3 A Brief Introduction to Law and Legal Institutions

"You are old," said the youth, "and your jaws are too weak
For anything tougher than suet.
Yet you finished the goose, with the bones and the beak.
Pray, how do you manage to do it?"
"In my youth," said his father, "I took to the law,
And argued each case with my wife.
And the muscular strength, which it gave to my jaw,
Has lasted the rest of my life."

From "Father William" in Lewis Carroll,
Alice's Adventures in Wonderland

The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

Oliver Wendell Holmes,
The Common Law 1 (1881)

An economist who picks up a law journal will understand much more of it than a lawyer who picks up an economics journal. For this reason, it is not hard to convince a lawyer that he does not know economics. (Convincing him that he *should* learn economics is harder!) On the other hand, economists are sometimes hard to convince that any aspect of social life is not, at its root, really economics. With respect to the law, economists sometimes wonder what lawyers really study: Is the law a branch of philosophy? Is it a list of famous cases? Is it a collection of rules?

In any case, economists cannot contribute significantly to law without studying it. This chapter provides an introduction to the law for nonlawyers. We shall explain, first, differences and similarities between the two great legal traditions that spread from Europe to much of the world; second, the structure of the United States' federal and state court systems; third, how a legal dispute gets raised and resolved in systems like that of the United States; and finally, how the legal rules made by judges evolve.

I. The Civil Law and the Common Law Traditions

Legislatures make laws by enacting bills, which judges must interpret and apply. If legislation is deliberately vague or inadvertently ambiguous, judges can choose among several different interpretations. Sometimes the choice of an interpretation overshadows the enactment of the bill, in which case the judge makes the law more than the legislature. Judges make law by interpreting legislation in all legal systems with independent courts.

Judges make law in other ways as well. In medieval Europe, the king in most countries could issue pronouncements that were law, and the king's courts possessed similar powers. However, the king's courts were not free to pronounce as law any command that they wished. According to one tradition in legal theory, the courts of the English king were to examine community life and "find" law as it already existed. The courts of the English king were to select among prevailing social norms and enforce some of them. These enforceable social norms were supposedly the "laws of nature," which reason and necessity prescribed.

The finding of a rule of law by a court of the English king created a *precedent* that future courts were expected to follow.[1] A precedent in common law resembles a generally accepted interpretation in civil law. Precedent was followed flexibly, not slavishly, so the law changed gradually. Over many years, the king's courts "found" many important laws, especially in the areas of crimes, property, contracts, and accidents ("torts"). These findings are called the "common law" because they are allegedly rooted in the common practices of people. Common law is still applied in the English-language countries, except where superseded by legislation.

Legal history is different in France and the other countries of Europe: When France revolted at the end of the eighteenth century, the revolutionaries thought that the judges were as corrupt and worthless as the king, so they killed the king and extinguished his laws, thus abolishing the common law of France. A comprehensive set of statutes was required to fill the void, so people would know what counts as property, how a valid contract is formed, and who is to bear the cost of accidents. Napoleon supplied them by commissioning legal scholars to draft the rules called the *Code Napoléon*, which was promulgated in 1804. The scholars who drafted it took as their model the *Corpus Juris Civilis* ("The Body of the Civil Law"), which was compiled and edited in A.D. 528–534 at the behest of the Roman emperor Justinian. Thus, the French revolutionaries looked to ancient sources and pure reason for law, rather than to the more immediate heritage derived from medieval times.

Napoleon's armies spread the *Code Napoléon* through much of Europe, where it remained long after his troops withdrew. Similarly, Europeans spread their law throughout the world, and this influence persisted long after the colonial empires collapsed. The "civil law tradition," as it is called, predominates in most of Western

[1] "Precedent" refers to the practice of resolving similar cases in a similar fashion. If it is known that a court is going to resolve a dispute by applying precedent, then the disputants have a good idea what the legal resolution of their dispute might be. This can induce the disputants to settle the matter themselves against the background law that they know the court will use.

Europe, Central and South America, the parts of Asia colonized by European countries other than Britain, and even in pockets of the common law world, such as Louisiana, Québec, and Puerto Rico. The common law tradition, which originated in England, prevails not only in Great Britain, but also in Ireland, the United States, Canada, Australia, New Zealand, and the parts of Africa and Asia that Britain colonized, including India.

Besides these two great traditions, the unique history of each country puts its own stamp on the law. For example, Japan, which was never colonized, voluntarily adopted a code that draws heavily on the German civil code while yet remaining distinctively Japanese. In much of the Middle East, Islamic law blended with, or displaced, the law of the European colonialists. In Eastern Europe, communism bent the civil law tradition to its own purposes, and now the post-Communist regimes are trying to straighten it.

