AMERICAN LAW

AN INTRODUCTION

THIRD EDITION

LAWRENCE M. FRIEDMAN
GRANT M. HAYDEN

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Lawrence M. Friedman

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(Based on the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.)

For Leah, Jane, Amy, Sarah, David, Lucy, and Irene
—L.M.F.
For Joanna, Luke, Ben, and Milo
—G.M.H.

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Preface

THIS BOOK IS a general introduction to the law and the legal system of the United States. In a way, writing another book about American law would seem to be like bringing another coal to Newcastle. There is certainly no shortage of books about our legal system. The Harvard Law School library, which is just about the biggest in the country except for the Library of Congress, has more than two million volumes. Hundreds of thousands of these are books about American law. Every year, Harvard adds thousands more to its collection. Of the making of law books, there seems to be no end. Do we really need more?

Perhaps we do. Almost all of those thousands and thousands of books are meant for the specialized eyes of the lawyers. Very few are written for the layman. True, in recent years, flocks of "how to do it" books have appeared: how to get your own divorce, how to avoid probate, how to deal with your landlord, how to resolve the legal problems of cohabiters, and the like. There are also some popular handbooks about people's rights, how to "win big" in small-claims courts, and so on. Books of this kind are no novelty. In the nineteenth century, too, there were "how to do it" books, with names like *Every Man His Own Lawyer*. Some were extremely popular. One such book, published in 1867, claimed it would be valuable for just about everybody: the "city wholesale merchant," the retailer, the country merchant, attorneys, justices of the peace, farmers, mechanics, even the "discharged soldier or sailor" of the Civil War, who would find "all the instructions and forms necessary" to get back pay or a pension, in language "so plain as to make the whole matter perfectly clear and simple."

Yet in this vast storehouse of literature, this ocean of print, now supplemented by all sorts of databases, computerized gadgets, and electronic aids, only a handful of books are designed to explain the system to general readers (and students) who presumably do not have some immediate, practical goal. True, there are some books on specialized subjects—constitutional law and business law, for example. Others of these books confine themselves more or less to what we might call the official story: the law on the books. They do not ask some of the difficult but important questions about the way the legal system meshes with its society. This book, written specifically for the general reader, tries to give an overall picture of the American legal system as it was and as it is, focusing on the law in operation—the living law.

This book, then, is about the American legal system as a working system. But exactly what is a legal system? Where does a legal system come from? What is it made out of? Where does it begin, and where does it end? There are no simple answers to such questions for any particular legal system, and certainly none that would apply to all legal systems, wherever they are in the world, and all the systems that have ever been, including extinct ones. We doubt that anyone could come up with a definition of a "legal system" that would fit the law of small tribes of nomads as well as the law of giant industrial societies; that would fit both modern legal systems and the systems of the ancient Hittites and Chinese. Building a conceptual structure that would bridge all of these would be a tall order indeed. Of course, some scholars have tried. There is no general agreement on whether their results have been worth the effort.

The goal of this book is more modest. It is an introduction to *American* law, and it has a right, then, to focus on the United States and neglect radically different societies. After all, "law," "legal system," and "legal process" are all mental constructs. They are not things that exist in the real world. You cannot touch, taste, smell, or measure law. Any definition, in short, has to be more or less conventional—which is to say artificial. This does not mean that such a definition is wrong; it simply means that a definition is good if it is useful, and if we make clear to ourselves and to others exactly what we are trying to accomplish with our definition.

Our first job, then, is to lay out a kind of map of the American legal system—to catalog the subject of this book. Roughly, the criterion for including and excluding will be based on popular understandings: what scholars and laymen would agree is inside the circle of law. The starting point must include the body of rules (statutes, regulations, ordinances) that come out of the halls of government; these are obviously part of what people mean when they talk about "the law." Clearly, too, whatever is concerned with making and carrying out these rules is inside the legal system. This means the courts, of course, and the legislatures, city councils, and county boards; also administrative agencies such as the Internal Revenue Service and the Securities and Exchange Commission; state agencies that license doctors, teachers, and plumbers; and even the rather lowly zoning boards and sewer districts. They all make rules and regulations.

A legal system cannot enforce or implement these rules and regulations without the work of a lot of men and women who carry out orders from above—police officers, for example, or elevator inspectors, or auditors who work for the tax bureau. We also include as part of the system our huge corps of lawyers. Their work—even their private dealings in the snug confines of a Wall Street office—is directly relevant to the legal system. Law is, after all, the lawyer's stock in trade. Lawyers advise their clients and tell them how to use law or how to pick a path among legal minefields. They work in the shadow of the law, and what they do is necessarily a part of the working legal system—indeed, a vital part.

But the activities of official agents of the law are not the whole story. Ordinary citizens participate in the legal system not just by their actions, which may be law-abiding or not, but also by their attitudes and beliefs. The American legal system in operation is thus a very complex organism. It has many parts, many actors, and many aspects. The actors range from justices of the Supreme Court to the desolate army of the homeless. The institutions include courts, prisons, zoning boards, police departments, and countless others. As in all legal systems, what gives the organism life is the way rules, people, and institutions interact. How they do so—how they combine, chemically as it were—is the general theme of this book.

The first edition of this book was published in 1985. The world does not stand still, nor do legal systems. A lot happened in the late 1980s and 1990s. The Soviet Union collapsed, and both the fifty-five-mile-an-hour speed limit and the Interstate Commerce Commission vanished into the black hole of history. The second edition was published in 1998. Since then, terrorist attacks prompted a whole new legal regime and a Department of Homeland Security to administer it. Same-sex marriage has become the law of the land. In many fields of law, there have been significant changes, small changes, large changes, and many changes in between. Despite all this, the basic structure of the legal system remains the same. For this reason, we have stuck with the basic structure we have used, for this, the third edition of this book. But we have thoroughly revised and reworked the text. We have tried to reflect what has happened in the years since the first two editions were born, but also, perhaps more significantly, to reflect what light events and evolutions have shed on our basic understanding of the things that make the legal system tick.

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AMERICAN LAW

THIRD EDITION

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What Is a Legal System?

IN MODERN AMERICAN society, the legal system is everywhere with us and around us. To be sure, most of us do not have much contact with courts and lawyers, except in emergencies. But not a day goes by, and hardly a waking hour, without contact with law in its broader sense or with people whose behavior is modified or influenced by law. Law is a vast, though sometimes invisible, presence.

For example, when we go to the grocery and buy bread, milk, soup, and potato chips, and when we pay by credit card, debit card, or check, and take the packages out to our car, we invoke or assume many aspects of the legal order. We may not feel that the legal system, like some sort of Big Brother, is staring at us over our shoulder. But in a sense it is: at us, and at the shopkeeper and his workers. Some branch of law touches every aspect of this ordinary little piece of behavior.

To get to the store, we drove a car or walked, crossing several streets. Traffic law walked or drove with us. Dozens of rules and regulations applied to conditions at the factory where the car was assembled—rules about the workforce, and about the car itself, body and engine. Inside the grocery store, there were labels on the cans and packages reflecting more rules and regulations; in the life history of every jar of jam, every tube of toothpaste, rules and regulations are lurking. And, of course, workers in the store, like workers in the auto plant, are covered by federal, state, and local labor regulations.

Indeed, most things we buy—TVs, mattresses, shoes, whatever—are covered by some body of law, some rules about safety or quality or other aspects of manufacture or use. Most buildings and places of business, including the grocery store itself, have to conform

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to building codes and to fire and safety regulations. There are rules about standard weights and measures, employee comfort and safety, time and a half for overtime work, Sunday closing laws—the list is endless.

But there is more. When I buy a loaf of bread or a can of soup, I have entered into a contract, whether I realize it or not. If something goes wrong with the deal, the rules of contract law, of the Uniform Commercial Code, or of some branch of commercial law come into play, at least theoretically. The Uniform Commercial Code governs the rules that relate to checks, and a vast body of banking law is relevant to the way these pieces of paper provide credit and payment. Credit card companies have to comply with many laws as well, and may be subject to rules about how much interest they can charge. If the can of soup is tainted and I get sick, I may have the right to sue the soup company; this will switch me onto still another legal track, the law of products liability, a branch of the law of torts.

This is not to say that law lies on us heavily, like a suit of lead. Rather, law is in the atmosphere, invisible and unfelt—often as light as air to the normal touch. (Manufacturers, storekeepers, and bankers, of course, may see things differently; and there are plenty of private citizens who do complain about the heavy hand of law.) Moreover, it is wrong to think of law as a tissue of don'ts, that is, as a kind of nagging or dictatorial parent. Much of the law is supposed to make life easier, safer, happier, or better (whether it is successful in doing so is another question). When the norms do forbid something (or require something from somebody), it is usually for the specific benefit of somebody else. The law might insist that soup companies put labels on their soup. They must tell us exactly what they put inside their soup. This is a burden on the company, but is a benefit (or is supposed to be) for buyers of soup. There are also many ways in which the legal system facilitates, rather than forbids or harasses. It subsidizes; it promotes; it provides easy ways to reach desirable goals. The law about wills or contracts, for example, is basically about ways to do what you want to do, safely and efficiently; it is much less concerned with what not to do or with the punishment or price for disobeying rules. A great deal of law is facilitative in this way. It provides standard ways—routines—for reaching goals. It builds roads for the traffic of society.

Law and legal process are extremely important in our society; that much seems to be obvious. But, as we said in the preface, defining exactly what we mean by law and legal process can be difficult. "Law" is an everyday word, part of the basic vocabulary. But it is a word of many meanings, as slippery as glass, as elusive as a soap bubble. And, as we said, law is a concept, an abstraction, a social construct; it is not some concrete object in the world around us—something we could feel or smell, like a chair or a dog.

As we suggested, to try to get at some sort of working definition, we might start by listening to the way people use words like "law" and see what they are referring to. To begin with, people seem to have in mind the network of rules and regulations that surrounds us. This is clear from such expressions as "breaking the law" or "obeying

the law." It is also what the word "law" means in sentences like "It's against the law to drive ninety miles an hour in a school zone." There may be, and certainly are, other shades of meaning, but the idea of rules and regulations is usually at the core. In ordinary speech, then, the word "law" is connected with "laws," that is, with rules and regulations.

Donald Black, in *The Behavior of Law*,[1] puts forward a concise, deceptively simple definition. Law, according to Black, is "governmental social control." By "social control" he means social rules and processes that try to encourage good or useful conduct or discourage bad conduct. There is a law against burglary, and police, judges, and criminal courts try to put teeth into it. The criminal justice system as a whole is a pretty obvious example of social control (or at least attempted social control). For the person in the street, it is perhaps the most familiar, obvious part of the legal system.

But law is more than criminal justice. The rest of the law (what lawyers call civil justice) is actually larger in size, however you measure it, and almost certainly more important. To make Black's definition work, we have to understand "social control" in a broader sense. It must mean the whole network of rules and processes that attach legal consequences to particular bits of behavior.

Take, for example, the ordinary rules of the law of torts. If I drive carelessly or too fast in a parking lot, and smash somebody else's fender, definite legal consequences might follow. Smashing a fender is no crime—I will not go to jail; but I (or my insurance company) might have to pay for the damage. Directly or indirectly, what happens will depend in part on rules of tort law—rules about what happens when one person injures another or damages his property.

These rules may change the way I behave. They certainly affect my pocketbook and the rates of insurance I pay. Hence these rules, too, are part of the system of social control. The rules reward some behavior and punish other behavior (or try to), just as surely as the criminal justice system does. They distribute costs and benefits among people, depending on how they behave. Careless drivers have to pay; victims get money.

All law, according to Black, is social control, but for Black (and many others), not all social control is law. Law is *governmental* social control. There are other kinds of social control as well. Teachers use rules (and rewards and punishments) to make children behave; parents use rules (and rewards and punishments) at home. Both teachers and parents also hope to mold behavior for the future. Organized religions, too, are concerned with behavior—with social control. A religion tries to induce its members to live a godly or proper life, as the religion defines it.

But these forms of social control are not governmental: they are not official, not part of the state apparatus. Under Black's definition, then, they are not law. At least we can say that in a country like the United States they are not part of the *official law*. But there are, in fact, two distinct ways to look at law. One way insists, with Black, that law is made up exclusively of official, governmental acts; the other takes a broader approach, and looks at the whole domain of social control.

The main focus of this book is not on "law" so much as on what can be called the legal system. The word "law" often refers only to rules and regulations; but a line can be drawn between the rules and regulations themselves and those structures, institutions, and processes that breathe life into them. This expanded domain is the "legal system."

It is plain that the legal system has more in it than codes of rules, dos and don'ts, regulations and orders. It takes a lot more than that to make a legal system. There are, to begin with, rules *about* rules. There are rules of procedure, and rules that tell us how to tell a rule from a nonrule. To be more concrete, these are rules about jurisdiction, pleadings, judges, courts, voting in legislatures, and the like. A rule that says that no bill becomes a law in New Mexico unless both houses pass it and the governor signs it is a rule about rules. It explains one way to make a legal rule in New Mexico. In a famous book, H. L. A. Hart called these rules about rules "secondary rules"; he called rules about actual behavior "primary rules." The rules against burglarizing the grocery store or against driving at ninety miles an hour to get there would be examples of primary rules. Law, according to Hart, is the union of primary and secondary rules.[2]

In a sense, all rules, including secondary rules, are directives about how to behave. Our example of a secondary rule, for example, is after all a rule about how lawmakers should behave in New Mexico. Both kinds of rule are important, but both are only raw materials, components, parts of a legal system. We could master all the rules and still know very little about the legal system in operation. All we would have is words; and these words—orders, commands, and rules—are blank and empty, unless something happens, unless somebody does something to turn the words into action, and this, in turn, makes somebody move or something happen.

This, of course, is not a fresh idea. It is something that everybody knows. People might say that a certain law is a "dead letter," while another rule is "in force." Or we use the term "living law." Dead letters are not living law, just as a dead language like Sanskrit or Latin is no longer a language that comes tumbling from the mouths of real people, here and now. Living law is law that is alive in a legal system.

For example, the maximum speed limit on Interstate 280 in California is sixty-five miles per hour. This is a legal rule. But the living law—the actual practice—is much more complicated. The rule itself does not tell us, for one thing, that people can actually drive at seventy, or maybe even seventy-five, without any risk of arrest. Police do not take the speed limit literally.[3] If, on the other hand, somebody barrels down the road at ninety or ninety-five, and a police car is around, its siren will scream and the police will come after the speeder. Each type of situation—whether it is driving a car, buying a house, getting a divorce, or merging two giant corporations—calls forth a particular interaction between the various elements of the legal system. These elements are not just laws, or even laws and institutions; they also include people and their attitudes and behaviors.

ELEMENTS OF A LEGAL SYSTEM

We now have a preliminary, rough idea of what we mean when we talk about our legal system. There are other ways to analyze this complicated and important piece of the social world. To begin with, the legal system has *structure*. The system is constantly changing, but parts of it change at different speeds, and not every part changes as fast as certain other parts. There are persistent, long-term patterns—aspects of the system that were here yesterday (or even in the last century) and will be around for a long time to come. This is the structure of the legal system—its skeleton or framework, the durable part, the part that gives a kind of shape and definition to the whole.

There is a Supreme Court in this country, made up of nine justices. The Court has been around since the late eighteenth century and is virtually certain to be around long into this century; its work habits change very slowly. The structure of a legal system consists of elements of this kind: the number and size of courts, their jurisdiction (that is, what kind of cases they hear, and how and why), and modes of appeal from one court to another. Structure also means how the legislature is organized, how many members sit on the Federal Trade Commission, what a president can (legally) do or not do, what procedures the police department follows, and so on. Structure, in a way, is a kind of cross section of the legal system—a kind of still photograph, which freezes the action.

Another aspect of the legal system is its *substance*. By this is meant the actual rules, norms, and behavior patterns of people inside the system. This is, first of all, "the law" in the popular sense of the term—the fact that the speed limit is sixty-five miles an hour on Interstate 280, that burglars can be sent to prison, that "by law" a pickle maker has to list ingredients on the label of the jar.

But it is also, in a way, "substance" that the police arrest drivers doing ninety but not those doing seventy on Interstate 280, or that a burglar without a criminal record might get probation, or that the Food and Drug Administration is easy (or tough) on the pickle industry. These are working patterns of the living law. Substance also means the "product" that people within the legal system manufacture—the decisions they turn out, the new rules they contrive. We know something about the substance of the legal system when we know how many people are arrested for arson in any given year, how many deeds are registered in Alameda County, California, how many sex-discrimination cases are filed in federal court, how many times a year the Environmental Protection Agency complains that a company dumped toxic wastes into a body of water.

The last paragraph makes it plain that what we call "substance" in this book is not the same as what, let us say, some lawyers put forward. The stress here is on living law, not just rules in law books. And this brings us to the third component of a legal system, which is, in some ways, the least obvious: the *legal culture*. By this we mean people's attitudes toward law and the legal system—their beliefs, values, ideas, and expectations. In other words, it is part of the general culture, specifically, those aspects of general culture that concern the legal system. These ideas and opinions are, in a sense, what sets the legal

process going. If someone says that Americans are litigious—that is, that Americans go to court at the drop of a hat—he is saying something about legal culture (whether or not what he says is true). We talk about legal culture all the time, without knowing it. If we point out that devout Roman Catholics tend to avoid divorce (because their religion disapproves), that people who live in slums distrust the police, that middle-class people make complaints to government agencies more often than people on welfare, or that the Supreme Court enjoys high prestige, we are making statements about legal culture, and how it affects the way people behave.

The legal culture, in other words, is the climate of social thought and social force that determines how law is used, avoided, or abused. Without legal culture, the legal system is inert—a dead fish lying in a basket, not a living fish swimming in the sea.

Another way to visualize the three elements of law is to imagine legal "structure" as a kind of machine. "Substance" is what the machine manufactures or does. The "legal culture" is whatever or whoever decides to turn the machine on and off and determines how it will be used.

Every society, every country, every community has a legal culture. There are always attitudes and opinions about law. This does not mean, of course, that everybody in a community shares the same ideas. There are many subcultures: white and black, young and old, Catholic, Protestant, Jew, rich and poor, Easterners and Westerners, gangsters and police officers, lawyers, doctors, shoe salespeople, bankers. One particularly important subculture is the legal culture of "insiders," that is, the judges and lawyers who work inside the legal system itself. Since law is their business, their values and attitudes make a good deal of difference to the system. At least this is a plausible suggestion; the exact extent of this influence is a matter of some dispute among scholars.

These three elements in American law—structure, substance, and culture—are the subject of this book. We will take a look at the way the American legal system is organized, at what it does, and at how it does it; and we will be especially conscious of legal culture—ideas and forces outside the law machine that make it stop and go. The three elements can be used to analyze anything the legal system does. Take, for example, the famous death-penalty case *Furman v. Georgia* (1972).[4] In this case, a bare majority of the U.S. Supreme Court—five justices out of nine—struck down the death-penalty laws in all of the states that had them, on constitutional grounds. (Later on, the Court backtracked; most states re-enacted death-penalty laws, and the Court accepted one type of these laws. This subject will be dealt with in another chapter.)

To understand what happened in *Furman* we must first grasp the structure of the legal system. Otherwise, we will have no idea how the case worked its way up from court to court, nor why the case was in the end decided in Washington, D.C., and not in Georgia, where it started. We will have to know something about federalism, the Constitution, the relationship between courts and legislatures, and many other long-run, long-lasting features of American law.

But this is only the beginning. The case itself takes up no less than 230 pages of print in the official reports—there were nine separate opinions. As we plow through these pages, we are enmeshed in the substance of constitutional law. The case, to begin with, turns in part on whether the death penalty is "cruel and unusual punishment"; if it is, the Eighth Amendment to the Constitution specifically forbids it. There are long discussions in the opinions about what "cruel and unusual" means, what earlier cases have said, and what doctrines and rulings have been woven about this phrase.

But structure and substance together do not explain why the case came up and why it came out as it did. We have to know something about social context—the movement to get rid of capital punishment, who and what was behind the case, what organizations were fighting for and against the death penalty, and why the issue came up when it did—that is, the attitudes, values, and beliefs about the death penalty, law, courts, and so on, which explain how the case got started in the first place.

We might be interested, too, in a fourth element, impact—that is, what difference the decision made.[5] The Supreme Court spoke; who listened? We know some obvious facts about the immediate consequences. For one thing, the men and women on death row never kept their dates with the executioners. Their sentences were automatically commuted to long-term imprisonment. There were other impacts, as well, in substance, structure, and legal culture. *Furman* set off a storm of discussion, furious activity in state legislatures, and ultimately a flock of new lawsuits. It may have had more remote (but important) consequences too: on the prestige of the Supreme Court, on the crime rate, on national morality. The more remote the consequences, the harder to know and measure them.

We know surprisingly little, in general, about the impact of decisions, even their immediate impact. It is not the job of courts to find out what happens to their litigants once they leave the courtroom, or what happens to the larger society. But impact is the subject of a growing body of research; from time to time the evidence from these studies will be noted or mentioned in this book.

THE FUNCTIONS OF THE LEGAL SYSTEM

But why have a legal system at all? What does it do for society? In other words, what functions does it perform?

One kind of answer has already been given. The legal system is part of the system of *social control*. In the broadest sense, this may be *the* function of the legal system; everything else is, in a way, secondary or subordinate. To put it another way, the legal system is concerned with controlling behavior. It is a kind of official traffic cop. It tells people what to do and not to do, and it backs up its directives with force.

The legal system can do this in a very direct, very literal way. There are traffic cops, after all, who stand on busy corners, waving traffic this way or that, and they are certainly

a part of the legal system as we have defined it. The criminal-justice system is probably the most familiar example of law as social control. Here we find some of society's heavy artillery: judges, juries, jails, prisons, wardens, police, criminal lawyers. People who break the law, and other "deviants," are chased, caught, and sometimes punished; this is control in the most raw and basic sense.

A second broad function of law is what we can call *dispute settlement*. A dispute, according to Richard L. Abel, is the public assertion of inconsistent claims over something of value.[6] Two people both insist they own the same piece of land. Or a Mercedes rear-ends a Honda Accord, and the driver of the Accord threatens to sue the driver of the Mercedes. Or the marriage of Mark and Linda Jones breaks up, and they squabble over who gets the house, the child, or the money. These are all disputes in Abel's sense: inconsistent claims to something of value.

Many times, the parties are arguing about some concrete thing (or person), something you can touch or squeeze or hug—a child, a bundle of money, a house. At other times, the "thing" is more abstract or nebulous: the right to citizenship, a reputation that has been dragged in the mud, damages for pain and suffering, somebody's goodwill or peace of mind. Disputes can be big or little, raucous or moderate. We use the phrase "dispute settlement," generally, when we are talking about putting an end to fairly small-scale, local disagreements between individuals or private businesses. There are, of course, bigger, more basic disagreements in society—disagreements between whole classes or groups. Of this sort might be, for example, clashes between labor and capital, or between regions of the country, or between black and white, or between the young and the old, or between people who want to protect the beaches and people who want more drilling for offshore oil.

We might give these macrodisagreements a name of their own, and call them *conflicts* rather than disputes. In any event, the legal system is concerned with conflicts as well as with disputes, if not more so. The legal system, in other words, is an agency of conflict resolution as well as an agency of dispute settlement. Courts come immediately to mind in this connection, that is, as institutions that help bring conflicts to an end. But the work of the legislatures is probably, on the whole, even more important. It is Congress and the state legislatures that iron out (if anyone does) most of the bitter battles between employers and labor unions, between businesses and the Sierra Club, between retired people and the people who pay Social Security taxes. It is in the city council of Chicago, say, that boosters who want new stores and factories and highways bump up against people who want to preserve old mansions and fight for their neighborhoods. In the suburbs, it is town councils and zoning boards that deal with conflict between those who want light industry and shopping centers and "residentialists" who want nothing but one-family houses, green lawns, and rosebushes.

The various functions of law overlap, of course. No single function has a clear and perfect boundary. The line between a dispute and a conflict is woefully indistinct. Other functions of law are even less clear-cut. One of these functions is what we might call the

redistributive or social engineering function. This refers to the use of law to bring about planned social change, imposed from on top, that is, by the government. Social engineering is a very prominent aspect of modern welfare states. The United States levies taxes on people who have money and uses this money to give cash, food assistance, medical benefits, and sometimes cheap housing to the poor and to others who are felt to deserve it. So, too, do all modern Western nations.

The planned or "engineered" aspect of social policy—whatever is done deliberately through public choice—is done through law and the legal order. Here law stands opposed to the unplanned market. In the market, the law of supply and demand sets prices. The market decides which products and businesses grow fat and rich and which ones shrivel and die. The market distributes goods and services, benefits and burdens, through a system of prices. It can be compared to a kind of auction in which buyers bid for goods they want; scarce, desirable goods go up in price, while common, less wanted goods go down.

The legal system is in a way a rival scheme for distributing goods and services. It, too, rations scarce commodities. To raise an army during times of war, we could literally buy soldiers; and in the past some countries did exactly that. Today we would never use this system. Mostly, we rely on a volunteer army—using incentives to induce young men and women to "join up." This system, along with the use of reserves, probably works well enough in "little" wars (like when the United States invaded the tiny island of Grenada in 1983, for example). It even works for medium-sized wars like Iraq and Afghanistan, though the government had to tweak the system in those cases with "stop-loss" orders to extend the active duty periods of some of the "volunteers." But if a really big war broke out, we would probably get soldiers through a draft, as we did in the Second World War. Congress would pass a law and make rules about who would or must serve in the armed forces. There would be rules and regulations about deferments, city and state quotas, how to handle conscientious objectors, and how to deal with recruits with flat feet or poor eyesight. The market would have little or nothing to do with these rules. If we change the rules, we change the allocation system. In other words, whether we realize it or not, our legal system acts as a way of distributing benefits and burdens: as a giant rationing system, a giant planning system, a giant system of social engineering.

We should not push the term "social engineering" too far. To do so would give too much of an impression that the legal system is constantly at work reforming and improving. Most of the time, legal allocations do exactly the opposite: rather than change things, they act in such a way as to keep, or try to keep, the status quo intact. This function can be called *social maintenance*. The legal system presupposes and enforces structures that keep the machinery going more or less as it has in the past. After all, even the "free market"—even the "invisible hand"—needs law to guarantee the rules of fair play. Even in the most laissez-faire system, the law enforces bargains, creates a money system, and tries to maintain a framework of order and respect for property.

Every society has its own structure, and this structure does not stay put by magic or accident, or even by inertia or the laws of gravity. What makes the structure persist over the years is, first of all, social behavior and social attitudes—customs, culture, traditions, and informal norms. But these, in modern society, do not seem to be enough. Contemporary society needs the muscle and bone of law to stay healthy, even to stay alive. If somebody breaks into my house and refuses to get out, I can call "the law" and get him driven out. If my neighbor owes me $300, I can go to court and collect my money. The law defends my rights, including my property rights. This is the social maintenance function. The criminal law is very much part of this system. After all, the crimes most commonly prosecuted are property crimes—theft, burglary, embezzlement. These are offenses against people who own property. If we punish people who steal things we are at the same time protecting people who own the things that are stolen; we are maintaining and preserving the economic (and social) structure of society.

Obviously, then, the law protects the status quo, and it does so in a very direct and obvious way. This sounds worse, perhaps, than it is. "Status quo" is a phrase usually spoken with a sneer; "protecting the status quo" sounds static, even reactionary. It suggests that law and society are fat and hidebound, and tend to uphold the rights and interests of the privileged against the rights and interests of the poor and the helpless. This is at least arguably true. But, after all, every society—even a revolutionary society—tries to preserve some parts of its status quo. The revolutionary society tries to preserve and strengthen the revolutionary order. The traditional society tries to preserve and strengthen tradition. Any society has to take steps to preserve itself from forces of disintegration and anarchy. There is no such thing as a total revolutionary—somebody who wants to change everything. Whether it is good or bad to keep up old ways and conserve the general structure of society depends on what the old ways are and which old ways and structures we are talking about.

The central fact of human life is that nobody lives forever. People serve out their little terms of life and die. But societies and institutions go on. A social structure is much more durable than the people who fill its roles. Structure is like a *play—Hamlet*, for example—in which the text carries on from generation to generation but different actors play the parts in different periods; moreover, new versions, new sets, new costumes appear every once in a while. We know that norms, morals, and customs help bridge generations. We realize that each generation teaches its language and culture to its children, so that the next generation carries on pretty much as its parents did. If we speak English, so will our children, and their children's children, too, even though a newborn baby speaks no language at all and will learn Hausa or Portuguese if that is what is spoken all around it.

Of course, social roles are not exactly like the role of Hamlet in Shakespeare's play; they are much more subject to change. And social change is taking place today at a fast and furious pace, faster than ever before. But not everything changes at once and in every sphere of life. A man or woman of a century ago who fell asleep like Rip Van Winkle and

came to life again today would be amazed by many things: cars, computers, smartphones, jet airplanes, air conditioning, antibiotics, not to mention the "sexual revolution." He or she might have trouble adjusting to our world. Yet many other things—clothes, customs, buildings, ways of thought—would be at least vaguely familiar, and some aspects of life would seem exactly the same.

Continuity—and yet change. These are the constants of social life. And the legal system plays a crucial role in promoting both continuity and change. It helps bridge generations, but it also helps guide social change into what people hope will be smooth and constructive channels. For example, there are laws about the inheritance of wealth—about ways to make out a will, about taxes on estates, about the rights of widows and widowers. We talk about the "dead hand," somewhat ruefully. But without the "dead hand"—without people's right to determine, more or less, what will happen to their money when they die—each generation might have to rebuild its structure from scratch; each generation would have to make up who is rich and who is poor all over again. That might be good or bad, just or unjust. It would certainly be different.

Laws about inheritance and taxes on estates, as they exist today, practically guarantee a great deal of continuity. Proposals to do away with such taxes, or cut them down to size, float around Congress from time to time. The federal estate tax was gradually reduced starting in 2001, and actually eliminated for a year in 2010, before springing back to life the following year. This shifting tax regime had some quirky, and important, consequences. Roger Milliken, a ninety-five-year-old textile tycoon, happened to pass away on December 30, 2010, less than forty-eight hours before the estate tax returned, saving his heirs (and costing the IRS) hundreds of millions of dollars. "His timing," Milliken's longtime Washington lobbyist quipped, "was impeccable." Playing around with estate taxes has a real impact on the distribution of wealth—and of power, prestige, and social status.

All our legal institutions, including courts, legislatures, and agencies, are designed, at least in part, for both continuity and change. They are structured in such a way that changes can take place, but only in a regular, orderly, patterned way. After all, every time Congress sits, every time the Delaware legislature meets in Dover, every time the city council of Omaha goes into session, volumes and volumes of new laws and ordinances come pouring out. Every new law changes something; every law tries to attack some social problem, big or small. Happily, it is an orderly process (most of the time) in this country. Like the rest of the world, America is trying to ride the wild horse of change instead of letting it gallop off in all directions. The legal system is an important part of the social system; it acts, or tries to act, as a kind of safety valve—it prevents too much change, and slows down changes that go too fast; it is a process for limiting volcanic bursts of change. It does not always succeed. Nor should it.

Claims of Right. When we think about social control, we usually have in mind a picture of law and government—of "authorities"—in control of "subjects," the people underneath. Social control is a police officer giving out a ticket for speeding, for example.

But we need controls over police officers, too. In our society, there is no horse without a bridle. Nobody—not the mayor of Memphis, not the governor of New York, not the president, not the Supreme Court itself—is supposed to be truly, absolutely supreme. Only law is supreme.

This, to be sure, is theory. Practice is more complicated and considerably less than perfect. Everybody knows that some people in authority abuse their positions. We know about bribery; we know about the petty tyranny of bureaucrats. In 2005, Representative Randy "Duke" Cunningham resigned from Congress a few hours after pleading guilty to receiving millions of dollars in bribes (in the form of cash, cars, rugs, antiques, and yacht club fees) to help certain friends and campaign contributors win lucrative military contracts.[7] Probably most abuses never get punished, or even uncovered. To correct abuses, there are controls built into the system. Law, in other words, has the further job of keeping an eye on the rulers themselves. This, in a way, turns social control inside out. In a way, however, it is another form of social control: control over the controllers. Control over controllers is, of course, a basic theme in American government. It is the idea behind checks and balances, and behind the corps of ombuds, inspector generals, auditors, and the like, all busily at work. It is also the idea behind "judicial review"; this is the power of courts to decide when other branches of government have overstepped the mark. Courts regularly, and sometimes fearlessly, rebuke or override Congress, administrative agencies, the police, and even the president, when these have gone beyond the limits of legitimate authority, in the court's opinion. Among the most important limits are those written into the Constitution, or put there by courts in the process of "interpreting" the text.

We also sometimes speak of "claims of right." By this we mean claims of private citizens or of companies against the government. Claims of right help control abuse of power; but most of the time what the claimant wants is relief from some particular mistake of government. There are innumerable examples: pension claims, benefit claims, grievances and complaints about the million and one ways a civil servant in America can bungle his job. For example—one example out of thousands—a man named James T. Blanks, living in Alabama, who said he was sixty-two years old, applied for old-age benefits. The Department of Health, Education, and Welfare (HEW) turned him down. In their view, he was only sixty, two years short of eligibility. They got this idea from a school census record of Marshall County, Alabama. Blanks countered with a family Bible, federal census records, insurance policies, and affidavits from neighbors and relatives. The HEW people were not impressed; they stuck by their original decision. Blanks went to court. He sued HEW and won his case.[8]

Citizens do not, of course, always win these cases. Probably more often than not, the government wins. In a Pennsylvania case, a state policeman, Joseph McIlvaine, was forced out of his job because (according to the rules) he was too old to serve. This seemed grossly unfair to McIlvaine, and he sued to get back on the force. The Pennsylvania

courts turned him down.[9] He tried to get the Supreme Court of the United States to take his case, but this, too, failed.[10]

As we leaf through reported cases, federal and state, we find countless claims of right. They are, perhaps, the tip of an iceberg. Such claims may have become more common in recent decades. Why this should be so and whether they bring about effective control of government (or are ineffective or a nuisance) are questions that will be taken up later in this book.

THE COMMON LAW AND ITS COMPETITORS

There is a bewildering variety of legal systems in the world. Every country has its own, and in the United States, each state, too, has its own legal system, which governs the internal affairs of the state, generally speaking; the national (federal) system is imposed on top of that system. A law student usually studies the law of a single country—the one he or she plans to practice in. This is true of the United States too; legal education sticks largely to American law. Our legal education, though, is fairly national-minded; it tends to ignore many of the differences between the laws of the various states. The curriculum and the materials studied are much the same in all law schools, whether they are in Oregon or in Alabama. A student does not go to Harvard Law School to study the law of Massachusetts, or to Vanderbilt to study the law of Tennessee. Nonetheless, the study of law is in a sense quite parochial. Medicine is more or less the same all over the world, and so generally are all the natural and applied sciences: electrical engineering in Uganda is no different, in essence, from electrical engineering as understood in China or the United States. Even the social sciences lay claim to a kind of universality. But law is different; it is restricted to one nation or jurisdiction; its power stops at the border. Outside its home base, it has no validity.

No two legal systems, then, are exactly alike. Each is specific to its country or its jurisdiction. This does not mean, of course, that every legal system is entirely different from every other legal system. Not at all. When two countries are similar in culture and tradition, their legal systems are likely to be similar as well. No doubt the law of El Salvador is very much like the law of Honduras. The laws of Australia and New Zealand are not that far apart.

We can also clump legal systems together into clusters, or "families"—groups of legal systems that have important traits of structure, substance, or culture in common. The word "family" is used deliberately: in most cases, members of a legal family are in a sense genetically related, that is, they have a common parent or ancestor, or else have borrowed their laws from a common source. English settlers carried English law with them to the American colonies, and to Canada, Australia, New Zealand, Jamaica, Barbados, and the Bahamas. Many countries in the world once were part of the British Empire. These countries are now independent and have distinct legal systems of their own, but they have kept some aspects of their historic traditions. The legal systems of the English-speaking

world have a definite family resemblance. Similarly, the Spanish brought their law to Latin America. Spanish-speaking countries in that part of the world share many traits and traditions.

The largest, most important family is the so-called civil-law family. Members of this family owe a common debt to a modernized version of Roman law. The ancient Romans were great lawmakers. Their tradition never completely died out in Europe, even after the barbarians overran what was left of the Roman Empire. In the Middle Ages, Roman law, in its classic form, was rediscovered and revived; even today, codes of law in Europe reflect "the influence of Roman law and its medieval revival."[11] Western Europe—France, Germany, Italy, Spain, Portugal, and the Low Countries, among others—is definitely civil-law country. Through Spain and Portugal, the civil law traveled to Latin America. The French brought it to their colonies in Africa. In Canada, the civil law is dominant in the French-speaking province of Quebec. It strongly colors the legal systems of two unlikely outposts, Scotland and Louisiana. It plays a major role, too, in countries like Japan and Turkey, which stood completely outside the historical tradition but borrowed chunks of European civil law in the nineteenth and twentieth centuries in hopes of getting modern in a hurry.

Civil-law systems are, generally speaking, "codified" systems: the basic law is set out in codes. These are statutes, or rather superstatutes, enacted by the national parliament, which arrange whole fields of law in an orderly, logical, and comprehensive way. Historically, the most important of the codes was the civil code of France, the so-called Napoleonic Code, which appeared in 1804. It has had a tremendous influence on the form and substance of most later codes. Another influential civil code was Germany's, which dates from the late nineteenth century.

During the Renaissance, European legal scholarship was dazzled by the power and beauty of the rediscovered Roman law, and it profoundly influenced the style and content of legal change in country after country. There was one holdout, however—one nation that managed to resist the "reception" of Roman law. The English were not seduced by the majesty of Rome; they held fast to their native traditions. Many ideas and terms from Roman and European law did, to be sure, creep into English law, but the core of the legal system held firm. This tenacious local system was the so-called common law. It differed and continues to differ in many ways from the legal order in other European countries. For one thing, the common law resisted codification. There never was an English equivalent of the Napoleonic Code. The basic principles of law were not found primarily in acts of Parliament, and least of all in careful, systematic statements of law adopted by legislatures or imposed by decree. The principles were found in case law—in the body of opinions written by judges, and developed by judges in the course of deciding particular cases. The doctrine of "precedent"—the maxim that a judge is bound in some way by what has already been decided—is strictly a common-law doctrine. The common law also has its own peculiar features of substance, structure, and culture—some important and basic, some less so. For example, the jury is a common-law institution. So is the

"trust," an arrangement in which a person (or bank) as trustee receives money or property to invest and manage for the benefit of certain beneficiaries.

The common law is no longer confined to a single small country. The English brought it to their colonies, and in most cases it took root and thrived. All common-law countries were once colonies of Great Britain, or, in some cases, colonies of colonies. Roughly speaking, the common law reigns wherever the English language is spoken. This means our own country, for one, and Canada (outside Quebec), Australia, New Zealand, Jamaica, Trinidad, Barbados, and Singapore, among others. Other systems of law contributed bits and pieces here and there—remnants of Spanish-Mexican law poke through the surface in California and Texas—but English law is by far the strongest historical element in our own legal system (Louisiana, as we said, stands off in a corner by itself). England and the United States have been drifting apart, legally speaking, for more than two hundred years, and there are now big chasms between them, but still the relationship between the two legal systems is obvious, instantly recognizable to any lawyer who jets from one country to the other.

The civil-law system was described above as the dominant system in Western Europe. No mention was made of Eastern Europe, which is a rather difficult area for purposes of classification. During the period when the Soviet Union dominated Eastern Europe, some scholars felt that the socialist countries were distinctive enough to make up a separate family of legal systems. Other scholars were not so sure; the Soviet Union and its satellites had close ties with the civil-law systems, and despite the revolutions and one-party rule, there were strong resemblances in many details to the legal systems of Western Europe. For this reason, some scholars treated these systems as still part of the family—black sheep, perhaps, or oddball deviants, but family members nonetheless.

Then, quite suddenly, at the end of the 1980s, the Soviet Union disintegrated. Its constituent parts became independent countries—from Latvia and Estonia to Uzbekistan. The countries of Eastern Europe—Poland and Hungary, for example—which had been under Soviet domination, renounced communism and rushed helter-skelter into the arms of a market economy and Western ways of life (more or less). One legal system—the system of the German Democratic Republic—simply expired; the GDR was absorbed into the German Federal Republic (formerly "West Germany").[12] All of the countries that were formerly part of the Soviet bloc set about reforming their legal systems, and in the process, most are drawing closer, in fits and starts, to the civil-law world.

"Socialist law" is not, of course, extinct; it survives, for example, in Cuba.[13] The controversy over whether socialist law was and is a separate system or is merely part of the civil-law family may be nothing but a question of words. Obviously, Cuba, which does not recognize private ownership of businesses for the most part, and has an agricultural system that is largely collectivized, has a lot in common with the now-defunct systems in Hungary or Poland and less in common with, say, the law of Mexico or Colombia. In these countries there are private businesses; lawyers work in the private sector (in Cuba they are employees of the government); the economy is not centrally planned; there is no

censorship. Whether these differences mean we have to put Cuba in a separate family is not terribly important. What *is* important is to see how the form of the economy and the structure of society fundamentally alter the legal system of each particular country.

In general, it is a fairly crude business to assign legal systems to this or that family. There are always troublesome cases at the margin. The Scandinavian countries, for example, do not precisely fit the technical patterns of law among their European neighbors; some scholars assign them a family of their own. In general, we have to remember that a legal system is not an exercise in history; it is a working system, very much here and now. In essence, it can be looked at as a kind of problem-solving machine, and the problems that face it are the problems of today, not yesterday. Legal tradition may explain some aspects of the shape and style of a system, but history and tradition are probably not as decisive as most lawyers (and laymen) think.

For example, Haiti and France are supposed to have very similar legal systems; they are close relatives inside a single family. The Haitian system is derived from that of France. This is certainly true on paper. But is it true when we look at the living law? For decades, Haiti was a plundered and mismanaged dictatorship; more recently, democratically elected presidents were overthrown in a series of military coups. The population was and is desperately poor, almost entirely rural, and largely illiterate, and a recent series of tropical storms and hurricanes, capped by a devastating earthquake in 2010, have made matters even worse. Haiti's people struggle to survive in a wrecked and overpopulated land. France is rich, has a parliamentary system, and is urban and highly industrialized. The two countries may have codes of law on the books that look very similar, but it seems likely that the living law of France has more in common with the law of England than with the law of Haiti, even though the English legal system belongs to a different "family."

This last statement is basically a guess, because there is surprisingly little research about the way legal systems actually work, and what we have is spotty and scattered. Comparing whole legal systems, in operation, is essentially beyond our power. But it simply has to be true that the level of development in a country must have an enormous influence on that country's legal system. If you ever traveled by car in England and France, you noticed (or took for granted) that the traffic rules in the two countries are basically the same, even though the English insist on driving on the "wrong" side of the road. It is probably the case that every country touched by the automotive revolution has traffic rules that have a lot of features in common. Technology is a great lawmaker and a great leveler. The railroad in many ways and in many fields practically rewrote the law books of the United States in the nineteenth century. In the twentieth century, the automobile had almost as big an influence on law. Neither the railroad nor the automobile shows much respect for what family a legal system belongs to.

It is hard to exaggerate the importance of technology in understanding what makes contemporary law tick. Accident law—the heart of the legal field we call torts—is basically the offspring of the nineteenth-century railroad; in the twentieth century,

the automobile largely replaced the railroad as a source of accidents, and of accident law. The automobile is responsible for a vast body of rules about roads, traffic, auto safety, buying cars on the installment plan, and so on. Its invention has changed society (and thus the law) in absolutely fundamental ways. We take many of these changes for granted. Could either urban or suburban life go on without cars? Yet the automobile is not something that separates civil-law and common-law countries. It poses the same problems for all of them. It does indeed separate modern systems from older or more primitive systems. And it has a deep impact on the way we live, on where we live, and on the very structure of freedom, our ability to come and go as we please.

Only two or three main groups—families—of legal systems have been mentioned thus far. But the civil-law and common-law systems are not the only families of legal systems. No mention has been made, for example, of the sacred-law systems of classical India, Israel, and the Islamic countries. Islamic law, in particular, is a living force in the world today. In Saudi Arabia, for example, it has official status, and it has made a dramatic comeback in other Muslim countries, most notably in Iran under the Ayatollah Khomeini and his successors. Africa is the home of dozens and dozens of tribal systems of law. Many of them are extremely interesting; some have been carefully studied; all are under great pressure from Western codes and rules in this age of global economies and instantaneous communication.

This book is about American law, a subject that is daunting in itself; it is impossible to provide much detail about other systems of law. But comparisons and contrasts are always interesting and sometimes enlightening. It is not fashionable anymore to label some systems of law as "primitive" (the word seems too insulting); but it is as plain as day that the law of a tribe of hunters and gatherers, or the law of the nomad empire of Attila or Genghis Khan, has to be different from the law of modern America—or, for that matter, from the law of modern Mongolia. Does it make sense to talk about evolutionary patterns in the history of law—progressions moving inexorably from stage to stage, from lower to higher? In other words, do legal systems evolve in some definite, patterned way, starting from stage A and passing through B and C on the road to D? Are there natural stages and a fixed order of progression?

This is a classic question of legal scholarship. There is no definite answer; some people even deny that the question makes sense. A small band of people with spears and knives has legal needs very different from ours; a feudal system generates one kind of law, big-city America quite another. Changes in social systems and technology necessarily push a system toward new burdens and new habits. Classical Roman law did not worry about custody of a baby born after in vitro fertilization, nor about copyrighting software. Legal systems are never static. They change with changing times. In a country like ours, constantly moving, squirming, changing, the law is especially dynamic. We live in a restless world. The rate of change, the kind of change, the effects of change—these are matters of vital interest, and are at the heart of the questions discussed in this book. Whether we call the main lines of growth "evolution" is only a question of words.

2

Law: Formal and Informal

WHEN PEOPLE THINK about law or talk about law, what they usually have in mind is the official legal system—that is, the system run by the government, the one we pay taxes to support. Many definitions of law make this concept explicit: Donald Black, as we have said, has defined law as governmental social control.

But there are other ways to define law, and some of these are broader than Black's definition. The legal scholar Lon Fuller once defined law as "the enterprise of subjecting human conduct to the governance of rules."[1] Of course, the government is very much in the business of subjecting behavior to rules (or trying to), but it is not the only entity playing this game. Fuller deliberately framed his definition in such a way that it was not limited to official rules—rules put out by the government. He simply said "rules." If we take his definition at face value, the government has no monopoly on law, in this or any society.

Fuller's definition, in fact, points to quite another way of looking at law. He asks us to look not only at the source of legal process—that is, whether it comes from the government and wears an official badge, so to speak—but also at the process itself. Any organization of any size has rules and tries to enforce them. The bigger the organization, the more rules it is likely to have. Students at university or college do not have to be told that schools make rules and regulations and try to enforce them. These rules and regulations are part of the life all around them. Just as obviously, any business bigger than a mom-and-pop store—and any hospital, prison, or factory—must work with rules: rules about the employees and their jobs, about ways of buying equipment, about

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the handling of customers and patients, about income and expenses, about bosses and underlings, and so on.

How does a company enforce these rules? It has no official police or courts. But it certainly has sanctions—ways of delivering rewards and punishments. A company cannot hang a worker, whip him, or deport him to a desert island, but it can fire somebody who comes in late all the time, or is drunk on the job, or refuses to follow the rules. At one time, the boss had unlimited power to hire and fire. He was rule maker, judge, and jury. But in large companies, at least, this is no longer the case—or not to the same extent. The process is much more "legalized" today. In many large companies, there are complicated procedures for handling discipline on the job and for settling grievances. Where the workforce is unionized, the labor contract will often set up and regulate these grievance procedures. Frequently both sides will agree that a neutral third person—an arbitrator—will make final decisions. Many nonunion companies also have some kind of grievance and discipline procedures.

This is not the only way in which a big company resembles a kind of private government, with a private legal system. Not only will a big company have private "courts," it will also have private police. In 1978, General Motors had 4,200 plant guards; this meant that the police force of this company was bigger than the police departments in any except the five largest cities in the country.[2] In 1992, it was reported that about 100,000 security guards toted guns—"more than the combined police forces of the country's 30 largest cities."[3] And by 2013, over a million people worked as private security guards, a force a great deal larger than the 635,000 public police officers in the United States.[4] These security guards wear uniforms and often look like the police who are paid by the state. They often walk regular beats, and they can and do make arrests.

The private police business is growing very fast. But it is not a new phenomenon. The famous Pinkerton National Detective Agency ("the eye that never sleeps") guarded Abraham Lincoln, spied on crooked railroad employees, and supplied scabs to companies whose workers were on strike.[5] Other detective agencies sprang up in the late nineteenth and early twentieth centuries. Companies stung by losses from crime, inside and outside, have turned more and more to private police and private detectives for help. People who live in closed subdivisions in the suburbs also turn to private uniformed guards to give them a sense of security.

