, there is no separation between the partner's liabilities and those of the partnership. This means that, unlike a shareholder of a corporation, a partner can be personally liable for the debts of the partnership when the partnership's assets are insufficient to meet its obligations. Partnerships are a common form of doing business for certain service enterprises such as law firms.

### **2. Limited Partnerships**

Limited partnerships are created when the partners wish to limit their personal liability for the partnership. Such partners are called limited partners. For a limited partnership to exist, there has to be one or more "general partner" who is liable for the debts of the partnership. This general partner can be a corporation.

Unlike partners in general partnerships, or general partners in limited partnerships, limited partners must enter into a written agreement with the partnership and must not actively participate in the running of the business, it is only then that they can benefit from the special features of a limited partnership. Limited partners act as investors, similar to shareholders in a corporation.

## **C. Corporations**

### **1. In General**

In contrast to a partnership, a corporation is an incorporated association. Once



the corporation is formally incorporated, it becomes a separate legal entity that has existence apart from the persons who form it. A corporation may own property in its own name and can sue and be sued under its own name.

Corporations come in all shapes and sizes. Some corporations have millions of shareholders and some have only one. In general, however, corporations are divided into two categories:

- a. publicly held corporations; and
- b. close corporations.

Publicly held corporations are ones whose shares are publicly traded on organized markets. Closely held corporations are corporations that restrict the number of shareholders to thirty-five or less and that forbid transfers of shares without the consent of other shareholders.

In the U. S. , there is no federal corporate legislation. States create the legal framework to govern corporations that are incorporated in its state. Each individual state has a secretary of state office whose corporate division usually handles the administrative matters for corporations, such as: incorporation, business registration and dissolution. The ownership of a corporation resides in its stockholders who normally have the right to appoint the directors of the corporation.

The differences between the laws of various states relating to business corporations are greater than the differences between partnership laws. Please note that a corporation does not need to be organized under the laws of the state where it conducts business or is the principal place of business for that corporation. It is possible to incorporate under the laws of one state and have the principal place of business of the corporation under the laws of another. It will be necessary, however, for the corporation to register itself in states other than its "home" state in order to do business in that state. Such registration will typically be with the secretary of state of those states where business is to be carried out. Failure to register in those states in which the corporation is doing business may mean that the corporation cannot sue in that state. It may also result in the imposition of a fine, or it may make contracts made by such a corporation void or voidable. Please note that in this context a California corporation is just as foreign in Arizona as a Chinese corporation would be. At what point does a corporation do enough business in a state to require registration depends largely upon the laws of each state, but it usually means more than one isolated contract or a sale in the state by a sales representative whose primary territory



was elsewhere.

## 2. Different State Laws Governing Corporations

Different legal requirements exist for setting up a corporation depending upon the state of incorporation. For example, the State of Delaware's corporate law only requires one director, while under the law of the District of Columbia or the State of New York a minimum of three directors are required. Traditionally, the State of Delaware has had the most "liberal" corporation law and has therefore registered more corporations than any other state in the U.S.. The State of Delaware is particularly good when it comes to minimizing the liability of "independent" directors for certain wrongs committed by the corporation.

### Notes 注释

- 【1】individual proprietorship: 个体业主
- 【2】partnership: 合伙
- 【3】the U.S. law of business enterprises: 美国的商务企业法
- 【4】close corporation laws (acts): 内部持股公司法(条例)
- 【5】shareholder: 股东
- 【6】general partnership: 一般合伙
- 【7】the Uniform Partnership Act (UPA): 统一合伙条例
- 【8】the Revised Uniform Limited Partnership Act: 统一有限合伙修订条例
- 【9】minor deviations: 细微差异
- 【10】incorporated: 组成公司
- 【11】the prevailing U.S. rule of conflict laws: 美国现行的冲突法规则
- 【12】Articles of Incorporation and Bylaws: 组织章程和内部规章
- 【13】Federal Securities Acts: 联邦证券条例
- 【14】the Securities Exchange Act: 证券交易条例
- 【15】the Securities and Exchange Commission: 证券交易委员会
- 【16】American business law: 美国商务(实业)法
- 【17】existing securities: 上市证券
- 【18】Blue Sky Laws: 蓝天法
- 【19】preempt: 优先于
- 【20】Federal Antitrust Laws: 联邦反托拉斯法
- 【21】the prevention of monopolization and the limitation of restraint of trade: 防止垄断和制止贸易限制
- 【22】forms of business: 工商企业的类型



【23】 separate legal entities: 独立的法律实体

【24】 written partnership agreement: 书面合伙协议

【25】 prima facie evidence: 表面证据

【26】 the recipient of the profits: 该利润的收受人

【27】...partners share equally in the assets and liabilities of the partnership upon the dissolution of the partnership. ....合伙人在解除合伙关系时平等分享该合伙的资产和责任。

【28】...a partner can be personally liable for the debts of the partnership when the partnership's assets are insufficient to meet its obligations. ....

当合伙的资产不足以抵其债务时,合伙人个人会负有偿还该合伙之债款的责任。

【29】...forbid transfers of shares without the consent of other shareholders. ....禁止在未经其他股东同意的情况下转让股份。

【30】 Secretary of state: 州务部长

【31】 incorporation: 成立公司

【32】 business registration: 商务注册

【33】 directors of the corporation: 公司董事

【34】 the principal place of business: 主要营业地;总部所在地

【35】 the imposition of a fine: 征收罚金

【36】 void or voidable: 无效或可撤销的

【37】...but it usually means more than one isolated contract or a sale in the state by a sales representative whose primary territory was elsewhere. ....但是它通常意味着多于一项单独的合同或者由主要业务范围在其他地方的销售代表在该州做的一笔生意。

【38】 The State of Delaware is particularly good when it comes to minimizing the liability of "independent" directors for certain wrongs committed by the corporation. 特拉华州的突出优点表现在它把“独立的”董事们对公司某些错误行为应负的责任减到最小限度。

## Exercises 练习

### 1. Questions about the text:

- ① What are the main classes of business enterprises in the United States?
- ② What are the main categories of laws applicable to business enterprises in the United States?
- ③ The Model Business Corporation Act is not a federal law, is it?
- ④ What are the internal matters of a corporation governed by?
- ⑤ What is the main difference between the 1933 Securities Act and the 1934 Securities Act?
- ⑥ What are Blue Sky Laws?



⑦ What is a proprietorship?

⑧ What are the differences between general partnerships and Limited partnerships?

⑨ What are the differences between publicly held corporations and closely held corporations?

⑩ Why do many corporations want to incorporate in the State of Delaware?

## 2. Dictation

One of the most important issues for people who wish to do business in the United States is what form of business organization to use. There are three basic types of business enterprise in the U. S. . They are sole proprietorships, partnerships, and corporations. The simplest form of business organization is a sole proprietorship, because the owner is the business. A partnership is different from a sole proprietorship in that two or more people agree to carry on a business for profit. The partners are co-owners of the business and have joint control over its operation and right to share in its profits. Of course, the most important form of business organization is the corporation. A corporation comes into existence by an act of the state, and therefore it is a legal entity. One of the key features of a corporation is that the liability of its owners is limited to their investments. Their personal estates are usually not liable for the obligations of the corporation.

## 3. Discussion

① Topic: Which form of business organization is the best for a Chinese entrepreneur to do business in the U. S. ?

②Reference information:

A. The Chinese entrepreneur has multimillion U. S. dollars and wish to start a business in the United States. However, he has no idea about what business he would do and what form of business organization he should start with. Therefore, he comes to different lawyers for advices.

B. Sole proprietorships are often associated with small enterprises, but this is not necessarily always the case. One advantage of a sole proprietorship is that the proprietor receives all the profits. In addition, it is often easier and less costly to start a sole proprietorship than it is to start any other kind of business. The disadvantages of a sole proprietorship include the unlimited liability for all obligations, the sole bearing of all risks of loss, and the less opportunity to raise capital.

C. A partnership agreement determines the rights and the obligations of the



partners. The agreement can be express or implied. Basically, the partners may agree to almost any terms when establishing the partnership so long as they are not illegal or contrary to public policy. Partnerships are not subject to levy for federal income taxes; and each partner's share of the net profit is only taxed as individual income. The major disadvantage with a partnership is that all partners are personally liable for all the debts of the partnership. A foreigner who becomes a partner in a U. S. enterprise is considered as doing business in the U. S. , even if he or she never sets foot on American soil.

D. A corporation can be owned by a single person, or it can have hundreds, even thousands, of shareholders. Since a corporation is a creature of statute, it is a legal entity, and its owners only have the limited liability for the debts of the corporation. In addition, a corporation may have many ways to raise capital and to develop business. However, the formalities for setting up a corporation are complicated and the expenditures for running a corporation are high. Above all, a corporation is subject to the imposition of a "double tax"; the corporation pays a federal income tax, and its owners also pay individual income tax on the amounts paid to them by the corporation in the form of dividends.

### ③ Instructions:

A. The students are divided into three groups of lawyers, and each is given an answer to the question.

B. The groups discuss the issue separately and each of them elect a speaker who will present the group's arguments in the class session and try to persuade the Chinese entrepreneur (the teacher may play this role in class session) to accept whose group's suggestion.

## **Supplementary Reading 补充读物**

### **MODEL BUSINESS CORPORATION ACT (1984)**

#### **CHAPTER 1. GENERAL PROVISIONS**

##### **Subchapter A. Short Title and Reservation of Power**

§ 1.01. **Short Title.** This Act shall be known and may be cited as the "[name of state] Business Corporation Act."

§ 1.02. **Reservation of Power to Amend or Repeal.** The [name of state



legislature] has power to amend or repeal all or part of this Act at any time and all domestic and foreign corporations subject to this Act are governed by the amendment or repeal.

### **Subchapter B. Filing Documents**

#### **§ 1.20. Filing Requirements.**

(a) A document must satisfy the requirements of this section, and of any other section that adds to or varies these requirements, to be entitled to filing by the secretary of state.

(b) This Act must require or permit filing the document in the office of the secretary of state.

(c) The document must contain the information required by this Act. It may contain other information as well.

(d) The document must be typewritten or printed.

(e) The document must be in the English language. A corporate name need not be in English if written in English letters or Arabic or Roman numerals, and the certificate of existence required of foreign corporations need not be in English if accompanied by a reasonably authenticated English translation.

(f) The document must be executed:

(1) by the chairman of the board of directors of a domestic or foreign corporation, by its president, or by another of its officers;

(2) if directors have not been selected or the corporation has not been formed, by an incorporator; or

(3) if the corporation is in the hands of a receiver, trustee, or other courtappointed fiduciary, by that fiduciary.

(g) The person executing the document shall sign it and state beneath or opposite his signature his name and the capacity in which he signs. The document may but need not contain: (1) the corporate seal, (2) an attestation by the secretary or an assistant secretary, (3) an acknowledgement, verification, or proof.

(h) If the secretary of state has prescribed a mandatory form for the document under section 1.21, the document must be in or on the prescribed form.

(i) The document must be delivered to the office of the secretary of state for filing and must be accompanied by one exact or conformed copy (except as provided in sections 5.03 and 15.09), the correct filing fee, and any franchise tax, license fee, or penalty required by this Act or other law.



**§ 1.21. Forms.**

(a) The secretary of state may prescribe and furnish on request forms for: (1) an application for a certificate of existence, (2) a foreign corporation's application for a certificate of authority to transact business in this state, (3) a foreign corporation's application for a certificate of withdrawal, and (4) the annual report. If the secretary of state so requires, use of these forms is mandatory.

(b) The secretary of state may prescribe and furnish on request forms for other documents required or permitted to be filed by this Act but their use is not mandatory.

**§ 1.22. Filing, Service, and Copying Fees.**

(a) The secretary of state shall collect the following fees when the documents described in this subsection are delivered to him for filing:

Document	Fee
(1) Articles of incorporation	\$ _____.
(2) Application for use of indistinguishable name	\$ _____.
(3) Application for reserved name	\$ _____.
(4) Notice of transfer of reserved name	\$ _____.
(5) Application for registered name	\$ _____.
(6) Application for renewal of registered name	\$ _____.
(7) Corporation's statement of change of registered agent or registered office or both	\$ _____.
(8) Agent's statement of change of registered office for each affected corporation	\$ _____.
not to exceed a total of	\$ _____.
(9) Agent's statement of resignation	No fee.
(10) Amendment of articles of incorporation	\$ _____.
(11) Restatement of articles of incorporation	\$ _____.
with amendment of articles	\$ _____.
(12) Articles of merger or share exchange	\$ _____.
(13) Articles of dissolution	\$ _____.
(14) Articles of revocation of dissolution	\$ _____.
(15) Certificate of administrative dissolution	No fee.
(16) Application for reinstatement following administrative dissolution	\$ _____.



(17) Certificate of reinstatement	No fee.
(18) Certificate of judicial dissolution	No fee.
(19) Application for certificate of authority	\$ _____.
(20) Application for amended certificate of authority	\$ _____.
(21) Application for certificate of withdrawal	\$ _____.
(22) Certificate of revocation of authority to transact business	No fee.
(23) Annual report	\$ _____.
(24) Articles of correction	\$ _____.
(25) Application for certificate of existence or authorization	\$ _____.
(26) Any other document required or permitted to be filed by this Act.	\$ _____.

(b) The secretary of state shall collect a fee of \$ \_\_\_\_\_ each time process is served on him under this Act. The party to a proceeding causing service of process is entitled to recover this fee as costs if he prevails in the proceeding.

(c) The secretary of state shall collect the following fees for copying and certifying the copy of any filed document relating to a domestic or foreign corporation:

- (1) \$ \_\_\_\_\_ a page for copying; and
- (2) \$ \_\_\_\_\_ for the certificate.

### **§ 1.23. Effective Time and Date of Document.**

(a) Except as provided in subsection (b) and section 1.24(c), a document accepted for filing is effective:

- (1) at the time of filing on the date it is filed, as evidenced by the secretary of state's date and time endorsement on the original document; or
- (2) at the time specified in the document as its effective time on the date it is filed.

(b) A document may specify a delayed effective time and date, and if it does so the document becomes effective at the time and date specified. If a delayed effective date but no time is specified, the document is effective at the close of business on that date. A delayed effective date for a document may not be later than the 90th day after the date it is filed.

### **§ 1.24. Correcting Filed Document.**

(a) A domestic or foreign corporation may correct a document filed by the



secretary of state if the document (1) contains an incorrect statement or (2) was defectively executed, attested, sealed, verified, or acknowledged.

(b) A document is corrected:

(1) by preparing articles of correction that (i) describe the document (including its filing date) or attach a copy of it to the articles, (ii) specify the incorrect statement and the reason it is incorrect or the manner in which the execution was defective, and (iii) correct the incorrect statement or defective execution; and

(2) by delivering the articles to the secretary of state for filing.

(c) Articles of correction are effective on the effective date of the document they correct except as to persons relying on the uncorrected document and adversely affected by the correction. As to those persons, articles of correction are effective when filed.

### **§ 1.25. Filing Duty of Secretary of State.**

(a) If a document delivered to the office of the secretary of state for filing satisfies the requirements of section 1.20, the secretary of state shall file it.

(b) The secretary of state files a document by stamping or otherwise endorsing "Filed", together with his name and official title and the date and time of receipt, on both the original and the document copy and on the receipt for the filing fee. After filing a document, except as provided in sections 5.03 and 15.10, the secretary of state shall deliver the document copy, with the filing fee receipt (or acknowledgement of receipt if no fee is required) attached, to the domestic or foreign corporation or its representative.

(c) If the secretary of state refuses to file a document, he shall return it to the domestic or foreign corporation or its representative within five days after the document was delivered, together with a brief, written explanation of the reason for his refusal.

(d) The secretary of state's duty to file documents under this section is ministerial. His filing or refusing to file a document does not:

(1) affect the validity or invalidity of the document in whole or part;

(2) relate to the correctness or incorrectness of information contained in the document;

(3) create a presumption that the document is valid or invalid or that information contained in the document is correct or incorrect.

### **§ 1.26. Appeal from Secretary of State's Refusal to File Document.**



(a) If the secretary of state refuses to file a document delivered to his office for filing, the domestic or foreign corporation may appeal the refusal within 30 days after the return of the document to the [name or describe] court [of the country where the corporation's principal office (or, if none in this state, its registered office) is or will be located] [of county]. The appeal is commenced by petitioning the court to compel filing the document and by attaching to the petition the document and the secretary of state's explanation of his refusal to file.

(b) The court may summarily order the secretary of state to file the document or take other action the court considers appropriate.

(c) The court's final decision may be appealed as in other civil proceedings.

**§ 1.27. Evidentiary Effect of Copy of Filed Document.** A certificate attached to a copy of a document filed by the secretary of state, bearing his signature (which may be in facsimile) and the seal of this state, is conclusive evidence that the original document is on file with the secretary of state.

**§ 1.28. Certificate of Existence.**

(a) Anyone may apply to the secretary of state to furnish a certificate of existence for a domestic corporation or a certificate of authorization for a foreign corporation.

(b) A certificate of existence or authorization sets forth:

(1) the domestic corporation's corporate name or the foreign corporation's corporate name used in this state;

(2) that (i) the domestic corporation is duly incorporated under the law of this state, the date of its incorporation, and the period of its duration if less than perpetual; or (ii) that the foreign corporation is authorized to transact business in this state;

(3) that all fees, taxes, and penalties owed to this state have been paid, if (i) payment is reflected in the records of the secretary of state and (ii) nonpayment affects the existence or authorization of the domestic or foreign corporation;

(4) that its most recent annual report required by section 16.22 has been delivered to the secretary of state;

(5) that articles of dissolution have not been filed; and

(6) other facts of record in the office of the secretary of state that may be requested by the applicant.

(c) Subject to any qualification stated in the certificate, a certificate of existence



or authorization issued by the secretary of state may be relied upon as conclusive evidence that the domestic or foreign corporation is in existence or is authorized to transact business in this state.

### § 1.29. Penalty for Signing False Document.

(a) A person commits an offense if he signs a document he knows is false in any material respect with intent that the document be delivered to the secretary of state for filing.

(b) An offense under this section is a [ ] misdemeanor [punishable by a fine of not to exceed \$ ].

## Reference Translations 参考译文

### 标准实业公司条例

#### 第一章 总 则

##### 第一节 简称和权力保留

第 1.01 条:简称——本法应统称为或引证为“[州名]公司法”。

第 1.02 条:修改或废止的权力保留——[州立法机关的名称]有权在任何时间对本法的部分或全部内容提出修改和废止,所有服从于本法的国内和国外的公司将受到修改的法律和废止使用的约束。

##### 第二节 注册申请文件

第 1.20 条:注册申请的要求

(a) 文件必须满足本条规定的要求,以及其他条对本条规定的增加或改变,且只有州务部长有权予以注册。

(b) 本法要求或只允许在州务部长办公室内注册文件。

(c) 文件必须包含本法所要求的内容。文件也可以包含其它内容。

(d) 文件必须打印或用印刷体书写。

(e) 文件应使用英语。如果用英语字母、阿拉伯或罗马数字书写的公司名字,可以不用英语;如果附有合理真实的英语译本,外国公司所需的实体存在证书可不用英语。

(f) 文件的签属必须由:

(1) 国内或外国公司董事会董事长、总裁或其官员中的其他人;

(2) 如果董事会还没有选出,或公司还没有成立,由一名公司创办人;或

(3) 如果公司被接受人、托管人或其它法院指定的受托人负责,由受托人签属。

(g) 执行文件的人应该签名,并在其签名下或背面,指明他的名字和他签名的行为能力。文件可能,但不一定包括:(1) 公司印章,(2) 州务部长或助理州务部长的证明,(3) 认知书、鉴定或证明。

(h) 如果州务部长要求使用根据第 1.2.1 条所设计的规定表格,那么文件必须附在该规定



的表格内。

(i) 文件必须递交给州务部长办公室注册,同时还必须附交一份精确或与原文一致的复印件(第 5.03 和 15.09 条规定者除外),正确的填写费和任何特许税、执照费,成本法或其它法律所要求的罚款。

#### 第 1.21 条:表格

(a) 州务部长可能在申请表格上规定和提供给:(1)一张实体存在证书申请表,(2)外国公司在这个国家办理业务的授权证书申请表,(3)外国公司注销证明申请表,和(4)年度报告。如果州务部长作了这些要求,那么填写这些表格是属于强制性的。

(b) 州务部长可能在申请表格上规定和提供本法所要求或允许注册的其它文件,但是使用这些表格并不是强制性的。

#### 第 1.22 条:申请注册、服务和复制费

(a) 当本节中所规定的文件呈交给州务部长注册时,州务部长应收取以下费用:

文件	费用
(1) 公司组织章程	美元_____
(2) 不可区别的名称使用申请	美元_____
(3) 保留名称申请	美元_____
(4) 保留名称的过户申请	美元_____
(5) 注册名称申请	美元_____
(6) 更换名称申请	美元_____
(7) 公司改变代理人或注册办公室或 两者兼有的申明	美元_____
(8) 代理人对每一个影响公司的注册 办公室改变的申明	美元_____
总数不超过	美元_____
(9) 代理商放弃代理声明	不收费
(10) 公司组织章程修改	美元_____
(11) 对修改后的公司组织章程的重新 声明	美元_____
(12) 合并和股权交易条款	美元_____
(13) 解散条款	美元_____
(14) 撤回解散条款	美元_____
(15) 行政解散证明	不收费
(16) 行政解散后权力恢复申请	美元_____
(17) 权力恢复证明	不收费
(18) 司法解散证明	不收费
(19) 授权证明申请	美元_____
(20) 授权证明修改申请	美元_____



- |                      |         |
|----------------------|---------|
| (21) 注销证明申请          | 美元_____ |
| (22) 办理业务授权撤回的申请     | 不收费     |
| (23) 年度报告            | 美元_____ |
| (24) 修正条款            | 美元_____ |
| (25) 实体存在或授权证明申请     | 美元_____ |
| (26) 本法所要求或允许的任何其它文件 | 美元_____ |

(b) 根据本法, 州务部长每次办理手续将收费美元\_\_\_\_\_, 这些费用应向他送交。在诉讼中需要这项服务的一方, 如果在诉讼中获胜, 有权收回这笔费用。

(c) 在对与国内或外国公司有关任何申请注册的文件复制或复制件的证明时, 州务部长应该收取以下费用:

(1) 美元\_\_\_\_\_, 复制每页; 和

(2) 美元\_\_\_\_\_, 复制件证明。

#### 第 1.23 条: 文件的生效日期和时间

(a) 除本条(b)款和第 1.24 条(c)款规定者外, 受理注册的文件于下列时间生效:

(1) 在所申请注册之日期的注册时间, 以州务部长在原文件上签署的日期和时间为准; 或

(2) 文件上规定的时间作为注册生效时间。

(b) 一份文件可能指明有一个延期的生效时间和日期; 如果有, 那么文件就在指定的日期和时间生效。如果延期的生效日期已指明但时间没有指明, 那么此文件就在那一日期的停业时间生效。一份文件的延期生效日期, 不能迟于注册日期之后的 90 天。

#### 第 1.24 条: 改正已注册的文件

(a) 国内或外国公司可能需要对州务部长已注册的文件进行改正, 如果这份文件(1)含有不正确的声明或, (2) 在签名、证明、盖章、鉴定或认知时有缺陷。

(b) 一份文件的改正:

(1) 要准备改正所需材料, 它包括(Ⅰ)描述文件(包括注册日期)或把文件复制件附在这些材料上; (Ⅱ)指明不正确声明和它不正确的原因, 或执行的缺陷方式; 和(Ⅲ)改正不正确的声明或有缺陷的签名; 和:

(2) 要把这些材料呈交给州务部长注册。

(c) 改正条款在文件的有效日期内是有效的。但是依赖于未改正之文件并且会受到改正后文件之不利影响者除外。对于这些人来讲, 改正的条款自改正之时起生效。

#### 第 1.25 条: 州务部长的注册义务

(a) 如果送交给州务部长办公室要求注册的文件满足第 1.20 条的要求, 州务部长应予以注册。

(b) 州务部长在原本、文件复制件、和注册费收据上盖章或签署“已注册”、州务部长名字、官方机构名称、和收到日期时间。文件注册后, 除第 5.03 和 15.10 条规定者外, 州务部长应将文件复制件、附上注册费收据(如果不收费则附上收到认知书), 送交国内或外国公司, 或其代理人。

(c) 如果州务部长拒绝注册该文件, 他应该在收到文件后 5 日内, 将文件连同一份简单的拒



绝原因说明书,送还该国内或国外公司,或其代理人。

(d) 州务部长根据本条内容注册文件的义务只是行政上的事务,他注册或拒绝注册一份文件并不:

- (1) 影响文件的整个或部分的有效或无效性;
- (2) 与文件中所包含的正确或不正确内容有关;
- (3) 产生一种推断:文件有效或无效;或文件中包含的内容正确或不正确。

#### 第 1.26 条:对州务部长拒绝注册文件之申诉

(a) 如果州务部长拒绝注册送交给他办公室要求注册的文件,国内或外国公司可以在文件被退回后 30 日内,向[公司总部(或,如果在本州没有,在其注册办公室)所在或将在地][××县]的[名称或指定]的法院对拒绝注册提出申诉。该申诉是要请求法院去迫使州务部长注册该文件,而且要附上被拒绝注册的文件和州务部长对其拒绝注册的解释。

(b) 法院可能即时命令州务部长注册该文件,也可能采取法院认为适当的行为。

(c) 法院的最后判决可以通过其它民事诉讼程序提出上诉。

#### 第 1.27 条:已注册文件复制件的证据效力

州务部长注册之文件的复制件,附有州务部长签名(可能是复印)和州印章的证明,将是对存于州务部长档案中的原件的结论性证明。

#### 第 1.28 条:实体存在证书

(a) 任何人都可以向州务部长提出申请,为一家国内或外国公司提供实体存在证明,或为外国公司提供授权证明。

(b) 实体存在或授权证明将宣布:

- (1) 在本州使用的国内公司的公司名称、或外国公司的公司名称;
- (2) (i) 根据本州的法律,国内公司已正式成为法人;公司成立的日期;和如果不是长期存在,那么它的存在期间;或(ii)外国公司在本州办理业务的授权;
- (3) 欠本州的所有费用、税、罚款已经付清,如果:(i)付款在州务部长的记录中有反映,和(ii)未付款将会影响到国内或外国公司的存在或授权;

(4) 第 16.22 条要求的大部分近些年的年度报告已送交州务部长;

(5) 没有提出解散条款;和

(b) 申请人可能要求的州务部长办公室内的其它事实记录。

(c) 依照证明中所指出的各种资格,州务部长所发出的实体存在或授权证明,可以作为国内或外国公司在本州存在或被授权办理业务的可依赖的结论性证明。

#### 第 1.29 条:对签署虚假文件的惩罚

(a) 送交给州务部长要求注册的文件,如果有人知道文件是虚假的,并且有实质性故意签署了文件,那么此人即触犯本法。

(b) 触犯本法的犯罪是一种[——]轻罪[以不超过美元——的罚金处罚]。



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## LESSON THIRTEEN

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### Insurance Law

### 保 险 法

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#### Background 背景

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保险制度是近代资本主义发展的产物。它起始于海上保险,后来又有了火灾保险和人寿保险等。随着保险业的发展,一些国家便制定了有关的法规。在这方面,欧洲大陆国家发展较早,而英国到 1906 年才颁布了“海上保险法”。美国没有全国统一的保险法,各州的保险法虽不完全相同,但一般都包括保险公司的成立、保险业的财务监督、投保人的利益保护等方面的内容。各州还设有专门管理保险业的行政部门。

在现代美国社会中,保险业涉及社会生活的各个领域,保险种类也异常繁多,除了常见的健康保险(Health Insurance)、人寿保险(Life Insurance)、海上保险(Marine Insurance)、火灾保险(Fire Insurance)、汽车保险(Automobile Insurance)、旅行意外保险(Travel Accident Insurance)等外,还有疾病保险(Sickness Insurance)、残废保险(Disability Insurance)、失业保险(Unemployment Insurance)、罢工保险(Strike Insurance)、公务员保险(Government Employee Insurance)、家畜保险(Livestock Insurance)、雨水保险(Rain Insurance)、冰雹保险(Hail Insurance)等等。美国人的保险意识极强,特别是健康保险,几乎人人都有。这大概因为美国的医疗费用太昂贵。此外,很多美国人都对其耐用消费品进行保险,包括电冰箱、洗衣机、洗碗机、电烤炉等。这种保险不同于我国的家庭财产保险,它实际上是具有保修性质的故障保险。当上述投保物品发生故障时,保险公司便负责出钱修理。



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**Text 课文**

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Many types of insurance are purchased by and through businesses. Much of the insurance is group insurance purchased for personal needs at cheaper rates. Cheaper rates on health and life insurance can be obtained by buying group policies through the business that are not normally available to families. This is an added benefit to your employees that should be taken into consideration. Group rates are often available, even for family businesses that have only a few employees.

Other important types of insurance for business are accident insurance and disability insurance. These will provide added insurance in case your employees are involved in accidents or become disabled in connection with their work. Liability insurance is also important. Owner of business incur risks that liability insurance can help reduce. If a customer slips and is injured, the owner can be liable for damages. Liability insurance can help reduce the risk of losing the business because of injuries that give rise to a tort judgment.

The insurance needs of a business should be handled by a professional who can help analyze what is available and what the business can afford. Always remember that an insurance agent or broker is trying to make a sale. It is wise to discuss the matter with several different brokers and agents in order to get the best deals.

Life insurance serves many business purposes. The first is insuring the life of a key employee to prevent losses to the business that would occur if he or she were to die and the second is using insurance proceeds to fund a buy-out agreement that is effective when one of the partners or shareholders dies.

Often, a particular employee will be important to the continued success of a business. The business will have an insurable interest in the employee because it expects to receive some pecuniary gain from the key person's continued employment and will suffer a loss if the person dies.

When a company insures itself against the loss of the services of a valuable employee, it is said to purchase "key man" or "key person" insurance. The monetary effects of the insurable loss may be readily apparent and predictable, such as the lost sales of a superior salesperson, the technical know-how of the plant manager, the unique skills of a particular employee, and the cost of finding, acquiring, and keeping



a suitable substitute.

The principal tax goal of key person insurance is to receive a tax-free receipt of the insurance proceeds. In the customary case where the company designates itself as beneficiary, it cannot deduct the premiums as a business cost. The company will generally receive the proceeds tax free so long as the company has an insurable interest. It must have been reasonably probable that the insured's continued life would benefit the company and that his or her death would cause an actual loss. Generally, the employee must be vital to the business.

Example: The XYZ Corp. takes out life insurance policies on the company president and one of its stock boys. When the stock boy dies, in all probability the receipt of the proceeds will be taxable because XYZ did not have an insurable interest. On the other hand, XYZ has an insurable interest in the company president and can receive the insurance proceeds tax free when he dies.

Partners in a partnership and shareholders in closely held corporations are often dependent on the individual owners devoting substantial amounts of time to the business. As a result, they frequently do not want errors to enter the business when any one of the owners dies. Consequently, they enter into a buy-sell agreement whereby a binding contract is created so that the survivor or survivors will buy out the interest of the deceased owner. A major problem that occurs is that the surviving owners do not have liquid funds from which to make the purchase.

Example: Able, Baker and Charlie formed the ABC Corp. as equal shareholders many years ago. They have an agreement that when one dies, the remaining shareholders will purchase the stock of ABC Corp. at its fair market value. Charlie dies when ABC is worth \$3 million but has little cash. Able and Baker have to go deeply into debt in order to fund the purchase of C's stock.

In its most basic form, a stock retirement plan is an arrangement under which a closely held corporation agrees to redeem the stock of a deceased shareholder from his or her estate. This is distinguished from a buy-sell plan in that corporate funds are used to retire the stock, rather than the other shareholders agreeing to purchase the stock individually.

To assure the successful operation of a stock retirement plan, the corporation must have a new source of funds available to it on the death of the participating shareholder. Life insurance is often used to solve this problem. In the basic stock retirement plan, the corporation will own the policy and will be the beneficiary. As in



the case of key person insurance, the premiums will not be deductible. This may create a problem when some shareholders are old with high costs of premiums and others are young with premiums being much lower in cost. A disproportionate amount will be spent on insuring the older shareholders. This problem is even greater when the older shareholders have more stock than the younger shareholders. This is because the corporation will have to purchase insurance with a greater face value in order to buy out the interest of the shareholders with larger interest. One solution that should be considered is to allow for less insurance than the full value of the older shareholders' stock. The goal of life insurance in stock retirement plans is to create a new source of funds, and it is not necessary wholly to pay for the stock retirement from the insurance proceeds. It is possible for the corporation to issue notes in addition to cash to pay for the stock.

A partnership would typically use a buy-sell plan to retire a deceased partner's interest. Either individual partners can own policies on the life of the other partners, or the partnership could own the policies. There are several key elements in a buy-sell plan. The first is that the partners must execute a binding contract that can be enforced to require the deceased partner's estate to sell to partners hip interests.

The second fundamental element in a buy-sell agreement is a definite valuation formula. Any one of the partners can be the first to die, and each has a vested interest in insuring that his or her estate is justly compensated for the partnership interest. There is no formula that fits all situations. One possibility is a formula based on the profits of the partnership, but this would not work in a real estate partnership that has significant assets and little or no earnings. Thus, another possible formula would be based upon the value of the underlying partnership assets. Alternatively, other formulas could take both assets and earnings into consideration in determining the value.

Another element in the agreement is the funding. Again, life insurance provides the answer in many cases. It provides a quick source of funds that becomes available at the partner's death. It allows the estate to receive mostly cash for the interest (some notes may be necessary if insurance is not sufficient to pay for the full partnership interest).

Planning Notes: You and your partners have decided that when one dies, the others will buy that partner's interests rather than bringing the heirs into the business and you want insurance to help fund the buy-out. You are not all the same age and



you do not all have the same financial interest in the company. How do you arrange the agreement so as to be fair to all partners?

First, you need to determine the current value of the business and provide a method for determining the value of the business when one of the owners dies. There are numerous ways to accomplish the valuation—the point is that all of you need to agree as to the method and enter into a binding contract to that effect. Each of you should be satisfied that if you were the first to die, the valuation method would provide a fair and equitable way to buy your interest from your estate.

Also, you must decide how much insurance to purchase. Insurance can be used to fund the entire amount of the purchase price, or it can be used to pay only a part of the purchase price. In fact, given that some of the owners will cost more to insure, an agreement may be reached to buy less insurance for them in order to reduce current costs of insurance. The remaining part of the purchase price would presumably be made in installments that draw current interest rates. In fact, the owners can negotiate a variety of payment plans to fit the individual needs of the partners. For an older partner, the payments can be spread over only a few years, and for younger partners the payments can be spread over a longer period of time to supply income for a longer period. This is all negotiable. You should attempt to draft an agreement that protects your own interest.

## Notes 注释

- 【1】group insurance: 团体保险。
- 【2】health and life insurance: 健康和人寿保险。
- 【3】insurance policy: 保险; 保险单。
- 【4】accident insurance: 意外保险。
- 【5】liability insurance: 责任保险。
- 【6】insurance agent: 保险代理人。
- 【7】insurance broker: 保险掮客。
- 【8】insurance proceeds: 保险收益。
- 【9】buy-out agreement: (股权) 承买协议。
- 【10】insurable interest: 可保险的利益。
- 【11】key man (or person) insurance: 关键人员保险。
- 【12】insurable loss: 可保险的损失。
- 【13】premium: 保险费。



【14】buy-sell agreement: (股权)买卖协议。

【15】binding contract: 有约束力的契约。

【16】stock retirement plan: 赎股计划。

【17】estate: 遗产

【18】This is distinguished from a buy-sell plan in that corporate funds are used to retire the stock, rather than the other shareholders agreeing to purchase the stock individually. 这(退股计划)与股权买卖计划不同。按这种计划,赎股使用的是公司资金,而不是由其他股东同意个人购买那些股权。

【19】a deceased partner's interest: 一名已死亡之合伙人的股权。

【20】...the partners must execute a binding contract, ...各方合伙人必须订立一项有约束力的合同。

【21】The remaining part of the purchase price would presumably be made in installments that draw current interest rates. 买价之剩余部分大概可采用收取当时利率的分期付款方式。

## Exercises 练习

### 1. Questions about the text:

- ① Why do people purchase group insurance for personal needs?
- ② What are the important types of insurance for business?
- ③ What can liability insurance help a business owner?
- ④ Why is it wise to discuss the matter with several different brokers and agents?
- ⑤ What business purposes can life insurance serve?
- ⑥ What is "key man" insurance?
- ⑦ Is the life insurance on a company's stock boy a "key man" insurance? And why?
- ⑧ What is the difference between a buy-sell plan and a stock retirement plan?
- ⑨ What is the goal of life insurance in stock retirement plans?
- ⑩ How should people arrange a buy-out agreement in order to make it fair to all partners?

### 2. Dictation

#### The Safety Responsibility Law

When you are involved in an accident that causes personal injury, the death of a person or more than \$250 in damage to property, you must file an accident report. If you were at fault in the accident, you must also meet the requirements of the Safety Responsibility Law. This law requires you to be able to put up security (a



guarantee of payment) if you do not have insurance coverage or another acceptable form of payment. The Illinois Department of Transportation determines the amount of the security. If you do not have insurance coverage or the required security, your drivers license may be suspended until the case has been settled. The owner of the vehicle involved in the accident may also have all license plates and registration stickers suspended.

### 3. Discussion

①Topic: Should China adopt the health insurance system to replace the free medical care system (or the medical care system at public expense)?

②Reference arguments:

A. China should adopt the health insurance system, because this system is more efficient and fairer than the old free medical care system, and the old system has often been a way of wasting public money.

B. China should not adopt the health insurance system, because this system is not suitable to the situation in China. In addition, the free medical care system is one of the important merits of socialism.

③Instructions

A. The students are divided into two groups and each of them is assigned an opinion for the discussion;

B. the two groups discuss the issue separately, and each group elect one speaker for the first-round debate and two speakers for the second-round debate (or rebuttal);

C. the two groups debate the issue in class discussion.

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## Supplementary Reading 补充读物

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### Part One

Insurance companies are fundamentally different than firms in most other industries in that they are in the business of attracting risk as opposed to shedding risk. A manufacturing firm has many opportunities or options to eliminate interest rate risk, foreign exchange risk, liquidity risk, and the risks associated with property and casualty perils. Financial institutions and specifically insurers, are in the business of attracting these risks and getting paid a premium to either manage or diversify them. This was the thesis of two McKinsey partners in a book written about five years ago entitled *Facing Up To Risks* and it really underscores the very different



challenge and subsequent skill sets required to run an insurance company. Attracting risk others do not want and successfully managing those risks requires sound information, superb analytical skills, financial strength and resilience. These core competencies are particularly important today as a changing climate worldwide has caused a string of property disasters around the world. With the globalization of trade, legal systems are under pressure for change bringing an uncertain liability environment with them. Further, healthcare advances and their costs continue to increase, adding an uncertainty to the cost of many accident and liability insurance products.

### Part Two

Historically, the reinsurance industry has offered discrete risk transfer products to help insurance companies mitigate or manage the risks that they have attracted from the insureds. While we certainly offer many of these traditional products, we have attempted to take a more holistic view of the challenges facing the insurance company executive. And, we have tried to develop the risk identification and assessment skills that allow us to position ourselves as a risk manager for an insurance company.

Insurance companies have three primary portfolios of risk: the underwriting portfolio, the investment portfolio, and the reserve portfolio. Additionally, one can think of the capital structure of the company as a fourth portfolio of risk, particularly today with the myriad forms of equity securities and debt securities that have different risk attributes. Our discussions will focus on these four portfolios of risk and most importantly, the interrelationships between them and the challenges these interrelationships present to both managing the risks that have been assumed and optimizing the financial performance of an insurance company. We will begin with a discussion of the underwriting portfolio and since it is our strength We will be focusing on the property/ casualty industry. And then we will have a discussion on the risks embedded in the investment portfolio and some of the tools that we believe are important to manage those risks. After then, we will have a discussion on the capital structure of an insurance company as a source of volatility, and its relationship with the other portfolios. Because of its importance, we will frequently comment on the reserve portfolio or the property / casualty liability structure of a company.

While we will reference various risk theories from time to time in our discussions, our intent is to concentrate on practical applications from a "how to"



prospective. And, while we are not here to endorse any specific approaches or strategies, our own biases are likely to be evident from time to time and we apologize in advance for that.

### Part Three

All motor vehicles operated in Illinois must be covered by liability insurance. Vehicle liability insurance pays for injuries or damages you may cause with your vehicle to other persons or their property. Vehicle owners are not required to show evidence of insurance at the time of registration. However, they are required to sign an affirmation that they will abide by the mandatory insurance law and properly insure the vehicle when it is operated.

The minimum liability insurance limits are:

- \$ 20,000 for injury or death of one person in an accident
- \$ 40,000 for injury or death of more than one person in an accident
- \$ 15,000 for damage to property of another person

Note: Some vehicle classes are required to carry higher liability coverage under other laws.

Evidence of liability coverage must be carried by the motorist or in the vehicle and shown to law enforcement officers upon request. Insurance companies must issue Illinois insurance cards to their policyholders for evidence of coverage. Contact your insurance agent or company if you lose your insurance card or the company fails to send you one. Meanwhile, carry in your vehicle some other kind of proof that you have insurance such as an insurance binder, the current declarations page of your insurance policy, a certificate of insurance or the receipt for your last insurance payment.

Enforcement of the law involves two methods of detection: random computer checks and traffic tickets/accident reports.

Penalties include:

- a minimum \$ 500 fine for driving uninsured.
- suspension of your vehicle registration for at least two months. Your vehicle may not be driven by anyone while its license plates are suspended. The minimum fine for driving a suspended vehicle is \$ 1,000.
- a \$ 50 reinstatement fee and proof of insurance before your suspension is ended. The fee for repeat offenders is \$ 100.

If an insurance company refuses to sell you insurance, apply with other



companies. If you still cannot get insurance, ask an insurance agent about the Illinois Automobile Insurance Plan. The plan is a state-monitored program for drivers who have difficulty getting insurance.

## Reference Translations 参考译文

### 第一部分

保险公司与大多数其他产业公司的基本区别就在于它们的业务是在吸收风险,而其他公司是要摆脱风险。一家生产公司有很多机会或选择来消除利率风险、外汇风险、资金流通风险、以及伴随着财产和意外伤害危险的风险。金融机构和特别是保险公司所经营的业务就是吸引这些风险并收取保险费来驾驭或分散这些风险。这正是两位麦金西公司的合伙人在大约五年前写的一本名叫“正视风险”的书中的命题,而且该书确实强调了经营一家保险公司所面临的与众不同的挑战和所需要的特殊技能。吸引他人不要的风险并成功地驾驭这些风险要求有正确可靠的信息、高超的分析技能、以及金融实力和应变能力。今天,由于全球气候变化已在世界各地引起了一系列财产灾难,所以这些关键能力变得尤为为重要。随着贸易的全球化,各国法律制度也承受到变化的压力且随之带来了一种不确定的责任环境。再有,保健的进步及其花费仍在持续上升,这又给许多意外事故和责任保险项目的成本增加了不确定性。

### 第二部分

长期以来,再保险业一直在提供离散性风险转移产品以帮助保险公司减少或控制其从投保人处吸引来的风险。虽然我们当然也提供许多此类传统产品,但我们一直试图对保险公司管理人员面临的挑战进行更为全面的观察。而且,我们已竭力开发出一套确认和评估风险的技能,它使我们得以作为保险公司的风险管理人。

保险公司有三种主要的风险组合:承保风险组合、投资风险组合和准备金风险组合。此外,人们还可以把保险公司的资金结构作为第四种风险组合,特别是在今天,形形色色的衡平证券(即股票)和债权证券各有不同的风险特征。我们的讨论将集中在这四种风险组合上,而最重要的是它们之间的相互关系以及这些相互关系向保险公司金融活动之优化和承担风险之管理所提出的挑战。我们将首先讨论承保风险组合。由于我们特长之所在,我们将集中讨论财产和意外损伤保险业务。然后我们将讨论植根于投资组合中的风险,以及我们认为对管理这些风险来说非常重要的一些手段。再后,我们将讨论作为不稳定性之根源之一的保险公司资金结构,及其与其他风险组合的关系。由于其十分重要,我们将频繁地评论准备金风险组合或者一家保险公司的财产保险和意外损伤责任保险的比例结构。

虽然我们在讨论中会不时地引述各种风险理论,但是我们的意图是要从“如何去做”这个角度阐述实际应用问题。而且,虽然我们来此不是为了支持某种具体的方法或策略,但是我们自己的倾向性很可能会不时地表露出来。对此,我们先致歉意。

### 第三部分

所有在伊利诺斯州行走的机动车都必须有责任保险。机动车责任保险用于支付你的车辆可能给他人或其财产造成的损伤或损害。车主在注册时并不被要求出示保险证明。但是他们



必须签署一份保证书,声明他们将遵守强制保险法的规定并在其车辆开动时恰当地给其车辆投保。

最低责任保险的赔偿限额为:

一次事故中一人受伤或死亡者为 20,000 美元;

一次事故中二人以上受伤或死亡者为 40,000 美元;

对他人财产损害者为 15,000 美元。

注:其他法律还要求某些种类的车辆应有更高的保险赔偿额。

保险责任范围的证明文件必须由开车人携带或放置于车中,并应执法人员的要求出示。保险公司必须向其保险单持有人发放伊利诺斯州保险卡作为保险责任范围的证明文件。如果你遗失了你的保险卡或者保险公司未寄给你保险卡,那么你应与你的保险代理人或保险公司联系。同时,在你的车辆内携带其他某种能证明你已投保的文件,如临时保险单、你保险单的现行申报页、保险证件或者你最近一次交付保险费的收据。

该法律的执行有两种检查方法:随机性计算机检查和交通违章通知单或事故报告检查  
处罚包括:

无保险驾车的最低罚金为 500 美元。

暂扣你的车辆牌照,时间至少为两个月。在车牌被暂扣期间,任何人均不得驾驶你的车辆。  
驾驶被暂扣车牌之车辆的最低罚金为 1,000 美元。

在暂扣到期之前提交保险证明和 50 美元的恢复车牌费。累犯的恢复费为 100 美元。

如果一家保险公司不卖给你保险,你可向其他保险公司申请。如果你仍然买不到保险,你可以向保险代理人询问“伊利诺斯州机动车保险计划”的情况。该计划是一个由州政府监督的、为那些难以买到保险的人设立的项目。



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## LESSON FOURTEEN

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# Commercial Law 商 法

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### Background 背景

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在美国及其他普通法系国家中,商法是一个相当含混的术语。在很长时期内,美国律师多认为商法是一个内容范围极广的概念,因为律师的大多数业务都在不同程度上具有商业性,甚至连属于公法领域内的税务问题也可包括在内。20 世纪中期以来,商法逐渐成为一个相对明确的法律概念。

在美国,商法主要属于州法律的范畴。虽然美国宪法第八条第一款被称为“商务条款”(Commercial Clause,或译为“贸易条款”),但其主要涉及国际和州际的商业活动等问题。1957 年,美国统一各州法律全国代表大会(National Conference of Commissioners on Uniform State Laws)通过了“统一商法典”(the Uniform Commercial Code)。目前,美国各州都在不同程度上采用了该法典。

按照“统一商法典”所规定的内容,商法包括:商品的销售和租赁(sales and leasing of goods);资金过户(transfor of funds);商业文件(commercial paper);银行押金和托收(bank deposits and collections);信用证(letters of credit);整体过户(bwlk transfers);仓库收据(ware house receipts);提货单(bills of lading);投资证券(investment securities)和担保交易(secured transcatons)等。

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### Text 课文

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#### Part One

Article I, Section 8 of the Constitution provides in part that Congress shall have the power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The brevity of this clause belies the fact that its



interpretation has played a significant role in shaping the concepts of federalism and the permissible uses of national power throughout our history. It must be remembered from the last chapter that the federal government, at least in form, was granted neither a general police power nor the inherent right to act on any subject matter in order to promote the health, safety or welfare of the people throughout the nation. But the framers did grant Congress a power to regulate commerce.

This power over commerce might, depending on the definition of that seemingly nontechnical word, include the power to promote the economic welfare of the citizens throughout the country. The grant of power also may be viewed as committing this subject matter to Congress and thereby removing some of the powers of states to deal with local matters that may be considered a part of the "commerce" described by this clause. Thus it can be seen that, absent some further restriction upon the power, it might indeed be the functional equivalent of a generalized "police power" because much of the activity which takes place within the country, and even within a single state, might be said to relate to economic issues and problems. A broad reading of the clause would not only grant a sweeping power to the federal government but it would also restrict the ability of individual states to adopt laws which burden the forms of commerce which were committed to the control of the federal government.

The history of the commerce clause adjudication is, in a very real sense, the history of the concepts of federalism as well as the development of doctrines supporting a specific federal power. It becomes quite important therefore to look at the treatment which the Supreme Court has given this clause throughout each stage in its history, even though we will also summarize the Court's current position in a single section. Therefore, this chapter follows the Court's interpretations of the commerce power on a chronological basis. After some introductory notes we shall turn to the first cases defining the power which demonstrate both historical and theoretical uncertainty on the part of the justices in defining the scope of powers for the new national government. In the next section we will examine the Court's attempt to restrict the power, more out of a desire to protect the role of the states in the federal system than to hold the federal government to an original limited grant of power. Finally, we shall see that modern economic problems made the justices aware that they were not institutionally capable of restricting this power on a principled basis; the other branches of government appear to be the more capable entities for defining the true nature of national commercial problems and the means that are needed to



promote the economic well-being of the country. Today, the Court will uphold the decisions of Congress so long as there is some rational argument for finding that the items that the Congress regulates fall within the commerce power. But in order to understand the meaning of the current rules concerning the nature of Congress' power and the slight restrictions placed upon it, one must read the current decisions in light of the past experience of the Court.

## Part Two

The Supreme Court today interprets the commerce clause as a complete grant of power. The Tenth Amendment is no longer viewed as a reservation of certain subjects for state regulation. Once the justices began to define the commerce power as an independent grant of power rather than in terms of the Tenth Amendment, the production-commerce and direct-indirect distinctions soon passed away. The Court now will defer to the legislature's choice of economic rationale; the possible economic impact of an activity on commerce among the states will bring it within this power. Thus the old concepts of physical connection to commerce and the "current of commerce" theories have been discarded as inappropriate judicial restrictions on the commerce power. The Court has finally returned to Marshall's definition of commerce among the states as that which concerns more states than one. The justices will defer to the legislative choices in this area and uphold laws if there is a rational basis upon which Congress could find a relation between its regulation and commerce.

**Modern Commerce Power Tests.** There are three ways that an item, person, or activity may come under the federal commerce power. First, Congress can set the regulations, conditions, or prohibitions regarding the permissibility of interstate travel or shipments if the law does not contravene a specific constitutional guarantee. Second, the federal government may also regulate any activity, including "single state" activities, if the activity has a close and substantial relationship to, or effect on, commerce. This relationship or effect may be based on theoretical economic relationships or impact. The activity may be subject to congressional power where it is one of a generic type of activities that have a cumulative effect on commerce. Third, Congress may regulate single-state activities which otherwise have no effect on commerce if the regulation is "necessary and proper" to regulating commerce or effectuating regulations relating to commerce.

**The Modern Delegation of Power Doctrine**—"Delegations" to States or the



**Executive Branch.** Just as the older concepts of the Tenth Amendment have not been revived, there is no significant “anti-delegation” principle which restricts the exercise of the commerce power. Congress may pass laws that allow states to independently regulate interstate commerce; such laws involve a federal adoption of varying structures for commerce rather than any unconstitutional delegation of the commerce power to the states.

The political process in modern times has resulted in federal control of wide variety of intrastate and multistate commercial matters; it has become impossible for the Congress to define with precision the scope and meaning of its commercial statutes. The past half century has witnessed increased congressional use of federal executive agencies to administer federal statutes and to promulgate regulations which effectuate legislative policies. The Congress may delegate both rulemaking and administrative functions to the executive branch or agencies it establishes.

Today the Supreme Court will allow Congress to share its legislative power with the executive branch by delegating aspects of that power to executive agencies. Such legislative delegations will be upheld unless Congress abdicates one of its powers to the executive agency or fails to give legislative definition of the scope of the agency's power.

If Congress were to grant a private group the power to control its competitors, in some instances there might be a procedural problem regarding whether the persons regulated were deprived of due process by being subject to the will of entities with interests contrary to theirs. However, this issue does not constitute an excessive delegation problem.

**Motive.** If Congress is regulating an activity that may be deemed to come under the three-part test for the commerce power, the motive of Congress in passing the regulation is irrelevant. Thus Congress may exercise its commerce power for clearly noncommercial reasons. The Court has upheld a wide variety of legislation under the commerce power including health regulations, criminal laws, and civil rights acts. If there is a rational basis for finding a sufficient relationship between the regulation and commerce under one of the three tests discussed above, the act is within the commerce power. If it does not violate a constitutional restriction or fundamental constitutional right the law must be upheld.



### Part Three

In the interest of uniformity and reform, the legal profession, under the leadership of the American Law Institute, has suggested comprehensive codes of laws to be adopted by the states. The most important of these for business is the Uniform Commercial Code. Other uniform laws have been developed for partnership, corporate, and probate among others, but the most ambitious uniform act of all is the Uniform Commercial Code.

The National Conference of Commissioners on Uniform State Laws and the American Law Institute sponsored and directed the preparation of the Uniform Commercial Code. These two organizations were assisted by literally hundreds of law professors, businesspersons, judges, and lawyers. The work on the UCC began in 1942, and the finished draft was completed in 1952. All 50 states and the District of Columbia and the Virgin Islands have adopted the Uniform Commercial Code in whole or in part. Louisiana has adopted only Articles 1, 3, 4, and 5. The UCC consists of 10 articles:

1. General Provisions
2. Sales
3. Commercial Paper
4. Bank Deposits and Collections
5. Letters of Credit
6. Bulk Transfers
7. Documents of Title
8. Investment Securities
9. Secured Transactions
10. Effective Date and Repealer

When each of the states adopted the code, it repealed numerous statutes, such as the Uniform Sales Act, the Uniform Bills of Lading Act, the Uniform Warehouse Receipts Act, the Uniform Negotiable Instruments Act, the Uniform Conditional Sales Act, the Uniform Trust Receipts Act, the Uniform Stock Transfer Act, the Bulk Sales Act, and the Factors Lien Act.

The code does not greatly change the basic principles of commercial law derived from the law merchant and common law, but instead it expands and codifies them in order to modernize, clarify, standardize, and liberalize the rules. The code also helps



to clarify the legal relationship of the parties in modern commercial transactions. The code is designed to help determine the intentions of the parties to a commercial contract and to give force and effect to their agreement. The code further is meant to encourage business transactions by assuring businesspersons that their contracts, if validly entered into, will be enforced.