The common law and civil law traditions differ significantly with respect to how judge-made law is justified. Common law judges traditionally justify their findings of law by reference to precedent and social norms, or by broad requirements of rationality presupposed by public policy. Civil law judges traditionally justify their interpretation of a code directly by reference to its meaning, which scholars tease out in lengthy commentaries. Because common law judges rely relatively more on past court decisions and civil law judges rely relatively more on the words in statutes, the common law system is based more on precedent than the civil law system. The difference in the pattern of justification affects the training of lawyers. The common law method is taught by reading cases and arguing directly from them, whereas the civil law method is taught by reading the code and arguing from commentaries on it.

All such generalizations about the difference between the two traditions, however, seem simplistic relative to the subtlety and complexity of reality. For example, although the United States is ostensibly a common law country, the American states have tried to obtain greater uniformity in commercial law by enacting the *Uniform Commercial Code*. Deciding disputes that fall under the *Uniform Commercial Code* in America has many similarities to deciding disputes that fall under the French Civil Code. Additionally, the American Law Institute, an organization founded in the 1920s, meets periodically to restate the law as it is emerging in the various states. These restatements, such as the *Restatement (Second) of Contracts* and the *Restatement (Second) of Torts,* serve a similar function to the codes that are thought to be characteristic of the civil law countries. Comparative law scholars vigorously debate whether the differences between civil and common law are more apparent than real.

Besides the difference in history between common and civil law, the laws are applied differently in the two traditions. In the common law countries, the arguments for the two sides in a dispute are made exclusively by their lawyers, and the judge is not supposed to direct a line of questioning or develop an argument. In this *adversarial process*, the judge acts more or less as a neutral referee who makes the lawyers follow the rules of procedure and evidence. The principle underlying the adversarial system is that the truth will emerge from a vigorous debate by the two sides.

In contrast, the civil law judge takes an active role in directing questions and developing arguments. In this *inquisitorial process*, the judge is supposed to ferret out the truth. The lawyers often have to respond to the judge, rather than develop the case

themselves. The principle underlying the inquisitorial system is that the court has a direct interest in finding the truth regarding private disputes and crimes.

Another difference between the two systems concerns the use of juries. Juries are more commonly used in common law systems. In America, either party to a dispute usually has the right to a jury trial, although both parties sometimes waive this right and allow the judge to decide the case. In England, the jury has been abolished in almost all civil trials since 1966,[2] but it is often used in criminal trials. (Notice the different use of "civil" in the preceding sentence.[3]) In France, however, the jury has been abolished for all trials except the most serious crimes, like murder. In general, the abolition of juries is more advanced in continental Europe than in some common law countries. In a common law trial before a jury, the judge is supposed to decide questions of law, whereas the jury is supposed to decide questions of fact.

In every legal system, laws form a hierarchy. The constitution takes precedence over statutes, and statutes usually take precedence over rules issued by the executive or government agencies. In countries with common law, statutes take precedence over it. "Taking precedence" means that the higher law prevails in the event of conflict. The courts, as the main interpreters of law, must decide whether laws conflict. We have explained that judges make law indirectly by interpreting statutes or codes. Another way that judges make law is by finding a conflict between laws and setting aside the lower-level law. Finally, judges make common law directly in those countries that maintain the common law system—a process we explain later in this chapter.

Constitutions are necessarily general and vague, so their interpretation is especially problematic. The power to review legislation for its constitutionality gives courts the power, in principle, to set aside laws enacted by the legislature. This power is potentially dangerous because it brings judges into conflict with the elected representatives of the nation. The extent to which this power is exercised varies greatly from one country to another. In the United States, the federal courts have few limits on their ability to strike down laws that, in the courts' opinion, contradict the Constitution. Some of the most profound laws in America have been made by courts interpreting the Constitution, as in *Brown v. Board of Education* in 1954, which eventually ended laws mandating racial segregation of schools. In other countries, such as Great Britain, the courts do not have the power to review statutes for their constitutionality, and the courts never strike down legislation as unconstitutional. The scope of constitutional review, which is fundamental to the power and prestige of courts, has no necessary connection with whether the country's legal tradition is common or civil law.

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[2] Except in cases involving defamation.

[3] "Civil law" has two meanings. It may refer to the system of law in most of continental Europe that rejects common law. In addition, "civil law" may refer to laws controlling disagreements between two private parties, which might arise, say, from a broken contract or an automobile accident. In this latter sense, the opposite of "civil law" is criminal or penal law, in which actions are initiated by the state's prosecutor against someone accused of violating a criminal statute, such as forgery or murder. Thus, the common law of, say, contracts can be described as "civil law," meaning "private law" or "not criminal law."

