

ECONOMICS 371

ECONOMICS & THE LAW

WINTER 2008

Howard P. Marvel

VERSION OF MAY 2, 2008.

*For the rational study of the law the black-letter man may be the man of the present,
but the man of the future is the man of statistics and the master of economics.*

OLIVER WENDELL HOLMES, *The Path of the Law*
1897

INTRODUCTION

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This document contains class materials for Economics 371, Law & Economics, as proposed for introduction as a new undergraduate class in calendar 2008. Our class is concerned with the ways in which economic theory can be used to understand what the legal system does and where our laws come from. The class is designed for undergraduate students who intend to go on to law school as well as for those who simply want to understand more about the structure and functioning of the legal system. No economic training is assumed, and, accordingly, the content of the course will be nontechnical.

Economic theory is used here as a lens through which we can see the causes and effects of legal rules more clearly. The course is not intended, however, to anticipate the kind of training you will encounter in law school. While it is true that virtually every major law school now has an economist on staff, and while law and economics is taught in most law school curricula both through courses dedicated to the topic and through inclusion of economic analysis into the basic building blocks of the curriculum, our approach will differ substantially from the case method so typical of law school instruction. We will look at a number of cases, but our goal will not be to develop legal reasoning. Instead, we will apply economic analysis to better understand the issues involved in the disputes and to predict the likely impact on behavior in the future of today's decision to establish a legal rule.

Why is economics useful for the purpose of understanding what legal rules do? In order to answer this question, we will need a basic introduction to economics. What is economics? It is the social science that studies choices and their consequences. People must make choices because they face constraints. They—we—have neither the time nor the wealth to have it all. Everyone must do the best they can with the resources and knowledge available to them. Scarcity of time and money forces us to make choices. Mathematically, economics is the study of constrained optimization, but in words, this just means the study of doing the best you can with what you've got.

What is Economics?

What do laws do? They constrain behavior. Laws limit the choices we are permitted to make with the goal of shaping the choice actually made. Thus a law is a component of the central economic problem we all face. Not surprisingly, a science that attempts to explain choices is suited to explain the effects of laws designed to shape choices.

Notice, then, that economics is forward looking. Economists look at how

changes in constraints shape choices that have not yet been made. The past matters to an economist only to the extent that past actions or outcomes shape the set of opportunities available to people who are still able to choose among meaningful alternatives.

opportunity cost

One need look no further than the economist's notion of cost to see this concern for the future in action. Economists define costs with reference to choices. Suppose I must choose only one action from three options, *A* or *B* or *C*. Suppose that I prefer *A* to *B* and *B* to *C* (and *A* to *C* as well). I'll choose my preferred option, *A*, but in doing so, I give up both *B* and *C*. What is the cost to me of *A*? It is the value to me of the best alternative (the most attractive opportunity) that I give up, which here is *B*. Economists define cost as opportunity cost, the highest-valued option I have to give up when I make a particular choice.

sunk cost

Suppose I spend a non-refundable \$500 on a plane ticket to Florida for Spring Break 2008, but when March rolls around, a recruiter offers me a trip to Flint, Michigan for a job interview during Spring Break week. What is the cost to me of taking the interview? How does the \$500 enter into the cost? The right answer is that the cost to me of going for the interview is the benefit I expect to get from the trip to Florida, but the \$500 doesn't count, because I don't get it back no matter what choice I make. The \$500 is what economics call a sunk cost, and sunk costs do not matter for choices. A sunk cost is *not* an opportunity cost, but rather a past cost that cannot be affected by what the person facing a choice does today. It is irrelevant to choice. Economics, the study of choices, always looks forward.

Economics is theoretical. It provides a distinctive view of the law as arising from attempts to deal with a common set of problems, all of which involve shaping choices. Indeed, during this quarter we will see that the same economic tools that can help us understand the sources and effects of rules in property law can be applied as well to the other great divisions of the common law, contracts and torts, as well as to diverse topics in criminal, constitutional, antitrust, and family law. This idea that a general and reusable theory can be applied across the legal landscape is inimical to the tradition of legal education in which areas of law are treated distinctly, and general rules are divined separately for each area from the study of specific cases. Indeed, the theoretical perspective of economics, together with its tendency to ask positive question of where legal rules come from and how they affect behavior are in sharp contrast to the approach of legal education, characterized by Judge Richard Posner as beginning the study of law *in medias res*, or plunging into the midst of things, "taking the structure of the legal system and the principal rules of law for granted." Lawyers look to precedent to attempt to resolve disputes, applying rules that were developed or enacted in the past to de-

termine legal outcomes today. The problem with this approach is, of course, that as circumstances change, so do must legal rules adjust, both to accommodate situations that their designers did not contemplate and because our understanding of how the world works has changed as well. Thus law and history are intimately linked, but perhaps this link is not altogether good. Here is the famous jurist, Oliver Wendell Holmes, Jr., on the subject:

I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics. The present divorce between the schools of political economy and law seems to me an evidence of how much progress in philosophical study still remains to be made. In the present state of political economy, indeed, we come again upon history on a larger scale, but there we are called to consider and weigh the ends of legislation, the means of obtaining them, and the cost. We learn that for everything we have to give up something else, and we are taught to set the advantage we gain against the other advantage we lose, and to know what we are doing when we elect.