## Notes 注释

【1】…“To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”……“规制与外国、各州之间、以及与印第安部落的商业活动。”

【2】The brevity of this clause belies the fact…这一条款的简要性误导了如下事实……

【3】general police power: 一般管治权力(警察权力)

【4】the framers: (宪法)制定者

【5】…depending on the definition of that seemingly non-technical word,……依赖于这个似乎并非专门术语之词的定义

【6】The grant of power also may be viewed as committing this subject matter to Congress and thereby removing some of the powers of states to deal with local matters … 该授权还可以被视为将此事项交托国会并由此取消各州处理那些……地方事务的权力。

【7】broad reading of the clause: 对该条款的广义解释

【8】…burden the forms of commerce: ……带有关于某些商业活动的规定

【9】…the treatment which the Supreme Court has given this clause: ……最高法院给予本条款的待遇(意指最高法院在审判中适用本条款的情况)

【10】on a chronological basis: 以年代顺序为基础

【11】the justices: 大法官们

【12】…they were not institutionally capable of restricting this power on a principled basis: …他们在体制上就不具备依据某种原则限制此权力的能力。

【13】Today, the Court will uphold the decisions of Congress so long as there is some rational argument for finding that the items that the Congress regulates fall within the commerce power. 今日,只要有合理理论证明该国会规制事项属于商务权力的范畴,该(最高)法院就会支持国会的决议。

【14】complete grant of power: 完全授权

【15】Once the justices began to define the commerce power as an independent grant of power rather than in terms of the tenth amendment, the production-commerce and direct-indirect distinctions soon passed away. 一旦大法官们开始把商务权力界定为一种独立授权而不是第十修正案中的授权,生产与商业和直接与间接的区分很快就失去了意义。

【16】Thus the old concepts of physical connection to commerce and the “current of commerce”



theories have been discarded as inappropriate judicial restrictions on the commerce power. 于是陈旧的与商业有实质联系的概念和“商业流”理论就被作为对商务权力之不恰当司法限制而抛弃了。

【17】Marshall's definition of commerce among the states: 马歇尔(大法官)的州际商业活动定义

【18】...defer to the legislative choices: 遵从立法机关的选择

【19】Modern Commerce Power Tests: 现代商务权力检验标准

【20】...if the law does not contravene a specific constitutional guarantee. ....如果该法律不与某项宪法保障相抵触的话。

【21】...a generic type of activities that have a cumulative effect on commerce. ....一种对贸易有累积影响的普通活动。

【22】Third, Congress may regulate single-state activities which otherwise have no effect on commerce if the regulation is “necessary and proper” to regulating commerce or effectuating regulations relating to commerce. 第三,国会可以规制那些对商业本无影响的单一州的活动,如果这种规制对管理商业活动或实施有关商业活动的法规来说是“必须且合适”的话。

【23】the Modern Delegation of Power Doctrine: 现代授权原则

【24】revive: 复苏;再生

【25】“anti-delegation” principle: “反授权”原则

【26】...such laws involve a federal adoption of varying structures for commerce rather than any unconstitutional delegation of the commerce power to the states. ....这些法律涉及联邦对各种贸易结构的采用,而没有任何违反宪法地将商务权力授与各州(的行为)。

【27】Such legislative delegations will be upheld unless Congress abdicates one of its powers to the executive agency or fails to give legislative definition of the scope of the agency's power. 这种立法性授权会得到(最高法院的)支持,除非国会将其某项权力放弃给行政机关或者未能就该行政机关的权力范围给出立法性界定。

【28】...whether the persons regulated were deprived of due process by being subject to the will of entities with interests contrary to theirs. ....是否那些被规制的人因必须服从与其利益相对立之实体的意志而被剥夺了正当程序(权利)。

【29】probate: 遗嘱认证

【30】the Virgin Islands: 维尔京群岛

【31】General Provisions: 总则

【32】Commercial Paper: 商务文件(票据)

【33】Bank Deposits and Collections: 银行押金与托收

【34】Letters of Credit: 信用证

【35】Bulk Transfers: 大量(财产)转让

【36】Documents of Title: 产权证书

【37】Investment Securities: 投资证券

【38】Secured Transactions: 有担保的交易



【39】Effective Date and Repealer: 生效日期与废止议案

【40】the Uniform Sales Act: 统一销售条例

【41】the Uniform Bills of Lading Act: 统一提单条例

【42】the Uniform Warehouse Receipts Act: 统一仓储单据条例

【43】the Uniform Negotiable Instruments Act: 统一票据条例

【44】the Uniform Conditional Sales Act: 统一附条件销售条例

【45】the Uniform Trust Receipts Act: 统一信托单据条例

【46】the Uniform Stock Transfer Act: 统一股票过户条例

【47】the Bulk Sales Act: (防止)大宗销售条例

【48】the Factors Lien Act: 代理商留置权条例

【49】the law merchant: 商业习惯法

【50】codify: 编成法典

【51】...to clarify the legal relationship of the parties in modern commercial transactions. ....明确现代商业交易中当事人的法律关系。

【52】...if validly entered into, ....如果是有效地签定的话。

## Exercises 练习

### 1. Questions about the text:

- ① What does Article I, Section 8 of the Constitution provide?
- ② The federal government was not granted a general police power by the Constitution, was it?
- ③ What is the history of the commerce clause adjudication?
- ④ Why is it important to look at the treatment which the Supreme Court has given this clause throughout each stage in its history?
- ⑤ What is the precondition for the Supreme Court to uphold the Congress' decisions today?
- ⑥ What does the Supreme Court interpret the commerce clause?
- ⑦ What happened when the justices began to define the commerce power as an independent grant of power?
- ⑧ Why was the "current of commerce" theories discarded?
- ⑨ What are the three parts of the Modern Commerce Power Tests?
- ⑩ What are the contents of the Uniform Commercial Code?

### 2. Listening Comprehension:

Negotiating is an art and a skill. Whenever you are going to negotiate with



someone about a deal, prepare yourself before-hand. Whether you are negotiating a multimillion dollar deal to ship goods internationally or simply arranging for the purchase of office supplies, enter the contract negotiations with a clear idea of your goals.

The following outline sets forth some of the key steps involved in negotiating a business agreement: ① determine your goals and attitudes; ② determine the other party's goals and attitudes; ③ gather a team of experts to advise you on the deal and clarify contract language; ④ prepare the documents you would need for the negotiations; ⑤ determine your strategy; ⑥ make a checklist of topics to be covered and an agenda for the negotiation; ⑦ the actual negotiations; ⑧ drafting the agreement. If the agreement is reached, get the contract signed as soon as possible.

### 3. Negotiation exercise:

① Topic: Negotiation about buying mountain-tyre bicycles.

② Reference information:

A. Corporation A wants to buy 10,000 mountain-tyre bicycles of high quality, and the highest price it would pay for the bicycles is \$60 each.

B. Corporation B and Corporation C want to sell mountain-tyre bicycles to Corporation A, and the lowest price they would accept for the bicycles is \$40 each.

C. Corporation A can buy the bicycles from either Corporation B or Corporation C, or from both of them. Its goal is to make the price as low as possible.

D. The goal of Corporation B, as well as Corporation C, is to get the whole deal and to make the price as high as possible.

③ Instructions:

A. The students are divided into three groups, each representing a corporation.

B. The groups prepare for the negotiation separately, and elect their representatives for the negotiation.

C. Corporation A negotiates with Corporation B and Corporation C separately, and then signs a contract with either B or C, or with both or none.

### Supplementary Reading 补充读物

A business corporation may obtain money to finance its operations by issuing securities. There are two basic types of securities: debt securities and equity securities.



### A. Debt Securities

A debt security is generally created when the corporation through its Board of Directors decides to borrow money. Typical sources of borrowed money are obtained from the corporation's organizers (or their families) or a bank. If the money is lent to the corporation by such individuals and institutions, the corporation will issue notes (one form of debt security) to the lender.

The corporation can also borrow money from members of the general public by, issuing and offering for sale to the public (usually through a broker) debt securities known either as bonds or debentures. These securities are issued in face amounts of generally \$ 1000 each. If the bond is sold for more than its face value, it is said to be issued at a premium. If sold for less than the face value, it is issued at a discount.

The following facts should be known about bonds:

Bonds have a maturity date, i. e., a specified time when the corporation must pay back the face value of the bond to its holder.

Bonds can be made desirable by promising bondholders that the corporation will take certain steps to insure that corporate assets will be retained and available to pay back the bondholders. E. g., the corporation could agree to: limit total corporate debts, reasonably restrict dividend payments to keep a certain amount of funds always at hand, create a special corporate reserve for bondholders, limit issuance of additional bonds, not incur any secured debts that would have a preferential claim to corporate assets above existing bondholders.

Bonds usually pay a fixed amount of interest per year regardless of the profits or losses for that year. A corporation may, however, make its obligations to pay interest depending on the amount of profits. Whatever the terms of payment, they should be expressed in the bond instrument. This insures that the bondholders are aware of the terms of payment.

A redemption provision may be included in the bond instrument so that the corporation could buy back the bonds at a previously agreed upon price before the due date or maturity date of the bond. Sometimes corporations may want to do this when the corporation is profitable using corporate funds to issue new bonds at better rates for the corporation.

A bond may be made convertible. A Convertible bond is one that may be converted into, or exchanged for, another type of bond or equity security. Bonds that are convertible should state that they are convertible on the bond itself. They



must also specifically state when and at what price the bonds may be converted.

### **B. Equity Securities**

Equity securities are known as shares (or stock) in a corporation. Stockholders are considered owners of the corporation. The Articles of Incorporation must state the number of shares and the characteristics of the stock. To issue stock is actually to offer shares of stock for sale. The corporation's Board of Directors control when and to whom the corporation's shares are offered and sold.

**Outstanding shares**——Outstanding shares are shares already issued and purchased by the shareholder or stockholder.

**Par value**——Par value is an arbitrary value assigned to each share in the Articles of Incorporation but does not necessarily reflect the true market value of the stock. Shares may not be issued and sold by the corporation for less than their par value therefore it is sometimes advisable not to state any par value at all or state a par value lower than the estimated market price. No par value allows the Board of Directors to decide each time shares are issued what the price per share will be. In a very large corporation where the stock is publicly traded at a public exchange, such as the New York Stock Exchange, the public demand for the stock of the corporation rather than the Board of Directors determines the selling price of the stock.

**Capital account**——The capital account of a corporation is an entry in the books of the corporation and is determined by multiplying the par or stated value of the corporation's stock by the number of shares outstanding. E. g., if the corporation had sold 1000 shares of stock which had \$ 10 par value, the capital account would be \$ 10,000.

**Stated capital**——If no par shares are issued, the total amount received from their sale is the corporation's stated capital. However, prior to the issuance of no par shares, the Board of Directors may pass a resolution declaring that only a portion of the money received for shares will constitute the corporation's stated capital and the remaining sum will be deemed as capital surplus.

**Preferred Stock**——Stocks may be divided into different classes. It is possible to create one or more classes of stock whose holders have a preference in receiving dividends before the holders of other classes of stock. If, for example, the Board of Directors decides to distribute a portion of the corporation's profits to shareholders, the preferred shareholders receive the dividend first (in the order of preference) and the other shareholders receive their share from the distributable profits remaining



after each higher preference has been paid. The payment to preferred shareholders is generally a constant amount phrased as: "a preference of \$ \_\_\_\_\_ per share".

**Common stock**——A stock that does not possess a dividend preference is known as a common stock. A common stock is generally the source of all shareholder power and typically includes the broadest voting rights and provides the potential for the largest financial gains. The common stock dividend is usually phrased in the form of: "\$ \_\_\_\_\_ per share" and is established by the Board of Directors rather than by the Articles of Incorporation.

**Voting rights**——Voting rights differ among classes of stocks. One class may be given the exclusive right to vote at shareholder meetings for the election of the corporations' Board of Directors. Other classes could be empowered to vote on ones could be given equal and complete voting rights. Many corporations do not give voting rights to preferred shareholders in recognition of the fact that common stockholders are the ones whose profits depend most directly on the skill and success of the corporation's management.

## Reference Translations 参考译文

一家实业公司可以通过发行证券来获得其运作所需的资金。证券有两种基本类型:债权证券和产权证券(衡平证券)。

### 一、债权证券

债权证券一般是在公司通过其董事会决定借款时设立的。借款的典型来源是该公司的组建者(或其家庭)或银行。如果钱款是从这种个人或机构筹借的,公司则要发给出借人借据(一种形式的债权证券)。

公司还可以通过向公众发行和出售(一般都通过经纪人)债权证券的方式来向一般公众借款。这就是所说的债券或债单。这些证券一般以每张 1,000 美元的面额发行。如果债券的售出价高于其面值,就叫做溢价发行。如果售出价低于面值,则是贴现发行。

下列事实是关于债券所应该知道的内容:

债券有偿还日期,即公司必须向持有人偿付债券面值的特定时间。

通过向债券持有人许诺该公司将采取某些步骤来保证公司资产将保留用来偿付债券持有人,可以使债券具有吸引力。例如,公司可以同意去限制公司债务的总额;去适当地限定股息发放以保持手头总有一定数额的资金;去为债券持有人设立一笔专门的公司储备金;去限制补充债券的发行;以及不去招致任何会对公司资产享有优先于现有债券持有人之索赔权的担保债务。

债券通常要每年支付固定数额的利息而不管该年度是否盈利。但是,公司可以规定按利润



额支付利息。无论是何种支付条款,其都应在债券契据上写明。这保证了债券持有人对利息支付条款一清二楚。

在债券契据中还可以包括回赎条款,以便使该公司可以在债券到期之前按事先商定的价格买回债券。公司有时会愿意这样做,因为当公司盈利时这样做可以使用公司资金为公司发行利率更好的新债券。

债券有可能是可以转换的。可转换债券是一种可以转换或交换成另一种债券或产权证券的债券。可转换债券应在其本身上写明这一点。它们还必须写明可以转换的时间和价格。

## 二、产权证券(衡平证券)

产权证券即人们所说的公司股份(或股票)。股票持有人被视为公司所有权人。公司章程中必须说明股份的数量和股票的特征。发行股票实际上就是发售股份权。公司董事会控制着发售公司股份权的时间和对象。

已发行股票:已发行股票是指已经发行并已被股东或股民买走的股票。

面值:面值是公司章程中人为确定的每一股份的价值,但它并不一定反映该股票的实际市场价值。公司不能将其股票以低于面值的价格发行和出售,因此有时最好根本不规定股票面值或者将股票面值订得低于预计的市场价格。无面值股票使董事会得以在每次发行股票时决定每股的价格。在诸如纽约股票交易所等公开交易场所上市其股票的大公司中,决定股票出售价格的不是董事会,而是公众对其股票的需求。

资本帐户:公司的资本帐户是公司帐目中的一个户头,它是由该公司股票的面值或设定价值与已售出股票的数量相乘来决定的。例如,该公司已售出股票 1,000 股,每股面值 10 美元,那么其资本帐户就是 10,000 美元。

设定资本:如果发行的是无面值股票,那么股票销售所得总金额就是该公司的设定资本。但是,在发行无面值股票之前,董事会可以通过一项决议来宣布在股票销售所得金额中只有一部分作为公司的设定资本,其余则视为资本盈余。

优先股票:股票可以分为不同的等级。公司可以设定一个或几个等级的股票的持有人可先于其他等级股票的持有人领取股息。例如,如果董事会决定向股东分配公司的部分利润,优先股的股东可首先领取股息(按照优先的顺序),而其他股东则在优先股东逐级领取之后才能领取可分配的剩余利润。支付给优先股东的金额一般都是固定的,其表述为“每股优先——美元”。

普通股票:不享有股息优先的股票即普通股票。普通股票通常是所有股东权力的源泉,而且一般都包括最广泛的投票表决权并提供了获得最大投资收益的可能性。普通股票的股息通常表述如下:“每股——美元”,而且股息是由董事会决定的,而不是由公司章程规定的。

投票表决权:不同等级股票的投票表决权也有所不同。一种股票可能被赋与在股东大会上投票选举公司董事会的独有权利。其他等级的股票可能只有就诸如合并或解散等特殊公司事务进行投票的权利,或者各种股票都享有平等和完全的投票表决权。许多公司都不给优先股股东以投票表决权,因为他们认识到普通股股东的收益是最直接依赖于公司管理技能和成果的这一事实。



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## LESSON FIFTEEN

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# Tax Law 税法

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### Background 背景

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税收是美国政府收入的最主要来源。美国税收的种类很多,如所得税(income tax)、财产税(property tax)、销售税(sales tax)、消费税(consumption tax)、遗产税(estate tax)、赠与税(gift tax)、执照税(license tax)、社会保险税(social security tax)、印花税(stamp tax)、股票过户税(stock transfer tax)、失业税(unemployment tax)、使用税(use tax)等。在各种税收中,所得税占的比重最大。例如,在联邦税收中,个人所得税(income tax on individuals)占一半以上;公司所得税(income tax on corporations)占四分之一左右。

美国的税收以联邦税收为主。无论从税收金额来说,还是从税收种类来说,州和地方政府的税收都比联邦税收少得多。因此,在美国的税法中,联邦税法占有重要地位;而在联邦税法中,联邦所得税法(the Federal Income Tax Act)又是最为一个重要的。

美国人的纳税意识很强。这并非说美国人天生就都具有纳税的自觉性。实际上,美国人良好的纳税习惯主要是由严格的税收管理制度所养成的。据说在美国,效率最高的执法机关就是国内税收机关。由此可见,没有严格执法,就很难形成自觉守法的社会习惯。

税务法院(Tax Court)是美国联邦政府中重要的税务司法机关。1924年,联邦政府建立了一个税务上诉委员会,专门受理纳税人不服国内税收官员决定的上诉。1942年,该委员会改名为税务法院,并于1969年成为联邦法院系统的组成部分。该法院的基本职权是审理关于拖欠联邦税的案件。该法院虽然设在华盛顿,但是可以在任何时间于美国任何地区开庭审判。



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**Text 课文**

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**Part One: Federal Taxation****1. Introduction**

Federal fiscal powers are comprehensive and exert a controlling impact upon the nation's economy. It is appropriate to observe not only that these powers are among the most important of the powers granted to the federal government, but also that the constitutional issues with respect to these powers have been firmly established. These powers include the power to tax, the power to coin money and to borrow on the credit of the United States, and the power to spend.

**2. General Scope of the Taxing Power**

Broad powers of taxation are granted to Congress by express provisions of the Constitution. Except for two specific limitations upon the exercise of the power and one prohibition, the power to tax is plenary. The specific limitations upon the exercise of the power to tax are these: (1) direct taxes and capitation taxes must be allocated among the states in proportion to population; and (2) all custom duties and excise taxes must be uniform throughout the United States. The single prohibition is that no duty shall be levied upon exports from any state. The due process clause of the Fifth Amendment operates, of course, as a general limitation upon the exercise of the power to tax.

The Sixteenth Amendment, which permits imposition of a federal income tax without apportionment among the states, was necessitated by the five to four decision in *Pollock v. Farmer's Loan & Trust Co.* Forty-two years later, with its decision in *New York ex rel. Cohn v. Graves*, the Court in effect overruled *Pollock* and in so doing rendered the Sixteenth Amendment redundant.

**3. Direct v. Indirect Taxes****(a) Historical Background**

Although the Constitutional grant of taxing power to the federal government is very broad, the dichotomy between direct and indirect taxes ultimately proved to be a



stumbling block in the development of our present federal tax structure. Prior to the decision in *Pollock* in 1895, it had been the general consensus that the term "direct" tax employed in the Constitution embraced only taxes on land (real property) and poll or capitation taxes. This consensus was firmly founded in at least three significant cases. The first was *Hylton v. United States* in which the Court in the early years of the new Constitution sustained a federal tax on carriages as a duty or excise which was not subject to apportionment. The second case was *Veazie Bank v. Fenno* in which the Court sustained as an indirect tax a prohibitory tax (duty) upon the issuance and circulation of state bank notes. The third and most important was the decision in *Springer v. United States* in which the Court sustained the Civil War Income Tax Act as an excise or duty which was not subject to apportionment. In light of existing precedent, the decision in *Pollock* came as a notable surprise.

In *Pollock*, the Court held that the Income Tax Act of 1894 was a direct tax and unconstitutional and void because it imposed a tax on income from real estate and personal property without apportionment. It is important to note, however, that in its decision on rehearing, the majority of the Court noted, with respect to taxes on the income of business and occupations:

We have considered the act only in respect of the tax on income derived from real estate, and from invested personal property, and have not commented on so much of it as bears on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such.

This exception to the basic decision was significant in that the Court made it clear that a tax on income from business and occupations was not a direct tax and could be subjected to taxation without the necessity of apportionment on the basis of population.

The reversal of the *Pollock* decision by the adoption of the Sixteenth Amendment provides a fascinating chapter in American history. The Populist movement, which had produced the Income Tax Act, of 1894 continued to gain momentum. In the campaign of 1908, the Democratic platform contained a plank supporting a constitutional amendment to authorize an income tax. William Howard Taft, the Republican candidate, in the course of the campaign expressed his view that the country could have an income tax without a constitutional amendment. In 1909, the pressure for an income tax culminated in a compromise with the addition of the



Corporate Excise Tax of 1909 as an amendment to the Payne-Aldrich Tariff Bill and the adoption of a joint resolution by the Senate and House of Representatives submitting the Sixteenth amendment to the states for ratification. On February 25, 1913, the Secretary of State issued a proclamation declaring that the Amendment had been duly ratified.

In the meantime, the Corporate Excise Tax Act of 1909 had been challenged and sustained in *Flint v. Stone Tracy Co.*. The statute provided that every corporation "engaged in business in any state or territory" was required "to pay annually a special excise tax with respect to the carrying on or doing business" at the rate of one percent upon all net income in excess of five thousand dollars. The constitutional challenge was based upon *Pollock* and was premised on the contention that the tax was invalid as an unapportioned direct tax in as much as it applied to corporate income derived from real and personal property. In *Pollock*, the majority of the Court had concluded that a tax upon income from property was the equivalent of a direct tax upon the income-producing property itself.

In sustaining the validity of the Corporation Excise Tax Act of 1909, the Court in *Flint* first noted that the statute was structured "as a tax upon the doing of business in a corporate capacity" and that "the measure of the tax [was]... income." Having defined the structure of the tax, the Court considered the issue as to whether a tax cast in such form, and computed upon all income including income derived from property, constituted a direct tax upon real and personal property within the proscription of the *Pollock* case. The Court concluded that the rationale of *Pollock* was not controlling. First, the Court noted its statement in *Pollock* that the decision did not bear "on gains or profits from business, privileges, or employments, in view of the instances in which taxation on business, privileges, or employments has assumed the guise of an excise tax and been sustained as such." The Court also relied on *Knowlton v. Moore*, sustaining a federal legacy tax as an excise upon the transmission of property by inheritance, and *Spreckels Sugar Refining Co. v. McClain*, sustaining a special tax measured by gross receipts upon the businesses of refining oil or sugar as an excise with respect to carrying on such businesses. After reviewing several cases relating to state franchise taxes, the Court finally summarized its position with respect to the difference between the subject and the measure of a tax with the following comment:

It is... well settled by the decisions of this court that when the sovereign



authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable.

Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed.

Thus, the Court reasserted its adherence to the doctrine that if the subject of a tax is within the taxing power the measure of the tax is not a matter of judicial concern.

#### **(b) *Current Status of Direct vs. Indirect Taxes***

As indicated by the citations in *Flint v. Stone Tracy Co.* of intervening decisions subsequent to *Pollock*, and as confirmed by later Court decisions, the dichotomy between direct and indirect taxes is no longer a problem. The Court has held that the following taxes are indirect (excise) taxes and not direct taxes subject to the requirement of apportionment: federal legacy tax of 1898; special federal tobacco tax of 1898; special excise tax of 1898 imposed on the business of refining sugar and computed upon gross annual receipts; federal estate tax enacted in 1916; and the federal gift tax of 1924.

### **4. Federal Taxing Power and Due Process**

On rare occasions but seldom with success, due process objections have been raised with respect to federal tax provisions. In *Brushaber v. Union Pacific R. R. Co.*, the first income tax (enacted in October, 1913, following ratification of the Sixteenth Amendment) was challenged on several due process grounds, including the fact that it was retroactive to March 1, 1913, and the fact that it provided for graduated rates. These contentions were brushed aside by the Court with the following observation:

So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause.



In two subsequent income tax cases, the Court again refused to recognize the taxpayer's due process objections. The first was *Corliss v. Bowers* in which the taxpayer challenged the provisions which taxed the income of revocable trusts to the settlor. The second was *Burnet v. Wells* in which the taxpayer challenged the provisions for taxing the income of irrevocable life insurance trusts to the insured-settlor. In *Corliss v. Bowers*, the Court concluded that it was reasonable to tax one on income which was subject to his unfettered control and which he was free to enjoy at any time he saw fit. In *Burnet v. Wells*, the Court concluded that it was reasonable to tax the settlor on the income applied to maintain insurance policies on his own life for the benefit of family members because, in effect, he had reserved the income for his own peace of mind.

### 5. Federal Taxes as Regulatory Measures

A tax, whatever the type, has an inherent economic impact on business and commerce. This result is unavoidable, however desirable the ideal of a neutral tax system. Custom duties, which until the turn of the century provided the major portion of federal revenues, were also regulatory in that certain tariffs protected American manufacturers against competition from foreign goods. But it was not until 1928 that the Court sustained the validity of protective tariffs which tended to produce little or no revenue.

In an earlier decision, *McCrary v. United States*, the Court had sustained a federal excise tax of ten cents per pound imposed upon the sale of colored oleomargarine in a decision which portended the results in the protective tariff case. The taxpayer alleged that the tax was prohibitory and therefore a violation of the due process provisions of the Fifth Amendment. But the Court rejected the argument:

Since... the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise.

The Court continued by noting that it would be improper for the judicial branch to inquire into the underlying motives of the Congress irrespective of the purpose of the Act.

Although a federal tax qua tax may be an exercise of the taxing power, it may be invalid in light of specific constitutional limitations such as the prohibition against self-



incrimination. Such specific limitations do not include the Tenth Amendment. Although it was held in the Child Labor Tax Case, that the federal government had violated the Tenth Amendment by infringing upon the powers reserved to the state, today the Court does not apply the Tenth Amendment in this manner.

## **Part Two: State Taxation**

### **1. Introduction**

The federal commerce clause, as well as other limitations in the Constitution, such as the due process and equal protection clauses, place certain limits on the taxing powers of states and their subdivisions.

When a state or local tax is measured against the dormant commerce clause, the Court seeks to allow the state or locality to extract from interstate commerce a fair share of the expenses without unduly restricting the flow of interstate commerce. In *Complete Auto Transit, Inc. v. Brady*, the Court fashioned the modern four-part test: a state or local tax is permissible under the dormant commerce clause if it [1] is “applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and is [4] fairly related to the services provided by the State.”

A tax challenged under the dormant commerce clause must also pass the due process requirements. Due process limits the territorial reach of the state’s power. Thus there must be “minimum” contacts between the person, thing, or transaction taxed and the taxing state. And there must be “a rational relationship between the income attributed to that state and the intrastate values of the enterprise.” The “substantial nexus” portion of the modern commerce clause test is similar to the due process requirement except that the commerce clause test focuses on the burden on interstate commerce: while the commerce clause will require that the state or local tax be fairly apportioned in order to prevent an undue burden on interstate commerce, the due process clause requires state jurisdiction to tax.

State and local taxes must also face the hurdle of the equal protection clause, but this hurdle is not a very high one. The state or local tax must have a “rational basis” and not be “palpably arbitrary.” However, if the only purpose of a state tax is to promote in-state business and to discriminate against businesses from other states, that purpose is impermissible and does not justify the imposition of discriminatory



taxes. Such a tax will be invalidated under the equal protection clause.

Similarly, the privileges and immunities clause of Article IV of the Constitution forbids state and local taxes discriminatory against out of state residents. And other clauses of the Constitution also limit the taxing power. For example, the first amendment forbids taxes which discriminate against newspapers.

## 2. Death Taxes

Jurisdictional concepts with respect to state death taxes parallel those which govern jurisdiction to impose general ad valorem property taxes. Real property and permanently situated tangible personal property have an exclusive tax situs in the state in which the property is located. Intangibles, on the other hand, have a potential multiple tax situs in the same manner and for the same reasons that intangibles are subject to multiple taxation under the general property tax. The potential for multiple death taxation of intangibles has been reduced, however, by the general adoption of reciprocal exemption statutes.

There are two complicating factors which relate to multiple death taxation of intangibles. The first is the fact that states apply different concepts in classifying certain property interests as tangible or intangible property. Second, because domicile provides a secure foundation for imposition of death taxes upon intangibles, there may be circumstances in which more than one state claims to be the state of domicile of the decedent.

## 3. Income Taxes

**Income Taxes on Individuals.** Due process principles governing jurisdiction to impose state income taxes upon individuals, residents and nonresidents, were established initially by two leading cases both of which were decided in 1920. In *Maguire v. Trefry*, a Massachusetts statute imposed a tax upon the income received by a resident-beneficiary of a testamentary trust administered by a Philadelphia trust company. The trust income consisted of interest and dividends upon securities comprising the trust corpus.

The taxpayer contended that the tax violated the due process requirements prescribed by *Union Refrigerator Transit Co. v. Kentucky* in that the effect was to tax property outside the jurisdiction of the state. In response, the Court noted that "we are not dealing with the right to tax securities which have acquired a local situs



[in another state], but are concerned with the right of the State to tax the [income of the ]beneficiary of the trust at her residence, although the trust itself may be created and administered under the laws of another state.”

The Court sustained the tax, and emphasized the fact that the taxpayer was domiciled in the taxing state: “The beneficiary is domiciled in Massachusetts, has the protection of her laws, and there receives and holds the income from the trust property. We find nothing in the Fourteenth Amendment which prevents the taxation in Massachusetts of an interest of this character, thus owned and enjoyed by a resident of the states.” In concluding its opinion, the Court drew an analogy to the property tax by observing that, in principle, imposition of an income tax upon a taxpayer’s out-of-state income does not differ from the imposition of an ad valorem property tax upon a debt owed to the same taxpayer by an out-of-state debtor.

The second case, *Shaffer v. Carter*, resolved the question as to whether a state could constitutionally impose an income tax upon a nonresident citizen of another state on income earned in the taxing state. An Oklahoma statute imposed a general income tax upon both residents and nonresidents and provided that the tax applied to “net income from all property owned, and of every business ... carried on in this State by persons residing elsewhere.” The taxpayer, a resident of Illinois, owned oil-producing land and operated oil and gas mining leases in Oklahoma. The taxpayer contended that the tax violated due process, and also equal protection and the privileges and immunities clause. The taxpayer primarily argued that the state lacked jurisdiction to tax the income of nonresidents even though the income was earned in and derived from the taxing state. The Court disposed of this contention by emphasizing the benefits derived by the taxpayer under the laws of the taxing state. To be sure, the Oklahoma statute could result in double taxation if, for example, the state where the taxpayer was domiciled decided to tax the income which the taxpayer derived in Oklahoma. But the Constitution does not necessarily forbid double taxation. After all, both the state and federal governments may tax the same income.

Although it may have appeared that the decisions in *Maguire* and *Shaffer* had fully resolved the issue as to state power to impose income taxes upon individuals, another decision was required to confirm the power of a state to impose an income tax upon out-of-state income of an individual residing and domiciled in the taxing state. In New York *ex rel. Cohn v. Graves* the taxpayer resided in New York. During the tax years in question, the taxpayer as beneficiary of a life estate under her husband’s



will received rental income from real property located in New Jersey real estate. Two of the executors resided in New Jersey and both the bond and mortgages were held for safekeeping in a New Jersey bank. The issue was whether New York had jurisdiction to tax the rentals and interest income derived from the New Jersey properties.

In reliance upon *Pollock v. Farmers' Loan & Trust Co.*, the taxpayer objected primarily on the ground that the tax was in substance and effect a tax on real estate and tangible property located without the state and therefore in violation of due process. In sustaining the tax, the Court distinguished between property taxes and income taxes and emphasized the benefits enjoyed by the taxpayer by reason of her status as a resident of the taxing state.

The decision in *Cohn* effectively removed any doubts which may have been created by the decision in *Pollock* and the Court reaffirmed the authority of a domiciliary state to tax all income of a resident individual irrespective of its source.

*Maguire, Shaffer, and Cohn* established as a matter of due process the constitutional power of a state to impose taxes upon individuals whether or not domiciled therein. In the case of individuals domiciled in the taxing state, domicile alone is sufficient to sustain the tax because of the personal benefits enjoyed by the individual under the laws of the state. In the case of an individual who is neither domiciled in nor resident of the taxing state, an income tax on income earned in the taxing state is justified by the benefits provided by the taxing state in the protection of the taxpayer's income-producing occupation, business, and property located within the state.

***Income Taxes On Corporations.*** The same principles of due process which have developed with respect to jurisdiction to impose income taxes upon individuals appear equally applicable to corporations. If a corporation is organized under the laws of the taxing state, it is taxable as a domiciliary corporation upon all of its income whether derived from within or outside of the state of domicile. Under principles of due process, jurisdiction to tax all the income of a domestic corporation is particularly apropos in view of the fact that the taxpayer-corporation derives its very existence from the taxing state. Similarly, a foreign corporation conducting business or owning income-producing property in the taxing state is taxable upon the income derived from its business operations or property owned there by virtue of the benefits and protection provided by the state.



## Notes 注释

【1】federal fiscal powers: 联邦财政权力

【2】... exert a controlling impact upon the nation's economy. ....对全国经济产生支配性影响。

【3】plenary: 完全的; 绝对的

【4】direct taxes and capitation taxes: 直接税和人头税

【5】custom duties and excise taxes: 关税和国产(货物)税

【6】levy: 征收(税)

【7】apportionment: 按比例分配

【8】The Sixteenth Amendment ... was necessitated by the five to four decision in *Pollock v. Farmer's Loan & Trust Co.* 第十六修正案.....是因波洛克诉农场主贷款信托公司一案中五比四的(法院)判决而成为必须的。

【9】*New York ex rel. Cohn v. Graves*: 纽约州依据科恩的控告诉格雷夫斯案(1937)

【10】... the Court in effect overruled *Pollock* and in so doing rendered the Sixteenth Amendment redundant. ....该(最高)法院实际上推翻了波洛克案的判决, 并且在这样做时使第十六修正案成为赘余。

【11】dichotomy: 分歧

【12】stumbling block: 拦路石; 绊脚石

【13】poll tax: 人头税

【14】*Hylton v. United States*: 希尔顿诉合众国案(1796)

【15】carriages: 运输(费)

【16】*Veazie Bank v. Fenno*: 维齐银行诉芬诺案(1869)

【17】... the Court sustained as an indirect tax a prohibitory tax (duty) upon the issuance and circulation of state bank notes. ....该(最高)法院确认就州钞票的发行和流通所征收的限制税(关税)为间接税。

【18】*Springer v. United States*: 斯普林杰诉合众国案(1880)

【19】the Civil War Income Tax Act: 内战所得税条例

【20】rehearing: 复审

【21】... has assumed the guise of an excise tax and been sustained as such. ....有着执照税的外貌而且被确认为此。

【22】the Populist movement: (19世纪末美国的)人民党运动

【23】In the campaign of 1908, the Democratic platform contained a plank supporting a constitutional amendment to authorize an income tax. 在1908年的(总统)竞选运动中, 民主党的竞选纲领中包含有支持用宪法修正案授权(政府)征收所得税的政策要点。

【24】William Howard Taft, the Republican candidate: 威廉·霍华德·塔夫特, 共和党(总统)候



选人

- 【25】... culminated in a compromise: .....最终导致一项折衷方案
- 【26】the Corporate Excise Tax of 1909: 1909 年的公司执照税
- 【27】the Payne-Aldrich Tariff Bill: 佩恩——奥尔德里奇关税议案
- 【28】joint resolution: 联合决议案
- 【29】the Secretary of State: 国务卿
- 【30】proclamation: 公告
- 【31】Flint v. stone Tracy Co.: 弗林特诉斯通·特雷西公司案(1911)
- 【32】inasmuch as: 因为;由于
- 【33】the income-producing property: 创收财产
- 【34】proscription: 禁止
- 【35】Knowlton v. Moore: 诺尔顿诉穆尔案(1900)
- 【36】federal legacy tax: 联邦遗产税
- 【37】Spreckels Sugar Refining Co. v. McClain: 斯普雷克尔斯食糖加工公司诉麦克莱恩案(1904)
- 【38】franchise tax: 特许经营税
- 【39】Brushaber v. Union Pacific R. R. Co.: 布拉什波诉联合太平洋 R. R. 公司案(1916)
- 【40】Corliss v. Bowers: 科利斯诉鲍尔斯案(1930)
- 【41】revocable trusts to the settlor: 对财产授与者的可撤销信托
- 【42】Burnet v. Wells: 伯内特诉韦尔斯案(1933)
- 【43】irrevocable life insurance trusts to the insured-settlor: 对被保险之财产授与人的不可撤销的人寿保险信托
- 【44】unfettered control: 不受约束的支配权
- 【45】peace of mind: 心安理得
- 【46】... however desirable the ideal of a neutral tax system: .....无论一个中性税收体制的理想是多么称心如意
- 【47】Custom duties ... were also regulatory in that ... 关税.....也具有规章性质,在这种制度下.....
- 【48】protective tariffs: 保护性关税
- 【49】McCrary v. United States: 麦克拉里诉合众国案(1904)
- 【50】colored oleomargarine: 有色人造黄油
- 【51】portend: 预示
- 【52】the prohibition against self-incrimination: 禁止自我归罪(即反对自我归罪原则)
- 【53】the Child Labor Tax Case: 童工税案(1922)
- 【54】the dormant commerce clause: 处于休眠状态的商务条款
- 【55】Complete Auto Transit, Inc. V. Brady: 全自动运输有限公司诉布雷迪案(1977)
- 【56】substantial nexus: 实质性连系



- 【57】the modern commerce clause test: 商务条款的现代检验标准
- 【58】the hurdle of the equal protection clause: 平等保护条款的障碍
- 【59】palpably arbitrary: 明显武断的
- 【60】discriminatory taxes: 歧视性税收
- 【61】the privileges and immunities clause: 特权与豁免条款
- 【62】death taxes: 遗产税
- 【63】ad valorem property taxes: 从价(依照价值征收的)财产税
- 【64】exclusive tax situs: 唯一的征税地点
- 【65】reciprocal exemption statutes: 互免(税)法律
- 【66】domicile: 住所地
- 【67】Maguire v. Trefry: 马圭尔诉特雷弗里案(1920)
- 【68】testamentary trust: 遗嘱委托财产
- 【69】... comprising the trust corpus: ...构成该委托财产的本金
- 【70】Union Refrigerator Transit Co. V. Kentucky: 联合冷冻运输公司诉肯塔基州案(1905)
- 【71】Shaffer v. Carter: 谢弗诉卡特案(1920)
- 【72】beneficiary of a Life estate: 一份终生遗产的受益人
- 【73】executor: 遗嘱执行人
- 【74】apropos: 恰当的

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## Exercises 练习

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### 1. Questions about the text:

- ① What are the two limitations upon the exercise of Congress' taxation power?
- ② What did the term "direct" tax mean in the 19th century?
- ③ What were the three significant cases concerning direct tax in the United States before 1895?
- ④ What did the Supreme Court rule in Pollock v. Farmer's Loan & Trust Co.?
- ⑤ What did the Secretary of State issue On Feb. 25, 1913?
- ⑥ What are indirect taxes according to the Court's decisions?
- ⑦ What provided the major portion of federal revenues in the 19th century?
- ⑧ What was the case of Mc Crary v. United States about?
- ⑨ What are the contents of the modern commerce clause test?
- ⑩ What are the principles of due process with respect to jurisdiction to impose income taxes upon individuals and corporations in the United States?

### 2. Dictation

Tax law are perhaps the most important considerations in determining which form



of business to choose. A corporation is treated as a separate entity for federal income tax purposes. Consequently, there is an imposition of a “double tax”; the corporation pays a federal income tax, and its owners, the shareholders, also pay federal income tax on the amounts paid to them by the corporation in the form of dividends. In contrast, the partnership or a sole proprietorship pays no federal income tax. Rather, the individual partners or the sole proprietor pay personal income tax with respect to their shares of the income of the partnership or the proprietorship. Because of the importance of tax laws, the tax implications of the various forms of business enterprises will be covered separately elsewhere.

One of the most common reasons for changing from a sole proprietorship or partnership to a corporation is the need for additional capital to finance expansion. A sole proprietor can seek additional partners in order to expand. They will bring capital with them, and in some instances, the partnership will be able to secure more funds than the sole proprietor could. This is because there are more partners who will remain liable on any partnership debts. But when a firm wants to expand greatly, simply increasing the number of partners can lead to too many partners for the firm to operate effectively; therefore, incorporation might be the best choice for an expanding business organization.

### 3. Discussion

① Topic: Quill Corp. v. North Dakota ex rel. Heitkamp (1992)

② Reference information:

(See Supplementary Reading in this lesson.)

③ Instructions:

A. The students are required to read the case carefully, and to write a “Case Briefing” before discussion.

B. Discussing the case according to the format of case briefing.

C. Format of Case Briefing

( i ) Facts: who are the parties? What happened? what is the problem?

( ii ) Procedural History: Is it a trial court case or an appellate court case (first instance or second instance)?

( iii ) Issue(s): What are the positions and arguments of each party?

( iv ) Holding: What are the court’s answers to or decision about the issue(s)?

( v ) Reasoning: What are the reasons given by the court (including the rules of



law or authority; the application of the rules to the facts in the case; and policy considerations. )?

(VI)Disposition: What is the judgment rendered by the court?

(VII)Dissenting Opinion & Concurring Opinion: Is there a dissenting opinion (an opinion of disagreement of one or more judges of a court with the decision passed by the majority upon a case before them)? Is there a concurring opinion (a separate opinion delivered by one or more judges which agrees with the decision of the majority of the court but offering own reasons for reaching that decision)? If yes, what is it?

### Supplementary Reading 补充读物

**Quill Corp. V. North Dakota ex rel. Heitkamp** (State Taxation of Interstate Commerce)

The mail-order industry has grown at an astonishing rate in the last quarter century. From L. L. Bean catalogs to the Home Shopping Network, mail order has become a major part of American life. This growth was significantly aided by *National Bellas Hess, Inc. v. Department of Revenue*, in which the Supreme Court held that states could not force out-of-state mail-order businesses to collect taxes from their in-state customers without violating the Commerce and Due Process Clauses of the United States Constitution.

Last Term, in *Quill Corp. v. North Dakota ex rel. Heitkamp*, the Supreme Court reaffirmed its Commerce Clause ban on interstate use tax collection statutes, a ban that many states had ignored in recent years. The Court overruled the due process holding of *Bellas Hess*, however, and cleared the way for Congress to permit the states to enact such statutes. But by ultimately refusing to lower the constitutional floor on state taxing jurisdiction, the Court properly reaffirmed the history, doctrine, and economic policies behind the Commerce Clause, all of which subordinate concerns of federalism to the maintenance of a free national market.

Quill Corporation is a Delaware company that sells office equipment and supplies through the use of catalogs, fliers, magazine ads, and telephone solicitations. Although Quill has no employees and only insignificant tangible property in North Dakota, it sells almost \$1 million worth of goods to approximately 3,000 customers in the state each year. In 1987, North Dakota passed legislation that required every "retailer" who engaged in the "regular and systematic solicitation" of North Dakota



consumers to collect and remit use taxes from their North Dakota customers. Challenging the state's authority to require such a tax, Quill refused to pay the taxes.

North Dakota filed an action in state court to compel the payment of taxes on all sales made by Quill to North Dakota residents after July 1, 1987. The trial court ruled in Quill's favor, finding the case indistinguishable from *Bellas Hess*. The North Dakota Supreme Court reversed, however, holding that "tremendous social, economic, commercial, and legal innovations" had rendered the bright-line "physical presence" test of *Bellas Hess* obsolete. The state supreme court based its holding primarily on *Complete Auto Transit, Inc. v. Brady*, in which the Supreme Court explicitly overruled its own bright-line test for reviewing Commerce Clause challenges to state taxation schemes.

By a vote of 8-1, the Court reversed. Writing for the majority, Justice Stevens reaffirmed *Bellas Hess* in part by holding that North Dakota's taxation scheme violated the dormant Commerce Clause and was therefore invalid. The Court overruled the part of *Bellas Hess* that was based on the Due Process Clause, however, and thus cleared the way for Congress to resolve the issue.

Justice Stevens began by noting that *Bellas Hess* was decided on both Due Process and Commerce Clause grounds. Although he recognized that the two clauses are "closely related" in that they both limit state taxing power, Justice Stevens explained that the two clauses are "analytically distinct" and "reflect different constitutional concerns." As a result, a tax might satisfy the minimum requirements of the Due Process Clause but nevertheless violate the Commerce Clause. Therefore, each clause must be examined separately.

Turning first to Quill's due process claim, Justice Stevens drew an analogy between North Dakota's power to tax Quill and a state court's power to exercise jurisdiction over a defendant. Noting that recent jurisdictional decisions under the Due Process Clause had abandoned formal tests based on physical presence in favor of a more flexible "minimum contacts" inquiry, Justice Stevens overruled the due process rationale for *Bellas Hess*'s bright-line rule because Quill had "more than sufficient" minimum contacts with North Dakota to warrant its subjection to the state's use tax collection statute.

Turning next to the Commerce Clause, Justice Stevens surveyed the history of state taxation challenges under the dormant Commerce Clause. He rejected North Dakota's argument that *Complete Auto* overruled *Bellas Hess* and explained that



Bellas Hess was merely incorporated into the first prong of the Complete Auto test, which requires a “substantial nexus” between the taxable activity and the taxing state. Justice Stevens then rejected North Dakota’s alternative argument that the “substantial nexus” test under the Commerce Clause was identical to the “minimum contacts” test under the Due Process Clause. He explained that whereas the Due Process Clause embodies ideals of “fair warning” or “notice”, the Commerce Clause embodies “structural concerns” about the national economy. Justice Stevens concluded by discussing the merits of bright-line rules and the resulting reliance of corporations on *Bellas Hess* over the past quarter century. He reaffirmed the longstanding doctrine that Congress remained free to alter the outcome of the Court’s decisions in this area and explicitly invited it to overrule *Bellas Hess*, now that the due process barrier to Congressional action had been removed.

Justice White, concurring in part and dissenting in part, argued that the majority should have gone further and given *Bellas Hess* “the complete burial it justly deserves.” First, he criticized the majority’s attempt to reconcile *Bellas Hess* With Complete Auto and argued that the Court in Complete Auto in fact repudiated *Bellas Hess*’s reasoning. Second, he criticized the majority’s “uncharted and treacherous” attempt to distinguish the “substantial nexus” test from the “minimum contacts” test and argued that a historical review of the “substantial nexus” test shows that it in fact constitutes a due process-like inquiry. Third, he criticized the majority’s “illogic” in attempting to justify the “anachronistic notion of physical presence” in this era when “physical presence frequently has very little to do with a transaction a State might seek to tax.” Finally, Justice White countered several of the arguments raised by the majority to support its reaffirmation of *Bellas Hess*’s physical presence rule.

Justice Scalia, concurring in part and concurring in the judgment, agreed that the due process rationale of *Bellas Hess* should be overruled and that the Commerce Clause rationale should be reaffirmed. However, he disagreed with the majority’s decision to reexamine the merits of *Bellas Hess*. Justice Scalia argued that *Bellas Hess* could have been reaffirmed without further discussion under *stare decisis*, which, he noted, applies with particular force in any case in which Congress has the power to alter the outcome of the Supreme Court’s decisions. Upsetting precedent would “visit economic hardship” on those who rely on a “square, unabandoned holding” of the Court.

Described as “one of the biggest tax challenges of the decade,” Quill sheds much



light upon the Supreme Court's byzantine jurisprudence concerning state taxation schemes. By reaffirming the physical presence requirement for state taxation, the Court properly declined to lower the constitutional floor on state taxation schemes, and thus acted in accordance with the history, doctrine, and economic policies behind the Commerce Clause.

Much of the confusion in the area of state taxation has stemmed from the tension between the conflicting ideals of federalism and a free national economy. In other words, the Court must not only respect the states' power to tax persons who benefit from state services, but it must also prevent the states from using this power to impose excessive burdens on interstate commerce. This conflict formed the central debate in *Quill*. According to North Dakota, the "substantial nexus" prong of the Complete Auto test required the lower constitutional threshold of "minimum contacts" between a taxing state and a corporation, which would give relatively great taxing power to the states. According to *Quill*, however, "substantial nexus" required the higher constitutional threshold of "physical presence," Which Would give less taxing power to the states in favor of a stronger national market.

By ultimately siding with the ideals of a free national market through the more restrictive physical presence rule, the *Quill* Court acted in accordance with the history of Commerce Clause. From its inception, the Commerce Clause was expressly intended to protect the national market from the oppressive power of the individual states. Specifically, one of the main purposes of the Federal Convention of 1787 was to establish a strong national economy, the lack of which had contributed to the collapse of the Confederation. The Court has repeatedly recognized that the Commerce Clause fosters a strong national market and that the nation's Founders intended it to do so. As such, something more than "minimum contacts" should be required before a state can interfere with interstate commerce by exercising its taxing power over out-of-state corporations.

The Court's doctrine in this area also demonstrates that the majority in *Quill* properly struck the balance in favor of national economic concerns. Although the Court has often upheld a state's right to tax an out-of-state corporation, it has always required the corporation to have a physical presence within the state and has never adopted the extreme position advocated by North Dakota in *Quill*. For example, the Supreme Court has upheld schemes that taxed out-of-state companies with a physical presence in the state, including companies with in-state agents who leased office space



and solicited sales, in-state retail outlets, in-state traveling salesmen, in-state independent contractors, and even in-state offices unrelated to the goods being sold. By contrast, the Court has struck down schemes that taxed out-of-state companies without a physical presence in the state, including companies that only made deliveries into the taxing state and those that only sold their goods by mail order. The Supreme Court has thus faithfully applied a physical presence rule in the context of state taxation challenges, both before and after *Bellas Hess*, and the rule laid down in *Bellas Hess* has even survived the challenge presented by *Complete Auto*.

Several other doctrinal reasons might account for the continuing appeal of the physical presence rule in the area of state taxation. First, like all bright-line rules, the physical presence rule “firmly establishes the boundaries of legitimate state authority.” It also creates greater certainty in state taxation jurisprudence — an area that has been frequently plagued by “controversy and confusion” — and thus the rule “reduce[s] litigation concerning [state] taxes.” Second, the physical presence rule promotes an “interest in stability and orderly development of the law” through its application of *stare decisis*. Since the rule was announced in 1967 in *Bellas Hess*, it has “engendered substantial reliance and has become part of the basic framework of a sizeable industry.” Third, the physical presence rule draws support from constitutional presumptions in favor of a free national market in the absence of congressional action. By allocating the burden on Congress to overturn the ban (instead of allocating the burden on Congress to implement the ban), the *Quill* majority properly recognized the significant forces of inertia that often prevent Congress from acting consistently with these free-market ideals. By invalidating the North Dakota tax, the Court ensured full enforcement of the policies underlying the Commerce Clause, even if Congress ultimately reverses the Court.

Finally, economic policies favor a strict presumption against a state’s power to tax entities not present in its jurisdiction. First, the physical presence rule prevents the imposition of significant and wasteful administrative costs on out-of-state businesses. Without such a rule, an out-of-state firm might be required to calculate and to pay taxes under 6500 different taxation schemes, to keep multiple records of the firm’s assets under many different income regimes, and to collect taxes from customers in a large number of jurisdictions who fail to pay the correct amount of tax. By contrast, an in-state firm would operate only under a single taxation scheme. Second, the physical presence rule prevents the unnecessary distortion of prices for a



given good. Without the rule, a single good might have up to 6500 different prices—each price depending solely upon where a consumer lives. Because these differentials are non-cost based (that is, they are based not upon a company's production costs, but rather upon the location of the company's customers), consumer choice will be distorted. That is, not all consumers will have the same level of willingness to pay for an extra unit of an identical good.

Despite the foregoing historical, doctrinal, and economic arguments in favor of the physical presence rule, two general objections might be raised. First, the physical presence rule might be seen as unfair; it allows out-of-state firms to escape untaxed while forcing in-state firms to pay, thus placing the in-state firms at a competitive disadvantage. Second, the rule might lead to greatly diminished revenue for the states as technology improves and physical presence becomes a less important factor in doing business.

These objections are not persuasive. First, the physical presence rule is fair because in-state businesses benefit more directly from state services than out-of-state businesses. For example, only in-state businesses benefit directly from tangible services such as police and fire protection and state-subsidized utilities. Because these services are unavailable to out-of-state businesses, in-state businesses should bear the greater burden of tax collection. Second, the physical presence rule will not lead to greatly diminished revenue, because *Quill* does not forbid the states from collecting use taxes themselves. That is, individual states can always collect use taxes from their residents directly, as opposed to shifting this burden on out-of-state corporations. The administrative cost on the states is likely to be much less than the cost on out-of-state businesses. For example, states can impose the tax in conjunction with their existing income tax collection systems.

Thus, the *Quill* Court properly acted in accordance with the history, doctrine, and economic policies behind the Commerce Clause to give meaning to the abstract verbal formulation of *Complete Auto*'s "substantial nexus" test. In so doing, the Court brought its state taxation jurisprudence closer in line with the ideals that have inspired the Commerce Clause for over two centuries.