II. The Institutions of the Federal and the State Court Systems in the United States

In the United States, whether at the state or the federal level, the court systems are organized in three tiers. These tiers constitute a hierarchical pyramid, with a very broad base of many courts, an intermediate level with a smaller number of courts, and a single court at the top of the pyramid. At the lowest level are the *trial courts of general jurisdiction*. These are the "entry-level" courts that first hear a wide array of civil and criminal disputes. The trial courts of general jurisdiction are "courts of record"; that is, the proceedings are written down and saved by the government. In the state systems these courts are usually organized along county lines. For example, in the State of Illinois there are 102 counties, and each has a "Circuit Court" that serves as the trial court of general jurisdiction within the county. These trial courts have different names in different states: In California they are called "Superior Courts"; in New York State, "Supreme Courts." The nearly universal practice is for each civil and criminal case to be tried to a single judge and possibly to a jury.

In the federal system the entire country is divided into 94 judicial districts, each of which contains a federal district court, which is the trial court of general jurisdiction for the federal judiciary. Every state in the Union has at least one federal district court, and about half have *only* one. The District of Columbia has its own district court. The larger states, where larger numbers of disputes involving federal questions arise, have up to four district courts, usually organized along geographical divisions of the state. New York has four districts: the Southern, the Northern, the Eastern, and the Western. Illinois has three federal districts: the Northern, the Central, and the Southern. As the volume of federal litigation has grown, Congress has responded not by creating more districts but by appointing more judges within each district. One of the busiest districts is the Southern District of New York, which contains most of New York City. As of 2010, there were 44 district judges in that district (and 15 magistrate judges).[4] Another busy district, the Northern District of Illinois, has 32 district judges (and 14 magistrate judges).[5] The usual procedure in the federal districts is for a single judge to hear each case, but a three-judge panel sometimes hears a case.

In addition, the federal court system includes several specialized tribunals. For example, there are special tax courts, and federal administrative agencies, such as the Federal Communications Commission, have administrative law judges who hear arguments about matters before those agencies. There is also, as we shall soon see, a special appellate tribunal in the federal system for dealing with intellectual property cases.[6]

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[4] In the last edition of this book, there were 25 district judges in that district.

[5] In the last edition there were 12 district judges in the Northern District of Illinois. Magistrate judges are appointed by district court judges in each federal district for renewable eight-year terms. Those magistrates preside over trials for federal misdemeanor crimes and hear preliminary motions in more serious federal crimes and pretrial motions for many civil cases. Magistrates may preside over federal civil trials if the parties consent.

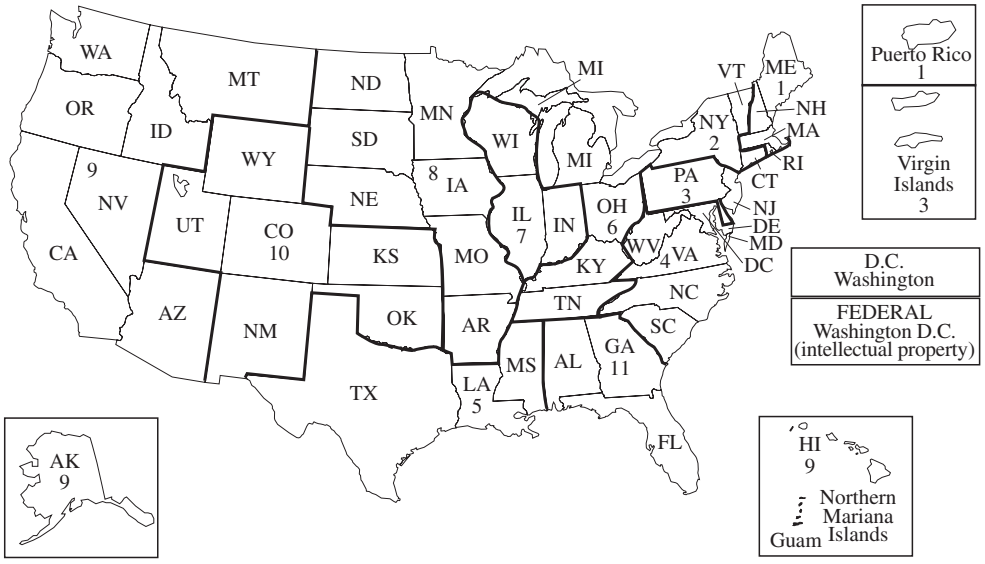
[6] As of August 2010, there were a total of 678 federal district court judges, 179 Court of Appeals judges, 9 judges on the Court of International Trade, and 9 justices of the United States Supreme Court for a total of 875 federal judges. There are currently 98 vacancies in the federal judiciary. Because Article III of the *U.S. Constitution* provides for these judges, the 875 federal judges are called "Article III judges."