Oliver Wendell Holmes, Jr.,
The Path of the Law,
Harvard Law Review, 1005 (1997 Reprint).

It is not surprising, though, that lawyers are focused on the past. After all, litigation before a judge is designed to resolve disputes, and disputes typically involve a specific incident that has happened, not one that will happen. If I sue you for running into my car, or for breaching your contractual promise to me, I want a past injustice righted, at least as far as it can be. I do not much care how the outcome of the case affects future behavior. I just want legal redress, or perhaps simply revenge.

The legal system, however, must care. The rule it enacts to deal with a past event makes sense only to the extent that it shapes behavior in the future in a desirable way. Moreover, according again to Holmes, in *The Path of the Law*, this forward looking perspective is what gets lawyers hired in the first place.

When we study law we are not studying a mystery but a well known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is entrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts. (at 991).

The emphasis here on prediction is still different from the economist's view. The lawyer is hired to predict "the incidence of the public force through the instrumentality of the courts." The economist asks two related questions. The first takes the lawyer's prediction as given in the form of a rule—if you do *X*, then consequence *Y* will follow—and tries to predict the effect of the rule on behavior. But the economist also considers alternate forms of the rule—how will people behave differently if the rule is changed?

The book for this course is entitled *Law's Order*, but that was not the original title. Its author, David Friedman, originally titled it *Why is Law?* The reason is clear. In order to understand what laws do and how changes in the law will change outcomes we need to do more than to predict the outcomes of disputes in the courts. We need to know not only what the law will say in the event of a dispute, but in addition, how expectations about the law's answer to particular disputes will shape the behavior of those who make choices in its shadow. The legal profession is charged with prediction what the law will say, but a prediction about what how the law will be interpreted does not tell us how people will respond. The absence of this second important prediction is the reason that many lawyers have turned to other disciplines, and increasingly to economics, for answers.

SYLLABUS

This section explains course policies, specifies topics and assignments, and provides a roadmap to what we will cover this quarter. But note that the schedule is tentative. We will almost certainly deviate to look at the role of economics in court opinions issued during the quarter.

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Course Calendar

MEETING TIMES: MONDAYS AND WEDNESDAYS,
TBA
ROOM TBA

Instructor

The instructor for this course is Howard P. Marvel, Professor in the Department of Economics and the College of Law, and Fellow of the Center for Interdisciplinary Law and Policy Studies.

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Disabilities

This syllabus is available in alternative formats upon request. In addition, if you may need an accommodation based on the impact of a disability, you should contact the instructor immediately.

Students with special needs should contact the Office of Disability Services (ODS) at 292-3307, or directly in room 150 Pomerene Hall, for certification. The ODS has a skilled staff able to assess the student's needs as well as to suggest ways to meet those needs most efficiently and effectively. Upon such certification, the ODS and the instructor will make every effort to accommodate special needs. Note, however, that in order to ensure that course evaluation is conducted in manner that is scrupulously fair to all students, requests for special treatment that fail to obtain ODS endorsement will not be granted.

Evaluation

Your grade in this class will be based upon a midterm, a final examination, and two assignments.

Midterm	30%
Final Examination	40%
Assignments (2, each 15%)	30%

Examination format

The Final Examination will consist primarily of short-answer essay questions. Questions will cover principles discussed in class, but will typically entail application of those principles to settings that have not been discussed.

Assignments

You are required to prepare two short papers corresponding to questions arising from the major subject areas law we will consider, namely property, contracts, and torts. If you go on to law school, you will discover that you must engage in quite a bit more writing than is expected of you in your undergraduate work. The writing component of this course will serve as useful preparation.

Papers will be roughly four pages, double spaced, with margins between 1 and 1.35 inches. You are neither paid nor graded by the word. The topics and structure of the assignments is specified explicitly below. You *must* employ economic analysis in response to the prompts provided.

Assignments should be neatly typed, formatted following the University of Chicago Manual of Style. You can find an accessible discussion of what to do in Kate Turabian, *A Manual for Writers of Theses, Term Papers, and Dissertations*. All legal citations should be provided, and must be formatted correctly. You may submit your paper electronically, either on disk or through email. You are responsible for submitting your document in a format I can read, though this is not ordinarily a problem.

Academic Misconduct

Don't cheat. Here's what Ohio State says I am suppose to say to you:

The Ohio State University's Code of Student Conduct (Section 3335-23-04) defines academic misconduct as: "Any activity that tends to compromise the academic integrity of the University, or subvert the educational process." Examples of academic misconduct include (but are not limited to) plagiarism, collusion (unauthorized collaboration), copying the work of another student, and possession of unauthorized materials during an examination. Ignorance of the University's Code of Student Conduct is never considered an "excuse" for academic misconduct, so review the Code of Student Conduct and, specifically, the sections dealing with academic misconduct.

If I suspect that a student has committed academic misconduct in this course, I am required by University Rules to report to the Committee on Academic Misconduct. If COAM determines that you have violated the University's Code of Student Conduct (i.e., committed academic misconduct), the sanctions for the misconduct could include a failing grade in this course and suspension or dismissal from the University.

