CHAPTER 3

Sources of the Law: Cases

Chapter Outline

Learning Objectives

After reading this chapter, you should be able to:

- Define judicial restraint.
- Define common law.
- Contrast the concepts of judicial restraint and a judge making law.
- Define the doctrine of stare decisis.
- Explain the importance of distinguishing the facts of an instant case from those of precedents.
- Explain the difference between adjudication and legislation.
- Define obiter dictum.
- Distinguish between binding and nonbinding authority.

INTRODUCTION

The law in practice revolves around disputes and problems. The primary forum for dispute resolution is the court. Even though most disputes brought to lawyers do not result in trials, the courts, through their spokespersons, the judges, are the final arbiters of what the law is. Because courts are the last legitimate resort of disputants, judges must decide. No matter how difficult or complex a case, the judge may not plead ignorance, frustration, or indecision. In deciding a case, the judge must provide reasons and rules, the final product of the process of adjudication. Without reasons and rules, decision making is purely political. This is particularly true in the U.S. constitutional system, in which the lines between the judicial function and the administrative and legislative functions are relatively distinct.

Where does a judge find the rules? The judicial imagination is not sufficient authority, even though some judicial decisions seem to suggest otherwise. There are several sources of the law, the primary ones being the Constitution, legislation, and prior judicial decisions. This last is the subject matter of this chapter.

judicial restraint

An accepted, customary policy of courts to restrict themselves to consideration of the questions presented to them and to restrain from legislating or interfering unduly with the executive or legislative branches. The principle also refers to the customary restraint federal courts exercise to leave questions of state law to state courts.

supremacy clause

Article VI of the U.S. Constitution, which provides: "This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be supreme law of the land, and the Judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding."

judicial review

2 Review by an appellate court of a determination by a lower court; also, the power of the federal courts to declare acts contrary to the Constitution null and void.

JUDICIAL RESTRAINT

In the American judiciary, a principle has evolved called **judicial restraint**. The U.S. Constitution set the stage by separating executive, legislative, and judicial functions into the three basic branches of government. Taking their cues from European Enlightenment thinkers of the eighteenth century, the framers of the Constitution established a political charter designed to break completely from the archaic remnants of feudalism, in which power and status were based on the accident of birth and society was ruled by an aristocracy with ultimate power residing in the monarch. The Constitution, by contrast, attempted to create a "government of laws and not of men," and allocated authority to the three branches of government in such a way that each could serve as a check on the other.

From the beginning, the president and the members of Congress were elected officials and ipso facto involved in politics and the political process. The political nature of the courts was not clearly defined in the Constitution, and it can fairly be said that Chief Justice John Marshall, who dominated the U.S. Supreme Court during the early nineteenth century, single-handedly defined the role of the federal judiciary. Among the important doctrines Marshall established, two stand out as fundamental principles that have guided American law ever since.

1. Marshall argued that the U.S. Constitution was the "law of the land," meaning that no law or official act that violated the Constitution was lawful; the Constitution stood as the guiding light superior to every other law. Because the U.S. Supreme Court is the final interpreter of the meaning of the Constitution, this doctrine of constitutional supremacy provided the Supreme Court with great political power. This phrase in the Constitution is referred to as the **supremacy clause**. The power of the court to examine legislative and executive acts is called **judicial review**.
2. This power was severely limited by another principle established by Marshall, which was dubbed *judicial restraint*. Because ultimate authority resides in the Court, which is made up of judges who are appointed for life subject only to removal by impeachment, it is necessary that judges restrain themselves from actively entering the political arena.

This can be effectively accomplished by judges devoting themselves to deciding cases according to existing law. In simple terms, this means that judges interpret the law rather than make it, the latter function being reserved to the legislature. Ideally, judicial decisions are based on the authority of legal principles already in existence and not on the moral, political, or social preferences of the judges.

The predecessor to today's National Stolen Property Act was passed in 1948. The Act has been interpreted by various federal courts over the years, including the U.S. Supreme Court in *Dowling v. United States*, a case decided by the Court in 1985. The court deciding *United States v. Zhang*, the case excerpted below, is the United States District Court for the Eastern District of Pennsylvania. As this court falls within the geographical area of the United States Court of Appeals for the Third Circuit, a case from the Third Circuit or the U.S. Supreme Court would be mandatory authority, while cases from other federal circuits would be non-binding authority.

995 F.Supp.2d 340
United States District Court,
E.D. Pennsylvania.
UNITED STATES of America,
v.
YIJIA ZHANG, Defendant.
Criminal Action No. 12–498
Jan. 17, 2014

§

Memorandum Order

LEGROME D. DAVIS, District Judge. . . .

On September 13, 2012, the Government filed an indictment (the "Indictment") charging Yijia Zhang with damaging a protected computer. . . ("Count I"), and violating the National Stolen Property Act ("NSPA"), 18 U.S.C. § 2314 ("Count II"). . . .

According to the Indictment, Zhang worked as a computer systems manager for "Company A" until July 6, 2010. . . . On June 28, 2010, Zhang copied approximately 6,700 of Company A's confidential files from an unspecified location on Company A's internal network to the desktop computer provided to Zhang by Company A. . . . Zhang then transferred some or all of these files from his computer to one of Company A's servers (the "Server"). . . . The copied and transferred files contained "sensitive information regarding the operation and development of Company A's computer network." . . . Two days later, on June 30, 2010, Zhang gave Company A written notice that his last day with the company would be July 6, 2010. . . .

On Saturday, July 3, 2010, Zhang copied approximately 2,800 more confidential files from Company A's network to his desktop computer. . . . On Sunday, July 4, 2010, Zhang copied roughly 300 more confidential files to his computer. . . . Zhang then transferred some or all of the confidential files that he had accumulated on his desktop computer that weekend to the Server. . . . Next, Zhang established an Internet connection between the Server and Internet storage sites in Sweden and Germany that Zhang maintained. . . . Zhang then used this connection to transfer an unspecified number of Company A's confidential files to the Internet storage sites. . . . After completing this transfer, Zhang covered his digital tracks by deleting unspecified files from the Server. . . . The deletion of these files eliminated evidence of Zhang's transfers and prevented the Server from functioning as intended. . . .

Presently before the Court is Zhang's motion to dismiss Count II of the Indictment . . . Zhang argues that the allegations in the Indictment fail to state an offense under the NSPA. . . .

The NSPA makes it a crime for a person to "transport[ ], transmit [ ], or transfer[ ] in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud.". . . The NSPA does not define the terms "goods," "wares," or "merchandise." It is an open question in the Third Circuit whether digital files can constitute goods, wares, or merchandise within the meaning of the NSPA. . . .

[I]n 1985, the Supreme Court addressed whether the NSPA criminalizes the "interstate shipments of bootleg and pirated sound recordings and motion pictures whose unauthorized distribution infringed valid copyrights." *Dowling v. United States.* The indictment in that case did not allege how the defendant came into possession of the copyrighted works. . . . Rather, the indictment alleged that the "unauthorized use of the musical compositions rendered the phonorecords 'stolen, converted or taken by fraud' within the meaning of the [NSPA]." . . . Thus, the Supreme Court decided whether the NSPA criminalizes the interstate shipment of bootleg records where nothing tangible was stolen, converted, or taken by fraud.

The Supreme Court began its analysis by noting that the text of the NSPA does not plainly cover the interstate shipment of bootleg records for two reasons. First, copyrighted works are not obviously goods, wares, or merchandise. . . . This requirement applies awkwardly to copyright infringement because "the property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple goods, wares, or merchandise.". . . Second, the Court noted that "interference with copyright does not easily equate with theft, conversion, or fraud." . . . The Supreme Court concluded that the NSPA does not "plainly and unmistakably" apply to the interstate shipment of bootleg records. . . .

In the years since the Supreme Court announced its opinion in *Dowling,* the Courts of Appeals for the First, Second, Seventh, and Tenth Circuits have concluded that only tangible property can constitute goods, wares, or merchandise within the meaning of the NSPA. . . .