In a sense, then, every institution could be said to have a legal system of its own. It would not stretch Fuller's definition very much to claim that even families make law and enforce it. Mother and father lay down rules and make decisions all the time: who does the dishes, when the children can stay out past ten, how much TV they can watch. There are rules big and small—nobody gets more than one slice of cake at a birthday party, chores and toys must be shared, and so on. These rules are, in a sense, part of the "law" inside the family.

There is nothing wrong in defining law to include these rules; nothing wrong with studying how fathers and mothers make "law" and run families. For some purposes such

a strategy would be useful; but it makes for a most unwieldy subject. To use the word "law" in this sense swallows up most of human activity and classifies vast areas of behavior as "legal." This may be unnecessary, or downright misleading, if our goal is to study processes and institutions that we more conventionally call "law" or "the legal order." Nonetheless, it is good to remember that the term "law" can be applied to processes of many kinds, even those that are very informal, very far from the official legal system. What makes them like official law is what Fuller pointed out: they subject behavior to rules.

There are some processes that are both formal and official, in the sense of governmental. This is true, for example, of any law that Congress passes. Other norms are part of the law, but are unwritten, informal—more "custom" than hard law. The speed limit is a good and everyday example. The formal, official rule sets the limit on Interstate 280 at sixty-five miles an hour. But everybody knows that the "real" rule, the one actually enforced, is closer to seventy-five. In other words, a police officer will not stop you if you are driving sixty-eight miles an hour, even though you are technically breaking the law.

If we turn to *private* law, we also find examples of both formality and informality. Grievance committees in industry sometimes look a lot like courts, may be quite elaborate procedurally, and may even behave like courts. Formal procedures abound in other big institutions. Students cannot be expelled from a university without (if they choose it) some sort of hearing or "trial." In some schools or universities, a student may even have the right to "appeal" a C grade in a course and get the grade reviewed at a higher level. In case of serious infractions—for example, if a student is accused of cheating on an exam—the student will certainly have the right to some sort of formal process, and may even have the right to bring a lawyer to the hearing. If the student is found "guilty," he or she can probably appeal to a dean or the president of the university. Yet all of this, thus far, is strictly private, at least in private universities. The government plays no part in the process.

This does not mean, of course, that the formal, official legal system had nothing to do with the development of these procedures. Quite the contrary is true. These inside procedures came about, in part, because of outside pressure from court decisions, for example. Indeed, the support of the courts has been a crucial factor in the rise of "due process" in schools. For example, in *Goss v. Lopez*,[6] the U.S. Supreme Court, the highest court in the land, decided that a high school student could not be suspended from school without some sort of hearing, if the student wanted one. It also does not mean that the results of these disciplinary hearings, even though the "outside" principles are influential, end up in perfect conformity to these "outside" principles, either of procedure or of substance. Colleges have had to deal with matters a lot more sensitive than cheating on exams—date rape, for example, or fraternity hazing, or the fallout from drunken parties on Fraternity Row, including a lot of mistreatment of women. Front-page stories in the *New York Times* in the mid 1990s alleged a pattern of excessive leniency, and downright cover-ups, at many colleges and universities.[7] Almost two

decades later those stories were repeated, but this time they involved a number of elite institutions such as Amherst College and Yale University,[8] and eventually prompted the White House and the Department of Education's Office of Civil Rights to name and investigate more than fifty educational institutions for potential violations of federal antidiscrimination law.[9]

There are also unofficial courts of various sorts scattered all through the country. Some of these are run by organized religious bodies. Orthodox Jews, for example, can bring disputes to a rabbinical court for settlement. The Catholic Church presides over an elaborate system of canon law. Church courts decide whether a marriage can be annulled, for example. This does not bind the regular secular courts, but it is very important to a devout Catholic, whose religion forbids divorce and who might want to get married again and yet stay within the church's good graces.

Leigh-Wai Doo has described in some detail a quite different kind of court: the Chinese Consolidated Benevolent Association in New England, which handled disputes within the Chinese community. Let us look at one example of this "court" in operation. One busy day in a Chinese restaurant, the chef asked the owner for a raise of $25 a week. The owner said no. The chef then walked off the job. Later, he sent a bill for back wages, plus $25; the owner, for his part, demanded $500 in damages. Neither one paid the other's claim.

Two months went by. The restaurant could not get a good chef, and its business began to suffer. Meanwhile, the chef's "family association" appealed to the Benevolent Association, demanding the back wages and denying that the restaurant had any right to claim damages. The Benevolent Association consulted with the restaurant association and with the family groups; it turned out that the restaurant wanted the chef back at work, and was willing to give him a raise (of $10) if he would change his "unreliable ways." The Benevolent Association then had the "task" of discovering "whether the chef wanted the job back," and, if he did, whether he could be talked into making amends. They "studied the man's character and the best ways of approaching him." After a week of "patient persuasion and stressing that he would not find work if he continued his erratic behavior," the chef agreed.

The Benevolent Association now knew that both sides were willing to settle. It called on them to meet before its board. The reconciliation took about two hours. The chef apologized; the owner rehired him with a $10 raise. They "finalized the settlement by drinking tea together."[10]

Neither a rabbinic court nor the Chinese Consolidated Benevolent Association has the power to back up decisions with force. Such institutions have no way to throw a "litigant" in jail or to squeeze money out of a loser. But they do have moral force, and this may be no small matter. They can bind those people who voluntarily submit to them. By inclination, and also because they are unable to crack the whip, these "courts" lean heavily toward compromise, toward restoring harmony, toward reconciliation and voluntary agreement. In this sense, they are less lawlike than ordinary courts. They are not so very

different from the way some judges work "in chambers." And they much resemble courts in simple societies, as anthropologists and others have described them.

These specialized "courts" may also be fairly prone to decay in a society like ours, which is very fragmented and very pluralistic. The old traditions die hard, but they do eventually die. Apparently, the dispute-settlement models described by Leigh-Wai Doo have been losing much of their strength in Chinese-American communities. New waves of immigration—Asian immigration was heavy in the 1980s and 1990s, and well into the twenty-first century—might, of course, strengthen them once more.

There are countless other ways in which Americans use law that is unofficial (non-state) and yet quite formal. Every trade association or occupational group—every big institution of any kind—will make rules and will have some way to enforce them or to settle disputes. Businesses often handle differences through the use of arbitration. Very often, when two businesspeople enter into a contract, they write into it an arbitration provision. This means that if some dispute or problem comes up, the two sides will not go to court (at least not initially), but instead hire an arbitrator—a private citizen, usually skilled and experienced in this work—to settle the dispute. Labor contracts (collective bargaining agreements) also typically provide for arbitration. In other words, arguments over what the contract means, or over work rules and the like, will be decided by an arbitrator, someone on whom both management and the union can agree. In some companies and industries, there has been a permanent arbitrator; this was true, for example, of U.S. Steel and the Ford Motor Company. Under other industry contracts, the arbitrator may be chosen case by case. The contract between the Major League Baseball Players Association and the owners of major league baseball teams, for example, calls for arbitration of salary disputes by a panel of three arbitrators.

Arbitration is in some ways a kind of halfway house between official and unofficial law. The arbitrator is, after all, not a professional judge. But his word is usually final, just like a judge's. If a soap company and one of its suppliers agree to arbitrate their disputes, they are going to have to abide by this agreement. The courts will, if pushed, force the losing side to carry out what the arbitrator decided. It is in this sense that arbitration is a kind of mixture of the public and the private.

Just as every institution, down to the family, has the habit, and need to, make rules, so too there is a general need to find ways and means to enforce the rules; otherwise they are perfectly meaningless. Hence it is no surprise that arbitration and processes like it are so pervasive in society. There is a hunger for ways to settle disputes that the regular courts cannot satisfy, or can satisfy only at too high a price. We can think of the formal courts as fancy French restaurants in a society that also needs pizza and hamburger joints for fast, cheap food.

In California one rather curious system, a hybrid between public and private dispute settlement, has been given the nickname "rent-a-judge." The "rent-a-judge" system is based on an old, rather murky state law, which was rediscovered and put to modern use in the late 1970s. In the rent-a-judge system, parties to a dispute sidestep

the regular courts; they hire their own judges (actual judges who have retired from the bench). These judges resolve the dispute—privately, but with all the trappings and procedures of a regular trial. The results are treated as binding on both sides. These private judicial services have since spread beyond California to other states, including Texas, Ohio, and Indiana.[11] One company, JAMS (formerly the Judicial Arbitration and Mediation Services), is the largest provider of rent-a-judge services. By 2015, JAMS and JAMS International had nearly three hundred "neutrals," mostly retired judges, who handle around 12,000 cases a year in cities throughout the United States and four other countries.[12]

Public and private spheres of law thus interact. They are not totally independent of each other. Students have hearings in universities not because universities decided to grant hearings out of the goodness of their institutional hearts, but in part because they were pressured by court cases on student rights. Arbitration awards, too, as we mentioned, can be enforced in court. The private sphere is also influenced by the public sphere in other ways. Most claims for damages (in automobile accidents, for example) are settled out of court, but the parties bargain "in the shadow of the law."[13] That is, both sides know that the legal system is alive and well in the country; that it generates rules and doctrines about damage cases, and they or their lawyers have some idea what is likely to happen if they go to court. These ideas enter into their bargaining and influence it, even though the bargaining is strictly private. The relationship between this "shadow" and the out-of-court bargaining process is, to be sure, quite complicated. Divorce lawyers, for example, may manipulate the "shadow," when dealing with their own naive clients, in ways that increase their own power.[14] There is much that we do not know about the way formal law interacts with private behavior.

The discussion so far has isolated four types of law. There is law that is both formal and public (an act of Congress, for example); law that is public (or governmental) but informal (the "real" rules about the speed limit); law that is formal but private (grievance procedures); and law that is both private and informal (rules inside a family). We can also draw a line between legitimate and illegitimate processes. Usually, a system is not illegitimate just because it is informal or private; nor is there anything illegitimate about the formal private systems (like the work of the Chinese Consolidated Benevolent Association or a university hearing about alleged cheating on a test).

The informal part of the public system is a more complicated story. Some aspects of it are illegitimate, or downright illegal. It is a basic fact about the American legal system (and the legal systems in other modern countries) that the way the system is described, on paper, its official form, does not tell us how it actually works in real life. Sometimes we are perfectly willing to accept a certain shortfall between form and reality. The speed laws can serve as our example once more: it does not trouble us, or the police, that the "real" speed limit on Interstate 280 is not sixty-five, the official figure, but something a bit higher. Most people also feel that rules are made to be bent a little bit, in the interest of common sense or humanity or human weakness.

Other situations are not so benign or so readily accepted. Some hover in a kind of twilight zone between the legal and the illegal. Prostitution, for example, is against the law everywhere, except for some counties in Nevada. Yet police and city officials have often closed their eyes to the "social evil," provided certain conditions were met. In many cities, in the past, police would not raid a house of prostitution so long as the house was inside an area of vice, the so-called red-light district. The police sometimes even issued rules to regulate prostitution—even though the business, strictly speaking, was completely illegal. In Chicago, for example, the superintendent of police in 1910 issued a whole sheaf of rules: "No house of ill-fame shall be permitted outside of certain restricted districts, or . . . within two blocks of any school, church, hospital, or public institution, or upon any streetcar line." Prostitutes in Chicago were not supposed to wear transparent dresses, and "houses of ill fame" had to have double doors, not "swinging doors that permit . . . a view of the interior from the street."[15]

Prostitution, in other words, was half inside, half outside the law. It was officially illegal, yet at the same time it was regulated, and by the same legal system that condemned it to illegality. This was not and is not a unique situation. The "real" law about gambling, divorce, abortion, immigration, and many other subjects is quite different from what it is supposed to be, and many aspects of social behavior, like prostitution, are both inside and outside the law at the same time.

There are other forms of "justice" that stand completely outside legality. The justice of underworld gangs, or of organized crime, is of this nature. Gangland justice stays hidden, operating only in certain dark corners of society. But our history is also full of open outbursts of unofficial law, or "popular justice," as it is sometimes called. Among the most famous examples are the so-called vigilante movements.

Vigilantism goes far back in American history. There were examples even in the colonial period—the so-called Regulators in South Carolina appeared on the scene in 1767. But the golden age of the vigilantes was in the West, in the period after 1850. The two San Francisco "Vigilance Committees," both active in the 1850s, were particularly famous in their day; but there were many other vigilante groups, in Montana, Colorado, Nevada, Oregon, and Texas. One scholar counted at least 326 vigilante movements, and if records were more complete, the count would probably rise to about five hundred. The vigilantes dispensed quick, often bloody "justice" against horse thieves, rustlers, desperadoes, and ne'er-do-wells of one stamp or another. One estimate is that vigilantes shot or hanged some 729 men.[16]

In their day, the vigilantes were often controversial. They were criticized by defenders of orthodox law and order. Still, many people—perhaps a majority—felt that the vigilantes performed a public service; that in the raw, lawless towns of the West, there was no real alternative to vigilante justice. The chief justice of Montana Territory—who might be expected to stick up for law if not order—praised them in 1864 as genuine "tribunals of the people." They were, he felt, an absolute "necessity."

"Popular tribunals"—private systems that rival the official system—come up (we often hear) out of a "vacuum" of power. This usually means that there is some group

that feels official law is too weak, or has fallen into the wrong hands. For example, the merchants of Dodge City, Kansas, in 1872, were so concerned about lawlessness that they hired an unofficial marshal, gave him a badge, and set him loose. In 1873, the businessmen formed a vigilance committee, which started its work by killing two men in a dance hall and ordering five more to get out of town. The committee itself later became such a disorderly nuisance that it had to be put down with force.[17]

The colorful vigilantes of the old West are no longer with us; but even today there are neighborhood associations that call themselves vigilantes (or "neovigilantes"). These groups patrol city streets and keep watch in their neighborhoods, because they feel the "real" police are not doing the job. Richard Maxwell Brown mentions some examples from the 1960s: the Deacons for Defense and Justice (a black organization); the Maccabees of Crown Heights, Brooklyn (largely Jewish); and the North Ward Citizens' Committee of Newark, New Jersey (largely Italian).[18] In 1988, the *New York Times* reported that "hundreds" of neighborhood groups in New York City were joining in a "movement of citizen activism against crack"; the movement "sometimes straddles the line between vigilance and vigilantism."[19] In 2012, George Zimmerman, an armed member of a neighborhood watch group in Sanford, Florida, disregarded telephone instructions from the police department, and kept on pursuing a "real suspicious" figure who turned out to be an unarmed, black teenager walking home from an errand at the store. What happened next is controversial; what is clear is that Trayvon Martin, the young man, ended up dead—shot and killed by Zimmerman. This tragedy captured the attention of the country for months.[20]

In Tombstone, Arizona—a town with its own history of rough cowboy justice—a group of concerned citizens set up the Minuteman Project in 2005 to "assist" federal authorities in securing the American border with Mexico. The goal of the Project was to post a thousand volunteers along twenty-three miles of the most porous part of the border, tracking and reporting immigrants and smugglers sneaking into the country. While the thousand volunteers never materialized, scores, maybe hundreds of people, many of them armed, ended up taking part in the patrols. The leader of the Project, Chris Simcox, said in an interview, "We're doing the job President Bush refuses to do." While both Bush and Mexican President Vicente Fox condemned these private patrols, the group may have had an impact: soon after its formation, the U.S. Department of Homeland Security added over five hundred Border Patrol agents and doubled air support along the Arizona border.[21]

In the old West, the vigilantes explained and justified themselves in various ways. The job of justification was easiest where people felt "the law" itself was corrupt: where the sheriff, for example, was part of a gang of horse thieves. Other vigilantes—and vigilante-like movements—were concerned primarily with enforcement of the traditional moral code. The so-called White Cap movement started in southern Indiana in 1887; it spread from there to Ohio, New York, and other states as far off as Texas. This was a "movement of violent moral regulation by local masked bands." The White

Caps usually punished their victims by whipping; their targets were "wife beaters, drunkards, poor providers, immoral couples and individuals, lazy and shiftless men, and petty neighborhood thieves."[22] Most of these offenses were not crimes at all, or if they were, the law punished them quite weakly. Throughout the nineteenth century there were outbursts of rioting directed against immorality: in Detroit, for example, between 1855 and 1859, "one bordello after another felt the fury of an angry mob." Seventeen brothels were damaged or destroyed.[23] Similar incidents took place in other cities as well.

Even today, private attempts to enforce moral codes crop up now and then, though they rarely involve the violence associated with those of the nineteenth century. Self-appointed "modesty squads," for example, patrol the ultra-Orthodox portions of Brooklyn and similar locations, to safeguard their communities from morally corrupting influences. A member of a neighborhood committee contacted a Brooklyn shopkeeper and asked her to remove the mannequins in her store window, which displayed women's clothing, because they "might inadvertently arouse passing men and boys." Afraid she might lose business if she ignored the request, she complied. In another, more startling case, masked men belonging to a modesty squad broke into a girl's bedroom in the Hasidic village of Kiryas Joel, New York, to take her cell phone (mobile devices and computer equipment are thought to be inappropriate for children). One Hasidic journalist remarked that "quite a few men" consider themselves God's police.[24]

"Popular justice," then, has taken many forms. At one end of the scale, groups like the modesty squads operate in the shadows, enforcing dictates through forms of social and economic pressure. Some of the old West vigilante groups were brazenly open, and may have even used self-appointed judges and juries, who, in some ways, imitated regular legal processes, even to the extent of holding "trials." And at the other end of the scale, popular justice could degenerate into blind fury, rioting, lynch law. Some of the most sinister episodes came about where communities (or parts of communities) felt they could not trust "the law" because it was too squeamish, or (from their standpoint) too much committed to rules and procedures.

The notorious Ku Klux Klan arose in the South, after the Civil War; federal troops occupied the southern states, and state governments could not or would not allow whites to terrorize black people openly. The Klan took over the job. In the 1870s, when the federal troops left, white supremacy rose to power in most of the southern states. These governments developed other ways to keep black people "in their place," and the Klan went mostly out of business. Some states used legal devices to enforce white supremacy. For example, poll taxes and literacy tests kept blacks from voting. Other methods, however, were savage and violent, even more than the Klan had been. "Lynch law" broke out in the 1890s. Hundreds of blacks in the South were hanged for breaking the Southern "code"—dragged from prison cells or from their homes and killed by jeering mobs.

The Klan cropped up again in the 1920s, and still a third outburst followed in the wake of *Brown v. Board of Education* (1954); the Supreme Court ordered schools to

desegregate; and there was massive resistance in the South. This time, however, there was no federal retreat, and the Klan today is a much weaker group, on the fringes of society. Not that Klan-like behavior has completely faded away. There were sporadic outbreaks of white vigilantism in the chaotic aftermath of Hurricane Katrina in 2005. One criminologist, John Penny, explained that the storm produced an environment that "brought out what was dormant in people here—the anger and the contempt they felt against African-Americans in the community." As broken levees left much of New Orleans—particularly the black areas of town—under water, armed white militias cut off some of the escape routes. Roland Bourgeoise Jr., later indicted on charges related to the shooting of three black men trying to leave New Orleans, reportedly told a neighbor that "anything coming up this street darker than a brown paper bag is getting shot."[25]

The main line of vigilante history was less bloody and less one-sided than its bastard brother, lynch law. The leaders of the Western vigilante groups were by no means thugs. Indeed, they were often solid citizens. It was the business community that organized vigilantes in Dodge City. Vigilante leaders themselves were, or became, bank presidents, political figures in some cases, even U.S. senators. Few people today would defend lynch law, but there is a certain yearning for the simplicity and swiftness of "popular justice." There are situations of frustration and rage, mostly over street crime, which lead people to feel that do-it-yourself law and order is justified. There is a good deal of public sympathy for a parent who kills a child-abuser, and there was also a good deal of support for Bernhard Goetz, the "subway vigilante." Goetz shot four black teenagers—one of whom was paralyzed for life—who Goertz thought were threatening him as he rode on the New York subway. Goetz was never convicted of any crime worse than a gun offense,[26] although his most seriously injured victim won a huge jury award in a civil case in 1996.[27] Many popular books and movies glorify the man who "takes the law into his own hands." The phrase is worth thinking about. It asserts—as the vigilantes did—that the private avenger comes not to deny the law but to fulfill it. Whether or not this is the result, or ever was, is another question.

Yet in the long run the key trend in criminal justice has been moving in the opposite direction: away from popular justice—away from the layman and toward the professional lawman. In the eighteenth century, there was no organized police force, certainly no FBI, no detectives, no fingerprints, no DNA, no forensic science. The role and power of the jury (a band of twelve laymen) was as great as it is today, and perhaps greater. The power of the public—of the "mob"—was a fact of life. The word "mob" has a lawless sound, but there was often a fine line between mob action and public action that was legal, if not downright praiseworthy. The community in general had the right to rise up and catch thieves when the hue and cry was sounded. A magistrate could form a "posse"—that is, a group of able-bodied men, private citizens—to help out the sheriff.[28] This system survived into the American West; the sheriff's posse is familiar to every fan of western movies. The West, of course, is where the vigilantes flourished. By the late nineteenth century, Eastern cities all had police forces; law enforcement was

professional or, in any event, full-time; paid police and detectives were supposed to be in charge.

Sometimes there are whole governments that technically speaking have no legal basis and are, from a certain standpoint, illegal. History or war is often the ultimate judge. When Ulysses Grant crushed the armies of the South, he swept away the government and legal system of the Confederacy. Other "governments" have sprung up, sometimes in remote areas, where a vacuum in power and law is perceived. This happened, for example, among the Mormons in Utah, before territorial government was organized. From the standpoint of the United States, there was no law in effect in Utah. But in fact, the Mormon Church exercised tight and effective control over this new community. The "government" in Utah was no different from a legitimate government, in any practical way.

Other examples of mini-governments that are not "official" come closer to the line between legitimacy and illegitimacy. On the American frontier, settlers often formed "claim clubs" to protect their interests in their land against "claim jumpers" (and against each other). In other parts of the country, groups of miners drew up their own codes of "customs." The claim clubs were thought to be necessary because, strictly speaking, the settlers were often squatters on public lands, without, in fact, any legally enforceable claims. Acts of Congress starting in 1796 provided for the orderly sale of public lands. First the land had to be surveyed; when this was done, the president could announce that the land was ready for sale. Government land offices would auction off the tracts of land. Before the date of the auction, nobody but the government owned the land, and nobody was supposed to settle on it.

This was "the law," but it was flagrantly disobeyed. Thousands of people crowded onto the public domain. They built houses and farms long before the land was officially open for sale. As far as the settlers were concerned, they had a perfect right to the land, which they had earned by their time and their sweat. But legally speaking, they lived in a vacuum. For this reason, they banded together, drew up constitutions and codes to govern their rights, and formed little governments of their own. Their methods were not always sweet and gentle, and their treatment of outsiders was sometimes harsh. The squatter organizations were yet another example of makeshift law, springing up in the cracks and crevices of the larger society.[29]

THE BIRTH OF FORMAL LAW

No legal system in a developed country can be purely formal or informal. It is invariably a mixture of both. Official government law is generally (though not always) formal: patterned, structured, leaning on the written word and on regular institutions and processes. Nonstate law is usually much less formal, but both the official and the unofficial codes are mixtures of the two. Why is it that some parts of a system of order are highly formal, some parts much less so, and some completely loose and formless?

We can start with a point that may be obvious: historically speaking, the informal comes first. The simplest societies, which probably resemble older human societies more than the world of New York or Tokyo, have highly informal legal systems. Formality seems to take over when an informal system no longer works, for one reason or another. In small societies—societies in which most relationships are face to face—a formal legal system may not be needed at all. Not many people break the rules. Custom is king. Public opinion—what friends, kinfolk, neighbors think—is a powerful force, a powerful pressure. People do what social norms say they should do, not because they are angels but because kinfolk and neighbors can inflict such terrible "punishment." In fact, these societies may even dispense with any organized method for applying public force to somebody who breaks the rules. Many simple societies, in other words, do not have courts, judges, or police. They make do without them.

An extreme case was the community on Tristan da Cunha, a lonely, isolated, barren spot of land in the middle of the South Atlantic Ocean. A few hundred people lived there, growing potatoes and catching fish. A team of scholars visited the island in the 1930s to study animals, birds—and social life. The social scientists on the team were amazed to see how law-abiding the people were—if we can apply the term "law-abiding" to people living in a place where there is nothing that even looks like law as we know it. As far as anybody could tell or remember, no serious crime—murder, rape, or the like—was ever committed on the island. There were none of the trappings of criminal justice—no police, courts, judges, or jails. Nobody needed them.

What made the people of this island such models of good behavior? One idea leaps immediately to mind: the islanders had no choice. They were trapped on their island, with no hope of escape; they were absolutely dependent on each other for social life and support. Life on Tristan da Cunha was totally "transparent"; everyone on the island was exposed, inexorably, to the "Argus-eyed vigilance of the community." Under circumstances like these, informal norms are just too powerful to be disobeyed.[30]

Of course, in a broad sense, there was law on the island, and lots of it. There were norms of behavior, and people followed them; these norms were enforced by real sanctions. Prisons, fines, whippings, and the gallows are not the only ways in which societies punish people. Teasing, shaming, and open disapproval are also forms of punishment. They can be terribly severe, in their own way. It is because they were so strong on Tristan da Cunha that the community never needed courts, police officers, and jails.

There are similar forms of punishment in other small, face-to-face communities. Some are quite familiar from our own legal history. In the American colonial period, Massachusetts Bay and other colonies forced some offenders to sit in the stocks, where everybody who passed by could see them. Sitting in the stocks was not physically painful, but it exposed a person to public scorn and shame. Samuel Powell, a servant who stole a pair of breeches in Virginia (1638), was ordered to sit in the stocks "on the next Sabbath day . . . from the beginning of morning prayer until the end of the Sermon with

a pair of breeches about his necke."[31] Whipping was another common form of punishment. It was painful to the body to be sure, but there was also psychic pain. Whipping was always done in public, before the eyes of the whole community.

But we do not have to go to far-off islands or to the long ago for examples of the process we are describing. It happens every day in our times, too. We see it in schools, in family life, in clubs, in small groups everywhere. The drill sergeant in the army punishes by yelling at the clumsy recruit, exposing him to ridicule. The law school professor, in the movie *The Paper Chase*, used ridicule and sarcasm to punish students who were unprepared or did not understand the work. Schoolteachers and parents have a whole repertoire of tricks to invoke shame, guilt, and derision.

But it is also clear that the bigger, the more complex, the more "advanced" the society, the less it can rely on informal sanctions alone. The United States is about as far as one can get from old Tristan da Cunha, socially speaking. People in our country live in face-to-face relationships with friends and relatives, but at the same time, all of us are in daily contact with people who are strangers to us; we use products that strangers make and sell; products which, in a sense, have mastery over our lives. We deal every day with people we do not know, on the streets, in the workplace, in banks and hospitals and government offices. The food we eat is packaged in faraway factories; the clothes we wear are woven in distant mills. People we never see manufacture the necessities of our lives, using procedures we do not understand. When we ride in a plane, a train, a taxi, or a bus, we put our lives in the hands of strangers.

These are the facts of life. They have tremendous consequences. As individuals, we have little control over these vital strangers. We open a can of soup and eat it. How can we be sure that the ingredients are safe and wholesome, that the soup won't make us sick? Wholesomeness is beyond our control, and certainly beyond our knowledge. Nor can we rely on informal norms or public pressure to guarantee that the soup is not poisonous, that it is nourishing and good. We want something stronger and more reliable than custom, something with independent force. In short, we want law. Hence complex, interdependent societies, like ours, develop enormous appetites for formal controls. But these controls can only come from some kind of organized government, working through rules of law.

As we said, face-to-face life is not gone, despite our dependence on strangers. Even in a big, impersonal society like this one, we have families, we have friends, we have strong personal ties to people and places. Even in this megasociety, we spend much of our lives in tiny groups. The big society is made up of these little molecules of people. Each one of us has some personal zone or sphere, our own island of Tristan da Cunha. Inside our little group, informal norms still rule. But for most of us, there is this vital difference: we can escape from the island. On Tristan da Cunha, the boat came only once a year. For us the boat comes every day, every hour, every minute. To a large extent, we feel we have a chance to catch the boat, a chance to change jobs, change cities, change families, if we wish—even, in a sense, to change lives. Of course, in many ways we are all prisoners of

the conditions of life, of traditions, prisoners too of our own characters and talents. But compared to most people in most societies, for us many doors of escape seem open.

This means that informal norms stay powerful only when we let them—when we agree for them to remain in full force. Of course, psychological bonds can be, and often are, tremendously powerful. Social norms and the influence of culture are also far stronger than most people realize. To a large extent, we live in invisible cages, unaware of unconscious limitations—unaware that context and culture determine to a large extent what we like and what we do. We feel that we are citizens of a "republic of choice," but the reality may be far, far different.[32] Still, in many areas of life, we *do* stay bound to some corner of society that rules us without "official" sanction; but this is because, in whole or in part, we want to, collectively—that is, people (or most of them) agree on what the norms are, and what they should be; or at least agree about who has authority to set standards and make up rules. The Chinese-Americans did not have to abide by the rules of their Benevolent Association. They could escape from that island, so to speak. Increasingly they do tend to escape—particularly the younger generation. If they stay on their island, it is because at some level they want to, or feel compelled to for inner reasons. But when agreement to abide by traditional norms and to submit to (informal) authority breaks down, as happens so often in American society, then formal law will have to step in. Even in face-to-face settings.

We can illustrate the general point by looking at the way law has entered the life of the American schoolhouse. In the past, schools were places where children learned to read and write, to do math, and, in addition, to obey the rules. The rules were for the most part informal; the teacher was in charge of the classroom, the principal in charge of the school, and the school board in charge of the district. In a few rare instances, some parent or student challenged the way schools were run, but these exceptional incidents ended, for the most part, in failure. Until deep into the twentieth century, nobody heard about such things as "dress codes." Everybody knew more or less what children were supposed to wear, how they were supposed to be groomed, and so on. In any event, parents (and children) understood that the teacher ran the classroom; on such matters the teacher's word, or the principal's, was final. There were no written norms, no procedures, no structure of appeals.

This cozy system broke down in the late 1960s. Styles of dress and behavior were changing rapidly. Long hair for boys had become a fashion—and a symbol of rebellion. At least, this is the way some boys regarded long hair, mustaches, and beards. Teachers and principals, in general, felt the same way: long hair was a symbol of rebellion, and they did not like either the symbol or the rebellion itself. Since informal norms were not working, the schools turned to formality—to dress codes and hair codes. In one high school in Williams Bay, Wisconsin, for example, hair had to be "worn so it does not hang below the collar line in the back, over the ears on the side and must be above the eyebrows." In this school, beards, mustaches, and "long sideburns" were also forbidden.[33]

Many other schools had similar rules. But the students did not necessarily give in. In any number of school districts, high school boys refused to cut their hair and were disciplined, sent home, even expelled from school. Consensus about the norms had broken down; along with consensus about authority itself. Most parents and students accepted the rules, but an important minority of parents and students did not. In a few aggravated instances, parents and students felt deeply enough about the hairstyle issue to go to court, and schools like the Williams Bay high school found themselves, perhaps to their surprise, forced to defend dress and hair codes in front of a federal judge. In the federal courts, there were no less than eighty-seven reported cases on hair length alone. The schools faced a dilemma. Agreement was unraveling, and the result was controversy, unpleasantness, disruption.

One way out was to submit; another was the path of formality. The dress codes themselves had been a step in this latter direction. Parents and students would at least know what was expected of them. Schools also developed formal procedures for dealing with disputes about student rights. A whole new field of law developed. Nobody in the nineteenth century had ever heard of "student rights" as a category of litigation, or as a problem for the law and for society. The new procedures spread to other institutions—universities, for example, as we have seen. The general pattern of development was much the same. Once upon a time the professor's word was law in the college classroom. By the 1970s, this was no longer quite so absolute. Now *law* was law. In many universities and colleges, a student had some right to challenge the professor, even with regard to the professor's most personal, most sacrosanct act: the grade given out in the course. Not that many students ever took up this opportunity. But the chance and the procedures were there, if anybody chose to use them. The "legalization" of university life, as we have already seen, later extended to such issues as sexual harassment and student misconduct in general—affairs that were once dealt with summarily or not at all.

We can draw a rather obvious principle out of this story: informal norms break down in a situation of conflict. Indeed, this proposition is almost tautological, almost like saying A equals A. In a conflict situation, any society (or subsociety) is likely to give up on informal norms—they simply don't work—and turn to a more complicated, more formal system of handling what seems to be the problem. New procedures will spring up. More law will be generated, and law will turn its heavy guns toward higher formality. The innocent days of consensus are over. The teacher in the one-room schoolhouse, ruling the roost, is a ghost out of the past. She has been replaced by professionals, by a massive school bureaucracy, by a dense thicket of regulations and procedures. To a degree, this was inevitable. Sheer size of the system made it so; you can't run a giant retailing operation, Walmart, for example, with the same techniques as a mom-and-pop store. Big-city school systems are also far more heterogeneous than they once were—a babel of tongues, a rainbow of races.

These last points give us at least a preliminary solution to a puzzle that runs through this book: Why is there so much "law" in this county, so much "procedure," so much

"due process," so much "legalization"? Society, like nature, hates a vacuum; and the breakdown of consensus—the decay of authority—creates a kind of vacuum, in this big, sprawling, diverse, and open society. Into this vacuum, law (in its formal sense) moves in. Here too is a clue to another puzzle: whether the trends we see will continue in the future, slow down and vanish, or get faster and stronger. Obviously, we have no crystal ball, but at least we have an idea about what to look for in daily life, what barometers to watch, what gauges to read.

3

The Background of American Law

THIS BOOK IS about American law today. But legal systems have a past, a history, a tradition. To understand American law as it is, it is helpful to know where it came from and how it grew to its present shape. This chapter briefly sketches the historical background of our law.[1]

BEGINNINGS: THE COLONIAL PERIOD

The territory that is now the United States was first settled by English-speaking people in the early seventeenth century. Their settlements were scattered along the eastern coast of the country. The Puritans sank their roots into the soil of New England; the Quakers settled in Pennsylvania; English Catholics colonized Maryland. There were also early settlements in what is now Virginia and the Carolinas.

The English were, of course, not alone in the race to plant colonies in the New World. The Spanish and Portuguese dominated what is now Latin America and many of the Caribbean islands. The Spanish flag once flew over Florida. Spain also claimed vast tracts of land in the far western deserts and along the western coast. The Dutch settled in New York, only to be pushed out by the British before 1700. The Dutch language and some bits and pieces of Dutch law lingered on in New York for a while before dying out.

A few traces of Dutch law perhaps spread beyond the borders of New York. The office of district attorney may have originated in the Dutch-speaking areas. The matter is in some dispute. But no one disputes the survival of rather big chunks of Spanish law, and

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of civil law generally, among the states carved out of land that was once under Spanish rule. Another survivor, too, must be mentioned: the indigenous law of the native tribes. The people who were here before Columbus had their own systems of law. The interaction between these systems and the law of the conquering settlers has been complex, but among many of the larger groups—the Navajos, for example—tribal law and custom still play a significant role, and there are functioning tribal courts.

Nonetheless, it is true that the main body of American law derives from a single source, the law of England, if it derives from any outside source at all. No other legal system really had a chance to establish itself, just as no language other than English ever really had a chance to set down roots. The common-law system—its habits, its traditions, its ways of thinking—crossed the Atlantic and took hold in this country.

Books on legal history often talk about "the" colonial period; but this can be somewhat misleading. After all, more than 150 years went by between the landing of settlers on Plymouth Rock and the outbreak of the Revolution. This is as long a stretch as the span of time between 1865 and 2015—an interval full of tremendous social change. The colonial period was not quite so turbulent and fast-moving, but it was crowded with events and developments, and it was structurally quite complex. For one thing, there were many different colonies—colonies whose identities were as distinct as those of New Hampshire and Georgia. The settlements were strung out like beads along the narrow coastline. Communication among them was poor. Communication with the mother country was even poorer; the immense, trackless, turbulent ocean separated the colonies from England.

This was a fact of vital importance. In theory, the British were in full control of the colonies, and the colonists were subjects of the king. In fact, the London government had only a feeble hold over these far-off children. The British were too far away to be effective tyrants, even when they wanted to be. Also (at least in the beginning) they had no consistent policy of empire, no idea how to govern distant colonies. For much of their history, then, the colonies (or most of them) were virtually independent.

The colonies can be divided into three groups. The northern colonies—Massachusetts, New Hampshire, Connecticut—were, in terms of English law, the most deviant. The middle group of colonies—New York, New Jersey, Pennsylvania, Delaware—stood halfway between north and south, legally as well as geographically. The southern colonies were the most conservative, in law and legal culture; they stuck more closely to English models.

These differences among colonies were not, of course, accidental. Puritan New England and Quaker Pennsylvania struck out on new paths, deliberately, in ways that Virginia and the Carolinas did not. Climate and land conditions were also influential. In the South, mild winters allowed a different kind of agriculture, organized on the plantation system. This made Southern society structurally somewhat closer to British society; like Britain, the southern colonies were ruled by a landed gentry. Black slavery was another striking aspect of Southern life. The first Africans arrived in Virginia

and other southern colonies before the middle of the seventeenth century. It is not clear when slavery crystallized as a *legal* status in Virginia and other colonies, but by 1700 a developed law of black slavery was in place. And by the time of the Revolution, slaves made up as much as 40 percent of Virginia's population.

There were virtually no blacks in England, and there was no such thing as slavery under English law. The law of slavery was an American invention, stitched together out of various sources, powerfully influenced by strong feelings of race, and mixed together with the labor customs of the West Indies and the southern colonies.[2] Slaves were slaves for life, and the children of slave mothers were slaves from birth. There was slavery in the northern colonies, too; in New York, slaves made up over 10 percent of the population. There were slaves even in Massachusetts and New Hampshire. But slavery never dominated the labor system of the North, as it did that of the South. New York slaves, for example, mostly "worked not in gangs but as domestic servants."[3]

In the colonies there were also thousands of "indentured servants." Indentured servitude was a kind of temporary slavery. Indentures were written documents—contracts of labor, in a way—that spelled out the terms and conditions of work. An indentured servant signed on to serve his master for some definite period: five to seven years was common. The servant earned no salary. During the term, the master had the right to sell the servant—or, to be more precise, to sell the right to the servant's labor for whatever was left of the term. The servant could not control this process; nor could the servant quit the job. Runaway servants were hunted down just like slaves. But when the period of indenture was up, the servant, unlike a slave, became completely free. Under custom and law, the servant was not supposed to leave the master's service empty-handed; he had the right to "freedom dues." In early Maryland, for example, these consisted of clothes, a hat, an ax, a hoe, three barrels of corn, and (until 1663) fifty acres of land. Later, food, clothing, and money were more typical dues ("Corne, Cloaths and Tolls").[4]

A good deal of research has been done on colonial legal systems. Much of it has concerned the northern colonies, especially Massachusetts. In truth, the legal system of Massachusetts Bay (as the colony was called) is uncommonly interesting. It deviated tremendously from English law, or at least from English law as practiced in the royal courts in London. Massachusetts law, in fact, looks so different from English law that at one point scholars argued among themselves whether it ought to be considered part of the common-law family at all.

By now, this idea seems a bit foolish. Despite some strange habits and language, the law of the colony was firmly rooted in English law and English practice. Some of its peculiarities disappear when we remember that the early colonists were not lawyers and were not members of the English landed gentry. The law they first brought with them was not the law of the great royal courts, which had little to do with the mass of the population; rather it was local law—the customs of their communities.[5] We might call this element "remembered folk law." Naturally, it was different from the strict, official law of the London courts. Nonetheless, the key elements of this law were English, and so was

its vocabulary. How could it be otherwise? This was the only law that the settlers knew. Their law, in other words, was a kind of Creole or pidgin form of the common law.

The details of colonial law are complicated and confusing, but its essential nature is easy to grasp. Imagine a group of American college students shipwrecked and marooned on a desert island, forced to build a new society. They will organize some crude sort of government, and they will create something that can be called a legal system. It will be very different from the one they left behind. For one thing, most of the old legal system will be irrelevant. Traffic laws, for example, will not be needed where there is no traffic. On the other hand, the "colonists" will have to make up many new laws—rules about posting sentries on a hill to try to signal passing ships, rules about how to divide fish and clams caught in local waters, and so on. People on the island will reproduce those parts of American law that they remember and that fit their new life and their new community. Ideology will also play a role. It will make a good deal of difference to know who the students were—whether it was a shipload of Young Libertarians that landed on the island, or a shipload of Young Socialists; what part of the country the students came from; what their religion was.

Colonial law was something like a legal system built up by shipwrecked, stranded people. It, too, consisted of three elements: remembered folk law, new law created because of the brute needs of life in the new country, and legal elements shaped by the settlers' ideologies (Puritans in Massachusetts, for example; or Quakers in Pennsylvania). If we look at the *Laws and Liberties of Massachusetts*, one of the earliest colonial law books (1648), we find dozens of examples of all three elements. We find, to begin with, all sorts of references to juries and judges, to wills and other legal documents, to a system of private property—all of these brought over from England as part of the baggage of custom and memory and taken almost for granted.

On the other hand, life in a raging wilderness demanded arrangements far different from those of Stuart England. There were rules, for example, against selling or giving "to any Indian . . . any . . . gun, or any gun-powder shot or lead . . . or any militarie weapons or armour"—a rule that of course had no counterpart in England. Ideology mattered, too: this was a community dominated by stern men of religion. There were rules against Jesuits, Anabaptists, witches ("any man or woman . . . that . . . hath or consulteth with a familiar spirit" was to be severely punished). There were also laws against heretics (those that "go about to subvert and destroy the Christian Faith and Religion, by broaching or mainteining any damnable heresie"). Blasphemy was a crime. There was certainly nothing remotely like the modern idea of separation of church and state.

Massachusetts law, inevitably, was simpler than the general law of England. It was stripped bare of old technicalities, for the most part; it was streamlined and altered so as to make it easier to handle. English law in the seventeenth century was a trackless labyrinth of technicality. It had grown slowly over the years, and this slow evolution allowed it to take the form of a dense texture of irrational, overlapping segments—a crazy patchwork that worked tolerably well in practice, but had become so complex that

only a handful of lawyers even pretended to understand it completely. Even had the settlers wanted to, they had no way to duplicate this kind of system exactly. A colony is always, in a sense, a fresh start.

In form and substance, then, Massachusetts and other colonies struck out on their own. To take one example, the king's law in England called for primogeniture. That is, if a landowner died without making out a will, all of his land went to his eldest son. Massachusetts, from the word go, discarded this rule. All children shared in the inheritance, though the eldest son got a double share. Most of the other northern colonies (Rhode Island and New York were exceptions) simply abandoned primogeniture, and quite early. It lasted much longer in the southern colonies: in Georgia it was abolished in 1777, in North Carolina in 1784, in Virginia in 1785. It is hard to resist the idea that differences in the social structure of the colonies had a good deal to do with the fate of primogeniture. Only in the South were there large estates or plantations. In New England, topography and soil militated against plantation agriculture; instead, there were small farms and compact settlements, and also an abundance of land. These facts favored dividing the land among all the children.[6]

The court system in England was as complicated as the rest of the law, if not more so. Lord Coke, who described the court system as of the seventeenth century, needed a whole volume just to list and explain the dozens of separate courts—royal, local, customary, and special courts in mind-numbing numbers—a maze of jurisdictions that litigants (and their lawyers) somehow had to navigate. This system was bad enough in England; it would have been totally ludicrous in the small, poor, struggling settlements along the American coastline. Massachusetts set up a clean, simple structure of courts; so did the other colonies. Court structures tended to be similar, though never identical, in the various groups of colonies. But there were also striking differences. In England, the courts of *equity*—which lacked a jury, and which administered a body of rules quite different from the ordinary courts—had grown up alongside the "common law" courts. The two systems complemented each other, so that one could not understand English law without in a way adding the two systems together. Massachusetts, however, never developed separate courts of equity; this prominent (if baffling) feature of English law was absent from the colony. South Carolina, on the other hand, had well-developed courts of this type.

In the eighteenth century, legal systems, both North and South, seemed to converge somewhat with English law; that is, they began to look more like their English models. This took place naturally and, for the most part, automatically. To a limited extent, this was because the British forced themselves on their colonies: they came to realize, with a bit of surprise, that they were in charge of an empire and that they might as well run it accordingly. As we all know, these attempts ended in disaster. The British began too late, in a sense. The colonists were used to running their own affairs; and when the English imposed new taxes, set up new courts, and in general behaved as imperialists, they touched off a revolution. As a result, they lost the crown jewel of their empire.

But pressure to conform to English models also came from more natural sources. First of all, whatever their political differences, the colonies had close commercial ties with the mother country. In the middle of the eighteenth century, America was a more sophisticated place than it had been a century before. The population was larger, cities had grown up, and legal institutions and doctrines developed that had been beside the point in the days of little villages along the coast, barely hanging on, isolated, and preoccupied with their own survival. The changeover was particularly marked in commercial law: the merchants, whose ships sailed to England, Jamaica, and ports all over the world, were eager users of up-to-date mercantile law as it was practiced in England and the rest of the European world.

There were also strong cultural ties with England. Lawyers who practiced in the colonies were Englishmen; some had actually gotten their training in England. The legal materials they used were English. Aside from collections of local statutes, the colonies published no native law books to speak of: all the treatises were English; all the published case reports were English. Anybody who wanted to learn about law had to read English books, and these books, of course, told about the English way of law, not the American.[7]

In 1756, William Blackstone's *Commentaries on the Laws of England* first saw the light of day in England. It became a bestseller there, but it was an even greater success on this side of the ocean. Blackstone had a clear, concise style. He wrote his book for English gentlemen—laymen who wanted to know something about their law. American laymen and lawyers alike seized eagerly on the book, because it was a handy key to the law of the mother country. An American edition was published in Philadelphia in 1771–72. Blackstone would probably have been less of a legal bestseller on this side of the Atlantic if there had been a book that was even roughly equivalent, explaining the law in distinctively American terms. No such book ever appeared, or was even thinkable, until the nineteenth century.

The colonial period has been dwelt on in some detail here, first, because it is interesting in itself, and second, because we can use it to explore one of the major questions of this book: How do social conditions mold and determine the legal system of a society or community? If we could adequately answer this question, we would understand our legal system today, and we would also have the key to understanding the legal past.

A FREE NATION: AMERICAN LAW AFTER 1776

In 1776, war broke out and the fragile ties between England and its colonies snapped. The war for independence was successful, and independence was achieved. But the colonies faced a problem: finding the right way to glue themselves together once the old connection was gone. They needed to form some kind of federation—a body with a central nervous system, so to speak—and yet, the individual colonies also wished to keep a good deal of autonomy for themselves. After one false start (the Articles of Confederation),

the colonies drew up a charter, the Constitution of 1787, which is still the highest law of the land. The Constitution gave the central government much more power than it had had under the Articles of Confederation, but the national government was still one of limited powers, within a federal system. Each state stayed sovereign in its own sphere. The United States (that is, the national entity) soon elected a president and went into business. Later it built itself a capital (Washington, D.C.). The national government ran the capital, foreign relations, the army and navy, and the post office. The states continued to run most other public affairs.

The new government faced one early and fundamental question: What should be done with the western lands? The United States owned a huge tract of wilderness. The public domain consisted of hundreds of miles of forest and prairie, stretching all the way to the Mississippi River and including what are now the Midwestern and border states, down through Alabama and Mississippi. The individual colonies, especially Virginia, had claims to most of this land, but these claims were ceded to the federal government between 1781 and 1802.[8]

It was still the case in the 1790s that most of the population lived in settlements strung along the eastern coast. The western lands were in the hands of native peoples, except for a few trappers and small, scattered settlements. Many Americans looked on these areas as lands of the future—lands that would fill up with settlers someday. The basic policy decisions were embodied in the famous Northwest Ordinance (1787). The United States, itself recently part of an empire, decided not to run its lands as a colonial power would. The dependent lands were its children, and like children, they would someday be adults. "Territories" would be carved out of the wilderness. When the population of a territory reached the right size ("five thousand free male inhabitants, of full age"), the territory could elect a "general assembly" to help the appointed governor run the territorial government. And when the population reached "sixty thousand free inhabitants," Congress could admit the territory as a new state, "on an equal footing with the original States, in all respects whatever."

And so it was. The union of states ultimately grew to fifty. In almost every case, the new state passed through a period of territorial government—its childhood, so to speak—before emerging into statehood. In only a few instances—Texas, for example, which began as an independent country—did the states avoid this period of pupilage. And it was not for a full century that the United States came to acquire lands that it did *not* organize on a territorial basis. The booty wrenched away from Spain after the Spanish-American War (1898) included Puerto Rico and the Philippines. These were the first important instances in which the Constitution did not "follow the flag" and in which the United States held colonies in the true imperial sense. It is no coincidence that these were places where most of the people were not white—a factor that also slowed down Hawaii's bid for statehood.