## Reference Translations 参考译文

### 奎尔公司诉北达科塔州案

在过去的 25 年里,邮购业正以惊人的速度增长着。从 L. L. 豆类商品目录到家庭购买网,邮购已经成为美国人生活的一个重要组成部分。全国贝拉斯·海斯股份有限公司诉税务署一案,大大地促进了这一增长。在此案中,美国最高法院裁定:即使不违反美国宪法的贸易和正当程序条款,各州也不能强迫外州邮购业对其州内的顾客征收使用税。

上一个开庭期,在对奎尔公司诉北达科塔州一案的判决中,美国最高法院再一次确认了关于州与州之间使用税收法令的商业条款禁令。近些年来,有许多州对这一禁令一直置之不理。然而,由于最高法院推翻了根据正当程序对贝拉斯·海斯的裁定,这样就为议会允许各州制定有关强迫外州邮购业对其州内顾客征收使用税扫清了道路。但是,最高法院到最后也拒绝降低解释宪法关于税收司法权的最低标准,重新确认了贸易条款背后的历史、原则、和经济政策。贸易条款背后的这些历史、原则、和经济政策,都是为了联邦主义的事务服从于国家对自由市场的维护。

奎尔公司是一家通过利用商品目录、传单、杂志广告、和电话征询的方式销售办公室设备和消耗品的一家特拉华州的公司。尽管奎尔公司在北达科塔州没有工作人员,仅有一些微不足道的有形资产,但是每年已在这个州要向大约 3000 名顾客出售价值近一百万美元的货物。所以在 1987 年,北达科塔州就通过了一项立法,要求每一位“经常和系统地”向北达科塔州顾客兜售的“零售商”都要向其北达科塔州的顾客征收并向北达科塔州交纳使用税。为反对北达科塔州当局的这一决定,奎尔公司拒绝收取和交纳此税。

1987 年 7 月 1 日过后,北达科塔州向州法院起诉,迫使奎尔公司就其对北达科塔州居民作的一切销售付税。初审法院判定奎尔一方获胜,认为此案与贝拉斯·海斯一案没有区别。然而,北达科塔州高等法院撤销了原判,认为“极大的社会、经济、商业和法律的变革”已经表明,贝拉斯·海斯一案的“实质出现”的明显界限标准已经过时。州高等法院的这一判决,主要是根据完全汽车运输股份有限公司诉布瑞迪判例。在此判例中,州高等法院认为,就反对州税收方案的贸易条款,美国最高法院明显地推翻了它自己的明显界限标准。

以 8 票对 1 票,美国最高法院撤销了北达科塔州的判决。在据多数票的意见写判决书时,史蒂文斯大法官对贝拉斯·海斯一案中的部分判决内容再一次表示确认;裁定北达科塔州的税收方案违反了处于休眠状态的贸易条款,因而是无效的。然而,最高法院推翻了根据正当程序条款对贝拉斯·海斯一案中的判决内容。这样就为议会解决这一问题扫清了道路。

史蒂文斯大法官开始时引用了根据正当程序和贸易条款理由所决定的贝拉斯·海斯一案。尽管已认识到在限制州税收权利方面两项条款是“紧密联系的”,但史蒂文斯大法官解释了这两项条款“分析起来是有区别的”,并且各自“反映了不同的宪法利益”。因此,一项税收可能能够满足正当程序条款的最低要求,但却违反了贸易条款。所以,就每一项条款必须分开进行检查。

首先看一看奎尔的正当程序要求,史蒂文斯大法官在北达科塔州对奎尔征税的权利和州法院对一个被告行使司法权之间作了一项类推。史蒂文斯大法官注意到了根据正常程序条款,最



近的司法判决放弃了实质出现的正式标准,而赞成使用一种更为灵活的“最低接触”审查标准。史蒂文斯大法官推翻了对贝拉斯·海斯案的明显界限正当程序原则,因为奎尔公司同北达科塔州有“非常充分的”最低接触,这是保证奎尔符合州使用税征收对象身份的条件。

再转向贸易条款看一看,史蒂文斯大法官调查了根据休眠的贸易条款对州税收所提出挑战的历史情况。他拒绝接收北达科塔州的辩论理由:完全汽车运输股份有限公司一案推翻了贝拉斯·海斯判例。并且解释说贝拉斯·海斯判例只是和完全汽车运输股份有限公司案的一些枝节相符合,而贝拉斯·海斯一案需要纳税活动和征税州之间有“实体的联系”。他还解释了正当程序条款所包含的“公正警告”或“通知”的意义、贸易条款所包含的关于国家经济的“结构利益”。通过讨论明显界限原则的法律意义和过去 25 年内所导致的对贝拉斯·海斯公司一案的信任,史蒂文斯对本案作出了结论。他重新肯定了这一长期存在的原则。他认为既然阻碍议会行动的正当程序已被移去,但议会一直没有改变最高法院在此的判决结果,这就清楚地表明需要推翻贝拉斯·海斯一案。

对此案判决部分赞成、部分反对的怀特大法官辩论道:那些属于多数票一方的人应该走得更远,应该给予贝拉斯·海斯一案彻底埋葬,就象它现在应得的那样。第一,他批评了多数票人试图使贝拉斯·海斯案与完全汽车运输股份有限公司一案统一,并说最高法院其实在完全汽车运输股份有限公司一案中已否定了贝拉斯·海斯一案的论据。第二,他批评了多数票人“未经调查就做成判决和使用奸诈行为”试图把“实体联系”判例同“最低接触”判例区别开;并还说道,从历史角度对“实体联系”判例回顾表明,事实上它已构成了类似于正当程序的审查标准。第三,他批评了多数票人在当今时代“实质出现经常与一个州可能试图征税的事务几乎没有什么联系时,”多数票人一方试图为“实质出现的过时概念”而辩护,这是“不合乎逻辑”的。最后,怀特大法官对多数票人为支持其再次重新承认贝拉斯·海斯一案的实质出现原则而提出的一些论据表示了反对。

赞成此案判决,但有保留意见的斯卡利亚大法官同意推翻贝拉斯·海斯一案正当程序的基本理由,但是认为对贸易条款的基本理由应该重新确认。然而,他不同意多数票人的重新检查贝拉斯·海斯一案法律意义的决定。斯卡利亚大法官辩论道,在没有根据遵照先例而进一步讨论的情况下,这样就可能会再次确认贝拉斯·海斯判例。他提出这可以运用议会会有权改变最高法院判决结果的特殊权利。推翻先例将会使那些依赖“公正、未被废弃的最高法院判决”的人遭受经济困境。

被描述为“近 10 年内最大的税收挑战之一”的奎尔一案,使人们更清楚地知道了最高法院关于州税收方案的拜占庭式法学观点。由于再一次确认了州税收所需要的实质出现要求,最高法院恰当地拒绝了降低关于州税收方案的宪法最低标准,因而遵循了贸易条款背后的历史,原则和经济政策。

在州税收领域内的许多混乱根源来自于矛盾的联邦主义理想和自由国家经济之间的紧张关系。换句话讲,最高法院不仅要尊重各州对从其州内获得服务的人征税的权利,而且还必须禁止各州使用这种权力而对州际之间的贸易施加过分的负担。这一冲突构成了奎尔案件的中心辩论主题。根据北达科塔州的辩论,他们认为完全汽车运输股份有限公司判例的“实体联系”原则已表明,在征税州和各公司间的联系方面,需要降低“最低接触”的宪法标准,从而给予各州



以相对大的征税权力。然而,根据奎尔的辩护,“实体联系”需要提高“实质出现”的宪法标准,从而给予各州以更小的征税权力,这样更有利于建立一个更为强大的国家市场。

由于最后通过了更为严厉的实质出现原则,而支持了一个自由国家市场的意义,奎尔法庭的判决符合贸易条款的历史。从一开始,贸易条款的意图就是为保护国家市场免受各州权力的压迫。需特别指出的是,1787年联邦制宪会议的主要目的之一就是为建立一个强大的国家经济。没有它,将会导致联邦的倒坍。最高法院不断地认识到贸易条款培育着一个强大的国家市场,而这也正是国家缔造者们的意图所在。因此,当一个州对外州的公司使用征税权,而干预州际贸易之前,除“最低接触”外,还应该需要其它条件。

最高法院在此的原则也表明了奎尔一案中多数票的裁定在平衡中更强调了国家经济利益。虽然最高法院经常支持一个州对外州公司征税的权力,但是,这仍然需要此公司在这个州内有实质出现,而从来没有采纳过比达科塔州在奎尔一案中所提倡的极端立场。例如,最高法院支持一个州对在其州内有实质出现的外州公司征税的方案,包括在州内有租借办公场地而招揽顾客销售的代理商的外国公司、在州内的零售市场、在州内的游动商人、在州内的独立承包人、和其它甚至在州内有与其所售货物没有关系的办公室。相反,最高法院反对那些对在州内没有实质出现的外州公司征税的方案,包括仅仅只是向征税州邮寄了货物的公司和那些只是靠邮购出售他们货物的公司。在贝拉斯·海斯一案的前后,就州征税问题的挑战,最高法院一直坚定地适用实质出现原则。于贝拉斯·海斯案件中已经平息下来的这一法则,在完全汽车运输股份有限公司一案中,仍然受到了挑战。

一些其它原则上的理由或许能够解释在州征税领域就实质出现法则所不断提出的上诉。第一,象所有明显界限法则一样,实质出现法则“坚定地建立了州当局合法的征税界限”。它在州征税裁判规程方面也建立起了更大的确定性——此领域经常受到“争论和混乱的”困扰——因此,这一法则减少了有关就州税收问题的诉讼。第二,通过实质出现法则的遵照先例的应用,促进了“法律的稳定和有序的发展”。自从这一法则在1967年贝拉斯·海斯一案中宣告以来,它就“产生了实体依靠,并已成为相当大工业的一个基本组织体制”。第三,在缺少国会行动时,实质出现法则将会从有利于国家自由市场的宪法事实推断中获得支持。利用把推翻这一禁令的责任交给议会(而不是把执行这一禁令的责任交给议会),奎尔案件中多数票人正确地认识到了巨大的惯性力量,这种力量经常阻止议会执行这些具有自由市场意义的行动。通过宣布北达科塔州征税无效,即使议会最后推翻最高法院的判决,最高法院也能保证贸易条款的基础政策将得到完全执行。

总之,在反对一个州对不在其州管辖权范围内出现的实体征税权力的问题上,经济政策支持严格的事实推断。第一,实质出现法则阻止了对外州贸易明显的强迫征税和行政开支浪费。假如没有这样一个法则,外州的一个公司可能需要根据6500种不同的税收方案计算和付税,根据多种不同的收入体制保持多项公司资产档案,从大量不同的司法管辖区中向未能正确付税的顾客收税。相反,州内公司却只需根据单一税收方案运转。第二,实质出现法则防止了对某项商品价格的不必要的歪曲。假如没有这一法则,一个商品可能会有高达6500种不同的价格——而每一种商品的价格只是靠它的买主住地来确定(因为这些价格的不同并不是根据公司的生产花费所决定,而是根据公司顾客住地来确定),这样将会扭曲顾客的选择。这是因为:并不



是所有的顾客同等地愿意为某一商品付额外的费用。

尽管在上面提到了赞成实质出现法则的历史、原则、和经济的论据,但是或许还有把两种反对观点提出来的必要。第一,实质出现法则或许能被看作是不公平的。因为它允许外州的公司逃避漏税,却强迫州内公司付税;因此,它置本州公司于不利的竞争位置。第二,由于技术改进,使得实质出现在做生意时所起作用已不怎么重要;所以,此法则可能导致州财政的巨大减少。

这些反对意见并不具备说服力。第一,实质出现法则是公平的,因为州内公司要较外州公司更直接地从本州服务中获益。例如,只有州内公司才能直接地从诸如警察、消防、和利用州资金建立的公共设施等有形服务中受益。对于外州公司来讲,这些服务是享受不到的。所以,本州公司应该承担更大的税收负担。实质出现原则也不会导致州财政上的减少。因为,奎尔一案并没有禁止各州对它自己州居民征收使用税,各州仍然能够对住在本州内的住户直接征收使用税。但不能把负担转嫁到外州的公司头上。这样,各州的行政开支可能要比对外州公司征收使用税要少许多。例如,各州可以把使用税归并于它们现行的收入税征收系统中去。

因此,奎尔一案法庭正确地执行了贸易条款背后的历史、原则和经济政策,对完全汽车运输股份有限公司一案的“实体联系”案件审查标准的抽象文字意义作了解释。这样,最高法院就使它的州税收判例法更加符合近两个世纪来一直激励着贸易条款的理想。



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## LESSON SIXTEEN

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# Environmental Law 环境保护法

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### Background 背景

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约翰·史密斯船长 (John Smith 1580-1631; 北美第一个英格兰移民区的创建者) 曾经说过一句在美国广为流传的话——“天地造就了一个供人类居住的最好地方。”(Heaven and earth never agreed better to frame a place for man's habitation.) 这个“最好地方”当然指的就是现在的美国。美国堪称地大物博。因此,很多早期的美国人曾认为美国那丰富的自然资源是取之不尽、用之不竭的。然而,随着人口的增长和工业的发展,美国人发现其自然资源不仅是有限的,而且是很容易遭受破坏的。于是,美国联邦政府和各州政府都采取了一系列保护自然资源和保护环境措施。

1970 年,美国联邦政府成立环保局 (Environmental Protection Agency, EPA), 负责协调和监督全国的环保工作;并于同年颁布了“全国环境政策条例”(National Environmental Policy Act)。该条例至今仍是美国最重要的联邦环境保护法律之一。除了政府机构之外,美国也有许多民间的环境保护组织,如“美好地球基金会”(Good Earth Foundation, GEF) 等。

在美国,环境保护问题对工业发展有着重大影响。按照联邦和各州法律的规定,任何重要的工业开发项目、任何大型工矿企业的建立、以及与环境问题有关的规章制度等,都必须在提出建议或计划时提交一份“环境影响报告”(Environmental Impact Statement),以说明其可能对环境造成的影响。此外,由于美国的环境保护法律规定相对来说比较严格,所以一些美国企业也在竭力寻找“环保成本”(“environmental cost”)较低的国家去开办工厂。



**Text 课文****Part One: National Environmental Policy Act  
(Enacted in 1970; Amended in 1975)****TITLE I DECLARATION OF NATIONAL ENVIRONMENTAL POLICY****§ 101[42 U.S.C. 4331]**

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may —

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national



heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

### **§ 102 [42 U.S.C. 4332]**

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall —

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act which will insure that presently unqualified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on——

( i ) the environmental impact of the proposed action,

( ii ) any adverse environmental effects which cannot be avoided should the proposal be implemented,

( iii ) alternatives to the proposed action,

( iv ) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

( v ) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the



comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

( i ) the State agency or official has statewide jurisdiction and has the responsibility for such action,

( ii ) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this Act; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and longrange character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international



cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by title II of this Act.

### **§ 103 [42 U.S.C. 4333]**

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

### **§ 104[42 U.S.C.4334]**

Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

### **§ 105 [42 U.S.C.4335]**

The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

## **Part Two: Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations (Executive Order 12898, 1994)**

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

### **Section 1-1 . Implementation .**

**1-101. Agency Responsibilities.** To the greatest extent practicable and permitted



by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Mariana Islands.

**1-102. Creation of an Interagency Working Group on Environmental Justice.**

(A) Within 3 months of the date of this order, the Administrator of the Environmental Protection Agency ("Administrator") or the Administrator's designee shall convene an interagency Federal Working Group on Environmental Justice ("Working Group"). The Working Group shall comprise the heads of the following executive agencies and offices, or their designees: (a) Department of Defense; (b) Department of Health and Human Services; (c) Department of Housing and Urban Development; (d) Department of Labor; (e) Department of Agriculture; (f) Department of Transportation; (g) Department of Justice; (h) Department of the Interior; (i) Department of Commerce; (j) Department of Energy; (k) Environmental Protection Agency; (l) Office of Management and Budget; (m) Office of Science and Technology Policy; (n) Office of the Deputy Assistant to the President for Environmental Policy; (o) Office of the Assistant to the President for Domestic Policy; (p) National Economic Council; (q) Council of Economic Advisers; and (r) such other Government officials as the President may designate. The Working Group shall report to the President through the Deputy Assistant to the President for Environmental Policy and the Assistant to the President for Domestic Policy.

(B) The Working Group shall; (1) provide guidance to Federal agencies on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations;

(2) coordinate with, provide guidance to, and serve as a clearinghouse for, each Federal agency as it develops an environmental justice strategy as required by section 1-103 of this order, in order to ensure that the administration, interpretation and enforcement of programs, activities and policies are undertaken in a consistent manner;

(3) assist in coordinating research by, and stimulating cooperation among, the



Environmental Protection Agency, the Department of Health and Human Services, the Department of Housing and Urban Development, and other agencies conducting research or other activities in accordance with section 3-3 of this order;

- (4) assist in coordinating data collection, required by this order;
- (5) examine existing data and studies on environmental justice;
- (6) hold public meetings as required in section 5-502(d) of this order; and
- (7) develop interagency model projects on environmental justice that evidence cooperation among Federal agencies.

**1-103. Development of Agency Strategies.** (a) Except as provided in section 6-605 of this order, each Federal agency shall develop an agency-wide environmental justice strategy, as set forth in subsections (b)-(e) of this section that identifies and addresses disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations. The environmental justice strategy shall list programs, policies, planning and public participation processes, enforcement, and/or rulemakings related to human health or the environment that should be revised to, at a minimum: (1) promote enforcement of all health and environmental statutes in areas with minority populations and low-income populations; (2) ensure greater public participation; (3) improve research and data collection relating to the health of and environment of minority populations and low-income populations; and (4) identify differential patterns of consumption of natural resources among minority populations and low-income populations. In addition, the environmental justice strategy shall include, where appropriate, a timetable for undertaking identified revisions and consideration of economic and social implications of the revisions.

(b) Within 4 months of the date of this order, each Federal agency shall identify an internal administrative process for developing its environmental justice strategy, and shall inform the Working Group of the process.

(c) Within 6 months of the date of this order, each Federal agency shall provide the Working Group with an outline of its proposed environmental justice strategy.

(d) Within 10 months of the date of this order, each Federal agency shall provide the Working Group with its proposed environmental justice strategy.

(e) Within 12 months of the date of this order, each Federal agency shall finalize its environmental justice strategy and provide a copy and written description of its strategy to the Working Group. During the 12 month period from the date of this



order, each Federal agency, as part of its environmental justice strategy, shall identify several specific projects that can be promptly undertaken to address particular concerns identified during the development of the proposed environmental justice strategy, and a schedule for implementing those projects.

(f) Within 24 months of the date of this order, each Federal agency shall report to the Working Group on its progress in implementing its agency-wide environmental justice strategy.

(g) Federal agencies shall provide additional periodic reports to the Working Group as requested by the working Group.

**1-104. Reports to the President.** Within 14 months of the date of this order, the Working Group shall submit to the President, through the office of the Deputy Assistant to the President for Environmental Policy and the Office of the Assistant to the President for Domestic Policy, a report that describes the implementation of this order, and includes the final environmental justice strategies described in section 1-103(e) of this order.

#### ***Sec. 6-6. General Provisions.***

**6-601. Responsibility for Agency Implementation.** The head of each Federal agency shall be responsible for ensuring compliance with this order. Each Federal agency shall conduct internal reviews and take such other steps as may be necessary to monitor compliance with this order.

**6-602. Executive Order No. 12250.** This Executive order is intended to supplement but not supersede Executive Order No. 12250, which requires consistent and effective implementation of various laws prohibiting discriminatory practices in programs receiving Federal financial assistance. Nothing herein shall limit the effect or mandate of Executive Order No. 12250.

**6-603. Executive Order No. 12875.** This Executive order is not intended to limit the effect or mandate of Executive Order No. 12875.

**6-604. Scope.** For purposes of this order, Federal agency means any agency on the Working Group, and such other agencies as may be designated by the President, that conducts any Federal program or activity that substantially affects human health or the environment. Independent agencies are requested to comply with the provisions of this order.

**6-605. Petitions for Exemptions.** The head of a Federal agency may petition the President for an exemption from the requirements of this order on the grounds that all



or some of the petitioning agency's programs or activities should not be subject to the requirements of this order.

**6-606. Native American Programs.** Each Federal agency responsibility set forth under this order shall apply equally to Native American programs. In addition, the Department of the Interior, in coordination with the Working Group, and, after consultation with tribal leaders, shall coordinate steps to be taken pursuant to this order that address Federally-recognized Indian Tribes.

**6-607. Costs.** Unless otherwise provided by law, Federal agencies shall assume the financial costs of complying with this order.

**6-608. General.** Federal agencies shall implement this order consistent with, and to the extent permitted by, existing law.

**6-609. Judicial Review.** This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.

/ s / William J. Clinton

THE WHITE HOUSE,

February 11, 1994.

## Notes 注释

【1】Declaration of National Environmental Policy: 全国环境政策宣言(声明)

【2】[42 U.S.C. 4331]: [《美国法典》(United States Code) 第 42 章第 4331 条]

【3】profound impact: 深远影响

【4】high-density urbanization: 高密度人口城市化

【5】restoring and maintaining environmental quality: 恢复和保持环境质量

【6】productive harmony: 生产性和谐

【7】... the responsibilities of each generation as trustee of the environment for succeeding generations: 每一代人作为后代的环境受托管理人的责任

【8】national heritage: 国家(民族)遗产

【9】diversity and variety of individual choice: 个人选择的多向性和多样性

【10】life's amenities: 生活乐趣



【11】enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources: 提高可再生资源的质量并最大限度地回收可耗尽资源。

【12】interdisciplinary: 交叉学科的

【13】the integrated use of the natural and social sciences and the environmental design arts: 自然和社会科学与环境设计艺术的综合运用

【14】the Council on Environmental Quality: 环境质量委员会

【15】any adverse environmental effects which cannot be avoided should the proposal be implemented: 任何不可避免的对环境有害的结果,假如该建议实行的话

【16】any irreversible and irretrievable commitments of resources: 任何不可逆转且不能弥补的资源投入

【17】section 552 of title 5, United States Code: 《美国法典》第5章第552条(该条是关于“公共信息;机关规章、意见、裁决令、档案和程序”的规定)

【18】the existing agency review processes: 现行的行政审议程序

【19】early notification: 及早通报

【20】solicits the views: 征求意见

【21】Federal land management entity: 联邦土地管理实体

【22】ecological information: 生态学信息

【23】resource-oriented projects: 以资源为主向的工程项目

【24】present statutory authority: 现行的权威性法律

【25】deficiencies or inconsistencies therein: 其中的缺陷或互相矛盾之处

【26】to bring... into conformity with ...: 把……变成与……相一致

【27】refrain from: 抑制;不(做)

【28】contingent upon: 依……而(行事)

【29】existing authorizations: 现有的授权性文件

【30】Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations: 关于强调少数民族人口区和低收入人口区的环境公正原则的联邦法令

【31】implementation: 实施

【32】the National Performance Review: 《全国行政工作评论》

【33】... make achieving environmental justice part of its mission: ...把实现环境公正作为其任务的组成部分

【34】disproportionately: 不相称地;不均衡地

【35】its territories and possessions: 其领地和属地

【36】the Commonwealth of Puerto Rico: 波多黎各自由邦(尚未取得“州”的资格但与“州”具有相等地位的行政区划)

【37】the Commonwealth of the Mariana Islands: 马里亚纳群岛自由邦

【38】Interagency Working Group on Environmental Justice: 跨机关环境公正工作组

【39】the Administrator's designee: (环保局)局长指定的人



- 【40】convene: 召集
- 【41】Department of Defense: 国防部
- 【42】Department of Health and Human Services: 卫生和人类服务部
- 【43】Department of Housing and Urban Development: 住房和城市发展部
- 【44】Department of Labor: 劳工部
- 【45】Department of Agriculture: 农业部
- 【46】Department of Transportation: 交通部
- 【47】Department of Justice: 司法部
- 【48】Department of the Interior: 内政部
- 【49】Department of Energy: 能源部
- 【50】Office of Management and Budget: 管理和预算局
- 【51】Office of Science and Technology Policy: 科学技术政策局
- 【52】Office of the Deputy Assistant to the President for Environmental Policy: 总统环境政策副助理办公室
- 【53】Office of the Assistant to the President for Domestic Policy: 总统国内政策助理办公室
- 【54】National Economic Council: 全国经济委员会
- 【55】Council of Economic Advisers: 经济顾问委员会
- 【56】clearing house: 信息交换所
- 【57】environmental justice strategy: 环境公正战略
- 【58】supersede: 替代
- 【59】mandate: 托管; 授权
- 【60】independent agencies: 独立行政机关
- 【61】petitions for exemptions: 豁免申请
- 【62】Native American Program: 土著美国人计划
- 【63】tribal leaders: 部落首领
- 【64】Federally-recognized Indian Tribes: 联邦承认的印第安人部落
- 【65】... and is not intended to, nor does it create ... 而无意也没有创立……
- 【66】be construed: 被解释为; 被认为
- 【67】/ s / = sign: 签名

## Exercises 练习

### 1. Questions about the text:

- ① Why did the Congress make the Declaration of National Environmental Policy?
- ② What is the continuing policy of the Federal Government?
- ③ What does “the end” mean in Section 101(b)?



- ④ Why is each generation as a trustee of the environment for succeeding generations?
- ⑤ What will a systematic, interdisciplinary approach do?
- ⑥ What are the main contents of an environmental impact statement?
- ⑦ What Shall the federal agencies do, according to Section 103?
- ⑧ What is the title of Executive Order 12898?
- ⑨ The Interagency Working Group on Environmental Justice will not report directly to President, will it?
- ⑩ Where and when did Mr. Clinton sign the Executive Order?

## 2. Listening comprehension:

Oxford Industries is a Tennessee corporation located in Oxford, a small rural town in the southeastern United States. Oxford Industries produces textiles in a factory built in 1957 and renovated in 1987. The factory now employs 3,000 workers, half of whom are unskilled or semi-skilled. Oxford Industries is the largest single employer in the county and through its tax payments provides 20% of the county's annual income.

Early in 1989, the U. S. Environmental Protection Agency (EPA) notified Oxford Industries that it had violated both the Clean Water Act, promulgated by the Congress in 1986, and Regulation 7, issued by EPA in 1988. The EPA based its position on eleven spot inspections taken by its engineers at three-month intervals between 1987 and 1989. During seven of those inspections (each of which lasted three days), EPA engineers found the temperature of Oxford factory's discharge to be 30° or more, which violated the provision of Regulation 7.

The EPA first notified Oxford Industries informally of its conclusion in an effort to persuade Oxford Industries to stop its allegedly unlawful behavior. When Oxford Industries refused, the EPA fined Oxford Industries \$ 1 million for damage already done to the public waters and issued an order for Oxford Industries to stop such unlawful discharges within 180 days or face daily fines of \$ 50,000.

Oxford Industries believes that it has been wronged. It argues that it has been in compliance with the Act and Regulation 7 during virtually all of the time since they were promulgated and that the instances observed by the EPA engineers are not normal. In support, it points to data regularly and automatically compiled by its factory computers that show that the factory only discharged effluent with a temperature of 30° or more on eighteen days during 1989 (or roughly less than twice



per month). Oxford Industries believes that the EPA should have taken better account of this data.

Oxford Industries also believes that the EPA failed to pay attention to its obligation to consider the impact of Regulation 7 on Oxford Industries' competitive position. The company believes that its \$5 million computerized equipment, installed in 1987, is responsible for the temperature of discharged effluent. It believes that the factory would be far less competitive if it could not use such equipment and might even have to relocate overseas if the EPA carried out its order.

Having exhausted the remedies at EPA completely, Oxford Industries has now brought its case to the U.S. District Court.

### 3. Discussion

① Topic: Oxford Industries v. EPA

② Reference informations:

A. Regulation 7 of EPA prohibits "the discharge into public waters of industrial effluent having a temperature of 30 degrees centigrade (30°) or more." The regulation was promulgated by the EPA pursuant to the Clean Water Act of 1986.

B. The Congress indicated in the Clean Water Act that its purpose was to "promote improvement of the quality of the nation's public waters." To attain that goal, the Act delegates authority to the EPA to prepare, issue, and enforce regulations that will "remedy the degradation of the public waters through measures including but not limited to the discharge of industrial waste ..." In doing so, however, the EPA must "be attentive to the implications of any actions it takes on the competitiveness of American industry in the international marketplace."

③ Instructions:

A. The students are divided into three groups. The students of group one are lawyers for Oxford Industries; the students of group two are lawyers for the EPA; and the students of group three are judges of the U.S. District Court.

B. The groups discuss the case separately to prepare for the class session. The group discussion should cover three issues: the issue of facts; the issue of application of Regulation 7 to this case; and the issue of enforcement.

C. Each group elects three speakers for the class session.

D. The lawyers give their arguments and rebuttals in the class session, and then the judges give their decision and reasoning. (The class may be held as a mock trial.).



## Supplementary Reading 补充读物

### Reardon v. United States

(1st Cir. 1991)

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), is designed to protect public health and the environment by ensuring the prompt cleanup of hazardous waste sites. As part of the 1986 amendments to CERCLA, Congress authorized the Environmental Protection Agency (EPA) to place a lien on property on which the United States has incurred cleanup costs. The statute does not entitle the affected landowner to notice or a hearing before the lien attaches. In *Reardon v. United States*, the First Circuit, sitting en banc, held that the CERCLA lien provision violates the Due Process Clause of the Fifth Amendment and required the EPA to provide notice and a hearing before imposing a lien. The First Circuit correctly held that due process requires pre-attachment notice and a hearing. In dicta, however, the court suggested that the EPA should bear the burden of demonstrating at the hearing that the landowner was not entitled to an asserted statutory defense. This suggested allocation of burdens is neither sound policy nor constitutionally required.

After high levels of polychlorinated biphenyls (PCB) were discovered in land owned by Paul and John Reardon, the EPA cleaned up the land and, acting pursuant to CERCLA section 107(1), filed a notice of lien on the property. The Reardons filed a motion for a preliminary injunction in federal district court in Massachusetts and asserted that imposing the lien without notice and a hearing violated their rights under the Fifth Amendment Due Process Clause. The Reardons also argued that they were "innocent landowners" and therefore not liable for the cleanup costs, and that the lien was overbroad because it covered parcels of land not affected by the cleanup.

The district court denied the Reardons' request for injunctive relief. The court found that Congress intended CERCLA to bar judicial review of the Reardons' claims until the EPA took legal action to recover cleanup costs, but held that Congress could not preclude the court from considering the due process claim. The court denied the preliminary injunction, however, because the Reardons were unlikely to succeed in arguing that the lien amounted to a taking of a significant property interest protected by the Due Process Clause.



The Reardons appealed, and after a three-judge panel reversed the district court, the First Circuit granted the EPA's request for a rehearing en banc. The full circuit, in a 4-1 decision, affirmed the district court in part and reversed in part. Writing for the majority, Judge Torruella first addressed the jurisdictional question. The majority agreed with the district court that CERCLA barred pre-enforcement review of the "innocent landowner" and the "overbroad lien" defenses. The court then found jurisdiction to review the due process claim. Taking a different approach than that used by the district court, however, the First Circuit decided that CERCLA barred pre-attachment review of the statute's administration, but not review of the constitutionality of the statute itself.

After finding jurisdiction, the court engaged in the traditional twopart analysis of the Reardons' due process claim, and asked whether there had been a deprivation of a "significant property interest," and if so, "what process [was] due." The First Circuit reversed the district court on the threshold issue and held that imposing the lien amounted to a deprivation of a significant property interest under *Connecticut v. Doe*. In *Doe*, a case decided after the First Circuit's panel opinion, the Supreme Court had declared that "even the temporary or partial impairments to property rights" that a lien entails "are sufficient to merit due process protection."

Having established that the Reardons' lien implicated due process concerns, the court next determined what process was due. Employing the familiar three-fold inquiry of *Mathews v. Eldridge*, the court considered the private interest affected by the lien, the government's interest in securing the lien and the burden of providing predeprivation notice and hearing, and the diminution of the risk of erroneous deprivation achievable through additional safeguards. Judge Torruella found that, because the dollar amount of the lien at issue was indefinite, it affected an even more significant private interest than the lien at issue in *Doe*. Examining the risk of erroneous deprivation, Judge Torruella found that the "highly factual" nature of the issues involved presented a significant danger that an unjustified lien would be imposed. Turning to the value of additional safeguards, the court determined that CERCLA insufficiently protected landowners against erroneous deprivations because the only hearing provided by the statute was "so far into the future as to render it inadequate." Further, the court noted, the statute lacked a bond requirement, and the Reardons might not have an adequate remedy if a court later found that the lien had been unjustified. Judge Torruella determined that requiring a hearing would only



minimally affect the government's interest because the government had no prior recognized interest in the property. Moreover, he noted, requiring notice and providing a hearing to property owners contesting a lien would not present an undue fiscal and administrative burden. Based on this analysis, the First Circuit concluded that a pre-attachment hearing was constitutionally required.

The First Circuit's reasoning in *Reardon* was consistent with a long line of Supreme Court decisions holding that, except for extraordinary situations, "opportunity for the hearing must be provided before the deprivation at issue takes effect." Although the First Circuit assumed that the provision of additional procedural protections would be a "relatively simple matter," the specific procedures it suggested in *Reardon* would, if followed, all but guarantee the opposite result. The First Circuit indicated in dicta that the EPA may "need to demonstrate probable cause or reason to believe that the land would be 'subject to or affected by' a cleanup, or that the landowner was not entitled to an 'innocent landowner' defense," before imposing a lien. This threshold showing, however, would place a greater burden on the government than due process requires, and is consistent with neither the statute nor sound policy. The court should have required only a predeprivation hearing at which the burden would be on the defendant to establish a statutory defense by a preponderance of the evidence once the government had shown probable cause for imposing the lien.

The First Circuit's suggested allocation of the burden of proof at the pre-attachment hearing is misguided because it places a greater burden on the EPA when pursuing a lien than when seeking ultimately to recover the costs of cleanup. When the government has spent money in cleanup activities, CERCLA provides the right to recover the costs from the owner of the cleanup site, unless the owner establishes a statutory defense by a preponderance of the evidence. The most significant defense is the "innocent landowner" defense, which requires the landowner to prove that he in no way contributed to the contamination and that, at the time he acquired the property, he did not know and had no reason to know that hazardous substances had been disposed of on the land. The defendant must also demonstrate that he undertook "all appropriate inquiry ... consistent with good commercial or customary practice" at the time of acquisition. In contrast to this procedure for final determination on the merits, to obtain a lien under *Reardon*'s dicta the EPA must demonstrate that a party is not entitled to an "innocent landowner" defense or to any other statutory defense a



party might raise.

Beyond its inconsistency with the statutory scheme, the Reardon dicta, if followed, would create an inefficient method of obtaining evidence and would impose unnecessary costs on the EPA. For instance, the Reardon scheme would force the EPA to amass information already in the landowner's hands. Although the definition of good commercial practice remains uncertain, the basic elements of proof include a showing that the landowner reviewed the chain of title, conducted an environmental audit, and visually inspected the land — elements that are solely within the knowledge of the defendant and not readily ascertainable by the EPA. In addition, because of the broad scope of liability under CERCLA and the low probability that an "innocent landowner" defense will succeed, placing the burden of proof on the EPA is inefficient. The EPA will lose the security of the lien in cases in which the defendant is not an innocent landowner but in which the EPA could not gather the information necessary to meet its burden of proof at an early stage in the litigation.

Obviously, these policy considerations are irrelevant if the EPA must bear the burden of proof in order to meet the strictures of the Due Process Clause. The Reardon scheme, however, is not constitutionally required. Courts have generally deferred to congressional policy determinations involving the placement of evidentiary burdens in civil cases. Civil proceedings, even when the government is the plaintiff, do not implicate the same concerns for the placement of evidentiary burdens as do criminal proceedings. Civil forfeiture cases resulting from drug investigations illustrate this point, and they provide an especially pertinent illustration because they also implicate an "innocent owner" defense. The Comprehensive Drug Abuse Prevention and Control Act contemplates that, once the government shows probable cause that property was used in violation of the statute, the burden falls on the party opposing forfeiture to prove by a preponderance of the evidence that the property was used without his knowledge or consent. Courts have consistently upheld this statutory provision against due process challenges. Thus, little doubt exists that the government can shift the burden to the property owner once it proves probable cause.

The civil forfeiture cases demonstrate the scant limitations that currently exist on Congress's placement of evidentiary burdens. However, constitutional limits must be considered. The yardstick courts most often refer to is whether the statutory scheme serves a legitimate government purpose. CERCLA easily meets this standard. The purposes of the lien provision in CERCLA—to secure the government's ability to



recover the costs of cleanup and to ensure the availability of resources for cleanups at other sites—are similar to other government interests acknowledged as legitimate. Certainly, if the government may place the burden of proof on the defendant at the time of the ultimate deprivation, there is no need for the burden to fall on the EPA when only a temporary, partial deprivation of property rights is at stake. The Due Process Clause should not be read to require this inefficient distribution of evidentiary burdens. Thus, the Reardon dicta should not be followed.

## Reference Translations 参考译文

瑞尔顿诉美利坚合众国(1991)

“综合环境反应、赔偿和责任法案”(以下简称环境法案)旨在确保及时清理有危害的废弃物场所以保护环境和公众健康。作为该法案 1986 年修正案的一部分,国会授权环境保护局留质那些由美利坚合众国支付清理费用的财产。法律并未规定受影响的土地所有人在其财产被留质前有权得到通知并参加听证会。在瑞尔顿诉美利坚合众国一案中,第一巡回区上诉法院认为环境法案的扣押权条款违反了第五修正案中的正当程序条款,并要求环保局在实施留质前要事先通知并召开一次听证会。第一巡回区法院纠正道,正当法律程序要求在留质财产前须事先通知并召开一次听证会。但是,在法官判决的附带意见中,法庭建议在听证会上由环保局承担举证责任以证明该土地所有人不具有法律所维护的法定抗辩理由。这项举证责任分担的建议既非明智稳妥的策略,也不符合宪法的要求。

环境保护局是在发现鲍·瑞尔顿和约翰·瑞尔顿的私人属地含有高背景值的聚氯联苯后,对该地区做了清理,并按照环境法案第 107 条的规定发出留质通知。瑞尔顿一家向马萨诸塞州的联邦地区法院发布预先执行令的申请,要求环保局暂停扣押财产,并宣称根据第五修正案正当法律程序条款的规定,在事先未通知且未召开听证会的情况下留质财产侵犯了他们的权利。瑞尔顿一家还辩解道,他们是“无过错所有人”,因此不对清理费用承担责任,而且该留质权实施范围过宽,将一部分未受清理的地区也包括在其中。

地区法院驳回了瑞尔顿一家有关预先执行救济的申请。法庭发现国会的意图在于通过环境法案阻止法庭在环境保护局依法采取行动取得清理费用赔偿之前对瑞尔顿一家的诉讼请求进行司法审查。但法庭认为国会无权阻止法庭考虑有关正当程序的诉讼请求。法庭之所以驳回了瑞尔顿一家的执行令申请是因为他们未能说服法庭该留质所侵犯的财产权益已达到正当程序所保护的重大财产利益的数额。

瑞尔顿一家提起了上诉,第一巡回区上诉法院在三人法庭撤销了地区法院的判决后应环境保护局的要求重新由全体法官开庭审理此案。合议庭在四比一的判决中对地区法院的判决作出部分维持部分撤销的决定。在撰写多数法官意见时,托若拉法官首先强调了司法管辖权的问题。多数法官同意地区法院的意见,认为环境法案阻止对“无过错所有人”和“扣押权实施范围过宽”的辩护进行执行先审查,但判定法庭对正当程序诉讼请求具有管辖权。然而与地区法院



的方法不同,第一巡回区上诉法院认为环境法案阻止的是法律实施过程中的执行前审查,而非对法律条文本身的合宪性审查。

在判定有管辖权之后,法庭以传统的两部分分析法致力于解决瑞尔顿有关正当程序的诉讼请求,探究留质是否剥夺了重大财产利益,如果是,那么何为正当程序。第一巡回区法院撤销了地区法院有关财产利益界线的判决并认为根据康涅狄格州诉道尔一案的判决,实施留质等同于剥夺重大财产权益。道尔一案的判决是根据第一巡回区法院全体法官的意见而做出的。根据此案最高法院曾宣布因实施留质而给财产权益造成的损失即使是部分的或是暂时的也应受到正当程序的保护。

在确定留质瑞尔顿财产应考虑正当程序后,法庭下一步的工作是确定何为正当程序。通过援引众所周知的马索斯诉埃尔瑞杰判例的三重审查标准,法庭对受留质影响的个人利益;实施留质所取得的政府利益;事先通知和听证责任承担以及如何通过附加的保障条款使错误性留质的可能性减少的问题加以考虑。托若拉法官发现争议中留质财产的价值是不确定的,这对个人利益的影响比道尔一案所争论的留质影响要大得多。在考察实施错误性留质的可能性时,托若拉法官发现由于该问题高度事实性的特征使实施错误性留质的危险性非常之大。法庭考虑到附加保护条款的重要性,认定环境法案并未充分保障土地所有人的财产不受错误性留质的权利,因为法律仅规定在实施留质后审理诉讼,这是完全不够的。法庭进一步认为,法律未规定保证书条款,即使法庭在以后发现留质实施是错误的,瑞尔顿一家很可能无法得到充分补偿。托若拉法官认为召开听证会仅会最低限度地影响政府利益,因为政府并未对该项财产有公认的利益存在。法官进一步写道,要求发布事前通知并召开听证会给财产所有人提供否决留质的机会将不会给政府带来额外的财政或管理负担。根据以上分析,第一审巡回区上诉法院认为在留质财产前召开听证会是符合宪法要求的。

第一巡回区法院的判决理由与最高法院的长篇判决是一致的。他们一致认为,在实施留质之前必须向财产所有人提供听证的机会,特殊情况除外。虽然第一巡回区法院宣称附加程序保护条款是一件“比较简单的事情”,但如果按照瑞尔顿一案所建议的这种特别程序,则意味着一种相反的结果。第一巡回区法院在法官判决的附加意见中指出,环境保护局在留质财产前必须提出可能性理由以确认该地区应该或已经得到清理,或确认该土地所有人不在“无过错所有人”之列。然而这种起码陈述和正当程序的要求相比,给政府带来了更大的负担,这既不符合法律规定,也非明智的策略。法庭本应仅要求召开执行前听证会,在会上只要政府方提出留置的可能性理由,被告方便要承担提出优势证据进行法定辩护的责任。

第一巡回区法院所建议的执行前听证会举证责任的分配方法是不正确的,因为这使环境保护局在实施留质方面比在最终追偿清理费用方面承担了更大的责任。当政府在清理活动中支付费用后,环境法案则授权政府向被清理地区的所有人追偿这笔费用,除非该所有人能够提供优势证据使法定抗辩理由得以确认。其中最重要的辩护是有关“无过错所有人”的辩护,这要求该所有人证明他根本没有造成污染,或者在他取得此项财产时,他不知道也没有理由知道该地区曾处置过有害物质。被告还必须证明他在取得该项财产时,已对此进行了所有符合良好的商业或习惯性做法的适当调查。与这种判决程序相对照,按照瑞尔顿判例附带意见的规定,环境保护局为实施留质必须证明受影响一方不属“无过错所有人”的范围并且该方不会提出其他法



定辩护理由。

瑞尔顿判例的附带意见除了与法定方案不相符合外,一旦实施,还会造成环境保护局收集证据措施不利,并可能增加不必要的费用。例如,瑞尔顿方案将迫使环境保护局去收集已掌握在土地所有人手中的证据。虽然良好商业惯例的概念是不确定的,但证据的基本内容包括土地所有人审查各种凭证的证据,编制环境决算的证据以及亲自视察该地区的证据,这些内容完全掌握在被告手中,而对环境保护局来说是有待查明的。另外,由于环境法案规定的责任范围较宽以及“无过错所有人”的抗辩理由成立的可能性较小,由环境保护局来承担举证责任是低效的。如果在一些案件中被告并非无过错,但承担举证责任的环境保护局又无法在诉讼的早期阶段收集到必要的证据,那么环境保护局留质权的实施就不能得到保证。

如果环境保护局为了达到正当程序条款的要求必须承担举证责任,那么这些策略考虑很显然是离题的。然而,瑞尔顿方案并非符合宪法的要求。在民事案件中,法庭一般遵照国会政策规定来设定举证责任。即使当政府成为诉讼原告时,在举证责任承担问题上民事诉讼程序也不能同刑事诉讼程序做同样考虑。产生于毒品调查的民事罚没案件就说明了这一点,由于这些案件也存在“无过错所有人”的辩护问题,它们则对所争论的问题作出了特别恰当的说明。“滥用毒品的综合预防与控制条例”中规定,一旦政府掌握违法使用财产的可能性理由、反对没收一方便有责任提供优势证据以证明违法使用财产并非得到该方的认可或同意。法庭一直坚持执行这项法律规定而不受正当程序的影响。所以,毫无疑问,只要政府提供可能性理由,即可将举证责任移到财产所有人身上。

民事罚没案件表明目前在国会设置举证责任问题上的限制是不足的。然而,宪法对此做出的限制也是必须考虑的。法庭最经常参考的衡量标准就是该法定方案是否符合合法的政府宗旨。环境法案很显然符合这个标准。环境法案中留质条款的目的是为了保证政府有能力追偿支出的清理费用并保证政府清理其他废弃物场所的费用来源。这一目的与法律所规定的其他政府利益是相一致的。肯定地说,如果政府在最后剥夺财产时都可让被告方承担举证责任,那么便没有必要由实施暂时部分性财产剥夺的环境保护局承担举证责任。执行正当程序条款将导致这种低效的责任分担。所以瑞尔顿一案判决的附带意见不能遵照执行。



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## LESSON SEVENTEEN

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### Family Law 家庭法

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#### Background 背景

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在美国,家庭法亦可称为“家庭关系法”(Domestic Relations Law). 它涉及婚姻 (marriage)、夫妻关系 (husband-wife relation)、离婚 (divorce)、分居 (separation)、父母子女关系 (parent-child relation)、收养 (adoption)、监护 (custody) 和供养 (support) 等问题。

美国的家庭法完全属于州法律的范畴,联邦政府无权在这一领域制定法律。不过,联邦宪法可以从保护公民自由权利的角度影响各州家庭法的制定和实施。从历史上来看,美国的家庭法受英国普通法的影响很大。由于各州的传统不同,所以各州的家庭法也有较大差异。例如,有些州要求结婚不仅要有结婚证书 (marriage certificate), 而且还要有正式的婚礼 (marriage ceremony); 还有些州则仍然承认普通法婚姻 (common-law marriage), 即无须结婚证或婚礼的婚姻。

在美国的有些州有专门的家庭法院 (family court)。虽然这些家庭法院的权限也是因州而异,但多数都具有以下几类诉讼案件的管辖权: 1. 虐待儿童案件 (child abuse); 2. 供养诉讼; 3. 确定亲子关系 (paternity) 和供养婚外生子女 (child born out of wedlock) 的诉讼; 4. 终止监护权的诉讼; 5. 未成年人违法 (juvenile delinquency) 案件; 6. 家庭罪 (family offense) 案件等。

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#### Text 课文

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The right to freedom of choice in marriage and family relationships lies at the heart of the right to privacy. The early due process cases regarding the education and rearing of children showed special concern for the values of free choice in such matters. Justice Harlan first described the modern “right to privacy” in terms of the



historic values of privacy and freedom of choice in marriage relationships. On this basis, the right to freedom of choice in marriage relationships is itself a fundamental right. Thus, laws which restrict individual choice regarding marriage or divorce will be subjected to "strict scrutiny" under the due process or equal protection clauses.

A law which generally limits freedom of choice in marriage for all persons will be invalid under the due process test unless the state can show an overriding or compelling interest in the restriction. Similarly, a law which restricts or inhibits the right of a class of persons to marry will be invalid under the equal protection guarantee unless the state can show that the classification in fact promotes a compelling or overriding interest.

A case of special significance in establishing marriage as a fundamental right is *Loving v. Virginia*. In this case the Court held unconstitutional a statute prohibiting interracial marriage. The statute was found violative of equal protection because it rested solely upon distinctions drawn according to race. It was a denial of due process, for it deprived each individual of significant freedom of choosing whom to marry. Since marriage is a fundamental right, the state could not restrict the right to marry for less than compelling reasons.

In *Boddie v. Connecticut* the Supreme Court held invalid a statute making the payment of court costs a prerequisite to obtaining access to state courts, as applied to persons seeking a divorce who were unable to pay such costs. Appellants were welfare recipients who had been unable to bring a divorce action in a state court solely because of their inability to pay the court fees. Because courts were usually not the sole means available for resolving private disputes, the Supreme Court had seldom been asked to view the access to courts in a civil context as an element of due process. Here, however, divorce was available only through the judicial machinery of the state. The state's refusal to admit these appellants to its courts, the sole means for obtaining a divorce, was the equivalent of denying them the freedom of choice regarding the dissolution of their marriage. Because the State could show no overriding state interest, this barrier to freedom of choice in marriage was a denial of due process.

The Court's decision was predicated upon the fundamental nature of the right to marry or dissolve that relationship, as well as the monopoly held by the states over the means of dissolution. Indeed, the Court pointed out that its holding was extremely narrow; one could not be denied access to the sole means to adjust a fundamental human relation because of inability to pay court costs. The importance of



this observation became clear in later years when the Court refused to order that persons be granted access to courts for such nonfundamental claims as welfare rights or bankruptcy discharges.

Although governmental regulation of the ability to enter or withdraw from a marriage is subject to close judicial scrutiny, the government may employ marital status classifications in welfare systems. In *Califano v. Jobst* the justices had little problem in upholding the provisions of the Social Security Act which terminated the benefits of a disabled person, who received benefits as a disabled dependent child of a deceased wage earner covered by the Act, when that person married someone who was not receiving Social Security benefits. An exemption from the "marriage termination rule" for those disabled children who married other persons entitled to benefits under the Social Security Act was held not to be so under-inclusive as to violate the equal protection guarantee embodied in the due process clause of the Fifth Amendment.

The opinion by Justice Stevens for a unanimous Court found the traditional rational relationship test applicable because the law could not be characterized as one based on "stereotyped generalization about a traditionally disadvantaged group, or as an attempt to interfere with the individual's freedom to make a decision as important as marriage." It was not irrational for Congress to terminate secondary benefits for the disabled children of deceased social security wage earners when those children were married, even if termination created financial hardship for these persons. Congress sought to alleviate the hardship on some persons dependent upon deceased wage earners and social security benefits by exempting those whose spouse was also entitled to benefits under the Social Security Act. The legislative exemption was not irrationally under-inclusive; Congress was entitled to deal with these economic problems and hardships one at a time. The result in *Califano v. Jobst* is justified because the law placed little burden on the right to marry and it was a reasonable means of identifying a group of financially needy persons for special economic benefits.

In *Zablocki v. Redhail* the justices experienced little difficulty in striking a law which restricted the ability of economically poor persons to marry. Yet the justices had considerable difficulty in deciding why the law violated the equal protection clause. The Wisconsin statute in question prohibited any Wisconsin resident from marrying without court permission if that person had minor issue who were not in his



custody and whom he was required to support according to a court order or judgment. A state court could grant such persons permission to marry only if they submitted proof of compliance with the support obligation and demonstrated that the children covered by the court order were not likely to become "public charges".

Justice Marshall wrote a majority opinion for five members of the Court which was somewhat unclear as to the nature of the right to marriage and the standard of review used in the decision. Justice Marshall described the right to marry as one of "fundamental importance" and a "part of the fundamental right to privacy implicit in the Fourteenth Amendment's due process clause." Thus, the majority opinion seems to continue to recognize marriage as a fundamental right although the language used is weaker than that of previous majority opinions. Justice Marshall also stated that all regulations of the incidents of marriage need not be subjected to "rigorous scrutiny." The majority opinion referred to the *Califano v. Jobst* decision and observed that "reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may be legitimately imposed." The opinion did not specify the types of regulations that need not be tested by "rigorous scrutiny."

The opinion by Justice Marshall found that the permission to marry statute was invalid, even assuming that the state had a substantial interest in its announced goals of counselling applicants for such marriages and protecting the welfare of the children. The statute neither afforded any significant counselling to persons who might be entering marriages that would injure their economic status nor did it reasonably protect the financial status of children from earlier marriages. The statute prevented a person's marriage but it did not insure support for the children from that person's prior marriage.

The majority opinion left the exact nature of the standard of review employed in this case unclear, but that has been true in many of the "fundamental rights by noting that the classification based on marital status in *Califano v. Jobst* simply was not as significant a burden on the right to marriage as was the law reviewed in this case. Justice Stevens indicated that the fact the ability to marry was limited by a law precluded reviewing that law under the most minimal rational relationship test even though such a law need not be subjected to a "level of scrutiny so strict that a holding of unconstitutionality is virtually foreordained." Indeed, the majority opinion by Justice Marshall stated that "when a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by



sufficiently important state interests and is closely tailored to effectuate only those interests." These statements indicate that the Court used a standard of review that approximates one or more of the middle level standards of review that have been previously advocated by Justice Marshall and several legal scholars.

Justice Powell concurred in the judgment in *Zablocki* although he felt the majority opinion swept too broadly by indicating that there might be strict scrutiny of a variety of traditional marriage regulations. He stated that the Court had never required "the most exacting judicial scrutiny" for all laws touching upon the marriage relationship; he noted that laws prohibiting marriages that would involve incest, bigamy, and homosexuality had been assumed to be within the constitutional scope of state powers. Justice Powell based his decision on the fact that the state had been unable to establish any reasonable basis for foreclosing marriage to citizens who were willing but unable to make payments to meet their previous child support obligations; this was not a reasonable manner of providing for the support of those children.

Justice Stewart would have abandoned the equal protection rationale because he did not feel that this law created any testable classification. He viewed the decision as one based on the concept of substantive due process. Justice Stewart found that marriage was not a constitutional right but only a "privilege" that was protected to some extent by the concept of liberty in the due process clauses. For him, this explains why a state may legitimately create regulations of the marriage relationship so long as the justices agree that the regulations are reasonable means of promoting important concerns of the state.

Justice Stewart voted to strike the law examined in *Zablocki* because it contained no exception for those who were truly indigent and could not afford to pay their child support obligations. Like Justice Powell, he found that the law was not a reasonable means of furthering important state interests. But Justice Stewart found no purpose in using equal protection language when "the doctrine is no more than substantive due process by another name." Justice Stewart believed that recognition of the use of substantive due process demonstrates why the Supreme Court should be hesitant to reject the decisions of the democratic process concerning important social questions.

Only Justice Rehnquist would have upheld the law in *Zablocki*. In rejecting substantive due process and equal protection strict scrutiny, apart from racial classification cases, the Justice consistently has taken the position that the Court should only determine whether laws which do not touch upon explicit constitutional



guarantees bear some rational relationship to legitimate governmental interest. Under the traditional test, of course, the law would have to be upheld; the law was an arguably, though not demonstrably, rational means of preventing an increase in the number of children for whom the state would bear financial responsibility. However, Justice Rehnquist recognized the possibility that the law could not be applied to persons who were truly indigent; under those circumstances the prohibition of marriage might not be even arguably a rational way of enforcing support obligations. He did not have to reach this question for, in his opinion, the litigant did not have standing to raise this issue. It is interesting to note that at the start of Justice Rehnquist's dissent he explicitly rejected the use in this case of either "the strictest judicial scrutiny" or any "intermediate standard of review."

The right to marry should be seen as a part of a broader constitutional right in family relationships. More than a half century ago the Supreme Court recognized that the government must respect the autonomy of the family unit as it held that states could not dictate to parents the conditions under which their child would be educated unless the government regulations were reasonably designed to prevent intellectual or physical harm to the child. The Court has also recognized that there is a fundamental right in the parent-child relationship when it has declared that states must guarantee a parent significant procedural safeguards against improper termination of the parent-child relationship, including a requirement that the parental unfitness be proven by "clear and convincing" evidence. While the Court has not described the exact parameters of the right to maintain family relationships, it clearly has indicated that regulation of these relationships must be justified by an overriding state interest.

Such regulations are not entitled to a strong presumption of constitutionality because they interfere with a form of liberty with strong roots in the history and traditions of our society. In another context, the Court has reviewed the cases regarding marriage, childbirth, and child rearing and concluded that:

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State ... The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of a family — marriage ... childbirth ... the



raising and education of children ... and cohabitation with one's relatives ... Family relationships, by their nature involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life.

## Notes 注释

- 【1】...lies at the heart of the right to privacy:.....处于隐私权的中心
- 【2】rearing: 抚养
- 【3】Justice Harlan: 哈伦大法官
- 【4】“strict scrutiny”: “严格审查”
- 【5】overriding or compelling interest: 压倒一切或令人信服的利益
- 【6】Loving v. Virginia: 洛夫英诉弗吉尼亚州(1967)
- 【7】a statute prohibiting interracial marriage: 一项禁止不同种族通婚的法律(该法律规定: 如果一个白人与一个非白人结婚, 则二者均可判处一至五年监禁。)
- 【8】Boddie v. Connecticut: 博迪诉康涅狄格州(1971)
- 【9】welfare recipients: 领取社会福利金的人
- 【10】the monopoly held by the states over the means of dissolution: 州对解除(婚姻关系)之方法的独占
- 【11】bankruptcy discharge: 破产债务解除
- 【12】marital status classification: 婚姻状况分类
- 【13】Califano v. Jobst: 卡利法诺诉乔布斯特案(1977)
- 【14】the Social Security Act: 社会保险条例
- 【15】a disabled dependent child of a deceased wage earner: 一个已故工资收入者的需要抚养的残疾儿童
- 【16】Social Security benefits: 社会保险补助金
- 【17】the “marriage termination rule”: 结婚终止规则
- 【18】under-inclusive: 包括不足的
- 【19】the opinion by Justice Stevens for a unanimous Court: 史蒂文斯大法官代表全体法官(意见一致之法庭)起草的判决意见
- 【20】the traditional rational relationship test: 传统的合理关系检验标准
- 【21】stereotyped generalization about a traditionally disadvantaged group: 关于一个长期以来处于不利地位的群体的立体型概括
- 【22】secondary benefits: 次位补助金
- 【23】alleviate: 减轻
- 【24】Zablocki v. Redhail: 扎布洛基诉雷德海尔案(1978)
- 【25】minor issue: 关于未成年人的问题



- 【26】public charge: 受政府救济者
- 【27】Justice Marshall wrote a majority opinion for five members of the Court: 马歇尔大法官代表最高法院的五位成员起草了多数人判决意见
- 【28】rigorous scrutiny: 苛刻的检查
- 【29】counselling: 劝告(力)
- 【30】...was not as significant a burden on the right to marriage as was the law reviewed in this case: .....并不象本案中所审查的法律那样给与婚姻权利以那么有意义的份量。
- 【31】...precluded reviewing that law under the most minimal rational relationship test: .....排除了按照最起码的合理关系标准对该法律之审查
- 【32】fore ordained: 预先注定的
- 【33】...is closely tailored to effectuate only those interests: .....是仅为实现那些利益而专门裁制的
- 【34】Justice Powell concurred...: 鲍威尔大法官有条件地同意
- 【35】incest: 乱伦(罪)
- 【36】bigamy: 重婚(罪)
- 【37】homosexuality: 同性恋
- 【38】Justice Stewart would have abandoned the equal protection rationale: 斯图尔特大法官本想抛弃平等保护的基本原则
- 【39】indigent: 贫困的; 贫穷的
- 【40】Justice Rehnquist: 伦奎斯特大法官
- 【41】arguably: 可以论证地
- 【42】demonstrably: 可以表明地
- 【43】...the parental unfitness be proven by "clear and convincing" evidence: .....父母不胜任应由“明确且令人信服”之证据证明
- 【44】the exact parameters: 准确参数
- 【45】the Bill of Rights: 《人权法案》
- 【46】substantial measure of sanctuary: 实际庇护措施
- 【47】The personal affiliations that exemplify these considerations: 那些以上述考虑为例的人身联系
- 【48】the creation and sustenance of a family: 一个家庭的创立和维系
- 【49】cohabitation with one's relatives: 与亲属共同居住
- 【50】attachments and commitments: 依恋与承诺

## Exercises 练习

### 1. Questions about the text:

- ① What is the relationship between the right to privacy and the right to freedom



of choice in marriage and family relationships?