Finally, the Second Circuit held recently that the NSPA does not apply to computer code stolen in an intangible form from an employer. In *United States v. Aleynikov,* the Second Circuit considered an appeal by a defendant, Aleynikov, convicted under the NSPA of "stealing and transferring some of the proprietary computer source code used in his employer's high frequency trading system.". . . On his last day of work, Aleynikov "encrypted and uploaded to a server in Germany more than 500,000 lines of source code for [his employer's high-frequency trading] system.". . . After a jury convicted Aleynikov of violating the NSPA, he appealed to the Second Circuit, "arguing, among other things, that the district court erred in denying his motion to dismiss the indictment in its entirety.". . . The Second Circuit held that the theft of "purely intangible property embodied in a purely intangible format" falls outside the NSPA. . . .

The following year, the Second Circuit again considered the scope of the NSPA when presented with another appeal by a defendant, Agrawal, convicted under the NSPA of stealing "confidential computer code . . . used to conduct high frequency securities trades" from his employer. *United States v. Agrawal.* Unlike Aleynikov, however, Agrawal stole computer code by "printing the code onto thousands of sheets of paper, which he then physically removed from [his employer's] New York office to his New Jersey home." . . . The Second Circuit affirmed Agrawal's conviction, holding that he was "engaged in the theft or conversion of a 'good' in violation of the NSPA" when he "removed . . . tangible property from [his employer's] offices without authorization, and transported it to his home in New Jersey.". . . The Court recognized that, "in terms of moral culpability, there may be little to distinguish Agrawal from the defendant in *Aleynikov,*" but nonetheless concluded that only Agrawal violated the NSPA because "it is Congress's task, not the courts', to define crimes and prescribe punishments.". . .

We find that the NSPA is ambiguous about whether stolen "goods, wares, and merchandise" must take a physical form. The Third Circuit directs that the ordinary meaning of goods, wares, and merchandise is "personal property or chattels" that are "ordinarily a subject of commerce."

United States v. Seagraves. Based on this precedent, we think that the most natural reading of "goods, wares, and merchandise" is personal property or chattels that "have some sort of tangible existence." *United States v. Smith*. . . . This interpretation fits best with the statutory requirement that the goods, wares, or merchandise transported in interstate or foreign commerce be the same as the goods, wares, or merchandise stolen, converted, or taken by fraud; and is consistent with the approaches taken by every United States Court of Appeals to consider the issue.

The government's contrary position is not unreasonable. In this digital era, we think that intangible products could reasonably be understood to constitute personal property that is ordinarily the subject of commerce. For example, we agree with the government that one could reasonably conclude that a consumer who pays for and downloads a digital copy of Microsoft Windows has purchased a good. . . . However, the government's position merely demonstrates that there is some ambiguity surrounding the NSPA's reach.

When faced with an ambiguous criminal statute, this Court must construe that statute in the defendant' favor. . . . We therefore conclude that the NSPA does not criminalize the theft and international transmission of intangible property in an intangible form. . . . To state an offense under the NSPA, the government must allege that Zhang transported, transmitted, or transferred something that had been stolen, converted, or taken by fraud while in a tangible form. The value of that object may derive from intangible information contained within the item; but without a physical manifestation, the stolen property is not goods, wares, or merchandise within the meaning of the NSPA. . . .

The government has not alleged, as it must, that the digital files transmitted by Zhang had been stolen, converted, or taken by fraud while in a tangible form. Bits transmitted over the Internet are intangible information falling outside the NSPA's ambit. Accordingly, the government has failed to state an offense under the NSPA. [We echo the sentiment expressed by the Second Circuit: In terms of moral culpability, there may be little to distinguish a defendant who transports information stolen in purely digital form from a defendant who transports information stolen by storing it on a flash drive or printing it on paper. "But it is Congress's task, not the courts', to define crimes and prescribe punishments." *Agrawal*]. . . .

[T]he indictment must be dismissed because it does not allege that Zhang stole goods, wares, or merchandise within the meaning of the NSPA. . . .

Case Questions

1. Is there any case law in the Third Circuit for the court to look to in determining whether removal of digital information violates the NSPA?
2. Why doesn't the court consider *Dowling* mandatory authority?
3. How are *Aleynikov* and *Agrawal* distinguishable?
4. How is this a case illustrating judicial restraint?

THE COMMON LAW

The American legal system is said to follow the **common law tradition** inherited from England. We are perhaps unique, along with England, Canada, Australia, and New Zealand, in enjoying more than 900 years of virtually uninterrupted legal evolution since the Norman Conquest of England in 1066. Since that time, England has not been invaded by foreign powers imposing their own legal institutions, nor have political or legal revolutions seriously disrupted the steady development of English law. When the British came to America, they brought their law with them. The American Revolution made a political break with the mother country and established a more democratic political organization, but it did not change the fundamental process of the law. When our judges sought legal authority for their decisions, they logically turned to the basic principles of English law, which they knew and trusted even if they did not trust George III.

common law tradition

In the first century after the Norman Conquest, the Normans established a legal regime for the entire Kingdom of England, with laws common to all inhabitants of the realm. Under that system, three common law courts were established (King's Bench, common pleas, exchequer). The decisions of these courts, and especially the decisions of the appeals of these courts, became binding precedents on lower courts under a doctrine called stare decisis.

When the Normans organized England into a unified kingdom, they eliminated the pockets of local authority and jurisdiction characteristic of continental European countries at the height of the Middle Ages. Although local legal process continued for a time for purely local matters, England gradually became a nation in the true sense of the word and gave birth to the "common law of England," under which developed a body of law common to all citizens of the nation. This undoubtedly led eventually to the reverence for the rule of law in the minds of the British people.

common law
Judge-made law.

The **common law** has come to mean something more than simply English law. In American jurisprudence, the common law refers to judge-made law, distinguishing it from continental European legal systems, which are civil law systems. From the seventeenth century onward, with the rise of European nationhood, centralized governments were formed that required corresponding national legal institutions. Rather than building on existing custom and institutions, these governments compiled sets of laws into codes, borrowing heavily from the *Corpus Juris* of the Roman Emperor Justinian, the first European to attempt to collect and organize legal principles into comprehensive written form. This movement had significantly less impact on England, which had long enjoyed a central government and a national court system.

Although the sources of English law included edicts of the monarch and acts of Parliament, the daily life of the law was conducted in the courts, where pronouncements of the law were made on matters great and small. Today we are accustomed to view the legislature as the source of new law and expect judges to exercise judicial restraint by merely interpreting and enforcing the laws, but this was not always so. Until well into the nineteenth century, the English Parliament, the U.S. Congress, and the various state legislatures were by modern standards virtually inactive. The law was declared by judges, relying on traditional principles, in the process of resolving disputes. In modern times, society and polity have grown more complex at an accelerating rate, and it is no longer possible to deal with modern problems by relying on slowly evolving legal principles. As a result, modern legislatures have assumed the major burden of lawmaking, and the courts have assumed a sharply reduced role.

JUDGES MAKE LAW

It is currently part of the American democratic folklore that judges merely interpret but do not "make" law. The fallacy of this notion lies in the fact that the power to interpret the law inevitably leads to making the law. Every time a judge is called upon to interpret the law, lawmaking occurs. Because judges ordinarily rely on the authority of existing law, judicial interpretation of the law invokes changes that are nearly imperceptible, but when faced with novel or difficult cases, judges occasionally formulate statements of the law that form important new principles.

product liability
A branch of tort law that assigns liability to a manufacturer when injury occurs due to a "dangerously defective product." It dispenses with traditional requirements of proving fault, as in intentional torts and negligence.

It may be helpful to give an example of judicial lawmaking. In the landmark case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), Justice Cardozo of the New York Court of Appeals wrote an opinion that ushered in a new era in liability of manufacturers for injuries caused by their products, leading many years later to the field of **product liability**. Mr. MacPherson sued for injuries caused by the collapse of a defective wooden spoke wheel on the Buick he had purchased. The company defended against the suit on the grounds that it had sold the car to a dealer, which had in turn sold the car to MacPherson. Because Buick did not have a contractual relation with MacPherson, it was not liable, stated attorneys for the company. In a carefully reasoned opinion, Cardozo explained why the company could not be protected by the traditional principle of **privity of contract**, and held the company liable. The appearance of the automobile on the American scene put in the hands of the American public a potentially dangerous machine. Cardozo held that the manufacturer was responsible for inspection of the vehicles it sold and refused to allow the manufacturer to pass liability on to the dealer under the guise of privity of contract. In handing down his decision, Cardozo charted a course for compensation law in the United States.