The law of the United States also spread east to west, but not by conquest so much as by natural infection from the original states. New states borrowed heavily from the

law of older states. After all, settlers always came from somewhere, and, except for the immigrants from abroad, that somewhere was the older states. Very often we can explain peculiarities in the law of a new state simply by looking to see where its settlers hailed from. In the old Northwest, the new American arrivals swamped the handful of trappers and villagers who lived in Illinois and elsewhere, who spoke French, and who carried on their lives in accordance with French legal customs. The old Northwest Territory borrowed pieces and chunks out of the statute books of Pennsylvania, Virginia, and other states. As the population of the Northwest grew, new states were admitted to the Union from the Northwest Territory, starting with Ohio shortly after 1800. When fresh territories were organized—Indiana, Illinois, Wisconsin—the old Northwest Territory split like an amoeba, and its legal system divided like the rest of it.

Everywhere, the wave of American settlers was strong enough to crowd out whatever body of settlers lived under different languages and law. The native tribes were dealt with ruthlessly, and their tribal customs followed them into exile or death. Only in Louisiana was the settled "foreign" population big enough to make a difference. In Louisiana, Spanish and French traditions were too firmly entrenched to give way without a struggle, and the common law never in fact succeeded in totally overthrowing the old legal system. It was a decisive step when Louisiana adopted its Digest of 1808, modeled after France's Napoleonic Code. Scholars still quarrel over whether French or Spanish law provided more raw material for the Digest. In any event, both of these systems were alien to the common law; they were civil law to the bone.[9]

English did, in time, overwhelm the French language in Louisiana, except in remote bayous; but the French legal tradition had more staying power. In theory at least, Louisiana to this day does not belong to the common-law family, but rather to the civil-law tradition. In some ways, indeed, its law sticks out like a sore thumb. The state is rather proud of its codes and its peculiarities of law and procedure. Whether by now the living law of Louisiana is all that different from the living law of other states is a more difficult question. Louisiana enjoys (or suffers) the same federal tax law as other states, and the same federal regulations. It is protected by the same Bill of Rights. Its lawyers speak English, and the legal culture is open on all sides to massive influence from its forty-nine siblings.

Spanish or Mexican tradition strongly colored the law of California, Texas, New Mexico, and other western states carved out of Mexican territory after the brief war of 1848. The civil law was never strong enough to survive as a system in these states, but big chunks were left behind. One famous example is the so-called community-property system (totally unknown to New York or Iowa, which are separate property states). In a community-property state, whatever a husband earns when he is married, and whatever property he acquires, will automatically belong half to him and half to his wife, as a general rule; the same is true the other way around. In other words, in these states a married couple is, generally speaking, treated as a unit—a "community"—unless the couple specifically makes some other arrangement. To be sure, in the bad old days, the unit was not

a community of equals. The husband ran the show: he had the exclusive right to manage and control the community property.

We must be careful not to make too much of survivals—old anomalies, pieces of law left over from dead or submerged traditions. Social, geographic, and economic conditions were always much stronger influences on law in these western states than the traditions that predated American settlement. Community property did not survive in California because of nostalgia or historical accident. It has lived on to this day because it has been able to compete with the common law and win a place for itself: it carried on despite, not because of, its Mexican roots. Indeed, in contemporary society, the community-property system seems to fit family life better than the common-law system, and it has tended to expand its domain over time.

A striking example of law generated by local conditions was the law of slavery—an enormous body of rules, statutes, and doctrines built up primarily in the southern states. Black slavery had existed in the North as well, during the colonial period, as we pointed out, but the northern states abolished slavery after the Revolution. The Vermont Constitution of 1777 began the trend; by 1800 the other states in the North had either gotten rid of slavery completely or had "provided for its gradual extinction."[10] From this point on, the line was sharply drawn: there were slave states in the South and "free" states in the North. A state was either one or the other, not both or in-between. The law of slavery was thus confined to the southern and border states.[11]

Slavery was one of the issues that ultimately poisoned relations between North and South to the point where the country fought what was then the bloodiest war in human history (1860–65). The war was fought to "preserve the Union," as far as the North was concerned, but the question of slavery was at the emotional heart of the conflict. Slavery was also at the core of the Southern social system. Slaves were capital assets of enormous value to their owners. In the days before farm machines, black bodies were the motor force that made plantations productive. Slaves cleaned Southern (white) houses, raised Southern babies, worked in Southern factories. In many parts of the South, most of the population was black and enslaved: a white layer of rulers sat on top of a mass of subordinated blacks.

Slavery was a vital cog in the machinery of Southern society; naturally, then, it was a vital aspect of Southern law. Each slave state had an elaborate code of laws to govern slavery and slaves. The master had almost complete control over the lives of the slaves. The slave was a piece of property. He had to obey his master; and, indeed, it was an offense for a slave to be "insolent" to a "free white person." Slaves could not legally marry. They could not own property. They could not come and go as they pleased: a slave was not to "go from off the plantation . . . without a certificate of leave in writing from his master." These provisions come from the North Carolina code of 1854; they are typical of the codes of slave states in general. Slaves had certain rights, at least officially; but these rights were hard to enforce, and were mostly on paper.

Even a freed slave was shackled with many disabilities. The slave code was also a race code. No black man, slave or free, had the right to vote or hold office in the South—or in most northern states, for that matter. If a slave owner set a slave free in North Carolina, as in many other southern states, the freedman had ninety days to get out of the state. An ex-slave who stayed on without permission (it was sometimes granted) was liable to be arrested and sold into slavery once more.

Southern slave law had to concern itself with the massive fact that slaves were pieces of property. Black people were bought and sold on the open market, mortgaged by slave owners who were in debt, leased out by slave owners who had "extra" slaves, left as legacies in the wills of dying slave owners, seized by a slave owner's creditors when the owner could not pay his bills.[12] States from Maryland to Arkansas to Florida built up an elaborate structure of rules and cases—all of it now extinct—to cope with the details of slave property and the affairs of men and women who owned, bought, sold, or dealt in human flesh.

In one case, for example, decided in Georgia in 1853, a man named Latimer owned a slave whose services he did not need. He auctioned off the right to use the slave for a year. A certain Dr. Thompson, who ran a hotel in Atlanta, was the winning bidder; he paid $91 to get the slave for a year, and put him to work as a waiter in his hotel. One of the guests came down with smallpox; the slave was ordered to take care of the guest, and the slave came down with smallpox himself. A doctor was called in; he treated the slave and presented a bill, as doctors tend to do. But who was liable for the doctor's bill? Was it the original owner, because it was *his* slave? Or was it Dr. Thompson, who had acquired a year's worth of labor, to use in his hotel? Who should bear the risk and costs of illness? In the end, the Georgia Supreme Court put the burden on Dr. Thompson.[13]

This case was only one of many cases in which slaves figured as part of the property system. This vast body of law was, of course, unknown in the North. The North was concerned with slavery, but as a political and moral issue, and as an issue of federal relations. There was bitter controversy, for example, over runaway slaves. Did northern states have the duty to return them to their masters? Or to make this possible? Yes, according to the various fugitive-slave laws; but these laws were deeply resented, and at times defied, by the northern states.

Northern states—farm states and commercial states of the seacoast—had their own set of legal and economic issues. These were by no means uniform. In New York at the beginning of the nineteenth century, for example, the courts handled dozens of cases about marine insurance. Kentucky, quite naturally, had very little of this. The states of the old Northwest were much more concerned with public-land law than was Rhode Island. And so it went.

These differences are still very important. Some states are crowded and industrial. (New Jersey is almost as densely packed with people as the Netherlands.) Farmers, growers, or miners dominate the politics of other states. In the dry western states, the population is light; grazing rights on public land or restrictions on strip mining or on

the logging of old-growth timber may be major issues. Southern states still have large black populations, memories of a lost war, and a tradition of conservatism. The Sun Belt, however, is growing and changing fast. The older industrial states—states like Michigan—are struggling to adapt to a world in which the global economy threatens their industrial base. One state, Nevada, is dominated by an unusual industry, gambling.[14] Another state, Hawaii, is tropical, was once a Polynesian kingdom, has a predominantly Asian population—and a "sovereignty" movement among native Hawaiians—and lives largely off the tourist trade. Demographically, the states vary considerably: Cuban-Americans live, by and large, in southern Florida; California and Texas have huge Hispanic populations; California has a growing number of Asians; there are French Canadians in Maine; and so on. The core of the law in all states (Louisiana is something of an exception, as we have seen) is the American version of the English common law. But the pressure of events, the rush of social forces, the needs and demands that come from people and places, from businesses and workers, are the basic forces molding the law at any given time.

In many ways, American law is distinctly and uniquely American. This is a natural and obvious fact. Every country has something unique about its legal system. To take a simple, almost trivial example: by law, we celebrate independence on the Fourth of July, and that day is a national holiday. Other countries celebrate their independence on other days. A legal system is a mosaic of rules, processes, institutions, behaviors, and roles. No two legal systems are exactly the same, or even close. After all, every country has a unique place in space, its own mix of birds, animals, plants, and insects, its own range of manufactured products and crops, its own political history. The experience of a society, in every aspect, colors its system of law.

American law, then, is one of a kind. But, on the other hand, no legal system is *entirely* different from all others. Our system shares many features and traits with other common-law countries, like England or Australia. Yet the American and English systems are noticeably different—different languages, though closely related: in a way, like German and Dutch, or Spanish and Portuguese. An American lawyer would have trouble practicing law in England (assuming he was entitled to do so); he would need special training—a crash course at the very least. Still, he could probably learn English law pretty quickly; French law, even in translation, would take more doing. The legal differences among American states—say, between Florida and Oregon—big as they are, are of a much lower order than the differences between two common-law countries.

It is not surprising—to go a bit further—that American law also has a lot in common with the law of other modern developed countries. For example, it has an income tax; so does Sweden; so does Japan. Rules about air traffic control, wiretapping, gene-splicing, copyrights for software, and so on can be found in all advanced countries at the beginning of the twenty-first century. Medieval England or France had no such rules and problems. New technology and a global economy tend to make the legal systems of the world "converge," at least to a degree.[15]

AMERICA: A MIDDLE-CLASS CIVILIZATION

In the eyes of many nineteenth-century visitors, America was an amazing place. Some of its characteristics, which we take for granted, struck outsiders as remarkable in the extreme. Compared to European countries, America seemed exceedingly classless. Even before the Revolution, there was more equality of condition in the United States than in European countries, including England. It is important to put this "equality" into perspective. In America, there were rich people and poor people, of course; there was also a large population of black slaves. Free blacks could not vote or hold office. Neither could women. Indeed, married women could not really own property or enter into contracts. When a woman married, her property automatically passed into her husband's clutches. He had total dominion and control. A married woman, legally speaking, was more or less on a par with idiots and babies. These rules were not changed until the middle of the nineteenth century. The pioneer law was passed in Mississippi in 1839; New York enacted important reforms in 1848 and 1860. But bits and pieces of these old "disabilities" (legal inequalities) lingered on in the law much longer.[16] And women did not get the vote until the twentieth century.

On the other hand, it was never the case that a few great families owned all of the land in America, or even most of it. There were large landowners, to be sure, but nothing like the vast estates of the European nobility and gentry. There were no real peasants or serfs in this country. Especially in the North, the small family-owned farm was the norm; tenancy (renting or sharecropping) was the exception, not the rule. Only in the South, after the slaves were freed, was there a large body of (black) farm workers who lived more like peons or serfs than the free farmers of Iowa or Illinois.[17]

The wide ownership of land was no accident. It was partly a natural development, in a country without an aristocracy, and with what seemed to be an endless supply of good land to settle and farm. (It has to be stated bluntly, of course, that a good deal of this "endless supply" was achieved at the expense of the native peoples, who were forced off their land.)[18] Partly, too, diffuse ownership was a matter of deliberate policy. The national government, as we noted, came into possession of millions and millions of acres after the Revolution. The Louisiana Purchase (1804) brought millions more. Yet no one ever thought that this land should remain under federal ownership. On the contrary, it was national policy (and felt to be national destiny) to sell the land to the public—to people who would clear away boulders, cut down trees, settle on the land, and grow crops.

This was the basic spirit of public-land law. The philosophy of this body of rules, before the Civil War, was completely unlike the goals of public-land law today. Today a strong central theme is conservation, preservation—holding on to the land, working it or using it (if at all) in the public interest, for the good of the population as a whole. There are, of course, controversies over public-land policy—between conservationists, for example, and timber, mining, and oil and gas interests. But almost nobody proposes flat-out disposition of the public domain. Land law before the Civil War was mostly concerned

not with keeping but with getting rid of the land—selling it or giving it away. And when land was sold, it was sold at low prices—a dollar or two an acre, at most.

Public-land law was a maze of rules, and in practice the gap between theory and reality was wide. There were endless scandals and corruptions at the level of local land offices. Yet, on the whole, the policy worked. True, speculators sometimes got hold of huge tracts of land, but even these speculators never intended to hold on to the land for long. They were wholesalers, not land barons. Their aim was to sell out at a profit. In any case and by whatever path, the land passed out of government hands and wound up in the hands of smallholders—hundreds of thousands of settlers, farmers, and tradesmen. The year 1836 was probably the peak year for land sales. The federal government sold over 20 million acres of land and took in about $25 million. Between 1820 and 1842, some 74 million acres were sold—about as much land as there is in Michigan and Wisconsin combined.[19]

At the same time, the government gave away millions of acres. Some of this land went to state governments; they in turn sold the land, using the money for schools, roads, railways, and so on. In the Revolutionary period, soldiers were given, as part of their pay, pieces of paper that entitled them to bits of the public domain—one hundred acres for a private, five hundred for a colonel. Many of the states, too, granted such military bounties.[20] The so-called Morrill Act (1862) gave every state a gift of public land, to be used to endow higher education. Out of this came such "land-grant" schools as the University of Illinois.

The pressure for cheaper and cheaper land, on easy terms and conditions, was politically almost irresistible. Symbolically, at least, the famous Homestead Act of 1862 was a fitting climax to the trend. This law offered 160 acres of public land, absolutely free, to actual settlers. In fact, the best farmland was already gone by 1862; what was left was mostly in the West and was rocky, arid, or otherwise unsuitable. Still, the law restated, in an especially vivid way, what had always been one goal of land policy.

One theme stands out, then, in the tangled history of American land law: private ownership, and not by a small elite, but by millions of people. There is no Walmart or Microsoft of American real estate. Large landowners—even the largest—own only a trivial portion of this enormous continent. Legal policy insisted on widespread ownership of land and reinforced the pressure for this kind of ownership. Mass ownership of land, in turn, had incalculable consequences for the legal system. English land law had been a maze of technicalities. Generations of budding lawyers broke their heads over land law; no layman could wander into the maze without getting hopelessly lost. The law was so technical that it could work only in a society where landowners were few, rich, and leisured—a class that could afford skilled lawyers to disentangle legal knots.

American law never had this luxury. To get by at all in a country with millions of landowners, land law had to be revised—stripped clean of its worst technicalities. It had to function for ordinary people who owned small amounts of land, people who could, perhaps, read and write, but were not rich and not legally sophisticated, and who did not and could not know the intricate details of land law. The law also had to fit the needs

of a fast-moving, active land market—a market in which tracts of land changed hands almost like shares of stock on a stock exchange.

In England, a single great family might live in one place for centuries, developing deep, sentimental ties to its house, its land, its "estate." The very meaning of land was different in America. Only in the South, with its great plantations, were there estates in the English sense: the "Tara" of *Gone with the Wind* had no analog in Vermont or Illinois. In the North and in the West, men started farms, built them to the point where they could be sold at a profit, and then (very often) sold out and moved on, to start a new farm somewhere else. Even when the owner stayed put, his sons were likely to move on rather than stay on ancestral soil. After all, there was plenty of land—and plenty of opportunity. From the start, Americans were a restless bunch.

Land law was not the only branch of law that needed to sing a fresh tune in the New World. Law never lost all its maddening complexity, but many fields of law were at least streamlined and refined to the level where they worked in this middle-class society. This was certainly true of commercial law; it was also true of family law and the law of wills and succession at death.

The rise of divorce law is a good, if somewhat complicated, illustration of the way in which the social facts of life in the new country molded the law.[21] Divorce was rare and expensive in England—until 1857, practically speaking, divorce was available only through an act of Parliament. Divorce was also extremely rare in colonial America. Here, too, divorce was mainly "legislative"; that is, each divorce was a separate law passed by a colonial assembly. In the nineteenth century, divorces became more common and also easier to get, especially in the northern states. Many states passed laws that allowed "judicial" divorce—divorce as we know it, divorce in court.

How do we explain this rise in divorce rates and the change in divorce law? Were American families less happy than families in Great Britain? Did they break up more often? Possibly: the rising divorce rate certainly says something about changes in the structure of the American family. But it is also clear that people wanted—demanded—a quick, cheap way to "legalize" their status, that is, an authoritative ruling on whether they were married or unmarried. Why? Because legal status makes a difference to people who have money or who own a farm or a house. For such people (and this category included millions of Americans) it was important to be sure of one's legal status. Divorce and remarriage was the best way to keep titles and claims of ownership clean and distinct: it made sure that one's children were legitimate, that the right wife inherited a husband's property, and so on. A society of landless peasants or paupers can do without formal divorce. Americans could not.

There was also a shortage of legal skill. True, there were plenty of lawyers in the country, but they were not well trained, as English lawyers were, in the old common-law technicalities. American lawyers were known more for cunning and business sense than for legal learning. In any event, the kind of fancy legal work that the English gentry could afford was far too expensive for ordinary Americans. And even the great hordes of

lawyers in this country would not have been enough to meet the demand if every little land sale, every last will and testament, every promissory note, and so on, were to take large chunks of a lawyer's time. Hence, the constant simplification of the laws and the constant selling of how-to-do-it books—books like *Every Man His Own Lawyer*, which was mentioned in the preface.

A typical example of this literature, if we can call it literature, was *The American Lawyer and Business-Man's Form-Book*, published by Delos W. Beadle in the 1850s and frequently reprinted. It had "forms and instructions" for contracts, chattel mortgages, bills of sale, bills of lading, bonds, drafts, promissory notes, deeds, mortgages, landlord-and-tenant agreements, vessel charters, letters of credit, marriage contracts, trust forms, articles of partnership, and wills, plus interest tables, digests of the laws of the states on various subjects, and all sorts of other material. The book claimed to be "a manual for the guidance of any and every man in business transactions." Its popularity is another sign of the way legal process percolated into the public mind and public needs, in this middle-class society.

LAW AND THE ECONOMY

Another aspect of American culture, and American law, in the period after the Revolution and up to the Civil War, was extremely salient. We were a nation of economic boosters. We wanted growth, development, gain. A prime goal of the legal system was to find ways and means to foster and encourage economic growth; to increase the wealth of society—and the wealth of individuals and families. Law was a tool to develop the country—to foster growth, to make people rich. J. Willard Hurst has used the term "release of energy" to describe the basic function of law in this period. We often hear people say, somewhat loosely, that law is conservative. In the first century of our independence, it would be more accurate to say, along with Professor Hurst, that law was dynamic: people were willing to "put law in action fast and boldly where they saw tangible stakes in improving physical productivity."[22]

What this means, roughly, is that influential people in this country—voters, property owners, merchants—consciously and deliberately used law in all its forms to push for economic growth. They (and the law) respected property rights, of course, but chiefly because property was an agent of dynamic movement. What they valued was not the fat, old, encrusted "estates" of an aristocracy, but the swift, lean, moving assets of a young country on the make. The legal system was pro-business, pro-enterprise. People were willing—even eager—to throw away old rules of law, if they stood in the way of "progress."

This was, for example, the message of the *Charles River Bridge* case.[23] This great case, decided by the Supreme Court in 1837, turned technically on a narrow issue. The Massachusetts legislature had in 1785 granted a charter to a group of men who undertook

to build a toll bridge over the Charles River in Boston. They built the bridge, successfully, and collected tolls for many years. Then in 1828 the legislature chartered a rival bridge, the so-called Warren Bridge; this bridge, after it recovered its costs, would be a free bridge, not a toll bridge. The two bridges were extremely close to each other; the free bridge, clearly, would drive the toll bridge out of business. The owners of the old bridge fought back in court. They claimed the second charter "impaired" the first charter, and that the legislature had no power and no right to destroy their business this way.

The case eventually found its way to the Supreme Court of the United States. The issue was hotly debated, but the majority, speaking through the mouth of the chief justice, Roger Brooke Taney, decided in favor of the second, free bridge. The first charter made no explicit promise, in black and white, that the legislature would never charter another bridge. Taney refused to read such a promise into the legislative act. That disposed of the claims of the Charles River Bridge.

There were issues of doctrine and precedent in the case, to be sure, but it was also a kind of inkblot test, measuring attitudes toward property and enterprise. To Taney, the real issue was the conflict between old vested rights and the demands of new enterprise—demands of "progress." Faced with such a choice, American law and American judges tended to choose the side of change, progress, growth. This meant the second bridge and not the first.[24]

We often assume that the nineteenth century was an age of laissez-faire, that is, that public policy and public opinion as a whole were dead set against government regulation and against any meddling in business. By modern standards, governments of the time were in truth incredibly weak. The annual budget of a state like Massachusetts, toward the end of the eighteenth century, or in the early nineteenth century, was less than a small city might spend today in a day, or than the Pentagon might spend in a single minute. The state government of Massachusetts spent $215,000 in 1794, and more than half of this was interest on state debt.[25] Millions of people today are on the government payroll; in the early years of the republic, only the merest handful worked for the state. Salaries cost Massachusetts $54,000 in 1794. Of course, the dollar went a lot further then than it does now; nonetheless the scale of government was minuscule compared to what it is today.

Still, it would be wrong to think of government as completely inert, or that most people were what we would call libertarians today—people who believed, as a matter of ideology, that the government should have no role in the economy (or in much of anything else). Ordinary people were, on the contrary, quite anxious to get government help, so long as it benefited them (which should surprise nobody); in particular, they wanted government action that would boost the national economy. Government (federal and state) did its best to promote roads, canals, turnpikes, bridges, and ferries. Later on, there was a positive orgy of support for the building of railroads. Pennsylvania spent more than $100 million—an astronomical sum in those days—on its main canal and railroad system.[26]

Pennsylvania was no exception. Some states used their resources to set up or to strengthen banks; all of them (and the federal government) used land grants to encourage enterprise, especially transportation. After 1850, the federal government gave out huge tracts of land to help get the railroads built. This giveaway was very popular at the time, whatever later generations thought of it. The farmer could not prosper, could not sell his crops, without some way to get them to market. What the typical landowner wanted, in Iowa or Kansas, was simple: good times, good prices for his wheat or corn, and rising land values. Farmers knew that the only way to get rich was to link their farms with markets back east. Only the iron horse could accomplish this. The same middle-class way of life that brought about simpler deed forms and easier divorce lay behind the policy of land grants for railroads and canals.

THE CIVIL WAR AND BEYOND

The Civil War (1861–65), bloody and disruptive, was a cataclysmic shock to American society. It is also a convenient dividing point between periods in American legal history. It is a useful marker of the end of the age of "release of energy"—the boom period of building and settlement, the period of western expansion and early railroads, when agriculture ruled the economy. The postwar age became an age of factories and big cities and floods of immigrants from Eastern Europe; an age of technology and industry; an age in which rural America slowly declined. Of course, the Civil War had little or nothing to do with this development; the process had begun before the war, and merely accelerated afterward.

In one regard, of course, the war was a real watershed. It ended slavery, though, alas, it did not bring about any golden age for the black men and women who had once been slaves. As soon as the war ended, the Southern states passed harsh laws—the so-called Black Codes—to grant blacks as few rights as possible, to keep them in their place, and to preserve as much of the old way of life as they could. But the North would have none of this; Northern armies moved in, most of the provisions of the Black Codes were repealed, and three new amendments to the Constitution (the Thirteenth, Fourteenth, and Fifteenth) were rammed down the throats of the South. The Thirteenth Amendment abolished, once and for all, slavery and "involuntary servitude." The Fifteenth Amendment gave voting rights to blacks: no state could abridge voting rights "on account of race, color, or previous condition of servitude." The Fourteenth Amendment made "all persons" born in the United States (including blacks, of course) full citizens—state and national. Two other provisions of this amendment were destined to have a rich, complicated, and ultimately glorious history: the clauses that guaranteed to citizens, against the states, the "equal protection" of the laws and that forbade the states from depriving any citizen of "life, liberty, or property, without due process of law."

These were, in the end, powerful tools of racial equality, and were probably so intended. But the courts made less benign uses of these clauses in the nineteenth century. During Reconstruction (the late 1860s and the 1870s), blacks and their allies gained quite a bit of political power in the South. But this ended when "white supremacy" governments took over, after the end of Reconstruction. By 1900, few blacks voted in the South; black voters were disenfranchised by a combination of laws, customs, and brute force. The federal government did little or nothing to protect the rights of African-Americans, or to make sure they were able to make their voices heard through the ballot. Only when a strong voting-rights law was enacted, in 1965, did real change come about. By the end of the nineteenth century, moreover, legal segregation was in place. This was the age of Jim Crow, of segregation, the age of lynch law. Later in this book, in Chapter 14, we will discuss the law of race relations in more detail.

In the years after the Civil War, government, in one form or another, played more and more of a role in the economy, especially in the northern states. This development was almost inevitable in the new industrial age. Big business confronted a growing labor movement. What could not be resolved around the bargaining table (sometimes because employers refused to bargain) or through strikes on the streets spilled over into courts and legislatures. State legislatures passed hundreds of new laws on issues of industrial society: wages and hours, company stores, union labels, sweatshops, the employment of women and children, and so on. Courts struck down some of these statutes. The courts also evolved new tools—the labor injunction, for example—which made life harder for organized labor. Indeed, some scholars feel that the crushing power of the law was a powerful influence in pushing the labor movement into a relatively meek and conservative stance.[27]

In this period, too, regulation of business expanded mightily and (for the first time) on a national scale. This was the age of the Interstate Commerce Act (1887), which set up the Interstate Commerce Commission (ICC), the first of the great national administrative agencies designed to regulate business. In 1890, Congress passed the Sherman Act. This law, practically speaking, created a new field of law: antitrust law. This is the branch of law that deals with monopolies and other business practices that "restrain trade" and (in theory) harm competition. The ICC is no longer with us—it was swept into oblivion by a Republican Congress in 1995[28]—but the Sherman Act, in its second century, is still a mighty legal force.

The administrative state has grown steadily since the late nineteenth century; its huge bulk outweighs all the rest of the law today. (We will deal with it in more detail in Chapter 6.) The New Deal, under President Franklin D. Roosevelt, in the 1930s, was the next great watershed in legal life. The Great Depression had wrecked the economy; in one sense, the New Deal was simply a response to this desperate crisis. In another sense, the New Deal merely speeded up what was already in the works: an ongoing process in which government intervened more and more into the workings of the economy. During the New Deal, the federal government gained power and changed its role in the

economy and society in a dramatic way. The Second World War followed immediately afterward, and the modern welfare state arose from the ruins left behind by depression and the dramatic needs of contemporary war. Whatever the sources and the motivations, law has gradually extended its domain over more and more areas of an increasingly complicated life.

FREEDOM AND LAW

In any brief sketch of the way American law has developed, it is easy to ignore (or take for granted) something that struck nineteenth-century visitors to this country with hammerlike force: our amazing level of personal freedom. During most of our history, Americans tended to congratulate themselves on this point. They may have overdone it. Every nationality has a tendency to pat itself on the back; America has been no exception.

In the 1960s, there was revulsion and a reaction, especially in scholarly writing, against this rose-colored view of American history. Historians, quite properly, pointed their fingers at the bloody and dismal story of race relations in this country. They rubbed our faces in some facts many people would just as soon forget. They reminded their readers that in the nineteenth century, freedom and justice were most decidedly not for everybody, either legally or socially. The black population did not share equitably in America's freedom and wealth. Women, too, who made up half the population, were legally and socially subordinate.

There are other skeletons in the American closet. The treatment of the native peoples is a sordid and disgraceful story. At best, they were cheated and dispossessed; at worst, slaughtered in cold blood. The Bureau of Indian Affairs never really understood or tried to understand the culture of these "savages," and it pursued a mindless policy of assimilation. The Chinese on the West Coast were subject to legal and social harassment in the late nineteenth century. During the Second World War, Japanese-Americans were shipped off to camps in the desert on trumped-up, hysterical charges. In the first half of the twentieth century, immigration law was racist to the core; Asians were not allowed to enter the country or become citizens, and in California they could not even own land. Toleration stopped short, too, when it confronted (in the nineteenth century) the Mormon minority (the Church of Jesus Christ of Latter-day Saints). The Latter-day Saints were clannish people with strange and offensive beliefs—in polygamy, most notoriously—and they enraged the "moral majority" of their day. The federal government passed harsh laws against the church and followed an active program of persecution. Leaders of the church were thrown into jail; some went underground. The persecution died down only after the church gave up polygamy in 1890.[29]

It is a fairly daunting list. And yet, despite it all, the balance in the accounts may be on the side of liberty. A lot depends on whether we look back on our history from the vantage point of *now* (in which case we see clearly all the failings and deficiencies)

or from the vantage point of *then*. For much of our history, we were indeed one of the freest, most democratic, most "equal" countries in the world. Where we were bad, other countries were (and are) much worse. America was never utopia, or even close; it has always been a mix of good and bad, plus and minus. It began as an experiment in letting people run their own country. Not all the people, to be sure—basically, "the people" meant men and meant whites—but far more than held power in England or France or anywhere else. This experiment worked; and in the course of time, it was extended to include more and more of the excluded. But popular democracy also meant that law reflected, and had to reflect, great waves of popular sentiment. It could never stray too far from the mean. It could express ideals, it could express "enlightened" opinion, but it could never be dramatically better or worse than the values of articulate people, and of people who had some (economic) stake in society. That was its weakness, and also its greatest strength.

4

The Structure of American Law: The Courts

IN MANY WAYS, the courts are the most familiar part of the American legal system. When people think about "the law," they often have courts and police in mind. They think about courts, even though most people do not have much experience with courts and the way they work. A fair number of people every year serve on juries; a substantial number may have dealings in traffic court. Others may go through a divorce or come in contact with probate court. But very few, except for jurors, have seen or been part of a trial in the flesh. As for the higher courts, only lawyers and judges confront them directly; a small number of people get to watch oral arguments at the Supreme Court. On the other hand, everyone, almost without exception, has watched a trial on TV or in the movies or on the stage.

The American court system is complex. Each state runs its own separate system of courts; no two state systems are exactly alike. The details of court structure can be quite technical, and confusing even to a lawyer. What makes matters even more mixed up is the double system of courts in this country. There is a chain of national (federal) courts, on top of (or beside) the courts of individual states. At least one federal (district) court sits in every state, from Alabama to Wyoming; states with big populations have more than one district court. A person who lives in Philadelphia, then, is subject to the jurisdiction of two very different courts, the local Pennsylvania court and the local federal court, and can sue or gets sued in either one, depending mostly, but not entirely, on what the case is about.

American Law: An Introduction. Third Edition. Lawrence M. Friedman and Grant M. Hayden.

AN OUTLINE OF COURT STRUCTURE

The state court system is a logical place to begin, since the overwhelming majority of lawsuits begin and end in these courts. Despite many local complications and technicalities, it is easy to describe the essential shape of the typical court system. We can think of it more or less as a kind of pyramid.

At the bottom, the broadest part of the pyramid, there is a network of lower courts, dotted all over the state and sprinkled about municipal areas. These courts handle the least serious offenses and the smallest claims. They have various names: justice courts, small claims courts, traffic courts, police courts, municipal courts, mayor's courts. Many of them are somewhat specialized: traffic courts stick to traffic cases; police courts deal only with petty offenses (you cannot sue your landlord or get a divorce in police court); small claims courts never touch traffic offenses or cases of drunkenness.

These courts are the bargain basement of justice, in a way; their goods are popular and cheap. They tend to be rather informal. Some of them refuse to let lawyers take part. Some permit a jury if one of the parties insists. Others do not allow a jury; if a litigant insists on his right to a jury, the case is transferred to a higher court. On the other hand, the judges in these basement courts are usually quite professional. They are trained in law, which was by no means always the case in the past. The "justice of the peace" in England was usually not a lawyer at all; he was a member of the local gentry who served as a judge. Some states still have laypeople serving on "limited jurisdiction" courts at the base of the system—men and women who have never gone to law school and have never taken the bar exam. Magisterial district judges in Pennsylvania aren't required to have law degrees, but they can preside over criminal arraignments and civil disputes involving $8,000 or less.[1] But this kind of arrangement is, by now, rather exceptional.

There has been a good deal of debate about the quality of justice in these lower courts. We hear about slapdash procedures, assembly-line justice, and the like. Maureen Mileski studied a lower criminal court in a "middle-sized Eastern city" around 1970. In this court, 72 percent of the cases were handled in one minute or less. In other words, "routine police encounters with citizens in the field last on the average far longer than court encounters."[2] The situation is still quite bad. The rise of "broken windows" policing in the last two decades has flooded lower courts with people accused of minor transgressions. One scholar recently reported that someone charged with a misdemeanor in New York City could expect, on average, less than twenty minutes of attention from his public defender, which included everything from reviewing the case file, meeting and interviewing the client, meeting family members, making phone calls related to bail, discussing the case with the prosecutor, advising the client on likely outcomes, and, perhaps, actually standing up in court on the case. This is the only "legal processing" time most defendants experienced before a guilty plea or a dismissal ended their case; only about two in a thousand misdemeanor cases actually went to trial.[3] It is not hard to see why this kind of "rough justice" is open to criticism.

Small claims courts have also taken their lumps. The first such court was established in Cleveland in 1913, as a branch of the municipal court. The idea spread quickly. It was argued that these institutions would serve as the poor man's court, cheap, easy to use, with no lawyers and no legal tricks. In many ways, these courts have been a spectacular success; hundreds of thousands of claims are processed through small claims courts every year.

Whether they have really supplied justice for the poor is quite a different question. Beginning in the 1960s, some scholars levied serious charges against them. These courts had become only one more example of the way the scales of justice were tilted against the poor. These were not courts for but against the working class. They were in essence collection mills for businesses, "courts of the poor" only in the sense that the poor person was dragged before the court and, in an "intimidating atmosphere," forced "to confront a powerful creditor," or a landlord, or the government.[4] To this day, debt collectors and debt buyers continue to use small claims courts, when the claims are relatively small; the filing fees are low, and the formal rules of evidence normally do not apply.[5] The *Boston Globe* reported that 60 percent of small claims cases filed in Massachusetts in 2005 were filed by debt collectors.[6] And large numbers of collection cases—45 percent in Cook County, Illinois, for example—result in default judgments against the debtors, that is, nobody entered any defense for the debtor.[7]

In some states, bad publicity and criticism led to efforts to restore the courts to what was supposed to be their original function. Some states—New York, Oklahoma—barred collection agencies from using small claims courts. In many places, the clerk will help a litigant fill out forms; some courts even give legal advice to bewildered litigants. Some courts have mediation processes, and this kind of less hurried, less adversarial way of doing small-claims business is apparently more satisfying to litigants.[8] Recent studies have tended to look at small claims courts in a more favorable light. A survey of twelve urban small claims courts, published in 1993, did find that businesses filed most of the complaints, but the survey did not feel that these courts were "primarily debt collection agencies for businesses." Most of the cases that were actually tried—that is, the cases actually contested—were brought by individual plaintiffs.[9]

The next level of the pyramid is made up of *courts of general jurisdiction*, the basic trial courts of the community. These are the courts that hear civil cases "worth" more than the ones in the basement courts (that is, more money is at stake). These courts also handle cases of serious crime—not drunkenness or walking on the grass, but burglary, rape, manslaughter, and murder. There are fewer of these courts, but they tend to be more professional than the basement courts. The judges are always lawyers. The atmosphere is more dignified, more solemn. There is more full-time staff.

These trial courts usually have jurisdiction over more people and larger areas than the municipal or police courts. In many states, the basic trial courts come one to a county (in counties with big populations, like Los Angeles County, the court may be divided into "departments"). There is no uniform name for the basic trial courts of the United

States. In some states, they are called circuit courts; in others, district courts. The basic trial court in California, Connecticut, and a few other states is called the superior court. In New York, through an odd quirk of naming, the basic trial court is called the supreme court; the highest court of the state is called the court of appeals.

Only a small percentage of the cases that get filed in court ever go to full trial; the vast majority are settled out of court, dropped, compromised, or handled summarily. Still, every year thousands of cases do go the whole route, either to trial by jury or to trial in front of the judge alone (a so-called bench trial). In California, for example, in the fiscal year 2012–13, over 7 million cases were filed in the superior courts. Only around 7 percent of these were "contested trials" (479,126), and many of those were bench trials. Fewer than 1 percent actually went to trial by jury; still, this amounted to 9,480 jury trials in the state during that year.[10]

In the contested cases there are, of course, winners and losers. The loser can throw in the towel; and most do. Or the loser can continue the struggle and "appeal." The term "appeal," in ordinary language, means taking a case to a higher court, an *appeals court*, higher up in the pyramid of courts. Typically, the appeals court does not review every aspect of the trial—it does not retry the case de novo, that is, all over again. But trial de novo is not completely unknown. The loser in a petty court, a justice of the peace court, for example, can usually take his case to the next court up; here the trial is likely to be de novo. But except for these small cases, it is the rule that a person who appeals will get only limited review from the appeals court. The higher court looks at certain features of the case, certain parts of the record, checking for errors.

Suppose, for example, a man is tried for murder and the jury brings in a guilty verdict. The defendant is almost certain to appeal, but on what basis? The appeals court will not convene a jury, will not hear new evidence, will not even go over the old evidence. Rather, the defendant (actually, his lawyers) will have to find some "legal error" to complain about, something done wrong at the trial. He might claim that the judge let the jury hear improper or irrelevant evidence, or that the judge gave the wrong instructions to the jury, or that the judge showed prejudice, and so on. The appeals court may take these complaints very seriously. But it will not try to second-guess the jury. It will not rehash the facts. If it finds an "error," it will usually send the case back down for a new trial. Findings of fact (generally speaking) will not be reviewed in appeals in a civil case, either. If a woman sues the driver of a truck that rear-ended her car, and injured her back, and the jury awards her $35,000, the appeals court will normally not review the facts, or the amount of the damages; only a "legal error" can lay the basis for appeal.

In a few states with small populations, like South Dakota, the loser in the trial court can appeal directly to the state's top court, the supreme court of the state. In other words, if you count the trial court as the first tier, South Dakota has a "two-tier" system. In a two-tier state, the supreme court will generally hear everybody who wants to appeal; the court does not screen its cases, or pick and choose the best or the most important. It takes them all. In these states, appeal is "as of right."

This works well enough in South Dakota, but it would hardly do in a state like California, which had more than 38 million people in 2015, and an enormous network of trial courts, all of them churning out decisions. If we let everybody who lost at trial in California appeal "as of right," the supreme court would be totally swamped. It is no surprise, then, that California, like other states with big or middle-sized populations, has developed a "three-tier" system. A layer of intermediate courts stands between the trial courts and the supreme court. Most appeals go to the middle level; and there they end. These middle-layer courts are called courts of appeal in California and in many other states; in some they have another name ("appellate courts" in Illinois, for example). In the 1980s and 1990s, six states—Minnesota, Mississippi, Nebraska, North Dakota, Utah, and Virginia—added intermediate courts, leaving only eleven states with two-tier systems by 2011.[11]

In three-tier systems, the top court has tremendous discretion; it can usually decide which cases to hear and which to reject. The loser at trial gets one bite of the apple; he or she has the right to appeal at least once within the system. But the loser has, ordinarily, no right to demand a hearing from the *highest court*. That privilege is reserved to those who convince the court their case is somehow important, that it presents a legal issue that will affect other cases in the future. There are exceptions written into the law in many states. For example, a man or woman sentenced to death may get automatic review in the highest court. That is true in California.[12] But generally speaking, the high court in three-tier states has enormous control over its workload, and this has important consequences for judicial policymaking.[13]

How does the high court, with this freedom and power, decide which cases to take? Obviously, the judges choose what they consider significant cases. (Tastes in what is and what is not significant tend to change over the years.) As populations grow, more people clamor to be heard; courts have to be tough and selective or they will drown in an ocean of paper. In 1950, there were 130 petitions for leave to appeal to the Supreme Court of Illinois; in 1978, there were 989, an enormous jump. The court actually decided fewer cases with full opinion in 1978 (195) than in 1950 (253).[14] The demand has continued to increase, and the state supreme court has gotten even pickier. In 2010, there were 3,020 petitions to the Illinois Supreme Court, and only 91 of these were granted.[15] Illinois is a three-tier state. Most people who appealed in 2010 had to be content with the middle tier of courts.

Federal courts are also organized on a three-tier system. They lack the "bargain basement" tier, however. There are no federal small claims courts or federal justices of the peace, generally speaking. The bottom federal level is the *district court*: this is the basic federal trial court. The other two tiers, the circuit courts and the U.S. Supreme Court, confine themselves to appeals, by and large.

This clean, sharp division was not always the way things were. We take for granted today a strict separation between trial courts and appellate courts. The distinction was not firm in the early nineteenth century. High-court judges, state and federal,

often did trial work as well. Even the justices of the U.S. Supreme Court had "circuit duty." Each justice was assigned to a region of the country. Every year the justice traveled to his circuit and tried cases there. This burden on the justices was not lifted until the end of the nineteenth century. In 1891, Congress made this traveling show optional; circuit work then became quite rare. It was totally abolished in the twentieth century.

There are, as of 2015, ninety-four federal district courts. Every state has at least one. In the smaller states, the district consists of the entire state; the larger states have more than one district. San Francisco, for example, is in the Northern District of California; Los Angeles is in the Southern District. There may, of course, be more than one judge to a district (imagine having only one district judge for the whole Los Angeles area!); most cases, however, are tried by a single judge, sitting alone.

The next step up is the level of the U.S. Courts of Appeals, the federal circuit courts. For many years, there were ten of these. Then Congress set up an eleventh, by splitting in two the old Fifth Circuit, which stretched from Florida through Texas and had been growing very fast in population (the new Eleventh Circuit consists of Alabama, Florida, and Georgia); Congress also added a new D.C. Circuit to service Washington, D.C., partly because so many administrative agencies sit in D.C. and make decisions that generate a large number of appeals. Circuit courts of appeals, unlike district courts, are not one-judge courts. The judges sit in panels usually made up of three judges each. The total number of judges varies from six in the First Circuit (this circuit handles Massachusetts, New Hampshire, Maine, Rhode Island, and Puerto Rico) to twenty-nine in the Ninth Circuit, a legal giant that includes California and eight other states of the West, plus Guam and the Northern Marianas.[16] If a case is important enough, it will be heard not by a panel, but "en banc," that is, by all the judges of the circuit. (In the Ninth Circuit, by way of exception, "en banc" does not mean all the judges, but a sizable number; the full bench would be unbearably cumbersome.)

For most cases—indeed, the overwhelming majority—the circuit courts are the end of the line. Above them looms the U.S. Supreme Court, in all its majesty; getting a hearing there is a rare privilege indeed. The Supreme Court sits at the apex of the pyramid of federal courts; it can also hear cases that come out of high state courts, if they raise important federal issues, usually issues under the federal Constitution. Most litigants seeking Supreme Court review must petition for "certiorari," a writ the Court issues to a lower court, pulling up the case for a hearing. The Court has only nine justices, and its workload is heavy. It has to be jealous of its time and effort, and it is. Few of the cases that knock at its door actually get inside. In 1880, 417 cases were filed with the court; in 1974, 3,661; in 2013, 7,376. The Supreme Court hears only a small percentage of these cases; the rest are turned down. The Court heard argument in only 79 of the 7,376 cases filed in 2013, disposing of 77 of them in 67 signed opinions. It also issued 6 "per curiam" decisions in cases that weren't argued (these "per curiam" decisions, made by the Court acting collectively, are unsigned and usually quite brief).[17] The other seven-thousand

applicants? They were simply turned down without a hearing. Getting to the Court makes you a member of a very exclusive club of litigants.

The Supreme Court has almost total control of its docket. But like the top state courts, it was not always in such a privileged position. A century ago, its workload included many rather prosaic cases—ordinary contract or property cases appealed from the territories, from the District of Columbia, or from lower federal courts. This is no longer true. Yet even today the Court is not a simon-pure appeals court. The Court hears a few "original" cases—cases that come to the Supreme Court first, without any stops along the way. The Constitution provides for original jurisdiction in cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party."[18] Under this provision the Court might hear (for instance) a boundary dispute between two states. An example of an original case before the Supreme Court was the long-drawn-out wrangle among Arizona, California, and other states over how much water each state could draw from the Colorado River and its tributaries.[19] Some states also give their high courts original jurisdiction over cases of various types. In Nebraska, for example, the supreme court has authority to issue certain extraordinary writs, and to have original jurisdiction "in cases relating to the revenue," in "civil cases in which the state shall be a party," and in "election contests involving state officers other than members of the Legislature."[20]

The structure of courts, state and federal, has been described here in a simple, rather idealized way. In many states, there are oddities or extra wrinkles. Court structure can be very complicated; the further back in history one goes, the more confused the situation gets. A number of states have tried to reform their court systems, to make them more streamlined, more rational. Arthur T. Vanderbilt (1888–1957), chief justice of New Jersey after 1947, led a notable and successful fight to reform the judicial system in his state, which was woefully out of date. But many states have preserved a flock of specialized courts, hangovers from the past.

These courts come in various shapes and forms. Georgia, for example, has separate probate courts that administer affairs relating to wills and estates of the dead (they also issue firearm and marriage licenses).[21] (In California, wills, trusts, and estates are dealt with by branches of the superior court, that is, the ordinary, general court.) Delaware has the distinction of preserving a very ancient tradition: separate courts of chancery, which decide cases of "equity," many of them disputes about the affairs of corporations. Separate equity courts once existed in most states; but the two sorts of court were long ago merged into a single system. New York, for example, joined "law" and "equity" together in 1848. In some states, there are separate juvenile or family courts, distinct from the regular courts. Massachusetts has a Land Court Department in its trial-court system to hear cases of foreclosure, eviction, land titles, and other matters of housing and real estate. Michigan and New York have a "court of claims," for claims against the state. Texas and Oklahoma each has a separate court of criminal appeals, the highest court for criminal appeals, separate from

the work of their supreme courts. Oklahoma has a court of tax review; Nebraska has a workers' compensation court. Some courts are relatively new to the scene. In 1989, there was exactly one drug court in the country, in Miami-Dade County, Florida; twenty years later, there were 2,459 drug courts, at least one in every state.[22] Municipal, traffic, and small claims courts, which we mentioned before, have been around a long time. Even in the federal system, there is a special court for custom and patent appeals, a court of claims, and a tax court (not technically a court at all, but in practical terms exactly that).[23] There are also separate federal bankruptcy courts. In the planning of court systems, there is a tension between simplicity and flexibility on the one hand and functional specialization (which has its points, too) on the other.

THE JUDGES

Judges in America are overwhelmingly lawyers—members of the bar. But only a tiny percentage of lawyers are, or ever become, judges. Who are they, and where do they come from?

In civil-law countries, like Italy and France, judging is a career of its own. Judges are civil servants, separated by training and experience from the practicing bar at an early stage of their career. A person who wants to be a judge will typically take a competitive examination right out of law school (or after some period of practical training). Those who pass the exams become judges. They will probably stay judges for the rest of their careers. Beginners start out as beginner judges; successful judges rise to higher and better courts. Usually the sitting judge has never practiced law and never will.[24]

The situation in the United States could hardly be more different. American judges are lawyers, plain and simple. Usually, they are lawyers who are, or have been, politicians, or at the least have been politically active. One survey of judges in the U.S. Courts of Appeals, for example, in the 1960s, found that about four out of five had been "political activists" at some point in their careers.[25] The situation is the same on state courts, perhaps more so. Judges are usually faithful party members; a seat on the bench is their reward for political service. They are also supposed to be good lawyers and to have the stuff of good judges; whether this is actually taken into account depends on where they are, who does the choosing, and so on.

The political nature of judgeships is underscored by the fact that in most states judges are elected, not appointed. They run for office on a regular slate, and in many states they have to attach party labels to themselves—that is, they run as Democrats or Republicans. This idea of electing judges would strike many Europeans as a very peculiar practice, as odd as if we elected doctors or police officers or government chemists. But the elective principle goes back rather far in U.S. history. It was, of course, unknown in the colonial period; it began to take hold soon after independence and became a marked trend in the first half of the nineteenth century. Lower-court judges were elected in Vermont from

1777 on, and in Georgia from 1812. Mississippi decided in 1832 to elect all its judges; New York followed in 1846.

Why elect judges? Essentially, the election of judges is based on the same theory that justifies electing governors or members of Congress: it is to make them responsive to the public. Precisely because judges come from political backgrounds, because they do not resemble the cold civil servants of France or Italy, some kind of public control seemed necessary. But the election system did not work out quite as expected. For one thing, few elections were actually contested in most of the states. Sitting judges rarely lost, regardless of party.