Above the trial courts in the state and federal systems are *appellate courts* or *courts of appeal*. In most state court systems, there is only one court of appeal. But about one-third of the states and the federal system have *intermediate appellate courts* that stand between the trial courts of general jurisdiction and the highest court (the *court of last resort*). For example, in Illinois there are five intermediate appellate districts with a total of just over 50 justices. Where these courts exist, parties from the trial court may appeal "as of right," which means that so long as they are willing to pay the costs involved, the parties may always seek appellate review of a lower court's judgment. Appeal is also a right in the federal system, at least from the district courts to the intermediate courts of appeal.

While there may be a right for either party to appeal the judgment of the trial courts of general jurisdiction, matters may be different if either party wishes to appeal the judgment of an intermediate appellate court. In both the state and the federal judiciary, the highest appellate court typically has a *discretionary* right of review. This means that the Supreme Court of Illinois, the Supreme Court of the United States, and all other courts of last resort may select which cases they will review, within certain limits. Some cases—for example, disputes between two states—come to the United States Supreme Court directly and without the discretion of the justices. And in many states the highest court is obligated to review death sentences. Thus, the United States Supreme Court and the highest courts in the states control most, but not all, of their docket.

An intermediate court of appeal in the federal judiciary is called the "Court of Appeals for the ___ Circuit." There are thirteen of these circuits, as Figure 3.1 indicates. Eleven of these courts of appeal are numbered; for example, the First Circuit is in New England; the Seventh Circuit covers Indiana, Illinois, and Wisconsin; and the Ninth Circuit covers the West Coast, some of the mountain states, and Alaska and Hawaii. The District of Columbia constitutes its own circuit and also has its own district court. All the other circuits include several states. An unsuccessful litigant from

FIGURE 3.1
United States Courts of Appeal and United States District Courts.



the federal district court can take an appeal, as a matter of right, to the court of appeals. Those courts often sit in a panel of three judges. Sometimes, for a particularly significant case, all of the circuit judges will sit together to decide the case. In that case the court is said to be sitting *en banc* or "in bank." Where more than one judge hears a case, the matter is decided by majority vote.

There is also a special intermediate appellate court in the federal system just for hearing matters regarding intellectual property: the United States Court of Appeals for the Federal Circuit. Congress established that court in 1982. This is the only U.S. Court of Appeals defined by its subject matter jurisdiction rather than by geography. The U.S. Court of Appeals for the Federal Circuit assumed the jurisdiction of the U.S. Court of Customs and Patent Appeals and the appellate jurisdiction of the U.S. Court of Claims. There are 15 judges on the Federal Circuit.

The Supreme Court of the United States is the highest court in the federal judiciary. That court has nine members, consisting of the Chief Justice of the United States and eight Associate Justices. All of the justices, rather than a panel, decide each case. The Court begins its work on the first Monday in October and concludes its term sometime in June of the following year. The workload of the Supreme Court increased significantly until the 1980s; since then the number of opinions that the Supreme Court issues has declined significantly. Typically, the justices decide less than 10 percent of the cases submitted to them for review. There is lively dispute about whether this figure is too large or too small. In the recent past some commentators have urged Congress to establish a national court of appeals between the courts of appeals and the Supreme Court. The argument is that this National Court would handle the more routine appeals arising from the thirteen circuits (for example, those in which there is a split among the circuits, which means that some circuits say the law is one way and other circuits say the opposite). Proponents say this would free up the Supreme Court to devote more of its energies to truly important cases.

Finally, there are rules that specify whether a dispute should be heard in the state or the federal court system.[7] This is often a matter of great strategic significance in an attorney's handling of a case. The general rules for deciding jurisdiction are relatively straightforward. State courts have jurisdiction in disputes involving state statutes or in civil actions between residents of that state or in cases arising under federal law when Congress has not given exclusive jurisdiction to the federal courts.

The jurisdiction of the federal courts is defined by Congress, through the powers assigned in the Constitution. That jurisdiction is limited to three principal areas:

1. Federal questions—that is, those matters arising under the United States Constitution or federal laws or treaties.[8]
2. Cases to which the United States is a party. Typically, these are criminal cases under federal statute law.