Translation: Don't cheat. If you do, cataclysm will ensue.

Incompletes

Requests for incompletes are strongly discouraged. Ordinarily such requests will only be granted if made by the executor of your estate.

Participation

I ask that, where feasible, you complete the readings prior to the lecture in which they are scheduled to be discussed, and that you be prepared to participate actively in the discussion of the materials in question.

Readings

The book assigned for this course is

David D. Friedman, *Law's Order: What Economics Has to Do with Law and Why It Matters*, Princeton, N.J.: Princeton University Press, 2000.

This book is now available as a reasonably-priced paperback.

Required readings are listed in the course calendar that follows. Please understand that this listing is merely a guide, and will be updated continuously during the quarter. Plan to revisit the electronic version of the syllabus from time to time.

Week 1:

Session 1: Looking Forward, Looking Back

Monday, January 3, 2008

We begin with a boot camp in economics to provide basic tools and to stress the differences and similarities in the way economists and lawyers look at problems. In this lecture, we provide a brief overview of the legal system and introduce a variety of important economic principles, including opportunity cost, social welfare loss, and Pareto efficiency. We consider the limitations of economics when dealing with questions concerning the distribution of income. We compare the prospective approach of economics (accident? no use crying over spilled milk) to the retrospective view common in legal disputes (who was at fault in that accident we cannot, now, do anything about? Who deserves compensation; who should pay?)

Required Readings:

From the Web:

- [Introduction](#)

- Rationality in Economics
- Divisions of the Law
- The Federal Courts
- Legal Citations

Other:

- Friedman, Chapters 1 and 2.

Assignment (not graded, need not be turned in)

I ask that you check the OSU library web site to find a copy of Oliver Wendell Holmes' famous essay "The Path of the Law." Notice that two different presentations are available. You can obtain a PDF document, essentially a photocopy of the Harvard Law Review issue in which the piece was reprinted. Alternatively, you can obtain a text version from Academic Universe. Find both. (I know that you can find copies through Google, but I want you to find the versions attainable through the OSU Library. In the future, some resources we employ may not be available via Google.)

Session 2: More Boot Camp

Wednesday, January 9, 2008

Basic Economics, Continued. Law of Demand, Prices and Values. Deterrence introduced. Required Readings: From the Web:

- Choices.
- The Law of Demand.
- Price and Value
- Externalities

Other:

- Friedman, Chapters 3 and 4.

Recommended Readings

- Ronald H. Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960).

Week 2: Out of the Neoclassical Tradition: Insurance; Game Theory

Session 3: Adverse Selection, Moral Hazard

Monday, January 14, 2008

A problem for you to consider prior to this class:

If you consult the “Automobile Dealers-Used Cars” listings of the Columbus area Yellow Pages, you will find a listing for Budget Car Sales, with the Budget Car Rental logo prominently displayed. Budget describes themselves as follows:

Budget Car Sales is an entirely new concept in automotive sales and service. We sell only rental, fleet, special purchase and quality trade-in vehicles.

Have you ever rented a car? Were you as careful with your rental as you would have been with your own car? If the answer is no, ask yourself why Budget offers its cars for sale under its own name, rather than marketing them through other dealers or through its own operations under a different name. Why aren't rental cars misused cars, rather than used cars?

Required Readings:

- Friedman, Chapter 6.
- Readings on Insurance
 - Expected Value, Expected Utility
 - Problems of Insurance
- George Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," Quarterly Journal of Economics 84(3), August 1970, pages 488-500.

Session 4: Some Simple Games

Wednesday, January 16, 2008

Required Readings:

- Friedman, Chapter 8.

Week 3: Property

Monday, January 21, 2008

University Closed for Martin Luther King, Jr., Day

Session 5: Monopoly, Bilateral and Otherwise

Wednesday, January 23, 2008

Eminent Domain. Market valuation. What do prices tell us? Value at the margin differs from total value. Consumer surplus. Social welfare loss.

The United States Supreme Court will hear a very important eminent domain case on February 22, *Susette Kelo, et al. v. City of New London, Connecticut, et al.*, No. 04-108. New London, Connecticut, wished to foster construction of a research park for by a major pharmaceutical company. In order to provide an attractive campus, the city decided to condemn property that was not blighted, and for which it did not appear to have clearly defined intentions. The Supreme Court will address questions as follows:

What protection does the Fifth Amendment's public use requirement provide for individuals whose property is being condemned, not to eliminate slums or blight, but for the sole purpose of "economic development" that will perhaps increase tax revenues and improve the local economy?

Required Readings:

- Friedman, Chapters 5 and 10.
- *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
- *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870 (1970).
- **Nuisance Law**
- **"The Condemned,"** by Gary Greenberg, from the January/February 2005 issue of *Mother Jones* magazine.