STARE DECISIS

Today the importance of the common law tradition lies largely in the principle of **precedent**, or stare decisis, by which judicial lawmaking is rendered orderly, predictable, and legitimate. The principle of **stare decisis** dictates that in making decisions judges should follow prior precedents. In practice, this means that disputes involving similar fact situations should be decided by similar rules. Former decisions are thus called *precedents* and are examined for guidance in making present decisions. When the court is faced with a novel fact situation (**case of first impression**) and formulates a rule to decide the case, the court "sets a precedent" that should be followed should a similar case arise.

As an example, let us suppose that a state court is faced with the following situation: A man and woman who have been living together for several years without benefit of marriage separate; the woman sues the man for breach of contract, claiming that when they entered into a cohabitation arrangement, the man promised to share his earnings equally with her if she refrained from employment and provided him with homemaking services and companionship, to which she agreed. The man defends on the basis of an established principle of contract law that a contract to perform illegal acts is unenforceable. Because sexual cohabitation is illegal in the state and that was the purpose of any promises that might have been exchanged, claims the man, the contract cannot be enforced.

Assuming the court has never been faced with this precise situation before, it must apply the rules of contract law and set a precedent for cohabitation agreements. Judging from similar cases already decided in several states, the court will probably rule that a cohabitation agreement is enforceable like any other contract unless its purpose is compensation for sexual services. Once this precedent has been set, the next dispute over a cohabitation agreement should be decided by application of the same rule. In this way, the first case is precedent for the second. If the rule is applied in many similar cases over a period of time, the court is likely to refer to it as a "well-established principle of law."

The force of a precedent depends upon the court that hands it down. A precedent is considered binding on the court that sets it and all lower courts within its jurisdiction. In a typical state court system, decisions can be rendered at three levels: trial court (lowest), court of appeals (intermediate appellate), and state supreme court (highest). Decisions of the highest state court are binding on all state courts. Decisions of courts of appeals are binding on that court and on lower courts within its jurisdiction. There is frequently more than one court of appeals, each with specific regional jurisdiction within the state. The hierarchy of federal courts also follows this pattern.

It sometimes happens that different courts of appeals within the same system (i.e., a state or the federal system) will formulate different rules for the same fact situation, creating considerable confusion. Trial courts in the First Circuit may feel bound by a different rule than those in the Fifth Circuit, and courts in the Third Circuit, whose court of appeals may not have

privity of contract

The relationship between two parties to a contract. Originally, this was a bar to a suit brought by a consumer against a manufacturer when the consumer bought through a dealer rather than directly from the manufacturer. Modern product liability law does away with this impediment.

precedent

Prior decisions of the same court, or a higher court, which a judge must follow in deciding a subsequent case presenting similar facts and the same legal problem. Precedent consists of the rule applied in a case and encompasses the reasoning that requires it. In a given decision, the precedent may be distinguished from *dictum*, which includes extraneous or conjectural statements not necessary to the decision and that are not binding on future decisions.

stare decisis

The doctrine that judicial decisions stand as precedent for cases arising in the future. It is a fundamental policy of our law that, except in unusual circumstances, a court's determination on a point of law will be followed courts of the same or lower rank in later cases presenti the same legal issue. It me to "stand by a decision." The conventional translatic (probably not very helpful) "Let the decision stand."

case of first impression

A case presenting a fact situation that has never b decided before by that c decided an equivalent case, may be in a quandary about whether to follow the First Circuit rule or the Fifth Circuit rule. The logical solution is to obtain a ruling from the highest court, which is at liberty to adopt either rule or even a different rule, which would then be binding on all the courts within its jurisdiction.

The quagmire of American jurisdiction can be clarified by certain important principles. First, not only are federal and state court systems separate; state and federal laws are separate as well. Where federal law is concerned, federal courts set the precedents, and the U.S. Supreme Court has final authority in declaring what the law is. In matters of state law, state courts have authority, and the highest court of a state has final authority to declare what the state's law is. Many Americans labor under the misconception that the U.S. Supreme Court is the final authority for interpreting state law. On the contrary, the highest court of each state is the ultimate authority for the law of that state. One of the reasons for the confusion arises from the supremacy clause of the U.S. Constitution, under which the U.S. Supreme Court may declare state law, whether judicial precedent or state statute, invalid if it is deemed to be in violation of the U.S. Constitution. This power of the U.S. Supreme Court is not derived from any authority to define state law, but rather from authority to interpret the meaning of the U.S. Constitution, which is the "supreme law of the land."

The *Li* case is an example of a court overruling a well-established precedent and thus substituting a new rule. The issue facing the Supreme Court of California was whether to abolish the doctrine of contributory negligence and replace it with the doctrine of comparative negligence. Negligence is discussed in some detail in Chapter 10 (on torts), but in lay terms, negligence occurs when one person injures another by failing to exercise care (e.g., if someone carelessly causes an auto accident). Because negligence is grounded in fault, the courts in the nineteenth century developed the doctrine of *contributory negligence,* which held that a negligent defendant would not be liable if it could be shown that the plaintiff's negligence also contributed to the injury. It soon became apparent that the doctrine was inequitable in cases in which the defendant's negligence was great and the plaintiff's negligence was minimal. For example, railroad workers commonly worked under dangerously unsafe conditions and sometimes contributed to their own injuries through momentary inattention. Gradually the states began to replace contributory negligence with the doctrine of *comparative negligence,* which apportioned fault between plaintiff and defendant so that the plaintiff, even if also negligent, could recover a diminished amount if the jury found the plaintiff less responsible for the cause of the injury (e.g., plaintiff twenty percent at fault and defendant eighty percent at fault).

In *Li,* the plaintiff made an improper turn through an intersection and was struck by the defendant, who was racing to pass through the intersection while the stoplight was yellow. The case was heard without a jury. The judge found both plaintiff and defendant negligent and entered a judgment in favor of the defendant based on California law. The plaintiff then appealed in the hope that she could persuade the Supreme Court of California to overrule prior precedent, in which effort she was successful.

A careful reading of the case reveals that four of the six justices ruling on the case wanted to change the law. Their decision was complicated by the fact that although contributory negligence originally arose through judicial decision, the California legislature had enacted a statute in 1872 establishing the doctrine of contributory negligence. In a lengthy discussion of the statute and its history (omitted here), the court concluded that the statute had not been intended to permanently establish contributory negligence as the law of the state.

LI v. YELLOW CAB COMPANY OF CALIFORNIA et al., Defendants and Respondents

13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975)

§

In this case we address the grave and recurrent question [of] whether we should judicially declare no longer applicable in California courts the doctrine of **contributory negligence**, which bars all recovery when the plaintiff's negligent conduct has contributed as a legal cause in any degree to the harm suffered by him, and hold that it must give way to a system of **comparative negligence**, which assesses liability in direct proportion to fault. . . .

It is unnecessary for us to catalogue the enormous amount of critical comment that has been directed over the years against the "all-or-nothing" approach of the doctrine of contributory negligence. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault.

* * *

It is in view of these theoretical and practical considerations that to this date 25 states have abrogated the "all or nothing" rule of contributory negligence and have enacted in its place general apportionment statutes calculated in one manner or another to assess liability in proportion to fault. In 1973 these states were joined by Florida, which effected the same result by judicial decision. (*Hoffman v. Jones* (Fla. 1973) 280 So. 2d 431.) We are likewise persuaded that logic, practical experience, and fundamental justice counsel against the retention of the doctrine rendering contributory negligence a complete bar to recovery—and that it should be replaced in this state by a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault. . . .

It is urged that any change in the law of contributory negligence must be made by the Legislature, not by this court. Although the doctrine of contributory negligence is of judicial origin . . . subsequent cases of this court, it is pointed out, have unanimously affirmed that . . . the "all-or-nothing" rule is the law of this state and shall remain so until the Legislature directs otherwise. . . .

[There follows a discussion of why the court may nevertheless abolish the doctrine of contributory negligence, followed by a discussion of the different forms of comparative negligence adopted in the other states.]