A growing number of states have begun to back off from the pure elective principle. In the twentieth century, some states adopted the so-called Missouri plan. Under this scheme the governor appoints judges, but his choice is restricted. A commission made up of lawyers and citizens draws up a list of names and gives it to the governor. The governor must choose from the list. The judge serves until the next election, then runs for reelection on his or her record. That is, the judge does not run against anybody; the public is simply asked to vote yes or no. Since you cannot fight somebody with nobody, the sitting judges almost never lose. The exceptions can be counted on one hand. The very controversial chief justice of California, Rose Bird, and two other associate justices, were removed in 1987 after a bitter and noisy campaign against them. More recently, the people of Iowa removed three justices of the Iowa Supreme Court in 2010 for their participation in a unanimous and controversial decision that permitted same-sex marriage.[26] Some scholars, like Erwin Chemerinsky, worried that the Iowa vote "might cause judges in the future to be less willing to protect minorities out of fear that they might be voted out of office. Something like this really does chill other judges."[27] By and large, though, these cases remain exceptional—most sitting judges can rest easy.

Why do sitting judges so rarely lose, even in states that do not have a system like the Missouri plan? Judicial elections are usually low-key affairs. It is hard to campaign against a sitting judge. An upstart who tries to defeat a judge already in office has to walk a narrow line. The candidate, unlike candidates for Congress or the statehouse, really cannot make any promises. It is not quite right, after all, to express an opinion about cases or situations that might come before the court. Sitting judges will sanctimoniously hide under the mantle of the law; they will not defend their decisions, but claim rather that they were just doing their duty, just deciding according to "the law," and letting the chips fall where they may. About all a frustrated candidate can say is that he or she can do it all better. Meanwhile, voters on the whole neither know much about these elections and the candidates nor seem to care.

At least this was the norm; more recently, there has been an ominous trend toward more contested elections.[28] From 2000 to 2009, state supreme court candidates raised $206.9 million for their campaigns, more than double that of the previous decade. Tens of millions more were spent on "independent" television commercials.[29] This has many court observers worried. The worry isn't so much that judges will be fearful of protecting

minorities in the face of a wrathful (and voting) majority, but the opposite—that special interests (rich and powerful ones, anyway) will be able to buy favorable treatment down the road. As former Supreme Court Justice Sandra Day O'Connor put it, "A saint would be hard-pressed to disregard the fact that one litigant gave them a huge donation while the other gave nothing."[30] Most judges are not saints, and this has led many to call for restrictions on judicial campaign expenditures or to replace judicial elections altogether, using appointment processes instead.

The question of judicial bias was addressed by the U.S. Supreme Court in a case out of West Virginia in 2009.[31] A state trial court found that A.T. Massey Coal Company committed fraud in a business deal and ordered it to pay $50 million in damages. After the verdict, but before the appeal, West Virginia held its judicial elections for state supreme court justices. The president of the coal company, Don Blankenship, spent $3 million dollars to support the campaign of Brent Benjamin, an attorney who was running to replace an incumbent justice up for re-election. (That amount was a million dollars more than the total amount spent by the campaign committees of both candidates combined.) Benjamin won, and when the case came up for appeal, then-Justice Benjamin refused to recuse himself, and cast the swing vote in a 3 to 2 decision to reverse the $50 million verdict against the coal company. For the U.S. Supreme Court, this was too much. They found that there was "serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent."[32] So there are at least *some* constitutional limits on the relationship between campaign expenditures and judicial decisionmaking, but they really apply only to extreme cases.

So far, judicial elections are still not as partisan as elections for governor or members of the state assembly—on the whole. And there is a deep feeling that judges, somehow and in some sense, should stand outside the hurly-burly of ordinary politics. Even elected judges are less beholden to voters and to political leaders than other elected officials. And nobody but the voters—not the governor, not the legislature—can get rid of them so long as they avoid gross misbehavior or incompetence. Judges are supposed to be independent of their governments, their regimes, and to a surprising degree they are.

Though widespread, the elective principle was never universal. There have always been a few states in which the governor appoints the judges, sometimes with legislative approval. Massachusetts never adopted the elective system, for example. But the main exception is and has been the federal system. The president, under the Constitution, appoints the justices of the U.S. Supreme Court "by and with the Advice and Consent of the Senate."[33] The president appoints all other federal judges, also with senatorial consent. This has been the system since 1789. The Senate plays an influential role. The custom of "senatorial courtesy" gives a senator a loud voice in choosing those federal judges who will sit in the senator's state. The president does not always get his

way. Richard Nixon was rebuffed twice in his appointments to the Supreme Court; a Democratic Senate turned thumbs down on President Ronald Reagan's nomination of Robert Bork (1987). More recently, President George W. Bush withdrew the nomination of Harriet Miers once it was clear that she lacked support from either side of the aisle. A president, of whatever party, cannot assume that the Senate will bend supinely to his will.

Once appointed and confirmed, a federal judge has no time limit, no term of office. The judge serves "during good Behavior," as the Constitution puts it. What this means is that federal judges have their jobs for life, or at least until they step down voluntarily. The only way under the Constitution to get rid of a sitting federal judge is to impeach the judge for "Treason, Bribery, or other high Crimes and Misdemeanors." This is rare and difficult. A senile or a drunken judge—or an outright lunatic—has, in theory, the right to sit tight on the bench until he or she is carried off feet first. Obviously, this system has its drawbacks, but it is supposed to guarantee that judges will be independent, nonpartisan, free from the immediate pressures of politics. This is worth the price of an occasional dodderer or misfit or crook. Most observers of court history seem to agree. And surprisingly few federal judges have been impeached—an impressive record.

Of course, the power to name the judges in the first place is no small power. The president will try to appoint men and women who agree with his policies. This is especially true for appointments to the Supreme Court. Still, once in office, a judge can thumb his nose at the president and the president's program; there is no recourse, no way to fire the judge, no effective sanction. President Dwight Eisenhower came to regret that he named Earl Warren Chief Justice; he joined a long line of presidents who felt betrayed by men they put on the bench. And, of course, judges, if they have longevity—and many do—may serve twenty or thirty years or more, until long after the president who appointed them leaves office or is dead and gone. Anthony Kennedy, the senior associate justice as of this writing (2016), was appointed by President Reagan and is approaching his twenty-eighth year on the bench. Chief Justice Roberts, appointed by President Bush in 2005, has already served more than ten years and, given his age and good health, is likely to oversee the Court for many more.

Whether elected or appointed, judges are relatively insulated from day-to-day political turmoil. But this does not mean that they operate outside public opinion, outside social forces, or free from the constraints of society. That would be impossible, and also undesirable. It does mean that the regime does not dominate the bench, as it does, alas, in totalitarian countries. A judge in mainland China who decided an important case against the wishes of the government, who acquitted a dissident, or who ordered the regime to grant more civil rights would lose his job and find himself with a one-way ticket to Xinjiang province, or worse. This simply does not happen in America. The government loses dozens of important cases each year; the regime swallows hard, but takes its medicine.

THE WORK OF THE COURTS: PROCEDURE AND SUBSTANCE

Trial Courts. The organization of court systems has now been briefly sketched. But what do trial courts actually do, and how do they do it? It is, of course, not easy to generalize. Each state has its own codes of procedure, its own rules on how to start lawsuits, how to run them, and how to finish. Each state is free in theory to think up its own special procedures. But many state systems of procedure in fact have a lot in common. For one thing, the Federal Rules of Civil Procedure have been an alluring model. The federal rules were originally adopted in 1938. More than half the states have adopted them for local use. Moreover, all states (except Louisiana) are part of the common-law tradition, and they are all part of the same society (this time including Louisiana).

The common-law tradition of trial procedure puts heavy stress on "orality." Common-law courts prefer the spoken word to the written document. Not that courts are averse to pieces of paper. Indeed, they are swimming in it: in many cases, boxes and boxes of "exhibits," depositions, and documents of all sorts are introduced into evidence. (A deposition, essentially, is the statement of a witness, reduced to writing; it is used, for example, to get testimony from people who are too feeble, too sick, or too far away to come to the courtroom in person.) Documents are quite indispensable in a great many trials. But still, the spoken word is the heart of the common-law trial, testimony fresh from the mouths of living, breathing witnesses, who stand or sit in plain view in the courtroom and are examined and cross-examined by the lawyers. The system is so familiar, so ingrained, that we take it completely for granted; Americans find it astonishing to learn that there are other ways of running trials, that there are systems in which, basically, judges proceed by shuffling papers and documents and the jury is quite unknown.

Then, too, ours is a so-called adversary system. This means that the parties (and their lawyers) control the case. They plan the strategy; they dig up the evidence; they present it in court. The two sides battle it out mainly by putting witnesses on the stand and asking questions. Lawyers (or teams of lawyers) are the chief actors in the courtroom drama. The judge sits on the bench, more or less in the role of an umpire. He or she sees to it that both sides obey the rules of the game. The judge goes no further. If there is a jury, the judge does not usually decide the big question: who wins and who loses. That is the jury's job. The judge keeps the trial going, and "instructs" the jury, that is, tells the jurors what rules of law have a bearing on the case. Unless the case is so lopsided that there is nothing for a jury to decide, the decision is left to the jury; the judge, by and large, has to accept its verdict, whether or not he or she likes it or agrees with it. Harry Kalven and Hans Zeisel, who carried out a major study of jury trials in criminal cases, claimed that judge and jury tended to agree in most cases; judges would have come to a different conclusion, had the choice been theirs, in about one case out of four.[34] In this study, juries were found to be more lenient than judges, but later studies have come to the opposite conclusion.[35]

The adversary system is very familiar to Americans. Not everybody knows it by name or could describe it, but everybody recognizes it from books, movies, and TV. The

adversary system is the system that creates courtroom drama, in which lawyers parade their skills to an eager jury. It is the system of Perry Mason and other detectives of fiction. It is Paul Newman in *The Verdict* and Julianna Margulies in *The Good Wife*. It is *Law and Order* and *Judge Judy* and the O.J. Simpson trial. We take this method for granted.

But of course it is not the only way to run a trial. Civil-law countries, for example, do not use the adversary system. Their systems are inquisitorial. In France or Germany or Brazil, judges play a much greater role in building and deciding a case than they do in common-law countries; they investigate the facts, they put the evidence together, they try to get to the bottom of the affair. Historically, civil-law systems have not used juries, and lawyers are not as dominant a presence in the courtroom as they are in common-law countries.

The two systems, adversary and inquisitorial, seem as different as day and night. There has been endless debate about which one is better. It is no surprise that common-law lawyers prefer their own way of conducting trials. The very word "inquisitorial" leaves a bad taste in the mouth of people who speak English. Our lawyers tend to feel that the adversary system is the only fair way to run a trial, the only way to give each party a proper shake. Justice and truth will win out nearly all of the time if we let each side argue, compete, cross-examine.

European lawyers naturally take a different point of view. To them, the adversary system is primitive and often unfair. Adversary trials, they feel, degenerate into battles carried on by lawyers who are too clever by half; the truth gets smothered in the process. Their system emphasizes the work of honest professionals—judges, in short. It is more efficient, more impartial, more rational; and certainly (in their eyes) more just.

In fact, the adversary system is much less adversarial than most people think, and the inquisitorial system is less inquisitorial. An American judge is not always neutral and helpless. The judge can dominate the trial in both obvious and subtle ways. Some specialized courts (family courts, for example) have gotten far away from the adversary system: the judges have tremendous leeway. In fact, the power of the judge in courts that deal with family or related matters has been subject to a good deal of criticism, and some courts (juvenile courts, for example) have gotten more "legal" (that is, adversarial) in recent years.

Still more important is the fact that most cases never go to trial at all: they are settled out of court. What counts, then, is what happens outside the courtroom, in the corridors, in the lawyers' offices, and in the chambers of the judge. The high drama of the O.J. Simpson case and the trials people see on TV are the exception, not the rule. Most criminal cases end with a guilty plea, with "copping a plea," with the process of plea bargaining, as we shall see. Civil cases too: the overwhelming majority never see the inside of a courtroom. In civil-law countries as well, it may be that most disputes avoid the courts, in favor of settlement, arbitration, or mediation. For this and other reasons, some scholars feel that the differences between the two systems are not as great as they

appear to be, or that the two systems, in the more developed countries at least, are tending to converge.

A Note on Equity. A short detour is in order here to explain one of the curious features of the history of Anglo-American law—a feature that, somewhat surprisingly, still has meaning today. Medieval England, which incubated the common law, also produced another system, almost entirely different, with its own courts, its own rules, its own procedures. These were the courts of the chancellor, the courts of "chancery." The rules and procedures of chancery made up the system called equity.

The origins of equity are shadowy.[36] In the Middle Ages, the chancellor was one of the king's highest officers. He had important administrative duties; he was also a clergyman, could read and write (few other people could), and was in charge of the "writs" that set lawsuits in motion. Sometimes he also heard complaints about this or that instance of injustice, and, as the king's representative, he occasionally exercised his power to bend the rules of law a bit, to right some wrong or prevent some injustice from happening. By the sixteenth and seventeenth centuries, equity had developed into a kind of full-blown rival to the common law. It was not just a difference of rules; the whole flavor of the system was different. The chancellor had never been immersed in the common law; if anything, it was church law (canon law) that he knew and that influenced him. Canon law was continental—civil law, in other words. Hence, procedure in equity looked a lot more like European law than like common law. For example, proceedings were written, not oral, and courts of chancery had no juries.

In many ways, equity was less rigid than the common law. This was even true of some of its procedures. In other ways, the two systems dovetailed. Only equity, for example, ever granted an "injunction," that is, an order to a defendant to stop doing something wrong (or start doing something right). Common-law courts had no way of issuing such an order. On the other hand, the common-law courts could award money damages; equity courts could not. The English system of justice was essentially made up of law plus equity. Each one was, in itself, somewhat defective; together they made up a more satisfactory whole.

An example might make this clear. Suppose my grievance is the behavior of my next-door neighbor. He is running a business on his property. From my standpoint, the business is a nuisance. Foul odors and smoke pour out onto my property; my garden is getting ruined; noise keeps me up at night; the value of my property is certainly impaired. If I go to an ordinary court, a court of "law," I can get money damages to make up for the harm my neighbor has done to me. But the court of "law" will not and cannot order him to stop. If he persists, I will have to go into court over and over again, each time collecting damages for harm done in the past.

To put a stop to this nuisance once and for all, I will have to find my remedy in "equity." There, in the chancery court, the judge, usually called a chancellor, can issue an injunction ordering my neighbor to stop his unlawful practices or suffer the consequences. So far, so good; but if I had gone to equity first, and asked for an injunction and

money damages for harm already done to me, the chancellor would have politely turned down my claim for damages. For that, one has to go to "law."

Obviously, as this example shows, there is something clumsy about a dual system of this sort. It is certainly not ideal to have two separate systems, run by two separate structures of courts. Often in past times a litigant needed both to get justice. Law and equity coexisted in the United States, somewhat uneasily, until the nineteenth century. In that period, most of the states reformed their systems of procedure and merged law and equity into one. From that time on, the same courts administered both systems, and many distinctions between the two were abolished. Nonetheless, the old double system left fossil traces behind. It can still be important to know if a case would have been "law" or "equity." For one thing, as we said, equity had no jury. If a case was historically "equity," then even today there is generally no right to trial by jury.

Settled Out of Court. Systems of procedure and ways of managing trials are important to the American legal system. But, as we pointed out, most cases that people file never actually go to trial. They fall by the wayside far earlier. In the lowest courts, creditors file thousands and thousands of claims to collect small debts, to repossess cars, televisions, suites of furniture; landlords file for thousands of evictions; and so on. In the overwhelming majority of these cases, defendants never show up, never defend themselves in any way. Plaintiffs win "by default." (If defendants owe the money and have no real excuse for not paying, why should they show up?) Most of us have paid for parking tickets by sending money to traffic court in the form of "bail." Since we never show up for the trial of this dastardly crime, we forfeit the "bail." This is what everybody expects: the forfeiture of "bail" is just a way to collect a fine, thinly disguised with a different name, and with no muss or fuss.

The examples in the last paragraph are all small cases, petty matters—in the eyes of the law, at any rate. The situation in regular trial courts is not much different. Thousands and thousands of couples file for divorce; all but a few suits are uncontested. Thousands and thousands of estates go smoothly through probate without a will contest or serious dispute. Most criminal trials, even for serious offenses, do not go to trial: as we said, the defendants "cop a plea," that is, they plead guilty as part of a plea bargain. Thousands and thousands of accident cases are filed every year; only a tiny percentage go to trial. In California, more than nine out of ten cases in superior court ended without any trial in 2012 to 2013.[37] In Wisconsin, in 2012, there were 135,336 civil cases filed in the trial courts of general jurisdiction. But of this mass of cases, only 0.2 percent ever made it as far as a jury trial; another 8.2 percent were tried before a judge, and all the rest dropped out or were terminated in other ways.[38] In federal court, the numbers are even starker—in 2013 to 2014, only 1.2 percent of all civil cases went to trial.[39]

Most issues, in fact, never even reach the stage of filing. An elaborate study of disputes and dispute settlement points up this fact. The study surveyed selected households in South Carolina, Pennsylvania, Wisconsin, New Mexico, and California to see what legal "grievances" people had and what became of them. The authors found that for

every thousand grievances in tort, mostly personal injury matters, only 201 "disputes" emerged, and only thirty-eight of these disputes ever got to the stage where somebody filed a complaint in court.[40] Most of these thirty-eight, moreover, will not go to the jury; they will get filtered out or settled before reaching that point. Thus only a third or so of 1 percent of all grievances go the whole route.

Yet this is supposed to be a litigious society. The fact is that courts play the role of decisionmaker in only a tiny percentage of grievance situations. Few contentious situations actually hatch and grow into regular trials. The survival rate is like that of the thousands of eggs that fish, frogs, and insects lay: out of each batch only a few survive.

What happens, then, to the other grievances? Why do so few potential cases ever get as far as filing suit? Why do so few reach the goal line? The general answer is simple: trials are risky and expensive. Usually, both sides would be better off settling, and so settle they do. In auto-accident cases, it makes sense for an insurance company to pay off the claim if the settlement amount is less than what a court case would cost and what the company would probably lose at the trial. Similarly, it makes sense for a victim to settle, even for less than he or she would probably win at a trial. There is always the risk of losing. And the trial itself and the lawyers will cost money, win or lose, in most types of cases.[41] For smallish claims, trying to settle almost always makes sense.

This means that you don't learn the "real" law of contracts, or landlord-tenant disputes, or auto accidents by studying trials and cases. The real law of auto accidents, for example, is the law of insurance adjusters, lawyers' negotiations, and the like, as well as the law of the courtroom. Of course, when a woman hit by a car settles with the driver's company we cannot assume that the law did not influence the outcome. The insurance company and the woman's lawyer are well aware of the state of the law. Hanging over their heads as they dicker are their guesses about the law and about the way a trial would actually come out if they got that far. These guesses affect the terms of their agreement. The parties bargain and reach settlement on their own, but they bargain "in the shadow of the law," to use the pungent phrase mentioned in Chapter 2.[42]

THE BUSINESS OF THE COURTS

Exactly what kinds of cases do courts handle? What is the business of the courts? We know surprisingly little in any systematic way about this subject. Judicial statistics are a sorry mess, generally speaking. Each state handles its own statistics; some are better than others; in all cases, it is hard to compare across state lines. Legal scholars have not done much to fill in the gaps. There are only a handful of studies that have tried to get a grip on the flow of business through general trial courts; petty courts are even more obscure.

You may find this surprising. After all, courts hardly work in secret. They deal with the public every day; ordinary people come in contact with them. These people no doubt form impressions about what courts do. Judges, lawyers, and court clerks have

their impressions, too. But it is one thing to have impressions; to have a sound, systematic grasp of the facts is another thing. After all, we see other people every day, we look at them, we talk and interact with them; but without a census, we would never know exactly how many people live in this country, where they live, who they are, and so on. We would have impressions, of course, but impressions can be very, very wrong.

Bad as they are, published statistics on the work of the courts are a good place to start. They give some idea of the workload of courts. In California, the superior courts are the trial courts of general jurisdiction. In 2013, there were 1,695 judges serving on these courts. Plaintiffs filed 922,458 complaints in these courts. Of these, 53,273 were classified as "personal injury, property damage, and wrongful death"; more than half of these (30,159) were under the heading "motor vehicle." There were 389,087 so-called family-law cases; many of these (140,180) were divorce, separation, or annulment proceedings—marriage accidents, as it were. There were 41,419 probate cases (involving estates of people who had died) and 25,013 cases involving mental health assessments. All this was on the civil side. Superior courts in the same year also heard 260,461 criminal cases (felonies) and dealt with 52,732 cases of juvenile delinquency.[43] Each state, of course, has its own quirks of jurisdiction, as well as its own way of counting and classifying cases. But everywhere, in terms of sheer bulk, auto accidents, divorce, and probate loom very large on the dockets.

These numbers of cases are impressive. The numbers filed in petty courts, however, are almost astronomical. There were, it is estimated, almost 52 million traffic cases filed in the various traffic courts of the states in 2012. But here the trend is not up but down: traffic cases are about 10 percent lower than they were in 2008. This is both because of a long-term trend to take petty traffic matters (parking, for example) out of the courts and let the bureaucracy deal with them; more immediately, it might be the result of the 2008 recession. The numbers, however, are still impressive; and there were, in 2012, over 9.5 million small civil cases in the petty courts along with 13.4 million (petty) criminal matters.[44] These figures give at least some idea of the tremendous number of petty cases that come up every day in the lowest courts. They are the plankton in the ocean of law.

What the numbers do not tell us, for whatever level of courts, is how much time and effort cases of particular types take up. Often the states count the number of cases filed, not the number that go to trial (which, as we know, is a much smaller figure). Uncontested divorces, for example, puff up the figures enormously, especially in these days of no-fault divorce. But most of these cases are short, snappy, routine. One big trial may gobble up more energy and manpower in court than hundreds of these cut-and-dried affairs. The bare statistics do not give us much feel for the court as a living organism.

We get a better idea from the (rare) studies of courts in actual operation. These confirm that much of what courts do is utterly routine. The uncontested, no-fault divorce is the perfect example. Often there is, or was, a real dispute. A marriage is on the rocks. He and she might argue about property, who gets the house or the car, how the bank accounts should be divided, or about custody of the kids or visiting rights. For most

people, these problems are ironed out long before any papers hit the courtrooms—in any event, long before the case reaches His or Her Honor, the judge. The parties themselves work these matters out, often with the help of lawyers. They, the parties and the lawyers, are the ones who decide the case.

The studies all agree on this point. The courts do a lot of routine administrative work; they rubber-stamp uncontested judgments and out-of-court decisions in a high percentage of the cases. Wayne McIntosh did a study of the work of the St. Louis Circuit Court, a trial court of general jurisdiction, from 1820 into the 1970s. His study documents the dominance of voluntary dismissals and uncontested judgments. For the first hundred years of the study, about one case out of four ended in a "contested hearing or trial," but after 1925, the "average skirted downward into the 15 percent range." In other words, rather less than one case out of five in the 1970s called for any real judging,[45] and as we discussed earlier, that number has done nothing but drop since then. Thousands of cases are handled every day in court that a clerk could dispatch, or a well-made machine; as we noted, some states, in recent years, have tried to get petty traffic cases out of the courtroom and into the offices of clerks.

If there are so many routine cases, then can we say that courts have abandoned their historic function of handling "disputes"? Yes and no; the evidence is conflicting. What is clear is that certain kinds of ordinary disputes have tended to drop out of court. In 1994, in forty-five urban courts, less than 4 percent of the civil filings went to trial—1.5 percent to "bench trial" (judge alone), 1.8 percent to a jury.[46] Only a minority of extraordinary cases are still there in court, getting the full treatment; indeed, these extraordinary cases may be becoming a bit more common. Balanced against those who think the courts are doing too little—those who think they are abdicating their function, or neglecting the legal interests of the poor and the middle class—are those (more numerous, probably) who think they are doing too much, upsetting too many apple carts, meddling in too many affairs.

Appellate Courts. The work of appellate courts is, in a way, less obscure than the work of trial courts. High courts publish their opinions; their output is thus an open book. Moreover, these opinions are what students study in law school; they are the raw materials that lawyers often work with in deciding the state of the law. Also, it is the high courts that make headlines (if any courts do). And no court in the world sits in the spotlight as much as the Supreme Court of the United States.

Despite this, the general public has only the vaguest idea what the Supreme Court does, day in and day out. Most people know chiefly about a few sensational cases. They probably know that the Supreme Court once struck down state abortion laws, and that the Court also once ordered schools to desegregate. More recent cases flit in and out of the public consciousness. Most educated people were aware that the Court struck down some key provisions of the Voting Rights Act in 2013 and upheld the Affordable Care Act ("Obamacare") in 2012 and again in 2015. They are aware that the Supreme Court, in June 2015, decided in favor of same-sex marriages (more on this later). But, almost

certainly, most have never actually read any of these Supreme Court opinions (they might be dismayed to find out how wordy the justices are). People know only a little bit about the Court, and many of them probably have as much wrong information as right. (They know even less about what state high courts do.) There is, to be sure, a certain hunger for information (or gossip). *The Brethren*, by Bob Woodward and Scott Armstrong (1979), promised a look "inside the Supreme Court"; it was a runaway bestseller.

So much for the layman. Lawyers, on the other hand, know a great deal about certain aspects of appellate courts, but lawyers, too, have great gaps in their knowledge. Not many lawyers ever appear in front of an appeals court. Even the lawyers who do appear haven't systematically studied the work flow in appellate courts (why should they?); they have at most some vague impressions about the state of the docket.

One lawyerly impression is that over the years the U.S. Supreme Court has been hearing more and more big, important cases, has gotten enmeshed more and more in controversy, and has handled more and more hot potatoes. This impression may well correspond to the facts. The Supreme Court has gradually gained, as we noted, almost total control over the cases it takes and rejects—a process that began in the nineteenth century, but was only completed in the twentieth. It has used its power to get rid of dull, ordinary cases. Not every Supreme Court case makes the headlines, but every case is by some standard important and is worth at least a paragraph or two in the *New York Times*.

This was not true in the late nineteenth century. The Supreme Court in our day would never deign to take most of the cases reported in Volume 105 of the *United States Reports* (covering October Term, 1881). In one of these cases, the Court had to decide whether a method of packing cooked meats for transport was novel enough to deserve a patent. (The meat was to be cooked at 212 degrees Fahrenheit, and "while yet warm," pressed into a box or case "with sufficient force to remove the air and all superfluous moisture, and make the meat form a solid cake"). The Court said no.[47] There were cases about public lands; what the customs tax should be on snuff and on white linen laces; whether a railroad was liable to a passenger who committed suicide in a fit of despondency six months after a railroad accident; whether a commodore in the navy who traveled under government orders to Rio de Janeiro, but in a foreign ship, was entitled to mileage at eight cents a mile. Cases of these types have totally disappeared from the workload of the Supreme Court.

State supreme courts have traveled a somewhat similar road. Many of them now have almost as much control of their dockets as the U.S. Supreme Court. A statistical study of the workload of sixteen state supreme courts by Robert A. Kagan and associates, covering the period between 1870 and 1970[48] (later updated by Herbert M. Kritzer and others to included data from 1995 to 1998),[49] revealed dramatic changes in court business over time. The typical case in 1870 in the Supreme Court of North Carolina or California would be either a property case (a dispute, say, over who owned some tract of land) or a commercial case (whether a buyer, for example, had a good excuse for refusing to accept a carload of lumber). Many of these cases involved debt (for example, an action by a

creditor to collect on a promissory note). In the period 1870–1900, 33.6 percent of the cases in these sixteen courts fell under the heading "debt and contract" and 21.4 percent fell under the heading "real property."

In the original study, the period between 1940 and 1970 showed quite a different picture. Debt-and-contract cases had shrunk to 15 percent, property cases to 10.9 percent. One big winner was "public law," up from 12.4 percent to 19.4 percent. These were cases on taxation, on regulation of business, on government abuse of authority. Criminal cases had risen from 10.7 percent to 18.2 percent, torts cases from 9.6 percent to 22.3 percent. Some of these trends were clearly accelerating; by 1970, criminal appeals had grabbed an amazing 28 percent share of the business of state supreme courts. That trend continued into the 1995 to 1998 period, when criminal cases made up 32.8 percent of the cases. Free counsel in criminal cases helps explain this great bulge of cases. The rise in torts cases was also not wholly unexpected. It reflects the great boom (if that is the word) in industrial accidents, followed by an even greater harvest of auto accidents, products-liability cases, and such newfangled fads as medical malpractice. Of course, more accidents does not necessarily mean more accident cases; many people feel there has also been a rise in claims-consciousness. But this is a matter of some dispute.[50] In any case, unlike criminal cases, torts cases leveled off by 1995 to 1998, comprising only 20.7 percent of the courts' cases. And those property cases that once filled state supreme court dockets? By the 1995 to 1998 period, they had continued their century-long decline, down to 2.1 percent, perhaps as a result of the rise of title insurance.

We must remember that the Kagan study and the Kritzer update looked only at the top courts in the sixteen states that constituted its sample of states. Many of the big states, California, for example, now have three layers of courts, not two. Some of the cases disappearing at the top are common at the middle level. It seems clear, though, that something is happening even in smaller, two-tier states, like South Dakota. They are following the same road, though a bit more slowly and with less control of their destinies. The studies tell us, at least, what kinds of dispute top courts consider important enough to spend time on; to a certain extent, we also learn something about the demand for the top courts' time.

The trends are not inconsistent with what seems to be happening at the trial-court level. Here, too, it is the ordinary case that gets squeezed out. Everyday business cases (contracts, property), which have become less common at the high-court level, and the simpler family cases and probate cases are also dropping off at the trial-court level, or else, as in divorce, filings may be high, but actual trials are uncommon. On the other hand, cases in which individuals or groups confront the government seem to be increasing in number. This category includes criminal cases. Most criminal cases get plea-bargained out, but of those that "stay the course," more will be hard-fought and more will get appealed than would have been true a century ago.

There also seems to be growth in some categories of unusual or extraordinary cases—the tough cases, cases about society's dirtiest linen and hottest potatoes, the deepest,

most sensitive, most poignant issues of the day. This is certainly true in the federal courts, and true to a lesser extent in state courts. Many people, from high-court judges on down, wonder why some of these cases are in court at all. They illustrate something mysterious and fundamental about American society and its legal system. In the United States, social issues often dress themselves up in legal costume and muscle their way into court. There are not that many countries in the world where abortion policy is decided, in the first instance, by judges. In few countries would courts draw the boundary lines of school districts or demand wholesale reform in state mental-health facilities. Yet these things happen in the United States.

A movement is going on that is bringing these issues into court, which expands the very idea of what should or can be dealt with through law and litigation, and which causes "law" to seep into nooks and corners where it never penetrated before. Nobody has quite found the right name for this movement or trend. We can call aspects of it judicialization, legalization, constitutionalization, the due-process revolution, or something similar. Whatever its name, it is certainly a significant trend. Court-like procedures and habits extend their tentacles throughout government, big institutions, and society in general. Courts themselves have become final arbiters of many social issues, not just individual disputes. Think about segregation, abortion, same-sex marriage. Think about the Court's role in the presidential election of 2000.

HOW COURTS DECIDE CASES

We have looked at the kinds of cases courts hear, the way they are handled, and the numbers that get filtered out along the way. Who wins and who loses in the cases that do get decided? And how are these cases decided? What factors tilt verdicts and decisions one way or the other?

Formally, it is easy to describe the process. In a trial court, the lawyers on each side present evidence and make arguments. Then the jury, if there is one, retires behind closed doors, talks things over, votes, and brings in a verdict. The jury deliberates in secret and never gives out reasons for what it does. (Individual members sometimes talk to reporters after the verdict is in, when the case is newsworthy—for example, after the celebrated trials of O.J. Simpson in 1995 or George Zimmerman in 2013.) Generally speaking, the mind of the jury is a closed book. Research has opened the book somewhat. We know, for example, that the thought processes of juries do not result in decisions that are radically different from what judges would decide; that juries do pay attention to what the judge tells them; that they generally try to live up to their expected role.[51]

Juries, however, are the voice of the community; and the "community" may be prejudiced or ignorant. Historically, juries in the white South were notoriously prone to act unfairly toward blacks. How much race and gender prejudice remains in jury decision-making is a much debated subject. Historically, too, there have been many examples of what is called jury "lawlessness"—willful refusal to follow the law. "Lawless" or

"nullifying" juries have refused to convict bootleggers or drunken drivers or poachers or even rapists, and even when the defendants were clearly guilty. A jury will behave "lawlessly" when it reflects norms outside the official norms of the law. Juries, for example, for a long time refused to convict men who killed a rival who was having an affair with the defendant's wife; this was the so-called "unwritten law." Juries do not like to convict mercy killers: old people who put a dying, pain-wracked spouse out of her misery. This sort of jury lawlessness undoubtedly exists, but perhaps on a more modest scale than at times in the past.[52]

Judges and jurists deplore jury lawlessness, but not everybody agrees that jury nullification is always a bad thing; certainly, many people would applaud the mercy killing verdicts. There is even an organization—the Fully Informed Jury Association (FIJA), formed in 1989—that lobbies for "laws protecting the right of nullification." FIJA gathers together some strange bedfellows, right-wing and left-wing, united in their hatred of certain laws—marijuana laws, tax laws, mandatory-helmet laws, for example—and is eager to authorize juries to disregard these laws.[53] FIJA members protest outside courthouses and hand out pamphlets to potential jurors.

What about the higher courts? Appeals courts do not run trials, but they receive "briefs," hear oral arguments, confer, decide, and write opinions. (A brief is a lawyer's formal argument, putting before the judge one side's version of the law and facts. Many of them are anything but brief.) The opinions pour out of the presses every year, volume after volume. Every state publishes opinions from its highest court, and many states (New York, California, and others) publish opinions from middle-level courts as well. Pennsylvania even publishes some trial-court opinions. A good law library used to have literally thousands of these volumes of reports, as more and more cases get decided, year after year. There are over five hundred bound volumes for the U.S. Supreme Court alone. Opinions of the lower federal courts fill well over a thousand volumes; there are many times that number for state courts. Inside these volumes are millions of words, all, in a way, telling the world how the court decided its cases. Nowadays, these words are also online; lawyers and law students rarely venture into libraries, some of which have gotten rid of the bound volumes; the vast body of written opinions is available at the click of a computer (though at a price).

The typical written opinion follows a fairly standard format. The opinion sets out the facts, states what the issues are, looks at statutes (if any) that have a bearing on the matter, looks at past cases (if any) on the same subject, and discusses the relevance of these "authorities." The court will announce certain legal principles that it (or courts in earlier cases) squeezed out of precedents or statutes. It applies or tries to apply these principles to the facts of the case and then comes up with an answer to whatever question or riddle is posed. This, then, is the decision. It either agrees with the results of the lower court (in which case the decision below is "affirmed") or it disagrees (in which case the decision below is "reversed"). Many cases are "reversed and remanded," that is, sent back down to the lower court, with orders to do it over again, and this time get it right.

Usually, the decision of an appeals court is unanimous—that is, all the judges agree with the decision. Less often, one or more of the judges has a different view of the matter, and there will be a "dissent." Courts almost always have an odd number of judges (five in Idaho; nine in the U.S. Supreme Court). The majority wins. If there is no majority (if a judge is sick or absent or disqualified and the rest split evenly), the lower court's decision will stand. Once in a while, a judge who agrees with the majority as far as its result is concerned will nonetheless quibble about the reasons. Such a judge can write a special opinion, called a "concurrence."

In some courts, dissent is quite common; in others it is rare. Certain kinds of cases are dissent-prone; others are not. The percentage of cases with dissents has been rising over time. In a study of sixteen state supreme courts, it was found that all but 8.7 percent of reported cases in the period 1870–1900 were unanimous. The nonunanimous cases rose to 15 percent in the period 1940–70. In the latest decade that the study covered, 1960–70, the rate had risen still more, to more than 16 percent. A more recent study found that 22.2 percent of state supreme court decisions in 2003 contained at least one dissenting opinion, while 16.4 percent had concurring opinions.[54]

These were the aggregate figures. Variations from court to court were striking. In some courts, there seems to be a tradition of squelching dissent. Other courts place less value on presenting a united front. About 98 percent of the cases decided by the highest court of West Virginia were unanimous in the 1960s, but only about 56 percent of such cases in Michigan. In some states, the dissent rate fluctuates, for no apparent reason. In Arizona, the dissent rate was 17.77 percent in 1917 and a big fat zero in 1921. In 1989, the rate was 6.81 percent; the next year, 1990, it jumped to 14.65 percent.[55] The overall trend, however, is clear. High courts take and decide fewer cases than they did a century ago, but the ones they take are more controversial, and this in itself probably generates a rising dissent rate.[56]

Dissents are often more personal and less legalistic than majority opinions; Justice Scalia was famous for his vituperative, angry, and sarcastic dissents. But, in general, dissents rehash the same sorts of legal arguments as the majority. The presence of dissents, however, makes the point that in many cases there are no "right" legal answers—or at any rate, the right answers are not self-evident, even to a judge. Most close scholars of the legal process have their doubts about whether "the law" is ever that clear and knowable, even in unanimous decisions. After all, few appeals are "frivolous" (that is, totally hopeless, or without any merit whatsoever). There is at least *some* sort of argument, for both sides, in almost every case. Maybe not in trial courts; but every case that the Supreme Court takes, or the supreme court of Florida or Pennsylvania, has to be one where reasonable people (or lawyers) could differ.

In general, scholars who study courts are a fairly skeptical lot. They read the written opinions, as they must, but they take them with a grain of salt. They certainly do not think that written opinions tell us exactly what goes on in the minds of the judges. They are suspicious of the power of dry legal arguments. They find it hard to believe that these arguments really persuade the judges, really move them to choose one side over the other.

But if not, what does? And is the elaborate facade of legal reasoning nothing but window dressing? An immense effort has gone into the study of judicial decisionmaking, trying to smoke out the governing factors and paint a realistic picture of the process. It is not an easy job. Nobody can read minds, few papers, notes, or diaries of judges are available, and judges rarely tattle on themselves. They are shy creatures, who dislike public attention. They want obscurity, and they generally get it.

The U.S. Supreme Court is a special case. Its decisions can hardly avoid the limelight. Yet its actual work goes on behind a velvet curtain of secrecy. Some justices even destroy their legal papers. Enough remains to shed some light on the process, but there are many gaps. As one author put it, journalists who cover the Supreme Court are like those assigned "to report on the Pope." The justices issue "infallible statements," draw their authority from a "mystical higher source," and conceal their status as human beings "in flowing robes." The justices have life tenure, which implies a license to thumb their noses at the news media.[57]

The air of mystery is probably one reason for the astounding success of Woodward and Armstrong's *The Brethren*, the 1979 "exposé" of the Supreme Court. The book was based in part on gossip leaked from the justices' clerks. It titillated the public with its claim to tear aside the veil of secrecy. In the introduction, the authors described the Court as an institution working "in absolute secrecy." No other institution has "so completely controlled the way it is viewed by the public." The public seemed quite eager to read this collection of tidbits about the justices, their habits, their likes and dislikes, their internal bickering, their opinions about each other, and the little inside dramas that led to this or that famous decision. Later authors have also tried to capitalize on the public fascination with the internal workings of the Court. Jeffrey Toobin, for example, published *The Nine* in 2007 with the subtitle "Inside the Secret World of the Supreme Court."

The Brethren and *The Nine* were hardly systematic studies. Some scholars, however, have tried to study judicial behavior in a more rigorous way. Much of the effort has gone into dissecting the work of the U.S. Supreme Court; much less has been done on the work of state courts or lower federal courts. The overall questions are the same: Can we find some factors which explain why judges decide the way they do? Does it matter whether a judge is a Republican or a Democrat? Whether the judge's family was rich or poor? Whether he or she is Protestant or Catholic? How much can we learn by exploring judges' attitudes or values? How much would we learn if we could give the judges personality tests?

The results are not terribly exciting. Many studies, for example, have shown that judges' political orientations affect their judgment. One recent study of the federal courts of appeals showed that, generally speaking, the political party of the appointing president was a good predictor of how a judge votes in most types of cases. But other factors, such as the ideology of the other two members of the panel (remember, federal appeals judges usually sit in panels of three) also played a strong role in an individual judge's decisions: a judge's ideological tendencies were amplified when sitting with like-minded judges and

dampened when sitting with judges appointed by a different political party.[58] Another recent, large-scale study showed that judicial ideology affected judicial decisionmaking at all levels of the federal judiciary, with the effect being the greatest at the top, at the Supreme Court. There, consistent with many other studies, they found that "Justices appointed by Republican Presidents vote more conservatively on average than Justices appointed by Democratic ones." This, they admit, tracks pretty closely to what "everyone knows."[59]

For many, the high (or low) point of ideological decisionmaking was the judgment of the Supreme Court in *Bush v. Gore*,[60] settling the controversy surrounding the 2000 presidential election in favor of George W. Bush. The five most conservative members of the court—Justices Rehnquist, O'Connor, Scalia, Kennedy, and Thomas—ruled that the disparate standards being used to recount Florida's ballots violated the Equal Protection Clause of the Constitution. This was somewhat startling because it involved an expansive, "liberal" reading of that clause—something that you wouldn't ordinarily expect from those justices. But, here, it led to the election of the more conservative candidate. (The other members of the Court were not immune from this kind of results-oriented judging: two of the more liberal justices—Ginsburg and Stevens—argued, atypically, for a more restrictive reading of the clause in their dissents.) In the end, the decision, in effect, flipped the typical relationship between the executive and judicial branches on its head—instead of the president appointing members of the Court, the Court had selected the president. The majority's opinion was widely viewed, by both liberal and conservative commentators, as blatantly partisan.

What about other possible explanations for why judges decide the way they do? As with political ideology, the studies do not tell us much that is new or startling or enlightening. The background or the personality of judges apparently does not explain how they decide their cases. Does the gender of the judge make a difference, now that there are more women judges? Do male judges decide cases differently when a female judge is on the same panel? Recent studies tend to say yes to both questions, but perhaps only in certain types of cases such as those involving sex discrimination.[61] Scholars have even begun studying some of the more arcane effects of gender. One recent study, for example, demonstrated that "judges with at least one daughter vote in a more liberal fashion on gender issues than judges with sons."[62] Again, though, this shouldn't be too surprising. The research, on the whole, has not reaped much of a harvest, at least if we're looking for something unexpected.

Trial-court research has been disappointing, too. Many scholars suspect that judges, consciously or not, are prejudiced against blacks or poor people, or that white-collar criminals are treated better (or worse) than street criminals, or that courts are more lenient (or harsher) toward women defendants. There have been many, many studies—hundreds of them, in fact—on such issues. What is surprising is how little has been proved one way or another. A number of studies show that white and black judges make different kinds of decisions in civil rights cases, like those involving employment discrimination

or voting rights.[63] But what about criminal cases? Do blacks charged with a crime in the United States today (yesterday may be different) get a worse shake—more convictions, tougher sentences—than whites facing the same sort of charge? It turns out that this question is devilishly hard to answer because of problems with data and because there are so many variables.[64] The jury is still out, so to speak, on this general subject.[65]

The meager harvest from these lines of research has led some scholars to try a different tack. Have we been too skeptical about the effect of the law itself on decisions? Perhaps judges honestly try to live up to what is expected of them. Perhaps they really try to play their part. Society has cast them in the role of judge, and they try to follow the script. In other words, the job description, the black robes, the tradition, may be as important in explaining judicial behavior as are childhood background or training or social class. As far as appellate courts are concerned, there is also the doctrine of precedent, that is, the idea that courts are supposed to follow past cases, indeed, are "bound" by them. Despite our skepticism, is it possible that this is what judges are really trying to do? It at least sounds plausible. But the idea that the law itself is the decisive variable still waits for more rigorous tests.

The conceptual and methodological issues are quite complex. A study by Ilene H. Nagel analyzed decisions on whether to grant bail or not in about 5,600 criminal cases from a borough of New York City, 1974–75. The study seemed to confirm that "formal law" was a significant factor in the "decision calculus" of the courts. It was not the only factor, but it was extremely significant. "Bias" on the part of judges played a lesser role. But Nagel also points out what many studies gloss over: the law itself often embodies a flexible, shifting standard. Judges are allowed by law to take many factors into account. Thus the distinction between legal and extralegal factors has been much overdrawn and overemphasized: "the complexities of law have often been ignored, and the extralegal category has been narrowly and selectively defined." Understanding how courts work will take continued study and greater sophistication in design.[66]

A few scholars have stressed what we might call the "structural" element in decisions.[67] High-court cases are decided by groups of judges, not by one judge sitting alone. The Supreme Court, as we mentioned, is made up of nine justices. California's top court has seven. The middle-level federal courts usually deliberate in panels of three. Typically, there will be some sort of process for assigning cases to particular judges, who then draft an opinion. To build a majority, a judge may have to make some sort of "deal," concessions to other judges who more or less agree with him. He may have to tone down certain language, or change the emphasis, and so on.

This process was one of the Supreme Court "secrets" that *The Brethren* so breathlessly revealed. No political scientist or court watcher was much surprised, of course. This inside dope was old news to them. This fact does say something about structure: a single judge, sitting alone, does not have to shade his views to construct a majority. Such a judge is, however, worried about the structure on top—the appeals court. No judge likes to be reversed. It is also obvious that upper courts need and want the cooperation of

lower courts, which, after all, apply the doctrines and rules that upper courts lay down. Some high courts may make concessions or frame rules with the lower courts in mind.

There has been surprisingly little work on still another factor: the influence of outside social forces. One reason is that research tends to focus on differences among judges. The studies ask why Judge A and Judge B seem to disagree in their voting. This means concentrating on cases in which at least one judge dissented. But it might be just as interesting and important to note the ways in which Judge A and Judge B think alike, to see how all judges change their tune in the course of time, under the pressure of social change.

For example, all judges (or almost all) today have attitudes about race relations, powers of government, civil liberties, and the like that are light years away from the attitudes of almost all the judges who worked and wrote a century ago. If you brought back to life a nineteenth-century judge, he would be dumbfounded to learn about the state of civil-rights law today. He would even be amazed at what has happened in tort law, how far the courts have gone in making companies pay for damages caused by badly designed products, such as defective cold cream, soup, medicine, and automobiles. The wheels of doctrine have turned many times, in response to changes in the world outside the courtroom. True, some judges today stand on the right side of the political spectrum, while others stand on the left. But the point around which they revolve, the point from which they deviate, right or left, is determined by social forces, by the national agenda—in short, by the way things are today.

If we look at the long run, at major trends, the law seems like so much putty in the hands of the larger society. Probably not one judge in the nineteenth century thought the death penalty was unconstitutional. Some were for it, some against it; nobody imagined that it violated the Eighth Amendment of the Constitution or any other amendment, for that matter. Today, some judges think it does; even some justices of the Supreme Court seem to believe this.[68] The Court, as we will see, went around and around on this question, and ended up upholding the death penalty—as most state court judges have done as well. But even these judges would agree that a serious legal question was posed. This was not true a hundred years ago.

Similarly, most nineteenth-century judges saw nothing wrong, legally speaking, with segregation of the races. Today, not a single federal judge thinks it acceptable (or is willing to admit it). That abortion and gay rights were constitutional issues was quite unthinkable. If anybody suggested to John Marshall or his associates, or to Thomas Jefferson himself, that the right to free speech included the right to sell picture books showing naked people making love, they would have thought that person crazy. The world has changed since then; judges' ideas have changed accordingly—even though they do not all agree. And of course the law has changed with them.

Social change, in short, drags doctrine along. Judges live in society, and their way of thinking shifts, consciously or unconsciously, as things happen in the world all around them. Often they are hardly aware of what is going on. If you ask judges what they do and how they decide cases, they are still likely to tell a rather old-fashioned

tale. They will say that they search conscientiously for the law, and that they are guided by existing law. Many judges (not all) deny that they take social policy into account. Yes, they have values and beliefs and opinions, but they try to suppress them when they do their judging. This general pattern emerges from the few interview studies of judges. There is variation among judges (and courts), but on the whole, the typical judge is quite conservative in what he or she says about the job. Chief Justice John Roberts Jr. famously claimed at his Senate confirmation hearings, "I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability. And I will remember that it's my job to call balls and strikes, and not to pitch or bat."[69] Other judges share this view. In a study by Henry A. Glick, for example, Louisiana judges, almost to a person, expressed the opinion that "nonlegal factors" played no role in a judge's decisionmaking.[70]

There is no reason to accuse Chief Justice Roberts or the judges of Louisiana of hypocrisy. No doubt they meant what they said. Judges do try to play the "legal" role, though probably not in every case. Some cases seem minor or unimportant; they are interesting only to lawyers, or not even to them. When a case of this kind comes up, the judge may have no strong feelings one way or the other. The judge (or a clerk) "looks up the law," figures out which way old cases point, and goes with the flow of past doctrine.

Even these cases, of course, may not be as cut and dried as one might think. As every law student comes to know, the law is often cloudy, ambiguous, uncertain. What the judge sees as the law is, in many cases, a little like a social inkblot test. The judge sees the case through his or her personal lenses. In these cases, the law is not in the books; it is inside the judge's head.