Assignment 1: Property

We have spent some time on the question of eminent domain, the ability of a government to take property in return for “just compensation.” The Supreme Court has visited the topic of when regulation constitutes a taking several times in recent years, including in the [Lucas Case \(Lucas v. South Carolina Coastal Council, 505 US 1003 \(1992\)\)](#). Lucas was in some ways an easy case in that the economic value of his beach front property was reduced essentially to zero by the action of the South Carolina Coastal Council. Harder cases emerge when we consider partial takings, seizures of just a few sticks in the bundle of property rights adhering to a particular piece of property. If we do a partial seizure of rights, the value of the property is decreased, but not eliminated. For this assignment, read [Dolan v. City of Tigard, 512 U.S. 374; 114 S. Ct. 2309; 129 L. Ed. 2d 304 \(1994\)](#). Then do the following:

1. This was a close decision, with Chief Justice Rhenquist’s opinion prevailing by a 5-4 majority. Summarize the views of the justices in this case, and indicate the reasoning *you* would have employed and the conclusion you would have reached had you been asked to issue your own decision.
2. One problem with this case is that the City of Tigard apparently did not think it faced the burden of demonstrating in detail the value to is of the exactions it demanded for the zoning variance Dolan requested. Suppose that we observed that the City of Tigard was ultimately require to condemn and pay for the land, and that it chose not to develop the bike path. Would this evidence provide any evidence as to the wisdom of the court’s decision? Explain.
3. Now consider a law banning highway billboards within specific distance of an interstate highway. Would such a law reduce the value of properties adjacent to the highway? Evaluate whether the government imposing such a restriction should have to compensate property owners for that imposition. How does this example differ from the bicycle path in *Dolan*?

Week 4: Property Rights, Continued

Session 6: Intellectual Property Rights

Monday, January 28, 2008

Protecting ideas vs. protecting the expression of those ideas. Patents and Copyrights as legally conferred monopolies. Efficiency effects of monopoly. Monopoly pricing and price discrimination. Introduction to the Microsoft bundling dispute. The Apple/Microsoft “look and feel” battle. Required Readings:

- Ohio University/Ohio State University trademark squabble.
- Friedman, Chapter 11.

Have you ever heard of Dreamworks? Who owns the rights to use that name for purposes of entertainment? You might be surprised by the answer. But would the answer have been the same had the case been decided in another jurisdiction? If you think the answer is “yes,” who do you think owns the rights to “March Madness”? You might be surprised by the answer.

Recommended Readings:

- Illinois High School Association v. GTE Vantage, Inc., 99 F.3d 244 (7th Cir. 1996).
- Dreamwerks Production Group v. SKG Studio, 142 F.3d 1127 (9th cir., 1998).
- William M. Landes and Richard A. Posner, "Trademark Law: An Economic Perspective," 30 Journal of Law and Economics 265 (1987).

Session 7: Concluding Lecture on Property Rights.

Wednesday, January 30, 2008

Why is free speech so expensive? Why are newspaper editorials so much more hard-hitting than anything found on TV? How fair is fairness?

- Lecture Notes
- Written Assignment 1: Property. Due in Class

Recommended Readings:

* Gary D. Libecap and Steven N. Wiggins, "The Influence of Private Contractual Failure on Regulation: The Case of Oil Field Unitization," *Journal of Political Economy*, 93 (4), August 1985, pp. 690–714.

Week 5: Introduction to Contracts

Session 8: Transition from Property to Contracts

Monday, February 4, 2008

Do you read software license agreements before you click "Agree"? What if you cannot read the agreement? Are you still bound by it?

Required Readings:

- ProCD v. Zeidenberg, 86 F.3d 1447 (7th cir. 1996) (Shrink wrap software licenses)
- Thomas Hobbes on Contracts, from *Leviathan*

Session 9: Introduction to Contracts. How are contracts enforced?

Wednesday, February 6, 2008

Rose the remarkable cow. Suez canal cases. Impossibility, impracticability, and unconscionability. Boilerplate and transactions costs. American Tobacco, and friends.

Required Readings:

- Friedman, Chapter 12.

Assignment for second paper

Week 6: Still on Contracts

Session 10: Opportunistic Behavior

Monday, February 11, 2008

Breach of contract and willingness to commit.

Session 11: Consideration and Promise

o.o.1 Wednesday, February 13, 2008

Property Paper Due in Class

Discussion of ALCOA v. Essex Wire.

Week 7: Commercial and Corporate Law; Introduction to Torts

Session 12: Corporations

Monday, February 18, 2008

Role of the residual income claimant. Market for corporate control. Minority shareholders. Debt covenants. Required Readings:

* Friedman, Chapter 14.

Recommended Readings:

* Posner, Chapter 15.

Session 13: Torts I

o.o.2 Wednesday, February 20, 2008

Effects of various negligence rules. The Hand formula. Required Readings:

* Posner, chapter 6.

Week 8: Torts

Session 14: Property Rules vs. Liability Rules

Monday, February 25, 2008

A property right gives its holder the right to exclude others from using that property. If you try to enter my property, I can call a policeman to stop you. If I go to court, I can obtain an injunction to keep you from imposing on my right. The Coase theorem suggests that this assignment of rights will work pretty well. As long as the rights are clearly assigned, the initial rights assignment can be contracted around by the parties, as long as transactions costs are low, resulting in the property ending up in its highest-valued use. But sometimes it just is not feasible to exclude people up front from using the property of others. You may be able to tell someone to stay out of your car, but somebody who accidentally runs

into you has violated your property, even though neither you nor they wanted to. So what to do?