- ② What did the Court rule in *Loving v. Virginia*?
- ③ What did the Court hold in *Boddie v. Connecticut*?
- ④ What was the Court's decision in *Boddie* predicated upon?
- ⑤ What was the case of *Califano v. Jobst* about?
- ⑥ What was the Court's opinion in *Califano*?
- ⑦ What was the difficulty to the justices in *Zablocki v. Redhail*?
- ⑧ What were the majority opinions in *Zablocki*?
- ⑨ What were the concurring opinions in *Zablocki*?
- ⑩ What were the dissenting opinions in *Zablocki*?

## 2. Dictation

In *Roe v. Wade* in 1973, the U. S. Supreme Court overturned a Texas statute which prohibited abortions except when necessary to save the life of the mother. The Court held that the statute violated the due process clause of the Fourteenth Amendment because it unnecessarily infringed on a woman's right to privacy.

There were two state interests which might support some limitations on the right to an abortion—the interest in the health of the mother and in the life of the fetus. The only interest which might have supported a total ban on abortion was the protection of the fetus as a human life. However, the majority of the Court found no basis for calling the fetus a person, except certain philosophies or religions.

## 3. Discussion

① Topic: Should Abortion Be Legal?

② Reference arguments:

A. Abortion should be legal, because it is a woman's right to individual choice to have an abortion. In addition, abortion is an important way to control the rapid increase in population.

B. Abortion should not be legal, because a fetus is a human being and a fetus' fundamental right to life should be protected. It is justified to say, at least to some degree, that an abortion is virtually a murder.

③ Instructions:

A. The students are divided into two groups, and each is assigned an opinion for the discussion;

B. the groups discuss the question separately, and each elects one speaker for the class session;



C. the speakers give their arguments in the class session, and then other students may add arguments, ask questions or give comments about the issue.

### **Supplementary Reading 补充读物**

#### **In re Lawrance (1991)**

Since the New Jersey Supreme Court decided the landmark case of *In re Quinlan*, courts and commentators have actively debated the proper conditions under which treatment may be withdrawn from an incompetent patient. The Indiana Supreme Court recently added one more voice to this debate. In *In re Lawrance*, the court held that state law authorized the parents of Sue Ann Lawrance, a nevercompetent patient who was in a persistent vegetative state, to withdraw the artificially provided nutrition and hydration that had supported Sue Ann's life. The court further held that this could be done without prior court approval, as long as no family member or treating physician filed a petition in probate court that alleged that the decision was not in Sue Ann's "best interests" or was not made "in good faith." *In re Lawrance* is not a positive addition to the debate. The court failed to recognize that families and physicians making termination decisions may not always take the best interest of the patient into account or may place too much emphasis on factors other than the patient's best interest. The court thus opted for an inappropriately deferential and vague standard of review.

In the summer of 1987, Sue Ann Lawrance, a thirty-nine year old woman who had been mentally handicapped since age nine, entered a persistent vegetative state. On March 4, 1991, Ms. Lawrance's parents petitioned the superior court for authority to remove the tube by which Sue Ann received nutrition and hydration. Sue Ann's treating physicians all concurred with the decision and agreed that there was little chance that her condition would improve. The superior court held that the Lawrances had the authority to withdraw treatment, and it enjoined the State Board of Health and all health care providers from interfering with the family's decision.

In an attempt to prevent the withdrawal of Sue Ann's treatment, the Christian Fellowship With the Disabled petitioned the probate court to obtain guardianship over Ms. Lawrance. The probate court granted the guardianship application and appointed the Christian Fellowship's attorney as temporary limited guardian for the sole purpose of seeking a stay of the superior court order pending any appellate review of the



superior court's judgment. The superior court then granted the guardian's motion for a stay, and the guardian appealed the initial ruling.

Chief Judge Shepard, writing for the supreme court, addressed three questions: whether the provisions of the Indiana Health Care Consent Act (HCCA) authorize the family of a never-competent patient in a persistent vegetative state to withdraw artificially-provided nutrition and hydration; whether court proceedings are required to effectuate decisions under the HCCA; and whether individuals other than family members and physicians have standing to challenge decisions made pursuant to the HCCA.

On the first issue, Chief Justice Shepard concluded that the artificial provision of nutrition and hydration constitutes "treatment" under the HCCA. The court then read the HCCA in the context of Indiana's constitutional, statutory, and common law, each of which, the court stated, reflects a commitment both to patient self-determination and to family decisionmaking when a patient is not competent to make decisions on her own. The court interpreted the HCCA provision that "a spouse, parent, adult child, or adult sibling" may consent to treatment for a patient who is unable herself to consent to mean that the family of a never-competent patient has legal authority to determine whether a health care provider should continue to provide artificial nutrition and hydration to the patient.

The court next held that a family does not need court approval to terminate treatment. The legislature promulgated the HCCA, the court wrote, "for a society in which health care decisions are routinely made by families on advice of physicians." The legislature intended the HCCA to empower families to resolve health care decisions without resorting to court proceedings. The court insisted that it would be "hubris" to presume that courts are better able to make treatment decisions than are families.

Finally, the court decided that the HCCA authorized only family members and health care providers to challenge termination decisions. Because the HCCA states that "[a] health care provider or any interested individual" may challenge a termination decision in probate court, the court concluded that the legislature had not intended to allow third parties with no direct interest in the case to challenge individual treatment decisions.

In justifying its holdings, the court asserted that its decision did not "irresponsibly place helpless patients in a position of unusual risk." Chief Justice



Shepard argued that many safeguards constraining the family's decision to terminate exist. "[T]he first line of defense against abuses in withdrawal of treatment," he wrote, "[is] the ethical guidelines of the medical profession." He also reasoned that the close relationship between the patient and the decisionmaker protects incapacitated patients: "'family members are generally most concerned with the welfare of a patient. It is they who provide for the patient's comfort, care, and best interests, and they who treat the patient as a person, rather than a symbol of a cause.'" The court further noted that the HCCA requires the family to "act in good faith and in the best interest of the individual incapable of consenting," or else "[a] health care provider or any interested individual" may challenge the health care decisions in probate court.

The court's protestations aside, *In re Lawrance* fails to protect effectively the best interests of the patient. Although families and doctors will generally attempt to keep the patient's best interests in mind, both family members and doctors may have substantial incentives to disregard the best interest of the patient or to unconsciously consider inappropriate factors. The court should therefore have followed the lead of jurisdictions that have adopted a more definite set of criteria to guide the family and a more rigorous process of review to ensure that families follow those criteria.

Families of incompetent individuals frequently have pressing emotional and financial concerns that may be in tension with the patient's best interest. For example, family members may need to achieve closure of a painful period. They may also feel that they themselves would not want treatment continued if they were in that situation. The often staggering cost of hospitalization and treatment may further influence their calculations. It is unrealistic to assume that all families will act in the best interest of incompetent patients. Even when the family seeks to act in the best interest of the patient, the difficulty and complexity of the decision and the lack of court-defined criteria may lead the family to consider factors other than the patient's best interest.

Doctors also face incentives to terminate treatment even when termination may not be in the patient's best interest. Most commentators argue that institutional constraints and professional mores make it more likely that doctors will improperly continue treatment than wrongfully terminate treatment. However, a doctor may be overly deferential to a family's termination decision because she seeks to avoid tough ethical choices, because of her own personal values, or because of a need to generate



additional hospital revenue. Even if most doctors try to be conscientious about serving their patient's best interests, not all will do so, and the checks that the court expects to protect patients in such cases — such as ethics committees and review boards — are not always present.

The Lawrance court implicitly relies on families to determine responsibly what is in the best interest of the patient. The court assumes that families will make termination decisions in good faith and will base their decisions on factors that fit within the range of reasonable considerations. As explained above, these assumptions do not necessarily comport with reality. The court failed to provide for this fact. It should have limited the family's and doctors' decisionmaking authority or provided the probate courts or other review bodies with meaningful standards with which to assess termination decisions.

Furthermore, *In re Lawrance* increases the probability that incorrect termination decisions will be made because it discourages doctors from disagreeing with family decisions to terminate. Under the court's system, if the family decides to terminate and the doctor disagrees, the doctor herself must petition the court to prevent the family from carrying out its decision. By not requiring any additional mechanism of review and by excluding third parties from the decisionmaking process, the Lawrance court inadvertently reinforced the existing pressures on the doctor to comply with the family's termination decision. For the doctor to challenge the decision, she must overcome not only the cost and inconvenience of going to court and the danger of earning a reputation for disregarding the wishes of her patients' guardians, but also the awkwardness of arguing publicly that the family is deciding either in bad faith or against the patient's best interest without any standards as to what those terms mean.

Under Lawrance, if the doctor decides to defer to the family decision, despite its inappropriateness, she will be protected from liability by a combination of three factors. First, Indiana law exempts doctors from liability if they act in good faith reliance on the instructions of someone with apparent authority to give such instructions. Second, there are no standards by which to judge whether the doctor acted wrongly. Third, because of the decision in Lawrance, no one other than a treating physician or family member has standing to contest a termination decision.

Courts in other states have approached termination cases far more effectively than the Lawrance court. These states have developed standards by which to evaluate a family's termination decision. They have defined factors by which to gauge the



patient's best interest, have insisted that some other objective body review the family's termination decision, and have defined clear standards of review. Unfortunately, the Lawrance court turned its back on these formulations of how best to implement the best interests of the patient standard. Although the Lawrance court may have been correct to carve out some room for private family decisions, it nonetheless went too far and abrogated its responsibility to protect incompetent patients.

## Reference Translations 参考译文

### 劳伦斯案(1991)

自从新泽西州最高法院对具有里程碑意义的“昆兰案”作出判决以来,对在哪些适当条件下才可以撤除对无行为能力患者所进行治疗。法院和评论员们便一直展开热烈的辩论。最近,印地安纳州最高法院对这场辩论又加入了一个见解。在“劳伦斯案”中,法院裁定,印地安纳州法律授权苏·安·劳伦斯,一个一直处于植物人状态的无行为能力患者的父母撤除维持苏·安生命的人工所提供的营养和水合物。法院进一步裁定,此项决定无需事先经过法院许可便可作出,只要其家属或主治医生未向遗嘱检验法庭呈交诉状并声称这项决定不利于苏·安的“最佳利益”或不是“诚心”做出的。对这场辩论来说,“劳伦斯案”并不具备积极意义。法院没有认识到,家庭和医生做出终止治疗决定并不是一直都考虑患者的最佳利益,或者可能更为重视其他因素而非其最佳利益。因此,法院选择了一种不恰当地顺从且含糊的审查标准。

苏·安·劳伦斯从9岁开始便心智残废,1987年夏天,39岁的她转入了持久性植物人状态。1991年3月4日,劳伦斯女士的父母向高级法院申请授权撤除对她输送营养和水合物的输液管。苏·安的治疗医生们都同意这项决定,同时也承认她的状况得到改善的机会微乎其微。高级法院裁定,苏伦斯夫妇有权撤消治疗,并且禁止州健康委员会和一切医疗保健提供者阻挠他们的决定。

为了试图阻止撤除对苏·安的治疗,基督教残疾人协会向遗嘱检验法庭申请获得对劳伦斯女士的监护权。遗嘱检验法庭准许了监护权申请,并指定此协会的律师担任临时的限制监护权人,其唯一目的是请求高级法院对判决的任何上诉审查前能延缓判决。高级法院准许了监护权人的延缓提议,监护权人便对初步裁决提出了上诉。

在代表最高法院起草的判决中,首席法官谢帕德提出了三个问题:《印地安纳医疗保健允诺法案》(以下简称《允诺法案》)中的规定是否授权一个持续植物人状态的无行为能力患者的家属撤除人工提供的营养和水合物,是否要求通过法庭程序来实现按此法案作出的决定,是否应由其他个人而不是家属和医生对依此法案作出的决定提出质询。

首席法官谢帕德首先断定,营养和水合物的人工提供构成了《允诺法案》所规定的“治疗”。法院又接着对在印地安纳州宪法、法规的普通法基础上制定的《允诺法案》作了解释,声称患者自己的决定以及当患者无法自己作出决定时其家属所作出的决定都可以在其中每一种法律中



找到依据。《允诺法案》中规定,对不能自己作出允诺的患者,“其配偶、父母、成年子女或成年兄弟姊妹”可以同意对其进行治疗。法院解释说,这就意味着医疗保健人员是否应该继续给患者提供营养和水合物的决定权是无行为能力患者的家庭所拥有的法定权利。

法院进一步认定,家庭无需法院许可便可终止治疗。法院答称,立法机关为社会颁布了《允诺法案》,在这个社会里,医疗保健的决定通常是由家庭在医生的建议下作出的。立法机关计划通过《允诺法案》授权家庭不诉诸法院即可以决定医疗保健问题。法院坚持认为,法院能比家庭作出更好的治疗决定的假设只会是“过份的自我吹捧”。

最后,法院认为,《允诺法案》只是授权家属和医疗保健提供者对终止治疗决定提出质疑。因为《允诺法案》中规定,“任何医疗保健提供者,亦或任何有利害关系的个人”可以在遗嘱检验法庭提出对终止决定的质疑,法院因此而推断,立法机关并未意欲让无直接利害关系的第三者对私人的治疗决定提出质疑。

在为其裁定辩护中,法院宣称,其判决并未“不负责任地将无助的患者置於非同寻常的危险境地”。首席法官谢帕德辩称,许多防范措施限制了家庭作出终止决定,这种情况是存在的。“对於撤除治疗的辱骂,”他答称,“反驳的首要理由是医疗职业的伦理准则。”他还论证说,患者和作出决定者之间的亲密关系保护着失去能力的患者:“家属通常最关心患者的幸福,也正是他们为患者提供舒适、护理和最佳利益,他们将患者当人看待,而不是一种事业的象征。”法院进一步指出,《允诺法案》要求家庭“真诚而且以无法允诺之个人的最佳利益为基础地作为”,否则“医疗保健提供者或任何有利害关系的个人”可以在遗嘱检验法庭对医疗保健决定提出挑战。

暂且撇开法院的断言不说,“劳伦斯案”没能有效地保护患者的最佳利益。虽然家庭和医生通常试图为患者的最佳利益着想,但是却可能有充足的推动力促使他们不理睬患者的最佳利益或无意中考虑到某些不恰当的因素。法院应该遵循法律的导引,而这法律又已采用了一套更为确切的标准来指引家庭,且有一套更精确的审查程序保证家庭依从这些标准。

无行为能力人的家庭总是有一些急迫的感情和经济上的忧虑,而这些又可能和患者的最佳利益相冲突。例如,家属可能想结束一段痛苦的时间、他们也可能想,假若他们自己身处那种境地时也是不会让治疗继续下去的。通常难以令人置信的住院和治疗费用可能会进一步影响他们的忧虑。假定所有的家庭都会从患者的最佳利益出发是不切实际的。即使家庭尽力为患者的最佳利益着想,决定的困难与复杂以及经法院确定的标准的缺乏都可能导致他们考虑其他因素而不是患者的最佳利益。

即使当终止治疗可能不利於患者的最佳利益时,也会有压力促使医生这样做。评论员们大都断定,单位的压力和职业道德使得医生更易於不恰当地继续治疗而不是错误地终止治疗。但是,医生可能会过份地顺从於家庭的终止决定,因为他想尽力避免棘手的道德上的选择,或是出於他本人的价值观念,亦或是为了增加医院额外收入的需要。即便大多数医生都是尽力尽责地为患者的最佳利益着想,但毕竟不是所有的医生都会这样做,而且法院期望能保护此类案件中病人的那些制约手段——如道德委员会和审查委员会——并非总是存在的。

“劳伦斯”法庭是绝对地依赖家庭来决定究竟什么才是患者最佳利益的。法庭假定,家庭会诚心地作出终止决定,并且是基於合理的考虑范围内的因素而作出的。如上所述,这些假定并不一定和事实相符。对这种情况法院没能作出规定。法院应该限制家庭和医生的决定权,



亦或给遗嘱检验法庭或其他一些审查人员提供实在的标准来评估终止决定。

更进一步说,因为“劳伦斯案”使得医生打消了不同意家庭的终止决定的念头,作出不正确的终止决定的可能性便更大了,在法院的那种体制下,如果家庭决定终止而医生不同意的话,医生自己必须呈诉法院以阻止家庭实施其决定,因为既无需任何另外的审查机制,又将第三者排除在作出决定的过程之外,“劳伦斯”法庭无意中便加重了业已加在医生身上的压力,使得他们依从家庭的终止决定。因为医生如要对决定提出质疑,她不但要承担和克服诉诸法院的费用和不便,以及背上无视患者监护权人意愿的名声的危险,还得陷入这样的尴尬境地,那就是得对公众作出解释,家庭的决定或是“不诚心的”或是“违背了患者的最佳利益”,而这些术语究竟意思为何却又无任何标准可依。

依劳伦斯判例,即便家庭的决定不恰当,只要医生决定顺从,便有三种情况免除了医生的责任,首先,如果医生是基于某些人的指示而真诚地执业,而且这些人又是有明确的授权来这样做的话,印地安纳州法律便免除了医生的责任。其次,没有标准来评价医生的行为错误与否,再次,因为“劳伦斯案”的判决,除了医生或家属以外没人会抗辩终止决定的。

在终止治疗类案件的处理上,其他州的法院比“劳伦斯”法庭要实际得多,这些州已经形成一些标准来评价家庭的终止决定。对赖以判断患者最佳利益的各种因素予以解释,且坚持由其他各界人士审查家庭的终止决定,并清楚地阐明了审查的标准,不幸的是,“劳伦斯”法庭却背弃了这些能最好地实现患者最佳利益的准则。尽管“劳伦斯”法庭努力为家庭的私自决定争取一席之地的作法或许是对的,然而又做得太过火了,以至取消了其保护无行为能力患者的职责。



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## LESSON EIGHTEEN

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# Intellectual Property Law 知识产权法

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### Background 背景

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随着社会的进步,随着科学技术的发展,人们对智力劳动成果的权益越来越关注。所谓知识产权,就是版权(或著作权)、商标权、专利权等智力劳动成果权的总称。这些智力劳动成果在为社会带来巨大财富的同时,也向法律提出了一个重要的课题,即如何有效地保护这些知识产权。美国早在 1790 年就由国会颁布了《版权法》和《专利法》,后来经过多次修订,逐渐扩大保护的范 围。从 20 世纪中期开始,美国的现代知识产权法律体系逐步形成。一方面,在传统知识产权领域内的法律规定更趋完善,例如,现行的《商标法》(即“兰海姆法”)是 1946 年颁布的,《专利法》是 1952 年颁布的,《版权法》则是 1976 年颁布的;另一方面,法律保护知识产权的领域也不断扩大,例如,商业秘密、电子数据等都成为了知识产权法律的保护对象。到了 20 世纪后期,知识产权的保护已经成为社会生活、经济生活、特别是贸易活动中最受人们关注的问题之一。

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### Text 课文

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Intellectual property is an example of intangible personal property. It is a collection of ideas and information in a broadly commercial context that the Law recognises as having a value by providing protection.

### Part One: The Subject Matter

#### Patents

A patent is a monopoly right granted by the Government through the Patents Office to an individual who has invented a product or process. The basic objectives for



granting this right are: to inform the public through publication of details from the application of the latest technological advances; to provide an incentive for innovation and thereby stimulate economic activity; and to provide a reward for creative and innovative effort.

### **Copyright**

This is an exclusive right to deal with original literary, dramatic, artistic and musical works. As well as protecting the fruits of creative effort, the legislation also protects those who have invested in those efforts by providing protection for sound recordings, films and published editions of literary work.

### **Database right**

Information arranged in a methodical and systematic way, usually accessible by electronic means such as databases, was originally protected under copyright law. However, since the implementation of the EU Directive on the legal protection of databases by the Copyright and Rights in Databases Regulations 1997, a new database right has been created.

### **Performers' rights**

These are linked with copyright but are aimed at providing protection for the actual performance of copyright works as distinct from the copyright works themselves.

### **Trade marks**

Trade marks are words or symbols used in relation to goods and services that distinguish the owner's goods and services from those of another. Current legislation allows for the possibility of distinctive smells and sounds also attracting protection. The law in this area restrains others from applying the owner's brand to their goods and services. The trade mark owner's rights are protected by statute, if registered, or by common law, where the rights in the trade mark are based on use and goodwill.

### **Designs**

Designs that give visual appeal to mass produced goods may be protected as registered designs, whereas designs that are merely functional are protected as unregistered designs. A child's toothbrush in the shape of a dinosaur is an example of the former, whereas an item of garden equipment is an example of the latter.

### **Confidential information**

Equitable remedies are available to restrain the use of trade secrets and other confidential information without the owner's authority.



## **Part Two: Protection and Justification**

### **The Protection Provided**

Legal recognition of intellectual property is provided by a negative form of protection. The legislation will usually describe the owner's right as 'exclusive', thus, by implication, giving the owner the right to restrain others from using his intellectual property without authority.

It can be argued that the protection given is purely economic as the intellectual property owner is being provided with the exclusive right to exploit that property. However, since 1988, there is also a recognition of moral rights under the Copyright, Designs and Patents Act 1988. The author of a work can, among other things, protect the integrity of the work using his right to object to derogatory treatment of the work under s.80.

### **Justification**

It would appear that the protection of intellectual property rights conflicts with policies in the European Economic Area to maintain free competition. However, it can be argued that the market economy is stimulated by the fact that consumers are assisted in making choices from a selection of goods by the use of trade marks, for example, that distinguish one trader's goods from those of another. Further, because the trade mark informs the consumer about the quality of the owner's goods, there is an element of consumer protection. Granting patents encourages innovation so more goods are available on the market.

Competition within the European Economic Area is protected by Articles 28—30 of the Treaty of Rome, which provide for the free movement of goods and Articles 81—6, which legislate for free competition within the European Economic Area.

Nationally, the abuse of intellectual property is checked using a variety of means, for example licences of right for patents are provided during the last four years of the 20-year term, and compulsory licences are also available for unreasonable underuse of the patent by the patentee. Section 144 of the Copyright, Designs and Patents Act restrains anti-competitive licensing in relation to copyright and s. 238 does the same in relation to unregistered design rights.

## **Part Three: Sources of Law**

Intellectual property law is mainly codified. Each of the main subjects of



intellectual property is governed by statute and supported by delegated legislation. The following are the main statutory sources of law:

The Registered Designs Act 1949(as amended);

The Patents Act 1977;

The Copyright, Designs and Patents Act 1988;

The Trade Marks Act 1994; and

Copyright and Rights in Databases Regulations 1997.

Confidential information and passing off are creatures of common law. Intellectual property cannot be protected on a mere national level and international influences can be found within the above legislation, most of which was passed to enforce the international obligations of the United Kingdom as well as to update the law. For example, one of the objectives of the Trade Marks Act 1994 was to implement Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks, and the Patents Act 1977 was passed, among other things, to give effect to provisions in the European Patent Convention.

A body of case law has developed on the interpretation of the above provisions by national courts and international bodies such as the European Patent Office. Common law also has a part to play in the areas of passing off and the law of confidence.

Intellectual property law is administered in the Chancery Division of the High Court, with appeals to the Court of Appeal and House of Lords. The Patents Court is also part of the Chancery Division and will hear cases regarding patents and registered designs. Since the passing of the Copyright, Designs and Patents Act 1988, there is also a Patents County Court.

As we have already indicated, the nature of the protection given for intellectual property is negative. The owners will usually go to court to restrain unauthorised use of their property by others. In a majority of cases, the remedy sought is the interlocutory injunction. An interlocutory injunction is an order sought by the intellectual property owner as a first step in proceedings before the substantive issues regarding ownership and infringement are considered. As a result, much of the case law that has developed has done so mainly from trial judges making a decision as to whether the plaintiff has satisfied him that he has at least an arguable case, because that is all a plaintiff needs to show at the stage of seeking an interlocutory injunction.

Cases on intellectual property law are reported in specialist law reports as well as



the standard reports. Students of intellectual property law can, therefore, also consult the Reports of Patent, Design and Trade Mark Cases (RPC) published by the Patents Office and the Fleet Street Reports (FSR) published by Sweet & Maxwell. Cases of the European Board of Appeal (EPOR) report on decisions concerning European patents. The *European Intellectual Property Review* (EIPR) is the main journal where academic work on the subject can be found.

## Notes 注释

- 【1】intangible personal property 无形的人身财产(权)
- 【2】subject matter 主题事项;标的
- 【3】patent 专利(权)
- 【4】monopoly right 专有权
- 【5】to inform the public through publication of details from the application of the latest technological advances 通过公布(专利)申请之细节来将最新技术进步告知公众
- 【6】copyright 版权;著作权
- 【7】exclusive right to deal with original literary, dramatic, artistic and musical works 涉及原创性文学、戏剧、艺术和音乐作品的排他性权利
- 【8】database right 数据权
- 【9】EU Directive 欧盟指令
- 【10】performers' rights 表演权
- 【11】trade marks 商标
- 【12】Designs that give visual appeal to mass produced goods ... 那些赋予大量生产之货物以视觉吸引力的设计.....
- 【13】confidential information 保密信息
- 【14】negative form of protection 否定(或消极)形式的保护
- 【15】derogatory treatment of the work 对作品的贬毁性处理(或使用)
- 【16】free movement of goods 自由物流;货物的自由流通
- 【17】compulsory licence 强制性许可
- 【18】unreasonable underuse of the patents by the patentee 由专利使用人对该专利的非合理性低用(不充分使用)
- 【19】delegated legislation 授权立法
- 【20】Confidential information and passing off are creatures of common law. (关于)保密信息和假冒专利(的规定)是普通法的产物。
- 【21】interlocutory injunction 临时强制令;(诉讼)中间的强制令
- 【22】much of the case law that has developed has done so mainly from trial judges making a



decision as to whether the plaintiff has satisfied him that he has at least an arguable case. ...那些已经形成的判例法中的多数都主要是通过审判法官关于原告人是否已经让他(法官)相信他(原告)至少有可争之诉的裁定来形成的。

【23】specialist law reports 专门(种类)的判例汇编

【24】the Fleet Street Reports 《舰队街判例汇编》

【25】the European Intellectual Property Review 《欧洲知识产权评论》

## Exercises 练习

### 1. Questions about the text

- (1) What is intellectual property?
- (2) What is patent?
- (3) What is copyright?
- (4) What is database right?
- (5) What is performer's right?
- (6) What is trade mark?
- (7) What designs are protected by law?
- (8) What are the legal protections for intellectual property?
- (9) What is the justification for protection of intellectual property?
- (10) What are the major sources of intellectual property law?

### 2. Dictation

Although intellectual property may be intangible or abstract, once in existence intellectual property rights bear much in common with the rights associated with real property. For the most part, intellectual property rights can be assigned. Those who 'trespass' on another's intellectual property can be held to account. Ownership generally gives an exclusive right to exploit the property or to give others a license to do so in a variety of ways. It is also the case that while intellectual property is itself intangible, it will be embodied in real objects. A Coca Cola sign, a best-selling novel, a new drug may each constitute the physical embodiment of an intellectual property right: a registered trade mark, a copyright and a patent respectively.

### 3. Discussion

- (1) Topic: Infringements and defenses about copyright
- (2) Reference information:

A. Mike and Bob became well known after they were captured by rebels and kept in a remote part of an African country for five years. On their release back to



their home country, they were approached by Daily News, a local newspaper, for a series of articles on their experiences. A fee of \$ 250,000 each was agreed.

B. During the interviews, Allan and Bob recounted their experiences to Mary, a reporter. Everything was recorded on her tape recorder. Afterwards Mary spent considerable time editing the recordings, entering details into her word processor and producing a number of articles based on the interviews. The articles were published by Daily News.

C. ETV used a substantial amount of the material from the articles as part of its news program without acknowledging the source.

D. Allan was also captured by the rebels. He knew that Mike and Bob had been held for only two years. After that they had joined the rebels in their campaigns. He wrote an article for a competing newspaper disputing their story, making substantial use of the material in the articles published by Daily News.

E. John, a research student engaged in a PhD thesis on rebel groups, used material from the articles for his thesis.

F. David, a political history teacher, photocopied the articles for his students.

### (3) Instructions:

A. The students are divided into several groups, each representing a party in the case;

B. the groups discuss the case separately, and each elects one speaker for the class session;

C. the speakers give their opinions in the class session, and then other students may add arguments, ask questions, or give comments about the case.

## Supplementary Reading 补充读物

In the last few years, the Internet has become an established medium for communication and the carrying on of business. Because goods and services are advertised, sold and, in some cases, delivered over the Internet, it is clear that all those intellectual property issues which arise in the course of traditional forms of advertising and trade will arise in the Internet environment.

As the Internet is a completely new channel which has given rise to forms of business not previously envisaged, there had been a feeling at the outset that intellectual property would be treated differently in this new environment. Although



it is true that some changes will need to be made to existing laws to iron out some of the extreme consequences of a strict application of existing intellectual property laws to the Internet environment, in broad terms the same rules that apply 'offline' will apply 'online' in relation to ownership, use and infringement of intellectual property rights. This is probably one of the main reasons why there have, to date, been relatively few cases in the English courts on intellectual property and the Internet.

### **1. Copyright and the Internet**

The Internet, as its name suggests, is an international network of computers enabling communication worldwide between anyone connected to that network. In order for a computer to access any material which is transmitted over the Internet, it is necessary for that computer to produce a copy of the material in question even though such a copy may only be transitory. If the material in question is a copyright work (or indeed, protected by the new database right) such copying will require the permission of the copyright (or database right) owner.

Because the Internet has grown so suddenly and has been spearheaded by many newly formed Start-up companies and individuals who may not have previously operated established businesses, the need for licences of any copyright materials being reproduced by these Internet businesses has sometimes been overlooked. The design of a website, all contents of that website displayed when accessed, and the software used to create and needed to access the website are all copyright works in which the copyright will be owned by somebody.

When users visit a website, they are producing a copy of all the relevant website pages on their own computer in order to view that website. Going one step further, if a user then downloads and prints any part of the website it is making a copy which requires the licence of the copyright owner. One further step that is often taken is to create a link from one site to another which will generally involve producing a copy of an element of the other website. Again, a licence to reproduce relevant copyright works is needed. However, the general practice on the Internet has been not to seek a licence and to presume an implied licence from the operator of the website. This licence can easily be presumed in the case of access to a website, and to downloading and printing off certain parts of a website (although one can imagine that such a licence could not necessarily be implied in relation to all parts of a website).

The question of copying in the course of linking has been considered (albeit only at interlocutory stage) in a Scottish case (the only reported copyright and Internet



case in the United Kingdom to date) called *The Shetland Times Ltd v. Dr Jonathan Wills and Zetnews Ltd* [1997] GWD 1—5(Ch). In that case, The Shetland Times Ltd was the owner and publisher of a newspaper, and Zetnews Ltd provided a news reporting service under the name The Shetland News. Both companies operated websites on the Internet under the respective titles of The Shetland Times and The Shetland News. The defendant, Zetnews, included on its website certain of the headlines appearing on the plaintiff's website. Visitors to the defendant's website could, by clicking on any of those headlines, link to the plaintiff's website and thus read the headlined article.

The plaintiff brought a claim for copyright infringement on two separate grounds. First, the plaintiff claimed that its headlines were copyright works and that the defendant had infringed by reproducing them on its website. Second, the plaintiff claimed that its headlines as appearing on its websites were cable programmes, and that by including those headlines on its website, the defendant had included the plaintiff's cable programmes in a cable programme service without authority and, as a result, had committed an infringement.

The defendant argued that the operation of a website did not involve 'sending' images or information but was rather a passive service that could be accessed by others and, even if it did involve 'sending' information, it fell within the statutory exception of being an interactive service. The court felt that there was at least an arguable case that the website was a cable programme service and that it was not an interactive service. As this was an interlocutory application, the court only had to find a good arguable case.

## 2. The Copyright Directive

The Internet has thrown up a lot of concerns, including those relating to intellectual property, which are being dealt with in draft legislation coming out of Europe and the English legislature. In relation to intellectual property, the main piece of draft legislation is the European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society. One of the most controversial aspects of this draft Directive is the definition of the boundaries of copyright in a digital world. In particular, how should the impact of digital copying impact on existing exceptions to copyright? Not surprisingly the most contentious issue centres on the core right in copyright—the reproduction right.



Telecommunications companies are worried that they may be held liable for copyright infringement if temporary, electronic copies of infringing material are stored, even fleetingly, on their networks. Consumer electronic equipment manufacturers say they are worried that rights owners may require copyright licences to permit manufacturers to make and distribute equipment which, because of the way the machine functions, involves the making of temporary, electronic copies (for example, by an audio-CD player). As a result, these companies argue that all temporary copies made as a result of the functioning of this equipment should be excluded from the reproduction right.

The other major area of controversy concerns the impact of new technology on the existing exceptions to the reproduction right. For example, in most EU Member States (although not the UK), consumers have the right to make copies of audiovisual works for purely private purposes. These copies are covered by blank tape levies, the proceeds of which are paid to collecting societies and then distributed to rights holders as 'compensation' for the making of these copies. In addition, libraries, educational institutions, news reporters and many other groups enjoy exceptions to copyright under existing legislation.

The draft copyright Directive contains an exhaustive list of exceptions from copyright, leaving Member States free to implement all or any of them. These exceptions are currently the subject of heated debate. The representatives of the user community want to see existing exceptions extended into the digital world.

In contrast, rights holders argue that as digital delivery replaces the sale of physical works, exceptions, particularly in the case of digital private copying, must be cut back and should be subject to rights holders' authorisation. They argue that, as we move increasingly to online delivery of publishing material, films, records and other copyright works, there may be nothing but 'temporary' copies. If these are carved out of the reproduction right, it would seem to leave a gaping hole in copyright through which copyright pirates can walk. Rights holders say any exception to copyright should only apply to temporary copies made in the course of an already authorised use.

Ironically, in many respects the Directive will not require changes to Member States' existing copyright laws because it merely confirms existing provisions. For example, the Directive confirms that, under the distribution right, authors and rights holders have the exclusive right to authorise the distribution of physical copies of their



works. However, removing uncertainty through clarifying legislation can be just as important as introducing new legislation. In the case of 'on-demand' transmission such as those via the Internet, the Directive makes it clear that these will be covered by the new 'making available' right. This is defined as covering 'the making available to the public of... works in such a way that members of the public may access them from a place and at a time individually chosen by them'. This is in line with the WIPO (World Intellectual Property Organisation) Copyright Treaty passed in December 1996. The important point is that the permission of the rights holder is required at the point when the work is first made available to the public. So, posting a copy of an article, a photograph or an audiovisual clip onto a web server requires permission, irrespective of whether that work is subsequently viewed or downloaded by anyone using a web browser. There is no definition of 'public', so national courts will have to apply existing principles to determine whether a closed network, such as an intranet, is 'public' for this purpose, although the answer is probably 'yes'.

### **3. Trade Marks and the Internet**

Whenever goods or services are being advertised or traded over the Internet, the same issues that arise in relation to traditional trading in connection with trade marks arise in this context. However, one specific area of concern that has arisen out of the Internet in connection with trade marks is in relation to domain names. These are the Internet addresses registered by users of the Internet to enable emails to be sent to them or their websites to be located. It is usual for an organisation with an established trading name to wish their domain name to incorporate all or part of its trading name which is likely, therefore, to be a trade mark. However, the registration process for domain names is far less regulated than that applying to the registration of trade marks. In particular, it is possible for a number of domain names to co-exist for the same goods or services which comprise essentially the same word or trade name provided that at least one character is different; so, for instance, website.com, web-site.com, web site.com and web.site.com could all co-exist as domain names for the same type of business although to the casual observer there is very little difference between them.

A particular problem that has arisen in relation to domain names, has been the practice which has now been termed 'cyber squatting'. This practice involves an individual or organisation that does not have rights in a particularly well-known trade name, registering a domain name comprising that trade name in advance of the



legitimate owner of that trading name. The 'cyber squatter' then approaches the legitimate trader seeking large sums of money for transfer of the registered domain name. Although the legitimate trade name owner might be able to avoid paying for the cyber squatter's domain name by registering a domain name with a small variation, most large trading organisations would prefer to know that any domain name incorporating any part of their trade mark was owned by them rather than an uncontrolled third part. In the area of domain names, the most well-known case is *British Telecommunications plc v. One in a Million Ltd & Others*, *Virgin Enterprises Ltd v. One in a Million Ltd*, *J. Sainsbury plc v. One in a Million Ltd*, *Marks & Spencer plc v. One in a Million Ltd*, *Ladbroke Group plc v. One in a Million Ltd* [1999] FSR 1. In that case, the defendants had specialised in registering domain names which contained the names or brands of well-known businesses without the brand owner's consent and offering them for sale. Among the brands concerned were Marks & Spencer, Sainsbury, Virgin and British Telecom and all of these companies sued the defendants alleging passing off and trade mark infringement. The court in that case found for the plaintiffs on both claims. First, although the court acknowledged that the mere creation of an 'instrument of deception' (in this case, the domain names containing the plaintiffs' well-known brand names) was not passing off, the subsequent offering for sale of those names with the implied potential damage arising out of the brand owner not buying those names, did amount to passing off. In relation to trade mark infringement, the court found that the defendant's use of the plaintiffs' well-known trade marks which had a reputation in the UK was detrimental to the marks, if only by damaging the plaintiffs' exclusivity and this was enough to amount to infringement under s. 10 (3) of the Trade Marks Act.

#### 4. Patents and the Internet

Although not a problem which has yet arisen in England, there have been a number of recent claims threatened by US companies for infringement of patents that they claim to have obtained in relation to processes used for online trading. One example of this is amazon.com having obtained a preliminary injunction in the US to protect its patented express lane shopping technology against infringement. This injunction has been obtained against barnesandnoble.com which had been using a version of one-click technology which Amazon claims infringes its patent. It is worth noting that in the US a method of doing business can be patented whereas, under



English law, such methods are specifically excluded under s. 1 (2) of the Patents Act. However, as discussed earlier, there are ways of constructing a patent specification so that software which achieves a new technical effect can obtain patent protection (especially if applied for through the European patent route). This, together with the proposed changes in relation to patentability of computer software under English law (see Chapter 3) could result in many similar claims for infringement of software patents relating to innovative Internet applications arising in the UK courts before too long.

## Reference Translations 参考译文

在过去几年里,互联网(Internet)已经成为了商业通信和经营的一种公认媒介。因为商品和服务在互联网上刊登广告、进行销售,在某些情况下还有递送,所以,很明显,所有那些出现在传统形式的广告和贸易中的知识产权(Intellectual property)问题,在互联网领域内也会出现。

由于互联网是一个全新的渠道,从中产生了人们过去无法设想的商业形式,因此在它的发展初期人们存在着这样一种观念,即认为对这个新领域中的知识产权应该予以不同的处理。虽然确实需要对现有的法律作一些修改,以消除一些将现有的知识产权法律严格适用于互联网领域所带来的极端的后果,从更广泛的意义上来说,“离线”时适用的关于知识产权的所有权、使用和侵权的同样规则“在线”时也会适用。这可能就是到目前为止,在英国法庭里相对来说几乎没有什么关于知识产权和互联网的案件的主要原因之一。

### 1. 著作权(Copyright)和互联网

互联网,就像它的名字所表明的,是一种计算机的国际网络,它使得世界范围内任何连接到这个网络的人之间都能够进行交流。一台计算机为了使用任何在互联网上传送的材料,它就必须产生一个该材料的复制品,即使这样一个复制品可能只是瞬间存在的。如果这个材料是一件受著作权保护的作品(或者实际上是受新的数据库权保护),这种复制则会要求有著作权(或者数据库权)所有者的许可。

因为互联网的发展是如此地突然,许多最近成立的新创公司和个人成为了其中的先锋,而他们可能以前从未经营过实业,所以对这些互联网企业所复制的受著作权保护的材料的许可的需要有时候会被忽略。网站的布局、用户登录时所展示的网站的全部内容以及用来创建网站的软件 and 用户登录网站所需要的软件都是受著作权保护的作品,这些作品中的著作权都是为某人所有的。当用户访问一个站点时,他们也就是在他们自己的计算机上产生一个所有相关网页的复制品来浏览这个网站的内容。再进一步说,如果一个用户此时下载和打印这个站点的任何部分,那他就是在制作一个复制品,而这需要著作权所有者的许可。用户常常会采取的下一个步骤就是创建一个从一个站点到另一个站点的链接,而这一般说来必然是产生了另一个网站的某个要素的复制品了。这里又需要有对复制相关的受著作权保护的作品的许可。然而,互联网上的一般做法并不是去取得许可,而是推测网站经营者已经作出了暗示的许可。这种许可在进入



网站、下载和打印网站的特定部分的情形下是很容易推断出来的(但是任何人都能设想这种暗示的许可不可能是必然地针对网站的所有部分的)。

链接的过程中的复制问题在苏格兰的一个案件(英国迄今唯一受到报道的著作权和互联网的案件)中得到了关注(虽然只是处于讨论阶段),该案例名为“雪特兰时报公司诉乔纳森·维尔斯博士和泽特新闻公司”,编号为[1997]GWD1-5(Ch)。在这个案件中,雪特兰时报公司是一份报纸的所有者和发行人,泽特新闻公司则以“雪特兰新闻报”为名提供新闻报道服务。两家公司都在互联网上开设了网站,分别以“雪特兰时报”和“雪特兰新闻报”为名。被告,泽特新闻,在它的网站上加入了某些出现于原告网站上的新闻标题。访问被告网站的读者只需点击其中的任一标题,就可以链接到原告的网站并且阅读该标题下的文章。

原告提出被告侵犯著作权的主张,分别举出了两个理由。第一,原告主张它的新闻标题是受著作权保护的作品,被告在自己的网站上复制这些标题已经构成侵权。第二,原告主张出现在它的网站上的新闻标题是无线服务项目,被告将这些标题加入到自己的网站中,是未经授权而将原告的无线服务项目加入到一个有线传播系统中去,因此,已经构成了侵权。

被告则主张网站的运行并不是“传送”图像或信息,而更应该是一种可能被其他人获得的被动服务,即使其中的确包括信息的“传送”,它作为一种交互式服务也符合法定的例外情况。法庭认为,对于网站是一个有线传播系统以及它不是一种交互式服务存在可争议的法律观点(Arguable case)。由于这是一个非正式申请(Interlocutory application),法院只能裁定其为存在良好争议的法律观点。

## 2. 著作权管理法

互联网已经受到了诸多关注,包括那些与知识产权相关的内容,欧洲的立法草案和英国的立法正在对其作出规定。与知识产权有关的主要立法草案是“欧洲议会和理事会关于调和信息社会中特定著作权及相关权利管理法”。这个草案管理法中争议最大的内容之一就是数字世界中的知识产权界限的界定。尤其是,数字化复制的影响会对现有的著作权例外规定有何影响呢?毫不惊人地,最有争议的问题集中于著作权的核心权利——复制权。

电信公司对此感到忧虑:如果在他们的网络系统中存储临时的、甚至是转瞬即逝的电子复制他们可能会被要求对侵犯著作权负责。用户电子设备制造商则说,他们担心权利所有者可能会要求制造商获得允许制造和销售设备的著作权许可,而由于机器运转的方式,这些设备必然会牵涉到临时电子复制品的制作(例如,使用一部音频光盘播放器)。因此,这些公司主张所有的临时复制品都是这种设备运转的结果,应该从复制权中排除出来。

争论的另一个主要领域与新技术对现有的复制权例外规定的影响有关。举例来说,在多数的欧盟成员国(但不包括英国)中,用户有权制作视听作品的复制品,但只能是出于纯粹的私人目的。这些复制品属于空白录音税的征收范围,将其收益交给代收团体,随后作为制作这些复制品的“补偿”分发给权利持有人。此外,依据现有的立法规定,图书馆、教育机构、新闻记者和其他许多团体享有著作权的例外。

著作权管理法草案中收录了一个著作权例外情况的完全列表,由成员国自由选择实施全部或者其中的任何一部。这些例外情况目前是这场白热化的讨论的主题。用户团体的代表们希望现有的例外规定能扩展到数字世界中去。



与此相反,权利持有人则主张,由于数字化传输取代了有形作品的销售,特别是在私人复制数字化的情况下,例外情况必须减少而且应该获得权利持有人的授权。他们认为,因为我们越来越多地依靠在线传输出版物、电影、录音和其他受著作权保护的作品,所以排除“临时”复制品可能就不存在任何东西了。如果把这些复制品从复制权中剔除出去,似乎就是在著作权上留下一个敞开的漏洞,成为盗版者的自由通道。权利持有人说,对于著作权的任何例外都应该仅仅适用于已经获得授权的使用过程中所制作的临时复制品。

具有讽刺意味的是,在很多方面管理法并不要求改变成员国现有的著作权法律,因为它只是在巩固现有的条款。例如,管理法强调,根据分配权,作者和权利持有人对于授权发行他们的作品的有形复制品享有排他性的权利。然而,通过澄清立法来消除法律的不确定性可能和引入新的立法一样的重要。在“随选”传输如那些通过互联网传送的情况下,管理法确定它们是包括在新的“公开”权之中的。这种权利包括“使公众有获得作品的途径……这种方式是公众成员可以个别地选择在某个时间从某个地点获得它们”。这是与1996年12月通过的“WIPO(世界知识产权组织)著作权协议”相一致的。重要的一点是,在作品首次向公众公开时,应该得到权利持有人的许可。因此,在一个网络服务器上公布一篇文章、一张图片或一段视听剪辑的复制品需要获得许可,而无论最终是否有任何使用网络浏览器的人阅读或下载该作品。草案中没有关于“公众”的定义,因此国家的法院必须运用现有的原则来判断一个封闭的网络系统如内联网是否以“公开”为目的,不过答案很可能会是“是”。

### 3. 商标和互联网

每当商品或服务在互联网上刊登广告或者进行交易,在传统交易中出现的与商标相关的同样问题,在这种情况下也出现了。然而,出现在互联网上、与商标有关的一个颇受关注的特别领域是关于域名的问题。这些域名是由互联网用户登记的互联网地址,由此可以向他们发送电子邮件,或者定位他们的网站。通常一个有固定营业名称的组织希望他们的域名中包含组织自己的营业名称的全部或者部分内容,因此它也就可能是一个商标。然而,对域名的登记过程的规定要比适用于商标登记的规定要少得多。尤其是,对于许多域名来说,包括实质性地相同的词或营业名称的相同商品或服务或许会并存,只要至少有一个特点是不同的;因此,举例说,“website.com”、“web-site.com”、“web site.com”和“web.site.com”作为域名,对于相同种类的企业来说可以全部并存,而在普通的观察者看来,它们之间几乎没有什么区别。

关于域名已经出现了一个突出的问题,那就是现在被称作“域名抢注”的行为。这种行为是指,一个在一个特别著名的商标上没有任何权利的个人或者组织,在商标的合法所有者之前注册一个包含该营业名称的域名。然后这个“非法占据者”会与商标的合法所有人交涉,高价转让该注册域名。尽管合法的商业名称所有人通过注册另一个差别很小的域名能够回避购买非法占据者手中的域名,但是多数大的商业组织更乐意看到包含他们的商标的任一部分的所有域名都是归他们所有,而不是在一个不受控制的第三方手里。在域名领域中,最为著名的案例是“英国电信诉百里挑一公司及其他、维京事业公司诉百里挑一公司、约·圣斯伯雷公司诉百里挑一公司、玛莎百货诉百里挑一公司、拉德布洛克集团诉百里挑一公司”,案例编号[1999]FSR 1.。在那个案件中,被告专业从事注册域名的业务,这些域名包括未经所有人同意的著名企业的名称或商标,而且他还出售这些域名。这些商标中涉及到玛莎、圣斯伯雷、维京和英国电信,这些公



司对被告提出控告,宣称其冒用商标、侵犯商标权。该案法庭支持了原告的两项诉讼请求。第一,尽管法庭承认仅仅创造一个“诈骗工具”(本案中,这些域名包括了原告的知名商标名称)并不是在冒用,而随后出售这些域名则暗含了对不购买这些域名的商标所有者有潜在的损害,这就构成对商标的冒用了。关于侵犯商标权,法庭裁定,只要损害了原告的排他性权利,被告使用原告在英国享有声誉的知名商标就是对商标有害的,这足以构成《商标法》s. 10(3)规定的侵权。

#### 4. 专利和互联网

尽管在英国还没有出现这个问题,但最近已经有许多由美国公司提起的专利侵权诉讼,他们主张其所获得的专利权是与用于在线交易的过程相关的。例证之一就是亚马逊网站在美国获得了临时禁令来保护它的专利快递邮购购物技术免受侵害。亚马逊获得这种禁令来对抗巴恩斯和诺布尔网站,这家网站一直在使用单击技术的一个版本,亚马逊控诉其侵犯了它的专利权。值得注意的是,在美国一种商业经营的方法可以取得专利权,而在英国法律中,依照《专利法》s. 1(2)的规定,这种方法是予以明确排除的。然而,正如前述,有一种制作专利说明书的方法能够帮助一项新技术成果获得专利保护(特别是在申请是通过欧洲专利通道进行的情况)。和英国法中关于计算机软件专利性的改革建议一起,这种方法的采用可能不用多久就会引发很多相似的关于创新的互联网应用的软件专利权的侵权诉讼。



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## LESSON NINETEEN

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# Civil Procedure

## 民事诉讼程序

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### Background 背景

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美国的民事诉讼具有两个显著的特点：其一是对抗制或抗辩制(adversary system)；其二是陪审制(jury system)。所谓对抗制，就是说诉讼活动以双方当事人(通过其律师)的“竞争”为主要内容。当事人提起诉讼；当事人提出证据；当事人进行证明。而法官只能作为仲裁人，不能进行独立的调查。有人曾把对抗制诉讼比喻为一场球赛——双方律师及其当事人和证人为参赛队员；法官则是裁判；双方“队员”竭力在激烈对抗的比赛中取胜；而法官则保证比赛按规则进行并确定和宣布比赛结果。在比赛中，法官应该保持公正，但是在实践中法官偏向某一方“队员”的情况亦非罕见。

所谓陪审制，即由一定数量(一般为12名)的普通公民组成陪审团参与审判的制度。陪审员须经一定程序挑选。陪审团的职责是依据他们的常识来对案件中的事实作出判断，而有关法律的问题则由法官做出裁定。因此，陪审制是公民参与审判程序的一种方式。

长期以来，美国各州的民事诉讼法律之间一直存在着很大的差异。1934年，美国国会授权最高法院制定民事程序规则。1938年，最高法院公布了“联邦民事诉讼规则”(Federal Rules of Civil Procedure)。此后，该规则不断被修改。目前，不仅联邦地区法院都使用该规则，而且有多数州的法院在使用该规则。诚然，民事诉讼规则在美国还远远没有得到统一。



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**Text 课文**

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**Part One**

The basic first year civil procedure course is designed to teach how lawyers choose a proper court and how they frame and present their cases throughout the proceedings until a judgment has been reached and all available appeals have been pursued. The impact of judgments on future litigation also may be explored. Thus, the primary focus in this course is on the methods and tools available to the litigator. This study requires an inquiry into judicially developed doctrines, as well as various rules and statutes governing the civil courts. At times it will produce questions that are theoretical or constitutional; at other times issues of careful or strict rule interpretation will be paramount. Throughout, it is important to keep in mind the purpose underlying the development of the civil procedure rules and doctrines—to provide a just, efficient, and economical means by which persons can resolve their disputes. Not always will this purpose be met and, as we will see, some of the existing procedures have been used by attorneys to thwart this goal. Nonetheless, the desire to achieve justice, efficiency, and economy in our civil dispute resolution process underlies the way in which the courts apply and interpret the governing rules.

In studying the procedures by which legal rights are vindicated, it also is important to remember that the Anglo-American judicial system is based on the adversary model. The judge sits solely to rule on disputed questions, as presented by the parties, and to apply sanctions when they are properly requested by a party. The lawyers shape the contours of the action. Issues not raised, objections not made, or points not challenged are, with very few exceptions, waived. The case moves forward only in response to the demands of the parties. While modern judges have tended to take a somewhat more active role in guiding litigation before them, it still remains true that the ultimate responsibility for each case rests with the litigants.

Finally, it should be noted that there is a very important aspect to framing litigation that typically is not taught in the basic civil procedure course: how to select a particular remedy as the one most likely to succeed or best suited to the needs of the client. That inquiry concerns matters such as whether injunctive relief or damages may be sought or whether some form of restitutionary relief might be most



appropriate. Historically, the question of what type of relief was involved also dictated in which court suit should be filed, as there were separate courts established——i. e. , law, equity, ecclesiastical——to dispense certain types of relief or to hear certain types of disputes. Modern court systems are not so designed. Instead, any civil court is authorized to dispense whatever remedy is appropriate. Thus, the problem of framing a remedy, while an essential step in preparing your case, is not particularly relevant in the selection of a court and is left to a course in remedies.

## Part Two

Most knowledgeable observers would agree that the Anglo-American adversary trial system is a thing of wonder. One wonders whether it is properly designed to reach its announced goal, the ascertainment of relevant truth. Beyond that, one wonders how it ever works at all.

There is nothing very scientific about the process of litigation. As one highly experienced trial lawyer, who believed in being frank, once described it, “The way we administer justice is by an adversary proceeding, which is to say, we set the parties fighting.” Professor Robert E. Keeton of the Harvard Law School has said it less dramatically: “A trial is a competition of inconsistent versions of facts and theories of law.” Defying all precepts of scientific fact-finding, the trial system actually works quite well. Adversariness seems to be the best method yet devised for forcing the truth into the open.

A few distinctive characteristics of the adversary trial system stand out. In the main, cases are brought to the court by the parties through their legal representatives——lawyers. The lawyers, guided by a judge, control the content and flow of the evidence. And the litigation process is, at least theoretically, two-sided, not one-sided, in the sense that each party has an equal opportunity to investigate the case and present his or her side of it at trial through evidence and argument.

The trial judge in an American jury case serves only as a sort of umpire. He or she applies the procedural rules to the lawyers and explains the substantive principles of law to the jurors, but generally the jurors, and they alone, decide what facts have been established by the preponderant evidence.

In other words, the judge is the arbiter of the law; the jurors are the arbiters of the facts. The jurors, in reaching their verdict, apply to the facts, as found by them,



the law as it is explained to them by the judge in his or her instructions (sometimes called the judge's "charge" to the jury). Of course, if trial by jury has been waived, the trial judge herself will find the facts and apply the law to them in what is referred to as a bench trial. Many plaintiffs and defendants would like to have their cases tried by a single judge.