A small but important batch of cases falls into quite a different and distinctive group. These cases cut much closer to the bone. They have massive importance, massive consequences. Here social currents swirl all about, filling the courtroom with their sound and motion, and these currents affect judges whether they know it or not. In other words, we can think of decisionmaking as a kind of two-stage process. The first stage is the judge's decision whether to play the law game or not. The second stage is the actual decision.

At both stages, attitudes, values, and social forces are crucial. After all, these are what determine whether the judge sees a question as boring or exciting, important or trivial, technical or nontechnical, socially and politically sensitive or solely "legal." The judges, to be sure, may not be aware at all of this two-stage process. They may feel that they are strictly bound by the law, and nine times out of ten they are quite sure that "looking for the law" is exactly what they are doing. But the two-stage process explains a mystery—how it is that social forces seem to have a powerful influence on the way the cases come out, yet at the same time judges say (and feel) that they simply "follow the law."

Glick's study found that most high-court judges do not think of themselves as policymakers or as lawmakers. They are old-fashioned in their attitudes about judging. But not all of them: some have a more sophisticated notion. This was true, for example, of the judges in New Jersey. Their minds were much more open to policy issues, which frankly

played a role (they felt) in decisions. There is some evidence—it is rather indirect—that high-court judges in general are moving in this direction. We can call this attitude legal realism. "Legal realism" is the name of a school of legal thought that flourished most notably in the 1930s. The realists argued that judges had much more freedom to decide, more discretion, more leeway, than they admitted, or were aware of; the realists sneered at the idea that judges decided cases by making logical deductions from preexisting cases and rules. Judges in our system make law; they create new policy. In fact, they cannot help doing so in certain cases. A realist judge would be a judge who is aware of outside and inside pressures, aware of the way they affect the judge's work. Such judges would be sensitive to the impact of their decisions—that is, their social consequences—and would be willing to take these into account.

How do we know that legal realism is a genuine force, that judges are gradually converting to this faith? Some crude measures can be found by looking at the style of judicial opinions. This is definitely changing over time. For one thing, opinions are getting longer; dissents have become more common. Interesting changes are taking place, too, in citation patterns. When a court writes an opinion, it typically sprinkles citations about in the text. These are the "authorities" that justify its decision.

Mostly, the authorities are cases, prior decisions on the same legal points. The court will also cite any laws (statutes) on the books that have a bearing on the case, or cite the Constitution if that is at issue. In a smaller percentage of cases, the court reaches out a little bit further. In California, for example, the citation of law reviews (scholarly journals, mostly published by university law schools) doubled between 1950 and 1970. In 1960–70, about 35 percent of the opinions written by New Jersey's highest court cited law reviews; the California figure was about 26 percent. (In such states as Alabama and Kansas, however, only 2 or 3 percent of the opinions cited law reviews.) That practice, though, seems to have peaked in the 1970s and 1980s and tailed off since then. The *Harvard Law Review*, for example, was cited 4,410 times by federal courts in the 1970s, 1,956 times in the 1990s, and only 937 times from 2000 to 2007. This trend is not confined to the *Harvard Law Review*. While about half of the Supreme Court's opinions in the 1970s and 1980s cited a law review article, that number fell to 37.1 percent by the first decade of the twenty-first century.[71] Chief Justice Roberts recently went out of his way to dismiss the whole genre, saying, "Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar."[72]

But it may be that what has changed is not the attitude of courts toward outside authorities, but the outside authorities. Law review articles used to be about legal doctrine; today, as the Chief Justice pointed out (sneeringly), they are much less likely to be about a subject a judge might consider relevant. Nonetheless, the trend toward citing "authorities" outside the narrow band of cases and statutes is likely to continue. For example, in the same-sex marriage case, *Obergefell v. Hodges*, decided in June 2015, the

majority opinion by Justice Kennedy cited, among other things, Confucius, Cicero, de Tocqueville, works by historians, including Nancy Cott and Hendrik Hartog, and reports of the American Psychiatric Association.[73] Typhoon winds of social change rage about the courts; the problems high courts face become more massive and intractable. Judges reach out, however, gingerly and delicately, for outside help. Changes in judicial culture help to smooth this path.

Most research on judicial decisionmaking has focused on high courts, and especially on the U.S. Supreme Court. This is certainly no surprise. The Supreme Court is unique in our system. The state high courts are also of obvious importance. After all, they make and unmake common law. The lower courts suffer from scholarly neglect. This is a pity. The lower courts may be undramatic, but that does not mean they are unimportant. The day-to-day work of lower courts, even traffic courts and small claims courts, has a tremendous effect on the lives of ordinary people. In the long run, these courts have a tremendous effect on the life of society as well. It was in the lower courts that the collusive or friendly divorce developed, long before anybody thought of a no-fault system. In the lower courts, creditors repossess thousands and thousands of pianos, automobiles, TVs, suites of furniture. These courts foreclose mortgages, evict tenants, hear claims for wages. In all these cases, they act as the agents of a bustling, growing, rampant economy, for better or for worse. That is not all. They also process hundreds of thousands of wills, they naturalize foreigners, they let people change their names, they put their stamp on the adoption of children, they appoint conservators for old people with Alzheimer's disease, they approve accounts of guardians and trustees. They smooth over (or aggravate) unnumbered disputes between families or neighbors. They punish millions of drunks, millions of speeders, millions who disturb the peace. They register far-reaching changes in social and economic life. They take part, in other words, in a series of events, utterly trivial looked at one at a time, but of volcanic importance in the mass. Fresh research may someday clarify how much they have meant, and still mean, to this country.

5

The Structure of American Law: Statutes and Statute Makers

COURTS ARE PROBABLY the best-known legal institution in our society, except perhaps for the police. But they are not necessarily the most powerful. One classical and durable legal theory has always insisted that courts have no right or power to make new law. They can only "find" law, or at best apply old law to new situations. It is the legislatures that have the right to make law, boldly and openly. Indeed, this is their job: they "pass laws." Yet students in law schools in the United States, or who study law and legal process as undergraduates, focus largely on the courts (including the way in which courts *do* make law, despite the theory). Legal education tends to pay less attention to legislative bodies—Congress, state legislatures, city councils. It also neglects administrative agencies.

Yet the legislative branch is a tremendous presence in society and in the legal system. It is part of the bulk and body of Leviathan. There are vast numbers of lawmaking bodies, all up and down the land. As with the courts, we can imagine them arranged in a kind of pyramid. At the base of the pyramid, in the typical state, are the lawmaking organs of local government. In California alone, there are more than five thousand local bodies with some lawmaking or rulemaking power. These include city councils, county boards, boards of supervisors, and thousands of special-purpose bodies. There are fifty-eight counties in California (San Francisco is specially classified as a "city-county") and 448 cities.[1] There is also a patchwork quilt of over a thousand school districts[2] and, as of 2012, 4,711 special districts in charge of everything from parks, water, and power to mosquitoes, sewers, and cemeteries.[3]

American Law: An Introduction. Third Edition. Lawrence M. Friedman and Grant M. Hayden.

One could quibble about whether these are all really legislative bodies, but they all have one thing in common: it is part of their business to establish general rules. This is, of course, obvious for legislatures, which churn out "laws" or "statutes"; towns and cities produce "ordinances." But park districts, transit authorities, sewer districts, and so on also make rules that are binding within their own small orbits of power.

The state legislature sits at the top of the pyramid in California. It is made up of two houses, a senate and an assembly. Every state has a legislature, and in every state except Nebraska the legislature is bicameral, like California's—that is, there are two houses, an upper and a lower. California is divided into legislative "districts," which elect senators and assemblymembers. At one time, senators were elected more or less on a county basis. One senator represented the millions of people in Los Angeles County; at the same time, a few thousand voters in the high Sierra counties had a senator all to themselves. The U.S. Supreme Court put an end to this; it declared most forms of "malapportionment" illegal in a series of cases that began with *Baker v. Carr*.[4] Today, all senatorial districts in California are more or less equal in population.

While legislative bodies in California have been described as forming a kind of pyramid, like the courts, the analogy is somewhat misleading. The organization is much looser: there is no such thing as an "appeal" from the city of Fresno, California, to the legislature, or from Yolo County to the legislature, or from the city of Hollister, California, to the county of San Benito. A citizen can, of course, complain that a city or town has overstepped its legal powers. But this complaint need not go to the legislature, and normally would not. It would most likely go to the courts.

Still, in another respect, legislative control over cities, counties, and towns goes far beyond the control that a high court exercises over lower courts. The legislature is in theory totally supreme. It can completely change the laws about towns and counties. It can shift boundary lines or add new counties. It can charter cities, amend charters, or take charters away. It could even abolish some local governments. In practice, the legislature stays out of most local affairs. But the state capital does have the last word; it is politics, not legal structure, that protects cities and counties from massive change from above.

In many states, ordinary people can directly participate in the legislative process through an initiative, referendum, or recall. An *initiative* is where a statute or constitutional amendment is placed on the ballot and voted upon by the public, completely bypassing the state legislature. A *referendum* is where a legislative enactment must be approved by the voters before it becomes effective. A *recall* allows voters to remove a state official from office before the end of his or her term. All three forms of direct democracy, and their variations, were introduced into state constitutions (mostly in western states) during the Populist and Progressive eras in late nineteenth and early twentieth century. As of this writing, eighteen states permit recall of a state official, twenty-four states have an initiative process, and all fifty states have some form of referendum.[5] But until the late 1970s, they did not play a significant role in state lawmaking.[6]

All three forms of direct democracy were viewed as a way to give a voice to ordinary people; to circumvent state legislatures thought to be dominated by special, moneyed interests (or just outright corrupt). Whether they have been successful in doing so remains an open question. Critics of direct democracy point to several shortcomings of the process.[7] They believe, for example, that it may lead to shortsighted decision-making, such as when Californians passed Proposition 13 in 1978, capping property taxes and robbing their (then) first-rate system of public education of necessary funding.[8] They claim that the only "people" given a voice through the modern initiative process are those with enough money to collect the thousands (or, in California, hundreds of thousands) of signatures required to get a proposal on the ballot and fund a modern campaign for its passage.[9] (It now costs around $3 million just to get a proposition on the ballot in California.)[10] Initiatives also suffer from being all-or-nothing propositions—they don't go through the give and take of the legislative process that may accommodate particular interests or make a law more workable. Supporters, though, point out that most of the really awful initiatives are rejected by voters or, if they're approved, rejected by the courts, and point to a number of important reforms that could have been accomplished only through direct democracy.[11] With the passage of Proposition 11 in 2008 and Proposition 20 in 2010, for example, California turned over the highly politicized process of redistricting state and congressional districts to a nonpartisan Citizens Redistricting Commission.[12] These and other reforms like them are consistent with the original purpose of making an end run around self-interested state legislators. And, whatever their downsides, people really seem to like the idea of direct democracy, at least in the abstract, so these devices are likely to be with us into the foreseeable future.

We live, of course, in a federal system. There is a national legislature, too: Congress. It, too, is divided into an upper house (the Senate) and a lower house (the House of Representatives). The House is elected on a population basis, but every state is entitled to at least one representative, no matter how tiny its population. There are 435 members, or roughly one for every 700,000 people. There are one hundred senators; each state has two, regardless of the size of the state or its population. California, with over 38 million people, has two senators; so do states with fewer than a million people, like Wyoming, Alaska, and Vermont. This scheme was written into the Constitution (in fact, it is currently the only provision that cannot be amended, without a state's consent, under the Constitution's own terms)[13] and is immune to *Baker v. Carr*.

The legislative system, like the rest of our legal structure, is influenced by federalism and, more significantly, by the American habit of decentralization. Voters take it for granted that the people they elect represent localities and local interests. We do not elect senators or representatives "at large." Members of Congress must please the people in their districts, or they will find themselves out of a job. Also, in the states, and in most cities, each lawmaker is elected from a particular district, and must be a resident of that district.

This is not the case in England, for example; a member of Parliament for East London need not live there at all. The American system struck James Bryce (who wrote a classic description of American government in the late nineteenth century) as plainly deficient. It meant that "inferior" men would inevitably sit in Congress: "There are many parts of the country which do not grow statesmen, where nobody . . . is to be found above a moderate level of political capacity," he felt. It was his opinion that men of "marked ability and zeal" were "produced chiefly in the great cities of the older States."[14] This sounds snobbish and wrong to American ears—the two presidential candidates in 1996, for example, President Bill Clinton and Senator Bob Dole, both came from small towns in small states (Arkansas and Kansas); both, whatever else one might say about them, were men of "marked ability and zeal." Still, Bryce had a kind of point. The system tends to send men and women to Congress (and to state capitals like Albany and Sacramento and to city halls) who lack the "big picture"; they think first and last of the wants and needs of their own little districts. Indeed, they have to.

It is easy to think of legislatures and courts as alternative lawmakers, or even as rivals. In some ways they are. But in our tradition, legislatures do many things that courts cannot do at all, or do only poorly. Legislatures can impose taxes and can spend money, which courts cannot really do, at least not directly. Courts respond to particular cases, in which John Smith sues Mary Jones, or the Acme Toothpick Company sues the city of Little Rock. In making a decision, an appeals court may lay down a general rule; but even so, the rule is supposed to be limited to the class of cases that *Smith v. Jones* represents.

Of course, it is anybody's guess how broad that category is. But in theory, anything that goes beyond the case is "dictum" (incidental talk) and is not binding on later courts. Whatever the theory, courts do act with caution most of the time. They do not presume to lay down minute, specific, detailed regulations. When a court hears a zoning case that turns on whether a gas station can be lawfully opened for business on the corner of Oak and Elm, the court may think the whole zoning ordinance or plan badly needs redoing, but it will not assume it has the right or the power to redo it on its own. Nor do courts change the speed limit or adjust parking fines; they do not generate systems of traffic rules or propose a list of chemical additives that can safely be used to make chicken soup yellow. Courts, in general, do not propose specific quantitative measures. They might (for example) decide that a tax rate is, for some reason, illegal or unconstitutional; but they will not suggest what the right rate might be. That is a job for the legislature. In the opinion of some critics, courts have strayed far from their classic preserves; they are, it is said, meddling in affairs that should not concern them, and crossing the line that sets them apart from the legislature and the legislative function. The point is controversial. Nonetheless, we think it is fair to say that the basic boundary between courts and legislative bodies still, in general, remains, and holds fast.

THE LEGISLATIVE OUTPUT

The sheer volume of work done by legislatures, in the mass, is growing by leaps and bounds. This fact seems crystal clear, though there are few systematic studies of legislative output and even fewer on the output of city councils and other similar bodies. Today, in a typical biennial session, over six thousand bills are introduced in the California legislature.[15] The statute book of a typical state in the mid-nineteenth century consisted of one fat volume; in other words, all the statutes in force in, say, Michigan or Indiana, were gathered together in a single thick book. Today, the collected statutes of any state, even a small state, will be ten or twenty times that size.

The reasons are not difficult to find. This is a complex society, and governing it calls for many detailed rules. New technology tends to bring new law. Consider, for example, how much law is on the books because of, or about, the automobile—traffic rules, speed limits, driver's licenses, and so on. It may be true that courts have sometimes fudged the borders between their work and that of legislatures; but it is undeniable that legislatures have stepped in to regulate matters that were historically the turf of common-law courts. For example, there was a vast body of law (and litigation) on industrial accidents in the nineteenth century; the courts created and developed almost all of the rules. Around the time of the First World War, the states began to pass workers' compensation laws, which covered most of this field and basically changed the rules of the game.[16]

The change was, of course, not just a matter of taste. The courts had developed rules that were for the most part vague and general. The new statutes were precise and detailed. For example, in the Idaho statute (passed in 1917), a worker who lost his "great toe at the proximal joint" in a work accident would receive 55 percent of his average weekly wage (but not more than $12 a week) for fifteen weeks. It is exactly this kind of precision that goes beyond the traditional power of courts. At any rate, though an immense body of case law on workers' compensation has accumulated in the last eighty years or so, the basic scheme operates in a routine and administrative way, under ground rules and schedules set up by the legislature. Even court cases on the subject use the statute as their starting point.

CODES AND UNIFORM LAWS

The common-law system is inherently messy; to understand what the law is, one must (in theory) rummage about in volume after volume of published cases. Judge-made law in the United States, with its fifty states, is especially ragged, nonuniform, inconsistent. A code—a statute—setting out the rules of law is much neater and more concise. Perhaps it is fairer too, since it may make clear, in advance, exactly what the law is, exactly what rules a citizen has to follow. As the English philosopher Jeremy Bentham pointed out in the early nineteenth century, common-law judges made law "as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and

then you beat him for it."[17] Civil-law systems, with their clean, logical codes, at least *seem* much more rational, more organized, than the common law.

In the nineteenth century, some lawyers and legal scholars in the United States, too, were intrigued by the idea of codifying the law—taking excess power away from judges and setting out the basic rules of law in modern codes. The idea is associated above all with David Dudley Field, a New York lawyer (1805–94). Field drafted or supervised a whole series of codes. The most successful was the Code of Civil Procedure, also known as the Field Code. New York adopted this code in 1848. It merged law and equity into a single system and in other ways, too, simplified and modernized pleading and process in court, though New York later drastically amended its code. Moreover, New York turned down Field's other codes, which dealt with substance. These codes, orphaned in New York, found homes in some of the western states—California and Montana, for example. Even in these states, lawyers were not trained in habits of reverence for statutes; the attitude of judges and lawyers toward the civil code of California is far different from the attitude of French judges and lawyers toward *their* civil code.

At the end of the nineteenth century, another strong but quite different codification movement arose. This movement had its greatest successes with regard to commercial law. Here the need was very great. The United States had entered the age of railroads, telephones, telegraph, interstate business. Goods and labor moved freely across state lines; laws did not. A company that did business in many states or that sold its goods in many states had to try somehow to comply with a whole host of slightly different laws.

The uniform-laws movement was spearheaded by prominent lawyers and legal scholars, but it succeeded, no doubt, because the business community felt a need for it. In 1892, a Conference of Commissioners on Uniform State Laws was founded. The commissioners were appointed by the governors of the states. The first "uniform" law suggested by the conference was the Negotiable Instruments Law (1896), dealing with checks, bills of exchange, and promissory notes. It was quite successful; every state eventually adopted it. The Uniform Sales Act (1906) won thirty-four adoptions. The commissioners continued their labors and drafted many other laws, some of which also proved popular. The Uniform Simultaneous Death Act is one example. This statute dealt with the mess that results when, for example, husband and wife die together in a common wreck and their estates are entangled with each other. Most states adopted this uniform act.

But no state is forced to enact a "uniform" law, and in practice the laws may not be quite so uniform as they look in print. Interpretations can vary from state to state, and local amendments are always possible. Undaunted, the Commissioners on Uniform State Laws, including many leading lawyers and legal scholars, took on, in the 1940s and 1950s, a complex task: drafting (and selling) a whole commercial code. One of the leaders in this movement was Karl Llewellyn, one of the country's foremost legal scholars. The Uniform Commercial Code, originally divided into ten separate "Articles" or divisions (there are now eleven), goes over ground covered by at least half a dozen older

laws. It replaces the Negotiable Instruments Law, the Sales Act, and others of the older "uniform" laws.

The code got off to a rocky start and met with considerable sales resistance. Massachusetts and Pennsylvania adopted it, however, and finally, after intensive efforts, it took off everywhere. Louisiana, our only civil-law state, was the last holdout; but even it gave in and adopted the code in 1990 (except for one Article). Still, each state is formally free (if it wishes) to repeal or change the code. The code is a good example of how it is possible to come close to legal unity in this enormous country, simply through state cooperation and parallelism. But obviously this sort of uniformity can never be as stable and complete as the uniformity that comes from a single central government.

STATUTES: FORM AND CONTENT

It is hard to generalize about the form or content of statutes. A statute can be about any subject that law touches on, which means, in practice, anything. The form, too, is infinitely various. Usually we think of statutes as being general directives, unlike decisions, which apply to particular cases. It is a statute that makes burglary a crime and fixes a range of punishment, but whether Joe Doakes, a particular burglar, goes to jail is a decision made by judges, juries, and others, not by a legislature.

But even the statement that statutes set out general directives is only partly right. Not all statutes lay down rules that apply to whole classes of cases. Congress, for example, still passes a few so-called private laws, many of which apply to a single person. In 2006, Congress passed Private Law 109-1, the Betty Dick Residence Protection Act, which allowed Mrs. Dick, an eighty-three-year-old widow, to remain in her summer cabin within the boundaries of Rocky Mountain National Park "for the remainder of her natural life."[18] Private laws have been used to make an end run around strict immigration laws, for favored individuals. For example, Private Law 112-1, passed in 2012, provided that "Sopuruchi Chukwueke shall be deemed to have been lawfully admitted to, and remained in, the United States, and shall be eligible for adjustment of status to that of an alien lawfully admitted for permanent residence under section 245 of the Immigration and Nationality Act (8 U.S.C. 1255). . . ."[19] Mr. Chukwueke was abandoned at an orphanage at the age of fifteen in Nigeria due to a harsh medical condition, similar to "elephant man's disease," that caused large tumors to distort one side of his face. He was rescued by a missionary nun and brought to the United States for treatment; he graduated from high school and college, and applied to medical school. But his visa that allowed him to travel to the United States ten years earlier had expired. Chukwueke faced deportation; but Private Law 112-1 remedied that; it allowed him to apply for legal permanent residence.

Private laws were once common in state legislatures, too: states used them to charter corporations, to settle minor property disputes, to straighten out administrative messes, and even to grant divorces. In 1850, for example, the Alabama legislature passed a law

changing the name of Matthew Robinson McClung to Matthew McClung Robinson.[20] Another private law allowed a certain John B. Moore ("who has been engaged in practicing medicine nine years . . . and is considered skillful and useful") to continue as a doctor, even though he had no license.[21] But private acts came to demand too much legislative time, and were open to corruption besides. After the Civil War, state constitutions began to outlaw the practice. The Illinois constitution of 1870 forbade "local or special laws" and provided that "in all cases where a general law can be made applicable, no special law shall be enacted."[22]

The output of Congress or a state legislature, in any session, consists of dozens and dozens of statutes. Some are long, complicated, and important; some are short and succinct; some may change a comma or two or make some trivial amendment to an older law. Some statutes lay down broad principles that courts or agencies will have to flesh out and interpret; other laws contain detailed regulations, dotting every *i* and crossing every *t*.

The Internal Revenue Code (the federal tax law) is probably the most complicated law (or system of laws) in the United States. Some of its provisions are broad and general; other parts of the code go into incredible detail. It is also almost totally unreadable—a dark, impenetrable jungle of jargon and bewildering cross-references, which only specialists dare tackle, and even they have plenty of trouble. Here is a small sample of its deathless prose. This is from Section 170 of the code, a long and involute section about income-tax deductions for gifts to charity. One part of this section puts a limit on corporate gifts to charity; in any year, the limit is 10 percent of the corporation's net income. What if a corporation gives more? Here is the crystal-clear answer:

> Any contribution made by a corporation in a taxable year . . . in excess of the amount deductible for such year . . . shall be deductible for each of the 5 succeeding taxable years in order of time, but only to the extent of the lesser of the two following amounts: (i) the excess of the maximum amount deductible for such succeeding taxable year under subsection (b)(2)(A) over the sum of the contributions made in such year plus the aggregate of the excess contributions which were made in taxable years before the contribution year and which are deductible under this subparagraph for such succeeding taxable year; or (ii) in the case of the first succeeding taxable year, the amount of such excess contribution, and in the case of the second, third, fourth, or fifth succeeding taxable year, the portion of such excess contribution not deductible under this subparagraph for any taxable year intervening between the contribution year and such succeeding taxable year.[23]

At the other end of the spectrum are laws that delegate broad authority to the president or some agency, or that speak in very vague, general terms. The famous Sherman Act, passed by Congress in 1890, is the fountainhead of federal antitrust law—the branch of law that deals with monopoly and restraints on trade. The Sherman Act is only

a page or so long. One key provision simply outlaws "every contract, combination . . . or conspiracy, in restraint of trade"; another provides that everyone who "shall monopolize, or attempt to monopolize" any part of interstate commerce is guilty of a misdemeanor. Obviously, this leaves many questions unanswered. What *is* a monopoly? What does it mean to "restrain" trade? If a company controls 56 percent of the market in lead pencils, is it "monopolizing" this market? Anyway, does the pencil business constitute a "market"?

The act is not very specific, to say the least. Nor does it set up any special agency or body to run the fight against "trusts" and to decide how the law should be interpreted and enforced. In this regard, the Sherman Act is quite different from other regulatory statutes, particularly later ones. But the law that created the Federal Communications Commission is also marvelously vague. The commission has power to license radio and television stations; the only standard mentioned in the law is "public convenience, interest, or necessity."[24] This means nothing much in itself, but at least we know that the commission will be in charge. It can put some flesh on the bare bones of the statute. It would have been nice if Congress had given the commission some guidance; Congress chose not to.

As far as the Sherman Act is concerned, policy is set by the attorney general, the Justice Department, and the lower courts. They have the job of deciding what to consider a violation, whom to prosecute, whom to let alone. The attorney general and the Justice Department make these decisions in the first instance; the federal courts accept or reject the government's line. More than one hundred years have gone by since the Sherman Act was passed; a huge body of law has accumulated. Without the statute, this body of law would not exist, yet its exact shape owes relatively little to the precise (or imprecise) words of the statute.

Why should Congress give away so much power? Why should it delegate its authority to other agencies? Much of the development makes sense simply in terms of the scope of government. Congress is made up of only so many men and women, and there are only so many hours in the day. Congress has neither the time nor the know-how to handle every detail that modern law requires. For example, Congress decided, in the Pure Food Law of 1906, to forbid the manufacture and sale of adulterated food. This is the general principle. But it is the Food and Drug Administration (FDA) that makes specific choices. The FDA, not Congress, decides how much butterfat must be in ice cream before you can call it proper ice cream, and what chemicals can or cannot be used to make cucumbers green and shiny in the stores; it is the FDA that decides whether a drug to deal with arthritis can or cannot be marketed. It is the FDA that hires chemists and doctors and puts them to work on these problems. Deciding questions about butterfat and additives and arthritis drugs is the agency's job. Congress has other things to do.

This is not the only reason for delegation. Delegation is also a form of delay, a way of dodging or compromising an issue. In the background of the Sherman Act, in the late nineteenth century, was a tremendous public uproar over the issue of "trusts." The trusts were huge industrial combines; the biggest of all was the Standard Oil empire of

John D. Rockefeller, which controlled virtually the entire industry. Congress had to do something to calm the public, which was thoroughly aroused. But it did not quite know what to do, and big business, of course, was a powerful political force on the other side. Congress responded to these conflicting pressures by passing a broad, sweeping act, marvelously vague. This sent a soothing message to the public: we have taken action against the trusts. At the same time, the act set up no real machinery for carrying out the policies it so broadly expressed. In this way, Congress dodged the long-term issue and passed the buck to the executive branch and the courts.[25]

Every important law or ordinance, whether passed by Congress or by a state legislature or city council, is its own special blend of specific detail and broad, vague principle. Some, of course, leave out the detail altogether; some leave out the big, broad brushstrokes. Still others mix them together. Ohio—to take one example out of thousands—has a food, drug, and cosmetic law that prohibits the sale of "adulterated" food. What does the word "adulterated" mean? There is a long chain of definitions. Some are quite general: food is adulterated if any "valuable constituent" has been "omitted." But the statute also gets down to minute detail: candy is adulterated if it has "any alcohol or nonnutritive article or substance other than harmless coloring, harmless flavoring, harmless resinous glaze not in excess of four-tenths of one percent," and so on.[26]

Why are statutes written one way or the other? Who makes these decisions and why? The mixture of detail or nondetail depends in each case on the history and politics of the particular law. Beyond this, it is hard to say anything more definite, except to point out that "historical accident" has almost nothing to do with the matter, nor is it a mere question of the techniques of draftsmanship. Legislatures do not pass laws as academic exercises or on a whim, but because somebody is pushing them; the social forces that lie behind any particular statute explain its form as well as its substance.

STATUTES AND THEIR INTERPRETATION

A statute is, of course, a kind of command. Legislatures pass them, but they are not in the business of enforcement or interpretation. These jobs are left for others to do. Every statute, then, has a double message. In the first place, the statute delivers to the public (or some part of it) a statement of dos or don'ts, or rights and privileges. In the second place, the statute also contains a message to some legal authority, giving instructions about carrying out the law. The second message may be, and often is, implicit; the statute does not necessarily say it in so many words.

For example, the Indiana penal code (section 35-42-5-1) provides that if a person intentionally takes "property from another person" with force or threat of force, the crime called robbery has been committed. A convicted robber can be sent to prison. This section of the penal code is, first of all, a message to the general public, warning people (if they need the warning) that robbery is forbidden and can be punished. At the same time, the statute is a message to district attorneys, police officers, judges, jurors, prison

wardens, and a whole host of other officials, authorizing them to do their job with regard to robbers. None of these officials are mentioned explicitly, in this particular law. Other Indiana laws deal with the structure of the criminal justice system, and the code section on robbery implies and assumes these other provisions. If we want to know whether the robbery statute "works" or not, we have to examine the impact of both of its messages. Is it getting through to robbers and potential robbers? And is it also getting through to law-enforcement officials? Are they doing their job of enforcement? These two impact questions are not, of course, unrelated to each other.

This is a simple example, because the robbery statute is itself relatively simple. The wording is not particularly difficult. A street holdup is an obvious case of robbery. There may be borderline situations, but the main thrust of the law is clear to anyone who reads it. Moreover, the layperson does not have to read it. People do not go around studying the text of the penal code; in this case, they *know* that robbery is a crime. The penal code itself rests on well-known, basic norms of American culture. The other branch of the message is also fairly clear. Dealing with robbers is part of the normal, ordinary work of police, judges, prison people, and so on.

Many of the thousands of statutes in the typical statute book are much more problematic, as far as their meaning is concerned: they are ambiguous, or confused, or novel, or very complicated, or extremely vague. We have seen some examples: the Internal Revenue Code is an example of enormous complexity, the Sherman Act an example of great vagueness. Even "clear" statutes run into problems of interpretation. Life is full of surprises, and situations often come up that do not quite fit the statute—but then again maybe they do. In other words, there are constant problems about what a statute actually says, how to interpret it if there are two conflicting meanings, and what to do when we are not sure that it covers some special situation.

Who decides what a law really means? A lawyer would answer, almost automatically: the courts. In a difficult case, it is true, courts have the last word in deciding on the meaning of a law. When Congress enacted Title VII of the Civil Rights Act of 1964, did the legislators mean only to get rid of discrimination against black people and other minorities? Could white people claim the protection of the civil-rights laws? If so, could they do so even in cases where they were challenging more "benign" forms of discrimination, such as affirmative action programs? The background was ambiguous, and the words of the statute were no help in the toughest cases.

The Supreme Court first tackled this question in 1976. In *McDonald v. Santa Fe Trail Transportation Company*,[27] two white men and a black man had stolen antifreeze from their employer, but the employer only fired the white men. They sued, but the trial court judge said they had no case: the Civil Rights Act, in that judge's opinion, was only designed to protect the rights of racial minorities. The Supreme Court disagreed; Title VII protected members of all races. The statute just said "race," not any particular race, and the legislative history had plenty of language that supported a reading of the statute that applied to people of all races. But what about white (or male) employees who felt

they got caught on the wrong side of an affirmative action program designed to remedy past discrimination against blacks (or women)? In *United Steelworkers v. Weber*,[28] a union had entered into a collective bargaining agreement with Kaiser Aluminum to reserve for blacks half of all new openings in craft-training programs. A white worker complained. In a split decision, the Court upheld the plan and ruled that the Civil Rights Act did not forbid this arrangement. Affirmative action programs, at least those that met certain conditions, were an exception to the general rule against discrimination on the basis of race.

This was an instance of "interpretation"—in theory, at least, a search for a meaning that is already *in* the statute. It is, in theory, not a question of the justices' values, ideas, beliefs, or preferences. This theory seems naive, to say the least. The Court that decided *Weber* was much more open to "benign" discrimination than the Court a few decades later; backlash and political change had had its impact on the appointment process, and a (narrow) majority of the Court, in a 1995 decision, expressed the view that *all* "race-based action," at least by "state and local governments," was deeply suspect, and almost certainly unconstitutional.[29] Later cases subjected affirmative action programs run by colleges and universities to a high level of scrutiny and doubt.[30] That the attitudes and values of the judges have an impact on the "interpretation" (of statutes or constitutional texts) seems undeniable. Meanwhile, "affirmative action" hangs in the balance. The *Weber* decision has never been officially overruled. The Supreme Court has shown distaste at times for race-conscious decisionmaking; but has thus far drawn back from a decisive vote against it, as the decision in a case in 2016, involving the University of Texas, suggests.

In a real sense, then, when courts "interpret" the statutes, they are actually making law. A law that has not been authoritatively interpreted—that has never come under the gimlet eye of the judges—is, in a sense, incomplete, inchoate; its meaning is clouded. Many lawyers would nod their heads in agreement at this last statement. But we have to be careful not to let the point distort our picture of the legal process at work. Of the thousands of laws and amendments to laws that pour out of legislative chambers every year, only a tiny (though important) minority ever go to court for interpretation. The rest are "interpreted" (if at all) by other people. All the people who handle the law in any way, including the police, officials of the Social Security Administration, and, yes, members of the general public, interpret the law, whether they know it or not. Lawyers play a key role in this process. Take, for example, the murky provision of the Internal Revenue Code about deductions for charity, which we quoted before. This message is much too complicated, much too "legal," for the general public. Somebody else has to receive the message, digest it, store it up, and feed it out in an easier form. This is the tax lawyers' job.

The lawyers do not do it alone. In their offices, they gather material from law-book companies, commercial tax services, trade associations, and so on, which help keep them current. Similarly, there are people working for any big company or any big institution (a university, a hospital) who have the job of sifting through the piles of matter that flow

into the institution, all the laws, rules, and regulations that affect what they do. These staff people, too, digest law and store it in a form that their organizations can use. They, too, interpret the law.

The statutes that courts interpret, of course, are not a random selection of all statutes. Courts decide *cases*, so these statutes are involved in some controversy that has ended up in court. The issues raised tend to be the most hotly controverted. This is probably why they got to the court in the first place.

How does a court decide what a statute means? Courts have been working with statutes for centuries. They have built up a body of doctrine on "construction" (interpretation) of statutes. They have, in other words, generated rules—or, more realistically, guidelines, rules of thumb—about the interpretation of laws. Some of these rules are in the form of "maxims" or "canons of construction"—slogans or sayings that sum up modes of interpretation in a pithy sentence or two.

There is, for example, one maxim to the effect that penal laws should be "strictly construed." This means that when a law makes behavior criminal, courts should interpret the law quite narrowly. They should stick as close as they can to the literal meaning of the words. They should avoid any interpretation that would apply the law to conduct that is not clearly, unmistakably covered by the text of the law. Otherwise, we might punish people without giving them fair warning in advance that their behavior is a crime.

Put this way, the idea is just and sensible. In practice, the notion can easily be carried too far. In one famous case,[31] decided in 1931, the U.S. Supreme Court had to construe the National Motor Vehicle Theft Act of 1919. The law defined a motor vehicle as an "automobile, automobile truck . . . motor cycle, or any other self-propelled vehicle not designed for running on rails." Congress made it a crime to cross state lines in such a vehicle "knowing the same to have been stolen." Defendant McBoyle flew a stolen airplane from Illinois to Oklahoma. Had McBoyle violated the law of 1919? An airplane is a vehicle, it has a motor, and it definitely does not run on rails. But the Supreme Court set McBoyle free. A penal law must give "fair warning," in "language that the common world will understand." The words of the statute were ones that would "evoke in the common mind only the picture of vehicles moving on land." It would not be fair (said the court) to extend this law to airplanes. McBoyle went unpunished, and Congress amended the law in 1945 to include aircraft.[32]

If this strikes you as far-fetched, you are not alone. Did McBoyle really think it wasn't a crime to steal an airplane? Presumably he did not know it was a *federal* crime; but did he know there was a federal law about taking "vehicles" (*whatever* that meant) across state lines? Not all courts are such sticklers, and some state laws tell them explicitly not to be. For example, section 4 of the California penal code states baldly that California does not follow the common-law rule requiring penal statutes to be "strictly construed." All criminal laws are rather to be interpreted "according to the fair import of their terms, with a view to effect its objects and to promote justice."

According to another famous maxim, statutes in "derogation of the common law" must also be strictly construed. This does not have a very precise meaning, but it expresses an interesting bias. The bias is this: courts should look suspiciously at changes in law that come from legislatures instead of from the courts themselves. Historically, many courts indeed took a rather narrow, illiberal view of statutes. They looked on them as (in a sense) alien intruders, disturbing the beauty and symmetry of common law. This general habit of courts helps explain the rather peculiar style of American (and English) statutes. Many of these statutes are incredibly verbose, piling synonym on top of synonym. Here is a typical example:

> All promises, agreements, notes, bills, bonds or other contracts, mortgages, or other securities, when the whole or part of the consideration thereof is for money or other valuable thing won or lost, laid, staked, or betted at or upon a game of any kind, or upon a horse race or cockfight, sport or pastime, or on a wager, or for the repayment of money lent or advanced at the time of a game, play, or wager, for the purpose of being laid, betted, staked, or wagered, are void.

This language comes from an Ohio statute, and all it means is that gambling contracts are void (that is, a court will not lift a finger to help either party collect or enforce them).[33] Its essential meaning can be expressed in four words; about a dozen more might help to explain it a bit further. The code uses more than eighty separate words, all part of a single very long and difficult sentence. The drafters wrote as if they had to cover every possible crack or gap in meaning—as if the text were a small, leaky boat in a storm on a hostile sea. These precautions, these synonyms, these long legalisms, were presumably there to prevent courts from punching holes in the statute or changing little holes into big ones.

There are many other maxims or canons of interpretation. Some states list them as official and make them part of the statute books. Even when this is done, it is questionable whether the maxims are very effective, whether they are anything other than convenient excuses for courts to do more or less what they want to, in reading a statute. Karl Llewellyn, in a well-known essay, pointed out that most maxims have their countermaxims; these act more or less as escape hatches, so that a court can ignore whichever of the two it wishes and use its opposite instead. For example, according to one maxim, courts should interpret statutes in such a way as to give sense to every word or clause in the text. On the other hand, a court can (by another maxim) reject as "surplusage" words that are "inadvertently inserted" or "repugnant" to the rest of the statute. The two maxims seem rather inconsistent.[34]

Systematic information is lacking about the ways courts handle statutes in practice. Probably a great deal depends on the attitudes of judges toward the actual subject matter covered by the statute. Even the maxims make distinctions—for example, the maxim that criminal laws should be narrowly construed; there is no equivalent for laws about contracts or torts. In any event, courts do their "interpreting" within certain rather

definite limits. They can twist and pull a little, but they can hardly construe "black" to mean "white" or "up" to mean "down." The words of a statute are not putty; they are more like a rubber sheet that gives a little here and there but cannot totally change shape. To "interpret" in such a way as to turn black into white or night into day would violate tradition and upset the judges' own sense of their legitimate role.

As we said, "interpreting" a statute is not something a court decides to do on its own; it takes a case to do this, and that means at least *some* kind of dispute or controversy. It is also not true to say that that a statute has no real meaning unless and until a court tells us what it is. As we pointed out, most statutes are not interpreted by courts at all. Nonetheless, they may have a real operative meaning; the people who carry them out or who come under them grasp this meaning, and act accordingly.

When a statute *does* come before a court, to be interpreted, is there a right way and a wrong way to do the job? One obvious "right" way is to search, honestly, for the "true" or "real" meaning of the text. But does such a thing really exist? Often, to be sure, there is a literal meaning, but sometimes this makes no sense or leads to absurd results. Perhaps, then, the meaning of a statute has something to do with its purpose, with what the members of the legislature had in mind, or the reason why the statute was passed in the first place. This actually carries us only a little bit further. Legislative intent is a slippery concept. First of all, no one can actually read the minds of the legislators; second, there are too many minds to read—435 in the House of Representatives alone. Neither in theory nor in practice is it easy to find out the actual purpose or intention of a law. Indeed, for most legislative minds there may be nothing to read, even if we could get somehow inside the heads of members of Congress. Many members have never even looked at the bills they vote on; others may have only a faint idea of what was in them. Some vote out of party loyalty, others to do a favor to another legislator. Even those members who take an active part in writing some particular law, or arguing for it, or pushing it along, might have among them quite different, conflicting notions of the purpose and sense of the law.

When a person wants to know what a word or phrase means, she might consult a dictionary. Courts can do this too. The U.S. Supreme Court does this frequently—at least in recent years. The use of dictionary meanings was rare until the days of the Roberts Court. But in the 2008 to 2010 terms, fully a third of the cases involved citations to dictionaries.[35] A recent high (or low) point occurred in a case where the Court, ironically enough, needed to interpret the term "interpreter" for the purposes of a federal statute that allowed "compensation of interpreters" as costs that could be awarded to prevailing parties.[36] The majority consulted fourteen dictionaries in its opinion, ten general dictionaries and four legal dictionaries, to reach its conclusion that an "interpreter" was one who provided oral translations but *not* one who translated written materials. This was at odds with long-standing trial court practice, and with the reason behind providing interpreters to begin with—ensuring that both oral and written foreign language materials are accessible to everyone involved in a court case. But those considerations mattered less to the Court than how the dictionary (or, in this case, dictionaries) defined the word.

Sometimes the Court uses a dictionary as a time machine to visit the period when a statute was passed in order to glimpse its "true" meaning. In the 1987 case, *Saint Francis College v. Al-Khazraji*,[37] the plaintiff, a man from Iraq, claimed that he was denied tenure based on his Arab ancestry. He sued under section 1981 of the Civil Rights Act of 1866, a post–Civil War statute that prohibited race discrimination. The lower court rejected his claim, reasoning that discriminating against someone for being Arab was not *race* discrimination; Arabs, in that court's opinion, were generally considered Caucasians. The Supreme Court rejected this view. Although more modern definitions of race may be based on biology or sociology, those definitions are irrelevant—the question is what people thought of race in the nineteenth century, when the statute was enacted. Turning to a collection of old dictionaries and encyclopedias, the Court discovered that race was then described in broader terms: one 1854 source referred to "various races such as Finns, gypsies, Basques, and Hebrews."[38] Race was more akin to modern notions of ethnicity, ancestry, or national origin, thus the Arab plaintiff had a claim for "race" discrimination under the terms of the old statute. Whether he would have had a case under more modern civil rights statutes—what, exactly, "race" means under the Civil Rights Act of 1964—is still an open question.

This rise in the use of dictionaries has been prompted, in part, by the rise in "textualism," a tendency that elevates the plain meaning of a statute above all else. Turning to a dictionary seems purer, more objective, and less tainted by the biases that are thought to infect judicial decisionmaking. This veneer of objectivity, though, is belied by the fact that justices often cherry-pick definitions. If nothing else, the sheer number of dictionaries consulted shows that the justices are often shopping for definitions that support their points of view rather than the other way around.[39]

Not all cases or issues invoke deep feelings or ideology among the justices. And even when these are involved, a justice might begin by asking what the point of the statute was in the first place: what prompted the legislature to act. Important clues might be found in what is called "legislative history": material, outside the text itself, that could shed light on what the text might mean. What were the events or situations that led to the introduction or drafting of the bill? We could also take a look at the various drafts and how they changed as the bill snaked its way through Congress; we can read committee reports and debates on and off the floor of the legislature; we can consider the words of experts and advocates who appeared before congressional committees—everything, in short, that happened up to the point where the president or the governor signed the bill into law.

In England, courts traditionally refused to pay attention to legislative history; they insisted on looking only at the text. Perhaps their hesitancy stems from differences in their legislative processes. In the United States, Congress makes extensive use of studies and reports; there are up to thirty-nine different types of sources of legislative history, including comments from the bill's sponsors, materials from hearings, debates, advisory committee comments, House and Senate reports, conference reports, and even materials on prior versions of the bill and evidence of legislative acquiescence in an administrative interpretation of a statute.[40] The United Kingdom, in contrast, uses a system

of legislative drafting that produces a much smaller and less informative set of materials. But there has been some international convergence on this issue in the last couple of decades. High British courts have begun, rather gingerly, to permit use of the more limited parliamentary material in certain situations—for example, where legislation is "ambiguous or obscure, or leads to an absurdity."[41]

American doctrine has been much more receptive. Some judges have argued that background is important only when the text is ambiguous: if the law has a "plain meaning," there is no reason to rummage around in the windy expanses of the *Congressional Record*, and so on. Many judges try to start with the plain meaning rule, but find that the meaning is not all that plain (even with the help of a dictionary or two). It is now standard practice to also use legislative history to interpret statutes. Take, for example, *United Steelworkers v. Weber*, the 1979 case on "benign" discrimination we have already cited. Here a white worker challenged an affirmative-action program for black workers; he claimed this was a form of race discrimination against whites. Justice Brennan, in his opinion, quoted extensively from the *Congressional Record* to drive home his points about the meaning of Title VII of the 1964 Civil Rights Act. Not to be outdone, the dissent of Justice Rehnquist quoted even more extensively, to make the very opposite point. In this case, as in so many, legislative history hardly leads to a single right answer.

State legislative history is often fairly skimpy; but Congress spews forth reams and reams of paper. In many cases, there is entirely too much history. There may be so many versions, drafts, debates, reports, messages, and so on that a judge can find material to support *any* interpretive position. The *Weber* case is a good example. But this is no real argument against the use of legislative history. As Professor Kenneth Davis has put it, that would be "a little like saying that we should not drill for oil because much of the drilling ends with dry holes. The important fact is that some of the drilling yields oil."[42]

Nonetheless, the use of legislative history has not gone unchallenged—by some legal scholars, and by a few judges, including Justice Scalia of the U.S. Supreme Court. Scalia, in a case decided in 1993, excoriated the use of legislative history as "likely to confuse rather than to clarify"; he quoted a judge who compared the use of legislative history to "entering a crowded cocktail party and looking over the heads of the guests for one's friends."[43] Yet in that very year and indeed in subsequent decades, members of the Court poked around in legislative materials in virtually every case that involved a federal statute. Justice Scalia, however, continued to criticize the practice.

LEGISLATIVE DECISIONMAKING

Just as there is a body of literature on decisionmaking in the courts, so there is a body of literature on the way legislatures make decisions. This literature is concerned, among other things, with the effect of public opinion (in general) on the legislative process, and (in particular) with the role of lobbyists and organized interest groups. The literature is

rich and complex, and cannot be summed up in any single, simple formula. A few points stand out.

First, most scholars agree that legislators, at least to some degree, behave in response to their constituents. They tend to do what the voters in their districts want, or at least those voters who write letters, donate money, or otherwise try to exert some pull. Legislators do not simply follow their own inner values. Of course, ideals and convictions are important to legislators; but a member of Congress or the state assembly knows that it could be fatal to get too far out of touch with the voters' wishes; the member could be thrown out of office at the next election.

Second, what legislatures do reflects the social force exerted; in other words, we can explain output (legislation) through input (social pressure). The man or woman in the legislature is a medium, a conduit, not an independent force. There is, however, a good deal of controversy about the source of the pressure. Who is it that exerts the force? Moderates (and conservatives) tend to stress the "pluralism" of American political life. They do not claim that everybody in the country has an equal say, but they stress how many groups and how many interests get some response from the lawmakers. There is a good deal of popular rule, in other words. Legislators listen to many voices, demanding many different ends and means. The groups have to deal with each other, inside and outside the legislature; they have to bargain and compromise; no single group ever gets its way entirely. The very form of the government reinforces this system: there is no "single center of sovereign power"; rather, there are "multiple centers of power, none of which is or can be wholly sovereign."[44]

But many scholars reject this image. They feel that it paints too rosy a picture. These critics argue that the rich and the powerful are, in practice, the only serious influences on major decisions; they are the only ones who can afford lobbyists, the only ones who can mount a real campaign to get results in Congress or a state legislature. Besides, campaigns themselves have become very expensive. Mitt Romney and Barack Obama raised over a billion dollars each to fund their 2012 presidential campaigns.[45] Even candidates for lesser offices cannot survive without heaps of money to buy television time, to conduct polls, to print leaflets, to hire managers and staff, and so on. Only big interests have the financial power to make important contributions; this gives them a say in elections and in the behavior of legislators that the average person can never hope to have. The poor, the minorities, the unpopular are shut out of the process. So are such "diffuse" interests as those of consumers and pedestrians. Attempts to deal with this issue—to reduce the role of money in elections—have not been successful; and the Supreme Court has been downright hostile to any efforts at reform.[46]

The word "lobbyist" has, if not a sinister, at least a distasteful ring. Lobbyists are those who are paid by various interests to try to influence passage or defeat of legislation. In 1946, Congress attempted to rein in lobbyists, or at least make their work more transparent, with a law that required certain kinds of disclosure, but the law was narrowed by the Supreme Court and became largely irrelevant to the actual practice of lobbying.