For all of the foregoing reasons, we conclude that the "all-or-nothing" rule of contributory negligence as it presently exists in this state should be and is herewith superseded by a system of "pure" comparative negligence, the fundamental purpose of which shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties.

* * *

The judgment is reversed.

* * *

CLARK, J., dissenting. . . .

[T]he Legislature is the branch best able to effect transition from contributory to comparative or some other doctrine of **negligence**. Numerous and differing negligence systems have been urged over the years, yet there remains widespread disagreement among both the commentators and the states as to which one is best. . . . This court is not an investigatory body, and we lack the means of fairly appraising the merits of these competing systems. Constrained by settled rules of judicial review, we must consider only matters within the record or susceptible to judicial notice. That this court is inadequate to the task of carefully selecting the best replacement system is reflected in the majority's summary manner of eliminating from consideration all but two of the many competing proposals—including models adopted by some of our sister states.

By abolishing this century-old doctrine today, the majority seriously erodes our constitutional function. We are again guilty of judicial chauvinism.

Case Questions

1. Is abolishing contributory negligence a question more properly addressed by the legislature than the court? (Consider this question when reading the section comparing adjudication and legislation.)

2. If the court sets a "bad" precedent, must it wait for the legislature to rectify the mistake?
3. What if the California legislature, after the decision in *Li,* passed a law unequivocally declaring that contributory negligence and not comparative negligence was the law of California? Does a legislature have authority to do this? Must the court follow the statute?

Case Glossary

contributory negligence A principle by which recovery will be denied to a plaintiff for defendant's negligence if plaintiff is also found to have been at fault. It is an affirmative defense that has been replaced by *comparative negligence* in most states.

comparative negligence A principle whereby damages are apportioned between plaintiff and defendant according to their relative fault in a negligence case where both are found to have been at fault.

negligence A cause of action based on a failure to meet a reasonable standard of conduct, which failure results in an injury.

DISTINGUISHING CASES

Stare decisis requires that the same rule be applied in future cases with identical fact situations. However, virtually every case differs in some respect, large or small, from preceding cases. Legal arguments commonly revolve around the comparison of the facts of the instant case with the precedents. Arguing against the application of precedent in a given case entails *distinguishing* the facts of the instant case from those of the precedents. The differences, of course, must arguably call for a different rule. Let us take a fairly simple (perhaps simpleminded) example. At common law, "every dog has one bite." The owner of a dog was not liable when his dog bit the first time but was liable thenceforth. In contrast, a person keeping a wolf would be liable upon the first bite. The owner of a wolf could not rely on dog precedents, but the owner of a collie could rely on cocker spaniel precedents. The difference between a dog bite and a wolf bite is legally meaningful (i.e., we can reasonably justify the difference). On the one hand, a dog is a tame, domesticated animal, and its propensity to bite is not known by its owner before it actually bites. A wolf, on the other hand, is a wild animal. Keeping a wild animal puts a duty on its owner to maintain sufficient control to keep the animal from causing harm. The difference between dogs and wild animals makes legal sense. Caveat: We will not go into the difference between pit bulls and golden retrievers. Suffice to say that dog ownership is today governed by statutes and local ordinances; the common law rule usually does not apply.

ADJUDICATION VERSUS LEGISLATION

legislation

The act of giving, making, or enacting laws; preparation and enactment of laws; lawmaking, ordinarily the prerogative of legislatures or legislative bodies.

Although judges may be said to "make law," they do so in a way quite unlike that of legislators. **Legislation** is a very different process with a different orientation. Although adjudication can be said to be *particularized,* in the sense that cases focus on particular events and particular parties, legislation is *generalized* in that it is designed to make rules that apply to everyone.

Adjudication: Narrow Focus on Past Events

adjudication
The formal act of deciding disputes by a court or tribunal.

Judges resolve disputes between parties; **adjudication** refers to the process of making these decisions. In the American system, a person (which can also be a business, a corporation, or a city) files a lawsuit against another to redress an injury or to establish rights and duties. When a case reaches trial, the judge is faced with past events that have been framed by attorneys for both sides for submission to the judge for resolution. Ordinarily, only the facts of the events relating to the dispute are relevant to the resolution of that dispute. Evidence presented at trial will reveal those facts in great detail in order to determine which rule of law is applicable. The judge will decide which laws are relevant to the facts as determined by the evidence presented in court. Thus, the process of adjudication focuses on past events specific to one dispute, and only the law the judge deems appropriate to that case will be applied.

In short, the judge looks through a magnifying glass at one case and declares what law is applicable. If law is made in the process, it is a by-product of the case. The function of the judge is to settle the dispute, not to determine how the law will apply to other cases in the future. The judge will look to the authority of the past to make the decision.

Legislation: Universal Application and Future Effect

The characteristics of legislation are universal application and future effect. Legislators do not resolve individual cases, though they are often motivated by dissatisfaction with the outcomes of cases decided in the courts. For example, the *Baby M* case in New Jersey (*In re Baby M,* 109 N.J. 396, 537 A.2d 1227 [1988]), in which a surrogate mother fought unsuccessfully to gain custody from the couple who had arranged to adopt the baby, resulted in many legislatures, including New Jersey, enacting laws regulating surrogate mother contracts. But the New Jersey legislature did not decide the *Baby M* case or change the ruling of the court; its enactment governed contracts between surrogate mothers and adoptive parents in future cases.

The legislative process typically operates by first recognizing a problem and then, through investigation and deliberation, attempting to solve the problem by enacting a law. When the legislative process is complete, the law is a matter of public record, and everyone must comply or risk legal consequences. Only rarely can legislation apply retroactively. The surrogate mother case brought to public attention the moral issues in the commercialization of pregnancy and adoption. Some people felt that such contracts should be illegal or unenforceable, some felt that the natural mother should have the option to revoke the contract, and others felt that ordinary contract law provided sufficient protection. State legislatures deliberated these questions and arrived at laws designed to deal with the question. These laws, however, did not change adoptions that had already taken place but instead served as the legal standards that would govern surrogate mother contracts subsequent to enactment of law.

The *Colby* and *Higgins* cases illustrate the difference between legislation and adjudication and illuminate the judicial attitude exemplified in the doctrine of stare decisis. American courts in the nineteenth century created or expanded immunity to suit for several categories of parties, including charitable institutions, the subject of *Colby* and *Higgins.* Immunity from suit leaves an injured party without a remedy, and in the twentieth century the courts and legislatures of our country began to question the wisdom and legality of immunity to suit. The rise of the insurance industry made such immunities obsolete. Individuals and institutions can protect themselves from catastrophic losses by purchasing insurance. The Supreme Judicial Court of Massachusetts was presented with an archaic principle of charitable immunity that it had created a century before. By the time these cases were decided, nearly every other state had abolished charitable immunity by statute or by the highest state court overruling its own prior decisions.

Even though the court was inclined to abolish charitable immunity, it found itself in a dilemma. Because the precedents were clear (i.e., charitable institutions were immune from suit according to a well-established line of precedents), the Supreme Judicial Court was reluctant to change the rule suddenly—but at the same time the doctrine of charitable immunity had just as clearly been discredited as a principle of American law. Charitable institutions should be able to rely on the law as stated by the courts. Why should a nonprofit hospital buy insurance if it cannot be sued?

Edwin A. COLBY, Administrator
v.
CARNEY HOSPITAL

356 Mass. 527, 254 N.E.2d 407 (1969)

§

The plaintiff **administrator** brings this action of tort and contract for the death and conscious suffering of his **intestate**. The defendant hospital set up, among other things, the defence of charitable immunity. The plaintiff demurred to this part of the answer, stating that it "does not set forth a valid or legal defense, in that said defense as alleged violates and abrogates certain rights, privileges and immunities granted to, and preserved for the citizens of the Commonwealth" under arts. 1, 10, 11, 12, 20, and 30 of our Declaration of Rights and also under the Fifth and Fourteenth Amendments to the Constitution of the United States. A judge in the Superior Court overruled the **demurrer**, and the plaintiff appealed.

The demurrer was rightly overruled. Nothing has been brought to our attention suggesting that the doctrine of charitable immunity is repugnant to any provision of the Constitutions of the United States and the Commonwealth.