### Part Three

Once a case has proceeded through discovery and survived any pretrial motions that may have been made, it will be placed on the trial docket of the court and a date for trial assigned. At that time, if no continuances or postponements have occurred, the parties and their counsel must appear to begin the trial.

Both jury and non-jury trials follow the same general pattern, although the outset of the trial differs in a jury case as time must be spent on choosing a jury to sit in the case. The order of presentation may vary slightly from court to court, but the general rules are as follows. Plaintiff's counsel followed by defendant's attorney each make opening statements, explaining what they intend to prove. The plaintiff's witnesses and evidence are examined and cross-examined. Then the defendant's witnesses and evidence are introduced, with similar rights of examination and cross-examination. The plaintiff and defendant then may be allowed to introduce rebuttal evidence. After all the evidence has been submitted, each side makes closing arguments summarizing the evidence supporting their respective positions. Plaintiff again typically summarizes first, but has a right of rebuttal after the defendant's closing remarks have been made. If there is no jury, the judge then will evaluate the evidence and render a judgment. If a jury is present, the judge instructs the jurors as to the law to be applied. Most commonly, the judge will require the parties to submit possible instructions and will choose from among those submissions. In some jurisdictions, pattern instructions have been approved for various types of legal issues and the parties will not need to prepare special drafts for their particular cases. In a few jurisdictions the judge also may comment on the evidence. However, in most jurisdictions this is deemed improper and the judge is authorized only to give an impartial summary of the evidence.

The jury then retires to deliberate in order to render its verdict. If the jurors report that they are deadlocked, the judge may send them back for additional deliberations. But if that fails to break the deadlock, then a mistrial will have to be



declared. If the jury returns with a verdict, the judge will enter a judgment on it.

### **Part Four**

The trial process is governed by rules of evidence. Each court system has its own set of evidentiary rules and the character of the proceeding may vary somewhat depending on what types of evidence are permitted to be introduced. Most generally, proper evidence or testimony is that which is relevant and not privileged or hearsay. Definitions of relevance, privilege, and hearsay fill the law books and are explored more fully in the separate course on evidence. A brief description here will suffice.

The relevance of specific evidence is determined in relation to the scope of the issues in the case at hand. Irrelevant evidence is excluded in order to aid the trier of fact in focusing on what actually is in issue. Privileged matter is excluded to protect the privacy of individuals in certain relationships (e.g., doctor-patient, lawyer-client). Persons in a privileged relationship need not reveal any communications that occurred between them. The law places a greater value on preserving the sanctity of those relationships than on the need to find truth based on all the possible evidence. Hearsay is defined as an out-of-court statement offered to prove the fact or truth of the matter stated. The rules defining hearsay are riddled with exceptions. In general, the prohibition against the use of hearsay evidence exists because hearsay is deemed inherently unreliable because there is no opportunity to cross-examine the actual person who made the statement. The exceptions that are recognized typically involve situations in which other circumstances appear to ensure that the evidence is reliable (such as the exception for the introduction of records created during the day to day operation of a business), or in which there does not appear to be other evidence that could be used to prove the matter at issue (such as statements by a person regarding his motives).

Counsel must raise evidentiary objections immediately or they will be waived. In addition, in the case of privileged information, the parties to the relationship can waive their right to claim privilege by their conduct. If an objection is sustained, the evidence will be stricken or the jury will be instructed not to take it into account in rendering the verdict. A judge trial often is a little less rigid in adhering strictly to the evidentiary rules because it is assumed that the judge will disregard improper evidence and consider only proper evidence. Thus, there is less need for the lawyers to object as frequently. Similarly, there is less fear that improper evidence will be considered if



the court sustains an objection. In the jury setting, there is a serious question whether it is reasonable to expect the jurors to disregard improper evidence that is mentioned in their presence, even if instructed to do so, or whether the jury has been so prejudiced that a mistrial should be called.

## Notes 注释

- 【1】judicially developed doctrines: 在审判活动中发展起来的原则
- 【2】careful or strict rule interpretation: 谨慎或严格的规则解释
- 【3】paramount: 首要的
- 【4】to thwart this goal: 阻挠这一目标的实现
- 【5】the governing rules: 指导性规则
- 【6】be vindicated: 受到维护的
- 【7】the adversary model: 对抗式
- 【8】...to apply sanctions when they are properly requested by a party. ....当一方当事人恰当地要求适用某些处分措施时便可适用之。
- 【9】the contours of the action: 该诉讼的轮廓
- 【10】points not challenged: 未提出置疑的论点
- 【11】waive: 放弃
- 【12】injunctive relief or damages: 强制性救济或赔偿
- 【13】restitutionary relief: 复原性救济
- 【14】ecclesiastical(court): 宗教(法庭)
- 【15】to dispense remedy: 施行补救
- 【16】...is left to a course in remedies: ....留给有关法律补救的课程。
- 【17】the ascertainment of relevant truth: 相关性真实情况的确认
- 【18】Defying all precepts of scientific factfinding: 无视科学事实认定的所有规则
- 【19】umpire: 仲裁人;裁判员
- 【20】the substantive principles of law: 实体法原则(法律的实体性原则)
- 【21】preponderant evidence: 优势证据
- 【22】arbiter: 公断人;仲裁人
- 【23】instructions: 指示(书)
- 【24】“charge”: 指令
- 【25】bench trial: 法官审
- 【26】discovery: 要求告知(即当事人在审判开始前查询已知证据和法律的一种诉讼活动或一个诉讼阶段)
- 【27】pretrial motions: 审前动议
- 【28】the trial docket of the court: 法院的审判日程表



- 【29】continuances or postponements: 诉讼延期或推迟
- 【30】appear: 出庭
- 【31】the order of presentation: 陈述顺序
- 【32】opening statement: 开场白(陈述)
- 【33】examine and cross-examine: (对证人等的)盘问和交叉盘问(前者指由本方律师问话;后者指由对方律师问话)
- 【34】rights of examination and crossexamination: 盘问权和交叉盘问权
- 【35】rebuttal evidence: 反驳证据
- 【36】closing argument: 终结辩论
- 【37】pattern instructions: 格式指示书
- 【38】...retires to deliberate: 退庭评议
- 【39】deadlocked: 僵局的(陪审团无法做出裁定的)
- 【40】mistrial: 误审;未决审判;无效审判
- 【41】...proper evidence or testimony is that which is relevant and not privileged or hearsay: 正当的证据或证言是那些相关的而且不属于特免权的或传闻的(证据)
- 【42】the relevance of specific evidence: 具体证据的相关性
- 【43】irrelevant evidence: 无相关性证据
- 【44】the trier of fact: 事实审定者(陪审团)
- 【45】sanctity: 神圣不可侵犯性
- 【46】...riddled with exceptions: .....充满了例外
- 【47】If an objection is sustained, the evidence will be stricken: 如果一项(对对方证据的)异议得到(法官的)支持,该证据将被取消
- 【48】prejudiced: 有偏见的

## Exercises 练习

### 1. Questions about the text:

- ①What is the purpose of the basic first year civil procedure course?
- ②What is the purpose of the development of the civil procedure rules and doctrines?
- ③What were the three types of courts in the English legal history?
- ④What did Prof. Keeton say about the adversary trial system?
- ⑤The adversary trial system is not a scientific method of fact finding, is it?
- ⑥What are the distinctive characteristics of the adversary trial system?
- ⑦Why is the trial judge in an American jury case only a sort of umpire?
- ⑧What is bench trial?



⑨What is the order of presentation in a civil trial?

⑩Why should hearsay evidence be excluded?

## 2. Dictation

Judicial opinions are printed in books called reports or reporters. For many years there was no organized for the publication-the reporting-of American court decisions. The job was left to private court reporters and publishers. The result was a hodgepodge of separate publications that made it difficult to locate the sources of law. Today the situation is different and much improved. The volumes of what is called the National Reporter System include all of the decisions of the highest state courts. This system of reports also includes the decisions of intermediate state appellate courts. And it publishes the opinions of federal courts, including the Supreme Court of the United States. Computer technology is making decisional law even more readily available.

## 3. Writing a legal memorandum

### ①Introduction

A legal memorandum is a document written to convey information within a law firm or other organization. It is a written analysis of a legal problem. The memorandum is usually prepared by a junior attorney or by a law clerk for a more senior attorney early in the firm's handling of a legal dispute. The writer analyzes the legal principles that govern the issues raised by that problem and applies those principles to the facts of the case. The attorneys will then use the memo to understand the issues that the case raises, to advise the client, and to prepare later documents of the case.

The memorandum is a formal document in that it is a professional piece of writing. Thus, you should use standard written English and avoid slang, other kinds of informal speech, and overuse of contractions. On the other hand, you should use simple, direct words and sentence structures.

### ②Format

A legal memorandum usually begins with a heading with the following information:

To: Name of the person for whom the memo is written

From: Name of the writer

Re: Short identification of the matter for which the memo was prepared

Date:



The body of the memo may be divided into the sections as follows:

- A. Statement of facts;
- B. question presented;
- C. applicable statutes;
- D. discussion;
- E. conclusion.

(The order of the sections may be changed according to the contents of the memo or the preference of the writer or the law firm.)

### ③ Sample

To: Victor Gray

From: David Zhang

Re: Emily West Contract Litigation

Date: November 6, 1994

**Question Presented:** Can a buyer of wheat successfully defend a breach of contract suit on the grounds that both express and implied warranties under the Kansas Commercial Code were breached when 15-20% of the wheat the seller delivered was blighted and unusable?

**Conclusion:** The buyer has a strong defense based on breach of implied warranty of merchantability, Kan. Stat. Ann. § 2-314 (1983), since the goods sold to her were neither of fair average quality nor fit for the ordinary purpose of baking bread. She can also prove a breach of the implied warranty of fitness for a particular purpose, Kan. Stat. Ann. § 2-315 (1983), since she informed the seller of her particular use for his goods, that of baking breads without additives or preservatives, and he knew she was relying on his judgment to select suitable goods. However, she probably cannot successfully use breach of express warranty, Kan. Stat. Ann. § 2-313 (1983), because the seller's statement to her was an opinion and not an affirmation of fact.

**Facts:** Emily West is president of the newly formed Aunt Em's Natural Heartland Bake Company, a producer of goods baked without additives or preservatives. While searching for a source of very high quality wheat, West was referred to Abel Prentice, an experienced wheat farmer with an excellent reputation as a knowledgeable grower and dealer. Prentice grows wheat on a 3,000 acre farm he owns and operates in this state. For over thirteen years he has been selling his own wheat and wheat grown by other farmers to manufacturers.



West visited Prentice in May 1988 and described the kind of bread she wished to produce. Prentice assured West that he knew a great deal about the bread business. In fact, Prentice told her that he probably knew more about her business than she did. After thinking it over, West signed a contract to buy wheat from Prentice. The written contract contained the terms of quantity, price, delivery, and payment schedules. No description or warranty as to the quality of the wheat, however, was included. After signing the contract, Prentice said: "You won't be sorry. I grow the finest wheat money can buy."

When the wheat was delivered in July, West found that 15-20% of it was blighted and unusable. West rejected the wheat and refused to pay Prentice. On August 5, 1988, Prentice filed suit against West's company for breach of contract.

**Applicable statutes :**

**Kan. Stat. Ann. § 84-2-104. Definitions: "Merchant"; "Between Merchants"; "Financing Agency"**

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

**Kan. Stat. Ann. § 84-2-313. Express Warranties by Affirmation, Promise, Description, Sample**

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he has a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

**Kan. Stat. Ann. § 84-2-314. Implied Warranty: Merchantability; Usage of Trade**



(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

(2) Goods to be merchantable must at least such as

(a) pass without objection in the trade under the contract description;

(b) in the case of fungible goods, be of fair average quality within the description;

(c) be fit for the ordinary purposes for which such goods are used.

**Kan. Stat. Ann. § 84-2-315. Implied Warranty: Fitness for Particular Purpose**

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

**Discussion:**

Abel Prentice's breach of contract claim is based on Emily West's wrongful rejection of the goods. However, if Prentice breached any of the three warranties under the Kansas Commercial Code, then West rightfully rejected the goods and has a successful defense. The Kansas Commercial Code provides three possible defenses based on breach of warranty: breach of implied warranty of merchantability, § 2-314; breach of implied warranty of fitness for a particular purpose, § 2-315; and breach of express warranty, § 2-313. West has a strong defense based on breach of implied warranty of merchantability. Moreover, she has a good defense based on implied warranty of fitness for a particular purpose. However, she cannot successfully defend the suit by claiming breach of express warranty.

The best defense against Prentice's suit is under § 2-314, the implied warranty of merchantability. This section provides that if the seller is a merchant, a warranty of merchantability is implied in a contract. *Id.* (1). Section 2-314 (2) sets out minimum standards which goods must meet to be merchantable. Under these standards, goods must, *inter alia*, "pass without objection in the trade under the contract description," § 2-314 (2) (a); and, in the case of fungible goods, be "of fair average quality within the description," § 2-314 (2) (b); and be "fit for the ordinary purposes for which such goods are used," § 2-314(2) (c). Prentice is a



merchant and the goods did not meet any of these standards. Therefore, Prentice breached the implied warranty of merchantability.

The statute itself defines merchant, in pertinent part, as “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.” Kan. Stat. Ann. § 2-104 (1) (1983). One court in Kansas has addressed the question of whether a farmer is a merchant in a case involving the sale of hogs between hog farmers. *Musil v. Hendrich*, 6 Kan. App. 2d 196, 627 p.2d 367 (1981). The court concluded that the defendant farmer in the hog transaction was a merchant under either definition in the statute. First, as someone who had been in the hog business for thirty years and was selling 50-100 hogs per month, he was a dealer in hogs. Second, he held himself out as having knowledge or skill relating to the goods, since he had equipment and buildings related to hog farming and sold hogs to private individuals, as well as to a slaughterhouse. *Id.* at 202, 627 P.2d at 373. Prentice, like the hog farmer in *Musil*, is a merchant under either definition. Prentice is a dealer because he is a wheat farmer who sold manufacturers not only his own wheat, but also the wheat of other farmers. He also held himself out as having knowledge relating to the goods, since he has been a wheat farmer for thirteen years, runs a 3,000 acre farm, and stated to West that he knew more about her business than she did. Prentice is therefore a merchant, and it is appropriate to apply § 2-314.

Under the standards of merchantability provided in § 2-314, the warranty was breached first because the 15-20% blighted wheat was of lesser quality than would “pass without objection in the trade” and was not of “fair average quality.” § 2-314 (2)(a)(b). Fair average is described as “the middle belt of quality... not the least or the worst... but such as can pass without objection.” § 2-314 Comment 7. According to regulations from the Kansas Department of Agriculture, to be of fair average quality, a wheat shipment can contain no more than 10% of a blighted or inferior product. Kan. Admin. Regs. 397.41 (1981). Since the wheat Prentice shipped was 15-20% blighted, it did not meet this standard.

The implied warranty of merchantability was also breached because the wheat was not fit for its ordinary purposes. Under Kansas law, the buyer must show the ordinary purpose of the goods involved and show that the goods are not fit for that purpose. *Black v. Don Schmidt Motor, Inc.*, 232 Kan. 456, 460, 657 P.2d 517,



525 (1983). The ordinary purpose for wheat is to make flour for bread. Since wheat that is 15-20% blighted would not make acceptable flour, the wheat is not fit for its ordinary purpose. Accordingly, Prentice breached the implied warranty of merchantability.

Prentice has also breached the implied warranty of fitness for a particular purpose. A warranty of fitness for a particular purpose is implied "when the seller, at the time of contracting, [knows] any particular purpose for which the goods are required, and [knows] that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." § 2-315. At the time the contract was made, Prentice knew that West required a high quality wheat for her all-natural bread, and that she was relying on his judgment to select and provide suitable wheat. Since the making of all-natural bread is a particular purpose, and since wheat that is 15-20% blighted is not fit for this purpose, Prentice has breached an implied warranty of fitness.

The first requirement is that the goods are to be used for a particular purpose, as opposed to an ordinary purpose. In *International Petroleum Services, Inc. v. S & N Well Service, Inc.*, 230 Kan. 452, 461, 639 P.2d 29, 37 (1982), the court described a particular purpose as more specific, narrow, and precise than an ordinary purpose. *Id.* The court also stated that a particular purpose meant a use peculiar to the nature of the buyer's business. *Id.* West intended to use the wheat to make all-natural bread and cakes using no preservatives. She would, therefore, need especially high quality wheat, not a product that could be used in making ordinary baked goods which could rely on preservatives for freshness.

In addition, Prentice had reason to know of the particular purpose she intended for the wheat. Prior to signing the contract, West described her business to Prentice and told him the kind of bread she wanted to produce.

Finally, West relied on Prentice's skill and judgment to select the appropriate goods. See *Addis v. Bernadin, Inc.*, 226 Kan. 241, 597 P.2d 250 (1979). In *Addis*, the plaintiff buyer, a manufacturer of salad dressings, informed the defendant seller that he needed jar lids for dressings containing vinegar and salt. Although the seller knew that the lids the buyer had ordered were incompatible with their intended use, he did not tell the buyer. *Id.* at 246, 517 P.2d at 254. The court held the seller, who had superior knowledge, had breached the implied warranty of fitness for a particular purpose. The buyer had relied on the seller's knowledge of his product



and on his judgment to select appropriate goods in conformity with the use the buyer described. *Id.* West, too, relied on Prentice's judgment to provide appropriate goods. She was just starting her business, but Prentice had been selling his own wheat for over thirteen years. Moreover, Prentice not only said he knew all about the wheat business, he boasted that he knew more about her business than she did. Therefore, a court would probably hold that Prentice breached an implied warranty of fitness for a particular purpose.

It is not likely, however, that an express warranty had been created. An express warranty is created by a seller's "affirmation of fact" about the goods, or a description, sample, or model of the goods given to the buyer, any of which is "made part of the basis of the bargain." § 2-313(1)(a)(b)(c). The seller need not use formal words of guarantee, or intend to create a warranty. § 2-313(2). However, a statement which is merely the seller's opinion of the goods does not create a warranty. *Id.* The written Prentice-West contract made no mention of any express warranty. It could only have been created in Prentice's statement to West that he grows "the finest wheat money can buy". However, as this statement is more opinion than an affirmation of fact, Prentice did not create an express warranty.

Kansas courts have held that express warranties can be created by oral statements if these statements are affirmations of fact and not opinions. Formal words of guarantee are not necessary, but an affirmation merely of the value of the goods is not sufficient to create an express warranty. *Young & Cooper, Inc. v. Vestring*, 214 Kan. 311, 521 P.2d 281 (1974); *Brunner v. Jensen*, 215 Kan. 416, 524 P.2d 1175 (1974). In *Young*, the defendant buyer purchased cattle from the plaintiff seller who told him that the cattle were "a good reputable herd... clean cows." 214 Kan. at 315, 521 P.2d at 285. The court held that such statements are taken by cattlemen to mean that cattle are free of brucellosis. The seller thereby created an express warranty, which was breached when the cattle were found to have the disease. *Id.* at 327, 521 P.2d at 293. The court classified these statements as affirmations of fact and not opinion, since they were representations of fact "capable of determination" or "susceptible of exact knowledge." *Id.* at 318, 521 P.2d at 290. Similarly, in *Brunner*, another case concerning cattle, the seller's oral statement to the buyer that cows would calve by a certain date was not, the court said, an opinion. The court held that the seller's statements created an express warranty which was breached when the cows did not calve on time. 215 Kan. at 418, 524 P.2d



at 1186.

The facts in *West*, however, are distinguishable from those in *Young and Brunner*. A court would probably classify Prentice's statements about his wheat as opinion, rather than fact because his statement is neither "capable of determination" nor "susceptible of exact knowledge." The statement more resembles sales talk, and therefore, did not create an express warranty.

#### ④Exercise instruction

Each student writes a legal memorandum about either *Reardon v. United States* (Lesson Sixteen) or *In re Lawrence* (Lesson Seventeen).

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### Supplementary Reading 补充读物

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## Jury Trial

### 1. In General

Jury trial is a fundamental part of the Anglo-American dispute resolution process. It was first formalized in the Twelfth Century in England during the reign of King Henry II and it fast became the hallmark of the common law courts. The historic jury was composed of twelve men from the community. These men were asked to determine what were the actual facts underlying a controversy and the judge then would apply the law. The jury's decision had to be unanimous. Although the form of the jury remained the same when it was transplanted to the American colonies, it assumed additional meanings. Jury trial became a symbol of American freedom or popular justice versus the king's justice. Although the need to establish our independence has long since passed, jury trial remains at the core of the civil court system.

In recent years several state and federal courts have modified the original character of the jury so that juries have been composed of less than twelve members and non-unanimous verdicts have been permitted. These changes have been in an effort to reduce the costliness of jury trials. Smaller juries should be selected more rapidly, and their deliberations should be shorter simply because there are fewer individual opinions to consider. Non-unanimous verdicts lessen the possibility of a deadlock, with its attendant need for a new trial. The United States Supreme Court



has approved the use of six member juries in civil cases. *Colgrove v. Battin* (1973), and non-unanimous verdicts in criminal cases, *Apodaca v. Oregon* (1970). It has not yet ruled on non-unanimous civil verdicts, but its reasoning in the criminal field suggests that they may be upheld in the future. The Court ruled that the character of the jury trial was not part of the historic or constitutional right and that, based on the studies to date, it could find no proof of a qualitative difference between verdicts rendered under either system. Thus, the lower courts are left to decide for themselves whether to modify the twelve person, unanimous jury, and the character of the jury may vary depending on the court in which suit is brought.

The role of the jury remains unchanged, however. The jury is to decide questions of fact; the judge determines issues of law. This distribution of responsibility recognizes the special qualities of the jury and the judge. The jury is present to conform legal standards to current experience. For example, if a case involves the interpretation of a contract, a question of fact is presented and a jury decision on the meaning of certain contract language relies on community experience as to common practices when persons enter into a contract. The judge's role is to provide rules to bind litigants in the future so that the community can know how to conduct future dealings. In contract disputes the judge decides whether a legally binding or valid contract has been made. The jury decides all issues of credibility since those are questions of fact, but the judge determines if the law allows relief under the facts as determined by the jury.

The line between issues of fact and of law is not always easy to ascertain and the case reports are filled with cases in which judges improperly have removed issues from the jury. The appropriate delineation of the jury's role is clouded further because of the jury nullification process. Most often, the judge instructs the jury on the law applicable to a given set of facts and the jury not only determines the facts, but also applies the law to those facts. In areas where the law has been slow to develop, the jury may decide to dispense justice, ignoring the law. Illustratively, there are negligence cases in which it is quite clear that the jury ignored rules of contributory negligence that would bar plaintiff's recovery and simply took the plaintiff's negligence into account in assessing the damages—utilizing a comparative negligence standard before it was adopted by the courts. Jury proponents argue that this is one of the special functions of the jury and is simply a means of modernizing the law in light of current community mores. However, allowing the jury to tamper



with the law presents potential dangers in situations, such as in the civil rights field, in which local community standards are inconsistent with more general, indeed constitutional, national standards. For these reasons, all judicial systems contain some devices by which the judge is given power to control the jury and prevent it from acting improperly. These devices are explored in later sections.

## **2. Scope of Jury Trial Rights**

The authority for demanding a jury trial in a civil action may derive from one of three sources. The first, and broadest, is constitutional. Federal and state constitutions set the minimal standards for jury trial in their respective judicial systems. The legislature has the power to authorize jury trial in cases not within the constitutional guarantee. Thus, the second jury trial source is statutory and represents those situations in which the legislature in establishing a particular cause of action has granted a right to a jury trial. Finally, the trial court always has the equitable power to impanel a jury, although in those instances the jury will be advisory only and the judge may accept or disregard its findings.

The major problems in determining the scope of jury trial rights have been in the constitutional area. It should be noted that the federal constitutional jury provision (Seventh Amendment) is not binding on the states so that they have been free to develop their own scheme of civil jury trial rights for their courts. All but four of the states (Colorado, Utah, Louisiana, and Wyoming) have constitutional provisions similar to the federal and in those four states statutory jury trial rights exist. Further, with the exception of four other states (Georgia, North Carolina, Tennessee, and Texas), which provide a jury trial in equity, all the states appear to interpret their constitutional and statutory provisions similarly to the federal courts in that they determine the right to jury trial based on whether that right would have existed at the time the governing constitutional provision was adopted.

## **3. Means of Controlling the Jury**

There are various methods or procedures designed to ensure that the jury performs its proper role. The evidentiary rules, for example, limit the jury to considering only legally relevant and generally reliable evidence in determining the facts. When the judge sustains objections to proposed evidence or testimony, he protects the jury from considering possibly irrelevant and prejudicial matters.



Similarly, the judge's instructions to the jury describe and define the proper scope of its inquiry, prescribing who has the burden of persuasion on the facts in issue. Of course, the effectiveness of this control depends totally on whether the jury follows the judge's charges. However, the attorneys may ask the judge to poll the jury after a verdict has been announced to make certain that each of the jurors is in agreement with and understands the verdict. Alternatively, the judge has the power to select the type of verdict that should be rendered, which may limit the jurors' ability to ignore the controlling law.

Even though the actual jury selection process varies from court to court, a few generalized statements can be made. The process begins by notices sent to community members by the court clerk requesting them to appear and be placed in the jury pool (called the array). Some potential jurors may exclude themselves if they fit under statutory exceptions. Excuses from jury service usually are limited to vocational categories (e.g., firemen or doctors), to health reasons or to incompetence (e.g., cannot speak English). Jurors also may be excused if they can show that it would be an undue hardship for them to have to serve. Under the federal jury selection statutes, the procedures used to create the jury pool are designed to obtain a broad cross-section of the community. Although state jury systems are not required constitutionally to develop processes fostering this cross-section concept, it is common to most systems. States are limited by the Fourteenth Amendment in designing their methods of jury selection, however. This means that no particular group can be systematically excluded, and that litigants must be afforded procedures within the selection process consistent with fundamental fairness.

Individual jurors from the array are selected to sit on a specific case (panel) after being examined before the court. That screening is called voir dire. In some courts the judge asks the jurors all questions; the attorneys submit in advance any questions they would like answered. In other courts the attorneys themselves conduct voir dire. The purpose in either situation is to determine if any of the prospective jurors is likely to be so biased or prejudiced in the case that he or she could not reach an independent judgment based on the facts presented. If so, the attorney may challenge for cause and, if the judge agrees, that person will be disqualified. If the judge permits the juror to remain, the same challenge can be raised on appeal from the final judgment and the verdict will be overturned if the trial court's decision was an abuse of discretion. Attorneys also are given a limited number of peremptory challenges by



which they can reject a potential juror without stating the reason. This device allows the attorney to try to select those persons he feels are most likely to be sympathetic to his client or to the type of evidence that will be presented. He can reject persons who do not reveal enough bias to merit a challenge for cause, but he feels will be prejudiced against the client or case. Further, although a few state courts have ruled that their state constitutions prohibit an attorney from using the peremptory challenge to exclude certain groups, in general the courts have allowed attorneys to exercise those challenges without any limitations imposed. Thus, by careful use of their challenges, the attorneys shape the character of each jury.

## Reference Translations 参考译文

### 陪审团审判

#### 1. 概述

陪审团陪审制是英美法系的纠纷解决过程的一个基本部分。它正式形成于亨利二世统治期间的 12 世纪,并很快成为普通法法院的标志。历史上的陪审团由来自于社会中的 12 个人组成。要求这些人决定争论中的客观事实,然后法官再适用法律。陪审团的决定必须是一致的。虽然在陪审团制刚传入英国在北美的殖民地时还保持着和原来的同一形式,但它还有另外的意思。陪审团成为美国自由或不同于国王司法的民众司法的标志。虽然建立我们的独立的这种需要已经过去很久了,但陪审制还保持在国内法院系统的核心部分。

最近几年,一些州和联邦的法院已在调整陪审团的初始特点,以便使陪审团的人数少于 12 人,并允许有不一致的裁决。这些变化已在尽力减少陪审制的臃华。小型陪审团可以更快地经过挑选组成,且因为需要考虑的个别不同意见相对减少,陪审团的审议能够简单快捷。不一致性裁决减少了出现导致当事人需要重新审判的审判僵局的可能性。美国最高法院已同意在民事案件中采用六人制陪审团。科尔格罗夫诉拜庭(1973),和刑事案件中的非一致性裁决,阿波达卡诉奥莱冈(1970)。虽然这还没有支配到不一致性民事裁决,但它在犯罪领域的论证已证明它们在将来可能被确认。

法院规定,陪审团陪审的特点不是历史上的权力或宪法规定的权力的一部分,且基于最新的研究,没有发现在哪一种审判系统下所得到的裁决的本质性差别的证据。因此,下级法院可以自行决定是否要调整 12 人制和裁决一致性陪审团,陪审团的特点可以因进行诉讼的法院的不同而不同。

然而,陪审团的地位却未改变。陪审团决定事实问题;法官决定法律问题。这种职责的分配确定了陪审团和法官的各自性质。陪审团出席审判使普通的经验遵从于法律标准。例如,如果一个案子涉及对合同的解释,那就产生了事实问题,于是陪审团对某种合同语言上含义的决



议,依赖于人们签属该合同之社区经验的普遍实践。法官的角色是提供法则,约束当事人未来的行为并使社会知道怎样进行将来的交易。在合同争议中,法官决定是否已经建立起了合法的约束力和有效的合同。陪审团决定所有关于可信性的问题,因为这些都是事实问题,但法官决定在陪审团确定的事实下法律是否允许补救。

事实问题与法律问题之间的界限不是总能很容易确定的,并且案例汇编中充满了这样的案件,在这些案件中法官已不恰当地将争议从陪审团那里拿走了。而陪审团无效程序更使陪审团的角色变得是黯然失色。更为经常的是,法官指示陪审团将法律适用于一系列事实,于是陪审团不但决定事实,还对这些事实适用法律。在法律发展缓慢的地区,陪审团可以决定为实施正义而忽略法律。形象地说,在一些过失案件中陪审团很明显地忽视了共同过失的法则,这会阻碍原告的胜诉,并且陪审团简单地把原告的过失用来估算损害赔偿金额——在被法院采用之前使用一种相对过失标准。陪审团的支持者认为这是陪审团功能的一种,而且只是根据普通社会风俗使法律现代化的一种手段。但是,允许陪审团干预法律在许多情况下都显示了危险性。象在民权领域中,当地社会标准与更为普遍的、根深蒂固的国家标准是不协调一致的。由于这些原因,所有的审判系统都包括一些手段,通过这些手段,给予法官控制陪审团的权力并防止陪审团行为错误。

## 2. 陪审团审判权利的范围

在民事审判中,决定陪审团审的权限可能从三种途径之一分离出来。第一,也是最广泛的,是宪法规定的,联邦宪法和州宪法在它们各自的审判系统中都为陪审团审设置了最低标准。在没有宪法规定的案件范围内,立法机构具有授权陪审团审的权力。因此,第2种陪审团审途径是法定的,并代表了立法机构在建立一个特殊诉讼问题时已给予陪审团审这一权利的情况。最后,审判法院总是具有衡平法上的权力来召集陪审团,虽然在那些诉讼程序中,陪审团将只是咨询性的,并且法官可以接受或漠视陪审团的发现。

决定陪审团审权利范围的主要问题已处在宪法规定的范围内。我们将会注意到,联邦宪法有关陪审团条款没有束缚各州,这样,各州可以自由地发展它们自己法院民事陪审团陪审权利的方案。总共只有四个州(科罗拉多州、犹他州、路易斯安那州和怀俄明州)有相似于联邦宪法的条款。在这四个州中存在着法定的陪审团审权利。再者,除了另外四个州(佐治亚州,北卡罗来那州,田纳西州和德克萨斯州)、在衡平法中规定了陪审团审外,其余各州看来都采取相似于联邦法院的方法来解释其宪法和法律规定,即根据有权威之宪法规定被通过时这种权力是否存在来决定陪审团审的权利。

## 3. 控制陪审团的手段

有一些设计好的方式或程序来确保陪审团正确扮演它恰当的角色。例如,证据法则限制了陪审团,使之在认定事实上只考虑合法的相关的和一般可信的证据。当法官对一方所提证据或证言的反对表示支持时,他防止了陪审团可能考虑无关的或带有偏见的事项。相似地,法官对陪审团的指示,表述和限定了陪审团审查的正确范围,指明了谁有对争议事实承担证明责任。当然,这种控制的有效性完全依赖于陪审团是否遵从于法官的指令。然而,律师可以要求法官在裁判已宣布后审查陪审团的裁判结果,以便确定每个陪审员都同意和明白这个裁判结果。此外,法官还具有选择将作出的裁判类型的权力,这可以限定陪审员们忽视适用于本案之法律的



能力。

虽然实际陪审团的选择过程因法院的不同而不同,但还可以做一些通用的声明。这个过程以法院人员将通知送给社区成员,要求他们出席并写入陪审员候选人名册中而开始。一些待选陪审员如果符合法定的例外条件可以将他们自己排除在外。对陪审团服务的推却一般限定于职业种类(如消防队员、医生)和身体原因或无行为能力(如不会讲英语)。陪审团如果能证明对他们来讲很难胜任这种服务,也可以推却。根据联邦陪审团选择法律的规定,用来挑选一个陪审团的程序设计成能够容纳一个更广泛的社会横断面,这对大部分系统来说是常见的。然而,宪法第十四修正案对各州设计陪审团选择方式进行了限制。这意谓着没有任何特定群体的人可以系统地被排除在外,并且诉讼当事人在这选择过程中应得到基本公正的程序。

在法庭审查之后,陪审团名单上每个陪审员都要被挑出来审理一个具体案件(合议庭),这种挑选叫诚实审查(或译“预先审核”)。在一些法院,法官问陪审员所有的问题;律师将提交他们愿意回答的任何问题。在另一些法院,律师们自己进行诚实审查。这两种情况的目的,都是为了检验是否有哪一个即将履行职责的陪审员可能会在案件中有偏见或不公正,以致于他或她不能基于出示的事实而达到独立裁判。如果这样,律师可以有正当理由反对某位陪审员出庭,且如果法官同意,这个人将会被取消资格。如果法官同意保留这个陪审员,同一反对可以上升到对最后裁决的上诉,并且如果审判法院的决定是对法官自由裁量权的滥用,那么,陪审团的裁定将会被推翻。双方律师也被给予一定限量的绝对回避请求权;以此他们可以不需要陈述任何理由而拒绝一名候选陪审员。这种方法允许律师尽力选择他认为最可能同情他的当事人或赞同将展示的证据的人作为陪审员。他可以拒绝一些并没有流露出足够的偏见以致于值得提出理由反对的人——只要他觉得此人可能会对他的当事人或案件产生偏见。并且,虽然一些州法院规定他们州宪法禁止律师使用绝对回避请求权来排除某些群体,一般法院都允许律师没有任何强加限制地实行他的回避要求。因此,通过谨慎地使用其回避请求权,律师们规定了每个陪审团的特性。



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## LESSON TWENTY

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# Criminal Procedure

## 刑事诉讼程序

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### Background 背景

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英美法系国家的抗辩式诉讼制度 (the adversary procedure) 是在控告式诉讼制度 (the accusatorial procedure) 的基础上产生和发展起来的。与之相对应的是大陆法系国家采用的纠问式或审问式诉讼制度 (the inquisitorial procedure)。前者的基本原则之一是“不告不理” (No accusation, no trial.)。不过,英国的传统是“私诉” (private prosecution), 即由公民(包括警察)以个人名义提起刑事诉讼;而美国则在殖民地时期就建立了“公诉”(public prosecution) 制度,即由检察官代表政府或人民提起刑事诉讼。

毫无疑问,对抗制或抗辩制也是美国刑事诉讼程序的最主要特点,而且它往往具有较民事诉讼更为重要的意义。此外,美国的刑事诉讼规则中很强调对被告人权利的保护,因此有许许多多“程序保障” (procedural safeguards)。不过,美国的刑事诉讼制度对被告人的保护“太多了”,以至于在某些情况下不得不牺牲社会安全和公众利益。刑事司法系统不能有效地打击犯罪活动,这显然是美国社会中犯罪问题严重的原因之一。有些美国学者批评美国的刑事司法系统 (criminal justice system) 是“不公正的无系统” (“no-justice non-system”, 在英语中,“justice”一词既可以表示“司法”也可以表示“公正”)。

美国的刑事法律在很大程度上受其宪法的影响。例如,美国宪法的第四、第五、第六等修正案都直接与刑事诉讼有关。因此,美国一些法学院中讲授刑事诉讼法的课程就称为“宪法刑事诉讼”(Constitutional Criminal Procedure)。美国各州都有自己的刑事诉讼法典。最高法院于 1946 年颁布的“联邦刑事诉讼规则” (Federal Rules of Criminal Procedure) 对各州的影响要比其民事诉讼规则的影响小得多。



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**Text 课文**

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**Part One: The Adversary System**

**Developments and Theory.** The Anglo-American system of law is an adversary system. It is, in other words, a system which arrives at a decision by (1) having each side to a dispute present its best case and (2) then permitting a neutral decision-maker to determine the facts and apply the law in light of the opposing presentations of the two sides. In the criminal case, the opposing parties are the state, representing the victim and the general public, and the defendant. Their legal representatives are the prosecuting attorney and the defense attorney. The neutral finder of fact is usually the jury and the neutral finder of law is the judge, although the judge also will serve as the fact-finder when the jury is waived.

The adversary system developed as England moved from a rural to a more urbanized society. When the jury system was initially established in eleventh century England, jurors were persons who were likely to know the facts of a dispute, and they were directed to decide disputes based on their first-hand knowledge. As English society became more urbanized, it was no longer possible to assume that the jurors themselves would have knowledge of the case. A method had to be developed for presenting the facts to the jury. The adversary system was instituted as a means of meeting this need, with each side presenting witnesses to testify on its behalf. Gradually, the structure of the trial changed until the adversary system predominated. First-hand knowledge of the facts kept one from jury service, and jurors were directed to consider only such evidence as was introduced by the adversaries.

The adversary system is based on the theory that partisan advocacy by the two opposing sides will best lead to the determination of truth and will best promote community confidence in the decision-making process. Each side is given its day in court, its opportunity to present its side of the story. The opposing parties frame the factual issues, seek out possible evidence, choose that evidence they will present, and advance the interpretation of the law that is most favorable to their side. The decision-makers, the judge and the jury, are neutral, passive participants. They have no responsibility to go out and develop a case. Rather, they sit back and largely work



with what they are given. It is assumed that material presented by the opposing sides will fully develop the relevant facts and law, thereby permitting the decision-makers to reach an impartial and rational conclusion.

**Adversary vs. Inquisitorial System.** Although the adversary system has been the American system from the start, it is not the only reasonable system for determining guilt or innocence. European countries, for example, utilize the so-called inquisitorial system of justice. While the adversary theory maintains that the truth will best be discovered in the clash between the parties, the inquisitorial system is based on the premise that the truth is best discovered through a disinterested inquiry conducted by a magistrate. The European magistrate accordingly acts as an active fact-finder concerned with the discovery of evidence rather than as a passive umpire. It is the function of the magistrate, not the parties, to call witnesses and experts and to make certain that all relevant evidence is produced. Both sides are obligated to assist the court in this regard by producing such evidence as the magistrate desires, including the defendant's own testimony (which cannot be compelled in the American system due to the privilege against self-incrimination).

The inquisitorial system reduces considerably the responsibilities of the attorneys and their opportunities to exercise some initiative in the presentation of the case. Witnesses are not interviewed by the attorneys before trial, in part because they are not viewed as witnesses for either side but as witnesses appearing on behalf of the court. Similarly, witnesses testify in an uninterrupted narrative and are questioned initially by the magistrate (although European lawyers today do have the right of cross-examination common to the adversary system).

Which is the best system—the adversary or the inquisitorial? Reasonable persons obviously can disagree on that issue. Persons favoring the adversary system claim that the inquisitorial system places too much authority in the hands of the magistrate and takes from the defendant too large a portion of his control over his own destiny. Moreover, it is argued, the system appears to favor the state. Even if one can assume that the magistrate actually will be fair and impartial, the structure of the system does not convey the positive sense of neutral fact-finding that instills public confidence in the criminal justice system. The adversary system, its supporters claim, presents exactly that image—at least as it is used in this country. Each side is given an equal opportunity to present its case through its own legal advocate. The final judgment as to guilt or innocence is left not to a judge, but to the community, as



represented by the jury. Moreover, to maintain public confidence in the fairness of the proceeding, the presentation of evidence, announcement of the verdict, and imposition of sentence are all public proceedings.

**Legal Safeguards.** The adversary process rests on the premise that each side will have the capacity to fully present its case. The primary criticism of the process is that this presumed equality in capacity does not exist. The state, it is argued, has so many resources that it simply can overpower the defense. The framers of the adversary process have been sensitive to such criticism almost from the outset. The adversary process has long been subject to various legal safeguards designed to ensure that the state will not win a case simply because it has more money, more lawyers, and the superior investigative authority of the government at its disposal. In particular, the state has been required to carry the burden of proof and to establish proof beyond a reasonable doubt. Indeed, as developed in this country, the criminal justice process has included a series of screening devices which require that the state meet progressively higher standards of proof and thereby ensure that no case will even be brought to trial unless the state has substantial evidence. In addition, the defendant is given the protection of various constitutional rights designed to ensure that the prosecution acts fairly and respects the dignity of the individual. Like the concept of adversary decision-making itself, these legal safeguards also belong among the basic principles underlying the criminal justice process.

## **Part Two: The Accusatorial System**

**The Burden of Proof.** The Anglo-American system of law is shaped by an accusatorial process of proof as well as an adversary system of decision-making. The key to an accusatorial process of proof is that the party making the accusation of wrongdoing bears the burden of proving that the accusation is true. The charging instrument—in the criminal case, the complaint, indictment, or information—is viewed as no more than a statement of the belief of the accuser. It alleges that certain facts exist, but these allegations establish nothing in themselves and no assumption is made as to their accuracy. The jurors may not assume, simply because the accuser represents the state, that his allegations are true. The prosecutor, as the accuser, must persuade the jurors, by reference only to evidence produced before them, that the allegations in the charging instrument are accurate. This burden of persuading the jury is described legally as the “burden of proof.”



Placement of the burden of proof on the prosecution means that the defendant need not establish his innocence; it is the prosecutor that must establish his guilt. The defendant can simply sit back, produce no evidence whatsoever, and be assured of his acquittal if the prosecutor has not produced sufficient evidence to convince the jury that the defendant committed the crime. Moreover, the prosecutor's evidence must be so convincing as to meet another basic standard of the criminal justice process—that the proof establish guilt beyond a reasonable doubt. That standard makes the state's burden of proof a particularly heavy one.

Why is the burden of proof placed on the state? In part, it is simply because the state is the initiating party. In an adversary system, someone must bear the burden of persuasion, and it is logical to assign that burden to the person asking the court to take action. Thus, in a civil suit, it is the plaintiff, the person who initiates the suit and asks for damages or some other relief, who bears the burden of meeting the level of persuasion required in civil cases. But the placement of the burden of proof on the state in criminal cases also reflects other, more basic values. As the Supreme Court has noted, it is a "fundamental value determination of our system that it is far worse to convict an innocent person than to let a guilty man go free." Indeed, the early English writer Blackstone, who was very influential in shaping the views of the draftsmen of the Constitution, once noted that "it is better that ten guilty persons escape than one innocent suffer". A system that views the protection of the innocent as its highest goal is invariably led to place the burden of proof on the state. Though a person is innocent, he may have difficulty in producing evidence that clearly establishes his innocence. If he were forced to carry the burden of proof, all uncertainties as to proof would be resolved against him. Where the jurors were uncertain as to whether he was guilty or innocent, they would be required to find him guilty. A guilty verdict would be based not on the prosecution's evidence establishing guilt, but only on the defendant's inability to "clear himself." The possibility of erroneously convicting the innocent would be far greater under such a system than under our system; by placing the burden on the prosecution, we permit conviction only where the jurors are affirmatively convinced of defendant's guilt by the prosecution's positive showing.

***The Burden of Going Forward With the Evidence.*** Although they often are combined, the burden of initially producing evidence is quite separate from the burden of proof. The two burdens should not be confused, as their relationships to the



accusatorial process are quite different. The burden of producing evidence refers only to the obligation of initially introducing evidence that places a particular issue in dispute before the jury. Ordinarily, that burden is assigned along with the burden of proof. Thus, the prosecution has the obligation of initially presenting evidence on each element of the crime as well as persuading the jury that those elements existed. For example, if the crime involved is the theft of property valued at over \$ 100, the prosecution must first introduce evidence showing that the stolen item was worth more than \$ 100. The prosecution cannot sit back and claim that, since the defense has not introduced any evidence suggesting the item is worth less than \$ 100, it must obviously be worth more than \$ 100. There are some matters, however, that the prosecution should not have to consider in its proof unless there is some evidence that the issue exists in the case. For example, the prosecution should not automatically have to introduce evidence that the defendant was not insane or was not entrapped. On these issues, largely within the special knowledge of the defendant, the defense ordinarily carries the burden of going forward with the evidence. Once the issue is raised by the defendant's evidence, the burden then shifts back to the prosecution to introduce counter evidence and persuade the jury that the defenses did not exist.

Unlike the placement of the burden of proof, the placement of the burden of going forward is not of great significance in protecting the innocent. It is a matter governed primarily by the convenience of the parties in first offering proof. Any defendant wanting to raise a particular defense can readily introduce sufficient evidence to suggest that the defense might be present in the case. The key point is that the prosecutor then assumes the ultimate burden of persuasion; he must convince the jury that the defense did not exist. The basic accusatorial structure is retained, but the prosecution's burden does not come into play until the defense first comes forward with at least some evidence.

***Presumption of Innocence.*** The presumption of innocence is closely related to the placement of the burden of proof. Indeed, the presumption really does no more than provide an additional means of emphasizing that the burden of proof is upon the prosecution. Thus, a typical jury charge on the presumption notes:

A defendant in a criminal action is presumed to be innocent until the contrary is proved. . . . This presumption places upon the State the burden of proving him guilty beyond a reasonable doubt.

The presumption of innocence is not what lawyers call an "evidentiary



presumption.” It does not arise from factual inferences, statistically supported, that accused persons are in fact more likely to be innocent than guilty. It merely reflects the obvious proposition that, with the burden on the prosecution to prove guilt, the individual must be treated as innocent until that burden is met. It serves to emphasize to the jury that they must accept the basic premise of an accusatorial system—they must put aside any suspicion that might naturally arise from the filing of a criminal charge by the state and reach their conclusion solely upon the evidence produced before them.

### **Part Three: Standards of Proof**

The criminal justice process acts as a sieve, with successive screening reducing the number of cases that pass through each subsequent stage of the process. This “sieve effect” is a product, in part, of a basic objective of the criminal justice process—to avoid imposing unnecessary restraints upon innocent persons. Thus, the process is designed not only to avoid convicting the innocent but also to minimize subjecting innocent persons to the trial process or even to the restraint of an arrest. To ensure that this objective is met, the process imposes a series of progressively higher standards of proof that must be met as each further restraint is imposed upon a suspect. Thus, as the individual moves from the status of suspect, to arrestee, to defendant, and finally to convicted person, the prosecution must carry a higher and higher burden of proof, culminating in proof beyond a reasonable doubt.

Each of the standards of proof to be met by the prosecution is measured in terms of a level of belief that must be established in the mind of a reasonable person as to the guilt of the accused. The chart below sets forth in its first column the legal phrase describing each of the standards of proof. The second column notes the level of belief that each standard must rationally establish, and the third column notes the type of action that may be taken when the particular standard of proof is met.

Note that the chart describes seven different standards of proof, but only the second through the sixth standards are critical legal standards. The first standard is a standard that is always satisfied since it describes that situation in which there is no evidence reasonably pointing to the guilt of a particular person. We have included it in the chart primarily to distinguish between this no-evidence situation and the second standard of proof (“reasonable basis”), which describes the minimum level needed to impose a restraint on a particular suspect. The seventh standard is included in the



chart for a similar reason. It describes absolute proof of guilt, a level never demanded by the law. We have included it primarily to illustrate the distinction between this highest of all possible standards and the sixth level ("proof beyond a reasonable doubt"), which is the standard required for conviction. Thus the issue before a court will be, depending upon the type of restraint being imposed, whether level two, three, four, five, or six has been met. Levels one and seven may be used to illustrate the lowest and highest possible standards, but neither are standards required by the law.

### STANDARDS OF PROOF AND LEVELS OF ACTION

#### LEGAL

DESCRIPTION OF STANDARD OF PROOF	LEVEL OF BELIEF ESTABLISHED	ACTION THAT CAN BE TAKEN
1. No significant proof	complete doubt (or suspicion without factual support)	investigation not involving restraints upon the person
2. Reasonable basis	belief that there is a significant possibility that individual has committed or is about to commit a crime	temporary restraint (e. g., stopping the suspect on the street)
3. Probable cause	belief that there is a substantial likelihood that the individual committed a crime	arrest; also a variation of this standard used in some jurisdictions for issuance of infor- mation or indictment
4. Preponderance of evidence	belief, based on all of the evidence presented, that it	variation of this standard used in some



	is more likely than not, that the individual committed a crime	jurisdictions for preliminary hearing bindover and issuance of information
5. <i>Prima facie</i> case	belief, based on prosecution evidence only, that individual is so clearly guilty as to eliminate any reasonable doubt	used in some jurisdictions for issuance of indictment
6. Proof beyond a reasonable doubt	belief, considering all of the evidence presented, that individual is so clearly guilty as to eliminate any reasonable doubt	conviction for crime
7. Absolute proof of guilt	belief so certain that defendant is guilty as to eliminate even unreasoned doubts	such certainty is never needed

## Notes 注释

- 【1】...present its best case:.....提出其最佳事实陈述
- 【2】prosecuting attorney: 起诉律师(即检察官)
- 【3】predominated: 占统治地位的
- 【4】partisan advocacy: 偏向性辩护
- 【5】inquisitorial system: 纠问式制度
- 【6】guilt or innocence: 有罪或无罪
- 【7】disinterested inquiry: 无利害关系者进行的调查
- 【8】uninterrupted narrative: 不间断的陈述
- 【9】destiny: 命运
- 【10】instill: 逐渐灌输
- 【11】public proceedings: 公开的程序



- 【12】legal safeguard: 法律保障措施
- 【13】burden of proof: 证明责任
- 【14】proof beyond a reasonable doubt: 超出合理怀疑的证明
- 【15】standard of proof: 证明标准
- 【16】substantial evidence: 实体证据;有实质价值的证据
- 【17】dignity of the individual: 个人尊严
- 【18】accusatorial system: 控告制度
- 【19】accusatorial process of proof: 控告证明程序
- 【20】charging instrument: 指控文件
- 【21】complaint, indictment, or information: 告发书、起诉书或控告书
- 【22】assumption: 假定;推定
- 【23】burden of persuasion: 证明(说服)责任
- 【24】positive showing: 正面证明
- 【25】the burden of going forward with the evidence: 先行举证责任
- 【26】burden of producing evidence: 举证责任
- 【27】entrapped: 被诱犯罪的
- 【28】presumption of innocence: 无罪推定
- 【29】evidentiary presumption: 证据推定(即一项事实的存在便可以推导出另一事实存在的推定;一般来说,如对方提不出相反证据,此推定事实便告成立。)
- 【30】factual inference: 事实推论
- 【31】obvious proposition: 明确的主张
- 【32】suspicion: 怀疑
- 【33】sieve: 筛子;滤网
- 【34】a series of progressively higher standards of proof: 一系列逐步提高的证明标准
- 【35】culminating in: 最终达到
- 【36】reasonable basis: 合理根据
- 【37】absolute proof of guilt: 有罪的绝对证明
- 【38】temporary restraint: 临时约束
- 【39】probable cause: 可能性理由
- 【40】preponderance of evidence: 优势证据
- 【41】*prima facie* case: 有表面(或明显)证据之案
- 【42】preliminary hearing bindover: 预审(听证)具结(即由主持预审听证的法官要求被指控者具结保证出庭受审或不再犯罪的一种司法行为)
- 【43】to eliminate even unreasoned doubts: 甚至可以消除那些没有理由的怀疑



## Exercises 练习

### 1. Questions about the text:

- ① How does an adversary system arrive at a decision?
- ② Who is the neutral finder of fact in a criminal trial?
- ③ When and how did the adversary system develop in England?
- ④ The judge in the adversary system does not have any responsibility to go out and investigate a case, does he?
- ⑤ What is an inquisitorial system?
- ⑥ What is the key to an accusatorial process of proof?
- ⑦ What does it mean to place the burden of proof on the prosecution?
- ⑧ What is the relationship between the presumption of innocence and the placement of the burden of proof?
- ⑨ How many standards of proof are critical legal standards and what are they?
- ⑩ What actions may be taken when the standard of probable cause is met?

### 2. Dictation

Under American law, all witnesses give their testimony through the question-and-answer method. The witness is required to provide his or her answers in reply to questions asked by an examining counsel. This method permits opposing counsel to object in time to prevent receipt of the damaging answer.

Cross-examination of the opposing side's witnesses is a matter of right. Thus if a witness dies or otherwise becomes unavailable as a witness before cross-examination of him has been concluded, a trial judge can strike his direct testimony and instruct the jury to disregard it. In an effort to weaken or demolish the witness's direct testimony, the cross-examiner's questions may challenge the sources of the witness's knowledge and attack his or her perception and memory. The cross-examiner may also try to demonstrate the witness's inability to describe events accurately and consistently.

### 3. Exercise of direct-examination and cross-examination

#### ① Introduction

- i. Direct examination is the examination of one's own witness; cross-examination is the examination of the opposing side's witness.
- ii. Irrelevance is one of the common reasons for an opposing counsel to raise an



objection. Example:

Q: Mr. Smith, isn't it a fact that at the age of fifteen years you were charged with the crime of shop lifting?

By opposing counsel: Object, your Honor, irrelevant.

The court: Sustained. What he did as a teenager is in no way probative of the charge against him now. That was twelve years ago.

iii. Leading question is another reason for an opposing counsel to raise an objection. Example:

Q: Mr. Robinson, you never touched the man, isn't that a fact?

By opposing counsel: We object, Your Honor. That is a leading.

The court: Sustained.

However, there are a number of situations in which leading questions are allowed, even on direct examination. Example:

Q: Mr. Wilson, are you able to remember the names of any other persons who were present at the meeting to which you have referred?

A: No, I can't. I'm certain that there were some other there, but I just can't seem to come up with their names now.

Q: You have exhausted your recollection of those who were present?

A: Yes, I'm afraid so. I just have a temporary mental block.

Q: Would it ring any bells if I suggested to you that Mr. Morton P. Lishniss also attended that meeting?

By opposing counsel: We object, Your Honor. A leading question.

The Court: Well, counsel, I think it is proper to refresh the witness's recollection and the jury is entitled to consider the additional relevant information. The objection is overruled and the witness may answer the question.

iv. In making the testimonial record on either direct or cross-examination, examining counsel are required to avoid using questions that will unjustifiably confuse or mislead the witness. Example:

Q: Tell the court and jury where you were and whether at that time you were conversing with Mr. Peterson——what was his first name? ——and, if so, tell them what that conversation concerned.

A. Right. He said his first name was Michael, and... I have forgotten the rest of your question.

By the examining counsel: Will the court reporter please read the question back?



The court: It might be better to ask him one question at a time, counsel. Why don't you just put another question?

V. Particularly on direct examination, questions by counsel are expected to be brief, clear, and phrased in reasonably simple terms. Example:

Q: Mr. Wilson, the fact is, you don't know whether Lishniss was there, do you?

A: Yes.

The court: Wait just a minute. Does the witness mean, "Yes, I know," "Yes, it is true that I don't know," or "Yes, Lishniss was there"?

## ② Examples

### i. Direct examination

By the prosecuting attorney: Give your full name if you would, please.