Almost fifty years later, Congress tried again, and passed the Lobbying Disclosure Act of 1995, which requires lobbyists to register, disclose who they represent, and also reveal a good deal of financial information.[47] Thousands of lobbyists have registered under this law, though there is good evidence that the actual number of people engaged in such activities under other guises—corporate government relations departments, trade associations, and the like—far exceed the number of registered lobbyists.[48]

Lobbyists claim, with some justice, that they do not deserve their shady reputation. Of course there have been corrupt lobbyists—lobbyists who used pressure or bribery to get their way. But in general lobbying is arguably a vital part of the democratic process. Lobbyists draft legislative proposals; mobilize public support or opposition to bills; and keep legislators informed of what is going on at the grass-roots level (or other levels). The Sierra Club has lobbyists; so do the National Rifle Association, the Japanese government, and Harvard University. In fact, like so many facets of law and government, lobbying is a complex phenomenon; it is neither all good nor all bad, and it is, in any event, deeply ingrained in the American tradition. Still, we do not have to demonize lobbying, or discount its value, to wonder about the role of money and power in the legislative process.

Studies of the legislative process emphasize the fact that votes on bills are not isolated acts. A legislature is an institution, a system; its members know each other, and they must learn to live and work with their colleagues. Congress is not "an anonymous group of men and women who occasionally meet to pass legislation"; on the contrary, it is a continuing body, with "an elaborate formal and informal structure, traditions, norms, and agreed-upon practices."[49] The same is true of state legislatures.

This means, for example, that to understand the legislative process, we have to understand the committee structure, seniority, the party system, and so on. We have to understand the structure of legislatures, and how it affects the work of the body. The Senate, for example, is usually a slower, more sedate, less ideological body than the House of Representatives; structure might account for some of this difference in legislative culture.

We must also realize that members do not deal with each single bill in isolation. Rather, they "deal" with each other; they trade votes, in subtle and not-so-subtle ways. There is a lot of open "logrolling," especially in regard to "pork-barrel" bills—legislation about construction projects, irrigation works, dams, harbor improvements, research centers, and the like, to be located in local districts. That is, legislator A agrees to vote for a dam in B's district, because B will vote for the harbor improvement in A's district. More subtle, and more important, is what has been called "implicit" logrolling; vote trading that is less blatant, less open, but still part of the process of "getting along."[50] A legislator is always aware of other legislators (and of the president or governor) and is generally willing to accommodate others in exchange for goodwill or a helping hand, or at least a friendly hearing, on his or her issues. There are, of course, limits to how far a legislator can "deal." Legislators must be careful not to deal themselves out of office.

One would expect, then, in the light of all this, that any complex statute would turn out in the end to be some sort of compromise. It comes about after an intricate game of give-and-take in which legislators, nudged constantly at the elbow by constituents, play power poker with each other. Almost any big bill could serve as an example. The Patient Protection and Affordable Care Act[51] (perhaps better known by its nickname "Obamacare"), which substantially overhauled the regulation of health care in the United States, reflected the influence of all the major players, including doctors, hospitals, drug companies, insurance companies, business interests, and, of course, the public at large. The Sherman Act reflected both the outcry of the public and the defensive maneuvers of big business. How much weight each interest has is, of course, the important question. It is not always easy to tell.

There is a middle view, then, between the exaggerated pluralist position and the extremists on the other side. The legislative process is neither as good at accommodating everybody as some have thought, nor as elitist and undemocratic as the worst of the cynics has described it. Rather, it is rough, complex, and imperfect. It also changes over time. African-Americans and consumers have, for example, a much greater chance to win the ear of legislators today than they did in 1950.

In general, legislative lawmaking needs a good deal more research. We particularly need to know a lot more about the bottom layers of decisionmaking. Most of the research we have puts the searchlight on Congress, although a certain amount does deal with state legislatures. We are much more in the dark about city councils, zoning boards, and school districts. The city council of Memphis, Tennessee, or the school board of Bangor, Maine, may not seem very important to the rest of the country, but the work of these local agencies, taken all together, is absolutely fundamental, and worthy of careful study.

6

The Structure of American Law: Executing Policy

THE ADMINISTRATIVE SECTOR is in many ways the fastest-growing part of the legal system, the cutting edge. This is the domain whose body and bones are made up of hundreds of boards, agencies, authorities, committees, commissions, and the like, poking their fingers into every aspect of modern life. The public is in constant contact with it. Yet it is also, on the whole, the most obscure branch of government. When a citizen applies for a document or a service, it may seem to him (as Herbert Jacob put it) that the request "drops down a dark chute and emerges untouched by a visible hand."[1]

Though in many ways obscure, this domain has long been a source of political controversy. A few decades ago, "deregulation" was the catchword of the day. Ronald Reagan won the presidency as the sworn enemy of "bureaucrats," and this was also a powerful theme of the Republican Congress elected in 1994. More recently, the financial crisis of 2008 and a series of environmental and workplace disasters led the Obama administration to embrace additional regulation, including a financial oversight system and a push for new mandates, greater enforcement, and higher fines in other areas. Peter Orszag, Obama's first Director of the Office of Management and Budget, explained that "[s]mart regulation can make people's lives better off."[2] These back-and-forth views are just the most recent skirmishes in a longer battle over the role of "big government"; and what makes government big is not the legislature, not the courts, but the administrative apparatus.

A good deal of the political noise is, in all honesty, simply that: noise. In fact, no one seriously thinks the end is near for administrative law and administrative government. Even the most zealous cutter and chopper hopes at most to slice an inch or two

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off its tremendous bulk; miles and miles will remain. Despite Reagan's rhetoric, neither the size nor scope of the administrative state was much changed during his administration.[3] He was largely unable to build on the momentum of the Carter administration's deregulation of the airline industry and bank interest rates. And, except for the changes that came with healthcare reform—the passage of the Affordable Care Act, or "Obamacare"—Obama's later actions were mostly attempts to improve and amplify enforcement of existing regulations. The administrative state, despite all the political commotion, lumbers on.

It is easy to reel off examples of administrative agencies or administrative tribunals. But it is hard to come up with an exact definition of the administrative sector. Indeed, the best definition, sloppy as it seems, may be a negative one: the administrative sector is everything left over in law and government if we take away the courts and legislative bodies, the president, and all the governors, mayors, and county supervisors (along with their immediate staffs), the police, and agencies concerned with national defense. The residue—everything else in the legal system concerned with rules and policy and with making rules and policy stick—is the administrative sector.

An enormous body of men and women, and an enormous apparatus, constitute this system. Here we have the Food and Drug Administration, the Securities and Exchange Commission, the Federal Trade Commission, the Federal Energy Regulatory Commission, the Social Security Administration, the Environmental Protection Agency, and dozens of other important administrative agencies, bureaus, and commissions, with headquarters in Washington, D.C., and branches strewn about the country. Many of these agencies have counterparts in the states; many do not.

On the other hand, the states have many agencies that have no real federal (national) equivalent. Among these are most occupational licensing boards. These obscure bodies (housed, perhaps, in small offices in the state capital) run exams, make rules, and give out licenses to doctors, nurses, plumbers, watchmakers, barbers, clinical psychologists, and midwives, among others. These boards are by no means unimportant, if we put them all together. Some trades and professions (doctors, for example) are universally subject to licensing rules. There is a common core of licensing functions in all states, along with some local variations and additions. Tennessee has a state board of accountancy, a state board of examiners for architects and engineers, and boards for auctioneers, barbers, cosmetologists, funeral directors and embalmers, general contractors, real-estate brokers, landscape architects, land surveyors, collection agencies, pest-control operators, "rental location agents," "private investigators," fire-alarm contractors, locksmiths, geologists, soil scientists, and "polygraph examiners," not to mention members of the healing and helping professions, doctors, nurses, veterinarians, psychologists, speech pathologists, dentists, chiropractors, hearing-aid dispensers, optometrists, osteopaths, and pharmacists, as well as "massage therapists," who manipulate "the soft tissues of the body with the intention of positively affecting the health and wellbeing of the client."[4]

Administrative bodies are found on the local level, too—for example, boards of zoning appeals. These decide whether Mr. and Mrs. Smith can open a restaurant on Elm Street, or whether Elm Street must stay residential. This is not a question of earthshaking importance, but it means a lot to the Smiths and to their next-door neighbors. On the local level, there are also park commissioners, port authorities, bridge commissions, and tax assessors; there are sewer districts and agencies charged with mosquito control. And most important, perhaps, there are local boards that run the schools.

Do all these agencies and bodies, from the top to the bottom of the pyramid, have anything in common? They share, on the whole, a curious combination of dependence and independence. It takes an act of Congress, a law of some state legislature, or a municipal ordinance to bring them into life. Their "parents" can also put them to death, simply by repealing the law or ordinance. It is a well-known fact that this does not happen very often. Once born, they cling stubbornly to life, and their parents oblige. Still, history is littered with fossils of extinct agencies. The Office of Price Administration, for example, had almost dictatorial power during the Second World War, fixing prices, wages, and rents. It is only history now. The Interstate Commerce Commission, regulator of railroads, lasted over a century; Congress put it out of its misery in 1995.

In many agencies, there is a curious mixture of powers. On the one hand, they can act like legislatures; that is, they can make up rules and regulations. In 2015, for example, the Food and Drug Administration decided to amend its color additive regulations to provide for the safe use of spirulina extract ("prepared by the filtered aqueous extraction of the dried biomass of *Arthrospira platensis*") in the coatings of drug tablets and capsules.[5] A few weeks later, the Federal Aviation Administration issued a rule setting out additional safety standards for the use of "rechargeable lithium batteries and battery systems" in Bombadier Aerospace Models BD-500-1A10 and BD-500-1A11 series airplanes because those batteries "have certain failure, operational, maintenance characteristics that differ significantly from those of the nickel-cadmium and lead-acid rechargeable batteries currently approved for installation on large transport category airplanes."[6] Agencies can also act like courts, and make policy decisions by adjudicating individual disputes. In 2011, the National Labor Relations Board (NLRB) ruled that a union's use of a sixteen-foot-high inflatable rat in front of a medical center in Brandon, Florida, was not a form of "picketing" and was thus not subject to various restrictions on secondary boycotts under federal labor law.[7] Many agencies publish reports of these decisions. Volume after volume of the NLRB reporter, for example, sit on the shelves of law libraries and contain accounts of the board's decisions, which are often as important as the decisions of courts.

Some scholars and politicians are dismayed by the rapid development of the administrative state. They look on it as a kind of cancerous growth. Yet the fact that the administrative state is massive and pervasive must mean there is a certain amount of social demand at the root of it—a demand, if not for the precise form of regulation, at least a demand that some social problem needs to be addressed. And this demand calls for

continuous, systematic, planned attention to certain problems and concerns. The rest of government has a short, spasmodic attention span. Congress lurches from crisis to crisis, the courts from case to case. Only the Securities and Exchange Commission doggedly keeps after the stock exchanges, reviews financial reports, and so on. Only the Food and Drug Administration monitors drug companies. Only the Federal Communications Commission lives in the world of radio, television, and cable networks, day in and day out.

American government mirrors what goes on in the community at large, to a greater or lesser degree. Planning and system in government grew up alongside of planning and system in business. Big business had to control and coordinate its various subsidiaries, divisions, and units. It tried to do this through formal rules. Workers punched time clocks and followed instructions; modern labor law "legitimized, while it regulated, patterns of workplace order and command relationships."[8] The administrative state is the public, official form of a pervasive private reality.

HOW THE LEVIATHAN GREW: A BRIEF SKETCH

It is hard to think of a more striking change in government and the legal system over the last century or so than the rise of the administrative agency. The administrative state has grown enormously in scale and scope. Administrative agencies as such, to be sure, are as old as the nation. There were administrators and agencies of government when George Washington was president. The post office was a major branch of government then, and it is still a big operation today. Each cabinet office in the federal government was and is an administrative agency of its own. The same was and is true in the states.

Today, there are millions of jobholders in the civil service. The federal workforce in the days of George Washington, on the other hand, was a tiny handful of men. The staff of Timothy Pickering, Washington's postmaster general, consisted of one assistant and one clerk. They took care of all the agency's business.[9] In general, administrative process in the early days of the republic was weak and inefficient. Most of the action, of course, was at the level of the states. But the states, too, had tiny budgets and tiny staffs.

One of the biggest responsibilities of the federal government in the nineteenth century was managing and selling public land. The General Land Office in Washington, D.C., came to preside over an empire of land—millions and millions of acres. It supervised dozens of local land offices. Public land was supposed to be disposed of in an orderly way. First, the land was to be surveyed and mapped. Then the president had the power to declare the land ready for sale. At that point, it would be auctioned off to settlers and buyers. But local offices were poorly run, on the whole, and badly staffed. Congress was always stingy with expense money. One surveyor complained in 1831 that he did not even have decent storage space for his papers: roaches and crickets had "free access"; mice made "beds out of old field notes . . . papers are thrown into old boxes and put out of the way: the roof leaks . . . and injures the books and papers."[10]

The states did at least as poor a job with their own lands. There was no tradition of a trained civil service, and government was usually weaker than its greedy subjects. The land office was a primitive operation, a far cry indeed from, say, the Internal Revenue Service today, which commands an army of lawyers, accountants, and agents, along with banks of computers, and has vast powers of audit and enforcement.

From the dawn of American history, regulating business was one of the jobs of the administrators. Even the early colonists were eager to have quality control of important goods. Under the *Laws and Liberties of Massachusetts* (1648), the selectmen of Boston and other towns that shipped pipe staves abroad were empowered to name two men from each town, "skillful in that commoditie," to act as "viewers of pipe-staves." All pipe staves for export had to pass before the watchful eyes of these viewers, who could reject staves that were "not merchantable" because of "worm-holes" or were poor in size and quality. For example, staves had to be four and a half feet long, three inches and a half "on bredth . . . without sap," and "in thickness three quarters of an inch"; they also had to be hewed "well and even."

In the eighteenth and nineteenth centuries, cities of any size had somewhat similar laws for the inspection of basic commodities (butter, coal, bread). A Connecticut law of 1822 provided for local inspection of a huge array of products: beef, pork, butter, lard, fish, hay, flour and cornmeal, lumber, barrels for fish, sawed shingles, potash and pearl ash, and "onions put up in bunches."[11] Local government also levied taxes, laid out roads and kept them in repair, and issued licenses to taverns, inns, and gristmills. Each township or county had its "overseers of the poor." These local citizens administered the "poor laws," the primitive welfare system of the day. They raised local taxes and spent the money on relief for the sick and the destitute, though in a bare-bones and minimal way. Since every additional "pauper" took money from local pockets, towns looked with a jaundiced eye on poor people who moved in from outside. Instead of being greeted by the Welcome Wagon, newcomers could be warned to get out of town; if they did not listen, they could be "removed"—dumped bodily across the township line.

Cities, counties, and towns performed other important administrative tasks. Education was one of them: running the local school system. Until recently, the federal government left education pretty much alone, financially and otherwise. Even centralized state control developed slowly. The schools were doggedly local affairs. Police, and law and order generally, were traditionally given over to local administration. In the nineteenth century, as the economy expanded, so did state administrative law. There were commissions to regulate banking, state lands, canals, bridges, and insurance companies. Connecticut in the 1840s had a commission of three ("annually appointed by the general assembly") to visit and check every bank in the state.[12] Insurance regulation was a particular concern of the states. States regulated many aspects of the insurance contract and the insurance business; the work was often handed over to an administrative body, the insurance commission.[13]

Cities and states welcomed the first railroads with open arms. But from about the 1850s on, control of the railroads became an important policy issue. The New England

states set up the earliest railroad commissions, in the 1860s. Connecticut, for example, gave a three-man commission power to inspect the state's railroads, though mostly to check on safety and repair of equipment. The commission had limited enforcement power and no jurisdiction whatsoever over freight rates and passenger fares.[14]

The next wave of railroad commissions, in the 1870s, was far more potent. The most noted of these commissions were in Midwestern states. They were the product of the so-called Granger movement; farmers and shippers lashed out in anger and frustration, accusing the railroads of abuse of power, of crude profiteering. The Granger commissions of Wisconsin, Illinois, and Iowa were far from toothless. The Illinois Railroad and Warehouse Commission, for example, had broad authority over railroads and grain elevators in the state. Besides general inspection power, the commission had power to enforce state laws, which included actual regulation of rates. Indeed, one law set a maximum charge for storing grain—two cents a bushel per month—and another law, aimed at the railroads, outlawed rate discrimination.[15]

The Granger laws were fairly radical for their day—so railroads and warehousemen thought. Business challenged the Granger laws in court, charging that they were unconstitutional. The famous case of *Munn v. Illinois*[16] reviewed the right of the state to regulate grain elevators. Under Illinois law, grain elevators had to procure a license to do business, and the law fixed prices for storing and handling grain. The Supreme Court turned back the challenge and refused to strike down the law. Regulation, even price-fixing, was acceptable, as long as the regulated business was "affected with a public interest." That is, a business with a crucial or vital place in the social or economic scheme could not claim immunity from public intervention. The principle of *Munn* was broad enough to cover most forms of administrative regulation.

The Interstate Commerce Act (1887)[17] was a landmark in the history of administrative regulation. Indeed, this was a landmark in American history generally. The original law created a federal (national) commission, the Interstate Commerce Commission, to regulate railroads. The statute laid down the general rule that all freight rates and passenger charges had to be "reasonable and just." It outlawed rebates, kickbacks, price discrimination, and other practices that had kindled the anger of farmers and shippers.

What stimulated the federal government to enter the field of railroad regulation? State regulation of railroads had generally failed. At first, railroads were small, local lines linking two towns, rarely crossing state boundaries. New Jersey, for example, chartered a "Belvedere and Water Gap Railroad Company" in 1851;[18] New Hampshire incorporated a "Concord and Portsmouth Railroad" in 1855.[19] But gradually, local railroads merged and consolidated, big sharks swallowed up little fish, and the railroad barons strung together large interstate networks. A few names, like "Atchison, Topeka, and Santa Fe" (later called the Santa Fe Railway) remained for many years to remind us of the older stage. At any rate, the individual states had neither the legal nor the political muscle to control these giant railroads. They had become a national concern.

The commerce clause of the Constitution gave Congress power to regulate commerce "among" the states. This was taken to mean power over interstate movements of vehicles and goods. The Supreme Court had for many years emphasized the negative aspect of the commerce clause: the commerce clause prevented states from impeding the flow of commerce across state lines. Now came the positive side: the power of the national government to regulate commerce itself. The ICC Act was not the federal debut in regulation or in the administrative business, but it was a major step in a fateful direction.

Some historians feel that the ICC has been looked at through the wrong end of the telescope. They claim it was in fact not an attempt to tame the railroads, and was in no way a reform measure, passed in the public interest, and in response to a public outcry. Rather, it was the railroads and not the citizens who benefited from the law. The ICC put a lid on competition; its regulatory actions were a protective cocoon for existing railroads. It guaranteed friendly guidance from a sympathetic agency, decent profits, and orderly markets for all.[20]

Some parts of this thesis are quite plausible, though it no doubt goes too far. Laws like the ICC Act, controversial laws, complicated laws, are rarely if ever one-sided. Railroads had a powerful voice in Congress, to be sure; so did farmers and shippers, in the aggregate. Both groups influenced the law. The ICC Act, as is typical, was some kind of compromise. Each side gained something, and lost something, too. This much is clear. The farmers and shippers gained some measure of control over rates and practices. The railroads gained order and protection. Administrative regulation, as a general rule, has to strike some sort of compromise between battling interest groups. The results are almost never all one way. The hard question is to assess who won the most, and why. Often, "compromise," which implies a certain rationality, is not the right word: the interplay of forces and interests produces a monster—a misshapen, irrational mess, with something for everybody, to be sure, but no coherence, no consistency, no underlying sense. Indeed, the ICC Act may well have fallen into that category.[21]

In any event, the ICC Act foreshadowed the rise of the administrative state at the federal level. In the twentieth century, the pace accelerated.[22] The Food and Drug Administration dates from 1906; the Federal Trade Commission Act, which was supposed to put teeth into antitrust law, was created in 1914. The New Deal of President Franklin D. Roosevelt, in the 1930s, was the next great watershed. Congress established a flock of new and powerful agencies. Some reflected twentieth-century technology, for example, the Federal Communications Commission (1934), which controlled "communications by wire and radio," later adding television, satellite, and cable communications. Others came out of the social changes and reforms of the New Deal, for example, the Securities and Exchange Commission (1934), which regulates stock exchanges and the sale of stocks and bonds by corporations; the National Labor Relations Board (1935), with its powers over union formation and collective bargaining; and the Social Security Administration (1935), a major federal incursion into a field (welfare) that had once been strictly local.

The New Deal is in many ways still with us. And presidencies since Roosevelt's only added to the stock of agencies. Under Lyndon Johnson, the Office of Economic Opportunity (1964) was created to run the "War on Poverty." The War on Poverty is dead now, but many of the Johnson programs, like Medicare and Medicaid, remain, and are administered by vast bureaucracies. And the Equal Employment Opportunity Commission was created in 1964 to enforce the new civil-rights laws.[23]

There was also a growing awareness in the 1960s of what seemed to be a conflict between the market economy and the health and safety of consumers: problems of clean air and water, problems of product safety, problems of the environment and Mother Nature. Rachel Carson's 1962 bestseller *Silent Spring* laid out the dangers of widespread pesticide use and the disinformation campaign by chemical companies. Ralph Nader followed a few years later with another popular book, *Unsafe at Any Speed*, alleging that automobile companies were knowingly putting unsafe vehicles on the street. Mining accidents and other workplace disasters served to highlight the shortcomings of workplace safety regulations.

As the public began to pay attention, their representatives began to respond. In the late 1960s and early 1970s, Congress passed a slew of new laws regulating business. This was the era of the Clean Air Act (1970), Clean Water Act (1972), and Federal Environmental Pesticide Control Act (1972). Congress consolidated existing transportation agencies into a new U.S. Department of Transportation, and set up the National Transportation Safety Board as an independent agency—free (it hoped) from political influences. The Occupational Safety and Health Act (1970) set up a new agency to protect employees from workplace hazards like toxic chemicals, excessive noise, and mechanical dangers; the Consumer Product Safety Act (1972) created a new agency to protect people from dangerous products. In all, Congress passed twenty-five laws regulating business between 1967 and 1973.[24] Eugene Bardach and Robert Kagan describe this legislation as a "quantum leap" in federal action to protect public safety.[25]

Meanwhile, administrative agencies have multiplied like rabbits on the state level, too. The occupational licensing boards mentioned earlier are all state agencies; the great rush to enact licensing laws began in the 1890s. The states have their own laws on corporate securities ("blue-sky laws"), and they are in control of many areas of life (zoning is one) that the federal government leaves almost entirely alone. Some state regulatory agencies have tremendous significance: the Texas Railroad Commission, despite its name, controls the oil and gas industry in Texas; it has power to stop the production of oil "in excess of . . . reasonable market demand," which gives it fantastic economic leverage.[26] There is a huge mélange of boards and agencies, on every level of government.

A TYPOLOGY OF ADMINISTRATIVE BODIES

There are so many agencies, their work is so various, and they operate in such different ways that it is almost a hopeless task to try to describe them in general terms. One useful way to classify them is by subject matter. Thus, some agencies are concerned with

regulation of business and labor (Securities and Exchange Commission, National Labor Relations Board), others with welfare (for example, the Social Security Administration), still others with public resources (for example, the Bureau of Land Management). Again, some regulating agencies regulate single industries (airlines, banks), others regulate business in general (Securities and Exchange Commission, Occupational Safety and Health Administration).

Another important way to distinguish among agencies is to look at their structure. Some agencies are "independent," others are not. An agency is legally independent if it is not attached to an executive department. Independence means the executive cannot control the work of the agency. The president appoints National Labor Relations Board members; once they are installed in office, he is not their "boss," and they do not have to obey his commands. The Bureau of Land Management (BLM), on the other hand, is part of the Department of the Interior. The BLM director makes policy, but the Secretary of the Interior is the boss and can supervise the business of the BLM, and so can the boss's boss, the president of the United States.

Independent agencies, even some of the small ones, sometimes flex their muscle in ways that catch people by surprise. In 1997, there was a low-level trade dispute running between the United States and Japan. As part of that dispute, a small, independent federal agency called the Federal Maritime Commission imposed a series of minor fines on Japan's largest shipping companies, mostly to persuade Japan to drop a complicated set of rules it was imposing on American ships in Japanese ports. When the shippers didn't pay, the commission exercised the full extent of its powers: it ordered the Coast Guard to bar Japanese cargo ships from U.S. ports and detain any Japanese ships currently in port.[27] This move—denying another country access to U.S. markets—was, in the words of the *New York Times*, the "nuclear option" of trade talks, and shocked both the Japanese government and the Clinton administration, which had no advanced warning of the decision.[28] The economic repercussions of cutting off billions of dollars in trade between the two countries would have been tremendous; the mere announcement of the decision drove down the stock market and the value of the dollar. Luckily, the dispute was settled relatively quickly, avoiding an all-out trade war between two enormous economies; but the Federal Maritime Commission had made its power, and its autonomy, crystal clear.

We can also draw a distinction between "friendly" and "hostile" boards and agencies, if we remember not to take these terms too literally. "Friendly" boards and agencies are manned by the very people the board or agency is supposed to regulate. The Federal Aviation Administration is not "friendly," in this sense. This agency is part of the Department of Transportation. It has an administrator and a deputy administrator. By law, neither may have "a pecuniary interest in, or own stock in or bonds of, an aeronautical enterprise."[29] The state boards that license druggists, plumbers, or optometrists are a different story. Druggists, plumbers, or optometrists control these boards and fill all or most of their seats. For example, the state board of optometry in California consists

of eleven members, appointed by the governor. There are to be five laypeople ("public" members), but the other six must be registered, practicing optometrists.[30]

There are good historical reasons for the difference between the two types of agency. Licensing of plumbers was probably the plumbers' own idea. They wanted to keep out amateurs, enhance their own prestige, control the work, and hold prices steady and stable. These are mostly economic goals, not very different from some of the goals of labor unions or of workers generally. But not all occupations are able to band together and form an effective union. Against whom could druggists, doctors, or plumbers call a strike? Whom could they ask for a raise? They can best achieve results by forming trade groups and by persuading the legislature to license their occupation, vesting in a board of practitioners the power to decide who gets licenses, and how and why. This puts control of membership and work conditions firmly in friendly hands.

At least part of the thrust to regulate railroads, on the other hand, was "hostile." It came from shippers and merchants who feared the railroads, who thought railroads had far too much power for the good of the country. Of course, there is more to the story of railroad regulation than that. Many concessions were made to the railroads as the ICC Act journeyed through Congress, and the results, as we noted, were fairly incoherent. But the hostile element remained part of the package. This is true of economic regulation in general.

Whatever the origin of railroad regulation, or regulation of public utilities, airlines, and so on, what happens in practice? Whom do the commissions serve? Often, it is claimed, the regulated industry ends up "capturing" the agency and bending it to suit industry purposes.[31] The ICC became the creature of the railroads early in its career; television networks allegedly took over the Federal Communications Commission. The puppets shove aside the puppetmaster and make him dance on their strings.

There is, on the whole, some truth to these charges. For one thing, regulators have to live with their subjects. They learn to see things through their subjects' eyes. Also, commissioners are supposed to regulate businesses, not kill them. A state power commission, let us say, has power to fix rates. A gas or electric company applies to the commission for a rate increase. It presents facts and figures about rising costs: coal, oil, and labor are all more expensive. If the commission accepts the facts and figures, it will grant the increase, more often than not. The commission, after all, is responsible for the health of the industry. The gas and electric companies are privately owned and must show a profit. Then, too, some commissioners come from the industry they regulate, and many expect to go back there when their terms are up. They are reluctant, then, to be tough and unyielding. Historically, the public or consumer interest has been weak, diffuse. Who, after all, speaks up for John and Jane Q. Public, day in and day out, at the agency? In many cases, nobody. Yet lobbyists and lawyers for industry have always been there, pressing their cases.

There is some empirical evidence in support of the "capture" idea. For example, David Serber[32] studied California's department of insurance and the way it handled consumer

complaints in 1969. He painted a depressing picture. The department leaned over backwards to accommodate insurance companies; consumers who made noise were treated as cranks by the staff; the staff systematically disfavored women, blacks, lower-class people, and anybody who seemed "inarticulate or angry." This was a small state agency, and the data came from 1969, but it seemed to reflect what was going on more broadly. Administrative agencies were in bed with big business; nobody was looking out for the little guy.

In the 1960s, this situation—the "capture" of the agencies—became a real issue. New business laws were passed; but just as important was what Richard Stewart termed "the reformation" of administrative law.[33] Regulatory processes were changed to allow for more agency accountability and citizen oversight. Courts came up with new "standing" doctrines that allowed citizens' and advocacy groups to challenge agency action (and inaction) in court; they also began to take a "hard look" at agency decisions to make sure they were the product of a reasoned decisionmaking process based on sound evidence. Congress required federal agencies to produce and disclose the environmental effects of their decisions in "impact" statements. And, crucial to this project, Congress gave people the information they needed to keep an eye on these agencies, through the Freedom of Information Act (1966) and other open government laws. The beneficiaries of regulation began to have a greater role in the process.[34]

Soon after this burst of new laws and administrative processes, the pendulum swung back. In his 1981 inaugural address, Ronald Reagan led the charge, blaming overregulation for the country's economic woes; and declaring that "government is not the solution to our problem; government is the problem."[35] Reagan, his successor George H. W. Bush, and the Republican Congress elected in 1994 all emphasized the downsides of the administrative state: red tape, bureaucracy, and interference with business, to the detriment of the economy. There was certainly evidence to support their claims; "regulatory unreasonableness" was a problem in many areas of the administrative state.[36]

This "counterreformation" manifested itself in some real legal changes over time. Some industries were "deregulated." Airlines, as we mentioned, were deregulated as early as 1978; some other significant industries—energy, communications, and finance—came later. Administrative law was also tweaked over time. Proposed regulations were subject to a more exhaustive "cost–benefit" analysis; the goal was to prevent overregulation. There was more executive oversight and control over agency actions; and "standing" doctrines were limited in ways that made it more difficult to challenge agency action (or, more to the point, inaction).[37] All this, perhaps, made a difference; but the size and reach of government did not, in the end, change all that much.

More recently, the president has tried to assert greater control over the work of regulatory agencies. In the last few decades, presidents from both political parties have required, by executive orders, that many proposed regulations be submitted to the Office of Information and Regulatory Affairs (OIRA). Originally, OIRA was supposed to coordinate agency action and promote the use of cost–benefit analysis, but there are

those who think it is used more and more to control, alter, and delay agency action.[38] After the terrorist attacks on September 11, 2001, Congress created a new cabinet office, the Department of Homeland Security, and threw into this new department twenty-two rather diverse agencies.[39] The vision (and theory) of the administrative state is that agencies would be independent, transparent, efficient, and nonpolitical. But the reality is that the agencies are and always will be deeply embedded in politics and the political system.[40]

The debate continues: Do we need more or less regulation? Is the administrative state too big or too little? Probably the best answer (as so often) lies somewhere in a calm quiet zone between the shouting on all sides of the controversy. Does the administrative state dispense justice or injustice? Probably both. A lot depends on *what* the agency is, whom it regulates or services, and how. The Internal Revenue Service, a state department of motor vehicles, an agency dealing with abused children, the antitrust division of the Justice Department—these are all different, with their own internal cultures, their own ways of handling clientele.

CONTROL OF ADMINISTRATIVE BEHAVIOR

Administrative process is everywhere in the modern world. It is the fastest-growing part of the law, yet in some ways the least visible. Administrators have a great deal of power. Even some lowly clerk at the bottom of the ladder can sometimes act with great authority. To someone who wants a pension or a dog license or a zoning variance, or to a company that wants to float bonds or build a new plant, the power of administrators seems boundless, almost out of control. One of the biggest issues in administrative law is, how tightly should agencies be kept in check? Who will watch the watchmen? Who will do the job, and how?

Administrative agencies are subject to both inside and outside control. Inside control is control built into the structure of an agency. Higher officials supervise lower officials. Inspectors and auditors monitor the working bureaucrats. Reports, spot checks, reviews, and internal audits prevent corruption or sloppy work. At least one hopes so. Outside control begins with the governing law. Controls and limits are written into the text of the law for each specific agency. Thus, the Federal Trade Commission (FTC) has power to prevent or stop "unfair" methods of competition, but the FTC Act also specifically gives businesses whose methods are challenged the right to appear and fight, with lawyers, at formal hearings.[41] There are also more general controls. The Administrative Procedure Act (APA), first passed in 1946, applies pretty much across the board. It sets ground rules of procedure that all agencies must follow. For example, under the APA, an agency must publish "descriptions of its central and field organization"; and it must make public its rules of procedure and inform the public where people can pick up necessary forms. All of these actions will appear in the *Federal Register*. The agency must also make public its rules and regulations, and it has to give notice when and if it intends to

change these rules. The *Federal Register*—in 2014, it ran to over 78,000 pages—is hardly the six-o'clock news, but at least it is accessible to lawyers and specialists who know what to look for. Agencies have to spread on the *Register* the gist of any of their new rules, and they must give the public a chance to object or to make comments in writing.

Congress, with its statute-writing power, is the most obvious outside control over federal agencies. Congress passes the laws that make the agencies; it can repeal those laws and kill its creatures. It can give them new marching orders any time it wishes. Congress (after intensive lobbying from industry) told the Consumer Product Safety Commission in 1981 to lower safety standards for power lawn mowers. The commission had no choice but to obey.[42] Sometimes Congress uses the power of the purse. In 2009, Congress gave money to the Environmental Protection Agency (in an appropriations bill) and urged the agency to study hydraulic fracturing ("fracking");[43] the Environmental Protection Agency responded with a draft report of its findings in 2015.[44] And, of course, Congress has the ultimate power: the power to destroy an agency altogether. As we saw, it got rid of the ICC in 1995.

Some controls are inside the agencies but outside the regular chain of command. It is possible to give controllers or inspectors great independence, even though technically they belong to the organization they seek to control. The army and navy have inspectors general. So do many governmental agencies. The Inspector General Act of 1978 created such offices in cabinet departments and in some agencies (the Environmental Protection Agency, for example).[45] The inspector general is authorized, among other things, to "receive and investigate" complaints about waste or abuse. The inspector general is supposed to keep secret the identity of whistle-blowers.

This form of control is based in part on the concept of the "ombuds." The word, if not the idea, comes from Scandinavia. Many private institutions—Stanford University, for example—have set up such posts for themselves. The ombuds is an official who is independent of the agency, and also, one hopes, independent-minded; he or she hears complaints from employees or others and tries to deal with them. Presumably the ombuds has no ax to grind and makes fair and impartial recommendations. How much actual power an ombuds has depends on the particular institution.

Congress has attempted, too, to guarantee that the agencies deal fairly with people who complain. The employees of agencies who decide "cases" brought by outsiders are much more independent than they once were. They are called "administrative-law judges" (ALJs), and the point of calling them by this name is to emphasize that they are supposed to do justice, not slavishly follow what their superiors in the agency want. As of 2010, there were more than 1,500 administrative-law judges in the federal system.[46] This number, however, has been fairly static, and there has been a kind of backward trend; "non-ALJ adjudicators," however, were for a time "sprouting faster than tulips in Holland," and by 1996 already numbered more than three thousand. The agencies have come to prefer hearing officers who are "easier to manage, and who can be procured at bargain rates" (ALJs are well paid).[47] Nonetheless, the *idea* behind the corps of

administrative-law judges is, basically, alive and well—the notion of a fair and impartial hearing for people and companies who feel that some agency has done them wrong.

Judicial review is perhaps the best-known form of outside control of administrative agencies. Most of what is called administrative law, as taught in law schools, is really the law of judicial review. Suppose a company is dissatisfied with an agency's decision: a drug company wants to market a diet pill, and the Food and Drug Administration (FDA) refuses to allow this. The company first has to "exhaust" procedures or appeals inside the agency—in a big, complex agency there will be a regular pyramid of hearings and appeals. If all these steps go against the company, it has one more chance: it can try its luck in court. Statutes creating administrative agencies almost always provide for, or imply, a right to review decisions in court. The Administrative Procedure Act itself has such a provision, and the Supreme Court has held that a right to review is implied unless Congress firmly and explicitly says otherwise. This happens from time to time. Congress declared that certain decisions of the Veterans Administration (now a cabinet-level department) were absolutely "final and conclusive." No court had power to review any such decision.[48] This, however, is a highly unusual situation.

Getting a court to review a decision of the FDA or the NLRB or the SEC is not a simple matter; one does not just snap one's fingers and file a complaint. Many roadblocks stand in the way. To begin with, there are procedural problems. One, mentioned briefly above, is the concept of "standing." Not everybody can complain about what an agency does. To have standing (the right to complain), the complainant usually has to show a financial stake—the drug company blocked by the FDA is an obvious example. But if the Department of the Interior decides to let Hilton Hotels build a lodge in Yellowstone National Park, can I complain in court (or in the agency) because I backpack and bird-watch in Yellowstone? Probably not; I have no standing. Using or liking or enjoying Yellowstone is not enough. Rules of standing are complicated; as they broaden or narrow, the scope of judicial review broadens and narrows in turn. For a while, during the reformation of administrative law in the 1960s and 1970s, federal courts began to apply more liberal rules about standing; they were willing to stretch a point to allow groups that represented "the public" to intervene in decisions, even though they had no financial stake. This opened the door to conservation groups that opposed power plants, and to church groups or just plain viewers who complained about the policies of some TV station.[49] In the 1980s and 1990s, the courts tightened up somewhat; as one judge, Richard Posner, put it in 1991, plaintiffs would be "tripping over each other on the way to the courthouse if everyone remotely injured by a violation of law could sue to redress it."[50]

Also, the scope of judicial review is narrow. Courts do not second-guess the agencies. If the FDA decides a drug does not work and takes it off the market, the manufacturer, after "exhausting" its agency rights, can indeed try to persuade a court to overturn the FDA decision. But as a general rule the court will not actually rehash the evidence; it will not ask whether the drug works or not. On that point, the court will consider itself bound by what the agency decided, especially its findings of fact. After all, it is the agency

that has expert knowledge; it is the agency that has on its payroll chemists, engineers, economists, and whatnot. The court will check only to see if the agency violated the law in some way. Did the FDA follow the Administrative Procedure Act correctly? Did the FDA do what Congress told it to do, and in the right way, according to the governing statute? Was its decision supported by *some* evidence? If the answer to these questions is yes, the court will, almost certainly, refuse to overturn the agency's decision.

All well and good; but in fact the line between procedure and substance, between decisions of "law" and decisions of "fact," is quite fuzzy, and some courts have been known to review agency work in a bold and assertive way. Before the New Deal, courts were on the whole hostile to administrative agencies; they scrutinized their work rather carefully, some would say too carefully. During the New Deal, the Supreme Court reflected this hostility in a number of notable instances. The Court did not want Congress to "delegate" its essential powers to agencies. Perhaps the most notorious New Deal decision was *Schechter Poultry Corp. v. United States*.[51] Here the court declared the National Industrial Recovery Act unconstitutional and knocked out one of the keystones of Roosevelt's program.

Schechter and similar cases raised storms of protest. In the long run, President Roosevelt won his point. The old, conservative judges resigned; the president appointed new ones more in tune with his views. The Court lost most of its taste for savaging administrative agencies. After the New Deal period, a long honeymoon set in for the agencies. Courts were reluctant to intrude into administrative decisions except in extreme cases. They refused to interfere if what the agencies had done was in the least bit defensible procedurally and had any shred of evidence to back them up.

That honeymoon seems to have ended in the 1970s. Then came a generation of diminished deference. Individuals and groups on the outside were more active than before in fighting the agencies in court, and the courts themselves started taking a more active role in controlling administrative behavior. A Washington, D.C., lawyer, in 1974, spoke for most lawyers when he talked of a "strong impression" that judicial review was tougher than before; the courts fancied themselves "as watchdogs at least comparable to the stature of the agencies."[52] This was the era of the "hard look."

In 1984, in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,[53] the Supreme Court told courts to respect the way agencies interpret the law; agency interpretations on doubtful points were to be upheld, unless they flatly contradicted what Congress had plainly said. This was understood by commentators to mean a regime of more respect for agency determinations and less vigorous judicial review. And, in fact, a study of the work of the courts published a few years after the decision showed that federal courts *usually* sided with the agencies—about three times out of four, in fact.[54]

But judicial review remains a powerful tool. How much impact it has, on any particular agency, is a tough (and largely unanswered) question. Why, despite *Chevron*, is it likely that judicial review retains its power? Courts are sensitive to what goes on in the outside world. The public generally has lost some of its faith in administrative process.

Administrative process, of course, is here to stay; but some people think of it as a necessary evil at best; they talk about "red tape," "bureaucracy," "Big Brother." Perhaps these attitudes make a difference in the way courts approach the work of the agencies.

Judicial review is expensive and time-consuming. Only a big drug company has the money to attack an FDA ruling. But new actors began to enter the stage in the 1960s and 1970s, representing new interests—consumers, for example, or the environment. Of course, no single consumer has the time, money, or skill to battle against the giant agencies or lock horns with the great corporations. But when consumers band together, the story is quite different. Where would environmental law be without the pressure of groups such as the Sierra Club, or the Natural Resources Defense Council (which took part in the *Chevron* case)? Particularly important are the "public interest" law firms, organized to fight legal battles on behalf of consumers. There are only a few of these firms, but they pick their battles and make a big splash in the courts.

Again, a change in public attitudes lies behind this trend. Consumers band together because there is a consumer movement; that is, some consumers feel suspicious of business or government and what they do, and want to take action to make their weight felt. There is always discussion about whether agencies are responsive enough to the public. This is a tricky subject. Often when people complain about unresponsive agencies they mean that the agency does not respond to *them*. But an agency may ignore group A because of pressure from group B, which is pulling in the opposite direction. In such a case, we can easily, but mistakenly, imagine that the agency is performing poorly because of technical, structural, bureaucratic reasons. The agency in fact *is* responsive; what is wrong (from our standpoint) is its pattern of response. Technical reform will not cure the problem. What is needed is political reform, giving group A more power, or exerting pressure on our own (if that is what we want).

On the other hand, there really does seem to be something about a bureaucracy that slows down its actions and toughens its outer skin. After all, the whole point of making agencies independent is to free them from short-run political pressures and control. If we make jobs "civil-service" jobs instead of patronage jobs, we loosen the grip of politicians and "special interests." But this can work all too well. When we regularize promotion and tenure, when we make internal controls stronger than external controls, we run the risk of distorting the incentives of those who staff the bureaucracies. Individual creativity is discouraged and downgraded; outstanding performance becomes risky. Timid, bureaucratic minds dominate the agency. Those who stick to the rules and never get in trouble are rewarded. Policy change becomes almost impossible.

Bureaucracy is at the heart of modern law and government. A vast civil service grinds away in thousands of tiny offices, churning out rules and applying them. To many people, it seems like a troop of blind army ants, mindless and implacable, following rules the way ants follow instinct. The work of life, to be sure, could not go on, in contemporary society, without this corps of ants. There is the charge that the bureaucracy squeezes vital juices out of the economy and commits, day in and day out, nagging, petty acts

of tyranny. Is there some way to give the modern state a human face? Is effective, efficient, and fair government possible? Can we make regulation "responsive"?[55] All sorts of reforms have tried to supply an answer. It is not easy to judge their ultimate success, but there seems little doubt that some of the worst forms of abuse have been brought at least partially under control. What is easy to forget is the *benefit* side of the administrative state. Many people insist they want government "off the people's backs," which means rolling back the bureaucracy. Yet, when a plane crashes, or a warehouse explodes, they are likely to complain with shrill voices that the government was not strict *enough* with regulation and inspection. If there is a flood, a fire, an earthquake, they want rapid response from federal emergency agencies. They want service in all sorts of ways, and they want it fast. Among the fundamental rights of the citizen is the right to hold contradictory opinions at once.

7

Federalism and American Legal Culture

ONE OBVIOUS, STRIKING fact about the American legal system is that it is organized on a *federal* basis. A federal system is a government and legal system in which the central, national government shares power with states, provinces, or sections, each of which is to some degree sovereign in its own right. There are quite a few countries in the world organized on a federal basis. One of the best examples is Canada, our northern neighbor. Australia is also a federal state. So is Switzerland. So is Germany. The now defunct Soviet Union was supposed to be a federation, made up of individual "republics" (Russia itself, Armenia, Estonia, and so on). Each Soviet republic, in theory, even had the right to secede. In fact, Moscow called the tune, and when it relaxed its iron rule, the union disintegrated, and the individual "socialist republics" all became independent states. The European Union—formerly the European Economic Community—is an interesting hybrid. The *general* government is relatively weak, and the individual countries (France, Italy, Germany, Austria, Denmark, Portugal, and the rest) retain their seats in the United Nations, their ambassadors, and all the trappings of sovereignty—and a great deal of control over their domestic law and politics. But this may change over time; indeed, the central government of the European Union—the bureaucracy in Brussels and the courts—is already more powerful than many people ever expected. It has produced a currency (the euro), which most of the countries share (though some, like Sweden, do not); and it relaxed border controls within the European Union for most countries. But the euro has not been a total success; and a crisis of refugees and asylum seekers has brought back a passion for border controls. In June 2016, the British voted

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to leave the European Union. The European version of federalism is thus, to a degree, in crisis.

The United States is a federal country that takes its federalism, on the whole, quite seriously. The national government sits in Washington, D.C., but the fifty states are hardly empty shadows. The states have their own governments and their own capitals, and within their spheres they are supposed to be "sovereign," that is, in full control. In many ways, they echo the structural patterns of the federal government. They all have constitutions—and these are, very often, quite different from the federal Constitution. They have legislatures, with two houses in every state but one. Each state has a chief executive, the governor. Each has its own court system, as we have seen. Each has a cabinet, an executive staff, and a flock of administrative agencies. Of course, the states are sovereign or independent within certain limits. The national (federal) government is more powerful, employs vastly more men and women, and taxes and spends much more than any particular state. It is only Washington that sends out and receives ambassadors, coins money, owns guided missiles and aircraft carriers, and tries to "fine-tune" the economy through control of the money supply. On the other hand, the federal government does not as a general rule arrest speeders, grant divorces, or probate wills; it does not pass zoning ordinances or run school districts; it does not foreclose mortgages, repossess televisions, or put people on trial for robbing gas stations. It does not do most of the ordinary, workaday jobs of the law.

Federalism, as it has evolved in this country, is a complex and interesting system.[1] It is also a good example of the interaction between structure and culture, within our system of laws.

FEDERALISM: THE FORMAL PLAN

The basic story of the American Constitution is well known. After the Revolutionary War, the former colonies became independent states. They set up a central government, under the Articles of Confederation. This central government was relatively weak; real power stayed in the states. Many people considered the experiment a failure: there was fear of anarchy as the separate states began to squabble in an unruly way, unrestrained by a strong central authority.

The Americans (or many of them) resolved to try again. A convention was called and a new plan drafted: the Constitution of 1787. It gave more power to the central government. It is still an open question exactly how much power the framers intended to give to the national government. Clearly, the men who wrote the Constitution intended to provide some muscle for the national government, but they also intended to keep a strong role for the states. They proposed to divide power between the two levels of sovereignty, spelling out in general what the central government could do and what was left to the states. Some powers, of course, would have to be shared. Many details of the division were left rather obscure.

The center had power over war and foreign relations; it had power to levy taxes, run a postal system, and coin money. It also had some smaller powers important to the legal

system—power to lay down "uniform" rules for naturalization and "uniform laws on the subject of bankruptcies"; also power to grant patents and copyrights.

The Constitution also set up a separate court system for the central government. At its head was a (federal) Supreme Court, along with "such inferior courts as the Congress may from time to time ordain and establish" (Article IV, Section 1). These courts would have jurisdiction over questions of federal law. They would handle admiralty cases as well. Admiralty cases were maritime cases—cases about affairs on the high seas or about the business of ocean commerce. In England, these cases went before a special court, the court of admiralty; in America, the powers of this court were given to the federal courts. The national courts also had jurisdiction to decide cases "between Citizens of different States." This is the so-called diversity jurisdiction. The idea here was that the federal courts would provide an impartial forum, free of state jealousies, rivalry, and chauvinism. The federal courts, unlike state courts, would not show bias against "outsiders," people from other states; that was the idea behind diversity jurisdiction.

The Constitution also listed some sovereign acts specifically forbidden to the states. They were not to coin money or levy any taxes on imports or exports (except "what may be absolutely necessary for executing . . . inspection Laws"). Commerce was to pass freely from state to state, without barriers or costs. The states were also shut out of foreign affairs; they were not to "enter into any Treaty, Alliance, or Confederation" or any "Agreement or Compact . . . with a foreign Power." They were not to wage war, except with congressional consent. Relations with the outside world were the province of the central government.