In the past on many occasions we have declined to renounce the defence of charitable immunity set forth in *McDonald v. Massachusetts Gen. Hosp.*, 120 Mass. 432, and *Roosen v. Peter Bent Brigham Hosp.*, 235 Mass. 66, 126 N.E. 392, 14 A.L.R. 563. We took this position because we were of [the] opinion that any renunciation preferably should be accomplished prospectively and that this should be best done by legislative action. Now it appears that only three or four States still adhere to the doctrine. . . . It seems likely that no legislative action in this Commonwealth is probable in the near future. Accordingly, we take this occasion to give adequate warning that the next time we are squarely confronted by a legal question respecting the charitable immunity doctrine it is our intention to abolish it.

Order overruling demurrer affirmed.

John HIGGINS
v.
EMERSON HOSPITAL

328 N.E.2d 488 (Mass. 1975)

§

This appeal brings before us the issue whether, by reason of the language in *Colby v. Carney Hosp.*, 356 Mass. 527, 528, 254 N.E.2d 407 (1969), we should hold that the defense of charitable immunity is not available to the defendant hospital. . . .

The plaintiff brought an action in tort and contract for injuries allegedly sustained by him on June 17, 1970, while he was an inpatient at the defendant hospital. The case was tried on June 20, 1974, before a Superior Court judge and a jury. The plaintiff's attorney made an opening statement that asserted the facts of the plaintiff's accident and injury, including a stipulation that the defendant hospital . . . was operated exclusively for charitable purposes. The judge thereupon **directed verdicts** for the defendant as to both counts of the plaintiff's declaration.

. . . The parties and the judge have clearly considered that the single issue is whether, by reason of the *Colby* case, or any other consideration, we should hold that charitable immunity is not applicable in this case. We hold that the doctrine is applicable and the judge properly directed verdicts for the defendant as to both counts.

The injury here occurred after the date of the decision of the *Colby* case (December 23, 1969), but before the effective date, September 16, 1971, of [the statute] which abolished the doctrine of charitable immunity. We have since held that the statute is not retrospective in effect . . ., and it is thus clear that the plaintiff here takes no benefit from the statute.

The plaintiff contends that, because of the intimation in the *Colby* case as to the possible future abolishment of charitable immunity, that doctrine is not applicable in this case. He argues that from the date of the decision the various charitable institutions, as well as the insurance industry and members of the public, were clearly given notice of and could conform their conduct in reliance on the fact that claims of charitable immunity raised with respect to incidents occurring after the date of the decision, December 23, 1969, would be rejected.

He further contends that had the Legislature not acted on the subject matter in 1971 there would be no question that this court would rule the charitable immunity doctrine abolished as to the instant case.

We reject the arguments. In *Colby v. Carney Hosp.*, 356 Mass. 527, 528, 254 N.E.2d 407, 408 (1969), we said that any renunciation of the doctrine of charitable immunity "should be accomplished *prospectively* and that this should be best done by legislative action" (emphasis supplied). At no time has this court abolished the doctrine. In *Ricker v. Northeastern Univ.*, *supra*, _____ at _____, 279 N.E.2d at 672, we said, speaking of the *Colby* case, "This language does not by itself abolish the doctrine of charitable immunity as of December 23, 1969 . . . [the language] makes it clear that no change of the doctrine was then being made." The Legislature chose to act subsequent to the *Colby* decision. We recognize the factual distinction between the instant case and the *Ricker* case, to wit, that the injury to Ricker occurred prior to December 23, 1969, the date of our decision in the *Colby* case, while the injury underlying this action occurred subsequent to that decision. Nevertheless, we see no persuasive reason now to rule, as in practical effect the plaintiff urges here, that the doctrine of charitable immunity does not apply to an injury which occurred after December 23, 1969, but before the effective date of [the statute].

* * *

Judgment affirmed.

Case Questions

1. If the court was so clearly opposed to charitable immunity, why did it not simply abolish it in *Colby*?
2. Because the doctrine of charitable immunity was a judicial creation in the first place, why did the court look to the legislature to abolish it?
3. How do these cases express the judicial attitude toward precedent in Massachusetts?
4. If you had been Higgins's attorney in *Higgins v. Emerson Hospital,* would you have predicted a win or a loss in the Supreme Judicial Court?

Case Glossary

administrator A person appointed by a court to manage the distribution of the estate of a deceased person.

intestate A person who dies without a will. Also used as an adjective to refer to the state of dying without a will.

demurrer A motion to dismiss a case, alleging that the complaint is insufficient to state a legal cause of action.

directed verdict The judge may order a verdict against the plaintiffs when they have failed to meet their burden of proof. Formerly the judge ordered the jury to enter a verdict against the plaintiff. Today the judge grants a motion for a directed verdict and enters a judgment.

OBITER DICTUM

dictum (dicta, obiter dictum)

Dictum is a Latin word meaning "said" or "stated." *Obiter* means "by the way" or "incidentally." *Obiter dictum*, then, means something stated incidentally and not necessary to the discussion, usually shortened to *dictum* or its plural *dicta*. In law, it refers to a part of a judicial decision that goes beyond the scope of the issues and is considered mere opinion and not binding precedent.

Not everything that is expressed in an opinion is precedent. The author of an opinion is free to make comments that go beyond the immediate issues to be decided. The remarks, opinions, and comments in a decision that exceed the scope of the issues and the rules that decide them are called **dictum** (plural **dicta**), from the older Latin phrase **obiter dictum**, and are not binding on future cases. As we have already seen, the process of adjudication commonly results in the making of new rules or the interpretation of existing rules. This is an unavoidable result of the necessity of resolving disputes. However, when a judge attempts to expand an argument to issues or facts not before the court in the dispute, adjudication ends and legislation begins. Although these statements are worthy of consideration in subsequent cases, they are not considered binding precedent and need not be followed; they are *dicta* rather than rule.

Analytically, the way to distinguish *dictum* from the rule of law is to determine the legal and factual issues presented by a dispute and analyze the reasoning that leads to their resolution. Anything outside this reasoning and the rule behind it is *dictum*.

This can be applied to the *Colby* and *Higgins* cases. In *Colby*, the court faced the issue of whether charitable immunity was still the rule in Massachusetts. Although the court expressed its disapproval of the rule, it nevertheless followed prior precedent and held that charitable immunity was still in effect, even while suggesting that it would be better for the legislature to abolish the doctrine. The court added that it intended to abolish the doctrine the next time it was faced with the same issue. This assertion of the court's future intentions was *dictum*. When the trial court in *Higgins* was faced with the same issue 5 years later, it upheld charitable immunity and directed verdicts in favor of the defendant. The trial court was legally correct because the Supreme Judicial Court in *Colby* had not abolished the doctrine but merely expressed its intention to do so. The Supreme Judicial Court agreed with the lower court that the doctrine had not been abolished by the court and indicated that its expression of future intentions had no legally binding force on Massachusetts courts. As a practical matter, the fact that the legislature had subsequently abolished charitable immunity meant that the Supreme Judicial Court need not take it upon itself to abolish the doctrine, which only affected those unfortunate few who were injured prior to the legislative act.

NONBINDING AUTHORITY

In practical terms, the law consists of state and federal constitutions, statutes, and judicial opinions. If a trial court in Rhode Island is faced with a difficult legal issue, it will attempt to determine the applicable law by resorting to Rhode Island statutes and case law that conforms to mandates of the Rhode Island and federal constitutions. It is bound by these authorities alone. Nevertheless, the court may confront an issue that clearly demands judicial resolution and for which the usual binding sources of the law provide little or no guidance. Typically this arises in a case of first impression, in which the factual situation giving rise to the dispute has never been decided by a court of the state nor been addressed by the state legislature.