A: Fred Stitz.

Q: Where do you live, Mr. Stitz?

A: In Chicago, Illinois, 373 West Pavon Street.

Q: What is your occupation or profession?

A: I'm an examiner of questioned documents.

Q: What does your work consist of?

A: I examine disputed documents and make reports as to their genuineness. I examine typewriting and matters of disputed interlineations, erasures, and deal with matters of papers, pens, and inks.

Q: How long have you had this profession?

A: I have been doing this work since 1965.

Q: Do you devote all of your time to this work?

A: Yes, I do.

Q: Have you ever testified before in a court regarding questioned documents?

A: I have testified in forty-two of the states and in Canada.

Q: Have you had any special study to prepare yourself to be an examiner of questioned documents?

A: Oh, yes. I have read all of the texts on the subject of questioned documents and on the related subjects that I mentioned. I have studied microscopy, inks and their manufacture, paper and paper manufacturing, and photography. I have all the necessary equipment. I have an office and a laboratory for my work and exchange ideas constantly with other experts in this field.



Q: You are able to compare handwriting of known origin with handwriting of unknown origin and form a conclusion or opinion as to whether they were written by the same person?

A: That's right.

Q: Then I will show you what has been marked Prosecution Exhibit Number 3 for Identification.

By defense counsel: Just a moment, if you please. May I ask this witness a few questions, Your Honor?

The court: With respect to his qualifications?

By defense counsel: Yes.

The court: You may proceed.

By defense counsel: Mr. Stitz, have you attended any special schools that teach one how to become a handwriting expert?

A: No, I don't think there are any.

Q: So you have had no special degrees or certificates that reflect special study in a college or university?

A: No, I do not.

ii. Cross-examination

By the defense counsel: Mr. Smith, on your direct examination just now, you testified that you saw the defendant Bushmat run out of the alley and that he was wearing a cap pulled down low over his face, didn't you?

A: That was my testimony, yes.

Q: Have you ever made a statement about this case to anyone from my law firm?

A: Not to my knowledge.

Q: You don't remember a young lawyer named Beckley coming to your house about a month ago and asking you about this case?

A: I remember that.

Q: Did you talk with Beckley?

A: Yes.

By defense counsel. (to the court reporter): Would you mark this single sheet of paper Defendant's Exhibit Number 13 for identification. (Court reporter complies.) Thank you.

Q: I hand you Defendant's Exhibit Number 13 for Identification and ask that you look at it. (In many jurisdictions it is necessary to let the witness look at his prior



written statement before any additional cross-examinations are put to him; in other jurisdictions this need not be done. )

A: I'm looking at it.

Q: Does your signature appear on Defendant's 13?

A: Yes, at the bottom.

Q: Did you sign it on the date that appears on it?

A: Yes.

Q: Is Defendant's 13 in the same form and condition as it was when you signed it?

A: It appears to be.

Q: Have any changes or alterations been made to the statement?

A: No, I don't think so.

Q: Does Defendant's 13 constitute your true and correct statement?

A: I guess it does.

Q: Then I will ask you whether or not on April 1 of this year you did not make the following statement: "This man ran out of the alley wearing a green jacket. He had on brown pants. He wore nothing on his head. I think he might have been wearing glasses." You made that statement, didn't you?

A: I remember the cap now.

Q: But in your written statement to Mr. Beckley, given very shortly after the incident in question, you specifically and quite positively stated, "He wore nothing on his head," did you not?

A: Yes, but I now remember the cap.

Q: Are you one of those rare people whose memory gets sharper and sharper as more and more time passes?

A: Well, no.

Q: Your memory was probably clearer and more accurate at the time you made your statement to Mr. Beckley, don't you think?

A: Maybe.

### ③Exercise instruction

A. The exercise is about the case of Hinckley (see "Discussion" in Lesson Seven), but the students may make up "stories" about it.

B. The students are divided into three groups: group one is the prosecuting party; group two is the defense party; group three is the court.



C. The groups prepare for the exercise separately. Each of the party groups may have two lawyers and a few witnesses (police officers; eye-witnesses; psychiatrists; the defendant; etc.), and they should be ready for direct examination and cross-examination. The judge group may have two or three judges and the rest are jurors. They should familiarize themselves with the case and the courtroom terms.

D. In the class session, the witnesses for prosecution will be examined (direct and cross) first, and then the witnesses for defense will be examined. The judges will be responsible for maintaining order of the exercise.

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### **Supplementary Reading 补充读物**

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In the United States, a criminal proceeding includes many stages, from investigation to sentencing. Some of them are pre-trial actions; while others are in-court procedures. The main stages are as follows:

#### ***Arrest***

Of course, the criminal justice process begins long before the trial that is described in the Sixth Amendment. An incident triggers an investigation by law enforcement agents. The investigation produces a suspect and an official decision to arrest him/her. The decision to arrest is backed by an information (a charge filed in court by a prosecutor) or an indictment (handed down by a grand jury). The arrest, depending on the circumstances, may be accomplished with or without a formal arrest warrant.

Arrest means that the suspect is taken into custody. He or she will then be "booked," which simply means that the arresting agency will make a record of the suspect's name and address, the name of the arresting officer, the date and time of the arrest, the charge, and the suspect's physical description. At this time the accused will be fingerprinted and photographed.

#### ***Arraignment***

Of course, the accused may be released from custody shortly after being booked if a decision is made to dismiss the charge against him, perhaps because a prosecutor who has been consulted thinks the evidence is weak or incomplete. Otherwise, the arresting agency must without delay present the accused before a magistrate or judge. This will be the accused's first contact with the judicial system. It is called an arraignment, a term drawn from the French word meaning "to speak." Most of the



speaking will be done by the magistrate or judge, who will advise the accused of the charge against him and inform him of his rights-particularly of his right to be represented by a lawyer. If the accused is too poor to retain private legal counsel a public defender will be assigned to assist him.

If the charge is a minor one, a petty misdemeanor, the accused's plea ("Guilty," "Not Guilty," "No Contest") can be accepted at the arraignment. If the charge is a more substantial one, such as a felony, a plea will not be taken at this time; the matter will be set for a preliminary hearing and, typically, the accused will be permitted to make bail. The making of bail, usually involving the posting of a cash bond, is intended to guarantee that the accused will show up for all future proceedings. If the accused makes bail he/she will be set free pending the preliminary hearing.

### ***Preliminary Hearing***

At the preliminary hearing it is determined by a judge whether there are reasonable grounds for believing that a crime has been committed and that the accused was the perpetrator. If both questions are answered in the affirmative, the accused will be "bound over" for trial unless he enters a "guilty" or "no contest" plea. He can again be released on bail; if he has been unable to post bond he will be remanded to jail to await trial.

### ***Pre-trial Motions***

During the period between arrest and trial there may be a flurry of activity by defense counsel, often taking the form of motions made before a judge. The defense may move to dismiss the accusation on the ground that it is technically defective. In a case that has attracted a great deal of prejudicial local publicity, the defense may move for a change of venue, which means a change of the place of trial to a locality in which there has not been saturating publicity.

The defense may move to suppress (exclude) evidence that it believes is inadmissible. For example, it may move to suppress a confession that it claims was coerced or obtained without advising the accused of his right to remain silent and to be represented by counsel. The defense may also seek to exclude items of tangible evidence that it contends were secured by means of an unreasonable search and seizure, which would be violative of the Constitution's Fourteenth Amendment. It may even seek to obtain advance rulings that specified evidence is inadmissible under principles found not in the Constitution but in codes of evidence or prior judicial



decisions.

Counsel for the defendant will also take pre-trial steps to learn what the prosecution's evidence is expected to be, and will demand a list of the witnesses that the prosecutor intends to call to the stand at trial. The prosecution, in fairness will be expected to reveal its evidence quite freely, and this is especially true if it has come into possession of evidence that is favorable to the defendant.

### ***Jury Selection***

The first in-court aspect of a criminal trial is jury selection. Typically, the process goes this way: a panel of prospective jurors is brought into the courtroom; perhaps twenty in an ordinary case, more in a case in which, perhaps because of heavy pre-trial publicity, a large number of potential jurors are likely to be excused from service because they have already formed an unshakable opinion about the defendant's guilt or innocence.

These persons, whose names were drawn at random from voter registration rolls, have already been screened to some extent, usually by means of a printed questionnaire that was mailed to them. The questionnaire probes for basic disqualifications that are laid down by statute: is the person under twenty-one years of age, is she an alien, is he a convicted felon, is she incapable of understanding English, is he/she in poor health? — and so on. No one who has given an affirmative answer to any of these basic questions will be called for jury duty.

Up to twelve prospective jurors are placed in the jury box. What they are about to undergo is called the *voir dire*, a Norman French term meaning "to tell the truth." The prospective jurors now take an oath to do just that. The questioning of them is about to begin.

The trial judge, relying in part on questions that have been submitted to her in writing by counsel, will concentrate on what, in theory, is the only legitimate function of the *voir dire*: development of sufficient information upon which to select qualified, impartial jurors. After the questioning each juror may be accepted or excused by the two sides. Two kinds of challenges are recognized in American trial courts — the challenge for cause and the peremptory challenge. The former must be based on a specific, recognized ground, be it statutory or the result of past judicial rulings, while the latter, as its name "peremptory" implies, can usually be for good reason, bad reason, or no reason at all, provided only that the limited number of such challenges allotted each side has not been used up. (And the Supreme Court has held



that peremptory challenges can never be employed in a deliberately discriminatory way to purge a jury of members of a racial minority. )

In trials that are likely to be lengthy, a few extra jurors ("alternates") are usually selected, just in case one or more jurors are lost during the trial due to illness, hardship, even death. In any event, when the questioning is over and all available challenges have been exercised, the acceptable panel that remains is sworn to well and truly try the case. In important cases that are likely to generate coverage by the news media, the jury may be sequestered in quarters provided by the court at the end of each trial day in order to insulate it from outside influence.

### ***Opening Statements***

At the very outset of a trial the lawyers are permitted to make opening statements to the jury that they have just selected. These are not arguments; argumentation must await the end of the trial. They are, or should be, straightforward recitations of what each side expects its evidence will be and what it will show. The prosecution, because it brought the charge and has the burden of proving it, is the first to address the jurors. Defense counsel can then make an opening statement or it can be reserved until the beginning of the defendant's case, when the defense lawyer has had a chance to hear the prosecution's evidence and gauge its effect. Since this is not argumentation, the prosecution is not permitted to make a rebuttal or closing statement following the defense's opening statement.

This is how an opening statement will sound:

**BY THE PROSECUTOR:** Ladies and gentlemen of the jury, at this time I, as the prosecutor, am permitted to make to you what is called an opening statement. What I am about to say to you is not itself evidence in this case — what we lawyers say is never evidence. Evidence comes from witnesses and exhibits in the case.

And it is not supposed to be an argument, either. We are not trying to get you to make up your minds about this case even before the first witness has been called to the stand to give testimony. Keep an open mind until you have heard all the evidence.

An opening statement is simply intended to outline for you what we expect our evidence will show. The idea is, and I hope it's correct, that this will be helpful to you. The evidence is introduced in bits and pieces, some testimony from a witness and then an exhibit such as the murder weapon, then another witness, and so on. It has to be this way. We can only do one thing at a time during a trial, you see, and so



you can't get the big picture all at once.

Think of this as a preview. I am just going to give you a preview of what the prosecution expects its evidence to be, and then the defense will have an opportunity to tell you what it thinks its evidence will show. We hope that this will help you to follow the evidence as it is admitted for your consideration.

I first take you to the night of April 4, 1990. We expect the evidence to show that at about 6:30 on the evening of that day, Clyde Bushmat was driving home from work in his car.

We further expect the evidence to show that he was northbound on the Outer Drive...

In this fashion the prosecutor and the defense counsel sketch the picture — the mosaic — that each hopes his or her evidence will reveal. The evidence is often described in chronological sequence. Counsel will speak in a rather general way; she will not attempt a word-for-word description of expected testimony, lest the jury read some significance into a slight variation in the words that eventually come from the witness' mouth. It is sometimes said that in opening statements the lawyers tell the jurors what the evidence will show, not how it will show it.

After the opening statements have been made, the moment that brings butterflies to the stomach of the most experienced trial lawyer has arrived. That moment is announced when the judge says, "Call your first witness, Mr. Prosecutor." (All other witnesses will have been excluded from the courtroom to prevent them from listening to each other testify, which might result in the convenient altering of testimony.) It is now time for the prosecutor to make good on his opening statement by presenting the People's case-in-chief.

### ***The Prosecution's Case-in-Chief***

The prosecutor will have issued subpoenas to all or most of its witnesses in order to ensure that they come to court at the specified time to give their testimony. (A subpoena can also require the witness to bring tangible evidence with her, such as documents or records.) During the prosecution's case-in-chief it must present evidence — testimony and exhibits — that support every legal element of the crime charged.

The elements of a crime are set forth in public laws (statutes), where the penalty for committing the crime will also be found. For example, the elements of the crime of larceny (theft) consist of (1) taking (2) and carrying away (3) personal



property (4) from another person's possession (5) with a specific intent to steal it. The prosecution, to carry its burden of proof, must produce admissible evidence calculated to establish all five of these elements beyond a reasonable doubt. (If the charge is grand larceny, as distinguished from petty larceny, the prosecution will also have to prove that the property had a value in excess of the amount set forth in the statute covering grand larceny.)

When a witness is called to the stand the prosecutor asks him/her nonleading questions aimed at eliciting relevant facts within the witness' personal knowledge. This is called direct examination, in contrast to the more freewheeling cross-examination of the same witness that will be conducted by defense counsel immediately following the direct. The prosecution may also use the witness to identify tangible evidence (exhibits) such as the murder weapon, a letter, a photograph. Objections to the admissibility of evidence can be made by defense counsel, based on the rules that will be described in this book, and the trial judge will rule on them, sustaining them or overruling them.

When the prosecutor believes that he/she has introduced sufficient evidence to support all elements of the charge, she will announce that "The prosecution rests" or "The prosecution rests its case," which simply means that she has completed the process of evidence-offering. The prosecution's case-in-chief has now concluded.

### ***Defense Motion for Dismissal of the Charge***

At this point the defense will move to dismiss the charge if it believes that the evidence as to any essential element of the charge is insufficient to justify a conviction. It may argue that as to some element there has been a total absence of proof. ("There has been no proof of criminal intent, your Honor. The prosecution's evidence fails to establish an intent to steal the coat from the checkroom. It was just a mistake.") Or the defense may contend that the prosecution's evidence was just not weighty enough to convince any rational juror beyond a reasonable doubt. (This motion is sometimes called a motion for a directed verdict of acquittal since, if it is granted, the jury is ordered by the judge to render a verdict of Not Guilty.) If the defense's motion is denied, it will now present the defense's case-in-chief.

### ***The Defense's Case-in-Chief***

Just as the prosecution summoned witnesses and produced exhibits, the defense will call people to testify on direct on behalf of the accused and will introduce relevant exhibits. However, the accused himself may invoke his Fifth Amendment privilege



against self-incrimination and stay off the witness stand, thereby avoiding cross-examination by the prosecutor, who will not even be allowed to comment on the accused's failure to testify.

The prosecution is entitled to cross-examine the defense witnesses; as in the prosecution's case-in-chief, there may then be redirect by defense counsel and recross by the prosecutor until all relevant evidence has been extracted from the witnesses. Objections to the admissibility of testimony and exhibits, and rulings on those objections, will again be heard.

After presenting all of its evidence, the defense will signal the end of its case-in-chief by "resting."

### ***Rebuttal Evidence***

The prosecution will now be accorded an opportunity to produce evidence rebutting — countering, contradicting — the defense's evidence. This opportunity is especially important where the defense has gone beyond flat denial ("It never happened!") and has injected some sort of affirmative defense or legal justification into the case, as when it presents alibi evidence ("The defendant was with me in Los Angeles when this crime in New York went down.") or a claim of self-defense ("True, I shot him, but only after he came at me with a knife!"). Of course, the defense will then be given a chance to counter the prosecution's rebuttal efforts.

When both sides have finally rested it will be time for the lawyers' closing arguments (summations) and the trial judge's instructions (charge) to the jury regarding the applicable law. In most jurisdictions the arguments come first, followed by the judge's charge to the jury; in a few jurisdictions the sequence is the other way around.

There will first have been a conference, in the judge's chambers, during which the prosecution and defense will have been given a chance to tell the judge what legal principles they think he/she should explain to the jurors during the charge. (The lawyers will want this conference to precede their summations so that they can confidently refer to the contents of the judge's charge when they address the jury.) For example, the prosecutor may request that the judge's charge describe the difference between direct and circumstantial evidence; defense counsel is sure to want a charge that stresses the presumption of innocence and the beyond-a-reasonable-doubt standard of proof. The judge, of course, will have her own ideas about what should



be included in the charge. The charge in its final form will be hammered out and reduced to writing. Any objections to its content will be made and ruled upon at this time.

### ***Closing Arguments to the Jury***

Unlike opening statements, the summations of the evidence at the end of a criminal case are argumentative, sometimes intensely so. Counsel for both sides are now at the last and perhaps most important stage of the proceedings. In those cases where the skill of counsel can make the difference, it is the closing argument more often than any other single stage of a case that determines who wins and who loses.

This is not to suggest that criminal cases are often won by flamboyant oratory and mock tears. Modern-day jurors, who have been brought up on a diet of Perry Mason and L. A. Law, are too sophisticated to be moved by the techniques that contributed to the success of yesteryear's great advocates. But, as we mentioned earlier in this chapter, a trial is a patchwork of bits and pieces of evidence. A jury may not appreciate the significance of many of these individual evidentiary scraps until they have been pieced together by a skillful advocate. Often the crux of the case will be one key answer on cross-examination which the astute trial lawyer did not emphasize at the time for fear the hostile witness would recognize its importance and change his testimony on the spot. Once it is in the record, the unguarded remark can be read to the jury during closing argument and its full significance revealed. In this sense it is frequently said that the closing argument reveals for the first time the method by which one side or the other has already won the case.

Although the day of flaming oratory is pretty much past, this is not to say that closing arguments are emotionless lectures. In a serious criminal case, where the jury's decision is especially likely to depend on its collective emotional response to the justice — the rightness — of the matter, a properly pitched argument may constitute the turning point. Logic, to be palatable, may require the lubrication not only of appealing organization and presentation but of emotion and drama as well.

The judge will have told the lawyers how much time each of them can have for argumentation. It is invariably less than they would like to have: an hour, let us say, for the prosecutor's "opening close," an hour and a half for the defense counsel's closing argument, and half an hour for the prosecutor's "closing close." (Since this is argument, the prosecution — which has not only the burden of proof but also the burden of persuasion — is allowed to present a rebuttal argument.) The arguments



must be based on the evidence that was admitted into the record of the trial; no reference can be made to evidence that, upon objection, was excluded by the trial judge. Inflammatory arguments, appealing to prejudice and other base instincts, will not be tolerated. In fact, objections are rarely heard during the lawyers' summations. Both sides know that their arguments to the jury, even though forcefully presented, must be both accurate and fair.

### ***The Judge's Instructions to the Jury***

The trial judge will now deliver to the jurors her instructions on the law. An explanation of the law is essential since the jurors must not only decide what facts have been proved to their satisfaction but also must apply the pertinent principles of law to those facts in reaching their verdict.

The jurors will be told to elect one of their members to chair their deliberations. The elements of the offense or offenses will be described. The jury will be told that it cannot convict unless it finds, as matters of fact beyond any reasonable doubt, that each and every element has been established by the prosecution. In some cases it will also be necessary for the trial judge to explain the legal components of an affirmative defense that has been raised by the accused, such as self-defense or insanity.

### ***Deliberation and Verdict by the Jury***

Following the judge's instructions, the jurors will be taken to their deliberation room. Exhibits that have been admitted into evidence will be provided to them for their review.

A unanimous verdict is required for conviction or acquittal in a criminal case. If the jurors cannot agree on a verdict the result is what lawyers inelegantly refer to as a "hung" jury. This sort of deadlock will produce a mistrial, which in turn will result in the ordering of a new trial for the accused unless the prosecution, discouraged, decides at this point to drop the charges.

If the accused is found not guilty, he is discharged — he goes free — and as a consequence of the constitutional concept of double jeopardy, which prohibits the prosecution from trying a defendant over and over again until it finally secures a conviction, he cannot ever again be tried on the same charge.

If the accused is convicted, the defense will move the court to grant him a new trial. This motion will be based on assertions that prejudicial errors occurred during the trial. Typically, it will be argued that the trial judge erroneously admitted or excluded significant evidence — in other words, that he or she failed to understand



the rules of evidence that we will be explaining in this book. Less commonly, it may be suggested that the judge gave incorrect instructions on the law to the jury. Even less commonly, it may be contended that the trial judge or the prosecutor engaged in misconduct that prejudiced the accused's right to a fair trial. For example, it might be demonstrated that the judge improperly took over the questioning of witnesses or engaged in secret and harmful communications with the jurors; the prosecutor might be charged with coercing false testimony or with making a grossly inflammatory and baseless closing argument.

If the defendant's motion for a new trial is granted, the jury's verdict will be set aside and a second trial ordered. If the motion is denied, as it usually is, the judge will set a date for the defendant's sentencing.

### **Sentencing**

There will be a delay, usually quite brief, between verdict and sentence because the judge will ask the court's probation department to conduct a presentence investigation. The resulting probation officer's report to the sentencing judge will contain information, not brought out during the trial, about the defendant's character and past conduct. The judge can take this information, be it favorable or unfavorable, into account in arriving at an appropriate sentence. Criminal sentences run the gamut from probation (the defendant is not imprisoned but his conduct is supervised for a period of time by a probation officer and he/she may be required to perform some sort of public service as a condition of probation) to imprisonment or death.

After the defendant's sentence is handed down, activity at the trial level ends. The defendant's only recourse lies in appeal to reviewing (appellate) courts in an effort to have his conviction reversed on the basis of the errors that were cited in defense counsel's motion for a new trial. If the cited errors involve important and unresolved constitutional issues, the defendant's appeal may go all the way to the Supreme Court of the United States.

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### **Reference Translations    参考译文**

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在美国,一个刑事诉讼过程包括许多阶段,从侦查直到量刑。其中有一些是审判前的诉讼活动;而其他则是法庭程序。其主要阶段如下:



### 逮捕

诚然,刑事司法过程早在第六宪法修正案所描述的审判之前就开始了。一个事件启动了执法人员的调查。调查产生了嫌疑人以及逮捕他或她的正式决定。逮捕的决定以控告书(由检察官向法院提出的指控)或起诉书(由大陪审团提出的)为依据。根据具体情况,逮捕的实施可以有或没有正式的逮捕证。

逮捕意味着嫌疑人被羁押,然后他或她将被“登记”,这仅意味着执行逮捕的机关将要记录嫌疑人的姓名和地址,执行逮捕人员的姓名,逮捕的日期和时间,指控的罪行和嫌疑人的体貌特征。此时,被指控者还将被提取指印和照像。

### 初审

诚然,被告人在登记后不久即可能被释放,如果作出了撤销对其指控的决定。而这大概是因为接受咨询的公诉人认为证据太弱或不充分。否则,执行逮捕的机关必须毫不延误地将被告人送交治安官或法官。这将是被告人与司法系统的首次接触。这被称为“初审”,这个词来源于法语,其本意为“说话”。大多数话将由治安官或法官来说,他或她将告知被告人被指控的罪名并通知其有关的权利——特别是由律师代理的权利。如果被告人无钱聘请私人律师,法庭将指定一名公共辩护人来帮助他。

如果指控的罪名是个较轻微的犯罪,那么在初审时就可以接受被告人的答辩(“有罪”、“无罪”、“不争辩”)。如果指控的罪名比较严重——如重罪,那么此时将不听取其答辩;此事将留待预审听证再处理,而且一般来说被告人将被获准保释。保释通常要交纳一笔保证金,其目的在于保证被告人出席此后的所有程序。如果被告人交了保释金,他或她将恢复自由并等待预审听证。

### 预审听证

在预审听证时,一名法官要判定是否有合理根据相信已有犯罪发生,而且被告人就是该作案人。如果对这两个问题的回答都是肯定的,被告人将被“勒令”受审,除非他作出“有罪答辩”或“不争辩答辩”,他可以再次保释;如果他无力交付保释金,他将被收监等待审判。

### 审前动议

在逮捕和审判之间这段时间内,辩护律师可以采取某些行动,而且经常采用向法官提出动议的形式。辩护方可以指控有技术性缺陷为理由而要求撤销该指控。如果案件已在当地公众中造成了极大的偏见,辩护方可以要求变更审判地点,即把审判地点移到一个没有对该案进行大量宣传报道的地方。

辩护方可以要求禁止使用(排除)其认为不具备可采性的证据。例如,辩护方可以要求禁止使用某一口供,其理由是警方在获得该口供时使用了逼迫方法或者没有告知被告人其具有保持沉默和会见律师的权利。辩护方也可以要求排除某些实物证据,其理由在于这些证据是通过不合理的搜查和扣押所获得的,而这种搜查和扣押违反了宪法的《第十四修正案》。辩护方还可以要求法官作出某些证据不得采用的审前裁定,其根据不是宪法中的原则,而是证据法典或者以前的司法判例中所确立的原则。

辩护律师还可以在审判之前采取措施来了解公诉方预计要使用的证据,并要求得到一份公诉方打算在审判中传唤出庭的证人名单。为保证审判的公正性,公诉方应相当自由地公开其掌



握的证据,特别是当其掌握的证据对被告人有利的时候。

### 挑选陪审团

刑事审判在法庭内的第一项活动便是挑选陪审团。这活动的典型过程如下:一组陪审员候选人被召至法庭;在一般案件中可能有 20 人,但是在那些审判前已产生重大社会影响的案件中则人数更多,因为会有很多候选人由于其对该被告人有罪或无罪的问题已形成了不可改变的意见而被免除作该案陪审员的义务。

这些候选人是以随机方式从选民登记名单中选出的,而且已经过某种形式的筛选,通常为寄一份书面问题给他们。这些问题审查他或她是否基本上具备法律规定的陪审员资格,如是否未满 21 岁;是否不在本地居住;是否有重罪前科;是否不懂英语;是否健康状况不佳;等等。如果某人对上述任何一个问题的回答是肯定的,那么他或她就不会被召来行使陪审员的义务。

首先找 12 名候选人坐到陪审团席上。他们所要进行的程序称为“诚实审查”——这一术语来源于诺曼底法语,其意为“讲出实话”。于是,这些候选人宣誓要讲实话,然后便开始对他们的询问。

审判法官虽部分地依赖于双方律师提交的书面问题,但他将集中精力实现“诚实审查”在理论上的唯一合法功能——为选择合格且公正的陪审员收集充分的信息。在询问之后,辩诉双方可以接受或否决每一个候选人。在美国的审判法院中得到承认的陪审员回避有两种:一种是“有理回避”;一种是“强制回避”。前者必须以特定的、得到认可的理由为基础,而且这些理由是由法律规定或者由判例确定的;而后者正如其名称中“强制”二字所示,可以有好的理由、坏的理由,甚至毫无理由,只要分配给每一方的这种要求陪审员回避的限额未用完即可。(而且最高法院曾裁定“强制回避”绝不能用来故意歧视地从陪审团中清除某一少数民族的成员。)

在那些可能持续时间较长的审判中,通常还要挑选几名额外的陪审员(“替补”),以防一名或多名陪审员在审判过程中因生病、困难甚至死亡而缺席。无论如何,当询问结束而且所有可以使用的要求回避权均已行使时,留下来被双方接受的陪审员们便应宣誓认真且诚实地审理此案。在可能有新闻媒介前来采访的重大案件中,陪审团可以在每日审判结束时住在法院提供的场所,以便使之与外界影响相隔离。

### 开场陈述

在审判开始时,双方律师获准向他们刚刚选定的陪审团发表开场陈述。这些不是辩论;辩论必须等到法庭调查结束之时。它们是或应该是每一方对其证据之期望及其实际内容的直接了当的叙述。由于公诉方提出的指控并负有举证责任,所以他应首先向陪审团讲话。然后,辩护律师可以进行开场陈述,或者留待其开始陈述辩护意见时进行,因为辩护律师此时已有机会听取公诉方的证据并调整自己的努力。由于这不是辩论,所以公诉方不得在辩护方的开场陈述之后便进行反驳或最后论述。

开场陈述听起来如下——

公诉人:“陪审团的女士们和先生们,我现在获准作为公诉人向你们进行所谓的开场陈述。我所要对你们说的话本身并不是此案中的证据——我们律师所说的一切都不是证据。证据来自本案中的证人和展示物。

“而且这也不作为辩论意见。我们并不企图让你们甚至在第一位证人出庭提供证言之前就



对本案形成固定的看法。请保持头脑的开放性,直到你们听完所有的证据。

“开场陈述的目的仅在于向你们概要地说明我们期望我们的证据能证明什么。其理由就在于——我希望它是正确的——这样作将对你们有所帮助。证据将一件一件地向你们介绍,先是某个证人的证言,然后是一件诸如杀人武器等展示物证,然后是另一位证人,等等。这事不得不这样作。我们在审判中只能一次干一件事,你们瞧,所以你们不可能一次看到一整张很大的图片。

“请把这作为预演来考虑。我这就向你们预示一下公诉方期望其证据能够说明什么;然后辩护方将有机会告诉你们他认为其证据将说明什么。我们希望这将有助于你们理解那些获准供你们评议的证据。

“首先我把你们带到 1990 年 4 月 4 日的夜晚。我们希望证据能表明大约在那天晚上 6 点 30 分时,克莱德·布什马特正开车下班回家。

“我们还希望证据能表明他当时正在外线公路上向北开车……”

用这种方式,公诉人和辩护律师便勾画出他们各自希望其证据将揭示的图画——“拼画”。证据的描述通常都按时间顺序。律师讲话多为一般性描述;她不会企图逐字逐句地介绍将要提出的证言,唯恐其介绍与最终由证人口中说出的话语不尽一致而对陪审团产生某些影响。有人说,律师在开场陈述中告诉陪审团“其证据将表明什么”,而非“将如何表明之”。

开场陈述之后,那会使最有经验的诉讼律师也不寒而栗的时刻便来到了——法官说到:“传唤你的第一位证人,公诉人先生。”(所有其他证人都要离开法庭,以免他们听到别人的证言而改变自己的证言。)此时便该公诉人通过提出“人民主诉”来证实其开场陈述了。

#### 公诉方主诉

公诉人将向其全部或大多数证人发出传票,以确保他们在指定时间出庭作证。(传票也可以要求证人携带实物证据,如文件或记录。)公诉方在其主诉中必须提出证据——证言和展示物品——来证明所控犯罪的每一个法律要素。

犯罪要素是在公法(成文法)中规定的,其中也规定有实施该犯罪应受的刑罚。例如,盗窃罪的要素包括:①拿取②并带走③属于他人所有的④个人财产⑤且具有窃为已有的特定目的。公诉方在执行其举证责任时必须提出可采性证据来证明所有这五个要素,而且是超出合理怀疑的证明。(如果所控罪名是与轻微盗窃罪相对而言的重大盗窃罪,那么公诉方还必须证明所窃财物的价值已超过了法律规定构成重大盗窃罪的数额。)

当某证人站到证人席上时,公诉人向他或她提出非引导性问题,以揭示该证人个人知晓的相关性事实。这被称为直接盘问,与此相对应的是更为随心所欲的交叉盘问。对同一证人的交叉盘问由辩护律师在直接盘问后立即进行。公诉方也可以让证人辨认实物证据(展示物品),如凶器、信件、照片等。辩护律师可以根据本书中将要介绍的规则对证据的可采性提出异议,而审判法官将对这些异议作出裁定——支持异议或驳回异议。

当公诉人确信他或她已经提出了证明所有犯罪要素的充足证据时,她就会宣布“公诉方静候”或“公诉方静候处理此案,”而这就意味着她已完成了提供证据的过程。公诉方主诉即告结束。

#### 辩护方的撤销指控动议

如果辩护方认为有关指控罪名的任何基本要素的证据不足以作出有罪判决,那么他就会在



此时采取行动要求撤销指控。他可能争辩说公诉方对某些要素根本没有证明。（“根本没有犯罪意图的证明，法官阁下。公诉方的证据未能证明被告人具有从衣帽间偷走该大衣的故意。那仅仅是一次误拿。”）或者，被告方可以说公诉方证据的分量不足以使任何有理性的陪审员超出合理怀疑地相信其结论。（这一动议有时被称为“指令性无罪裁定”动议，因为如果其获准，法官便要命令陪审团作出无罪的裁定。）如果被告方的动议被驳回，他就将提出被告方主诉。

### 被告方主诉

就象公诉方传唤证人和出示物证一样，被告方也将叫人直接为被告人利益出庭作证并提出相关性展示物品。然而，被告人本人可以据《第五修正案》反对自我归罪的特权而不出庭作证，从而避开公诉人对其的交叉盘问。公诉人甚至也不许评论被告人不出庭作证的行为。

公诉方有权对辩护方的证人进行交叉盘问。与在公诉方主诉中的情况一样，辩护律师先进行直接盘问，然后公诉人再进行交叉盘问，直至所有相关性证据都已通过证人引出。关于证言和展示物品可采性的异议及其裁定也将再次听见。

在提出其全部证据之后，被告方将以“静候处理”为信号来结束其主诉。

### 反驳证据

此时，公诉方将被给与用证据反驳——与之对立或矛盾——辩护方证据的机会。当辩护已超出简单的否认（“绝无此事！”）而且已注入某种确定的或合法的辩护理由，如提出阿里白证据（“当该犯罪在纽约发生时被告人正和我一起在洛杉矶。”）或宣称为正当防卫（“是的，我开枪打了他，但那是在他持刀向我冲来之后！”）时，这种反驳机会尤为重要。诚然，被告方然后也会得到反驳公诉方反驳证据的机会。

当双方最终都“静候处理”时，就轮到律师们的“最后论述”（辩论总结）和审判法官就适用法律对陪审团的指示（训令）。在大多数地区，律师的最后论述在先，然后是法官对陪审团的指示；但是在少数地区，这一顺序正相反。

首先要在法官室内进行协商。在协商期间，公诉方和辩护方将被给予机会向法官讲述其认为法官在给陪审团的指示中应该解释的法律原则。（律师们会要求这协商在其辩论总结前进行；从而使他们在向陪审团讲话时可以有把握地引用法官训令的内容。）例如，公诉人可以要求法官训令解释直接证据与间接证据的差异；而辩护律师则肯定会要求训令强调无罪推定和超出合理怀疑的证明标准。当然，法官对训令所应包含的内容会有其自己的见解。最终形式的法官训令将锤炼出来并形成文字。对其内容的任何异议都将在此时提出并作出裁定。

### 对陪审团的最后论述

与开场陈述不同，在刑事诉讼结束时有关证据的辩论总结是争论性的，而且这争论有时很激烈。双方律师在此时都处于诉讼过程的最后而且可能是最重要的阶段。在那些取决于律师技能的案件中，恰恰是最后论述阶段比其他任何阶段都更为经常地决定着谁胜谁负。

这并非说刑事案件的取胜常依靠浮夸的辩辞和虚假的泪水。现代的陪审员们是靠佩里·梅森的饮食和自由美国的法律长大的，他们老练世故，很难被昔日那些成功的辩论手段所打动。但是正如我们在前面所提到的，审判是一种把一片片证据拼在一起的工作。陪审团可能要等这些零散的证据被技艺高超的律师拼到一起之后才能认识这许多证据的个体价值。案件诉讼的成败往往就在于交叉盘问中对某个关键问题的回答。精明的诉讼律师在盘问时并不强调这一



点,因为害怕对方的证人会意识到其重要性而临场改变其证言。一旦这证言被记录在案,律师在最后论述中就可以把这些毫无戒备的话语重读给陪审团并揭示其全部意义。正是在这种意义上人们常说,最后论述才首次揭示了一方或另一方已在诉讼中获胜的方法。

尽管那浮夸辩辞的时代已经过去,但是这并不等于说今日的最后论述都是干巴巴的演说。在一起严重的刑事案件中,陪审团的决定极可能取决于其对本案中正义——公正——的综合性情感反应,因此那适度装饰的辩词就可能形成这转折点。迎合趣味的逻辑性可能不仅要求有感染力的语言结构和陈述的润滑,而且要求情感和戏剧效果的影响。

法官会告诉律师他们各方在辩论总结时可以使用多少时间。这时间总是少于他们希望得到的:比方说,先给公诉人一小时进行“开场总结”;给辩护律师一个半小时作最后论述;然后再给公诉人半个小时作“最后总结”(由于这是辩论,而且公诉方不仅有举证责任还有说服责任,所以其获准提出反驳意见。)辩论必须以准许载入审判记录的证据为基础;不得援引那些已由审判法官根据对方提出的异议予以排除的证据。唤起偏见和其他卑劣本能的煽动性争论是不能容忍的。实际上,在律师的辩论总结时很少听到对方提出反对。双方都知道,尽管他们对陪审团讲的辩论意见以强有力的方式提出,但也必须是准确的和公正的。

#### 法官对陪审团的指示

审判法官此时将向陪审员们提出其有关法律的解释。对法律的解释十分重要,因为陪审员们在作出裁定时不仅要决定已向其证明的事实是什么,而且要把有关的法律原则适用到这些事实。

陪审员们将选出一名成员担任其评议的主席。该犯罪的要素将得到描述。陪审团将被告知,只有当其确凿无疑地确认公诉方已证明了每一个犯罪要素时,才能认定被告人有罪。在有些案件中,法官还有必要解释已由被告人提出辩护主张的法律构成,如正当防卫或精神不正常。

#### 陪审团的评议和裁决

在法官指示之后,陪审员们将被带到其评议室。已被采纳为证据的展示物品将送给他们审查。

在刑事案件中,有罪或无罪裁定要求一致同意。如果陪审员们不能就裁定达成一致意见,那结果便是律师们不太高雅地称呼的“上吊”陪审团。这种僵局将成为“未决审判”,并导致对该被告人的重新审判,除非受挫折的公诉方决定在此时放弃该指控。

如果被告人被认定无罪,他便获释放——得到自由——并且永远不得再以此相同指控受审。这是宪法所规定的“一罪不二审”概念的结果,它禁止公诉方对一名被告人一再进行审判直至最终获得有罪判决。

如果被告人被裁定有罪,辩护方将会要求法院准许对其重新审判。这一动议的基础应是确认在审判中有偏见的错误发生。一般来说,辩护方会争辩说审判法官错误地采用或排除了具有重要意义证据——换言之,他或她未能理解证据规则。有时,辩护方也可能说法官就有关法律给予陪审团的指示是错误的。偶尔,辩护方还可能声称审判法官或公诉人采取了侵犯被告人获得公平审判之权利的不当行为。例如,它可能表明该法官不恰当地接过了对证人的询问或者进行了与陪审员的秘密且有害的联络;而公诉人可能被指控强迫证人提供虚假证言或者其最后论述具有低级的煽动性而且是毫无根据的。



如果被告方要求重新审判的动议得到批准,那么原陪审团的裁定便被搁置一旁并命令第二次审判。如果该动议象通常发生的那样被驳回的话,那么法官就确定一个对该被告人宣判的日期。

### 量刑

法官在陪审团裁决之后要间隔一段时间才宣布刑期,因为法官将要求法院的缓刑部门进行量刑前的调查,但这耽搁通常都不会太久。缓刑官向审判法官提交的调查报告应包含有关该被告人品格和过去行为的信息,而这些在审判中并未展示出来。法官在量刑时可以考虑这些情况——对被告有利的或不利的。刑罚的范围从缓刑(被告人不受监禁,但其行为在一定时间内要受缓刑官的监督,而且他或她可能被要求从事某种公共服务活动作为缓刑的条件)到监禁或死刑。

当法官宣布对被告人的判决之后,审判活动便结束了。被告人唯一的求助希望就是向复审(上诉)法院提出上诉,以便使其有罪判决得到推翻,而推翻的基础应是辩护律师要求重新审判的动议中指出的审判错误。如果该错误涉及重要且尚无统一意见的宪法问题,被告人则可以一直上诉到合众国最高法院。



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## LESSON TWENTY ONE

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### Rules of Evidence 证据规则

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#### Background 背景

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证据规则或证据法是关于证据的可采性(admissibility)、相关性(relevancy)、价值量(weight)和充分性(sufficiency)以及证明责任(Burden of Proof)等问题的法律原则和规则的总称。美国的证据法与其他程序法一样,也带有对抗式诉讼和陪审团制度的特征。例如,举证责任属于原告和被告而不属于法官;所有证人都是为原告或被告出庭而不是为法庭作证;很多证据规则都是围绕着陪审团的职能而制定的。

按照美国的法律传统,证据有两种基本类型(types of evidence)和三种基本形式(forms of evidence)。两种基本类型是直接证据(direct evidence)和间接证据(indirect evidence)或旁证(circumstantial evidence)。三种基本形式包括言词证据(testimonial evidence)、实物证据(tangible evidence)和司法认知(judicial notice)。其中,实物证据即案件中的“展示物品”(physical exhibit),它包括实在证据(real evidence)和示意证据(demonstrative evidence)。前者指案件中“实实在在的东西”,如杀人用的枪、伪造的支票等。后者指能表明案件中某些情况的视听材料,如现场模型、图示等。司法认知是指那些无须专门证明即可由法官确认的事实,如旧金山市属于加利福尼亚州的司法管辖权范围之内;7月下午7点30分在得克萨斯州的达拉斯是白天的傍晚时光;通过检验血液确定是否醉酒是一种可以采纳的科学方法等。

在美国的证据规则中,证据的可采性处于核心的地位。确定一个证据是否可以采用,主要应考察其实质性(materiality)、证明性(probateness)和有效性(competency)。而实质性和证明性合在一起即构成了相关性。由于美国律师们在就对方证据提出反对时经常使用无相关性(irrelevant)、无实质性(immaterial)、无有效性(in competent)这三个概念,所以有人把证据的可采性规则概括为“三无”



规则 (“three I’s”)。

美国的证据法主要存在于大量的法院判例之中。1975年通过的“联邦证据规则”主要适用于各级联邦法院。虽然统一各州法律全国代表大会早在1953年就推出了“统一证据规则”(Uniform Rules of Evidence),但是各州的证据法仍有很多差异。美国证据法的另一个特点是其刑事案件中的证据规则与民事案件中的证据规则基本相同。

虽然美国的证据法在证据可采性等问题上有具体明确的规定,但是在证据价值的评断和运用证据证明案件事实的问题上却赋予法官和陪审员极大的自由裁量权。因此,其证明制度也应属于“自由证明”(Free Proof)的范畴,而不应属于“规制证明”或“法定证明”(Regulated Proof)的范畴。

## **Text 课文**

### **Federal Rules of Evidence for United States Courts and Magistrates**

**(Approved Jan. 2, 1975)**

#### **An Act to establish rules of evidence for certain courts and proceedings.**

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The following rules shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act. These rules apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply.

### **Article I . General Provisions**

#### **Rule 101. Scope**

These rules govern proceedings in the courts of the United States and before



United States bankruptcy judges and United States magistrates, to the extent and with the exceptions stated in rule 1101.

### **Rule 102. Purpose and Construction**

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

### **Rule 103. Rulings on Evidence**

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

## **Article IV . Relevancy and Its Limits**

### **Rule 401. Definition of "Relevant Evidence"**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

### **Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**

All relevant evidence is admissible, except as otherwise provided by the



Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

**Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

**Article VI. Opinions and Expert Testimony**

**Rule 701. Opinion Testimony by Lay Witnesses**

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

**Rule 702. Testimony by Experts**

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

**Article IX Authentication and Identification**

**Rule 901. Requirement of Authentication or Identification**

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.



(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by Act of Congress or by other rules prescribed by the Supreme Court pursuant to statutory authority.

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## Notes 注释

【1】Be it enacted by...:倘若它经……颁布施行(此为倒装句,表示条件)



- 【2】pending: 待决或未决的(案件)
- 【3】except to the extent: 除非;但……者例外
- 【4】scope: (适用)范围
- 【5】…before United States bankruptcy judges and United States magistrates:……由合众国破产法官和合众国司法官受理的……
- 【6】…to the extent and with the exceptions stated in rule 1101:……以 1101 规则中写明者为限而且该规则中写明之例外者除外
- 【7】purpose and construction: 宗旨与解释
- 【8】construe: 解释
- 【9】elimination of unjustifiable expense and delay: 消除不正当的花费与拖延
- 【10】ruling on evidence: 证据之裁定
- 【11】effect of erroneous ruling: 错误裁定之效力
- 【12】Error may not be predicated upon a ruling…:一项……的裁定不可断言有误
- 【13】…a timely objection or motion to strike appears of record:……一项及时的异议或勾销动议在(法庭)记录中载明
- 【14】offer of proof: (主动)提供证明
- 【15】an offer in question and answer form:以问答方式提供(证明)
- 【16】hearing of jury:陪审团听审
- 【17】plain error:明显错误
- 【18】taking notice:提起注意
- 【19】…any fact that is of consequence to the determination of the action:……任何对该诉讼之判定有重要意义的事实
- 【20】except as otherwise provided by…:除……另有规定者外
- 【21】probative value:证明价值
- 【22】cumulative evidence:累积证据;重复证据
- 【23】opinions and expert testimony:意见证言和专家证言
- 【24】lay witness:非专家证人
- 【25】fact in issue:争议事实;待决事实
- 【26】authentication and identification:鉴定与认定
- 【27】…what its proponent claims:……其提议(检验)者所主张的
- 【28】illustrations:举例说明
- 【29】testimony of witness with knowledge:知情证人的证言
- 【30】the genuineness of handwriting:笔迹的真实性
- 【31】…familiarity not acquired for purposes of the litigation:……并非为该诉讼之目的而获得的(对该字迹的)熟悉
- 【32】comparison: 比对
- 【33】specimen: 样本



【34】voice identification: 声音认定; 声纹鉴定

【35】... the number assigned at the time by the telephone company to a particular person or business: .....其时由电话公司分给某人或某实业的(电话)号码

【36】... circumstances, including self-identification, show the person answering to be the one called: .....包括自我认定在内的情况证据表明该应答者就是那个打电话的人

【37】... and the conversation related to business reasonably transacted over the telephone: .....而且那谈话是与合理地通过电话处理的业务有关的

【38】purported: 声称是

【39】data compilation: 资料汇编

【40】authenticity: 真实性

【41】statutory authority: 制定法典据

## Exercises 练习

### 1. Questions about the text:

- ① What do the rules of evidence apply to?
- ② What is the scope of the Act?
- ③ What is the purpose of the Act?
- ④ What are the conditions to predicate error upon a ruling?
- ⑤ What may the court direct a party to do regarding offer of proof?
- ⑥ What is "relevant evidence"?
- ⑦ What evidence is not admissible?
- ⑧ What are the limitations for a lay witness to give opinion testimonies?
- ⑨ What is the requirement of authentication or identification in general?
- ⑩ The illustrations of Rule 901 are not exclusive, are they?

### 2. Dictation

There are two principal questions about evidence that have to be answered. First, what matters and what materials should be admitted into evidence for the jury to consider? Secondly, what use can properly be made by the jurors of those matters and materials that are ruled admissible?

Almost all of the rules of evidence relate to the first of these two questions. That is, most of the rules of evidence relate to the problem of what shall be received in evidence—the problem of admissibility.

The second question is what use should be made of matters and materials admitted to control the way a jury deals with items of admitted evidence. For example, in a



criminal case a judge may instruct the jurors that certain evidence is admissible only for the purpose of impeaching a witness's credibility and not as substantive evidence affirmatively proving any element of the alleged offense. Consciously or unconsciously, however, the jurors may use the evidence as substantive proof of guilt.

### **3. Preparation for a trial**

#### **① Main steps:**

##### **A. Knowing the case**

The attorney needs to become familiar with every fact, inference, and aspect of the case. This knowledge will be necessary to analyze and select the theories of the case, establish the overall themes, plan the trial presentation, and determine which facts need to be proved in the case and presented in the opening statement.

##### **B. Developing issues and themes**

The issues and central theme of a case should be decided, thought out, and organized before the trial begins.

1. The Issues. The issues are the key or pivotal questions of fact raised by the contentions of the parties. After deciding what issues exist, the attorney should select the issues to be stressed to the jury. The early presentation of these issues may provide a framework for the trial that focuses attention on these issues and away from the opponent's case.

2. The Themes and Theories of the Case. The themes of a case are the major concepts central to the case. The theories of a case consist of the legal and factual theories that support the themes. The opening statement is the time to present the themes and theories in a comprehensive and complete way. The jury may have some idea about the case based upon the judge's preliminary instructions, statements, and questions during jury selection. In opening statement, the attorney explains to the jury how the various parts of the trial will fit together.

The attorney should select words which reflect and reinforce the themes of the case. These theme words should be used during the opening statement as the attorney describes the story of the events. Theme words should be repetitively used throughout the trial to reinforce the theories and issues of the case.

##### **C. Citing authorities**

Before going to the courtroom, the attorney also needs to become familiar with the legal authorities governing the case, especially the binding precedents. Therefore, a brief introduction to case citations is necessary.



A typical citation to a state court decision will look like this: *People v. Miller*, 238 N. E. 2d 407 (S. Ct. Ill. 1968). “People” and “Miller” are the names of the parties to this reported criminal case: the People, represented by the state’s attorney, are prosecuting the defendant, Miller. The intervening “v.” stands for versus, which, translated from the Latin, simply means “against”—People against Miller. The “N. E.” refers to the geographical region covered by the reporter series; “2d” indicates that this system of regional judicial reports has gone into a second series of volumes, the preceding series having been denominated simply “N. E.”

Other phases of the National Reporter System reprint decisions from the Pacific region (Pac. and P. 2d), Northwestern (N. W. and N. W. 2d), Southwestern (S. W. and S. W. 2d), Atlantic (Atl. and A. 2d), Southeastern (S. E. and S. E. 2d), and Southern (So. and So. 2d). Separate series are published for New York (N. Y. S. and N. Y. S. 2d) and California (Cal. Rptr.).

The number 407 in our citation to the case of *People v. Miller* refers to the page of volume 238 of the N. E. 2d series on which the opinion in that case begins. Within the parentheses in the citation to *People v. Miller* are the name of the court handing down the decision—here, the Supreme Court of Illinois—and the year in which the decision was announced, 1968.

Citations to federal cases are similar in appearance. *United States v. Harris*, 403 U. S. 573 (1971), refers to a decision in volume 403 of the official series that reports decisions of the Supreme Court of the United States.

#### **D. Anticipating opposition’s positions**

An attorney needs to review the case from the perspective of the opposition and take such matters into account when preparing an opening statement. It is necessary to anticipate the other side’s position in an attempt to defuse the opposition. The more an attorney knows about the theories, arguments, and positions of the opponent the more complete the opening preparation will be.

#### **E. Writing an outline**

The material for an opening statement needs to be organized into an outline format. The outline should include the introduction, the body, and the conclusion. The use of an outline helps organize the facts and theory of the case into an easily usable and readily accessible format. As the attorney prepares other aspects of the trial, this outline may be modified or altered and needs to remain flexible.

Some attorneys will find it advantageous to write or dictate a complete opening



statement. This draft may then be reviewed and improved. With this format, the attorney will know that the final script of the opening statements will contain everything that needs to be prepared. The drawback of using a script during an opening statement is the temptation to read the opening statement to the jury. Reading a script of the opening statement will appear dry and impersonal to the jury. A better approach for the attorney who wishes to use a script is to prepare a key word outline of the script. After becoming completely familiar with the script, the attorney should be able to present the opening statement using only the key word outline. When notes or outlines are used, they should be used in a candid, forthright fashion.

#### **F. Practicing and rehearsing**

After the attorney has prepared the outline or script, practice and rehearsal are necessary to be adequately prepared for the presentation at trial. The attorney who practices the opening statement several times prior to trial will find the time well spent. The attorney may want to think through the opening statement silently and then practice verbally concentrating on its content. As the content of the opening statement is mastered, the attorney can work on stylistic improvements. After this preparation the attorney should continue practicing and rehearsing the opening statement to an audience of colleagues or others, in front of a mirror, or on videotape for later review and critique. The attorney should practice presenting the opening statement until it can be done without referring to notes. Practice and rehearsal time can be stolen from non-law, non-productive activities which permit two tasks to be accomplished at once, i. e. drive time, lawn mowing, garden weeding, dishwashing, clothes folding, house cleaning, or daydreaming.

#### **② Exercise instruction**

The students are divided into two groups: one for Christophersen; and one for Allied-Signal Corp. (See Supplementary Reading below). However, the students are required to prepare for the trial individually; and some of them will be required to give opening statements in the class session.

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### **Supplementary Reading 补充读物**

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#### **Christophersen v. Allied-Signal Corp.**

(1991)

Before the passage of the Federal Rules of Evidence in 1975, the rule of *Frye v.*



United States governed the admissibility of scientific evidence. This rule required that a scientific technique be “generally accepted within the relevant scientific community” before an expert could testify to an opinion based on that technique. Commentators have criticized the Frye rule for excluding reliable evidence from the jury. The Federal Rules of Evidence broadened the standards for admissibility of evidence generally, and Rule 702 commissions judges to admit expert testimony on scientific matters if it “will assist the trier of fact.” This rule effectively establishes a relevance standard that leaves questions of scientific validity to the jury.

These liberal standards of admissibility have opened the gates to dubious scientific claims and allowed paid expert witnesses to give the aura of scientific legitimacy to virtually any claim. In recent years, the pendulum has begun to swing back, and courts have called for restrictions on the admissibility of expert testimony. In a recent toxic tort case, *Christophersen v. Allied-Signal Corp.*, the Fifth Circuit has signaled this change by giving renewed vitality to the Frye rule. The irony of *Christophersen* is that, although the rules of admissibility of expert scientific testimony need to be made more rigorous, toxic tort is one context in which the Frye rule is too strict.

Albert Christophersen died in 1986 from a rare form of liver cancer. For fourteen years before his death, he worked as a manager in a manufacturing plant, where he was exposed to battery fumes. Christophersen’s wife brought a wrongful death suit in federal district court and alleged that exposure to the fumes caused his cancer. At trial, the plaintiff relied on the testimony of a single expert witness, Dr. Lawrence Miller, who claimed that Christophersen’s cancer had been caused by prolonged exposure to the battery fumes. Dr. Miller based his opinion on the affidavit of a co-worker who described Christophersen’s exposure to fumes but did not know their chemical composition. Questioning both the reliability of the co-worker’s affidavit and Dr. Miller’s causation theory, the district court excluded Dr. Miller’s opinion and granted summary judgment for the defendants.

Sitting en banc, the Fifth Circuit affirmed the district court’s ruling. The court, in a per curiam opinion, began by stating that the Federal Rules of Evidence and Frye provided the proper test for determining the admissibility of expert testimony. The testimony of an expert witness should be admitted only if sufficient facts support the expert’s opinion, as required by Rule 703, and the expert’s method has met general acceptance, as required by Frye. The court found that Dr. Miller’s testimony failed both tests.



The court held that Rule 703 excludes an expert opinion based on underlying facts so unreliable that the opinion would not assist the jury. The court stated that “the inquiry into the... ‘facts and data’ underlying an expert’s testimony is not limited to the admissibility of that data,” but extends to the sufficiency and accuracy of the underlying facts. The co-worker’s affidavit on which Dr. Miller relied was so “critically inaccurate or incomplete” that the district court did not abuse its discretion in excluding his testimony.

The Frye test, the court explained, requires a court to examine the validity of the expert’s reasoning by considering its acceptance in the scientific community. Both defense experts agreed that Dr. Miller’s theory “‘has no support in medical science and is without foundation.’” The court similarly concluded that Dr. Miller’s theory was “a scientific hunch, which as far as the record shows, no one else shares,” and as such was properly excluded by the district court.