What about those areas where the federal and state governments both have the power to make law, where they have "concurrent" powers? Here, the Constitution gives a simple answer: if there is any conflict between the two, federal law trumps state law. The Supremacy Clause (Article VI, Section 2) establishes that the U.S. Constitution, federal statutes, and treaties are "the supreme law of the land." This means that any federal law—even the lowliest federal regulation—preempts any conflicting state law, even provisions of a state constitution. The basic idea of the Supremacy Clause is easy to grasp; figuring out when, exactly, a federal law comes into conflict with a state law can be tricky, and courts have developed a whole body of preemption law to sort it out.

There was a good deal of opposition to the proposed Constitution at the time, but in the end it was ratified nonetheless. The hope was that the central government would be strong enough to keep the country from disintegrating into little quarreling baronies—strong enough for that, but no more. The states had control of their domestic affairs, and of everything not specifically granted to the central government. That reserve, most people thought, *was* a vast and important domain.

FEDERALISM: HISTORY AND CULTURE

Federalism, of course, is much more than a formal plan. It is also a tradition, and it is an important facet of our legal culture. In fact, federalism as a structure would be

meaningless or empty unless federalism were also part of the culture. To understand federalism in this country, how it grew and how it changed, it will not do simply to tell how the constitutional plan has altered over time. Indeed these changes (on paper) are fairly small. The Constitution of 1787 is still very much with us. It has gone well past its two hundredth birthday, yet it has been amended only sixteen times since 1800. By now, it is by far the oldest written constitution still in force anywhere. There are countries with much longer histories, but most of them (like France) have suffered constitutional upheaval time and time again. There is no American Third Reich or Fifth Republic. There is still the first and only American republic. The Civil War was, to be sure, a major constitutional crisis, but even then, the Constitution survived (though at tremendous cost in blood).

But in what sense has the Constitution "lasted" or "endured" for two centuries or more? The words are the same, but the music? Can a plan set up in 1787, in the horse-and-buggy age, when men wore powdered wigs, and before the Industrial Revolution got going, really suit the world of the twenty-first century? Probably this is not the right question. Obviously, in many ways, the Constitution, as it was understood in 1787, cannot possibly fit the world of today, but the constitutional *system* has evolved over the years. The reality of federalism has drastically altered in the process, and the culture of federalism along with it.

This is precisely what we would expect. Massive social and economic changes have taken place in the last two centuries. Technology has altered the world. In 1787, communication between the center and the periphery was tortuously slow. A message from New Hampshire to Georgia took days or weeks. Over time, the telegraph, telephones, radio and television, jet airplanes, computers, satellite communication, and the Internet, all made it possible to govern a continent from a single nerve center. The power of Washington, D.C., in the twenty-first century would be unthinkable without these innovations. And these innovations are a factor in the growth of the power of the central government. When travel was painfully slow, when there was no quick way to send messages or communicate from region to region, the states were necessarily much more on their own; and this was much less a single country. People used to say "the United States are"; now they say, "the United States is"; is, in other words, a single country.

Swift means of travel and communication have created mass markets across the country and stimulated the consumer economy. Travel, too, has been revolutionalized. The American population is restless and mobile. People ceaselessly cross state lines, by train, plane, and car, looking for new jobs, visiting relatives, searching for sunshine and scenery, and so on. If there is to be any control over the national economy, it will have to come from the center. And in the age of nuclear weapons and international terror gangs, people want central control over foreign affairs and diplomacy (not to mention war).

Social change, culture (attitudes), and legal structure are bound together in so many ways that we cannot ever really disentangle them. None of the three basic elements of law—structure, substance, and culture—has meaning without the others. Federalism

is a structural fact. It also generates substance (rules about state and national powers). These in turn influence the legal culture. At the same time, it is the legal culture (what people think and believe) that makes federalism a living part of law, a structure with meaning. And the legal culture is not static. It changes along with society.

Federalism in the first half of the nineteenth century was a far cry from federalism today. The national government was a tiny dot on the legal map. Washington, D.C., was a miserable village, with muddy roads, appalling summer heat, and few permanent inhabitants. The federal government was pathetically small by modern standards. The Department of the Treasury in 1801, which "far overtopped any other administrative agency," contained more than half the civilians who worked for the federal government. It had seventy-eight employees in its central office, and 1,615 in the field.[2] In 1829, the whole body of federal employees in Washington, "from the lowliest clerk, messenger, and page boy to the President," and including congressmen and senators, was 625.[3]

In short, the central government was small and, in many ways, insignificant. It played second fiddle to the states. The states probably loomed much larger in people's lives than the federal government. People thought of themselves as citizens of Virginia or Pennsylvania first, as Americans second. The national legal system was like the tiny brain of a giant dinosaur. There was not much in the way of a central nervous system. The weakness and remoteness of the federal government became even more pronounced as one traveled west. In the early nineteenth century, people in a state like Kentucky, separated by mountains from the eastern seaboard, saw little use for a central government and were rather bitter about its revenue laws (which they largely ignored). But we should not exaggerate the point. Mary Tachau has studied the federal courts in Kentucky during this period; she found in these courts a surprising level of strength and activity.[4] Still, in most respects the state government was the heart of public life, the national government distant and irrelevant.

In one regard, the West was more national-minded in the later nineteenth century, though for a rather special reason. Local culture and local tradition were thinner in the West than in the East and in the South. The population of the West was a migrant population. People in Idaho or Oregon had no roots there; there was no state patriotism of the Virginia type. Americans were rolling stones. What could devotion to Montana, or love for Montana culture and tradition, mean in 1890, when most people who lived there had literally just arrived? Even today, state "patriotism" varies greatly from state to state, depending on cultural tradition. There is tremendous local pride, almost nationalism, in parts of New England and the South. In California or Arizona most people are raw newcomers who came for sunshine or jobs, or are at best the children of newcomers. The idea of a California "patriot" is absurd in a way that the idea of a fanatical Texan is not.

American legal culture is local in another sense. Judges and lawyers are locals. There is no national career line for judges. State judges cannot cross the border and still be judges: once a Delaware judge, always a Delaware judge. There is no way to transfer to Pennsylvania. Even federal judges tend to be locals: the district judge in North

Dakota is a resident of North Dakota. The lower bench is even more parochial: judges of Aroostook County, Maine, will stay there, unless promoted; they will not take up court in Kennebec County. (In some states, however, the chief justice or a court administrator can shift judges around temporarily, to clear up backlogs.) Lawyers also tend to be local. A lawyer who practices in Memphis, Tennessee, will not take cases in Louisville, Kentucky. While many large law firms have branch offices in many cities (a rather recent phenomenon), most lawyers within the firm will practice primarily at one of the offices; they will not, ordinarily, leave "home."

It is true that major law schools claim to be "national"; they draw students from all over the country and ignore the law of the state they sit in. Only a handful of the students in the Yale Law School will practice in Connecticut, even though the school is in New Haven. Yale students will learn very little about Connecticut law in the classroom; they will study the common law as a general system, along with some aspects of national (federal) law. Students will argue about cases under the federal Constitution. The constitution of Connecticut will probably never get mentioned.

Freshly minted lawyers, however, are often great travelers. In an earlier day, they flocked to new settlements out west. Today, many will leave home for New York or Washington, D.C., or other centers of practice, or for places like Seattle or Denver that appeal to them. Still, most of these fledgling lawyers will not wander very long. Once the tumbleweed days are past, they take root in one place and stay there. Each state admits lawyers to its own bar only; some states once admitted lawyers county by county. A Georgia lawyer is a layperson as far as Oregon is concerned. A lawyer who moves to a new state does not automatically get "reciprocity." He or she may have to take the bar exam over again, like the rawest recruit. In general, then, lawyers are pretty much bound to one jurisdiction, just as the judges are.

This state of affairs makes American legal culture somewhat parochial; it tends to keep alive aspects of local legal culture. This point was vividly illustrated by a study of delay and congestion in trial courts.[5] The researchers wanted to find out why cases, once filed, had to wait so long for trial in some cities, while in others there were only short delays, or no delays at all. In other words, some courts were slow, some were fast, but why? The scholars started out with hunches about the reasons, but none of these, surprisingly, panned out, either in civil or criminal cases: "Neither court size, nor trial rate nor judicial case load, nor use of settlement conferences, differentiates faster from slower courts."[6] Then what does? The scholars fell back on what they called local legal culture: "informal court system attitudes, concerns and practices." Judges and other courtroom hands had old, deep-seated habits and ideas. How quickly cases were handled differed from city to city, but judges and lawyers knew only what went on in their own bailiwick. What happened someplace else never came to their attention. Thus, local legal culture was slow-moving, a kind of legal molasses. Fads like the hula hoop or disco dancing or taking "selfies" race across the country; local legal culture barely crawls.

In some ways, then, courts and lawyers in different communities are sealed off from each other. But we must not carry the point too far. The federal court system is fairly uniform, and it enforces national policy. Federal courts follow local law in "diversity" cases; but the Federal Rules of Civil Procedure (and of Criminal Procedure) govern courtroom behavior and the local rules of procedure (if different) do not. Nor do federal courts bow down to local opinion and local prejudice in matters on which Washington (or the national Constitution) has spoken. This became dramatically clear after the *Brown* decision in 1954. Some federal judges were segregationists and resisted the Supreme Court decision as much as they could; others, however, acted with great honor and courage and refused to defer to local norms.[7] As a whole, the lower federal courts were much more willing than the state courts to carry out civil-rights policy in an honest, consistent way.

Except at the federal level, the country is not *legally* unified, at least in matters of detail. But it is definitely unified in economic life. There is also a common language, and the culture has a certain commonality, from coast to coast. There are strong regional differences, of course, but TV and rapid travel and the Internet and internal migration are tending to level these off as time goes on.

The economic unity of the country is especially basic. People and products stream across state borders. There is no legal way for one state to keep out the goods of other states. The Constitution expressly forbids it. Vermont cannot put import taxes on New Hampshire goods. Colorado cannot exclude the products of Utah. At most, a state can stop rotten fruit and sick cows at its borders. Beyond this, it cannot go.

Nor does a state have power to keep out unwanted people, any more than unwanted goods. Oregon has no right to chase migrants from Ohio away. At one time, states were able to keep out "paupers" (or try to), but the Supreme Court put an end to this practice years ago.[8] No state, said the court, can "isolate itself from difficulties common to all . . . by restraining the transportation of persons and property across its borders." According to the Constitution itself, if a criminal escapes into another state, that state has to extradite him, that is, he must be "delivered up," on demand of the governor, to the "State having Jurisdiction of the Crime."[9]

The Constitution also provided for the return of fugitive slaves, although it included them rather delicately in a more general phrase: persons "held to Service or Labour." They were to be "delivered up on Claim of the Party to whom such Service or Labour may be due."[10] Congress accordingly passed a number of fugitive-slave laws to put this provision into effect. These were controversial laws, wildly unpopular in parts of the North. Attempts at "slave catching" in the North sometimes led to outright defiance, or even bloodshed. No issue put a greater strain on federalism than this one.[11] Slavery and race pitted state against state, region against region. The Civil War by no means ended the conflict.

Slavery put a strain on federalism because, under the constitutional scheme, states are required to recognize, and give effect to, the laws of other states. This meant, for example, that states with tough divorce laws had to recognize (by and large) divorces in the easy

states. In 1996, the *chance* that Hawaii would recognize same-sex marriages led to a kind of moral panic on the mainland. Would other states have to recognize these marriages? Congress quickly passed a law, the Defense of Marriage Act (DOMA), to try to prevent just this result,[12] though its attempt, in that regard, was largely redundant because states already had the power to refuse to recognize out-of-state marriages on grounds of public policy. The same-sex marriage controversy represented a kind of cultural protectionism; the Supreme Court put an end to it. First, in 2013, it declared parts of DOMA unconstitutional;[13] then, in 2015, it made same-sex marriage legal in the entire country.[14]

The states have not always been free from the more ordinary type of protectionism—economic protectionism. That is, they have often tried to wriggle out of the constitutional plan, passing laws to benefit their own residents at the expense of people in other states. Some cities and states in the nineteenth century tried to tax to death out-of-state peddlers or put special burdens on "foreign" corporations (that is, corporations from other states). A Virginia law of 1866, for example, required agents of "foreign" insurance companies to get licenses; the companies had to deposit bonds with the treasurer of the state. The Supreme Court upheld the law,[15] partly on the grounds that "issuing a policy of insurance is not a transaction of commerce"; insurance policies were not "commodities to be shipped or forwarded from one State to another." Thus they were not "interstate commerce," which Congress might regulate, but were off limits to the states. In the twentieth century, however, the Supreme Court vastly expanded its definition of "commerce," and protectionist measures have on the whole done poorly in the courts. They have failed economically as well. State borders are as weak as pieces of string.

These borders are meaningless in other ways, too. They are never great cultural divides, as is sometimes the case in Europe. Every single state (except Hawaii, a collection of islands) has a straight line somewhere on its borders. Western states are mostly lines on a map: Wyoming and Colorado are rectangles, plain and simple. Rivers separate Wisconsin and Minnesota, Kentucky and Ohio, Missouri and Illinois, but even these natural boundaries do not divide one civilization or language from another. North Dakota and South Dakota are separate states, but not separate cultures. They do have different criminal codes, divorce laws, and tort laws, and somewhat different systems of procedures. Some differences in legal structure and in the culture of lawyers and judges do tend to persist over time. But in many ways these differences are not terribly important, except to lawyers. In any event, legal differences between the two Dakotas, or the two Carolinas, do not closely map differences in economy or society or culture. Legal differences between the states, then, tend to be rather minor, on the whole. This is, after all, a single country. The state laws are like dialects of a single language. (Louisiana is in some ways an exception.) A man with a strong Boston accent can tell a Southerner a mile away, but the two of them can still talk easily to each other. The border with Canada means much more, legally speaking, than does the straight line between North and South Dakota; and the border with Mexico is legally very wide and very deep, much wider and deeper than the Rio Grande and much, much harder to cross.

FEDERALISM AND THE "MARKET" FOR LAWS

The central fact of American federalism is worth repeating: the United States is by and large an economic union, by and large a social union, but not a legal union, or at least not completely. State laws are, or can be, rather similar, but this is, first, because the states choose to harmonize their laws, and, second, because conditions in the states are fairly similar. A state is free to be different (if it wishes), within its zone. But since the 1860s, the central government has gotten stronger and stronger, and there has been a steady, marked change in relations between states and the federal government. It is obvious why this took place. Changes in technology and socioeconomic structure paved the way. In the age of the Internet, satellite communication, and jumbo jets, the country is a single entity to an extent undreamed of in 1787.

When all is said and done, however, the states still maintain a substantial reservoir of power. This makes possible what we might call a "market" for laws. The states vie with each other for "customers," by passing competing laws. And one state can frustrate the policy of others by offering for sale (so to speak) a cheaper, better, or simply different brand of law.

Nevada is, in a way, an extreme example.[16] Nevada is a large but barren state, mostly mountain and desert. It was admitted to the union in 1864. There is some mining in Nevada and some cattle here and there munch at sparse grasses, but basically there is not much to do for a living in the state. The population in 1900 had fallen to about 42,000. Still, this wilderness of sagebrush and ghost towns had one great ace in the hole: it was a sovereign state, like all the others. It had a governor and a legislature. It had the power to pass whatever laws it wanted. This was a kind of natural resource, just as much as silver or gold.

Specifically, Nevada could compete with its neighbors, especially California, the giant to the west, by passing laws that California did not have and that the legislature in California did not seem to want. Nevada could legalize behavior that was illegal in California. Hence Nevada, either deliberately or by happy accident, stumbled into its present role. First, as early as the 1920s, it became a divorce mill. This was not a new idea. There had been divorce mills—places where divorce was quick and easy to get—in other states in the nineteenth century: Indiana, the Dakotas. Those divorce mills eventually collapsed under the weight of moral indignation.[17] Moral indignation has never been big in Nevada.

Nevada is also the motherland of legal gambling in the United States. Today, gambling and its spin-offs are the largest industries in the state. Thousands and thousands of pleasure seekers from California fly or drive there across the Mojave Desert. Jets bring millions of people to Reno and Las Vegas from all over the country and abroad.[18] Nevada allows its counties (except Clark County, where Las Vegas is located) to legalize houses of prostitution. No other state has gone this far (not, at any rate, officially). Nevada also competes for the marriage business. It requires less time and fewer formalities than

California, and it allows anyone over sixteen to get married with the consent of one parent. Many California couples, of all ages, who want to elope, get in a car and hightail it for the Nevada border. They bring along their wallets, and the newlyweds pump still more money into Nevada's economy.

Nevada is only one blatant example of how the "market" works. Delaware is another. This tiny state, clinging by its fingertips to the base of Pennsylvania, is the "home" of thousands of corporations, including great corporate giants. All sorts of companies are chartered in Delaware without any real connection to the state; it would not be the least bit surprising to find that (say) a Denver bus company was actually a Delaware corporation. Why is the state so popular? The answer is no secret: around 1900, Delaware deliberately passed lenient corporation laws. This attracted companies like bees to honey. They set up "headquarters" in downtown Wilmington, Delaware. These were, for the most part, nothing more than tiny cubbyholes where the company could receive mail. (The real head offices were elsewhere.) Many of these companies are there to this day. Their taxes, low as they are, are a boon to the Delaware economy.

Increasingly, states, and their cities, are competing for more than just a company's official "home"—they want the real head offices, the factories, the distribution centers, the stores. To get them, they offer economic development incentives, subsidies, in an attempt to influence decisions on locating factories and firms. Sometimes these involve direct spending, such as investment in infrastructure. Cities build stadiums and arenas to entice professional sports teams to move to (or stay in) their city. Other times, the incentives consist of tax breaks. Is this money well spent? Alan Peters and Peter Fisher summed up the consensus of nearly fifty years of studies this way: "There are very good reasons—theoretical, empirical, and practical—to believe that economic development incentives have little or no impact on firm location and investment decisions."[19] The rebates, however, are politically popular, and mount up to tens of billions of dollars each year.[20]

States don't just spar over the big stuff; there are hundreds of smaller competitions for products and the tax revenues that comes with them. Take fireworks. Laws regulating the sale and use of consumer fireworks vary widely from state to state, even county to county. In some states, you can't buy fireworks at all; in others, you can buy and use only small novelties like sparklers; and in still others, you can get almost anything, including rockets that fly through the air and explode.[21] (This difference between states helps explain the fact that large fireworks stores tend to cluster along state borders.) Over the last couple of decades, states have been racing to loosen their restrictions on the sale of fireworks. "The states are all competing for revenue," said Julie Heckman, the executive director of the American Pyrotechnics Association. "[T]hey got tired of the general public crossing state lines, purchasing products and bringing them back in."[22] The number of states banning all consumer sales dropped from around ten at the beginning of 2000 to just three—Delaware, Massachusetts, and New Jersey—by 2015.[23]

States also directly compete for new residents, and have done so for a long time. In the nineteenth century, many Midwestern and Western states, hoping to attract new

settlers from overseas, offered resident aliens the right to vote so long as they intended to become U.S. citizens.[24] Some of these states struggle to entice residents to this day. Kansas, for example, recently declared seventy-seven of its counties to be "Rural Opportunity Zones." "There's something special about life in rural Kansas," their marketing materials declare. "Something authentic and wholesome." In case the subtle pleasures of rural Kansas aren't quite enough, the program offers state income tax waivers for new residents and, for those who are college graduates, student loan repayments up to $15,000.[25] Other states, like Florida and Texas, boast of the fact that they have no state income tax at all.

We can note another consequence of the national "market" in laws. For the longest time, the divorce law of New York State was unusually stringent. Basically, adultery was the sole ground for divorce. Year after year, there was pressure to loosen up these laws, to bring them in line with the divorce laws of other states. There was also strong pressure on the other side, some of it for religious reasons, from the Catholic Church and its faithful, or from Protestants who feared the consequences of easy divorce. Probably New York could hold out so long precisely because there was an escape hatch in Nevada, at least for those with money enough for the trip. In other words, New York stumbled into a kind of rough compromise. The strict divorce laws remained on the books, making their moral statement. But the shoe did not pinch too hard: rich New Yorkers went to Reno and got their divorces anyway. Needless to say, this arrangement was not completely satisfying, especially for people without much money. Nevertheless it lasted for generations: New York eventually loosened its laws. It was, however, the last state to adopt no-fault divorce, which it did in 2010.[26]

In other words, the legal "market" has both advantages and disadvantages. On the one hand, a state can forge ahead of its neighbors: it can act, as Justice Louis Brandeis once put it, as a "laboratory" of social reform. On the other hand, conservative states, for their part, can retard economic changes. This was what happened in labor law, for example, before the New Deal. Organized labor gained political power in the northern industrial states, and these states passed the first tough child-labor laws. Southern states had no such laws on their books, or if they did, they enforced them fitfully. The northern states were faced with the problem of runaway factories; textile mills and other plants would and could pack up and go south, where wages were low and where children could work in the mills. In general, the southern states failed to adopt the welfare and labor statutes that became standard in the North and West, or accepted them much more slowly. Since capital and labor could easily flow from North to South, the federal system was a drag on reform. Or so it seemed to Northern liberals.

It was a frustrating situation. The southern states made a mockery of the labor laws of northern states, in much the same way that Nevada made a mockery of New York's divorce laws. The remedy had to be on a national level, that is, through federal law. Congress obliged. It passed a statute in 1916 that prohibited the interstate shipment of goods made in factories that used child labor. But a conservative Supreme Court,

in *Hammer v. Dagenhart*,[27] declared the law invalid. Congress, said the Court, had no power to pass such a law. The case set off a storm of protest. There were attempts to get around *Hammer v. Dagenhart* through the taxing power or through constitutional amendment. For one reason or another, these measures failed. Effective control of child labor, on a national scale, was achieved only during the New Deal period, in the 1930s.

Child labor was a controversial subject, but for other fields of law, which were more "lawyerly" and less politically visible, there were more successful movements to come to grips with the problem of legal disunity. The best examples of "success" were in commercial law, in the uniform-laws movement, described in Chapter 5. The success of some of these laws, and in particular the Uniform Commercial Code, means that commercial law has at last become in essence a national legal subject.

FEDERALISM IN RECENT TIMES

The "market" effects we have talked about are still with us, as the example of Nevada shows. But their influence has gone down considerably, as the role of the central government has gone up. Federal control of economy and society is pervasive; traditional ideas of states' rights have come to impede the power of Washington less and less. The Constitution did not give the federal government much regulatory control, on the surface. It doled out power in teaspoons. The central government could regulate commerce "with foreign Nations, and among the several States, and with the Indian Tribes" (Article I, Section 8). "Among the several States" was assumed to mean commerce that flowed across state lines. But interstate commerce was the exception, not the rule, in the early nineteenth century. Commerce was mostly local trade.

In addition, Congress (before the Interstate Commerce Act) showed little inclination to regulate even interstate commerce, and the Supreme Court up until the New Deal tended to take a narrow view of congressional power—not narrow enough to please extreme "state's righters," but certainly narrow from a modern point of view. For example, in *United States v. E. C. Knight Co.* (1895),[28] a Sherman Act case, the government had moved to break up the so-called Sugar Trust. The American Sugar Refining Company had already gobbled up most of the country's sugar refineries and had just gotten its grip on four more, which would give it 98 percent of all sugar-refining capacity in the country. This certainly looked like a monopoly under the Sherman Act, but the Supreme Court decided against the government. Congress had power over "commerce," and the Sugar Trust was engaged in manufacture, not commerce. Of course, a monopoly of manufacture necessarily affected commerce, but the Court brushed this point aside.

This narrow view of the commerce clause and of federal power over national affairs is now almost completely discarded. The federal government in fact exercises vast control over the economy, and the legal barriers that the interstate commerce clause seems to imply now appear almost meaningless. Interstate commerce is the dominant form of commerce, and both Congress and the Court have reduced the limiting effect of the

interstate commerce clause to a thin, thin wisp of its former self. This process began in earnest in the 1930s, and it has gone very far indeed.

For example, the Civil Rights Act of 1964 outlawed race discrimination in stores, restaurants, hotels, and other public places. Where did Congress get the power to tell some tiny snack bar, some Southern greasy spoon, that it had no right to exclude black customers? A prior "public accommodations" law, of 1875 (passed after the Civil War), was thrown out in 1883 by the Supreme Court. Under the Fourteenth Amendment, said the Court, only *state* discrimination was outlawed, not private acts of discrimination.[29] Congress chose to solve the problem by resting its power on the commerce clause. Any restaurant that served interstate travelers fell under the act; so too if the "food which it serves . . . has moved in commerce." If the soup cans on the shelf, or the meat in a roast beef sandwich, or the box of Rice Krispies, had ever crossed state lines, then the restaurant came under the terms of the Civil Rights Act.

This line of argument was (perhaps) logically flimsy, but it was ethically powerful. The nineteenth century, or even the early twentieth century, would have found the argument absurd. The modern Supreme Court bought the argument eagerly and swallowed it whole. The case was *Katzenbach v. McClung*.[30] In this case, a place called Ollie's Barbecue, in Birmingham, Alabama, made legal history; it was the subject of the test case in which the Supreme Court gave its endorsement to that part of the Civil Rights Act of 1964 that made race discrimination unlawful in restaurants, inns, and hotels. This case only underscores the fact that the commerce clause was hardly much of a restraint on Congress any longer. When it came to enforcing national policy on an issue as sensitive as civil rights, the courts would impose no restraint.

It was something of a surprise, then, when the commerce clause corpse, in 1995, seemed to twitch and show signs of new life. The Supreme Court struck down the "Gun-Free School Zones Act," which made it a federal offense to "possess a firearm" in a school zone. To say that this had anything to do with interstate commerce was too much of a stretch for the Court. Even so, this was the decision of a bare majority of the Court—four justices vigorously dissented.[31] A few years later, in another close decision, the Court struck down a portion of the Violence Against Women Act on the same grounds, finding that "[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity."[32] Though these cases did not, in the end, set off a process of root-and-branch rethinking of the commerce clause, they at least established that there were *some* outer limits to the clause that restrained national power.

The commerce clause, in any event, is far from dead in its negative sense. It still operates as a limit on what the *states* can do. States are not allowed to discriminate against the goods of other states. California cannot bar Florida oranges. And state regulations that "burden" interstate commerce unduly, for instance, some weird rule about mudflaps on trucks, or restrictions on the length of interstate trains as they run through the state from outside, have been struck down by the courts.[33] In a landmark case in 1951, the Supreme Court reviewed an ordinance of Madison, Wisconsin. The city banned all supposedly

pasteurized milk unless it was processed and bottled at "an approved pasteurization plant within a radius of five miles from the central square of Madison." An Illinois milk company challenged the law. The Court struck down the ordinance. The concept of "preferential trade areas" was "destructive of the very purpose of the Commerce Clause." The ordinance put a "discriminatory burden on interstate commerce"; hence it had to go.[34] And in 1992 the Court struck down an Oklahoma statute that forced utilities in Oklahoma, if they used coal, to burn a certain proportion of coal mined in Oklahoma.[35]

This is a difficult, technical area of law. The courts have been struggling to find some reasonable middle ground. The states should have some right to run their own affairs, make their own policy. But the national economy comes first. Where is the line to be drawn? Can New Jersey prevent landfill companies from dumping in the state "solid or liquid waste which originated or was collected outside" New Jersey? The Supreme Court said no.[36] Yet the Supreme Court allowed Maine to ban out-of-state baitfish, mentioning the danger of "possible . . . parasites and nonnative species."[37] In another case, Montana charged its residents $30 for a license to hunt elk and other animals; outsiders had to pay $225. Was this a violation of the Constitution? No, said the Court; it was a reasonable way to preserve a "finite resource." [38] The line-drawing process continues.

Today, the federal government is a vast taxing machine, sucking up several trillion dollars to support its great enterprises and to feed its millions of mouths. The tax money goes primarily for three main objects: welfare entitlements (such as Social Security and Medicare), defense, and interest on the national debt. The armed forces of a superpower, in this dangerous world—even after the end of the Cold War—are obscenely expensive. Only the federal government can afford them; only the federal government is a player in world affairs. Arkansas has no nuclear weapons, no ambassadors, no say in international politics. But international politics is a matter of life and death, and so is international trade. These facts feed federal power and cut down the relative importance of the states.

Since the New Deal of the 1930s, more and more areas of American law, government, and life have crossed an invisible line from state responsibility into the federal domain. Before the New Deal, welfare law was as local as local could be. It was hardly even centralized at the state level; townships, cities, and counties ran the show. The Great Depression wrecked local finance. Social Security moved in. Today, the federal government is the dominant partner in old-age pensions, unemployment relief, Medicare, and most other social programs. Even the welfare "reforms" of 1996, which turned *some* of the responsibility back to the states, left untouched a massive federal presence.

Education, too, was once exclusively the affair of local school boards, with some degree of state supervision. In any event, the federal government had no say in the matter. In 1950, Congress passed a law granting money to "impacted" school districts. These were districts with special "financial burdens" because of some federal activity (an army base with heaps of kids, for example).[39] In 1965 came a dramatic change, the Elementary and Secondary Education Act.[40] This provided money for school districts generally, whether impacted or not. From that point on, federal money and federal rules, about bilingual

education, race segregation, children with disabilities, and so on, began to transform the law and practice of educational administration. The Department of Education is now a cabinet post, spending billions and overseeing dozens of programs. Noises have been made from time to time about abolishing the department, but there seems little chance that the federal role is about to evaporate. Quite the contrary. In 2001, Congress enacted the No Child Left Behind Act.[41] This law reauthorized the Elementary and Secondary Education Act and provided for reform of the educational systems of the country, based on national standards. Under the act, states are now required to assess their students; federal funding to state schools is tied to these assessments. Congress reauthorized the Elementary and Secondary Education Act once more at the end of 2015 with the Every Student Succeeds Act, which slightly narrowed the federal government's role in education.[42]

At one time, too, nothing was more solidly local, more exclusively under state and city control, than ordinary criminal justice. The local police took care of murder, robbery, and rape, and gambling and drunkenness, too. There were only a few federal crimes (smuggling, illegal immigration) in the nineteenth century; the federal government did not even have its own prisons before 1891. It boarded its few prisoners in state prisons.[43] Today, crime itself has gone interstate in many respects. Federal crimes became more significant in the twentieth century, because of laws against driving stolen cars across state lines; and laws against drugs, draft evasion, and income-tax fraud. There is a powerful Federal Bureau of Investigation; the federal government even plays some role in financing local crime-fighting. The Law Enforcement Assistance Act (1965) and the Omnibus Crime Control and Safe Streets Act (1968)[44] pumped money into state and local governments. The 1968 act stated that crime was "essentially a local problem," but that the high incidence of crime was a threat to the "peace, security, and general welfare of the nation." This justified a program of federal support for local law enforcement.

For the last generation or so, crime and criminal justice have been major *political* issues; consequently, they have vaulted into the spotlight in federal elections. Abraham Lincoln and Theodore Roosevelt did not have crime policies. But modern presidents have no such privilege. Presidents Clinton, Bush, and Obama all tried, in various ways, to show that they were tough on crime—and this means legislation. In the twenty-first century, no major program of government is completely "local" anymore—especially if it is politically hot; and this remains true despite all the talk about turning matters back to the states.

The federal government, then, has become a colossus. Yet the old balance is not completely dead. Federalism still has some hold on legal culture. There is an intense ideology favoring government close to home. The Constitution tried to build a system of "checks and balances." Executive, legislature, and judiciary would control and monitor each other. State governments would balance the federal government; the federal government would keep states under control. All this was part of the original plan. The founders distrusted unbridled power. They rejected the divine right of

kings or kinglike rulers. They preferred a kind of warlord system, that is, a government made up of little pieces, of small fiefdoms, without overall plan or direction. Even in the nuclear age there is something to be said for the plan. Much battered by history, it never quite gave up the ghost.

The Republican Congress of 1994 zoomed into office vowing to reverse the trend and give government back to the states. They appealed to a nostalgia for an older federalism, a federalism tilted more strongly away from the center. The Supreme Court seemed to be of a similar mind, and spent the next two decades reviving some of the federalist constraints on congressional action. The Court, as we saw above, began to set some outer limits on the commerce clause. It also reined in congressional power to pass legislation under its Fourteenth Amendment enforcement powers, striking down portions of the Religious Freedom Restoration Act,[45] the Age Discrimination in Employment Act,[46] and the Americans with Disabilities Act[47] that applied to the states. To top it off, the Supreme Court came up with some new principles of federalism that were not tied to any particular constitutional provision.[48] It restricted Congress's ability to "commandeer" state officials to enforce federal law,[49] and prohibited Congress from authorizing suits against states in state courts.[50] Between 1991 and 2001, the Court found ten federal statutes unconstitutional on the basis of federalism; in the fifty years before that, only one federal statute was declared invalid on the basis of federalism, and that decision was later reversed.[51] The federalism flurry continued into the twenty-first century, most notably when the Supreme Court struck down a key provision of the Voting Rights Act.[52]

But there may be less to this "new federalism" than meets the eye. Issues of federalism have not gone away; and probably will not, as federal and state governments jockey for power and position. "States' rights" has always been a political slogan, rather than an ideological one. In the modern world, the United States is a national economy; and a major world power. In the modern world, images and messages travel around the world in nanoseconds; and physical travel is rapid in a way that the founding fathers could not have dreamed of. Federalism will survive, but as a junior partner in the massive task of running a mighty superpower and an economy worth trillions of dollars, in a dangerous world of nations locked into a system of mutual dependence.

8

Inside the Black Box: The Substance of Law

THE STRUCTURE OF law, the court system, legal procedures, legal history, the place of law in society—all of these are important subjects. But at the core of the legal system are its actual operating rules, the substance of law. What behavior does the system try to control? How well does it do it? How does the law influence behavior? What conduct does it encourage or discourage? These are key questions in any society.

The legal system affects our lives every day. This is especially true when we take a broad view of law, defining it as all public social control. The system is of awesome bulk, and it touches on many matters, big and small, as the tale of the trip to the grocery in Chapter 1 made clear. The law also operates on many levels. Imagine yourself living in Omaha, Nebraska. You are, of course, a citizen of the United States of America. You are under the Constitution of the United States, under its protection and also constrained by the kind of government it sets up. As an American, you are under the wing, or the thumb, of the federal statutes. The unannotated version of the federal statutes, 2012 edition, ran to thirty-four volumes of text, averaging more than a thousand pages per volume. True, most of this mass of material has nothing to do with you or your life, directly or indirectly. Still, a surprising amount of it may have an impact on you or your family, sometimes (or often) in ways you are totally unconscious of. You may, for example, neither know nor care about the law of patents. But inventions that were patented under patent laws, from telephones to computers to safety pins, most definitely matter to you. You run into the banking laws every time you go to the bank or use an ATM. We could multiply examples endlessly.

American Law: An Introduction. Third Edition. Lawrence M. Friedman and Grant M. Hayden.

The federal statutes are only a start. There are also more than five hundred volumes of Supreme Court cases and well over two thousand volumes of decisions of lower federal courts. Here even less of the contents concerns most of us personally, but in this great mass of words there are undoubtedly decisions (on war and peace, on the economy, on abortion or affirmative action) that do affect millions of people, every day. Then there are the federal regulations, volume after volume, and decisions of administrative agencies and tribunals on food and drug matters, the income tax, labor law, civil rights, stock markets. It is literally impossible to count these.

Yet this is only federal law. You are also under the jurisdiction of Nebraska. It, too, has a legal system. The Revised Statutes of Nebraska fill a good-sized shelf. A cumulative supplement, published in 2014 and covering only some of the changes in the law of Nebraska since 2001, ran to three volumes and 3,468 pages. There are also the reported cases of the Nebraska Supreme Court (several big shelves), and the rules, regulations, and decisions of state agencies. We are not yet done: there is the City of Omaha, too, with its ordinances and its local rules, regulations, and decisions, about schools, about traffic, about local sanitation, about where you can build a house and where you cannot, and so on.

All this amazing mass of material has to be organized in some way. Otherwise, nobody could teach law in law school and lawyers could not navigate their way through the mess. It is perfectly clear that no lawyer can ever hope to "know the law." Every lawyer knows some of it, of course, and a specialist lawyer knows some of it well and precisely. But even the most learned lawyer is ignorant about most of our law. What lawyers do know (or should know) is the *limits* of what they know. They also know how to "look up law," and how to deal with law once it is found.

The written laws, in other words, are like entries in a gigantic English dictionary. Most people know some of the words, the easy, everyday words. Specialists know the words that belong to their specialties (biologists know biology words, gourmets know food words, soccer players know soccer words). The same is more or less true of the law. People in general know the easy words (judge, jury, contract, mortgage, murder). They also know some simple rules. Lawyers know a lot more: they know the basic principles, the stuff everyone learns in law school. Specialists know their fields—tax law, for example. But the tax expert may know little or nothing about food and drug law or admiralty law or the law of prisoners' rights.

We have been talking about the visible, written parts of the law. But lawyers are not just people who look up law. Many lawyers operate day after day without looking anything up in a book or on a computer. They have experience; they have gone through the ordinary processes a hundred times before. They have closed dozens of house deals, or probated dozens of estates, or handled a hundred divorces, or filled out countless tax returns. They also know how the legal system actually works in their towns. They know whom to see, what to do, what forms to fill out, when to wait quietly and when to move swiftly and soon. Their practical knowledge is a vital part of their skills, as vital as "knowing the law."

CLASSIFYING LAW

The Romans were probably the first people to address the problem of reducing law to a system. Long before the Romans, of course, societies had laws and codes of law. But as far as we know, early peoples like the Babylonians and the Hittites did not write treatises about law or try to organize legal knowledge in some systematic way. The Romans did. They organized and classified their laws, and they did so in a way that has proved useful—or at least historically persistent—ever since.

Classical Roman law, for example, drew a line between the "law of persons" and the "law of things." William Blackstone, whose *Commentaries on the Laws of England* tried to sum up English law for a lay audience in the middle of the eighteenth century, used the same distinction, and it is also found in many basic civil codes in Europe and Latin America. In Louisiana, too, the first part (Book I) of the civil code is called "Of Persons" and includes (among other things) rules about marriage, divorce, and minor children. Book II is called "Things and the Different Modifications of Ownership"; it is basically about property law.

Civil-law scholars (mostly European) have always been interested in classifying law. They have searched for some rational and systematic way to break law down into subjects or parts. The common law has shown a lot less zeal for this task. Of course, over the years, the common law has expanded, to the point where it has reached an uncomfortable size. As this happened, scholars in England tried to take it apart and put it together in some handy way, restating the whole in convenient form. Blackstone was one of these scholars. He borrowed his arrangement, essentially, from civil-law scholars. As we have noted, his *Commentaries* were wildly successful, especially in this country. There were many "American" editions, that is, versions of Blackstone with special notes on American sources and the differences between English and American practice.

After independence, American jurists tried their hand at the Blackstone game, this time with respect to American law. The most notable effort along these lines was James Kent's *Commentaries on American Law*, first published between 1827 and 1830. This work, in four volumes, was arranged more or less like Blackstone's *Commentaries*. It, too, ran into many editions.

Blackstone was a good popularizer but not much of a legal philosopher, at least not by European standards. Still, his book was far more systematic than most of the earlier attempts, in England, to cope with the common law as a whole. The "abridgments" of the law were another method of trying to restate the basic rules of the common law. The word "abridgment" might seem a bit ironic, since some of the abridgments were many volumes long. They were arranged as crudely as possible: alphabetically, by topic.

This idea, too, carried over into America. Nathan Dane put together an *Abridgment of American Law* in the early nineteenth century, with the same general organization (or lack of organization). Huge, alphabetical legal encyclopedias, used as reference books, continued to be produced into contemporary times. One of these is *Corpus Juris*,

which (along with its continuation, *Corpus Juris Secundum*) tries to cover the whole of American case law. *Corpus Juris* is arranged alphabetically, by topic, like a dictionary or encyclopedia; so are many digests of state or multistate law. The second edition of *American Jurisprudence*, one of the major digests, currently runs to eighty-three volumes; the first volume begins with "Abandoned Property," the last volume ends with "Zoning and Planning." Contemporary lawyers also have at their fingertips electronic systems for searching the law. A lawyer's office is still conventionally lined with sturdy rows of impressive-looking books; but most lawyers (and their assistants) now find the law online, reading it off screens and printing it out rather than looking it up in books.

An alphabetical arrangement means that the arranger has no overall theory for joining the pieces together. But the arranger must still find a way to carve the huge carcass of the law into segments or pieces. Otherwise, one could not even list things alphabetically. Like flour or sugar, law has to be packaged in boxes or sacks before one can handle it. Conventionally, there are dozens and dozens of such packages, to be found in the encyclopedias, but most of the categories (like "Abandoned Property") are of minor importance. A few categories are of major significance; they constitute big, basic subdivisions of law. These chunks of subject matter are often the names of basic courses taught in American law schools. A few of these big subdivisions will be mentioned here, and briefly described.

Contracts. Contracts is the body of law that by and large concerns voluntary agreements. Most people understand more or less what it means to enter into a contract. They realize that a contract is a bargain or agreement between two people (or more) to do some work, to buy or sell goods, to put up a building or tear one down, or to perform countless other activities, which one person or company promises to do in exchange for a counterpromise (usually a promise to pay money). Anytime you buy a newspaper, or a car, or even a can of soup, you are technically making a "contract."

More than a century and a half ago (1861), the great English jurist Sir Henry Maine published a book called *Ancient Law*. In a famous passage, Maine tried to describe how the law had evolved over the years in "progressive" (that is, modernizing) societies. In such societies, Maine argued, the law moved "from status to contract." What he meant was that legal relations in modern societies do not depend primarily on birth or caste; they depend on voluntary agreements. Elizabeth II has been queen of England because of an accident of birth, but it is not an accident of birth that I may be making monthly payments on a used yellow Chevrolet, it is because I agreed to buy the car, on my own, as an adult, and quite willingly.

In this sense, a regime of contract is fundamental to modern society. The whole economy—indeed, the whole social system—rests on this basis. But a regime of contract, a system of contract, that is, an economy organized around voluntary agreements, governed mainly by the market, is not the same as the law of contracts as conventionally defined and taught in law schools. The law of contracts only deals with certain aspects of the market, and with certain kinds of agreement.

In legal terms, a contract is a promise (or set of promises) that the law protects and enforces. If I promise to deliver a carload of lumber and the buyer promises to pay me a certain price, and I do not deliver the lumber, I have "breached" my contract. The buyer can sue me for damages, if the buyer chooses.

To make a valid contract, generally speaking, we need at least two parties; both have to have legal "capacity." A small child or someone who is mentally incompetent cannot legally enter into a contract. One side must make an "offer"; the other side must "accept" it. "Offer" and "acceptance" are ordinary English words, but they have specialized, technical meanings in law. A department store ad that announces an "offer" of a sewing machine for sale at a low price, as a "Thursday-Only Special," is probably not making a legal offer. For one thing, there is no actual promise to sell the sewing machines. If, for example, the public gobbles up the sewing machines that the store has on hand, the store (probably) cannot be forced to sell cheap sewing machines to disappointed customers.[1] An "offer" that forms the starting point for a contract, however, has to be a real promise. An "acceptance" is a promise that follows an "offer."

"Offer" and "acceptance" are promises, then, and they must be supported by a mysterious substance called "consideration." This is an intricate legal concept, hard to define in a sentence or two. The underlying idea, however, is fairly simple. Each party to a contract makes his or her promise "in consideration" of something that the other one promises. If I offer to sell my old car for $2,000, and the buyer accepts (promising to pay $2,000), the "consideration" on each side is clear. But if I promise to give my daughter a bushel of stock certificates because I love her, there is no "consideration" for my promise; she contributes nothing in return. (Love, alas, does not count in the law of contracts.) Here, if I fail to deliver (or die before I get a chance to), she has no right to sue me or my estate and claim the stock certificates.

There are, of course, many other issues in the law of contracts. Samuel Williston's treatise on contract law, the leader in the field for many years, lumbers through volume after volume.[2] There is, however, some question whether all this lore matters very much in the world of affairs. In a classic article, Stewart Macaulay explored the behavior of businessmen in Wisconsin. He found that many of them tended to avoid or sidestep (formal) contract law and (official) contract doctrine. They especially shied away from suing each other, even when they had a good case according to the law as expressed in treatises and court decisions. The reason was not at all mysterious. The businessmen depended on each other; they lived and worked in networks of continuing relationships. A manufacturer might buy paper clips, pens, and office supplies from the same dealer, year in and year out. Suing at the drop of the hat, or arguing excessively, or sticking up for abstract "rights," would be disruptive; it might rip apart these valuable relationships. Also, there were norms, practices, and conceptions of honor and fairness that businessmen customarily followed. These were more subtle, more complicated, than the formal norms of the lawyers.[3]

"Contracts" is a standard first-year course in every law school. Yet it is probably a less important part of the living law than other fields that build on contract law or contract

ideas. One of these fields is commercial law. This is the branch of law that concerns the buying and selling of goods, especially sales for credit and on the installment plan; it also deals with checks, promissory notes, and other "negotiable instruments." Another related field is the law of bankruptcy and creditors' rights. A bankrupt business or individual goes through a process that wipes the slate clean and allows the bankrupt to begin again. Even more important, the bankruptcy process is designed to ensure fairness to all of the creditors. It tries to avoid a dog-eat-dog struggle over the assets of wrecked businesses and failed debtors. Bankruptcy law is a federal concern and is administered in the federal courts. Another rapidly growing field is the law of consumer protection. Still other fields concern themselves with special kinds of contract, for example contracts of insurance. Insurance contracts, like the insurance business, are quite heavily regulated and subject to distinctive rules.

Torts. Tort law is usually defined as the law of "civil wrongs," and it is hard to give a more exact definition. I commit a tort if I hit somebody accidentally but carelessly with my elbow or my car; if I falsely call someone a thief or put this accusation in writing (slander and libel); if I have somebody maliciously arrested, or invade somebody's privacy, or trespass on someone's land without permission.

This is a more or less ragtag collection of behaviors, which have little in common except that they are all defined as wrong and do not grow out of a contractual relationship between victim and "tortfeasor." They are also "civil" wrongs, which means they are not crimes (at least not necessarily). If I wander onto somebody's land by mistake and trample on something valuable, I may have to pay, but I have not committed a crime and I will not go to jail. It is not a crime for me to back out of a parking space and dent somebody else's fender, unless I did it willfully and recklessly. But of course I have to pay. There are torts that are also crimes, especially if the behavior is reckless or malicious. The ordinary tort is not.

A tort is conduct that causes injury and does not measure up to some standard set by society. Everything listed in the last paragraph is a tort, but some torts are more important than other torts. The heart of tort law is the action for personal injury, a claim against a person or company for hurting the claimant's body in some way. Probably 95 percent of all tort claims are for personal injury. Auto accidents, nowadays, are responsible for a hefty share of these. Formerly, railroad and work accidents were the most prolific sources of tort cases. Indeed, the law of torts was insignificant before the railroad age of the nineteenth century, and no wonder. This branch of law deals above all with the wrenching, grinding effects of machines on human bodies. It belongs to the world of factories, railroads, steamboats, and mines—in other words, the world of the Industrial Revolution.

Basically the railroad created the law of torts, with a bit of an assist from the steamboat industry. Not a single treatise on the law of torts was published before 1850, either in England or in the United States. The important early tort cases in this country often came up out of railroad accidents. Nicholas Farwell, who worked for the Boston and Worcester Railroad, had his hand smashed in a switchyard accident and sued the

railroad; he ended up getting nothing for his injury. It was probably cold comfort that his case, *Farwell v. Boston & Worcester R.R. Corp.*, was a landmark decision and made legal history.[4] In this case, the chief justice of Massachusetts, Lemuel Shaw, announced an American version of what came to be known as the "fellow-servant rule." Under this rule, an employee could not sue his company for work injuries if the accident was caused by the carelessness of a coworker (a fellow servant; servant, in this period, basically meant employee). Of course, if a worker was injured in a factory or mine or on the railroad, and somebody's carelessness caused it, the source was almost certainly another employee. Thus the rule protected employers against almost all claims of injured workmen.[5]

Nonetheless, industrial accidents, incidents in which workers like Farwell were mangled by machines, were a fertile source of tort cases in the nineteenth century.[6] In the twentieth century, the fellow-servant rule was abolished; an administrative system, workers' compensation, replaced it. Each state has a workers' compensation law. Under these laws, generally speaking, *all* work accidents are compensated, no matter who is or is not at fault, but the amounts of recovery are limited. In the twentieth century, too, the auto accident came to occupy center stage in the world of torts.