Reasoning from Authority

To arrive at a reasonable solution, the court will use the best authority it can find. It may reason from existing state law using logic and analogy to infer a rule. For instance, until recently state courts universally rejected the notion that a professional license was property that could be used to establish property settlements upon divorce. This was particularly problematic in cases in which spouses, usually wives, had worked to support their husbands through professional school, only to be divorced soon afterward, when their professional husbands had not yet practiced long enough to acquire much property to be divided between husband and wife. In attempting to classify professional licenses, the courts, though admitting that a license clearly had value for its holder, noted that the licenses did not have the usual attributes of property (namely, they could not be transferred, sold, leased, or given away) and noted that they could be revoked by the licensing authority. Although many courts obviously felt that this traditional definition of property resulted in an injustice to many wives, they felt compelled to follow the law. Finally, in *O'Brien v. O'Brien,* 489 N.E.2d 712 (N.Y. 1985), the New York court defined professional licenses as "marital property," justifying its departure from prior law on the basis of recent divorce legislation that provided a broad definition of marital property in divorce. Of course, the *O'Brien* decision was only binding on New York courts. The definition of "marital property" is a matter of state law, and New York had used a definition broader than that of other states.

Law from Sister States

When binding authority is absent, the court often looks to nonbinding authority from other states. An issue unique in one state may very well have been decided in another. It seems reasonable to examine such decisions to see whether the rules handed down and the reasoning behind them are applicable to the law of the state faced with a case of first impression. Often the pioneering state will give its name to the principle; for example, one of the comparative negligence rules mentioned in *Li* as the "fifty percent" rule might also be referred to as the "Wisconsin rule," as opposed to the "Florida rule," which is normally referred to as "pure" comparative negligence.

Decisions of other state courts are commonly referred to as **persuasive authority**; they command respect because they represent the law of another American jurisdiction even though they are not binding outside that jurisdiction. The persuasiveness of such authority is greatest in areas of common law, especially torts, and weakest in decisions based on statutory interpretation. For example, in the area of family law, there is considerable variation among the states concerning divorce law, so the reasoning of the court of one state may be considered inappropriate in another by virtue of differences between their respective statutes. For example, California is a **community property** state, whereas New York is an **equitable distribution** state, making California decisions regarding the distribution of property upon divorce largely inapplicable to New York cases. In contrast, because the **Uniform Commercial Code** (UCC) has been adopted in every state except Louisiana, decisions interpreting the UCC are often used as persuasive authority.

Secondary Sources

In addition to cases from other states, there exists a vast array of legal materials used in arguments by lawyers and opinions by judges that are not officially the law anywhere; these materials are called **secondary authority**. Principal among these are law review articles, **treatises**, and

persuasive authority
Authority that carries great weight even though not qualifying as precedent; for example, decisions of other state courts.

community property
A regime in which the earnings of husband and wife during marriage are owned equally by both; eight states borrowing from French (Louisiana) or Spanish (Texas west to California) law incorporated the concept of community property into marital law.

equitable distribution
Legal scheme of property ownership designed to equalize the marital shares of husband and wife for purposes of divorce.

Uniform Commercial Code (UCC)
Commonly referred to simply as the UCC, a set of comprehensive statutes governing most commercial transactions; has been adopted in every state except Louisiana.

secondary authority
Authoritative statements of law other than statutes and cases, such as law review articles, treatises, and the Restatements.

treatises
In the legal context, scholarly books about the law, usually covering one of the basic fields of law, such as torts or contracts, or a significant subfield of the law, such as workers' compensation.

Restatements of the Law
Compilations of general interpretations of major fields of common law, sponsored and published by the American Law Institute (founded in 1923).

the **Restatements of the Law**. Law review articles written by legal scholars commonly address contemporary problems in the law and suggest carefully reasoned solutions. For example, the surrogate motherhood question that arose in New Jersey in the *Baby M* case gave rise to numerous articles critiquing the court's decision and discussing appropriate solutions to the issues raised. Treatises by eminent scholars are often cited in cases, and the Restatements are especially respected because they attempt to provide a general statement of American law rather than focus on any particular state.

In addition to cases of first impression, courts, usually the highest state courts, are sometimes presented with cases that reveal serious weakness in prior precedents and urge that those earlier cases be overruled. In rationalizing the departure from what otherwise appears to be binding precedent, the court will muster all the available persuasive authority and secondary authority it can.

Because cases raise serious legal issues and judges are entrusted with the administration of justice, decisions are not mechanical products of legal scholarship. Much attention is given in written opinions to fairness to the parties and the consequences to society of the rules that are constructed or enforced. The search for authority on which to base a rule helps to ensure that judges do not act merely on their own personal value systems but instead reflect a consensus of the wisdom of their peers. This is the legacy of the common law, a system of judicial decision making that has endured many centuries of political and social change and has perhaps greatly assisted in making those changes.

In the following case, the New Hampshire Supreme Court states that the trial court relied on *Shaff v. Leyland*, a 2006 case decided by the New Hampshire Supreme Court. In reaching its decision below, the court also relied heavily on *Shaff* but interpreted *Shaff* to apply differently to *Lynch* than had the trial court. The other source that the New Hampshire Supreme Court relied on even more heavily than *Shaff* was that portion of the *Restatement of Property* concerning servitudes. The *Restatement* has various textual sections and comments to the sections. Although the *Restatement* is a secondary source, the New Hampshire Supreme Court treated it as quite authoritative and went so far as to adopt one section of the *Restatement*.

Supreme Court of New Hampshire.
J. Albert Lynch
v.
Town of Pelham

No. 2013-064
104 A.3d 1047
October 24, 2014

§

Opinion

BASSETT, J.

The following facts were drawn from the plaintiff's petition, the allegations of which we accept as true for the purposes of reviewing the trial court's order on the motion to dismiss. . . . In the 1980s, Elizabeth Mills owned twenty-four acres of land in the center of the Town. After she fell ill, her daughter, Shirley Parker, attempted to sell the property. Two local developers made offers to Parker with the intent to subdivide the property into multiple building lots. Before she had acted upon either offer, Louis Fineman and J. Albert Lynch, both residents of Pelham, approached Parker about purchasing the entire tract for $300,000, with the intention to sell it to the Town rather than develop it.

Fineman and Lynch approached the Town Board of Selectmen with their proposal to purchase the property and then sell it to the Town. The Board of Selectmen told them that the Town would be willing to purchase only eighteen acres because it could not afford the entire tract. Sometime prior to the conveyance, the FIN–LYN Trust was established with Lynch as the trustee. On February 1, 1985, the property was conveyed to Lynch, as Trustee, by deed recorded in the Hillsborough County Registry of Deeds. . . . The Town ultimately agreed to purchase the eighteen-acre parcel for $180,000, subject to a number of restrictive covenants. The deed conveying the eighteen-acre parcel was executed on May 31, 1985. It provided, in part:

(6) All buildings to be constructed on the land hereby conveyed shall be of Colonial architecture and shall be architecturally consistent with each other. No building shall have a flat or single pitch roof and no building shall exceed two stories in height, excluding the basement.

(7) Within two years of the date of this deed and prior to the construction of any building or parking lot on the southern one [-]third of the land hereby conveyed, the [Town] shall plant a dense row, at least thirty (30) feet deep, of white pine, scotch pine, fir, spruce or willow trees along the southern property line of the land hereby conveyed.

. . . .

(13) The [Town] agrees to reconstruct and maintain the stone wall along Marsh Road and said wall may be breached only for ingress and egress.

. . . .

The land hereby conveyed is subject to and has the benefit of easements, restrictions, agreements and reservations of record, if any there be, insofar as the same may now be in force and applicable.

The deed did not specify whether the restrictions were intended to be in gross or appurtenant. . . .

The Town has constructed municipal buildings on the eighteen-acre parcel, now known as the Village Green. In March 2012, the Town voted to approve construction of a new fire station on the Village Green. . . . By letter dated March 27, 2012, the Trustee advised the Board of Selectmen that the proposed fire station did not comport with the restrictive covenants in the deed to the Town. The Trustee filed a writ on April 20, 2012, in superior court. . . .

In his writ, the Trustee alleged that "the portion of the new fire station constituting the garage will have a flat roof," and "portions of the new fire station will consist of poured concrete walls" rather than clapboards. The Trustee petitioned the court for declaratory and injunctive relief, claiming that: (1) the proposed fire station would violate the restrictive covenants because it is not of "Colonial architecture," in whole or in part, and has, in whole or in part, a flat roof; (2) the Town violated the deed restrictions when it failed to plant a dense row of trees along the southern boundary of the Village Green; and (3) the Town violated the covenants by failing to fully reconstruct and maintain the stone wall along Marsh Road. . . .