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[7] The rules for resolving whether a state or federal law should apply in a particular dispute are complex and themselves constitute a special course in law school called "Conflict of Laws."

[8] There used to be a minimum dollar amount in controversy ($10,000) before a case could be a federal case, even if it was a federal question. That minimum no longer applies to matters arising under federal law.

3. Diversity cases—any civil dispute, currently involving more than $75,000, between citizens of different states. In the late eighteenth century, Congress allowed these disputes to be removed from state to federal courts because it felt that state loyalties were so strong that the citizen of another state might lose in a state court, regardless of the merits of his or her case, simply because he or she was a "foreigner."[9]

In the event that a federal district court hears a diversity dispute *not* involving a federal question, the Court will generally apply the law of the state in which it sits. Today diversity of citizenship is no longer as compelling a reason for the federal courts to assume jurisdiction as it was 200 years ago. Indeed, former Chief Justice Burger urged Congress to ease the caseload of the federal judiciary by entirely removing the diversity cases from federal jurisdiction.[10]

As to the selection and tenure of judges, there are two broad practices. For the federal bench, the rule is appointment by the president with the advice and consent of the Senate for life tenure with removal only by impeachment by the House of Representatives and conviction by the Senate. For state judges in a majority of the states, the rule is election to the bench and limited tenure. For the remainder of the states, the state judiciary is nominated by the executive branch and approved by the legislature for varying, but fixed, terms.

III. The Nature of a Legal Dispute

A legal dispute arises when someone claims to have been illegally harmed at the hands of another. It is possible that the victim and the injurer can resolve their dispute themselves, but sometimes they cannot. The person who feels injured may have a *cause of action*, that is, a valid legal claim, against another person or organization. To assert that action, he files a *complaint* and is, therefore, referred to as the *plaintiff*. The complaint must state what has happened, why the plaintiff feels that he has been injured, what area of law is involved, what statute or other law is relevant, and what relief he wishes the court to give him. The complaint and the management of the subsequent aspects of the dispute are complicated matters; typically, private citizens retain the services of a lawyer, who usually has far more experience in these matters than does the citizen, to help them in all this.[11]

The person who is alleged to have injured the victim or plaintiff is called the *defendant* and must *answer* the complaint. The answer does not go into detail about the

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[9] In 2007 Congress raised the minimum amount in controversy in diversity cases in order to alter the caseload of the federal courts. Clearly, the greater the amount in controversy required, the fewer the number of diversity cases that will be eligible for resolution by the federal courts.

[10] But there is still an argument for maintaining federal jurisdiction in diversity cases where the benefits of a decision may accrue to the people in one state and the costs fall on the people of another state.

[11] Private citizens may, of course, represent themselves in a legal dispute. That is referred to as someone appearing *pro se*—that is, "for himself." A common joke among lawyers is that a person who represents himself has a fool for a client.

matters at hand; rather, it is a short statement of what the defendant intends to argue in detail if the matter goes to trial. Thus, the answer may say that the facts as alleged are true but that even so, the defendant is not legally responsible for the plaintiff's misfortune. Figuratively, this form of answer says, "So what?" Or the answer may say that the facts as alleged in the complaint are incorrect and that when the true facts are known, the defendant will be seen to be innocent of any wrongdoing.

The dispute may well stop at this point. For example, the parties may decide not to proceed to trial. They may drop the whole matter, or they may *settle* their dispute—that is, reach a mutually satisfactory agreement between themselves. If the case is not settled or dropped, a judge must make a determination based on the complaint and the answer whether there is sufficient reason to proceed to trial. The judge may determine that the plaintiff has failed to state a valid cause of action or that the defendant has made a complete and convincing answer to the complaint. If so, she might dismiss the complaint or enter *summary judgment* for the defendant. Usually, she will allow the parties to proceed to trial. Parties may appeal from a summary judgment or a dismissal.

If the dispute proceeds to trial, a jury may be empaneled to determine the facts, or else the case will be tried to a judge without a jury; this latter situation is called a *bench trial*. Each side will develop evidence and testimony supporting its assertions, and then the jury or judge will retire to determine who wins.[12] The standard that the jury or judge will use to make this determination is by a *preponderance of the evidence*. That means that if the plaintiff's arguments are more believable than the defendant's, then the plaintiff wins; if the defendant's are more believable, the defendant wins. Some people say that the preponderance-of-the-evidence standard means that if the plaintiff's story is 51 percent believable, she wins. Notice that this standard, which is the routine standard in cases involving private parties as litigants, is different from the one that is used in criminal proceedings. There, the prosecution must convince the jury that the defendant is guilty *beyond a reasonable doubt,* a much more exacting standard than is preponderance of the evidence.