In his concurrence, Chief Judge Clark criticized both the majority’s interpretation of Rule 703 and its application of Frye. He argued that Christophersen implicates Rule 703 only insofar as the expert’s opinion derives from “inadmissible facts or data.” If the affidavit was admissible, Rule 703 was inapplicable. Even if the affidavit was inadmissible, the proper inquiry was not whether experts in the field would reasonably rely on the particular facts used by this witness, but whether “similar experts use facts or data of the same kind to form opinions on the subject in issue.” Judge Clark also criticized the Frye rule, but he concluded that it did not survive the adoption of the Federal Rules of Evidence. He concurred with the judgment, however, because the risk of prejudice outweighed the testimony’s minimal probative value and warranted exclusion under Rule 403.

In dissent, Judge Reavley criticized the majority for changing the Federal Rules of Evidence “without benefit of [an] amendment.” He reaffirmed the traditional proposition that the courts “properly entrust determinations of evidentiary weight and credibility to the jury—even in ‘scientific’ cases—because of our faith in the adversarial process.” Judge Reavley maintained that although the coworker’s affidavit was “imprecise,” Dr. Miller’s reliance on imprecise data was a question for the jury, not the district court, to decide. He argued that Rule 703 requires deference to “an expert’s reliance on chosen facts and data.”

Judge Reavley also faulted the court for relying on Frye. He noted that, although the Fifth Circuit had not expressly abandoned the Frye test, its use always



had been limited to the admissibility of “novel device[s] or technique[s]” such as lie detector tests, and it had never been applied to the admissibility of expert “reasoning” such as whether exposure to certain chemicals causes cancer. Judge Reavley concluded that excluding “otherwise relevant evidence strictly on the basis of lack of general scientific acceptance. . . would impose a significantly heavier burden of proof and persuasion on the offering party.”

Although the court in *Christophersen* plainly erred in reading Rule 703 to allow judges to inspect the validity of an expert’s factual foundations, the real import of the case is that it breathes new life into the *Frye* rule and counters “the movement away from the general acceptance test.” In the years after the passage of the Federal Rules, courts have severely limited and modified *Frye*, and one circuit has explicitly rejected it. At least in the Fifth Circuit, *Christophersen* extends the *Frye* requirement of general acceptance to an expert’s theory of causation in toxic tort cases.

On the one hand, the court was correct to recognize the importance of general acceptance in determining the validity of scientific reasoning—and that the Federal Rules of Evidence do not preclude such recognition. An appeal to general scientific acceptance is justified because a scientific consensus is a good indicator of the validity of a scientific theory. Courts that admit untested theories solely because an expert is willing to testify about them, without any inquiry into the validity of the reasoning, run the risk of allowing bad science into the courtroom. Such questionable but seemingly authoritative testimony often persuades lay juries to award damages for unfounded liability, especially in toxic tort cases. Moreover, an appeal to the larger scientific community is consistent with a conception of judicial competence to assess scientific claims. The general acceptance standard recognizes that courts, ill-suited for evaluating the validity of scientific theories, should defer to the scientific community’s determinations.

On the other hand, the court was wrong to follow *Frye* to the point of making general acceptance a threshold requirement for the admission of a new scientific theory. Although general acceptance is clearly important, it is simply not true that a scientific theory is never valid until the scientific community endorses it. Few would argue that Galileo’s heretical theory that the earth revolves around the sun was not “true” until it was later adopted by a majority of scientists. Toxic tort causation theories such as Dr. Miller’s occasionally will be, like Galileo’s, ahead of their time.

The importance of not allowing general acceptance to be an absolute requirement



is highlighted when, as in toxic tort cases, scientific consensus is especially slow to form. Determining whether certain chemicals have caused specific diseases often takes enormous amounts of time and money, and scientific consensus develops only after considerable research and widespread publicity.

A better approach than the Fifth Circuit's extension of Frye—one that would give general acceptance its proper due—would have been to adopt a strong but rebuttable presumption in favor of excluding theories not shared by a substantial part of the scientific community. Only such a presumption can ensure that junk science stays out of the courtroom while the Galileos of the world, who come to court with a valid albeit novel, theory, are allowed in.

## Reference Translations 参考译文

### 克里斯托弗森诉联合讯号公司案(1991)

在联邦证据法于 1975 年通过之前,法庭一直依据弗瑞尔诉合众国一案确立的规则审查专家证词。该规则规定,专家可以以某项技术为根据提出证词,但该项技术必须是在有关科学领域内为之公认的技术。评论家们抨击弗瑞尔规则,指出它使陪审团排除了可靠的证词。联邦证据法则从总体上放宽了审查证词的标准。第 702 条规定,如果专家就专业问题所做的证词有助于法官查清事实,法官有权采纳之。这项规定卓有成效地建立起了一个恰当的标准——依此标准,判断专家证词正确与否的问题将留给陪审团去解决。

然而,这些宽松的审查标准为存有疑点的专家证词进入审判程序打开了方便之门;事实上,这也使得受聘的专家证人对任何证词都可为之披上合法的外衣。所以,近年来的舆论已开始回头,许多法庭也呼吁严格限定审查专家证词的标准。在最近的一个因中毒而致侵权的案件中,即克里斯托弗森诉联合讯号公司案中,第五巡回区上诉法院重新确立了弗瑞尔规则的重要地位,即是这种变化到来的一个信号。不过,具有讽刺意味的是,克里斯托弗森案揭示了这么一个事实:尽管人们需要为审查专家证词制定更严格的标准,对中毒侵权事件的调查仍说明弗瑞尔规则过于苛刻。

阿尔伯特·克里斯托弗森 1986 年死于一种罕见的肝癌。在他去世前的 14 年间,他一直在一家制造厂担任经理。在该厂,他长期在充满电池气味的环境中工作。克里斯托弗森的妻子遂以非法致死为由向联邦地区法院起诉。她声称长期在这种环境中工作是致她的丈夫患癌症的根本原因。庭审时,原告提出一位专家证人——劳伦斯·米勒博士的证词作为根据。米勒博士称,克里斯托弗森的癌症是由于长期在充满电池味的环境中工作所致。米勒博士的意见基于一位死者同事的书面证言。在该证言中,该同事叙述了克里斯托弗森长期在充满电池味的环境中工作的情况,但他并不知道此类气味的化学成份。经过对该同事证言和米勒博士因果理论的质询,地区法院排除了米勒博士的意见,并做出了支持被告的即决判决。

第五巡回区上诉法院在全体出庭法官听审后维持了地区法院的判决。根据法官判词,在宣



布联邦证据法及弗瑞尔规则为审查专家证词规定了适当的检验方法之后,法庭开始审查米勒博士的证词。依照第 703 条和弗瑞尔规则的规定,只有有足够的事实支持专家的说法,也只有专家采用了公认的方法,该专家的证词才可被采纳为证据。结果,法庭发现他的证词在这两方面都未能达到要求。

法庭援引了联邦证据法第 703 条的规定。依照该条,如专家证词所依据的基本事实不可靠,陪审团将不采用该证词。法庭还宣布:“对专家证词所依据的‘事实和数据’进行审查,并不只限于审查数据,还包括审查基本事实全面、精确的程度。”米勒博士作为根据的该同事的证言“非常不精确、不全面”,因此,地区法院排除他的证词并不是滥用自由裁量权。

法庭解释道:弗瑞尔规则要求法庭考虑专家论断为科学界接受的程度,并由此确定其正确与否。被告方的两名专家一致认为米勒博士的理论“在医学领域内无法证实,是站不住脚的”。与此类似,法庭也认定米勒博士的理论只是“科学家的预感,就诉讼记录中所描述的而言,没有人会同意这种说法”,因此,地区法院将其排除是正确的。

首席法官克拉克,在其有条件赞成的意见中既驳斥了多数派法官对第 703 条所做的解释,又对适用弗瑞尔规则进行了抨击。他指出,只有该专家的证词来源于“不予采纳的事实或数据”时,本案才适用第 703 条的规定。如果该同事的证言被法庭采纳,本案就不能适用第 703 条的规定。即使该同事的证言不被采纳,正确的审查方法也应是“看其他专家能否运用同种类的事实或数据得出与正在争辩的主题有关的论断”,而不是看本领域的专家将该同事证言的特定事实作为根据是否合理。克拉克法官也抨击了弗瑞尔规则,不过他认为联邦证据法通过后,此项规则已失效。但最后,他还是同意了本案的判决,因为该证词的片面风险性超过了它仅有的证明价值;同时,这也符合第 703 条的排除规定。

里夫勒法官,在他的反对意见中,则指责多数派“在无权修改联邦证据法的情况下”,对该法进行了改动。他再次强调了传统的原则——“法庭正是基于对辩论式诉讼程序的信赖,而将审查证据证明力和可信度的权力合法地赋予了陪审团,甚至在专业案件中也不例外。”里夫勒法官坚持认为,尽管该证言是“不精确的”,但米勒博士以不精确的数据作为根据是否可靠,则应由陪审团来决定,而不是由地区法院来决定。他举证道,第 703 条规定对“专家以特定的事实和数据作为根据”应表示尊重。

里夫勒法官也指出,法庭以弗瑞尔规则为依据是错误的。他写道:尽管第五巡回区法院没有明确表示废弃弗瑞尔规则,但通常它也只是用来审查新奇的设备或技术,例如测谎器,它从未被用于审查诸如身处于充满某种化学物质的环境中能否引发癌症等的专家“论断”。里夫勒法官断定,“严格依照非为科学界公认的理由而排除其他的相关证据,将会使举证方背上一个更加沉重的证明负担。”

审理克里斯托弗森一案的法庭宣布:按照第 703 条,法官有权判定专家证词所采用的事实理由是否正确。显然,这是错误的。不过,本案的真正意义正在于它打击了“废除公认审查原则运动”,使得弗瑞尔规则恢复了生机。联邦证据法通过后的十多年内,各地法院一直严格限制弗瑞尔规则的适用,限定其含义;有一个巡回区法院更是明确宣布废止它。现在,至少在第五巡回区法院,克里斯托弗森案使得它所确立的公认原则进入了对中毒侵权案件中专家所做的成因理论进行审查的领域。



总之,一方面,法庭是正确的,因为它认识到公认原则在审查专业论断时有着重要的作用,而联邦证据法并没有禁止这样的公认审查。要求采用专业领域内公认的原则也是正当的,因为专家们能否达成共识是本专业的一项理论正确与否的有效的指示器。若法庭只是因为某位专家愿意出具有关证据就采纳该理论,而不对其论断进行任何审查,则是在冒着让伪科学混入审判的危险行事。这些看起来权威的实则是不可靠的证词常常使得外行的陪审团做出毫无根据的损害赔偿判决,在因中毒而侵权的案件中尤其如此。另外,更重要的一点是,在专业领域内得到公认与立法者将审查专家证词的权力授予法院的意图是一致的。公认原则还表明,在那些要求评价科学理论之可靠性的争议诉讼中,法院应将其交付科学界决断。

另一方面,法庭是错误的,因为它照搬弗瑞尔规则,致使公认原则变成了接受一项科学新理论的起码要求。公认原则的重要地位是显而易见的,但是一项科学理论在被整个科学界接纳之前就是不正确的也不是事实。伽利略的地球围绕太阳运转的“异端”理论,在被大多数科学家接受之前,也没有什么人能证明它是不正确的。同样,关于中毒侵权成因的某些理论,就如米勒博士所得出的,偶尔也有可能象伽利略的理论一样超越了我们的时代。

显然,避免公认原则绝对化是非常重要的。正如那些因中毒而致侵权的案件所揭示的,专家们达成共识是一个相当漫长的过程。判断特定的化学物质能否引发特定疾病常常需要花费大量的时间和财力;而且只是在大量调查和广泛宣传之后,专家们才逐渐达成共识。

与第五巡回区上诉法院扩大弗瑞尔规则的适用范围相比,一种更为优越的方法应该是这样一种方法——它能将公认原则的作用发挥得恰到好处,同时又能接纳确凿有力但可以驳回的推定,从而便于排除非为科学领域内绝大多数专家所公认的理论。只有存在这样的推定,才能保证在将伪科学拒之门外的同时,伽利略们提出的新奇而正确的理论可为法庭采纳。



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## LESSON TWENTY TWO

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### WTO Rules 世贸组织规则

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#### Background 背景

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世界贸易组织(WTO,简称“世贸组织”)是于1995年1月1日成立的。其前身是1948年成立的关税及贸易总协定(GATT,简称为“关贸总协定”)。然而,关贸总协定并没有获得正式的国际组织的地位,它仅设有一个很小的秘书处,负责组织和协调成员国之间就关税减让及货物贸易关税问题的谈判。与关贸总协定相比,世贸组织不仅扩大了所调整和规范贸易的范围(包括货物贸易、服务贸易和知识产权等,而关贸总协定仅涉及货物贸易),而且确立了一套相当完备的争端解决机制。世贸组织的基本宗旨包括五个方面:提高生活水平;保障充分就业;大幅度稳步提高实际收入和有效需求;扩大产品生产,提高服务质量,促进货物及服务贸易;确保发展中国家,尤其是最不发达国家能获得与其国际贸易额增长需要相适应的经济发展。中国于2001年11月成为了世界贸易组织的成员国。

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#### Text 课文

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#### I . UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU)

Members hereby agree as follows:

##### Article 1

##### Coverage and Application

1. The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the



“covered agreements”). The rules and procedures of this Understanding shall also apply to consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization (referred to in this Understanding as the “WTO Agreement”) and of this Understanding taken in isolation or in combination with any other covered agreement.

2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the “DSB”), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.

## Article 6

### Establishment of Panels

1. If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel.

2. The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of



special terms of reference.

### **Article 7**

#### **Terms of Reference of Panels**

1. Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.

3. In establishing a panel, the DSB may authorize its Chairman to draw up the terms of reference of the panel in consultation with the parties to the dispute, subject to the provisions of paragraph 1. The terms of reference thus drawn up shall be circulated to all Members. If other than standard terms of reference are agreed upon, any Member may raise any point relating thereto in the DSB.

### **Article 8**

#### **Composition of Panels**

1. Panels shall be composed of well-qualified governmental and/or nongovernmental individuals, including persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.

2. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

3. Citizens of Members whose governments are parties to the dispute or third parties as defined in paragraph 2 of Article 10 shall not serve on a panel concerned with that dispute, unless the parties to the dispute agree otherwise.

4. To assist in the selection of panelists, the Secretariat shall maintain an



indicative list of governmental and non-governmental individuals possessing the qualifications outlined in paragraph 1, from which panelists may be drawn as appropriate. That list shall include the roster of non-governmental panelists established on 30 November 1984 (BISD 31S/9), and other rosters and indicative lists established under any of the covered agreements, and shall retain the names of persons on those rosters and indicative lists at the time of entry into force of the WTO Agreement. Members may periodically suggest names of governmental and non-governmental individuals for inclusion on the indicative list, providing relevant information on their knowledge of international trade and of the sectors or subject matter of the covered agreements, and those names shall be added to the list upon approval by the DSB. For each of the individuals on the list, the list shall indicate specific areas of experience or expertise of the individuals in the sectors or subject matter of the covered agreements.

5. Panels shall be composed of three panelists unless the parties to the dispute agree, within 10 days from the establishment of the panel, to a panel composed of five panelists. Members shall be informed promptly of the composition of the panel.

6. The Secretariat shall propose nominations for the panel to the parties to the dispute. The parties to the dispute shall not oppose nominations except for compelling reasons.

7. If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request.

8. Members shall undertake, as a general rule, to permit their officials to serve as panelists.

9. Panelists shall serve in their individual capacities and not as government representatives, nor as representatives of any organization. Members shall therefore not give them instructions nor seek to influence them as individuals with regard to



matters before a panel.

10. When a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.

11. Panelists' expenses, including travel and subsistence allowance, shall be met from the WTO budget in accordance with criteria to be adopted by the General Council, based on recommendations of the Committee on Budget, Finance and Administration.

## Notes 注释

【1】Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) 纠纷解决程序与规则谅解书(或谅解备忘录)

【2】Member 成员国

【3】the Agreement Establishing the World Trade Organization (WTO Agreement) 世贸组织议定书

【4】The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. 本谅解书的程序与规则的适用要受制于如本谅解书附录2中列明的包含在相关协定中的特别或附加的纠纷解决程序和规则。

【5】prevail 优先(适用)

【6】the Dispute Settlement Body (DSB) 争端解决机构

【7】a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda 专家组最迟应该在该请求首次列为争端解决机构的议程事项之后的争端解决机构会议上成立

【8】consultation 磋商

【9】terms of reference 提交裁定用语

【10】relating thereto 与之相关

【11】composition of panels 专家组的组成

【12】including persons who have served on or presented a case to a panel 包括那些曾经在专家组工作或曾经向专家组提交争端的人

【13】its predecessor agreement 作为其前身的协定

【14】the Secretariat 秘书处

【15】sufficiently diverse background 充分多样化的背景

【16】wide spectrum of experience 广泛多样的经历

【17】indicative list 指导性名单



- 【18】roster 花名册;专门人员名单
- 【19】retain 保留
- 【20】compelling reason 强制性原因
- 【21】in their individual capacities 以个人身份
- 【22】subsistence allowance 生活津贴

## **Exercises 练习**

### **1. Questions about the text**

- (1) What is DSU?
- (2) What does the "covered agreements" refer to in DSU?
- (3) What is DSB?
- (4) What is the principle for the Chairman of DSB to determine the rules and procedures to be followed when there is a disagreement?
- (5) The request for the establishment of a panel cannot be made in oral form, can it?
- (6) What is the composition of a panel?
- (7) All panel members must be governmental officials of the Members of WTO Agreement. Is that right?
- (8) How many members are there in a panel?
- (9) A panelist does not serve as a representative of his government in the panel, does he?
- (10) What do you think of the rules and procedures of WTO governing the settlement of disputes?

### **2. Dictation**

It is appropriate to ask what we mean by "international economic law". This phrase can cover a very broad inventory of subjects: embracing the law of economic transactions; government regulation of economic matters; and related legal relations including litigation and international institutions for economic relations. Indeed, it is reasonable to suggest that 90 percent of international law work is in reality international economic law in some form or another. Much of this, of course, does not have the visibility of nation-state relations, but does indeed involve many questions of international law and particularly treaty law. Increasingly, today's international economic law issues are found on the front pages of the daily newspapers.



### 3. Discussion

(1) Topic: Import monopoly and mark-up

(2) Facts:

W, a developing country, has recently created a governmental agency with the exclusive right to import fertilizers. In order to promote the establishment of domestic fertilizer production, the Government instructed the agency to resell imported fertilizers at a price 30 percent higher than the total cost of importing them and to transfer the resulting profits to the Government. The government further instructed the agency not to import more than 100,000 tons of fertilizers annually. However, given the high price of imported fertilizers resulting from the 30 percent mark-up, the agency has never been able to sell more than 80,000 tons of fertilizers annually. The tariff for fertilizers provided in W's Schedule of Concessions was zero. A Panel was established at the request of Y, a developed country exporting fertilizers to W, pursuant to DSU Article 6.

(3) Reference information:

A. On the issue of import monopoly, the Interpretative Note to GATT Article XI makes clear that the terms "import restrictions" and "export restrictions" include restrictions made effective through state-trading operations. The annual import quota is clearly a violation of GATT Article XI. But what was the effect of the fact that W's quota of 100,000 tons had never been filled?

B. On the issue of 30 percent mark-up, the Interpretative Note to GATT Article II indicates that the import monopoly may not operate so as to afford protection on the average in excess of the amount of protection provided for in the country's Schedule of Concessions. Generally speaking, a government import monopoly cannot charge a mark-up if it is greater than a normal profit margin.

C. For defending its import monopoly policy, a developing country may rely on exceptions providing for the establishment of infant industries, pursuant to GATT Article XVIII, Section A and C. However, such reliance would have to be notified and justified in advance.

(4) Instructions:

A. The students are divided into three groups: group one represents country Y; group two represents country W; and group three represents the Panel.

B. Group one and group two each prepare a submission to the Panel; and group three prepares the Panel's findings and conclusion.



C. The three groups discuss the case separately, and then the class session is held.

### **Supplementary Reading 补充读物**

Until the end of 1994, there was no multilateral or international organization that dealt with trade issues between countries. For almost fifty years, the international trading system had functioned without such an organization: under the aegis of the General Agreement on Tariffs and Trade, rules of the game had been developed and respected. But the GATT was created through agreement among trading nations: it did not have the international standing of the International Monetary Fund (IMF) or the World Bank, both of which were international organizations. Instead, the GATT Secretariat, as its name implied, served the signatories to the GATT.

All of that changed suddenly in 1994, when, contradicting earlier gloomy forecasts, the Uruguay Round of trade negotiations under the GATT ended not only with considerable progress in strengthening the international trading system, but also with an agreement to found the World Trade Organization.

The WTO now has the same legal and organizational standing as the Fund and the Bank. The WTO came into being on 1 January 1995, without much fanfare. The staff of the WTO was the same as that of the former GATT, although it was subsequently expanded by about 10 percent to 400, contrasted with the Fund's approximate 3,000 and the World Bank's 6,000 employees! The WTO was housed in the same building as the GATT has been, and the director general of the GATT became director general of the WTO.

A casual observer might well have asked whether anything had changed. The answer was a qualified yes. On one hand, the WTO was assigned responsibilities additional to those earlier carried out by the GATT. On the other hand, the fact that the WTO was an organization provided potential and opportunities for the institution to alter its role in the international trading system, at least to some extent, relative to the passive "instrument of the GATT signatories" that the GATT Secretariat had earlier, necessarily, taken.

While considerable attention was given to the substantive achievements and challenges arising out of the Uruguay Round agreement, little attention was paid to the challenges facing the WTO as an international organization.



### **Ironies in the Evolution of the International Trading System**

The evolution of the multilateral trading system since the Second World War has been replete with ironies. A first irony is that the growth and liberalization of the international trading system has been the most prominent success of the postwar period, even though the nations participating in deliberations over the postwar international economic system were unable to produce a charter for an international trade organization that was acceptable to key governments. Hence, the great liberalization of tariffs and trade in the postwar period was achieved under the auspices of the GATT, which did not even have the legal status of an international economic organization.

A second irony is that the very success of the multilateral tariff negotiations conducted under the aegis of the GATT was so remarkable that the world has become interdependent at an unprecedented rate. That interdependence in itself has generated a number of new challenges for the international trading system. As transport costs and tariff barriers have fallen and the ease of communication has increased, trade in services is booming, while foreign investment is rising sharply, treatment of intellectual property rights in other countries matters as it never did before, and there is increasing concern about a "level playing field" for all competitors.

A third irony is that concerns over the ramifications of increased interdependence gave rise to great gloominess over the prospects for a successful outcome of the Uruguay Round, yet the round achieved far more than those instigating it anticipated. The pessimism regarding the outcome of the round was well founded, given the complexities of the issues with which negotiators were dealing, and the round was far longer than any preceding one, beginning in 1987 and concluding only in 1994. However, the outcome included not only a framework agreement on services, agreements on intellectual property rights and trade-related investment measures, a timetable for phasing out all quantitative restrictions on trade, and first steps toward bringing agriculture more firmly under a multilateral discipline, but also the establishment of the WTO, giving that body the same international status as the International Monetary Fund and the World Bank.

A fourth irony is that the United States provided strong leadership for an open multilateral system and its very success has resulted in its retreat from open multilateralism. That retreat has taken place when the United States is no longer as dominant economically as it was yet when trade liberalization is probably even more in



U.S. economic self-interest than it was in the first quarter century after the Second World War. U. S. support for the GATT and for the successive rounds of multilateral tariff negotiations at a time when it was simultaneously economically dominant was clearly an important factor in permitting the cooperative dismantling of trade barriers. Its very success in fostering the open multilateral trading system led to a reduction in its share of world GDP and world trade. Increased competition from abroad has, in turn, increased protectionist pressures in the United States and led Americans to see themselves more as a competitor in, rather than as a protector of, the open multilateral trading system. Yet even the United States is more “globalized” than it was, as its percentages of GDP in exports and imports have risen and its businesses are increasingly global in scope.

Thus, the history of international trade since the Second World War has been one of “accidental success,” where plans (such as the International Trade Organization [ITO]) were not realized and the outcome (i. e., liberalization under the GATT) far exceeded what any of those planning the system could have reasonably hoped for.

That track record should be borne in mind, as this volume focuses on future challenges. The major challenges that are currently facing the open multilateral trading system and the WTO as an international organization arise to a fair degree out of past successes and the increased globalization of economic activity. As will be seen, however, increased interdependence has raised to the forefront difficult and complex issues. A simple litany of those issues is enough to persuade even the most optimistic that continued liberalization and economic integration will require not only commitment and attention on the part of the world’s key policymakers, but also an appreciation of the importance of maintaining the open multilateral system.

### **Principles Underlying the GATT and WTO**

The key principle to which the GATT contracting parties subscribed was an open and nondiscriminatory trade, thus giving rise to the term “open multilateral system.” Except for provisions in article XXIV, which governs preferential trading arrangements, signatories undertook to treat all other GATT signatories equally in applying whatever tariffs they imposed on imports from abroad. GATT articles precluded export subsidies and quantitative restrictions on trade (with the exception of some provisions for grandfathering existing quantitative restrictions).

GATT contracting parties *did not* commit to free trade with zero tariffs. Under GATT auspices, however, it was anticipated that they would undertake a series of negotiating rounds



in which “tariff concessions” would be exchanged. As took place in the first round in 1947 (where the articles were simultaneously drafted), contracting parties negotiated with their key trading partners for reductions of tariffs on items they exported in return for “concessions” on items of interest to their trading partners. Once tariff concessions were agreed, they extended to all contracting parties (the most-favored-nation, or nondiscrimination, clause). The tariff rates were subsequently “bound” so that tariffs could not be raised unless the “escape clause” was invoked.

The principle that each country should offer “concessions” on its own tariffs in order to gain something (tariff reductions from its trading partners) flew right in the face of international trade theory, which demonstrated that, in most circumstances, tariffs hurt most the countries that impose them. However, for purposes of analyzing some of the challenges facing the international system, it is useful to note that the principle of reciprocal concessions has important political economy implications that require stressing. That is, when bargaining is reciprocal, the interests of exporters in a given country will support the agreement and make it politically more acceptable than would be the case if unilateral tariff reduction were to be undertaken by a country. When, for example, in the Uruguay Round the United States and other developed countries undertook to dismantle the Multifiber Arrangement over the next decade, that commitment was politically easier because American exporters of goods such as machinery supported the agreement because of promised reductions in tariffs in importing countries. While the GATT articles may not represent “good economics,” in the sense that reducing a tariff unilaterally normally helps the trade-liberalizing country, those arrangements do represent good politics, in tying export interests to political support for trade liberalization. I return to this point below in considering the scope for advances of liberalization through sectoral bargaining.

The open multilateral trading system has served the world well, as has the system of multilateral tariff negotiations. Indeed, as early as 1970, it was possible to argue that the GATT has been so successful that tariffs among the major industrialized countries were no longer a problem, and that remaining barriers to trade were virtually all nontariff barriers (see Baldwin 1970). World merchandise trade in volume terms had grown at an average annual rate of around 8 percent between 1950 and 1974, while world output had grown at around 5 percent. There was no question that trade was, at least to some extent, an “engine of growth,” and that trade liberalization had contributed to that growth.



Growth in both trade and output slowed down after 1974. From 1974 to 1994, the volume of world trade grew at an average annual rate of about 4 percent while growth of world output averaged about 2 percent. A number of factors accounted for slower growth, although again the volume of international trade grew more rapidly than output. Removing nontariff barriers to trade, especially nontraditional trade in services and related items, became paramount once tariffs had successfully been dismantled, and the pace of liberalization was clearly slower.

Before turning to the challenges to the system, it should be noted that two major exceptions were made to the "open multilateral" aspect of the international trading system. One concerned centrally planned economies, and the other related to developing countries.

The provisions governing trade with centrally planned economies were never of great importance under the GATT because those economies were to a very great degree cut off from world trade. With the abandonment of central planning and the emergence of economies in transition, one challenge for the WTO is to devise terms of entry for those economies. For the economies in transition that are embracing market principles, the challenge is minimal. For Chinese entry, however, serious issues are raised. Not only is China still far from a market economy, it is sufficiently large so that concerns regarding possible decisions that might adversely impact international markets cannot be entirely dismissed. Clearly, China is too large to remain outside the WTO and to be entitled to the exceptions that developing countries had in the past (but that are now being abandoned in any event).

Developing countries' attitudes and trade policies during the 1950s and 1960s generally resulted in heightened walls of protection as industrialization through "import substitution" was attempted. That generally meant that developing countries were not benefiting as much as they might have from the growth of the world economy, while the "balance-of-payments" provisions of the GATT were liberally interpreted to enable developing countries to maintain quantitative restrictions, often including import prohibitions, on their imports. Moreover, the GATT articles were amended in the early 1960s to provide nonreciprocal preferential treatment of imports from those countries. One consequence was that developing countries (the East Asian newly industrializing countries being a prominent exception) were losing shares of their world markets (see Krueger 1990). Until the 1980s, therefore, it appeared that the world was divided into three major trading areas: the industrialized countries and



the newly industrializing countries, the other developing countries, and the centrally planned economies.

Interestingly, the developing countries' leaders themselves began recognizing the economic costs of their failure to integrate with the international economy, and policies began shifting during the 1980s. Many developing countries participated in the Uruguay Round, agreeing to items such as the treatment of intellectual property rights and rules governing trade-related investment measures, but also seeking and achieving agreement for liberalization of trade in agricultural products and in textiles and apparel. By the early 1990s, the centrally planned economies began shifting toward market-oriented economies, and they, too, therefore began integrating with the rest of the world. Thus, one "challenge" that faced the international economy as of the late 1970s and early 1980s in fact was resolved without international action.

## Reference Translations 参考译文

在 1994 年以前,并没有处理国家之间贸易争端的多边组织或者国际组织。在将近 50 年的时间里,国际贸易体系就是在没有这样一个组织的情况下运行的:在关贸总协定的(GATT)框架下,游戏规则已经得到了发展和尊重。但是 GATT 是通过贸易国家之间的协议创设的:它并没有如国际货币基金组织(IMF)或世界银行那样的国际基础,而后两者都是国际性的组织。相反,GATT 的秘书处,正如其名称所暗示的,只是为 GATT 缔约国服务的。

所有这一切在 1994 年突然发生了改变,当时,与各种令人沮丧的预测相反,在 GATT 框架下进行的乌拉圭回合贸易谈判最终的结果是,不仅在加强国际贸易体系方面取得了显著的进展,而且还达成了一项协议——组建世界贸易组织(WTO)。

现在 WTO 已经拥有了如国际货币基金组织和世界银行一样的法律基础和组织基础。1995 年 1 月 1 日,在没有营造有更多声势的情况下,WTO 成立了。WTO 的成员与此前的 GATT 成员完全相同,尽管此后人员扩充了大约 10%,达到了 400 人,但比较而言,国际货币基金组织雇员大概有 3000 人,世界银行雇员有 6000 人。WTO 的办公地点就是原来 GATT 的所在地,原来 GATT 的总干事变成了 WTO 的总干事。

也许有人会问情况是否有所改变。答案当然是肯定的。一方面,WTO 除了承担以前由 GATT 承担的职责以外,还承担了更多的职责。另一方面,WTO 作为一项组织的事实也为其改变自身在国际贸易体系中的角色提供了潜力和机会,至少在一定程度上不再是 GATT 秘书处以前所必然扮演的"GATT 成员国的被动性工具"角色。

当人们更多地关注于乌拉圭回合协议所带来的成绩和挑战时,WTO 作为一项国际组织所面临的挑战并没有受到什么关注。

### 国际贸易体系演变中具反讽意味的事件

二战以来多边贸易体系的演变过程中充满了具有反讽意味的事件。第一个具有反讽意味



的事件是,国际贸易体系的扩张和自由化成为了战后时期内最为显著的成绩,即使参与战后国际经济体系审议的国家并没能够为国际贸易组织拟订出一项为关键的几个政府所接受的宪章。因此,战后一段时期内关税和贸易的广泛自由化进程都是在 GATT 的支撑下发生的,而 GATT 甚至都没有作为一项国际经济组织的法律地位。

第二个具有反讽意味的事件是,在 GATT 的框架下进行的多边关税谈判所取得的成绩是如此的引人注目,以至于世界已经以一种前所未有的速度变得相互依赖起来。而这种依赖本身又为国际贸易体系提出了许多新的挑战。随着运输费用和关税成本的降低、交流便利程度的提高,服务贸易迅速发展,随着外国投资的迅速增长,知识产权在他国的待遇情况成为问题,这是以前从来不曾出现过的,而且,一个面向所有竞争者的“平等竞争领域”问题受到越来越多地关注。

第三个具有反讽意味的事件是,对于相互依赖程度增加这一副产品的关注,导致了人们对乌拉圭回合谈判所带来的丰硕成果的前景也产生了巨大的忧虑,然而,乌拉圭回合取得的成就远比预期的更令人鼓舞。鉴于谈判者需要处理的问题的复杂性,以及乌拉圭回合谈判的时间要远长于此前自 1987 年起到 1994 年起的任何一次谈判的时间,对于本回合谈判结果的悲观态度是普遍存在的。然而,(谈判的)结果不仅包括一项框架式的服务协议、一系列关于知识产权和与贸易相关的投资措施的协议、一项消除所有贸易数量限制的时间表以及迈出了将农业更稳步地纳入多边秩序下的第一步,而且还包括 WTO 的创建,给予了这一实体与国际货币基金组织和世界银行一样的国际地位。

第四个具有反讽意味的事件是,为建立一个开放的多边体系,美国起了强有力的领导作用,可是恰是它在这方面的成功导致了它在开放的多边体制中的衰退。衰退在美国不再像以前那样在经济上占据主导地位的时候就已经发生了,其时,相比于二战后的第一个 25 年时间,贸易自由化甚至都有可能更有利于美国自身的经济利益。美国在经济上占据主导地位的同时,支持 GATT、支持连续几个回合的多边关税谈判,这显然是推进合作式的排除贸易壁垒的一个重要因素。恰是它在培育开放的多边贸易体系过程中的成功导致了它在世界 GDP 和世界贸易中所占份额的缩减。来自国外的日益激烈的竞争反过来又增加了美国国内贸易保护的压力,也促使美国人更多地把自己看成为这个开放的多边贸易体系的竞争者,而不是保护者。然而,即使美国也是比以前更为“全球化”了,因为美国进出口总额所占 GDP 的百分比上升了,其贸易活动也日益在全球范围内开展。

因而,二战以来的国际贸易历史只是一个“偶然的成功”,此中有些计划(诸如国际贸易组织 ITO)并没有被意识到,结果(例如 GATT 下的自由化)远远超出任何一种计划体系的合理预期。

在焦点集中于未来的挑战时,这一轨迹记录应当被牢记于心。目前,这一开放的多边贸易体系和 WTO 作为一项国际组织所面临的挑战,相当程度上来自于过去的成功和经济活动的日益全球化。然而,正如将要看到的,越来越深的相互依赖已经突出成为最困难和复杂的问题。就这些问题的一个简单罗列就足以说服即使是最为乐观的人相信,持续的自由化和经济一体化将不仅需要世界上部分关键的政策制定者的承诺和谨慎,而且还需要对于维持这一开放的多边体系的重要性的认同。

#### 隐含于 GATT 与 WTO 之中的原则

GATT 中签约成员签署的关键原则是一种开放的非歧视性的贸易,因而才产生了“开放的



多边体系”这一术语。除了在 24 条中规定特惠贸易安排的条款外,缔约国在外国进口物品征收不管是什么类型的关税时,有义务平等对待所有其他 GATT 缔约国。GATT 条款排除出口补贴和贸易上的数量限制(除了一些已存在数量限制的不溯及既往条款)。

GATT 缔约成员并没有承诺零关税的自由贸易。可是,在 GATT 的框架下,可以预期它们将会进行一系列的回合谈判,从而互相“削减关税”。正如发生在 1947 年第一回合谈判上的那样(正是在这一回合谈判上同时起草了各种条款),缔约成员与它们的关键贸易伙伴协商,对它们的贸易伙伴在利息条款上“让步”以换得对其出口物品上的关税降低。一旦妥协达成,其结果就会扩展到所有的缔约成员(根据最惠国条款或者非歧视条款)。关税税率继而也会受到“约束”,因此除了起用“例外条款”,关税不得再被提高。

每个国家为了获得一些东西(贸易伙伴的关税缩减),就应当在其自身关税上“让步”,根据国际贸易理论,这一原则是正确的,理论表明,在大多数情况下因关税受到损害最大的国家就是施加关税的国家。但是为了分析国际体系所面临的一些挑战,注意到互惠的妥协原则带有重要的政治经济含义是有益的,此中需要一些强制性的力量。也就是说,如果谈判是互惠的,一个既定国家中由出口商形成的利益集团就会支持该协议,并且使其在政治上更为令人接受,这不同于由一个国家承担单方面关税缩减责任时的情况。例如,在乌拉圭回合谈判时,美国和其他发达国家许诺在此后的十年时间里消除多种纤维协定(MFA),这一承诺在政治上是简易可行的,因为美国的货物出口商,例如机械出口商,考虑进口国家的关税缩减承诺,因而会支持这一协议。当 GATT 条款不能再代表“良好经济”,在一定意义上也就是说不能再通过正常的单方关税缩减来有助于贸易自由化国家时,这些安排通过把出口利益同对贸易自由化的政治支持相联系,确实体现了良好政治的作用。现在我回到下面这一点考虑通过区域性谈判推进自由化进程的空间。

开放的多边贸易体系运行良好,正如多边关税协商体系一样。实际上,早在 1970 年就有争议说,GATT 已是如此成功以至于在主要的工业化国家中关税已不再是一个问题,余下的贸易壁垒实际上都是非关税壁垒(见 Baldwin 1970)。1950 年到 1974 年间,世界商品交易量以平均每年约 8% 的速度增长,而世界总产量的增长速度也达到了约 5%。至少在一定程度上可以说,贸易毫无疑问是“增长的发动机”,而贸易自由化促成了这一增长。

贸易和出口的增长速度在 1974 年以后开始缓慢下来。自 1974 年到 1994 年,世界贸易量平均每年以大约 4% 的速度增长,世界总产量平均是 2%。有许多因素来解释增长速度减缓的事实,尽管国际贸易量增长速度再一次远远超过产量增长速度。一旦关税壁垒被成功去除、自由化进程显著减缓,消除对于贸易,尤其是服务及其相关产品的非传统贸易,的非关税壁垒便成为首要的问题。

在转而讨论体系所面临的挑战之前,应该注意到国际贸易体系的“开放的多边”方面有两个例外。一个涉及到中央计划经济国家,另一个涉及到发展中国家。

规定有关与中央计划经济国家进行贸易的条款在 GATT 中向来不很重要,因为这些经济相当程度上是与世界贸易相隔离的。随着中央计划的取消和经济转轨的出现,对于 WTO 的一个挑战就是修订这些经济国家的准入条款。对于包含市场原则的转轨经济而言,挑战是微小的。然而,关于中国的准入却有比较多的问题。不仅仅是因为中国的市场经济还很不完善,而



且还因为中国实是过于庞大,有关于它的任何决定都有可能逆转式地冲击国际市场,这一考虑不能被完全忽略。显然,中国如此之大,不能被 WTO 排除门外,(但)也不能享有过去发展中国家所享有的那些例外优惠(但现在这些优惠无论如何都正在被取消)。

随着通过“进口替代”的工业化尝试,20 世纪 50—60 年代发展中国家的态度和贸易政策普遍导致了贸易保护的加剧。这一般性地意味着发展中国家还不能如它们应有的那样从世界经济增长中受益,而 GATT 的“国际收支”条款也可以自由地解释为,发展中国家可以维持对于进口的数量限制,经常是包括进口禁止。而且 20 世纪 60 年代早期对 GATT 条款的修改还对来自这些国家的进口物品提供了非互惠的特惠待遇。一个后果就是发展中国家(中东的一些新兴工业化国家是一个显著的例外)渐渐失去了其在世界市场中的份额(见 Krueger 1990)。因此直到 20 世纪 80 年代,很明显地世界被分为三个主要的贸易区:工业化国家和新兴的工业化国家、其他发展中国家以及中央计划经济国家。

有趣的是,发展中国家的领导人自身也开始意识到,它们未能融入国际经济体系中的经济成本,并且在 20 世纪 80 年代开始转变政策。许多发展中国家参加了乌拉圭回合谈判,它们不仅赞同其中的很多条款,诸如知识产权待遇条款、与贸易相关的投资措施规则,而且还努力寻求并且赢得了关于在农产品、纺织品、服务贸易自由化的协议。到 20 世纪 90 年代早期,中央计划经济国家开始了以市场为导向的经济转变,因而它们也开始与世界的其他部分融合起来。这样,国际经济如 20 世纪 70 年代后期、80 年代前期所面临的一个“挑战”,实际上在没有任何国际行动的情况下已经被解决了。



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## Appendix I : Simulations 附录一: 模拟练习

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### Mock Trial of California v. Simpson

### 加利福尼亚州诉辛普森案的模拟审判

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#### Selected Newspaper Reports about O.J. Simpson Case 报纸摘要

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##### Lawyers Set to Battle in O.J. Simpson Case

LOS ANGELES — Prosecution and defence lawyers spent Saturday polishing opening statements for delivery today as the O.J. Simpson double murder trial moves from seven months of legal skirmishing and jury selection to the real thing.

According to legal experts who have followed the case since Simpson's arrest last June, the prosecution goes into the "trial of the century" with a distinct advantage.

Most crucial, and the biggest blow to the football legend's defence team, the experts said, was Superior Court Judge Lance Ito's ruling earlier this week allowing the defence to introduce most of the evidence relating to Simpson's alleged abuse of his ex-wife, Nicole Brown Simpson, during their 17-year relationship.

Noted Los Angeles criminal defence lawyer Harland Braun, who represented one of the police officers accused of beating black motorist Rodney King, said getting the domestic violence evidence admitted was a key victory for the prosecution.

"It overcomes the advantage that the defence had initially which was, 'O. J.? It's inconceivable. We know O. J.'"

"Now the jury will get to know O.J. in a different way than the public got to know him over the years. It will make the murder seem the logical culmination of a fiery relationship rather than just something that occurred unexpectedly," Braun said.

Laurie Levenson, a former prosecutor who now teaches law at Loyola University in Los Angeles, noting that all the scientific DNA blood test evidence as well as the spousal abuse testimony, will be put before the jury, said the prosecution was going to trial in a strong position.

But Deputy District Attorneys Marcia Clark and Bill Hodgman and their team cannot afford to be complacent, especially going up against Simpson's "dream team" of renowned and skillful attorneys



led by Johnnie Cochran.

"They (the prosecutors) have an overwhelming case, so it's theirs to lose," said Braun.

He said given the racial element in the case — Simpson is black and the murder victims were white — there were pitfalls facing the prosecutors.

But Braun did not think, as others have, that the predominantly black jury favoured Simpson in any way.

"The fact there are eight blacks on the jury helps the prosecution because there will not be a polarization where two or three blacks say 'well, we're not going to be the people to give up O.J.'."

Black jurors in Los Angeles County, he pointed out, routinely convict blacks of murder. "So the notion that black jurors are always going to vote not guilty is silly."

### **Battle for Simpson Jurors' Minds Begins**

LOS ANGELES — On Monday, football legend O.J. Simpson faces the only 12 people whose opinion really matters on whether he stabbed his ex-wife and her friend on a late summer night seven months ago.

When the prosecution and defense square off with opening statements before a jury of eight women and four men in "People of the State of California vs. Orenthal James Simpson," each side will tell very different stories of what happened to Nicole Brown Simpson, 35, and Ronald Goldman, 25, the night of June 12.

Is it a classic domestic violence murder, as the prosecution maintains, preceded by a recognizable pattern of physical abuse, threats and stalking? Or is it a "classic who-done-it," as the defense says, confused by police incompetence, even a racist frame-up, while the real killer remains at large?

In the widely watched case that has become a social mirror on celebrity, domestic violence, race and media frenzy in the 1990s, prosecutors will argue their theory first that Simpson murdered his ex-wife as the final act of retribution and obsessive jealousy in a violent 17-year relationship.

Then the defense will counter with its version that Simpson reformed after a 1989 battering, though police unfairly targeted him as the sole suspect in a double murder his lawyers have likened to a drug-related hit.

Prosecutors plan a two-pronged approach bolstered by Judge Lance Ito's pre-trial rulings allowing most of their evidence before the jury. The district attorneys will present DNA test results to link Simpson to the crimes and testimony on past abusive behavior to show a motive and capacity to commit an act so at odds with his affable public persona.

Despite the serious setback for Simpson with evidence about his past behavior admissible at trial, legal observers seriously doubt the defense will try to plea bargain. District Atty. Gil Garcetti, after deciding not to seek the death penalty against Simpson, repeatedly has emphasized that the prosecution will accept nothing less than life in prison.

With lawyers' professional reputations at stake on both sides, the Los Angeles District Attorney's office is trying to live down losing a string of high-profile cases, including a hung jury in the



prosecution of the Menendez brothers for shooting their parents to death.

On the defense side, which includes some of this country's foremost criminal lawyers and egos, trial veteran Johnnie Cochran Jr. has emerged as the undisputed leader in his camp after resolving a public feud between attorneys Robert Shapiro and F. Lee Bailey on the eve of trial.

Sequestered at a secret place where the food is good but "conjugal visits" so far have been quite limited, the 12 jurors and 10 alternates have been shielded from the lawyerly hyperbole and the onslaught of sensational coverage leading to trial.

Prosecutors, led by Marcia Clark, a seasoned specialist in forensic evidence, will present DNA test results indicating that Simpson dropped his own blood at the crime scene from a cut finger and then stained his Ford Bronco and front driveway with blood from the victims.

Acting on Judge Ito's pivotal ruling allowing domestic violence evidence to prove "motive, intent, plan and identity" in the murder, prosecutors will highlight a 1989 New Year's Eve fight that landed Nicole Brown Simpson in the hospital and dramatic recordings of her 911 call for help in 1993 as her ex-husband broke down her door.

Family, friends and neighbors will testify about other beatings, threats and stalking behavior, including Simpson's purported statement that he often watched his ex-wife from a secret pathway behind her house.

The defense plans to challenge the domestic violence allegations in point-by-point "mini-trials," picking apart each alleged incident. "In a number of instances there will be strong evidence to the contrary," Cochran said.

Simpson's lawyers say he wants to take the stand to testify on his own behalf, though such a move has yet to be decided.

Without witnesses to the double murders, the prosecution's case still is based on "circumstantial evidence," which the defense will attack to highlight unanswered questions, inconsistencies and police mistakes.

Holes in the case have yet to be filled: How could one man kill two people, though no one heard either of them scream for help? Two knives might have been used in the stabbings, but what happened to the murder weapon or weapons?

In a much-needed victory for defense lawyers, Ito ruled that they may try to challenge Detective Mark Fuhrman's testimony that he found a bloody glove behind the guest house at Simpson's estate by introducing evidence that Fuhrman has made racist statements in the past. But the defense may do so only if it first can provide some evidence, however slight, that the glove could have been planted.

To undermine the DNA test results, which can be sensitive to contaminants, the defense will scrutinize how police handled, collected and stored blood samples and other evidence. Sure to come under tough questioning, as during the preliminary hearings, are a novice police trainee assigned to collect blood samples at Simpson's estate and the coroner who failed to order a complete examination of Nicole Brown Simpson's body.



"With a circumstantial evidence case, you don't want the jury to get lost," explained Laurie Levenson, a former prosecutor and professor at Loyola University Law School in Los Angeles. "Confusion is enough to create reasonable doubt."

To win a conviction, prosecutors must leave the jury with an "abiding conviction of the truth of the charge," which is how California law describes "beyond a reasonable doubt."

Though the hundreds of witnesses to be called in the Simpson trial will take months to testify, Monday's opening arguments are considered central in drawing the road map the jury will follow to a verdict.

"Most lawyers assume juries make up their mind based on opening statements," said noted defense attorney Harland Braun.

The prosecution will try to bring the case back to the victims, who might easily be forgotten because it is Simpson who sits in the courtroom facing the jury day to day, according to Levenson.

But the victims' immediate families, 14 strong, will watch from the spectators' benches in the crowded courtroom. Nicole Brown Simpson's mother, Juditha, and two sisters, Dominique and Denise, are scheduled to take the stand for the prosecution.

"It will all come down to whether the jury is convinced enough by the evidence that they can wake up the next day and say they made the right decision," Levenson said.

### **Evidence, Testimony Summarized**

Key evidence and testimony in the O. J. Simpson murder trial, with explanations of how the prosecution has used it against Simpson thus far and how the defense has challenged it:

#### ***Crime-scene blood***

Blood drops were found alongside bloody shoe prints leading away from the bodies of Nicole Brown Simpson and Ronald Goldman; blood was found on a gate at the back of the murder scene condominium; blood from both places contained Simpson's genetic markers. Simpson had a cut on his left middle finger when interviewed by police the day after the killings.

**Prosecution:** one of the most important parts of the case, claiming it placed Simpson at the crime scene; said Simpson dripped blood after wounding his finger with a knife during the murders; said scientific controls and testing by different labs thwarted any possibility of contamination or tampering.

**Defense:** mounted vigorous counterattack, alleging samples were sloppily collected and poorly handled, rendering DNA results unreliable; raised possibility that blood was planted by someone who took it from a police crime lab vial that contained Simpson's blood and a blood preservative; most compelling evidence was bloodstains on paper wrapping that was supposed to be holding dry blood samples; wound on Simpson's left hand was only a minor one he suffered in his house — not enough to drip as much blood as prosecutors found — and that Simpson re-injured the finger when he cut it on a glass in a Chicago hotel room the morning after killings, before police interviewed him.

#### ***Bloody shoe prints***

The bloody shoe prints matched a size 12 Bruno Magli shoe, a relatively rare Italian-made model.



Simpson wears size 12 shoes.

Prosecution: tried to place Simpson at the murder scene by showing that Bloomingdale's in New York, where Simpson sometimes shopped, carried such shoes.

Defense: Thousands of people bought such shoes; noted that no murder shoes were ever recovered and that the prosecution had no evidence that Simpson ever purchased such shoes; raised the possibility that unexplained "imprints" that didn't match the Bruno Magli sole also were at the crime scene.

### ***Crime-scene hairs and fibers***

Hairs found in a dark knit cap were similar to Simpson's hairs; fibers on a cap were similar to those in the carpeting of Simpson's Ford Bronco; dark blue cotton fibers were found on Goldman.

Prosecution: Evidence places Simpson at the crime scene; noted that a witness said Simpson wore a dark sweat suit the night of the murders.

Defense: Hairs mean nothing more than assailant may have been black, as is roughly 10 percent of Los Angeles' population; also pointed to hairs that appeared to contain no dandruff, while Simpson's hair sample had some dandruff; no dark blue sweat suit was ever found; evidence could have been cast about the scene when a detective unfurled a blanket from Ms. Simpson's home to cover her body.

### ***Bloody gloves***

One dark, cashmere-lined Aris Light leather glove, size extra large, was found at the murder scene another behind Simpson's guest house, near where Brian "Kato" Kaelin heard bumps in the night. Ms. Simpson bought Simpson two pair of such gloves in 1990. DNA tests showed blood on glove found on Simpson's property appeared to contain genetic markers of Simpson and both victims; a long strand of blond hair similar to Ms. Simpson's also was found on that glove.

Prosecution: Simpson lost the left glove at his ex-wife's home during the struggle and, in a rush, inadvertently dropped the right glove while trying to hide it; explained that evidence gloves didn't fit Simpson in a courtroom demonstration because the gloves shrunk from being soaked in blood and Simpson had rubber gloves on underneath.

Defense: glove behind guest house was planted by Detective Mark Fuhrman, a racist cop trying to frame Simpson; blood on glove may have been Planted by police; gloated that evidence gloves didn't fit; hair analysis isn't sophisticated enough to be trusted.

### ***Bloody socks***

Pair of dark, crumpled socks found at the foot of Simpson's bed; DNA tests found the genetic markers of Simpson and his exwife.

Prosecution: contended this directly linked a victim to Simpson.

Defense: suggested socks were planted at house by police, then blood was put on socks later at the police lab to frame Simpson; most compelling evidence of tampering is that some blood soaked all the way through one sock to other side, which it shouldn't have done if a foot was in it.



**Bloody Bronco**

Small spot of blood found near driver's outside door handle of Simpson's Ford Bronco; other blood found smeared inside on console, door, steering wheel and carpeting; DNA tests showed some of the blood apparently a mixture with genetic markers of Simpson and the victims.

Prosecution: said Simpson drove Bronco to and from crime scene.

Defense: challenged interpretation of DNA tests, particularly those suggesting a genetic match to Goldman in a mixture; noted that the genetic material of an unknown person was found in the steering wheel blood; suggested police planted some of the blood; elicited testimony that the Bronco was entered at least twice by unauthorized people while it sat in a police impound yard.

**Timeline**

Murders occurred between 10:15 p.m. and 10:40 p.m., based on testimony from prosecution and defense witnesses who heard barking from the area of the crime scene. Ms. Simpson's blood-covered pet Akita was found shortly before 11 p.m.

Prosecution: Simpson lacked an alibi or even plausible story for what he was doing alone during this period; pointed to testimony of a neighbor who saw a vehicle similar to a Bronco racing away from the crime scene at 10:35 p.m.; suggested that Simpson would still have had time to make the approximately five-minute drive home in time for Kaelin to hear bumps behind guest house at about 10:40 p.m.; suggested that the shadowy figure seen by a waiting limousine driver slipping into Simpson's house just before 11 p.m. was Simpson returning from the murders.

Defense: Simpson didn't have enough time from when he was last seen by Kaelin about 9:40 p.m. to drive to Ms. Simpson's home, kill two people, hide bloody clothing and murder weapon, drive home, drop glove behind guest house and clean up before greeting the limo driver about 11 p.m.; told jurors during opening statements that Simpson was home practicing his golf swing at the hour of the murders.

**Conspiracy Theories Challenge Simpson's 'Dream Team'**

LOS ANGELES — As O. J. Simpson's trial progresses and the evidence unfolds, defense conspiracy theory has grown more complicated, involved more players and become, in some analysts' eyes, ridiculous.

Ridiculous or not, the prosecution carries the burden of proof, leaving Simpson's "dream team" to raise reasonable doubts.

It was simpler in the case's infancy, when the defense painted Detective Mark Fuhrman as a renegade racist cop with a particular dislike for interracial couples like Nicole Brown Simpson and her ex-husband.

"It is so far-fetched that the police put together this whole thing ... I don't think the defense believes it," UCLA law professor Paul Bergman said. "I think the conspiracy theory is just a smoke screen."

So, where do the defense scenarios stack up now, after Fuhrman's trip to the stand, in the glow



of DNA expert Robin Cotton?

Closing arguments will be vital, especially for the defense, Southwestern University law professor Myrna Raeder said.

There's an awful lot to explain away when the defense presents its case. Among the key parts of the Simpson conspiracy theories, problems posed and questions unanswered:

#### ***The murder***

The theory: The defense has suggested that Mr. Simpson and Ronald Goldman were murdered by Colombian drug dealers June 12 to send a message to Ms. Simpson's drug-using friend Faye Resnick for failing to pay cocaine bills.

The problem: No evidence has been offered that Resnick failed to pay her drug bills (she said she did) or that she even lived with Ms. Simpson.

#### ***The rogue cop***

The theory: Fuhrman, either out of racism or to become a hero, is assigned to the Simpson case and begins the frame-up, transporting a bloody glove from the crime scene to Simpson's house and possibly smearing the glove inside Simpson's Bronco.

The problem: Nobody has said they saw Fuhrman move the glove or smear it inside the Bronco. There has been no evidence that Fuhrman even knew Simpson lacked an alibi the night of the murders.