The alternative to a property rule permitting exclusion is to move after the fact. The result is a liability rule—I pay you for damages I cause to you or to your property. Remember our case of *Boomer v. Atlantic Cement*, an example of a nuisance? Atlantic Cement had to pay compensation to its neighbors. The compensation was set by the court, not by negotiations between the parties. That's a liability rule. What was the alternative? The court could have granted the homeowners an injunction. Boomer would have been willing to pay a very substantial amount of money to contract around that right, but the assignment itself would have been a property rule. What about Spur?

Contracts Paper Due in Class

Session 15: Final session on torts

Wednesday, February 27, 2008

A fellow gets drunk, ignores warning signs (which he cannot read anyway) and barriers, trespasses on another's property, and urinates in a very unwise manner. The results are shocking. What to do?

Required Readings:

- Lee v. Chicago Transit Authority, 605 N.E.2d 493 (Ill, 1992).

Suggestions for third paper

Week 9: Criminal Law; Regulation

Session 16: Optimal Deterrence

Monday, March 3, 2008

Tort law vs. Criminal law. *Katko v. Briney*

My object all sublime I shall achieve in time
To let the punishment fit
the crime

The punishment fit the crime;

And make each prisoner pent Unwillingly represent
A source of innocent merriment!

Of innocent merriment!

(From *The Mikado*, by Gilbert and Sullivan)

The decision to engage in criminal activity has important economic components, as in “Don’t do the crime if you can’t do the time.” But how should punishments be chosen to deter crime efficiently? Why are premeditated crimes punished more heavily than the same crime committed on impulse, or by a person not deemed “competent”?

Required Readings:

- Friedman, Chapter 15.

Session 17: Incentive Effects: Safety, Security and Guns

Wednesday, March 5, 2008

We consider the often surprising incentive effects of laws and regulations designed to improve safety and security. In some cases, as for the U.S. Food & Drug Administration, it appears that incentives faced by the regulators have resulted in excessively stringent approval screens for new drugs, in that lives lost due to delay of effective treatments are valued less highly than potential problems caused by offering new drugs on the market without adequate scrutiny.

We will also consider spillover effects from efforts of individuals attempting to improve personal security. A person who installs a sophisticated alarm system that increases the probability that a burglar will be apprehended may deter burglary in general. A more controversial notion is that the same sort of externality may be present if some persons are permitted to carry concealed handguns.

Required Readings:

- Steven E. Landsburg [Property Is Theft: When protecting your own property is stealing from others](#). From Slate magazine, www.slate.com.

Recommended Readings:

- Sam Peltzman, "An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments," *Journal of Political Economy* 81(5), September-October 1973, pages 1049-91.

- John R. Lott, Jr., and David B. Mustard, "Crime, Deterrence, and Right-to-Carry Concealed Handguns," *Journal of Legal Studies* 26(1), January 1997, pp. 1-68. How's this for controversial? Lott and Mustard present evidence suggesting that the threat someone may pull out a concealed weapon when accosted is empirically an important deterrent to crime. They suggest that such bans, among other things, deflect crimes against people toward crimes against property.

Open Topic Paper Due in Class

1 The Federal Court System

The **Federal Judiciary** is established by **Article III** of the United States Constitution, which provides for “one Supreme Court, and ... such inferior courts as the Congress may from time to time ordain and establish.” Federal judges (except for Federal magistrate and bankruptcy judges) are granted life tenure—they can only be removed if impeached and convicted of “Treason, Bribery, or other high Crimes and Misdemeanors.”

Article III, §2 of the United States Constitution defines the jurisdiction of the federal courts:

The judicial power shall extend

- to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;
- to all cases affecting ambassadors, other public ministers and consuls;
- to all cases of admiralty and maritime jurisdiction;
- to controversies to which the United States shall be a party;
- to controversies between two or more states;
- between a state and citizens of another state;
- between citizens of different states;
- between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

...

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

The federal courts thus handle federal questions—disputes governed by federal statutes, treaties or the Constitution—as well as cases that involve interests crossing state lines. These latter cases, termed “diversity” matters, mean that the federal courts spend a fair amount of time interpreting state laws. However, if you are an Ohio resident, or perhaps a foreign national, who sues, say, the state of Kentucky, your case will be heard in Kentucky state court, a consequence of [the Eleventh Amendment to the Constitution](#).

How many and what kind of cases end up in federal court? In the year ending March 31, 2002, 265,091 civil cases were filed in federal district court. In addition, 63,515 criminal cases involving 84,389 defendants were filed. The bankruptcy courts received 1,504,806 filings, a 15.1% increase over the prior year, perhaps reflecting the state of the economy, but also a 60.1% increase over 1993.¹

What kinds of cases do the district courts hear? “[F]or most of the 10-year period [1993–2002], the national civil docket was dominated by large influxes of personal injury/product liability cases involving breast implants and asbestos, recovery of defaulted student loan cases, and prisoner petitions.”² Figure 1 provides a breakdown of civil case filings for two recent years. Most of the cases that we will be concerned with are in the “other” category.