The courts can and have established other standards for prevailing in private law disputes. For example, some jurisdictions have created a standard of *clear and convincing evidence* for some aspects of a civil case, such as the award of punitive damages. No one can be certain exactly what that standard entails, but it is certainly more demanding than the preponderance-of-the-evidence standard and less demanding than the beyond-a-reasonable-doubt standard of criminal law.

The jury returns with a *verdict,* which says, simply, which party wins. But the verdict is not the end of the matter. The judge must *enter judgment on the verdict.* It is the *judgment,* not the verdict, that is the controlling action of the court. Most of the time the judge issues a judgment that follows exactly the jury verdict. But in a few rare cases the judge decides that the jury got the matter entirely wrong and enters a *judgment non obstante verdicto* or j.n.o.v. (judgment notwithstanding the verdict), holding the exact opposite of what the jury decided.

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[12] Even after the trial has begun but before the judge or jury returns with a verdict, the parties are free to settle the case. There are even examples—about which we have a question in Chapter 11—regarding situations in which the plaintiff has secretly settled with one of multiple defendants but allows the trial to go forward to a conclusion.

In a civil dispute, either party, winner or loser, may appeal the court's decision. The winner may appeal because he feels that he has not received everything to which he is entitled; the loser may appeal for the obvious reason that he thinks that he ought to have won. Interestingly, the ground for the appeal must be that the court below made a mistake about the relevant *law,* including the relevant general principles that the court applied and the procedures that were used in court, but not about the *facts.* For instance, the appellant (the party filing the appeal) may allege that the judge gave the jury improper instructions about what the relevant law was, or about what facts they could and could not consider, or that the judge improperly excluded some evidence or testimony from the jury's consideration.

At the appellate level there will be no new evidence or facts introduced. The appellate court takes the facts as developed in the trial court as given. The only people to appear before the appellate panel will be the attorneys for the appellant and appellee. The attorneys will submit written briefs to the appellate panel and then appear before the panel for oral argument, during which they may receive very close questioning on the matters at hand. There may be additional briefs submitted by parties who are called *amici curiae* (friends of the court); these parties are not directly involved in the legal dispute but feel that the legal issue involved touches their interests sufficiently that they would like the court to consider their arguments in addition to those of the appellant and appellee.

The appellate panel retires to consider the matter and later issues its opinion. The judges may be in unanimous agreement and issue only one opinion. However, there may be a split in the panel, and that split may result in multiple opinions: a majority and a minority or dissenting opinions. The appellate panel may *affirm* the lower court's judgment or *reverse* that judgment. In some instances, the panel *remands* the matter (that is, sends it back) to the lower court for specific corrective action, such as a recalculation of the damages owed to the plaintiff.

IV. How Legal Rules Evolve

We now consider a sequence of cases in order to apply the preceding ideas and show how law evolves. The three cases come from England and concern *tort law,* which covers accidents.

BUTTERFIELD V. FORRESTER, 11 EAST 60 (K.B., 1809)[13]

This was an action on the case[14] for obstructing a highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown down with his horse, and injured, etc. At the trial before Bayley, J.,[15] at Derby, it appeared that the defendant, for the purpose of making some repairs to his house, which was close by the roadside at

[13] Our selection and discussion of these cases owes a great debt to the stimulating lectures given by Professor Robert Summers to the Fifth Legal Institute for Economists.

[14] The phrase "action on the case" refers to an old legal category of dispute. Simply read it as "dispute."

[15] "J." means "Judge" or "Justice" and, by tradition, opinions are headed by the last name of the judge or justice who wrote the opinion.

one end of the town, had put up a pole across part of the road, a free passage being left by another branch or street in the same direction. That the plaintiff left a public house [a tavern] not far distant from the place in question at 8 o'clock in the evening in August, when they were just beginning to light candles, but while there was light enough left to discern the obstruction at one hundred yards distance; and the witness who proved this, said that if the plaintiff had not been riding very hard, he might have observed and avoided it; the plaintiff, however, who was riding violently, did not observe it, but rode against it, and fell with his horse and was much hurt in consequence of the accident; and there was no evidence of his being intoxicated at the time. On this evidence, Bayley, J., directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant, which they accordingly did.

QUESTION 3.1:

a. Who is the plaintiff? What is he asking the court to do?
b. Is there a statute involved in this dispute?
c. Who won?
d. Was the jury asked to determine fact or law? How was the law stated?