The trial court relied on *Schaff v. Leyland*, in ruling that, because the Trustee did not own land benefiting from the covenants, he lacked standing to enforce them. It interpreted *Shaff* to hold that any deeded covenant that is not clearly labeled "in gross"—including those at issue here—is an appurtenant covenant. The trial court also ruled that, even if it were to construe the covenants as in gross and enforceable, the Trustee had failed to allege a cognizable "legitimate interest" in enforcing the covenant. See *Restatement (Third) of Property: Servitudes* § 8.1. The court ruled that aesthetic concerns "cannot be considered legitimate where [the Trustee] does not own any nearby property." The court found that the equities favored the unrestricted use of the Town's land as endorsed by its voters, over the aesthetic concerns advanced by the Trustee. It also rejected the Trustee's contract-based arguments. This appeal followed. . . .

We first address the trial court's conclusion that the covenants at issue were appurtenant. "A covenant, as used in the context regarding the use of property, is an agreement by one person, the covenantor, to do or refrain from doing something enforceable by another person, the covenantee. Every covenant has a burden to the covenantor and a benefit to the covenantee." *Shaff.* "The benefit and the burden of a covenant are subject to two general classifications—'appurtenant' and 'in gross'—which themselves are subject to further classification as 'personal' or 'running with the land.'" . . . "'Appurtenant' means that the rights or obligations of a servitude are tied to ownership or occupancy of a particular unit or parcel of land." *Id.* (quotation omitted). Conversely, "'[i]n gross' means that the benefit or burden of a servitude is not tied to ownership or occupancy of a particular unit or parcel of land." . . . Both "[c]ovenants appurtenant and covenants in gross can be personal or can run with the land." . . . "Running with the land means that the benefit or burden passes automatically to successors," . . . whereas "'[p]ersonal' means that a servitude benefit or burden is not transferable and does not run with land." . . .

In *Shaff*, we observed that "[t]he general rule of construction favors appurtenant servitudes over servitudes in gross," and similarly favors construction as "personal to the covenantee and [as] enforceable only by the covenantee, unless a contrary intent is expressed in the language of the covenant." . . . In *Shaff*, the original grantor petitioned the court to enforce a restrictive covenant against a grantee after the grantor had conveyed all of her interest in the original parcel. . . . The restrictive covenant stated that it "shall run with the land" but expressed "no intent regarding the benefit of the covenant or the type of covenant conveyed." . . . At the time of the conveyance, the petitioner did own land in the immediate area, and we concluded that the covenant was both appurtenant and personal. . . . Therefore, because the petitioner no longer owned land that benefited from the covenant, we held that she lacked standing to bring a claim. . . .

In *Shaff*, we commented that "[h]ad the respondent wished to hold the covenant in gross, regardless of whether or not she owned land in the area, she could have included language to that effect." . . . We did not, however, create a per se rule requiring all in gross covenants to be expressly stated as such in the deed.

"A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created." *Restatement (Third) of Property: Servitudes. supra* § 4.1(1). . . . Although in *Shaff* we did not cite section 4.5 of the *Restatement* we did apply the principles articulated in that section and its comments:

> The circumstances surrounding creation of a servitude will generally indicate whether the benefit was intended or expected to be appurtenant or in gross. The fact that the benefit serves a purpose that is only or primarily useful to the holder of a particular interest in land, which was held by the original beneficiary at the time the servitude was created, strongly suggests that the benefit is appurtenant.

Restatement (Third) of Property: Servitudes, supra § 4.5 comment d. . . . A rule of construction, such as the preference for construing covenants as appurtenant and personal, may aid in discerning the parties' intent when there is little evidence thereof, but such a rule is not necessarily dispositive.

Here, the parties' intent can be discerned both from the circumstances surrounding the transfer as well as the plain language of the deed itself. At the time of the conveyance, the Trustee owned no other property in the Town. The deed did not identify any specific property intended to be benefitted by the covenant; thus, there was no owner to enforce the covenants. Thus, if the benefit of the covenant had been appurtenant, the restriction requiring Colonial architecture and prohibiting flat roofs would have been unenforceable from the moment that the deed was signed. Such a result would be neither logical nor consonant with the intent of the parties. Recognizing that such a circumstance can arise, the *Restatement* provides that, except where contrary to the parties' intent or public policy, "the benefit of a servitude is . . . in gross if created in a person who held no property that benefited from the servitude." *Restatement (Third) of Property: Servitudes, supra* § 4.5(1)(b). . . .

In addition to the circumstances of the transfer, we draw further support for our conclusion that the parties' intent was that the servitude be in gross, by comparing the covenants at issue with other covenants in the deed which are manifestly appurtenant. For example, one restriction contained in the deed provides that "[n]o Police or Fire Station shall be located within 200 feet of the rear lot lines of any single family home lot that fronts on Sawmill Road or Timber Lane," and another states that "[a] portion of the land hereby conveyed to the north of Lot 7–237–6 100 feet deep is subject to an easement for the benefit of said Lot 7–237–6 if it is necessary to properly construct and maintain a septic system for the benefit of Lot 7–237–6" if one cannot be properly constructed on Lot 7–237–6. These provisions establish both a dominant and a servient estate – that is, they explicitly identify which parcel is benefited as well as which parcel is burdened. . . . We agree with the Trustee that, when considered together, the evidence that the parties created explicitly appurtenant servitudes when they so desired, and the fact that the servitudes at issue would be unenforceable if they were read as anything other than in gross, supports the conclusion that the covenants at issue were intended to be in gross. . . .

Therefore, based upon the evidence of the parties' intent provided by the plain language of the deed and the context of the transfer, as well as the principles set forth in the *Restatement,* we conclude that the covenants at issue were in gross.

We next consider whether the Trustee can enforce the in gross covenants. Under the traditional common law theory, "[w]here a person no longer has any land in the vicinity which might be affected by the disregard of a covenant, he or she cannot enforce the restrictions." *Shaff.* In *Shaff,* we contrasted this view with the one endorsed by the *Restatement,* "which eliminates the requirement of an ownership interest in benefited property in order to have standing to enforce a covenant in gross, instead requiring only that a holder establish a legitimate interest in enforcing it." Id. (quotation omitted). Thus, we observed that "[a]doption of this view would change the common law standing requirement for covenants in gross, but not for covenants appurtenant." Id. However, because we found that the covenants at issue in *Shaff* were appurtenant, that case did "not present a proper opportunity to decide whether to adopt such a rule because it [was] not necessary to our decision." . . .

Here, because we have concluded that the covenants at issue are in gross, we now have the opportunity to decide whether to adopt section 8.1 of the Section 8.1 provides:

> A person who holds the benefit of a servitude under any provision of this *Restatement* has a legal right to enforce the servitude. Ownership of land intended to benefit from enforcement of the servitude is not a prerequisite to enforcement, but a person who holds the benefit of a covenant in gross must establish a legitimate interest in enforcing the covenant.

Restatement (Third) of Property: Servitudes, supra § 8.1. . . . By limiting enforcement rights to only those beneficiaries with "a legitimate interest in enforcing the covenant," section 8.1 effectively accomplishes many of the policy goals of the common law rule preventing enforcement of benefits in gross. As the Reporter's Note to that section explains, "[t]he traditional rule that a restrictive covenant could be enforced only by a beneficiary who owned land that would be benefited by enforcement generally operated to ensure that the beneficiary had some interest other than simply forcing the burdened land owner to pay for a release of the restriction." Id. § 8.1 Reporter's Note comment c at 488. The traditional rule "prevented enforcement by original covenantees, or their heirs, after they had disposed of the land benefited by the covenant; it prevented fortune hunters and mischief makers from buying up old covenant benefits for their nuisance value without also buying the land they were intended to benefit." Id. § 8.1 comment a at 475. "Requiring that the person seeking enforcement who does not own benefited land show some legitimate interest in enforcement of the servitude is intended to provide a substitute means of preventing opportunistic use of servitude violations for extortion or other improper purposes." Id. § 8.1 Reporter's Note comment c at 488–89. Thus, we conclude that the adoption of section 8.1 addresses the legitimate concerns of the trial court and commentators, while at the same time striking a reasoned balance in permitting enforcement of covenants in gross under limited circumstances.