While the volume of criminal cases is only about 1/4 of that of civil cases, judges often complain of the volume of criminal cases clogging the system. Figure 2 shows that drug crims and immigration issues have increased dramatically in recent years. One can expect that in the wake of September 11, immigration matters will attract even more attention.

1.1 United States District Court

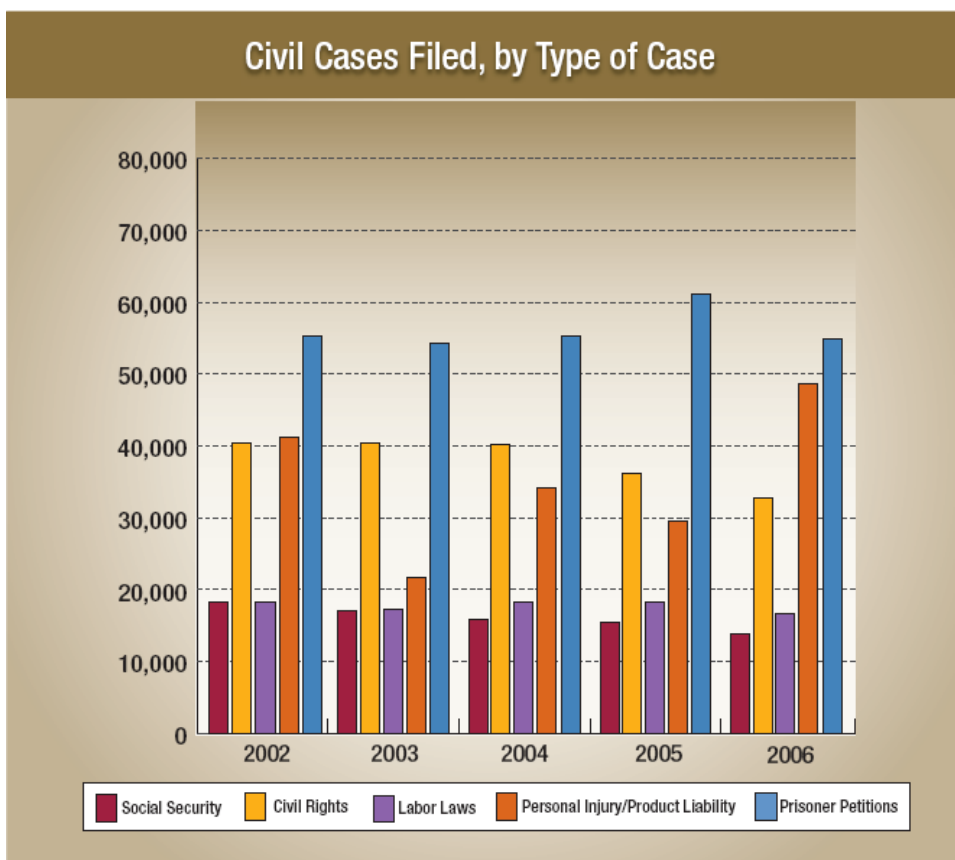
For most disputes, Congress has chosen to establish two levels of “inferior courts” below the Supreme Court. The lowest level, responsible for the first decision in most disputes, consists of the United States district courts. These are the trial courts for the federal court system.

The United States is divided into 94 geographic districts. For example, Ohio has two district courts, the Northern and Southern Districts. Each district court can in turn be broken into divisions, but these divisions are for convenience and do not represent a distinct level. The United States District Court for the Southern District of Ohio has an Eastern Division that sits in Columbus, and a Western Division that sits in both Cincinnati and in Dayton. In Columbus, sessions are held

¹See [Administrative Office of the United States Courts, Judicial Caseload Indicators](#).