When this case was tried, English law accepted the principle that a defendant whose negligence caused the plaintiff's injury would be held liable. Consequently, the judge instructed the jury that the defendant should be held liable if he could have avoided the accident by taking "reasonable" care. This case presented a novel issue: Suppose that the defendant was negligent, *but* further suppose that the *victim* was also negligent. Should the defendant still be held liable for the victim's losses? An excerpt from the opinion of the judge in this appeal follows.

LORD ELLENBOROUGH, C.J.

A party is not to cast himself upon an obstruction which had been made by the fault of another, and avail himself of it, if he does not himself use common and ordinary caution to be in the right. In case of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff. [C]ontributory negligence is a complete bar to recovery.

QUESTION 3.2:

a. Who appealed the judgment?
b. Who won the appeal?
c. What is the judge's holding?

When precedent does not provide a clear rule for resolving a dispute, the judges must *create* such a rule. *Novel disputes* are the occasion for altering the law made by judges. Lord Ellenborough created a new precedent in this case. How broad is the new precedent? Under a narrow interpretation, the judge held that riders of horses cannot recover money damages for their injuries from a negligent defendant if they do not ride with ordinary care, and this lack of care contributes to the accident. This narrow interpretation says that the rule applies only to accidents like this one. Indeed, Lord Ellenborough's example of a horseman riding on the wrong side of the road into another horseman riding on the correct side would seem to support this narrow interpretation. But a broader interpretation of the court's holding is possible, and did, in fact, come to be the common interpretation. Under a broad interpretation of the holding, Lord Ellenborough held that no plaintiffs can recover when their own negligence contributes to their injury (even if the defendant was negligent). This was new law.

About 30 years later, another novel case arose involving similar facts.

DAVIES V. MANN, 10 M.&W. 545 (EX., 1842)[16]

> At the trial, before ERSKINE, J., it appeared that the plaintiff, having fettered the forefeet of an ass belonging to him, turned it into a public highway, and at the same time in question the ass was grazing on the off side of a road about eight yards wide, when the defendant's wagon, with a team of three horses, coming down a slight descent, at what the witness termed a smartish pace, ran against the ass, knocked it down, and the wheels passing over it, it died soon after. . . . The learned judge told the jury, that . . . if they thought that the accident might have been avoided by the exercise of ordinary

[16] The traditional English court system that took shape in the late twelfth century and prevailed until the late nineteenth century consisted of three common law courts and a court of equity. The first of the common law courts was the Court of Common Pleas. The members of that court were called "Justices" and were presided over by the Chief Justice. The court originally concentrated on civil disputes concerning land but came to consider a wider range of civil disputes. The Court of King's Bench, the second common law court, was originally a criminal court but over time became a court of review over the civil issues appealed from the Court of Common Pleas. The third common law court was the Court of Exchequer of Pleas or, more simply, the Court of Exchequer. The Exchequer was the King's treasury. This court originally heard disputes arising from tax liability and other matters concerning the King's revenues. By the late sixteenth century, the Court of Exchequer had extended its jurisdiction to cover nearly all civil disputes. Members of that court, in which the appeal in *Davies v. Mann* was heard, were called "Baron," abbreviated "B.," and were presided over by the Chief Baron, abbreviated "C.B."

The equity court was the Court of Chancery, so called because it was presided over by the Chancellor, the most important member of the King's Council. England established this court by the late fifteenth century as a separate court specializing in the dispensing of a more flexible kind of justice than that available in the so-called "law" courts, especially with respect to remedies. There is, therefore, a great historical and substantive difference between the courts of law and the court of equity. One of the most important of those differences has to do with the types of remedies available to a successful plaintiff. Roughly speaking, a court of law would award only compensatory money damages—an amount that would compensate the plaintiff for his injury. A court of equity would possibly do more than that if the plaintiff could demonstrate that his injuries were such that a payment of money damages would inevitably undercompensate him.

(*continued*)

care on the part of the driver, to find for the plaintiff. The jury found their verdict for the plaintiff. . . .

Godson now moved for a new trial, on the ground of misdirection. [That is, the defendant's lawyer appealed the judgment on the ground that the judge in the trial court had incorrectly instructed the jury on the law to be applied to the facts in this case.] The act of the plaintiff in turning the donkey into the public highway was an illegal one, and, as the injury arose principally from that act, the plaintiff was not entitled to compensation for that injury which, but for his own unlawful act would never have occurred. . . . The principle of law, as deducible from the cases is, that where an accident is the result of faults on both sides neither party can maintain an action. Thus, in *Butterfield v. Forrester*, 11 East 60, it was held that one who is injured by an obstruction on a highway, against which he fell, cannot maintain an action, if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction.