Having determined that these covenants are in gross, and that an entity that holds the benefit of a covenant in gross can enforce it if it can establish a legitimate interest in enforcement, we next examine whether the record establishes that the Trustee has a legitimate interest in enforcing the covenant on behalf of the trust.

The trial court found that the Trustee's concerns "relate purely to the Trust [ee]'s aesthetic taste, and cannot be considered legitimate where he," in his capacity as Trustee, "does not own any nearby property." It added, "[a]lthough the Town may have initially intended to be bound by the covenants, there is no benefit to the Town or the petitioner in continuing them," especially because a Town vote indicated general approval for the fire station proposal. The Town argues on appeal that the Trustee has no legitimate interest in enforcing the restrictive covenants. The Town contends that the property was not developed as part of an overall development scheme, and, therefore, that it is not subject to reciprocal covenants. It further states that the Trustee has not suffered economic harm attributable to the Town's construction of the fire station. We disagree with the Town and conclude that the record establishes the Trustee's legitimate interest in enforcement of the covenants.

A "legitimate interest" need not be financial. Comment c to the *Restatement (Third) of Property: Servitudes* § 8.1 entitled "Legitimate interest that entitles beneficiary to seek judicial enforcement," explains:

> Some covenant benefits in gross, like the benefits of conservation servitudes, are similar to appurtenant benefits in providing valuable benefits that are difficult

to monetize and difficult or impossible to replace. To establish a legitimate interest in the enforcement of such a covenant, the beneficiary need not establish that he or she will suffer economic harm from covenant violation, but rather, that he or she seeks enforcement to advance the purpose for which the servitude was created.

Restatement (Third) of Property: Servitudes, supra § 8.1 comment c at 477. We view the covenants relating to the aesthetics of buildings constructed on the Village Green to be of this type. The covenants are for the benefit of the public, difficult to monetize, and difficult or impossible to replace. See id. Thus, to demonstrate a legitimate interest in enforcement, the Trustee need not demonstrate economic harm, but rather, that he seeks enforcement "to advance the purpose for which the servitude was created." Id. It is evident that the Trustee's petition was filed to advance the purpose for which the servitude was created. The petition did not seek an award of damages, but rather injunctive relief requiring the Town to "comply with the restrictive covenants in its deed," as well as the award of litigation costs and fees incurred by the Trustee.

We observe that the Reporter's Note to section 8.1 discusses when a party's interest is not legitimate, thus precluding a finding of standing:

Situations that ordinarily call for denial of standing under this rule arise where someone not otherwise connected to the burdened property or development has bought up the rights of the developer (or other original covenantor) after the developer or other covenantor has severed his or her connection to the area. Unless the claimant can demonstrate some interest other than simply extracting payment from the burdened party, standing should be denied.

Restatement (Third) of Property: Servitudes, supra § 8.1 Reporter's Note comment c at 489. Here, because the dispute is between the original grantor and grantee, and does not involve a third party who has acquired rights and now seeks to exploit them, the policy concerns giving rise to comment c are not implicated.

We conclude that the covenants at issue are in gross and enforceable by the Trustee, and that the record establishes that he has a legitimate interest in enforcing the covenants on behalf of the trust. Therefore, the trial court erred in ruling that the Trustee lacked standing. Upon remand, the trial court shall determine whether the fire station violates the restrictive covenants, and, if so, the nature of the remedy.

Case Questions

1. What is the difference between a covenant in gross and a covenant appurtenant?
2. Were the covenants in the instant case covenants in gross or covenants appurtenant?
3. Are the covenants enforceable by the trustee?

Precedent and Unpublished Cases

In the 1960s and 1970s, appellate courts found their caseloads increasing significantly. This tendency has continued since that time without a corresponding increase in the number of appellate judges or the amounts of their budgets. Faced with numerous cases that could be decided on well-established precedents and offered little of interest to anyone other than the parties, judges in the past few decades have increasingly decided that some decisions were not worthy of inclusion in the reporters. These cases are deemed "unpublished" because they do not appear in the official printed reports. This practice allowed judges to skimp on writing, focusing their attention simply on the facts and issues necessary to explain the decision to the parties without the extensive discussion needed for opinions serving as stare decisis. Of course, the decisions were "official" in the sense that they decided the winners and losers, adjudicating the rights of the parties; but they were not published in the usual sources that attorneys would research. Recently, though, these unpublished opinions have been made available on Westlaw and Lexis, the two primary legal databases, as well as by other sources, so that they are readily searchable on the Internet.

These unpublished decisions were deemed by many jurisdictions not to have precedential force. An apparently logical conclusion followed that attorneys should not cite them. Federal Rule of Appellate Procedure 32.1, adopted in 2006, provides that a court may not limit an attorney from citing to an unpublished federal case decided on or after January 1, 2007; however, this rule is arguably effective only for the United States Courts of Appeals.

SUMMARY

The Anglo-American legal tradition has a rich history of judge-made law known as the common law. It is governed by the principle of stare decisis, which urges that the courts abide by past precedents unless there is a compelling reason to depart from them. The process of adjudication focuses on disputes, in contrast to the legislative process, which enacts general laws for future application.

In determining and interpreting the law, courts base decisions on authority, principally statutes and prior case law. When these do not provide a clear answer to the case at hand, secondary authority may be used as the source of reasoning and rules.

The statements of the law made in higher courts must be followed by the lower courts, but the force of precedent applies only to that part of the decision pertinent to the facts of the dispute before the court and not to incidental statements of the author of a judicial opinion.

KEY TERMS

adjudication
case of first impression
common law
common law tradition
community property
dictum (dicta, obiter dictum)
equitable distribution
judicial restraint
judicial review
legislation
persuasive authority
precedent
privity of contract
product liability
Restatements of the Law
secondary authority
stare decisis
supremacy clause
treatises
Uniform Commercial Code (UCC)

CHAPTER REVIEW QUESTIONS

1. What is meant by *judicial review*? On what constitutional provision is it based?
2. What political purpose encouraged the establishment of judicial restraint? Why is it called a *doctrine*?
3. How did the phrase *common law* originate?
4. Why is the statement "judges do not make law" inaccurate?
5. What is the Latin phrase expressing the principle of precedent?
6. By what authority can the U.S. Supreme Court invalidate state laws?

7. What are the two characteristics of legislation?
8. What is the practical significance of *obiter dictum?* (see *Colby* and *Higgins*)
9. What is a *case of first impression?*
10. What are examples of secondary sources?

CRITICAL THINKING QUESTIONS

1. What alternatives are there to stare decisis?
2. Should judicial opinions be written in "plain English" so the average person can understand them?

CYBER EXERCISES

1. Opinions of the Pennsylvania Supreme Court are accessible at a number of websites, including the website for Pennsylvania state courts, http://www.aopc .org/. The Pennsylvania Supreme Court decided *Freed v. Geisinger Medical Center*, 971 A.2d 1202 (Pa. 2009) on June 15, 2009. The case contained a majority and a dissenting opinion. Locate the case at the Pennsylvania state courts website and answer the following questions concerning the case:
   a. Why did Freed file the lawsuit?
   b. What did the Pennsylvania Supreme Court hold in *Flanagan*?
   c. How did the Pennsylvania Supreme Court distinguish *Miller* and *McClain*, on the one hand, and *Flanagan*, on the other hand?
   d. What effect did the Pennsylvania Supreme Court's decision in *Freed* have on *Flanagan*?
   e. What three conclusions did the court reach regarding its prior decision in *Flanagan*?
   f. Does the new rule announced by the court apply prospectively or retroactively, and why?
   g. What conclusion would Justice Eakin have reached?
   h. What was Justice Eakin's reasoning?
   i. Do you find the majority or the dissenting opinion more persuasive?

2. The state courts of your state probably have a website. Find the website and answer the following questions concerning the website:
   a. What is the URL for the website? (If there are multiple websites, provide the URL for each such website.)
   b. Is the full text available for state court cases, and for which courts are opinions available?
   c. What information do you need (such as party names, docket number, date of decision, etc.) to access opinions?
   d. For which years are full-text opinions available?