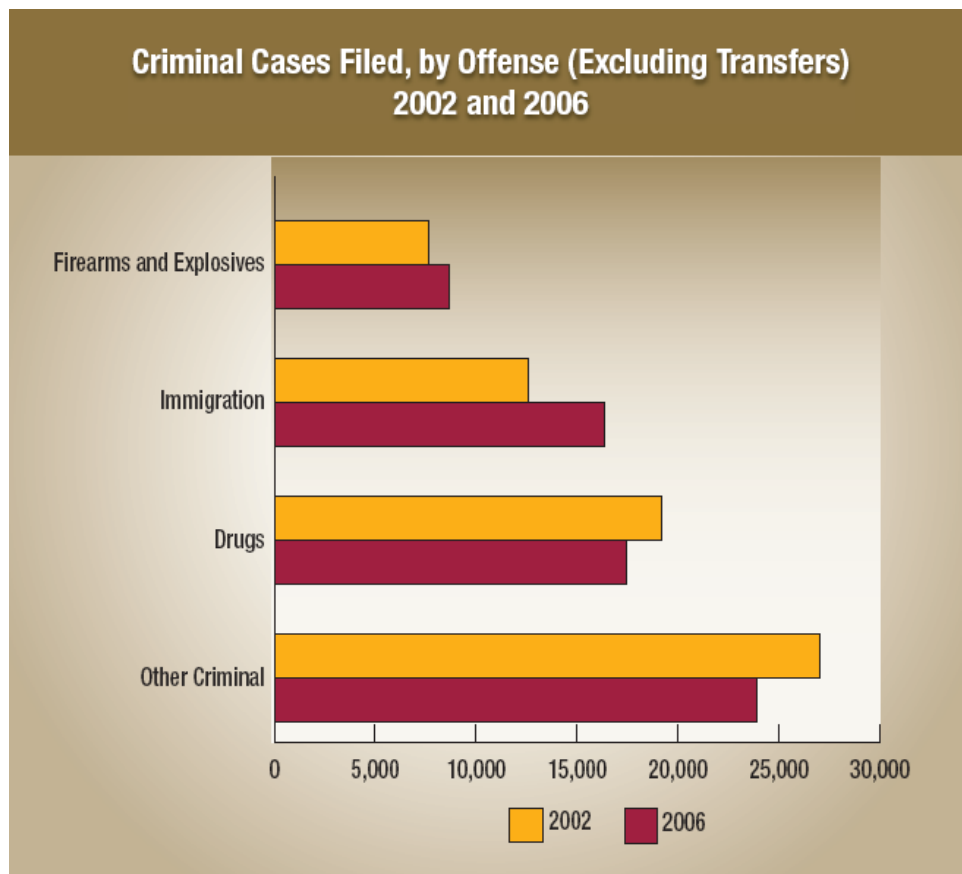
²*Id.*

Figure 1: District Court Business



Source: Administrative Office of the United States Courts, "Judicial Business."

Figure 2: District Court Business, Criminal



Source: [Administrative Office of the United States Courts, "Judicial Business."](#)

in the Joseph P. Kinneary U.S. Courthouse downtown on the river at 85 Marconi Boulevard.



The district courts are not the only trial courts, and while they are usually the point at which trials are initially held, this is not always the case. Two specialized courts, the Court of International Trade and the United States Court of Federal Claims have nationwide jurisdiction. The former court handles trade and customs matters and the latter rules on contract disputes with the federal government, on some eminent domain (takings) claims, and on claims for monetary damages against the United States. In addition to these courts, separate courts of special jurisdiction include [the United States Tax Court](#), [the United States Court of Appeals for the Armed Forces](#), and [the United States Court of Appeals for Veterans Claims](#). Unlike the district courts, these special jurisdiction courts are not trial courts, but adjudicate appeals from the decisions of the corresponding executive branch agencies. Their judges do not receive life tenure.³

Federal District Courts have multiple judges, but with a few exceptions, only one judge is assigned to a particular dispute.⁴ These judges are appointed by the President and must be confirmed by the Senate. Some aspects of individual cases are handled by magistrate judges. These judges are appointed by a majority of judges in the corresponding district court for an eight year term.

In addition to magistrate judges, each district court has a number of bankruptcy judges. These judges are appointed by a majority of the judges of the corresponding United States court of appeals for fixed terms of fourteen years.

³The Article III guarantee of life tenure does not apply because these courts are formed by Congress under its authority granted in Article I.

⁴A challenge to the McCain-Feingold campaign finance law has recently been heard by a three-judge panel of the D.C. District Court. The panel's decision will be appealed directly to the United States Supreme Court. This situation is unusual enough that Charles Fried, former solicitor general for the United States, incorrectly referred to this court in [a New York Times op-ed](#) as "a special appeals court." The panel is a trial court, not an appellate court.

1.2 Circuit Courts

The judicial districts are grouped into eleven regional ‘circuits,’ each with its own circuit court of appeals. These circuits are shown in Figure 3. As you can see, Ohio is part of the Sixth Circuit, which is located in Cincinnati. In addition to these regional circuits, the volume of disputes that arise in the District of Columbia have resulted in the establishment of a D.C. Circuit, so that in all there are twelve courts of appeal with general jurisdiction. One more court, the Federal Circuit, has been established with a special mandate. The Federal Circuit handles patent cases as well as appeals of decisions of the Court of International Trade and of the Court of Federal Claims.

Typically, courts of appeals judges sit as three-judge panels, and a majority vote carries the day. On occasion, particularly if a strong dissent is issued, the court of appeals may agree to rehear the decision *en banc*, that is, as a whole. In these instances, the decision of the three-judge panel is deleted from the court’s records, and the decision of the majority of the entire court governs the dispute.

Courts of appeal are supposed to defer to the findings of the initial trier of fact, typically the district court. They simply look at whether the law was applied properly.