#### ***The detective***

The theory: Detective Philip Vannatter assisted in the frame-up by failing to give a criminalist a vial of Simpson's blood sample the evening after the murders, holding onto it instead, perhaps as long as overnight. It was this blood that may have ended up on various pieces of evidence and blood swatches.

The problem: News footage appears to show a criminalist holding the envelope that Vannatter said contained the blood. at the time and location both said the vial was turned over. There has been no evidence pointing to why Vannatter would destroy his reputation by taking part in a conspiracy. Also, if that vial of blood, called a reference sample, had been used in a frame-up, stains from evidence should show signs of a laboratory preservative from the tube; prosecutors say there is no such preservative in evidence stains, though the defense insists there is. No one from the FBI, which performed tests to find preservatives, has yet testified.

#### ***The criminalists***

The theory: Criminalists Dennis Fung, Collin Yamauchi and Andrea Mazzola were stooges in the detectives' conspiracy, with Fung lying in court and doctoring reports, and Yamauchi and Mazzola possibly tampering or accidentally contaminating evidence in the lab.

The problem: No evidence has been presented on why the three would engage in a conspiracy with detectives whom they hardly knew — if at all — before this case. Videotape appears to back up Fung's contention that Vannatter gave him the blood vial. Nobody has testified that they saw



any of the three tamper with evidence in the lab.

### ***The blood trail***

The theory: DNA test results showing a strong possibility that Simpson's blood was found on a walkway leading from the bodies are flawed because original samples were maliciously or accidentally contaminated in the police lab with blood from the vial containing Simpson's reference sample. The defense points to the lack of quality control at the police lab as raising the risk of contamination.

The problem: Control samples taken on the walkway near blood drops tested free of DNA. If there was cross-contamination, the prosecution claims, the controls would show Simpson's genetic markers. There has been no evidence that such a problem occurred.

### ***The Bronco blood***

The theory: Blood in the Bronco was put there by Fuhrman or somebody else. There may also have been contamination of Bronco blood swatches in the lab.

The problem: Some of the blood samples show signs of Simpson's DNA. Simpson's blood wasn't available to Fuhrman at the time the detective is alleged to have done this. Nobody has said they saw anybody plant blood in the vehicle.

### ***The glove***

The theory: Fuhrman carried the glove, covered in the victims' blood, from the crime scene to Simpson's house. Simpson's blood may have been planted or accidentally put on the glove later by Yamauchi.

The problem: Simpson had not yet given blood to police at the time Fuhrman found the glove. Nobody has testified to seeing Yamauchi tamper with or contaminate the glove.

### ***The socks***

Theory: Blood from Ms. Simpson was planted on socks from Simpson's bedroom well after the socks were seized by police. The defense notes that criminalists didn't notice any blood on the socks when they were first picked up or later when they were examined.

The problem: Several experts have testified the blood on the dark socks was difficult to see and some drops were microscopic. None of the blood stains soaked all the way through from one wall of the sock to the other, as it presumably would if it were planted.

## **Notes and Additional Information 注释与信息**

■ O.J. Simpson was a football legend in the United States in 1970's. Then he became a movie star and an advertisement star. He married Nicole Brown Simpson, a white beauty, in 1977, and the couple separated in 1992. They have two children.

■ Nicole Brown Simpson and her boyfriend, Ronald Goldman, were stabbed to death in her house on June 12, 1994.

■ O.J. Simpson was arrested, as the suspect of the double murder case, on June 17, 1994, and was prosecuted by Los Angeles District Attorney later.



■ The trial of People of the State of California vs. Orenthal James Simpson began in Los Angeles District Court on January 23, 1995.

■ On October 3, 1995, the jury delivered a “not-guilty” verdict for O.J. Simpson.

## **Instructions 指导**

### **Role Assignment**

All participants will be assigned to one of the following four groups:

Group One: Judge and clerks

Group Two: Jury

Group Three: Prosecuting attorneys and witnesses for the prosecution.

Group Four: Defense attorneys and witnesses for the defense.

### **Planning and Preparation**

All participants should read the case materials thoroughly and prepare for the mock trial according to his or her role. For example, the judges and the jurors should prepare for the jury selection, as well as the verdict or the judgment; the lawyers should prepare fact summary and written outline for the argument; the witnesses should prepare for the direct examination and the possible cross-examination.

### **Dry Run**

Each group has a dry run (practice) according to its role assignment.

### **Outline of the Trial Process**

- I Selection of the jury;
- II Opening statements to the jury by the prosecutor and the defense counsel;
- III The prosecutor's case-in-chief against the defendant;
- IV The defendant's case-in-chief;
- V The prosecution's rebuttal, and perhaps evidence from the defendant to counter the prosecution's rebuttal evidence;
- VI Closing argument to the jury by the prosecutor and the defense counsel;
- VII The judge's instructions to the jury;
- VIII Deliberation and verdict by the jury;
- IX Judgment of the court.

### **Opinions**

Although this mock trial is based on the facts in California V. Simpson, the opinions of the groups are not bound to the opinions and judgments in the Case.



## Reference Materials 参考资料

### 1. Courtroom English

#### 法庭常用英语

-The court is in session now

-Order in the courtroom.

-The courtroom order!

-The court is in recess.

-We will be in recess for half an hour.

-The court will resume in ten minutes.

-Ladies and gentlemen of the jury, at this time I am making to you a so-called opening statement.

-Please call your first witness, Mr. Prosecutor.

-Your Honor, we call as our first witness Ronald Smith.

-Your Honor, we call Jon Peterson as our next witness.

-Object, Your Honor, irrelevant

-We object, Your Honor. That is a leading (hearsay, etc.).

-The objection is sustained and the witness will not answer the question.

-Sustained. Ladies and gentlemen of the jury, disregard the question completely.

-The objection is overruled and the witness may answer the question.

-I'll overrule your objection.

-Overruled, counsel.

-Your Honor, we now offer this into evidence, as Defendant Exhibit Number 5.

-Hearing no objection, it will be received as Defendant Exhibit Number 5.

-Please read my last question back, court reporter.

-No further questions at this time, Your Honor.

-Thank you so much, Your witness.

-The prosecution rests.

-The defense rests its case.

-I now ask that the court reporter mark this for identification. If I remember correctly, this would be Prosecution Exhibit 10.

-Yes, this is going to be Prosecution's 10. (By court reporter)

-Your Honor, may we now hand the exhibit, Prosecution's Number 10, to the jurors for their examination?

-Object, Your Honor.

-Overruled. You may proceed, Mr. Prosecutor.



- I call to the stand Dr. Harvey L. Ziff.
- Sir, you said a minute ago, during your direct examination by defense counsel, that...
- Mr. Smith, you gave us on your direct examination just now a detailed description of a person...
- Now, I draw your attention to the evening of April 1, 1994, Mr. Smith...
- Object, Your Honor. What relevance does this have?
- Oh, I'll withdraw the question.
- I have no further questions of this witness at this time, your Honor.
- I swear, under the penalty of perjury, to tell the truth. (by witness)
- I swear to tell the truth, nothing but the truth. Please help me, my God. (by witness)
- I swear to well and truly try the case, without any prejudice. (by juror)
- I swear to be justice and fair. (by juror)
- I swear, upon the Bible, to render an impartial verdict upon the law and the evidence. (by juror)

## 2. Examples of Jury Instructions Given by the Trial Judge

### 法官给陪审团的指示范例

#### ① Basic Instruction,

Members of the Jury:

Now that you have heard all of the evidence and the argument of counsel, it becomes my duty to give you the instructions of the Court concerning the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case. . . .

Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any view of the law other than that given in the instructions of the Court, just as it would also be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything other than the evidence in the case. . . .

As stated earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

#### ② Burden of Proof

The burden is on the plaintiff in a civil actions such as this to prove every essential element of his claims by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely than not so. . . .

All of the questions of the special verdict which you are to answer, except those relating to comparison of negligence and damages, are to [be] answered either "Yes" or "No." The burden of



proof as to any such question is upon the party or parties who contend that you should answer the question "Yes". Such burden is to satisfy or convince you, to a reasonable certainty, by the greater weight of the credible evidence, that "Yes" should be your answer. That means that before you are justified in answering the question "Yes," you must be satisfied that the greater weight of the credible evidence not only leads to the conclusion that the question should be answered "Yes," but it must also satisfy you to the point of reasonable certainty that "Yes" should be your answer. If, after a fair consideration of all the evidence bearing upon the question, you become so satisfied or convinced that the answer should be "Yes," then it is your duty to so answer the question; but if you are not so satisfied or convinced, you should answer the question "No."

### ③ Action for Fraud and Deceit — Essential Elements

Plaintiff's claim against the defendant has six essential elements, as follows:

First, that the defendant represented to the plaintiff that (here set forth the alleged representation.)

Second, that the representation was false;

Third, (that the representation was known by the defendant to be false when it was made) (that the defendant made the representation recklessly and without regard to its truth or falsity) (that defendant told the plaintiff that it had knowledge that the representation was true, while not having such knowledge);

Fourth, that the plaintiff relied on the representation and was deceived by it;

Fifth, that the plaintiff acted with ordinary prudence in relying on the representation, and

Sixth, that the false representation was the proximate cause of injury to the plaintiff.

If you find that the plaintiff has established each of these elements by the preponderance of the evidence, then you should return a verdict for the plaintiff. If on the other hand you find that the plaintiff has failed so to establish any one or more of these six elements, then you must find for the defendant.

### ④ Intentional Torts — Interference with Person or Property — False Imprisonment

One who intentionally and without authority detains a person against his will and thereby deprives him of his liberty, even momentarily, is guilty of false imprisonment and liable for all damages resulting from the detention.

Plaintiff claims that defendant arrested him without a warrant for the crime of [specify] and caused him to sustain damages. Defendant admits that he arrested plaintiff and that he had no warrant, but says that under the circumstances confronting him the arrest was lawfully made.

Under Section 177 subdivision (4) of the Code of Criminal Procedure, defendant as a police officer had the right to arrest without a warrant if he had reasonable cause for believing that a felony had been committed and that the person arrested had committed it. The burden is upon defendant to satisfy you by a fair preponderance of the evidence that he had reasonable cause for believing that the crime of [specify felony for which plaintiff arrested] had been committed and that plaintiff was the



person who had committed it.

Reasonable cause existed if the facts and circumstances known to defendant, or the information supplied to him before making the arrest, were such as to lead a reasonable and prudent person to believe that the crime of [specify] had been committed and that plaintiff was the person who had committed it. An arrest made with reasonable cause is lawful even though, as it now appears, (the crime of [specify] had not been committed, though the crime had been committed plaintiff was not the person who committed it).

The elements of the crime of [specify] are [define]. There was testimony that [here marshal evidence supporting justification and that controverting the defense]. Defendant contends that at the time he arrested plaintiff the facts as they appeared to him were [specify the facts which the judge finds sufficient, if believed, to constitute reasonable cause; otherwise charge that as a matter of law reasonable cause did not exist]. If you find that the facts appeared to defendant as he claims and that a reasonably prudent person would have believed that those were the facts, your finding will be that defendant had reasonable cause to believe that the crime of [specify] had been committed and that plaintiff had committed it, and your verdict will be for defendant. If you find that the facts appeared to defendant otherwise than as he claims or that it was not reasonable for him to have believed that those were the facts, or if you find the evidence so evenly balanced that you are unable to say that there is a preponderance on either side of either of those questions, your finding will be that defendant did not have reasonable cause and your verdict will be for plaintiff.



## Appendix II : Vocabulary 附录二: 词汇表

### A

absolute proof 绝对证明  
absolute property 绝对财产(权)  
abstract of title 产权书摘要  
acceleration clause 提前(偿还)条款  
acceptance 承诺  
accident report 事故报告  
accident insurance 意外保险  
accusation 指控; 控告  
accusatorial procedure 控告程序  
accusatorial process of proof 控告证明过程(程序)  
accusatorial system 控告或诉讼制度  
accused 被指控者  
accuser 控告人  
acknowledgement 认知(书)  
acquittal 无罪判决  
act 条例; 作为  
Act for the Prevention of Frauds and Perjuries  
《预防诈欺和伪证条例》  
action 诉讼; 行为  
actual losses 实际损失  
adjudication 裁决; 裁定  
administrative law 行政法  
administrative law judge 行政法法官  
administrative procedure 行政程序  
administrator 管理人; 监管人  
admissible 可采的  
admissibility 可采性

admit 采用; 允许  
adoption 收养; 采纳  
adulterous conduct 通奸行为  
ad valorem property tax 从价财产税  
adversarial hearing 对抗式听证会  
adversarial process 对抗式程序  
adversary 对手  
adversary trial system 对抗式(或抗辩式)审判制度  
advocacy 出庭辩护; 诉讼代理  
advocate 辩护人; 诉讼代理人  
affidavit 正式书面陈述  
affirm 维持(原判)  
affirmation 保证书; 证词  
affirmative 确证的  
agency (行政)机关  
agency action 机关(行政)行为  
agreed upon remedies 补救协议  
agreement 协议  
agreement-as-written 书面协议  
agreement-in-fact 事实协议  
alibi 阿里白(不在犯罪现场的证明)  
alienation of affection 离间夫妻关系  
allegation 声称; 指控  
allege 诉称; 指控  
alleged offense 所控罪行  
alternate juror 替补陪审员  
amendment 修正案  
American Bar Association 美国律师协会  
American Law Institute 美国法学会



- analogy 类推  
Anglo-American Legal System 英美法系  
anonymous accusation 匿名控告  
appeal 上诉  
appear 出庭  
appellant 上诉人  
appellate action 上诉行为  
appellate court 上诉法院  
appellee 被上诉人  
appellor 上诉人  
appropriate 拨款  
appurtenant 附属物  
arbitor 仲裁人  
arbitrary 武断的  
arbitration 仲裁  
arraignment 初审  
array 陪审员名单  
arrest 逮捕  
arrest warrant 逮捕令(证)  
arrestee 被捕人  
article 条款;文章  
article of authority 授权条款  
Articles of Confederation 《联邦条例》  
articles of incorporation 公司组织章程  
artificial person 法人  
Asian American Legal Defense and Education Fund 亚裔美国人法律辩护与教育基金会  
assault 意图或威胁伤害  
assert 主张;宣称  
asset 资产  
assistant attorney 助理检察官  
associate judge 副法官  
associate justice 副大法官  
assumpsit 口头合同;违约赔偿之诉  
assumption 假定  
attempt 意图;企图  
attempted escape 逃脱未遂  
attestation 证词  
attorney 代理人;律师  
attorney at law 律师  
attorney general 检察长  
authentication 鉴定  
authority 权力;法源;权威性依据  
automobile insurance 机动车保险  
automobile tort 机动车侵权行为  
autonomy 自治(权)
- B**
- ban 禁令;禁止  
banishment 流放  
bankruptcy 破产  
bankruptcy discharge 破产债务解除  
bankruptcy judge 破产法官  
Bar 律师职业  
Bar Association 律师协会  
barrister 出庭律师  
battery 殴打  
bench trial 法官审  
beneficiary 受益人  
benefit 收益;福利  
bigamy 重婚(罪)  
bill of lading 提单  
Bill of Rights 《人权法案》  
bind over 具保;具结  
binder 临时保险单  
binding 有约束力  
binding contract 有约束力的合同  
binding force 约束力  
binding interpretation 有约束力的解释  
black-letter Law (普遍接受之基本原则的)黑体字法  
Black National Bar Association 全美黑人律师协会  
Blue Sky Law 蓝天法(关于股票买卖控制的法



律)  
 Board of Governors (ABA) (美国律师协会的)  
 董事会  
 body of law 法体;法律部门  
 bond 债券;保释金  
 bond instrument 债券契据  
 branding 鞭笞  
 breach 违约;破坏  
 bribe 贿赂  
 bribery 贿赂(罪)  
 bright-line test 明显界限检验标准  
 broker 中间人  
 brokerage contract 居间合同  
 brokerage fee 佣金;中介费  
 brother-sister corporation 兄弟公司;姊妹公司  
 Bulk Sales Act 《大宗销售条例》  
 burden 责任  
 burden of going forward with the evidence 先行  
 举证责任  
 burden of persuasion 说服责任;证明责任  
 burden of producing evidence 举证责任  
 burden of proof 证明责任  
 burglary 入室盗窃(罪)  
 business corporation 实业公司;商务公司  
 business law 实业法  
 business organization 实业组织  
 buy-out agreement (股权)承买协议  
 buy-sell agreement (股权)买卖协议  
 bylaws (内部)章程

## C

california Penal Code 《加州刑法典》  
 capital account 资本帐户  
 capital crime 可判死刑罪  
 capital punishment 死刑  
 capital surplus 资本盈余  
 capitation tax 人头税

career criminal 职业罪犯  
 career judiciary 职业法官  
 case briefing 案情摘要  
 case-in-chief 主诉  
 case law 判例法  
 case method 案例教学法  
 case report 判决报告  
 case reports 判例汇编  
 case reporter 法庭笔录员  
 case reporters 判例汇编  
 casualty insurance 意外(伤害)保险  
 catalog 商品目录(单)  
 causality 因果关系  
 certificate 证书  
 certificate of existence 实体存在证明(书)  
 challenge 置疑;挑战  
 challenge for cause 有理回避  
 chancery court 衡平法院  
 charging instrument 控告文件  
 checks and balances 制衡(原则)  
 chief judge 首席法官  
 chief justice 首席大法官  
 child abuse 虐待儿童  
 circuit court 巡回法院  
 circuit judge 巡回法官  
 circumstantial evidence 旁证;情况证据  
 citation 引证  
 cite 援引;传讯  
 civil court 民事法庭  
 civil forfeiture 民事罚没  
 civil law 民法  
 Civil Law Legal System 民法法系  
 civil liability 民事责任  
 civil Liberty 民事自由  
 civil litigation 民事诉讼  
 civil procedure 民事诉讼程序  
 civil suit 民事诉讼



civil trial 民事审判  
 civil right 民权  
 civil right law 民权法  
 Civil War Income Tax Act 《内战所得税条例》  
 claim 诉讼请求; 索赔  
 classification of law 法律分类  
 close corporation 内部持股公司  
 closely held corporation 内部持股公司  
 closing 终结; 成交; 结帐  
 closing argument 最后论述  
 closing statement 成交声明  
 code 法典  
 Code of Judicial Conduct 《法官行为准则》  
 codify 编成法典  
 co-felon 共同重罪犯  
 cohabitation 同居  
 collateral contract 附属合同  
 collegiate bench 合议席  
 collegiate panel 合议庭  
 commercial clause 商务条款; 贸易条款  
 commercial law 商法  
 commercial paper 商务文件; 票据  
 commission 佣金  
 commit 犯(罪); 交托  
 commitment 犯罪; 许诺; 委托  
 commitment of financing 融资许诺  
 common law 普通法  
 common law damages 普通法赔偿金  
 common law legal system (family) 普通法法系  
 common law marriage 普通法婚姻  
 common property 共同财产  
 common stock 普通股票  
 community property 共同财产  
 comparative law 比较法  
 comparative negligence 比较过失  
 compensation 赔偿(金)  
 compensatory damage 应予赔偿之损害

competence 管辖权限  
 competency 有效性  
 complaint 控告; 申诉  
 Comprehensive Drug Abuse Prevention and Control Act 《滥用毒品的综合预防与控制条例》  
 compulsory licence 强制性许可  
 concur 附条件地同意  
 concurring opinion 并存(判决)意见  
 confer 授与  
 conference 协商会议  
 confidential information 保密信息  
 confiscation 没收  
 conflict law 冲突法  
 congress 国会  
 consent 同意; 认可  
 consideration 对价; 约因  
 constitution 宪法  
 Constitutional Convention 制宪会议  
 constitutional law 宪法  
 constitutional tort 宪法性侵权  
 constitutionality 合宪性  
 construction (法律的) 结构; 解释  
 construe 解释; 分析  
 consultation 磋商  
 consumer protection statute 消费者保护法律  
 consumption tax 消费税  
 Continental Law Legal System (or Family) 大陆法系  
 contingent fee 胜诉酬金  
 continuance 诉讼延期  
 contract 合同  
 contract dispute 合同纠纷  
 contract formation 合同构成  
 contract interpretation 合同解释  
 contract law 合同法  
 contract performance 合同履行



contracter 承包商  
 contravene 触犯;违犯  
 contributory negligence 共同过失  
 controlling law 应适用之法律  
 conversion 非法占有  
 convey 转让  
 conveyance 转让  
 convertible bond 可转换债券  
 conviction 有罪判决  
 convincing evidence 使人信服的证据  
 copyright 版权;著作权  
 corporal punishment 肉体刑  
 corporate counsel 公司法律顾问  
 corporate excise tax 公司执照税  
 corporate law 公司法  
 corporation 公司  
 corporation aggregate 合有公司  
 corporation code 公司法典  
 corporation law 公司法  
 corporation sole 独有公司  
 corpus 尸体;本金  
 Council on Legal Education Opportunities 法律教育机会委员会  
 counsellor (法律)顾问;律师  
 counsellor-at-law 律师  
 court 法院;法官  
 court decision 法院判决  
 court fee 诉讼费  
 court of appeals 上诉法院  
 court of chancery 衡平法法院  
 court of claims 索赔法院  
 court of customs and Patent Appeals 关税及专利上诉法院  
 court of domestic relations 家庭关系法院  
 court opinion 法院判决意见  
 courtroom 法庭  
 coverage 保险范围

crime 犯罪  
 criminal code 刑法典  
 criminal homicide 有罪杀人  
 criminal justice system 刑事司法系统  
 criminal law 刑法  
 criminal liability 刑事责任  
 criminal procedure 刑事诉讼程序  
 cross-examination 交叉盘问;盘诘  
 cruel and unusual punishment 残忍和非常的刑罚  
 cumulative evidence 累积证据  
 curative 临时监护的  
 curriculum guide 课程指南  
 custody 监护  
 custom duty 关税  
 customary law 习惯法  
 customary practice 惯例  
 customs court 关税法院

## D

damage 损害;损伤  
 damage claim 损害赔偿请求  
 damages 损害赔偿金  
 deadlocked jury 僵局陪审团  
 death penalty 死刑  
 death tax 遗产税  
 debenture 债单(券)  
 debt securities 债权证券  
 decide a case 判案  
 deed 契约  
 deed book 文契汇编  
 defamation 诽谤  
 default 不履行;违约  
 defendant 被告人  
 defense 辩护  
 defense attorney 辩护律师  
 defense's case-in-chief 辩护方主诉



deficiency judgment 不足额判决  
 degrees of murder (恶意)杀人罪的等级  
 delegation 授权  
 delegated legislation 授权立法  
 deliberate intention 故意  
 deliberation (陪审团)评议  
 demonstrative evidence 示意证据  
 deprivation 剥夺  
 derogatory treatment of the work 对作品的贬  
 毁性处理(或使用)  
 designs 设计  
 detract 毁损;贬低  
 developer (土地)开发商  
 dicta 判决附带意见  
 dignity 尊严  
 direct evidence 直接证据  
 direct examination 直接盘问  
 direct tax 直接税  
 disability insurance 残疾保险  
 disabled dependent child 无谋生能力的残疾儿  
 童  
 discharge 解雇;释放  
 discount 贴现;折扣  
 discovery 要求告知  
 discrete risk transfer product 离散性风险转移  
 (保险)产品  
 discretion 自由裁量权  
 discriminatory tax 歧视性税收  
 dispense 执行;施行  
 dispute 争议;纠纷  
 disposition 处置(权)  
 dissent 异议;反对  
 dissenting opinion 异议;反对意见  
 dissolution 解散  
 distort 歪曲;误解  
 district attorney 地区检察官  
 database right 数据权

dividend 股息  
 division of title 产权分割  
 divorce 离婚  
 docket 备审案件目录  
 doctrine 法则;原则  
 doctrine of constitutional supremacy 宪法至上  
 原则  
 doctrine of Miranda Warnings 米兰达忠告原则  
 document 文件;文书  
 document of title 产权证书  
 dormant Commerce Clause 休眠的“贸易条款”  
 domicile 住所地  
 double jeopardy 一罪二审  
 draft 起草;草拟  
 draftsman 起草者  
 drug trade 毒品交易  
 drug trafficking 毒品交易  
 dry run 干转;排练  
 due diligence 适当努力  
 due process 正当程序  
 Due Process Clause 正当程序条款  
 due process test 正当程序检验标准  
 duration 期限  
 duress 强迫;胁迫  
 duty 义务;关税  
 duty of care 照看义务

## E

earnest money 定金  
 easement 地役权  
 ecclesiastical court 宗教法庭  
 economic law 经济法  
 effective date 生效日期  
 effective time 生效时间  
 element of crime 犯罪要素(件)  
 empower 授权  
 enact 制定;颁布



en banc 全体法官出庭审判  
 encroachment 侵占  
 encumbered property 抵押财产  
 enforce 实施; 执行  
 enforceable 可强制执行的  
 enforceability 可执行性  
 enforcement of Law 执法  
 English-American Legal System (or Family) 英美法系  
 English Legal System (or Family) 英吉利法系  
 enjoin (衡平) 强制令  
 entail 限定继承  
 entity 实体  
 environmental impact statement 环境影响报告  
 environmental Law 环境保护法  
 Environmental Protection Agency (EPA) 环境保护局  
 environmental quality 环境质量  
 equal protection clause 平等保护条款  
 equitable relief 衡平救济  
 equity 衡平法  
 equity Law 衡平法  
 equity precedent 衡平法判例  
 equity securities 产权证券; 衡平证券  
 error 过错  
 escape 逃走; 逃脱  
 escrow 第三者保存合同  
 essential justice 实质公正  
 estate 财产; 遗产  
 estate tax 遗产税  
 EU Directive 欧盟指令  
 evaluate 评价  
 evict 逐出(租户)  
 evidence 证据  
 evidentiary presumption 证据推定  
 evidentiary rule 证据规则  
 ex aequo at bono 公平且善良

examine 检查; 盘问  
 examination 检查; 盘问  
 exception 例外  
 exception clause 例外条款  
 excise tax 执照税  
 exclude 排除  
 exclusive listing 独家上市  
 exclusive right 排他性权利  
 exclusive tax situs 唯一征税地点  
 excusable homicide 可宽恕之杀人  
 execute 执行; 签署  
 execution 执行  
 executive acts 行政条例  
 executive branch 行政部门  
 executive order 行政命令  
 executor (遗嘱) 执行人  
 executor of estate 遗产执行人  
 exemption 免除; 豁免  
 exhibit 展示物(证)  
 exigent circumstance 紧急情况  
 existing securities 上市证券  
 exparte 单方面的  
 expectation damages 预期赔偿金  
 expert 专家(证人)  
 expert testimony 专家证言  
 expert witness 专家证人  
 express contract 明示合同  
 express statutory provision 法律明文规定  
 express warranty 明示保证(保修)  
 ex rel 依据告发

## F

face amount 面额  
 face value 面值  
 facilitate 促使; 利于  
 fact 事实  
 fact in issue 争议事实



factor 因素;代理商  
 Factors Lien Act 《代理商留置权条例》  
 fair trial 公平审判  
 false imprisonment 非法拘禁  
 family court 家庭法院(庭)  
 family Law 家庭法  
 family offense 家庭罪  
 fault 过错  
 fault principle 过错原则  
 feasibility study 可行性研究  
 Federal Administrative Procedure Act 《联邦行政程序法》  
 Federal Antitrust Law 《联邦反托拉斯法》  
 federal convention 联邦制宪会议  
 federal crime of murder 联邦杀人罪  
 federal homicid laws 联邦杀人罪法律  
 Federal Housing Act 《联邦住房条例》  
 Federal Income Tax Act 《联邦所得税条例》  
 federal judge 联邦法官  
 Federal Rules of Civil Procedure 《联邦民事诉讼规则》  
 Federal Rules of Criminal Procedure 《联邦刑事诉讼规则》  
 Federal Rules of Evidence 《联邦证据规则》  
 Federal Securities Act 《联邦证券条例》  
 federal supremacy 联邦至上(原则)  
 Federal Tort Claims Act 《联邦侵权索赔条例》  
 felon 重罪犯  
 felony 重罪  
 felony-murder 重罪杀人  
 fiduciary 受托人  
 file 档案;注册  
 file a petition 呈交诉状;提出请求  
 fine 罚金  
 fingerprint 手印  
 fire insurance 火灾保险  
 fire protection 消防

first degree murder 一级杀人罪  
 first instance 一审  
 fixture (不动产)附属物  
 flogging 烙印  
 force of law 法律效力  
 forcible felony 暴力性重罪  
 foreign exchange risk 外汇风险  
 forfeiture 没收;罚没  
 form contract 格式合同  
 form of evidence 证据的形式  
 formal adjudication 正式裁决  
 formal rulemaking 正式规则制定  
 formation 构成;签定  
 franchise tax 特许经营税  
 fraud 诈欺  
 free enterprise system 自由企业制度  
 free movement of goods 自由物流,货物的自由流通  
 freedom of choice 选择自由  
 frustrate 使受挫折  
 fundamental law 基本法  
 fundamental right 基本权利

## G

general acceptance Standard (科学证据的)公认标准  
 general partnership 一般合伙  
 general property 一般财产(权)  
 general provisions 总则  
 gerontocratic 老人统治的  
 gift tax 赠与税  
 government tort 政府侵权(行为)  
 grant of power 授权  
 gross negligence 严重过失  
 group insurance 团体保险  
 guarantee 担保  
 guardian 监护人



guardianship 监护权

guidelines for sentencing 量刑指南

guilt 有罪

guilty 有罪的

guilty plea 有罪答辩

## H

habitual offender 惯犯

hail insurance 冰雹保险

handcuff 手铐

handwriting 笔迹

health insurance 健康保险

health regulation 卫生法规

hearing 听证(会)

hearing of jury 陪审团听审

hearsay 传闻证据

heir 继承人

hierarchy 等级制度

high crime 重罪

hold 认定;裁定

holding 认定;裁定

holding device 拥有手段(形式)

homicide 杀人(罪)

homosexuality 同性恋

house counsel (公司)专职法律顾问

husband-wife relation 夫妻关系

husband-wife tort 夫妻侵权(行为)

## I

Id. 同上

identification 认定;确认身份;身份证

ignore 忽视;驳回

illegal 非法的;违法的

illegal act 违法行为

immaterial 无实质性

immigration law 移民法

immovable property 不动产

immunity 豁免(权)

impair 损害;削弱

impeachment 弹劾;质疑

implementation 实施;执行

implied contract 默示合同

implied warranty 默示保证(保修)

imprisonment 监禁

imputable 可归罪于……的

inputation 归罪

in re 关于;案由

in recess 休庭

in rem 对物的(诉讼)

in session 开庭

inadmissible evidence 不可采证据

incarceration 禁闭;监禁

incest 乱伦

income tax 所得税

Income Tax Act 《所得税条例》

income tax on corporations 公司所得税

income tax on individuals 个人所得税

incompetence 无行为能力;无法律资格

incompetent 无行为能力的;无法律资格的

incorporation 法人;公司;组成公司

incorporator 公司创办人

independent regulatory agency 独立监管机构

indicative list 指导性名单

indictment 起诉书

indirect evidence 间接证据

indirect tax 间接税

individual choice 个人选择(权)

individual freedom 个人自由

individual omnicompetence 个人全权

individual proprietorship 个体业主

individual right 个人权利

ineffective 失效的

inequality 不平等

infamous 罪恶的;丑恶的



inference 推理;推论  
 infliction 处罚  
 informal adjudication 非正式裁决  
 informal rulemaking 非正式规则制定  
 information 信息;控告书  
 informer 耳目;情报员  
 initial ruling 初步裁定  
 injunction 禁令;强制令  
 injunctive relief 强制救济  
 injure 伤害  
 injustice 不公正  
 innocence 无罪  
 innocent 无罪的;无罪者  
 innocent owner defense 无过错所有人辩护  
 inquiry 调查  
 inquisitorial system 纠问式诉讼制度  
 insane 精神失常  
 insanity defense 精神失常辩护  
 inspection 检查;审查  
 installment land vendor 分期付款的土地出售人  
 installment plan agreement 分期付款购物协议  
 instruction 指示  
 instrument 文件  
 insurable interest 可保利益  
 insurable loss 可保损失  
 insurance 保险  
 insurance agent 保险代理商  
 insurance binder 临时保单  
 insurance broker 保险中间人  
 insurance card 保险卡  
 insurance coverage 保险范围  
 insurance law 保险法  
 insurance policy 保险单;险种  
 insurance premium 保险费  
 insurance proceeds 保险收益  
 insurance product 保险项目

insured 被保险人  
 insurer 保险人  
 intangible 无形的  
 intangible damage 无形损害  
 intangible property 无形财产  
 intangible personal property 无形的人身财产(权)  
 inter alia 除了别的以外  
 interfere 干涉;侵犯  
 interlocutory injunction 临时强制令;(诉讼)中间的强制令  
 intermediate appellate court 中级上诉法院  
 intermediation 调解  
 international business 国际商务  
 interrogation 讯问;审讯  
 intentional 故意的  
 intentional tort 故意侵权行为  
 interest 利息;权益;利益  
 interest rate risk 利率风险  
 interview 询问  
 invalid 无效的;不合法的  
 invalidate 使无效  
 invasion of privacy 侵犯隐私权  
 investigation 侦查;调查  
 investment 投资  
 investment portfolio of risk 投资风险组合  
 investment securities 投资证券  
 irrelevancy 无相关性  
 irrelevant 不相关的  
 irrelevant evidence 无相关性证据  
 irrevocable 不可撤销的  
 irrevocable life insurance trust 不可撤销的人寿保险信托  
 itinerant judge 巡回法官  

J

 joint tenancy 共同租借(权)



joint venture 合资企业  
 joint venture corporation 合资公司  
 joint venture with Chinese and foreign investment 中外合资企业  
 judge 法官  
 judge-made law 法官立法  
 judge's chamber 法官室  
 judge's charge to jury 法官对陪审团的指令  
 judge's instruction to jury 法官对陪审团的指示  
 judgment 判决; 裁定  
 judicial branch 司法部门  
 judicial clerkship 法院书记员职位  
 judicial decision 法官判决  
 judicial district 司法区  
 judicial interpretation 司法解释  
 judicial notice 司法认知  
 judicial opinion 法官判决意见  
 judicial review 司法审查  
 judicial scrutiny 司法检查  
 judicial subjectivity 审判主观性  
 judicial system 法院系统; 司法系统  
 judiciary 法官(总称); 法院系统  
 jurisdiction 司法管辖区; 管辖权  
 jurisprudence 法理学  
 juror 陪审员  
 jury 陪审团  
 jury charge 法官对陪审团的指令  
 jury pool 待选陪审员库  
 jury selection 挑选陪审员  
 jury trial 陪审团审判  
 justice 公正; 大法官  
 justice of the peace 治安法官  
 justifiable homicide 正当杀人  
 juvenile court 未成年人法庭  
 juvenile delinquency 未成年人违法行为

## K

Key man insurance 关键人保险  
 Key person insurance 关键人保险  
 Kickbacks 回扣  
 Kill 杀人  
 Killer 杀人者  
 Know-how 技术秘密; 商业秘密

## L

land use law 土地使用法  
 last clear chance doctrine 最后明显机会法则  
 law 法; 法律  
 law firm 律师事务所  
 law merchant 商业习惯法  
 law of evidence 证据法  
 law reform 法律改革  
 lawsuit 诉讼; 官司  
 lawyer 律师  
 lawyer in government 政府律师; 官方律师  
 lawyer in private practice 私人开业律师; 私人律师  
 lawyerette 律师娘; 律师姐  
 layman 外行人  
 lay witness 普通证人; 非专家证人  
 lease 租赁  
 lease agreement 租赁协议  
 legacy 遗产  
 legacy tax 遗产税  
 legal 合法的; 法律的  
 legal advice 法律咨询  
 legal commentary 法律评论  
 legal education 法律教育  
 legal effect 法律效力  
 legal enforcement 执法  
 legal English 法律英语  
 legal family 法系



legal history 法律史  
 legal instrument 法律文件  
 legal mechanism 法律机制  
 legal memorandum 法律备忘录  
 legal methodology 法律方法论  
 legal order 法律秩序  
 legal problem 法律问题  
 legal profession 法律职业  
 legal protection 法律保护  
 legal relationship 法律关系  
 legal representative 法律代表  
 legal safeguard 法律保障(措施)  
 legal system 法律体系;法律制度  
 legal theorist 法学理论家  
 legal writing 法律文书写作  
 legalese 法律涩语  
 legalism 法制  
 legislation 立法  
 legislative branch 立法部门  
 legislative history 立法史  
 legislature 立法机关  
 legitimate 合法的  
 levy 征收(税)  
 liability 责任;债务  
 liability insurance 责任保险  
 Liberty 自由  
 License plate (车)执照牌  
 License tax 执照税  
 lien 留质(权)  
 life estate 终生财(遗)产  
 Life insurance 人寿保险  
 Limited partnership 有限合伙  
 liquidated damages 预定违约金  
 liquidity risk 流动资金风险  
 literary property 著作权  
 litigant 诉讼当事人  
 litigation 诉讼;打官司

livestock insurance 家畜保险  
 loan 贷款  
 Lord chancellor (英国)大法官  
 loss of rights 丧失权利

## M

magistrate 司法官  
 Magna Charta of Great Britain 《英国大宪章》  
 mail order 邮购  
 majority opinion 多数(法官)的意见  
 malicious prosecution 恶意起诉  
 malfeasance 渎职(罪)  
 malpractice 渎职行为  
 mandate 命令;授权  
 mandatory insurance law 强制保险法  
 manslaughter 非恶意杀人  
 marine insurance 海上保险  
 marital status 婚姻状况  
 marital status classification 婚姻状况分类  
 maritime tort 海上侵权行为  
 market economy 市场经济  
 marriage 婚姻  
 marriage ceremony 婚礼  
 marriage certificate 结婚证书  
 marriage law 婚姻法  
 marriage relationship 婚姻关系  
 marriage termination rule (残疾人领取社会保  
 险补助的)结婚终止规则  
 material 实质性的  
 materiality 实质性  
 maxims of equity law 衡平法准则  
 Mayflower Compact “五月花号”(船名)公约  
 medical malpractice 医生不当行为  
 mental capacity 心智能力  
 mental condition 精神状态  
 mentor 辅导教师  
 minor issue 枝节问题;未成年人问题



Miranda Warning 米兰达忠(警)告  
 misapply 错误适用  
 misdemeanor 轻罪  
 mislaid property 错置财产  
 misrepresentation 虚假陈述  
 mistrial 无效审判  
 mock trial 模拟审判  
 Model Business Corporation Act 《标准实业公  
 司条例》  
 Model Penal Code 《标准刑法典》  
 Model State Administrative Procedure Act 《标  
 准州行政程序条例》  
 modern commerce Power test 现代商务(贸易)  
 权力检验标准  
 modern delegation of power doctrine 现代授权  
 法则  
 monopolization 垄断  
 monopoly right 专有权  
 moot court 模拟法庭  
 mortgage 抵押(品)  
 motion 动议;请求  
 movable property 动产  
 multiple listing 多重上市;多重登记  
 Multistate Bar Exam 多州律师资格考试  
 murder 恶意杀人;凶杀  
 murderer 杀人犯  
 mutilation 断肢

## N

National Association for the Advancement of  
 Colored People 全国有色人种促进会  
 National Conference of Black Lawyers 全国黑  
 人律师大会  
 National Conference of Commissioners on  
 Uniform state Laws 统一各州法律全国代表  
 大会  
 National Environmental Policy Act 《全国环境

政策条例》

National Institute of Minority Lawyers 全国少  
 数民族律师学会  
 National Law Journal 《国家法律学报》  
 narcotics distribution 麻醉品供销  
 narcotics trafficking 麻醉品交易  
 narcotics violation 麻醉品违法行为  
 natural justice 自然公正  
 negative form of protection 否定(或消极)形式  
 的保护  
 negligence 过失  
 negligent homicide 过失杀人  
 negligent tort 过失侵权行为  
 negotiable instrument 票据  
 negotiation 谈判;协商  
 New Deal (罗斯福)“新政”  
 no contest 无争辩  
 no par share 无面值股票  
 non-profit corporation 非营利公司  
 norm 规范;标准  
 not guilty plea 无罪答辩  
 notice 通知  
 notice of transfer 过户通知  
 notification 通知;通报  
 notion 概念  
 nullification process 无效程序

## O

object 反对  
 objection 反对;异议  
 obligation 义务  
 occupancy agreement 占用协议  
 offender 犯罪人  
 offense 罪行  
 offer 要约;发盘  
 offer of Proof 提供证明  
 Old Boy Network 老哥们关系网



Omission 不作为;不履行义务  
 Omniscience 有全部权力  
 Opening statement 开场陈述  
 Opinion testimony 意见证言  
 Oral contract 口头合同  
 order 命令;秩序  
 ordinance 法令  
 outstanding balance 未付款额  
 outstanding share 已发行股票  
 overrule 推翻;驳回  
 ownership 所有权  
 ownership interest 所有权益

## P

panel (法官或陪审员组成的)团或组  
 par value 面值  
 paramour 奸夫;奸妇  
 parent-child relation 父(母)子(女)关系  
 parent corporation 母公司  
 parental unfitness 父(母)不胜任  
 parole 假释  
 partnership 合伙  
 passage of title 产权转移  
 passive investor 消极投资人  
 patent 专利(权)  
 paternity 父亲身份  
 penal code 刑法典  
 penalty 刑罚  
 pending 待决的  
 penitentiary 监狱;教养所  
 penitentiary sentence 监禁刑  
 penology 刑罚学  
 per curiam 依法院所定  
 peremptory challenge 强制回避  
 perform 履行  
 performance 履行  
 performance bond 履行保证金  
 performers' rights 表演权  
 peril 危险  
 perjure 作伪证  
 perjury 伪证(罪)  
 perpetrate 犯(罪)  
 perpetrator 犯罪人  
 personal property 动产  
 personal right 人身权利  
 personal tort 人身侵权  
 persuasive authority 劝导性法源  
 petition 申请;请求  
 petty misdemeanor 微罪  
 physical exhibit 展示物品  
 physical injury 身体伤害  
 plaintiff 原告人  
 plea 答辩;辩解  
 plea of guilty 有罪答辩  
 plea of no contest 无争辩答辩  
 plea of not guilty 无罪答辩  
 police 警察  
 police magistrate 警务法官  
 police magistrate court 警察法院;警务法院  
 police power 警务权力;警察权力  
 policy 政策;保险(单)  
 policy holder 投保人  
 poll tax 人头税  
 portfolio of risk 风险组合  
 possession 占有(权)  
 postponement (诉讼)延迟  
 practice law 从事律师工作;开业做律师  
 practicing lawyer 开业律师  
 practice of law 律师实务  
 precedent 判例  
 precedential support 判例支持  
 predeprivation hearing 执行剥夺前的听证(会)  
 predictability 可预见性  
 preempt 优先于



preferential claim 优先索赔权  
 preferred stock 优先股票  
 prejudice 偏见  
 preliminary examination 预审  
 preliminary hearing 预审听证(会)  
 preliminary injunction 预先执行令  
 preliminary negotiation 预谈判;初步协商  
 premises 房屋;上述房屋  
 premium 保险费;红利;溢价  
 prenotice seizure 通知前扣押  
 preponderance of proof 优势证明  
 preponderant evidence 优势证据  
 prescription 时效;规定  
 presentation 陈述  
 presentence investigation 量刑前调查  
 Presidential Assassination Statute 《暗杀总统法》  
 presumption of innocence 无罪推定  
 pretrial motion 审前动议  
 prevailing doctrine 优势法则;流行学说  
 prevail 优先(适用)  
 prima facie 表面的;初步的  
 prima facie case 有表面证据之案  
 prima facie evidence 表面证据  
 primary authority 主要法源  
 principle of legality 法制原则  
 privacy 隐私权  
 private corporation 私有公司  
 private law 私法  
 private property 私有财产  
 private prosecution 私诉  
 privilege 特权;特许权;特免权  
 privileges and immunities clause 特权与豁免条款  
 pro se 自己;亲自  
 probable cause 可能理由;合理原因  
 probate court 遗嘱检验法院

probation 缓刑  
 probation officer 缓刑官  
 probative value 证明价值  
 probativeness 证明性  
 procedural history 程序史  
 procedural law 程序法  
 procedural regime 诉讼制度  
 procedural safeguard 程序保障  
 procedure 程序  
 proceedings 诉讼;程序  
 product liability 产品责任  
 profit 利润  
 profit corporation 营利公司  
 progeny 后代  
 prohibition 禁止  
 promise 许诺  
 promulgation 颁布  
 proof 证明  
 proof beyond a reasonable doubt 超出合理怀疑的证明  
 property 财产  
 property law 财产法  
 property right 财产权利  
 property tax 财产税  
 property tort 财产侵权行为  
 proponent 支持者;提议者  
 proprietor 个体业主  
 proprietorship 个体企业  
 proscription 禁止;剥夺公权  
 prosecuting attorney 公诉律师;检察官  
 prosecution 起诉  
 prosecutor 检察官;起诉人  
 prosecutor's case-in-chief 检方主诉  
 prospective juror 将任陪审员  
 prostitute 妓女  
 protective tariff 保护性关税  
 prove 证明



provisien 规定;条款  
 Provisions of Oxford 《牛津条例》  
 psychiatrist 精神病学家  
 public charge 受政府救济者  
 public corporation 公有公司  
 public defender 公共辩护律师  
 public good 公益  
 public law 公法  
 public offense 公罪(侵犯公共利益的犯罪)  
 public property 公共财产  
 public prosecution 公诉  
 public prosecutor 公诉人;检察官  
 public utilities 公用事业  
 publicly held corporation 公众持股公司  
 punishable 可处罚的  
 punishment 刑罚  
 punitive sanction 惩罚性处分  
 purpose 目的;宗旨  
 pursuant to law 依法

## Q

qualified property 有限制财产  
 quantum meruit (无合同规定时) 按合理价格支付;合理给付  
 quasi tort 准侵权行为  
 quote 引用;引证

## R

racial discrimination 种族歧视  
 racial segregation 种族隔离  
 rain insurance 雨水保险  
 rampant 猖獗的  
 rape 强奸  
 ratify 认可  
 rational relationship test 合理关系检验标准  
 real estate 不动产  
 Real Estate Settlement Procedure Act 《不动产

## 纠纷解决程序条例》

real evidence 实在证据  
 real property 不动产  
 reasonable basis 合理根据  
 reasoning 论证;推论  
 rebuttable presumption 可驳回推定  
 rebuttal evidence 反驳证据  
 recess 休庭  
 reciprocal exemption statutes 互免税法律  
 reckless conduct 疏忽大意行为  
 reckless homicide 疏忽大意杀人  
 recourse 追索权;求偿权  
 recovery 追索;补偿  
 redemption 赎回  
 redress 矫正;赔偿  
 registration sticker 注册贴签  
 regulation 法规;规章  
 rehearing 复审  
 reinstatement (权利)恢复  
 reinstatement fee 恢复费  
 release 释放  
 relevancy 相关性  
 relevant evidence 相关证据  
 relief 救济  
 remand 发回重审  
 remedy 补救  
 repeal 废止;撤销  
 repealer 废止议案  
 repeat offender 累犯  
 representation 代理  
 res ipsa loquitur 不言自明的  
 reservation of power 权力保留  
 reserve 储备金(保险)预备金  
 reserve portfolio of risk 预备金组合风险  
 resolution 决议;解决  
 rest 停止陈述  
 Restatements of law 《法律注释汇编》



restitution 恢复原状  
 restitutionary relief 恢复原状的救济  
 restraint 约束; 限制  
 retain 连任  
 retire 退休; 退庭  
 retroactive 有溯及力的  
 retroactive effect 溯及力  
 revenue 税收  
 Revised Uniform Limited partnership Act 《统一有限合伙修订条例》  
 revocable trust 可撤销的信托  
 revocation 撤回  
 right 权利  
 right to privacy 隐私权  
 rigid procedure 刚性程序  
 risk 风险  
 risk transfer 风险转移  
 robbery 抢劫(罪)  
 Roman Law 罗马法  
 Roman Law Legal System (or Family) 罗马法系  
 roster 花名册; 专门人员名单  
 rule of evidence 证据规则  
 rule of Law 法治; 法律规则  
 rulemaking 规章制定; 规则制定  
 ruling 裁定  
 ruling on evidence 关于证据的裁定

## S

Safety responsibility law 安全责任法  
 Sales tax 销售税  
 Sanction 制裁; 处分; 罚则  
 Sanitary code 卫生条例  
 search 搜查  
 search warrant 搜查令(证)  
 second instance 二审  
 secondary author'ty 次要法源  
 secondary benefit 次位补助金  
 secondary financing 间接融资  
 secondary party 间接当事人; 次位当事人  
 Secret Service (联邦) 保密署  
 Secretary of state 州务部长  
 secured debt 担保债务  
 securities 证券  
 Securities and Exchange Commission 证券交易委员会  
 Securities Exchange Act 《证券交易条例》  
 securities law 证券法  
 security 担保; 保安; 证券  
 seductive 诱人堕落的  
 seize 扣押  
 seizure 扣押  
 seizure warrant 扣押令(状)  
 self-defense 自卫; 正当防卫  
 self-identification 自我认定  
 self-incrimination 自我归罪  
 seminar 研讨班; 研讨会; 研讨课程  
 separate 分立; 分局  
 separate legal entity 独立法律实体  
 separate property 分有财产  
 separation of powers 三权分立  
 settlement agreement 清偿协议  
 settlor 财产授与者  
 share 股份; 股票  
 share holder 股东  
 shell corporation 空壳公司  
 shoplifting 商店偷拿行为  
 short title 简称  
 shyster 讼棍  
 sickness insurance 疾病保险  
 simulation 模拟(练习)  
 slander 诽谤  
 Social Security Act 《社会保险条例》  
 social security benefit 社会保险补助金



social security tax 社会保险税  
 solicitor 诉状律师  
 source 渊源  
 sovereign power 主权  
 special court 特别法院; 专门法院  
 special property 特别财产  
 specific performance 特定履行  
 specimen 样本  
 stamp tax 印花税  
 standard of proof 证明标准  
 standing 依据  
 stare decisis 遵从前例  
 state attorney 州检察官  
 state property 国家财产  
 stated capital 设定资本  
 statute 制定法; 法律  
 statute-like norm 准法律规范  
 statute of frauds 诈欺条例; 反欺诈法  
 statutory authority 制定法法源  
 statutory crime 制定法规定之犯罪; 法定犯罪  
 statutory law 制定法  
 statutory measure 法定措施  
 statutory offense 制定法规定之犯罪; 法定犯罪  
 statutory provision 法律规定  
 stay 延缓(审判或执行)  
 stock 股票  
 stock exchange 股票交易  
 stock retirement plan 退(赎)股计划  
 stock transfer tax 股票过户税  
 strategy 战略; 策略  
 strict liability tort 严格责任侵权  
 strike insurance 罢工保险  
 sub judge 在审判中; 尚未判决  
 subject 主体; 标的  
 subject matter 主题事项; 标的  
 subject property 标的财产  
 subject to financing clause 融资条件条款

subpoena 传唤(令)  
 subsidiary corporation 子公司; 附属公司  
 subsistence allowance 生活津贴  
 substantial evidence 实质(体)证据  
 substantial law 实体法  
 substantive due process 实体性正当程序  
 substantive law 实体法  
 sue 起诉; 诉  
 sufficient evidence 充足证据  
 suit 诉讼  
 summary judgment 即决判决  
 supervisor 监察; 监委  
 support 供养; 抚养  
 supreme court 最高法院  
 supreme law 最高法律(宪法)  
 suspect 嫌疑人  
 suspicion 嫌疑; 怀疑  
 sustain 维持; 认可

## T

tangible 有形的  
 tangible evidence 实物证据  
 tangible property 有形财产  
 tariff 关税  
 task force 专项研究组; 专案组  
 tax 税; 税收  
 tax assessment procedure 税额评定程序  
 tax court 税收法院  
 tax evasion 逃税  
 tax law 税法  
 taxation 税收; 税务  
 taxation Law 税收法; 税务法  
 tenant 承租人  
 term 条款; 期限  
 testamentary trust 遗嘱委托  
 testator 立遗嘱人  
 testify 作证



testimonial evidence 言词证据  
 testimony 证言  
 the Dispute Settlement Body (DSB) 争端解决机构  
 the European Intellectual Property Review 《欧洲知识产权评论》  
 the Fleet Street Reports 《舰队街判例汇编》  
 title 产权书; 所有权  
 title insurance 产权保险  
 title insurer 产权保险人  
 title plant 产权书库  
 tort 侵权(行为)  
 tort claim 侵权索赔(请求)  
 tortfeasor 侵权行为人  
 tort law 侵权法  
 tortious 侵权行为的  
 trade marks 商标  
 traffic accident 交通事故  
 traffic ticket 交通违章(罚款)通知单  
 tranquility 安宁  
 transaction 交易  
 transfer 转让; 过户  
 travel accident insurance 旅行意外保险  
 treason 判国(罪)  
 treaty 条约  
 trespass 侵犯; 侵害  
 trial 审判  
 trial by judge 法官审判  
 trial by jury 陪审团审判  
 trial court 审判法院; 初审法院  
 trial process 审判程序  
 trust 信托; 托拉斯  
 trustee 托管人  
 truth-in-lending form 真实借贷表  
 two-house legislature 两院制立法机关  
 type of evidence 证据类型

## U

umpire 仲裁人  
 unanimous 意见一致的  
 unanimous court 合意(意见一致的)法庭  
 unanimous verdict 一致裁决  
 unauthorized practice laws 有关无授权开业活动的法律  
 unclaimed property 无主财产; 无人认领财产  
 unconscionability 显示公平  
 unconstitutional 违宪  
 undercover 秘密的; 化装的  
 undercover narcotics purchase 化装购买麻醉品  
 underpinnings (理论) 基础  
 underwrite 下签; 承保  
 underwriting portfolio of risk 承保风险组合  
 unemployment insurance 失业保险  
 unemployment tax 失业税  
 Uniform Bills of Lading Act 《统一提单条例》  
 Uniform Commercial Code 《统一商法典》  
 Uniform Conditional Sales Act 《统一附条件销售条例》  
 Uniform Negotiable Instrument Act 《统一票据条例》  
 Uniform Partnership Act 《统一合伙条例》  
 Uniform Rules of Evidence 《统一证据规则》  
 Uniform Sales Act 《统一销售条例》  
 Uniform Stock Transfer Act 《统一股票过户条例》  
 Uniform Trust Receipts Act 《统一信托单据条例》  
 Uniform Warehouse Receipts Act 《统一仓库单据条例》  
 unintentional killing 非故意杀人  
 unjust enrichment 不当得利  
 unlawful conduct 非法行为  
 unwritten law 不成文法



U. S. attorney 联邦检察官

Use tax 使用税

## V

validation 有效性;生效;批准

validity 合法性;正当性

venue 审判地

verdict 判决;裁定

verification 鉴定

veto 否决

victim 受害人;被害人

vindicate 辩护

violate 违犯;侵犯

violation 违法

voice identification 声音认定;声纹鉴定

void 无效的

voidable 可撤销的;可使无效的

voir dire (对陪审员的)诚实审查

voting right (投票)表决权

## W

waive 放弃(权利)

warrant 批准令(状)

warrantless seizure 无证扣押

warranty 保证;担保;保(修)单

weight of evidence 证据份量

welfare 福利

welfare recipient (社会)福利受领人

welfare right (社会)福利权

witness 证人

witness with knowledge 知情证人

writ (法院)令状

writ upon the case 本案令状

written law 成文法

written partnership agreement 书面合伙协议

wrongful death action 非正常死亡之诉

## Y

Young Lawyers Division 青年律师分会

Your Honor 法官阁下

Your Witness 证人先生或女士(尊称)

## Z

zoning 区域规划

zoning ordinance 区域规划法令