LORD ABINGER, C.B. [A]s the defendant might, by proper care, have avoided injuring the animal, and did not, he is liable for the consequences of his negligence, though the animal may have been improperly there.

PARKE, B. [T]he negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could, by ordinary care, have avoided the consequences of the defendant's negligence. [A]lthough the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road. . . .

[New trial denied.]

QUESTION 3.3:

a. Who appealed the judgment?
b. Who won the appeal?
c. What is the judge's holding? Actually, there are three opinions. Are they in accord?

A plaintiff has suffered a loss: His donkey was killed, allegedly because the defendant was driving a wagon too quickly for the conditions on the road. However, the plaintiff himself was negligent for having left his donkey unattended, although fettered, beside a public road. Strictly following the rule in *Butterfield,* the plaintiff's fault or negligence contributed to his losses and thus should bar his recovery. That is precisely what Mann's lawyer argued in appealing the judgment for the plaintiff in the lower court. But at the trial, the court believed that the facts in *Davies v. Mann* were

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In the Judicature Act of 1873 and the Supreme Court of Judicature (Consolidation) Act of 1925, the British Parliament replaced all of these courts—and the distinction between law and equity—with a greatly simplified structure that drew no distinction between common law and equity.

As we shall see in Chapter 4, these dusty historical matters are relevant to one of the most famous examples of law and economics: the Calabresi and Melamed argument regarding the most efficient method of protecting a legal entitlement.

distinguishable from those in earlier cases in which a contributorily negligent plaintiff was not allowed to recover from a negligent defendant. There appear to be two reasons for excusing the plaintiff's negligence in Lord Abinger's and Baron Parke's opinions. First, there is the element of time. Although the plaintiff was negligent in leaving his donkey unattended on the public highway, the defendant's negligence came afterward. And if the defendant had not been driving recklessly, he would have had time to avoid the donkey by stopping or swerving—even though the donkey ought not to have been unattended where he was. Apparently, the defendant's negligence came afterward and controlled the outcome. This doctrine has come to be known as the "last clear chance" rule: If both parties to an accident are negligent, the party who had the last clear chance to avoid the accident will be held responsible for losses arising from the accident.

The second argument for excusing the plaintiff's negligence is to encourage precautions in the future by people situated like the defendant. Again, Baron Parke puts the point nicely, "[A]lthough the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road." This interpretation of the law suggests that rules should create incentives for avoiding accidents.

Notice that *Davies v. Mann* changes the law handed down in *Butterfield v. Forrester*. The blanket rule from the earlier case—contributory negligence is a complete bar to recovery—was amended by judges who faced a new situation. We may say that after *Davies v. Mann* the legal rule became:

> Contributory negligence is a complete bar to recovery *unless the defendant had the last clear chance to avoid the accident and did not take that chance.*

The "last clear chance" doctrine was quickly adopted throughout the common law world.[17]

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[17] But that is not the end of the story of contributory negligence and "last clear chance." For a fascinating further episode, see *British Columbia Electric Rail Co., Ltd. v. Loach,* [1916] 1 A.C. 719. In brief, here is what was at dispute in that case: Benjamin Sands was driving a horse-drawn wagon and talking with a friend. Not paying attention to his surroundings, he pulled onto the train tracks and stopped. He looked up to see a train coming. The train's engineer applied the brakes as soon as he saw Sands and his wagon on the tracks. Unfortunately, the brakes, unknown to the engineer, were defective and failed to stop the train before it ran into and killed Mr. Sands. Loach, the executor of Sands's estate, sued the British Columbia Electric Rail Co. on a theory of negligence. The railroad claimed, following *Butterfield,* that it should not be held liable because Sands was contributorily negligent. Loach answered that the railroad had, following *Davies,* the last clear chance to avoid the injury and did not take that chance. The railroad claimed that it had not, in fact, had the last clear chance because its brakes were defective. (Everyone agreed that the train would have stopped in time had the brakes been in good working order and that the railroad should have checked the brakes before leaving the roundhouse that morning.) The holding was that the railroad should be held liable: To hold otherwise would, the court said, create an incentive not to maintain one's train (or car or wagon or other device) in good working order.

Conclusion

To summarize, we compared the two great legal traditions—the civil law and the common law. We examined the hierarchical structure of U.S. courts. We saw some of the general characteristics of a legal dispute: a plaintiff who alleges that he or she has been wronged by a defendant and seeks the courts' help in getting relief. We learned some methods that judges use to resolve novel issues. Finally, we looked at the evolution of the doctrine of contributory negligence as developed by courts. This chapter provides a brief, selective introduction to some of the basic facts about law, which we analyze using economics in the rest of the book.

Suggested Readings

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