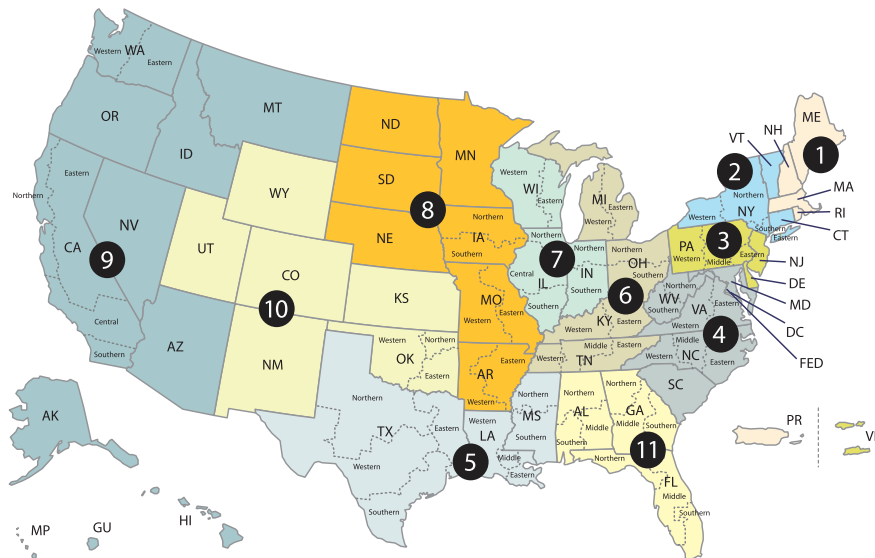
2 The Supreme Court of the United States

Though the Constitution does not specify the composition of the Supreme Court, since 1869, it has consisted of a chief justice and eight associate justices. It deals with about 5,000 cases each year, most of which it chooses not to hear. Its opinions deal with the most difficult and significant issues reaching the court system. The Supreme Court is responsible for ensuring that laws are consistent with the Constitution, and for resolving disagreements among the circuit courts of appeals (these disagreements are known as circuit splits). The Court will also on occasion be asked to deal with issues of first impression, disputes over matters that have not previously been ruled upon by the court system, such as issues raised by the Internet. Even when statutes are in place to deal with problems that arise, the Court will often need to elaborate their meaning, as, for example, it has had to do with the remarkably brief Sherman Antitrust Act. The Supreme Court receives thousands of petitions annually, but issues a writ of certiorari (“grants cert”) indicating its willingness to hear a dispute, only for about 150 cases a year.

Figure 3: Federal Circuit Courts of Appeal

Geographic Boundaries

of United States Courts of Appeals and United States District Courts



Source: Administrative Office of the U.S. Courts.

3 Legal Sources and Citations

How does one find court opinions? It is a lot easier now than it used to be, given the range of legal resources available on the Internet. But for the foreseeable future, it will remain necessary to understand the language with which lawyers refer to past cases, the language of legal citation. Citation practice for court cases is defined by something called *The Bluebook: A Uniform System of Citation* (17th ed., 2000). You can find a complete of citation practice as defined by the Bluebook on the Internet at the Legal Information Institute, a service of the Cornell Law School.

Here is a brief introduction to citations. A citation will consist of the following parts:

Case Name	The names of the parties appear, plaintiff first v. defendant, only the last names of the first parties on each side listed. If the parties are companies, only the name of the first company on each side is listed.
Volume Number	Opinions are published in series of reports. The volume number for the reporter in question appears first. If you head over to the Law Library and up to the Mezzanine, you will see bookshelf after shelf of tan volumes, each with a volume label and number. The label is the series to which the volume belongs (see the following entry) and the number tells you which volume in the series. The series are numbered sequentially, but the numbers do not correspond to years since several volumes are issued annually.
Name of the case reporter, abbreviated.	Three different reporting services publish Supreme Court opinions. Circuit Court opinions are published in the Federal Reporter, which starts its volume numbering over from time to time. The most recent cases are in the Federal Reporter, Third Series, abbreviated F.3d. District Court opinions appear in the Federal Supplement, F.Supp., though you may see a few citations to Federal Rules Decisions, F.R.D.
Page number	The page number of the volume of the case reporter, as indicated by the preceding two entries. This is normally the first page of the decision, though some reporters add their own summary materials before printing the decision.
Year	The year in which the case was decided, sometimes accompanied by the name of the court issuing the decision, in parentheses.

Here is a rather length citation to a Supreme Court Opinion.

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990)

Here there are three separate reporters listed. U.S. refers to United States Reports, L. Ed. to the Lawyers' Edition, and S. Ct. to the Supreme Court Reporter. All are reporters devoted to Supreme Court Case. To find a printed copy of the case, one might go to the law library, find the United States Reports, pull volume 495 from

the shelf, and turn to page 328. The case opinion would take considerably more than one page, but only the starting page is listed. Here's another opinion:

Local Beauty Supply, Inc. v. Lamaur, Inc., 787 F.2d 1197 (7th Cir. 1986).

This one is in the Federal Reporter, second series, indicating that it is a Court of Appeals opinion, also indicated by the 7th Cir. in parentheses. Find the Federal Reporter, check volume 787 of the second series, remembering that the volume numbering starts anew with each series, and turn to page 1197.

Most students will find it easier to obtain opinions electronically. To do so, visit the Ohio State University Libraries web site and click on the Lexis/Nexis link under "Other Online Research Tools."

You can only access Lexis/Nexis from computers connected through the University, either a computer on campus or a computer connected via Homenet. If you connect to the Internet with AOL or RoadRunner, you need to ask the Help Desk at University Technology Services for instructions on using Ohio State's proxy server.