More recently, two subfields of the law of torts have received a lot of attention: medical malpractice and products liability (injuries caused by defective foods, toys, appliances, drugs, or other commodities). A study of jury trials in Cook County, Illinois (Chicago and its suburbs), between 1960 and 1979 documents how auto accidents dominated in the lower courts. Of the civil jury trials in that period, 65.5 percent were auto-accident cases. Medical malpractice cases rose from 1.4 percent of the load to 3.5 percent at the end of the period; products liability rose from 2.3 percent to 5.8 percent.[7] A broader survey of state courts in the nation's seventy-five most populous counties in 2005 gave a snapshot that was consistent with the earlier findings from Cook County. The newer survey looked at all civil trials, including both those that went to a jury and those decided by a judge alone (a "bench trial"). Auto accidents accounted for more than half of the tort cases, more than a third of the cases overall, and an even higher proportion of jury trials. Tort cases were much more likely to be heard by a jury—this happened 90 percent of the time—than were disputes over contracts, at 36 percent, or real estate, at 26.4 percent. Medical malpractice claims were up to 9.1 percent of the total trials, though products liability cases dropped off to a mere 1.3 percent of the caseload.[8]

Medical malpractice and products liability claims, however, create an uproar in society out of all proportion to their numbers; the rise in medical malpractice cases generated a sense of crisis in the profession and led to all sorts of efforts to put a ceiling on how much plaintiffs could recover from doctors and hospitals. These efforts were successful in many states. "Tort reform," including limitations on recoveries, is still an important—and contentious—political issue. In fact, however, plaintiffs do not do particularly well in medical malpractice cases, at least those cases that go to a jury. A careful study of malpractice cases in North Carolina between 1984 and 1990 found that plaintiffs lost the vast majority of these cases; the median recovery was a piddling $36,500,

and million-dollar recoveries, despite all the noise in the media, were as rare as hen's teeth.[9] In that 2005 survey of seventy-five counties, medical malpractice claims were still among the hardest to win (only 22.7 percent of plaintiffs won their cases), though the median award was up to $400,000.[10] A later paper from the National Center for State Courts concluded that medical malpractice claims were declining in number and that the awards were generally proportionate to the severity of the injury.[11]

A fundamental concept of tort law is "negligence." This means, roughly, carelessness. Basically, if somebody causes me harm, I can sue for damages only if that person was negligent. The person I sue has to be at fault. If the person was as careful as he or she should have been (as careful as the imaginary "reasonable person," the yardstick for measuring negligence), then I cannot recover for my injury.

Thousands of cases have turned on what does or does not amount to negligence. In the twentieth century, the concept went into something of a decline, especially in products-liability cases. More and more, courts imposed "strict liability," that is, a victim could recover even if there was no negligence and if the manufacturer was as careful as humanly possible. If a company makes jars of pickles and has good quality control, it can still happen that one jar out of a million is bad, slips through the net, and makes someone sick. The company has not been negligent, in nineteenth-century terms. But modern cases insist, on the whole, that the company must pay.

The Law of Property. The old common law was preeminently the law of real property, and the distinction between "real property" and "personal property" was crucial. Today, generally speaking, real property means real estate—land and whatever buildings are on it. But it also includes such things as growing crops. Everything else is either personal property (money, stocks and bonds, jewelry, cars, carloads of lumber, IOUs, bank deposits) or intellectual property (copyrights, patents, trademarks). We all have a stake in real estate, since we all live somewhere, and we work, study, and travel somewhere, too. Everyone is a renter or an owner, or lives with renters or owners, or, at worst, camps out or squats in a place that somebody else owns. But for most of us, property means more than real estate. It seems odd, then, that as far as the law is concerned the word "property" means primarily real property; personal and intellectual property seem less important.

Actually, personal property is legally a minor field precisely *because* personal property has become so important. There is no single, special field of law devoted to personal property. Personal property is what contract law, commercial law, and bankruptcy law—yes, and torts, too—are all about. Intellectual property concerns something even less tangible—copyright and patent laws, for example, which give writers, musicians, and inventors the right to control (and profit from) the fruits of their intellectual labors; trademark laws allow sellers to distinguish their goods or services by giving them exclusive rights to use certain signs, designs, or expressions. The laws governing personal property have become extremely significant, in these days when trillions of dollars are invested in stocks and bonds. Intellectual property, too, is a legal Cinderella: in the era

of the Internet and the World Wide Web, of gene splicing, software copyrights, and so many other issues, this branch of the law has blossomed. And in an era of brand names, trademarks are vital to the economy: the value of many companies rests primarily on their control of a brand name, which everybody looks for in products they want to buy and own. Nonetheless, there are so many special rules about real estate that it still makes sense to treat "property" as a separate field of law.

Which it is. It is both separate and fairly fundamental. Real-estate practice, too, is a significant branch of law practice. Still, historically considered, real-property law is a mere shadow of its former self. One of the major developments in our system, if you take the long view, is the relative decline of real-property law. In medieval England, to say that land law was the law of the land would be only a slight exaggeration. When Blackstone published his *Commentaries* midway through the eighteenth century, one whole volume (a quarter of his space) was devoted to land law. A modern Blackstone would shrink the topic to a fraction of this bulk, 5 or 10 percent, at most, of the total law.

Medieval England lived under a feudal system. Power and jurisdiction, the cornerstones of wealth and position in society, were based on land and land alone. The "lord" was a person who held an estate, a person with ownership, mastery, control over land. A person without land was a person with no real stake in affairs of state. The overwhelming majority of the English population was landless, or at best tenants on somebody else's land; but the common law, as it was expounded in the royal law courts, had little to say to these people. Even in this country, at one time, only persons who had interests in land were entitled to vote or hold office. Under the New York constitution of 1777, for example, only men who owned "freeholds" worth £100 or more, free and clear of debt, were entitled to vote for state senators (Article X).[12] All this, of course, has long since ended. Today, land is only one form of wealth. A great and powerful family is one that controls mighty enterprises, rather than one that rules vast estates.

Property law still covers a rich and varied group of subjects. To begin with, it asks: What does it mean to "own" land? How can I get title to land and how can I dispose of it, legally? There are issues about deeds, joint ownership, and land records and registration; and problems of land finance, including rules about mortgages and foreclosures. There is the law of "nuisance," which restricts me from using my land in such a way as to hurt my neighbors, pouring smoke or sending bad smells onto their land, for example. There is also the law of "easements" and the exotic law of "covenants" (especially those that "run with the land"): these deal with rights a person might have in a neighbor's land, rights to drive a car up a neighbor's driveway, to walk across a neighbor's lawn, or to keep a neighbor from taking in boarders. These are not rights of ownership; rather they are "servitudes"—restrictions or exceptions to the rights of a landowner, in favor of other people, or the public in general.

The common law was ingenious in carving up rights to land into various complex segments called "estates." These could be either time segments or space segments. A "life estate" (my right to live in a certain house, for example, until I die) is a time segment;

so is a three-year lease of a farm or apartment. Space segments include mineral rights (the right to dig underneath certain property) and air rights (the right to build on top of the property). In theory air rights were unlimited—up to the heavens, though after the invention of the airplane, the right to control the sky above your land became less literally true.[13] Nowadays, the condominium is also popular; I can own a slice of some building, even if my slice is thirty stories above the ground. The common law was also quite ingenious in devising forms of common or joint ownership, with subtle technical differences between them.

There are also all sorts of "future interests" known to the common law. Suppose I leave my house to my sister for life, and then to any of her children who might be alive when she dies. The children have a future interest; that is, the time they will get the house is postponed to some far-off date. But many future events are certain to happen—my sister will not live forever—so future interests can have value and reality now, even though my sister is very much alive. The law of future interests developed in a most gnarled and complicated way. Its intricacies drove generations of law students to quiet despair.

Another important, and fairly new, branch of property law is the law of "land-use controls." It deals with the limits imposed on what people can do with their property. This was an issue in the law of nuisance, but modern controls go far beyond this. Zoning is a familiar type of land-use restriction. Zoning ordinances date from about the time of the First World War; they are now almost universal in cities and villages. Zoning ordinances divide towns into zones designated for different uses. If my neighborhood is "zoned" residential, I cannot build a factory or run a restaurant on my property. If the zone is restricted to single-family dwellings, I cannot even run a rooming house or rent out apartments.

The Law of Succession. This field, the law of wills and trusts, is closely related to property law as such. It is the branch of law that, essentially, considers how property gets passed along from one generation to the next.[14] The United States is firmly wedded to the system of private property. Property is allocated among individual owners, by and large; this is generally the practice in modern, industrial societies, unlike more traditional societies, where land may be "owned" in common or by clans, families, or tribes. We tend to have title to our land and homes outright, along with whatever else we possess, from rings and wristwatches to stocks and bonds and money in the bank. Since it is a fundamental rule (alas) that we all die in the end and take nothing with us (the pharaohs tried and presumably failed), this property must somehow move on at our death.

One way to make this happen is to execute a will. You, the owner, will decide, for the most part, what should become of your worldly goods when you die. This is the principle of "freedom of testation." You decide, but you must do it in a certain way. If you forget to make a will (or botch the job of drawing it up), you have died "intestate," and the state will distribute the property for you according to a fixed scheme set out in the statute books. Intestate property passes to the heirs at law—the nearest surviving relatives. If

you leave behind a large enough estate, the government takes a bite of it, too, in the form of taxes payable at death.

A will is a formal document. It must be made out just right, and in most states it needs two witnesses. In about half the states, mostly in the West and South, you can also execute a will without witnesses, the so-called holographic will. A man or woman who wants to make out a holographic will has to write it entirely by hand; typing is not allowed. (Nobody will do this if the will is long and complicated; hence holographs, though reasonably common, are mostly short, do-it-yourself documents.) If you have a valid will, you can disinherit any blood relatives you choose. A parent can, with a stroke of the pen, cut off his or her children without a penny (except in Louisiana); but minor children may have some rights to support, at least during the probate period. A husband or wife cannot be cut off so easily. The surviving spouse has a claim to a share of the estate, and though many angry spouses have tried, it is not at all easy to find a way around the law and disinherit a marriage partner completely.

"Trusts" are arrangements that, in essence, transfer property to a trustee (often a bank), to invest and to manage. The trustees are usually required to pay the income to one or more "beneficiaries," who are quite passive; they sit back and collect the money. Trusts are gifts, and rich people use them as part of a general estate plan, their scheme for orderly disposition of their property. Many trusts are "testamentary," that is, part of a plan contained in a will. Others are set up long before death, but even these generally have death and the taxes on estates in mind. The law of trusts goes together with the law of wills, both in law school and in the lawyer's office; both are aspects of "estate planning." Lawyers who specialize in this branch of practice get paid for their skill in finding the best, cheapest, and most effective way to carry out the wishes of their clients, at the same time avoiding the buzzards of taxation as much as possible. In modern practice, this often means avoiding probate altogether, through various trust devices that lawyers draw up.

Estate planning is basically law for the rich. Most people do not have enough "estate" to need the fanciest tricks of the trade. Adults who have money or property do need wills, but many people do not bother with them. In Cuyahoga County, Ohio, whose main city is Cleveland, a study in 1964–65 found that almost a third of the estates probably lacked wills.[15] The percentage of "intestacy" was probably higher in the general population; a lot of people who die leave so little money that the family does not bother with probate. In a 2010 survey of 1,022 American adults, only 35 percent reported that they had a will, though the survey indicated that estate preparation increases with age.[16]

Sociolegal scholars have paid relatively little attention to the law of succession. This is unfortunate. It is a crucial branch of law, as vital to social continuity as DNA is to survival of the species. Since all of us eventually die, society must reproduce itself every generation, not only biologically, but also socially and structurally. The basic techniques are far from mysterious. Social norms and structures get transmitted from generation to generation through education, child-rearing, and other processes that mold the new generation in the shape of the old one. But the inheritance of property also plays a crucial

part. Without the laws of succession, there would be no such things as "old money," aristocracy, or "good families." Each generation would start over, and social structure would be fundamentally altered—perhaps for the better, perhaps not. In any event, life would be different, in a revolutionary way. Even the socialist countries allowed some inheritance of property. And the middle class, too, has a stake in the law of succession. The law permits money to flow across time, and specifies how this is to be done. Without succession, there would be no heirlooms, no old family homes, no gifts left to grandchildren for college. There might be less family quarreling as well.

Perhaps just as important as the rights of inheritance are the limits on inheritance. There are complicated rules about estate taxes (the taxes which the federal government imposes on estates of the dead). The larger estates are, the more taxes they pay. There is a strong movement to repeal the estate tax, but as of 2016, it was still in effect. The estate tax affects only the rich. The first $5 million is free of tax. In addition, there are important escape valves. One of these is the unlimited right to give to charity, tax-free. Without this right, the great charitable foundations would not exist. All gifts to a surviving spouse—a widow or widower—are also tax-free.

There are other rules, too, that limit the duration of dynasties of wealth. No trust—no arrangement tying up money over generations—can last forever (charities are exempt from this rule), at least not in most of the states. The general limiting rule was called the rule against perpetuities. Its details were of daunting complexity, but the upshot was to restrict the dead hand to something less than a century at the absolute limit. The rule has decayed greatly in recent years, and a few states have essentially gotten rid of it; but the general rule remains in effect in most states: that is, the dead hand has to loosen its grip after a certain period of time.

Family Law. One branch of family law borders on the law of succession. Most people, after all, leave their money to relatives, or give it away to family during their lifetime. Family law includes rules about marital property; in California, and other western states, the so-called community-property system prevails. A married couple is a "community"; and the income of each of them is treated legally as half belonging to the other member of this little "community." This field also concerns marriage and divorce, child custody, and children's rights.

Family structure is changing rapidly, and family law changes with it. Divorce, for example, was once rare and difficult to get. Indeed, in the early nineteenth century, some states granted divorces only through special acts of the legislature;[17] one state, South Carolina, simply allowed no divorce at all. Even in "easy" states, divorce was based on the so-called fault system. A married person who wanted a divorce had to go to court and prove some "grounds" for divorce. Divorce was available only to "innocent" parties, whose spouses were guilty of adultery, desertion, cruelty, habitual drunkenness, or whatever else was on the statutory list. Some states were much stricter than others. In New York, one of the strict states, adultery was, practically speaking, the only ground for divorce.[18]

The nineteenth century moaned and groaned about rising divorce rates; in retrospect the rates seem ridiculously low. Only in the twentieth century did divorce become an everyday affair. But for at least a hundred years—since the 1870s or so—most divorces were consensual. That is, the courtroom proceedings were a mere ritual, a sham; there was no real contest. The alleged grounds of divorce were often faked. Courts knew all about this, but they closed their eyes to reality and let the system run its course. There was a heavy, rising demand for divorce, with the rise of "companionate marriage." Men and women expected more from each other than they had during the age of traditional marriage. When marriage did not live up to expectations, divorce seemed the only way out. As divorce became more common, the stigma attached to divorce steadily weakened.

Nobody liked a divorce system based on perjury and fraud. But the system lasted until 1970. Then, starting with California, state after state adopted a so-called no-fault system. There is no longer any need to prove grounds for divorce—or indeed to prove anything. All that is required, essentially, is the fact that the honeymoon is over—that the marriage has broken down irretrievably. Divorce is now legally as well as socially routine. It is not even called divorce anymore in California; the new (official) name is "dissolution of marriage." The last holdout against no-fault (New York) capitulated in 2010.

Easy divorce does not mean easier problems for family law. Indeed, changes in family structure, which lie behind the divorce explosion, brought certain dilemmas closer to the surface. Custody disputes are if anything more common and acrimonious than in the days before no-fault divorce. The basic legal principle is that the child's best interests come first, but in the modern world that does not carry us very far. We can no longer assume, as we once did, that "best interests" almost always means mother, especially for children of "tender years." Joint custody is one of many new ideas that the system has been trying out, to cope with problems of the children of divorce.

The family and "family values" are important political and social issues. The issues inevitably spill over into family *law*. The so-called sexual revolution has made a deep impress on family law. Cohabitation—nobody calls it "living in sin" any more—is a way of life; and the law has had to deal with the issue of what rights members of these quasi-families have. Many of these couples proceed to have children, who are of course technically illegitimate. But the stigma of "bastardy" has diminished almost to the vanishing point; and, at the same time, legal rules treat these children almost though not quite the same as children born to parents in holy wedlock.

The gay rights movement swept on to victory after victory in the early years of the twenty-first century. Gay couples can now adopt children, which was once proscribed in many states. Indeed, gay marriage as of 2015 is now the norm in every state, thanks to the U.S. Supreme Court. Legally married gay and lesbian couples also can and do produce children—making use of artificial insemination and surrogacy in some cases. There are children now who have egg mothers as well as womb mothers. What rights do these types of mothers have against each other? These, and other issues in contemporary family law, do not produce a mass of cases; but they do raise fundamental questions about

the nature of family life, and the role legal rules can and do play in shaping and reshaping the modern family.

The Law of Business Associations. The corporation is the dominant form of business enterprise today, the dominant employer, the dominant force in the economy. It is also the main concern of the law of business associations. Corporations take many forms, but they have in common limited liability and a division of function between the owners of shares and the actual managers of the company (unless the managers themselves own the shares). Corporations are legal entities. Limited liability means that shareholders cannot lose more than the value of their shares, no matter how many debts the corporation accumulates. Shareholders, in other words, are not personally liable for the corporation's debts. Corporations are "persons" in the eyes of the law (to be precise, "artificial persons") and can sue and be sued in their own names. Moreover, the Supreme Court recently found that they also have certain political and religious rights.[19]

At the time of the Revolution, and for several generations afterward, setting up a corporation was not easy. The incorporators had to follow a long, laborious route. Corporations were chartered one by one; each charter was a special law passed by the state legislature. Most of these early corporations held "franchises": they were little monopolies, with the right to build a bridge over some particular river or a railroad between this town and that. It seemed only right to deal with them case by case. The law was also quite strict about their powers. They were not allowed to move one step beyond what their charters specifically authorized.

Today, corporation law has an entirely different flavor. Basically, the law is much more permissive. Anybody who wants to form a corporation fills out a form or two and pays a state fee ($100 in California, as of 2015), and that is that. Corporations, generally speaking, last forever and can do whatever they wish, provided it is not downright illegal. A corporation can also become involved in many different sorts of business. There would be nothing odd about a corporation that owns a candy factory along with a chain of drug stores. Courts also will generally uphold the business judgment of management. Tricky questions still arise, to be sure, about the rights of shareholders and about the duty of officers toward their companies, creditors, and others. There is also a significant measure of federal control. The Securities and Exchange Commission (SEC) monitors the issue of public securities—stocks and bonds offered to the public. SEC rules are designed to promote honest disclosure of financial facts. They are meant to prevent the kinds of fraud and chicanery that were once all too common among the gaudy wheelers and dealers of Wall Street.

The corporation is not the only form of business association. Many law firms, for example, are partnerships. The rights and duties of partners, in relation to each other and to third parties, raise many tangled legal issues. The law of "agency," too, is closely linked to the law of business associations. This is the branch of law that deals with principals and agents. If a pedestrian is hit by a truck that belongs to Acme Toothpick, Inc., the pedestrian will almost certainly sue the company (the "principal") even though the

actual tort was committed by Joe Smith, the driver (the "agent"). Can the pedestrian sue Joe Smith instead? Yes, but the company has more money and is a better target. And the company is liable for the acts of its agents. This is the doctrine of *respondeat superior*—"let the superior [principal] answer," or, in cruder language, "make the boss pay." This much seems clear. But it assumes the driver was actually on company business. This is usually but not always the case. Suppose the driver had borrowed the truck to go to a ball game. The driver is off on a "frolic," as the law quaintly puts it. Is the company still liable? In other words, if you hire people to work for you, exactly how much responsibility will you have for the various things your agents might do? The law of agency explores this and similar questions.

PUBLIC LAW

European legal scholars make much of the distinction between "public" and "private" law. The distinction goes back to classical Roman law. Public law concerned the Roman state; private law concerned the rights and interests of individuals. From this standpoint, most fields we have discussed in this chapter fall under the heading of private law. A divorce case is *Smith v. Smith*, between husband and wife; tort cases are mostly between person and person, or person and insurance company; most disputes over title to land are also "private." But when the government brought a huge antitrust lawsuit against Microsoft for bundling its web browser with its operating system (the case was eventually settled), this was definitely public law.

Theorists in common-law systems make much less of the distinction between public and private law. And, as many scholars have pointed out, the distinction seems less and less relevant as time goes on. There are few, if any, fields today that are purely "private." Government is a silent—or noisy—partner in every branch of law, to a greater or lesser degree. Land law is essentially private, but zoning is public. Tort law is private, but dozens of statutes on safety regulation and the like affect the course of private lawsuits. And so it goes.

Lawyers' work, too, shifts more and more from the private to the public side. There is, for example, taxation, a bloated monster of a field. The federal government spends hundreds of billions of dollars every year; so do the states and the cities, in the aggregate. The money has to be wrung out of taxpayers. Taxpayers wriggle and resist. As a consequence, tax law may well be the single largest field of law, in terms of effort, dollars involved, and the sheer bulk of statutes and regulations, however one measures it. It is also a field of awesome technicality. The Internal Revenue Code, the key to all of Uncle Sam's billions, is the longest, most difficult statute in the whole federal armory, as we have seen.

Taxation is one among many great fields of public law. There is antitrust law, concerned with monopolies and restraint of trade. There is regulation of business in general—public utility law, and such specialties as food and drug law, maritime

law, and immigration and naturalization law. Public law also includes bankruptcy and consumer-protection law and most of the rules and structures that bear on labor relations. Most of the work that most lawyers do—especially the lawyers who practice in big-city firms—is "corporate law," that is, law relevant to the giant businesses that dominate the economy. Much of this work, perhaps most of it, is "public law." The growth of public law is bound up with the rise of the administrative state. All through this book, we have seen examples of public law at work. Constitutional law and civil liberties are two key fields in this large area, and they merit fuller discussion in a chapter of their own.

9

Crimes and Punishments

FOR THE LAYPERSON, the criminal side of the legal system is in many ways the most familiar aspect of American law. In fact, when you mention law or the legal system to people, what springs most naturally into their minds is criminal justice and its cast of characters and settings—police, courtrooms, juries, trials, prisons and jails, the gas chamber. The drama of the trial has fascinated people for centuries. Crime and punishment are front-page news, and are the subject of hundreds of plays, movies, and books. There is a great novel called *The Trial* and another called *Crime and Punishment*. No novel worth reading is called *Antitrust Suit* or *The Shopping-Center Lease*.

Criminal justice is a vast, complex system. It is, in essence, that part of the legal system that, first of all, marks off certain behavior as wrong or "criminal"; second, takes steps to control or prevent that behavior by threats of punishment; and third, if prevention fails, tries to catch and to punish the wrongdoer. Some aspects of the system are exceedingly familiar; others are obscure and much misunderstood.

To begin with, we can ask, what is a crime? Every country, and in the United States every state, has its own special list of forbidden behaviors. The list is part of an elaborate statute, which is usually called the penal code. The code lists types of conduct that it declares illegal and defines as "crimes"; it also sets out punishments. The federal government has its own code, which is fairly specialized. It does not cover most ordinary crimes (the states, not the federal government, punish murder, arson, drunk driving, and the like).[1] The national government punishes violations of federal laws, like smuggling or tax fraud. The District of Columbia has its own criminal code, much like that of the states. Some acts can be both federal and state crimes—this is true, for example, of many drug offenses.

American Law: An Introduction. Third Edition. Lawrence M. Friedman and Grant M. Hayden.

Some crimes are in the penal codes of every state: murder, manslaughter, robbery, burglary, rape, arson, and so on. Others are less universal. The Georgia code makes it a crime "to be a peeping Tom" or to invade a person's privacy with acts "of a similar nature."[2] The Georgia code also deals with the distribution of obscene material, shooting guns within fifty yards of a public highway, illegal use of credit cards, necrophilia ("any sexual act with a dead human body"),[3] sale of Molotov cocktails, and dozens of other offenses. The precise list of crimes is different in each state.

What is criminal in one society need not be criminal in another. It was a serious offense in the former Soviet Union to speculate in foreign currencies. In our country, on the other hand, currency trade is a respectable business. For medieval Mongolians, it was a crime to urinate into water or ashes. Americans might find this offensive, but hardly a crime. Definitions also vary with time and circumstances. It was once illegal to own gold ingots in this country. This is no longer the case. During the Second World War, wages and prices were frozen; it was a crime to charge more than the "ceiling" price. There are no such restrictions today.

Are there some acts that are crimes universally, that is, which every society defines as criminal? Yes and no. It would be hard to think of a society that did not forbid murder—the wrongful killing of another human being. But each society has its own definition of murder. Not every intentional killing is murder. A soldier can lawfully kill during wartime; citizens are allowed to kill in self-defense. Infanticide is murder in the United States, but abortion is not, although many people would like to brand abortion as a kind of murder. In some societies, it is not murder to kill for revenge or to get rid of a woman who has brought dishonor on the family.

Many crimes listed in the penal code are acts that shock the conscience. Murder is a prime example. But different societies have different consciences. And not every listing in a penal code carries the same moral freight. The codes are motley collections. There are many regulatory or economic offenses that are unknown to most people; most of us will never run up against them because they affect small groups or particular occupations, like druggists or taxi drivers or used-car salesmen. Other acts (shooting deer out of season, picking rare orchids, overtime parking) are well known, but do not shock the conscience as, say, murder does. These are crimes only because the state so defines them; murder would be (in a sense) a crime even if the laws against it ceased to exist. It is a crime, in other words, in people's minds and hearts.

The great, classic crimes are part of the social code, whatever their status in the legal code. The average person *knows* these are crimes. People have a rough working knowledge of what constitutes murder, even though they do not understand the fine distinctions and technicalities that are part of the body of criminal law. Cold-blooded killing is murder, we know, although few of us can tell the difference between first-degree and second-degree murder, or what "malice" means in a state where this is part of the definition of murder, or what level of insanity excuses an act of killing.

Punishment, too, is variable. It depends mostly on how serious the crime is. Seriousness is not inherent in criminal conduct; it is a social judgment. Legally speaking, serious crimes are called felonies; less serious crimes are called misdemeanors. The exact line between them is a matter of legal definition. In New York, a felony is a crime for which you can be imprisoned "in excess of one year."[4] Lesser crimes are misdemeanors, except for some petty acts (traffic violations, for example), which are called infractions. These carry less of a punishment than crimes and have less of a stigma. A history of parking tickets is not a criminal record.

FUNCTIONS OF CRIMINAL JUSTICE

Why do we have criminal justice? What functions does it serve? The short and obvious answer is that this system guarantees law and order. Criminal justice is a substitute for private violence and vengeance; instead of "taking the law into their own hands," communities turn to specialized people and agencies who do the job for them.

Every society has deviant behavior; every society has people who behave in ways that society (or its leaders) cannot tolerate. In small, isolated societies, there are no specialists or specialized agencies (like the police) to enforce social norms. The anthropologist E. A. Hoebel described the system of handling deviance among the peoples of the far north. The Inuit groups he wrote about had no police, no judges, no obvious courts. But when someone stepped out of line, some member of the community, more or less self-appointed, could punish on behalf of the community, perhaps even killing the "criminal."[5]

Clearly, this system would not work in a complex society like the United States, or France, or Japan. Criminal justice is supposed to take the problem of dealing with violence and other forms of deviance out of the hands of private citizens and concentrate it in the hands of the government. This is justified as a way to protect the great mass of people against the bad and the strong. It also outlaws revenge, blood feuds, and lynching. But it is also an obvious opening for oppression and tyranny, for the so-called police state. If the state has a monopoly on violence, it can misuse or overuse its power. History, alas, is full of examples. Not all of them are to be found in far-off places. Abuse often begins at home.

Outlawing private violence is not an either-or affair; it is the product of a long evolution, a process, and it is even now not complete. Many people defend or romanticize a certain amount of private vengeance; it is amazing how often this crops up in movies and on TV, and in heroes played by, say, Clint Eastwood. Still, on the whole, private citizens and laypeople do not play much of a role in criminal justice in modern societies; the task is more and more given over to officials—to professionals in the field.

The most obvious function of criminal justice is control of dangerous behavior—dangerous, of course, as the particular society defines it. Another function is to set out and enforce a moral code. Fornication—sex between unmarried people—was once a

crime, but why? It is not physically dangerous in the sense that murder is; unlike burglary, it does not threaten the property system or take away people's hard-earned goods and money; it does not violate the sanctity of the home. Indeed, it was in fact stricken from the roster of crimes in modern times. Most people now think that sex between consenting adults should not be criminalized. Still, most people do think that one business of criminal justice is to announce and enforce rules of morality. The penal code is full of crimes whose main point is ethical: they offend the moral interests or tastes of some fraction of the public: restrictions on gambling, and some forms of sexual behavior. But the moral code has been changing, and the penal code follows along. Same-sex sexual behavior was once seriously criminal; but no longer.

Criminal justice is also concerned with order and discipline. It is not dangerous or immoral to park overtime on a busy street or to go through a red light when no traffic is coming. It is neither dangerous nor immoral in the classical sense to hunt deer out of season or to catch a fish that is too big or too small. The word "order" implies a kind of rationing system. There are not enough deer or fish to go around. There are not enough parking spaces for everybody. We need rules to prevent overuse.

Rules of order are common in our society. For example, a public library may have rules against talking. Talking is a harmless activity; if there were only one or two people in the library, probably no one would care if the users had a nice conversation. But to keep order, the library feels it has to restrict this harmless activity—in other words, ration it or forbid it altogether. The legal system provides this kind of order, for space on the streets and other scarce commodities, and the criminal justice system enforces it. Breaches of order are punished, not so drastically as more serious crimes—the gas chamber or long jail terms would be out of place—but punished nonetheless.

The word "discipline" applies to a special kind of order. We "discipline" behavior when it violates rules of order that have some flavor or nuance of immorality or danger. Rules against public drunkenness are a good example; for many years this was the commonest "crime" of all, the one most frequently punished in many places.[6] Another crime against discipline is disturbing the peace. The line between dangerous behavior and undisciplined behavior is, of course, very fuzzy, and disturbances of the peace can range from drunken singing on the sidewalk to something close to a riot.

Perhaps all these functions can be summed up in a single formula, and fitted into one huge macrofunction. They are all concerned with keeping society on an even keel, protecting its structure, and safeguarding its boundaries. The more you have, the more there is to protect. Stealing is a crime, and if it is punished, this is a service to people who have property worth stealing. Criminal justice protects the property system and the value system; it is the watchdog of the house, guarding the furniture, the pictures on the wall, and the peace and contentment of the residents.

Criminal justice, then, is vital to any social system. It is essential to welfare capitalism, but it is also a pillar of socialism in Cuba, of Muslim fundamentalism in Iran and Saudi Arabia. Whatever the system, criminal justice supports it. The law supported

apartheid in South Africa, and it later supported the dismantling of apartheid. Law buttressed Hitler's vicious and murderous regime, and it supports democracy in Finland and Holland. This chameleon-like quality does not mean that criminal justice (or law) is by nature conservative, that is, inherently an enemy of change. In fact, patterns of power and wealth change constantly in the United States, through tax laws, for example, or through other forms of legislation. Many of these changes are slight, but they are changes nonetheless. The legal system is not against all change; rather, it tries to control the process. It stamps some methods of altering structure and rules as fair and legitimate—for example, those that come about through acts of Congress or court decisions. It outlaws all others—riots and revolutions, or the robbing of banks. Criminal justice is the strong arm of the law, its main weapon against these outlaw methods.

In our modern welfare state, criminal justice has a special role in enforcing rules about the economy. Many "economic crimes" are best looked on not as dangerous or repulsive acts, but as activities subject to rules of rationing or of order. Thus, in Rhode Island, it is an offense to catch egg-bearing female lobsters without a license or to take this type of lobster if it is less than three and five-sixteenths inches long "measured from the rear of the eye socket along a line parallel to the center line of the body shell to the rear end of the carapace."[7] There are countless other examples, in state and federal laws. But why make these technical regulations part of the criminal process? One reason is that criminal justice is *public justice*; it requires *public* litigation. The plaintiff is the people or the commonwealth or "the state"; the state sets the process in motion and the state pays the bills.

This makes criminal justice useful in situations in which private citizens do not have financial stakes high enough to encourage private enforcement. If a butcher runs a crooked scale and cheats every customer a nickel or two per pound of meat, no customer would sue, even in small-claims court, for the money lost on three pounds of hamburger, or a two-pound steak. But if using crooked scales is made a crime, the state can prosecute and control this offense, presumably for the benefit of all of the customers at once.

TYPES OF CRIME

There are a number of conventional ways to classify crimes. One is to ask what interests have been injured by the crime. Thus we speak of crimes against the person and crimes against property. Crimes against the person contain an element of force, of physical contact: murder, manslaughter, rape, kidnapping, robbery, assault. Crimes against property include various forms of stealing (burglary, theft, shoplifting, embezzlement), plus various frauds, extortion, forgery, receiving stolen property, and so on. Property crimes also include arson, a serious, dangerous crime. There are also crimes against public order, or against the administration of justice. These include disorderly conduct, prison escape, rioting, resisting arrest, and perjury.

We also speak of crimes against morality. Examples are gambling, drunkenness, prostitution, and drug possession. The law also forbids various kinds of "unnatural" or immoral sexual behavior: incest, for example. Sexual contact with children is quite generally forbidden and treated as a very serious crime. "Sodomy" (including most same-sex sexual contact) was defined as a crime in some states, until the Supreme Court invalidated those laws in *Lawrence v. Texas* (2003). "Bestiality" is a crime in some states and not in others. In 2005, a man turned up dead in a local emergency room in Washington State, from injuries received while having sex with a stallion. It turned out that there was an "animal brothel" at a farm near the town of Enumclaw, where people paid to have sex with animals.[8] The resulting publicity (including an Internet video) prompted the state to criminalize such behavior.[9] The penal code is sensitive to outbursts of public opinion; and this may be especially salient when a lurid or shocking crime creates an uproar.

We can also speak of "regulatory" crimes: adulterating food, criminal monopoly, price-fixing, dishonest weights and measures, dumping toxic wastes, and so on. There are many regulatory crimes, and their numbers are increasing. They are a product of the administrative state, of a sense of social interdependence, and of a desire to protect public health and safety. There is a newfound interest in conservation, too—in the beauty of the country and in the preservation of the national heritage; hence laws against littering, against killing bald eagles, against tearing down historic houses. There are also regulations of billboards and other forms of outdoor advertising. Each state has its own special interests to protect. Florida, for example, with its tropical coastline, has a total ban on the taking of sea turtles' eggs, and an elaborate statute protects the manatee, a lovable but endangered creature that is the official "state marine mammal."[10]

Among serious crimes (felonies), property crimes clearly predominate; they account for more arrests than all other categories. In 2014, police nationwide reported slightly over 2 million arrests for "serious crimes." "Larceny" and "theft" accounted for more than half; burglary added 238,000 more, motor-vehicle theft another 68,000 (about a third of the number reported in the early 1990s). There were about 11,000 homicides, 21,000 rapes, 9,000 arsons, and 94,000 arrests for robbery. Among "non-serious" crimes, which produced about 9 million arrests, "drug abuse violations" was the leader—over 1,560,000 arrests—with "driving under the influence" pretty close behind with 1,120,000. Liquor-law violations and drunkenness together produced another 730,000. Prostitution accounted for only 48,000 arrests, sex offenses (other than rape) another 55,000.[11]

Arrests, of course, do not tell us how many crimes were reported to the police or how many were actually committed. We can learn some of this from "victim studies," which ask people if they have ever been victims of crime, and whether or not they reported the crime to authorities. The figures are somewhat alarming. In 2014, people surveyed claimed they reported only 34 percent of the rapes or sexual assaults, 45 percent of the assaults, 60 percent of the burglaries, and 29 percent of the thefts.[12]

Arrests also vary because of policy decisions. The police arrest any murderer or burglar they get their hands on, but not every speeder, gambler, or public drunk. Arrests for

crimes against morality or public order may rise and fall more dramatically than arrests for murder or burglary. In many cities, the police normally ignore, or wink at, gambling, prostitution, pot smoking, and certain other offenses. Of course, as was true in the case of bestiality in Washington State, if some scandal suddenly rocks the town and makes big headlines, a crackdown will follow. The arrest rate for (say) gambling might zoom because of the public outcry—at least for a time.

Crimes against morality or public order make more of a splash in arrest records when we look at arrests for petty offenses (misdemeanors). In Portland, Oregon, in 2014, for example, out of about 33,000 arrests, there were only 18 for homicide, 282 for robbery, and 376 for burglary; but there were 2,991 arrests for drugs, 2,667 arrests for violations of liquor laws, 1,377 arrests for driving under the influence of intoxicants, 166 arrests for prostitution, and 1,463 arrests for "disorderly conduct."[13]

Almost all of us accept without question the idea of punishing crimes against the person, and there is not much controversy about burglary or theft. Crimes against morality are another story. These are much more sensitive to ebbs and flows of public opinion, to shifts in the moral climate. This is why arrest rates zig and zag so radically, especially for laws against "victimless crimes." Many people argue it is wrong to punish acts simply because they are "immoral." Morality is "not the law's business," as the title of a book by Gilbert Geis put it (1972). There was a movement to wipe most of these laws off the books, to decriminalize adultery, fornication, and "unnatural" sex, at least between consenting adults. Many states did just that. The Supreme Court got rid of the surviving sodomy laws in *Lawrence v. Texas*. Some people would go further and legalize gambling, prostitution, or the use of drugs like marijuana or cocaine. In recent years, four states—Alaska, Colorado, Oregon, and Washington—legalized the retail sale and recreational use of marijuana; many other states and jurisdictions now allow the use of medical marijuana, and some have decriminalized recreational use, treating marijuana possession more like a parking ticket than a serious crime. Taboos against gambling also seem to have broken down—there are state lotteries in many states, and casinos are springing up like weeds as states compete to capture the potential tax revenue they lose when residents go elsewhere to gamble. Prostitution, though, remains illegal throughout the country (with the exception of a few rural counties in Nevada). Many people resist these movements, of course, and oppose decriminalization of what they consider to be immoral or socially harmful acts.

We sometimes hear people talk about the "Puritan heritage" of the country. This heritage gets blamed for what some people feel is an unhealthy tendency to meddle in private lives and punish people if they choose styles of living outside the mainstream. In fact, the history of victimless-crime law is not a simple line of descent from the colonial past. It is rather a story with surprising twists and turns.[14]

The Puritan colonies, in the seventeenth century, were in fact very much concerned about crimes against morality. No crime in Massachusetts Bay was punished more frequently than fornication. Thus we read, for example, that in Salem, Massachusetts, in 1655 the court ordered Cornelius Hulett to be "whipped ten stripes on some lecture day

in seasonable weather, for fornication with Elizabeth Due."[15] These were small, gossipy communities; the clergy held leadership roles; and in general, law made little or no distinction between sin and crime. Hulett was only one of hundreds who were whipped, fined, put in the stocks, or forced to marry because of the "crime" of fornication.

If we leap forward to the nineteenth century, we get a different picture. Laws against fornication and adultery were still on the books. But there seemed to be little appetite for enforcement. In some states, the crimes were redefined: in Indiana, for example, adultery was against the law only if it was "open and notorious." In other words, adultery could not be punished unless the adulterers flaunted themselves before the public. The law was much less concerned with secret sin. Vice was tolerated if it kept in its place. In every large American city, there were so-called red-light districts. Prostitution was illegal in all of these cities, but it was "tacitly tolerated" and "relatively undisturbed" so long as the brothels stayed put in the red-light districts. Despite sporadic outbursts of morality and occasional riots, brothels were "almost as much a part of social life as the cocktail lounge is today."[16]

The situation changed rather dramatically, beginning in the late nineteenth century. There was a new birth of interest in outlawing and punishing victimless crime. In 1873, Congress passed the so-called Comstock Law, which made it a federal crime to mail any "obscene, lewd, or lascivious" book, or "any article or thing . . . for the prevention of conception." In 1895, Congress prohibited the interstate sale of lottery tickets. In 1907, Arkansas passed a law making it a crime to manufacture, sell, or give away "any cigarettes or cigarette wrappers or papers to any person."[17]

There was more to come. The famous Mann Act (1910)[18] made it a federal offense to transport any woman across state lines "for the purpose of prostitution or debauchery, or for any other immoral purpose." Under the Harrison Narcotics Tax Act (1914),[19] it was illegal to buy or sell narcotics, except with a doctor's prescription. For the first time, practically speaking, the law made outlaws out of drug addicts. The climax of the purity movement came just after the First World War: the Eighteenth Amendment to the Constitution (1919) launched the "noble experiment" of Prohibition. This was the end point of a long struggle for temperance. Congress sent the amendment to the states in November 1917; Nebraska, the thirty-sixth state, ratified it in January 1919, putting it over the top. National Prohibition actually began in January 1920. The Eighteenth Amendment slapped a total ban on the "manufacture, sale, or transportation of intoxicating liquors" in the United States. Congress also passed a strong federal law (the Volstead Act, 1919) to enforce Prohibition.[20]

It is one thing, of course, to pass a law, and quite another to enforce it. The troubles of Prohibition are legendary, and most historians consider it a dismal failure. It certainly did not get rid of alcohol, although there is a good deal of dispute about its actual impact. There was clearly a lot of evasion, corruption, and scandal. After a decade or so of conflict and misery, the country got rid of it with enactment of the Twenty-first Amendment (1933). Another failure (in the long run) was the red-light abatement movement, which flourished around the time of the First World War. This was a campaign by reformers

and moralists to get rid of vice and prostitution once and for all. Tough new laws were passed, and armies of the righteous closed down the Barbary Coast in San Francisco, Storyville in New Orleans, and other notorious vice districts, at least temporarily. (Sin had a way of popping back, in the end.)

The movement had just about run its course by the 1930s; a strong reaction soon set in. In recent years, the pendulum has swung in the opposite direction. Many states took the criminal label off fornication and adultery, and stopped punishing homosexual acts among consenting adults. In 2003, the Supreme Court finished the job and, a little more than a decade later, it told states that they must allow same-sex couples to marry. As we mentioned, states are also moving in the direction of decriminalizing drugs, at least marijuana. To be sure, opposition to these recent changes is also strong and highly motivated, particularly in the conservative South.

It is far from obvious what lies behind all these movements and countermovements. They begin in the dark and mysterious world of social attitudes. If we knew what brought on the "sexual revolution," we would understand more about the legal reaction, too. Many people feel that loose laws on personal behavior weaken family life, endanger public morality, and threaten the very health of society. This may or may not be true. But again, even if it is true, it is probably a mistake to blame the laws—or to assume that tightening up the laws will bring about a renaissance of sound morality. The legal system plays a part, to be sure, in the moral constitution of society, but it is a secondary, symbolic, and derivative role. The laws are symptoms; they are not the disease. Law responds to social movements, to forces that come and go, to deep rhythms and great powers that lie outside of the legal system itself.

THE CRIMINAL PROCESS

So far we have talked mostly about laws on the statute books. Let us turn now to the criminal process, and take a look at the life cycle of a typical felony case, in California.[21] We begin, of course, with the crime itself, a burglary, let us say. Somebody climbs through a window into a house in Atherton, California, and steals jewelry, silver, and stereo equipment. The people who live in the house come home and find to their horror that somebody has broken in. They call the police.

All too often, alas, this is nearly the end of the story. Most break-ins are never solved; no arrests are made; the goods are never recovered. In 1971 in New York City, victims reported 501,951 felonies to the police; in four cases out of five, nothing more happened. The police made 100,739 felony arrests. Some of the people arrested were charged with more than one reported felony. Still, the police were able to "clear" by arrest only 111,824 of these half million felonies.[22] Forty years later, the situation has hardly improved. In 2011, only 47.7 percent of the violent crimes reported nationwide were "cleared by arrest," and a mere 18.6 percent of the property crimes; 64.8 percent of the murders led to an arrest, but only 12.7 percent of the burglaries.[23]

Our householders, let us assume, are among the lucky few. The police take notes, go off, and lo and behold, in due course they find a suspect and arrest him. The police now "book" the suspect—that is, they record the charges, photograph the man, and take his fingerprints. He goes before a magistrate (a judge), who tells him about his rights. This judge may also set bail, and may arrange for a "public defender," who will act as the suspect's lawyer. Sometimes the suspect will hire his own lawyer, if he has the money to do so.

The district attorney's office will make the next move. The staff will have to decide whether the case is strong enough to act on. Is there enough evidence to make prosecution worthwhile? If not, the case must be dropped. Let us suppose the district attorney thinks she can get a conviction. Before the man can be brought to trial, there is one more major hurdle. This is the "preliminary examination."

The preliminary examination is a kind of pretrial trial. It starts when the prosecutor files an "information," that is, formal charges. These proceedings, too, take place before a "magistrate," usually a municipal-court or police-court judge. There is no jury. Magistrates hear what the prosecution has to say. They do not decide whether the accused is actually guilty. The magistrate has three choices: to dismiss the charges and let the accused go free (if the prosecution seems to have no case); to knock the case down to a misdemeanor; or to decide that the state does have enough of a case so that it pays to go on to a full-scale trial. To do this, the case must be transferred to another court, a court that tries felonies. In California this would be the superior court.

In some states, this "information" method is not used. Screening is done by a different body, the grand jury. The grand jury is made up of laypeople who are picked at random, like the members of an ordinary jury. The number of grand jurors varies. Texas law calls for not less than fifteen or more than forty.[24] Grand jurors serve for a limited time. Prosecutors show their stuff to the grand jury, and ask for "indictments" against the accused. The grand jury decides whether to indict or not to indict. If it indicts, the case will go forward for felony trial. This alternative method (by way of the grand jury) is on the books in California, too, but the "information" method is much more common and is much preferred.

The prisoner's fate will be finally decided in superior court. The judge may, of course, dismiss the matter there, too, either on the judge's own accord or because the prosecution decides not to press charges. The defendant can plead guilty and end the matter that way. His lawyer can file any one of a number of "motions" on points of law. The lawyer can, for instance, file a motion to suppress certain evidence, on the ground that the state gathered it illegally. This motion usually fails; nonetheless, it is an irritant to those who would like the system to get tougher. Under the "victim's bill of rights" in California, adopted in 1982, "relevant evidence" is not to be "excluded in any criminal proceeding."[25]

Most felony cases do not get this far. Only a small minority actually go to trial. The rest fall by the wayside. Data from the seventy-five largest counties in the U.S. in 2009 show a high rate of "attrition" in felony arrests. Out of one hundred arrests, only three

will actually end up in trial; sixty-four defendants will plead guilty to some crime, a felony (fifty-three) or misdemeanor (eleven). (These guilty pleas are the product, usually, of plea bargaining, which we will discuss a bit later.) The rest will be rejected at initial screening or dismissed by the prosecutor or judge (nine will be referred to "diversion" and deferred adjudication programs).[26]

Trials, then, are a relative rarity. Yet trials are the most dramatic and familiar way of deciding on innocence or guilt; they are what people see on television, and what they see in dozens of movies. Not all trials, incidentally, go on before a jury. Defendants can waive their right to a jury. The judge will then handle the whole case. This is called a bench trial. If the defendant does not choose this route, the court proceeds to pick a jury.

A jury usually consists of twelve men and women chosen from the community. Twelve is the traditional and almost sacred number, but a few states (Arizona, for example) allow fewer in *some* serious cases, and most states allow for smaller juries—often six—for petty cases.[27] Jurors are supposed to be totally impartial. Lawyers on either side will question prospective jurors, and the lawyer can "challenge," that is, demand dismissal, if a juror seems unsuitable for one reason or another—a man is the defendant's brother-in-law, for example, or a woman says her mind is made up. (In some states, the judge conducts the question period.) A certain number of prospects, too, can be "peremptorily" challenged, that is, for no legal reason at all. A defendant's lawyer may have a hunch that this sour-faced, mean-looking man would be deadly for the defendant; the lawyer can get the man excused, using one of the defendant's precious stock of peremptory challenges. In Minnesota, for example, a defendant charged with an offense "punishable by life imprisonment" is entitled to fifteen of these challenges; the state can have nine. In all other cases, the defendant can have five, the state three.[28] But these peremptory challenges cannot be used as a tool of race or sex discrimination—as a way to get rid of jury members because they are black or white, male or female.[29]

Once the jury is chosen, the trial can begin. Both sides present their cases, usually through lawyers. They cross-examine each other's witnesses. The judge is supposed to see to it that the trial runs smoothly and correctly. The judge makes rulings on points of law and decides any questions that come up on issues of evidence. A police officer may want to testify, for example, about something the officer heard a witness say. If the defendant objects, claiming that this testimony is "hearsay," the judge will decide which side is right.

At the end of the case, the judge "instructs" the jury. That is, the judge recites the legal rules that are supposed to guide the jury in reaching its decision. Unfortunately, such instructions usually do not instruct very well. In past times—in the early nineteenth century, for example—judges gave the jury real explanations, in everyday language, about the relevant rules of law. Today, judges simply shovel out to the jury a mess of canned, stereotyped formulas, "pattern" jury instructions, written in dense legalese. Legally speaking, these instructions are quite accurate; whether the jurors can make

heads or tails of them is much more doubtful. Curiously enough, in many states the judge will refuse to explain them any better even if the jury begs and pleads.[30]

In any event, the case now goes to the jury, and for the first time the jurors are truly in the driver's seat. They retire from the courtroom and deliberate in private. In most states, a jury verdict in a criminal case has to be unanimous.[31] (Louisiana and Oregon are the outliers in felony cases—Louisiana requires only ten of twelve jurors for most criminal cases, unanimity for capital cases;[32] Oregon requires ten of twelve for most cases, eleven of twelve for murder or aggravated murder).[33] Sometimes a jury "hangs," that is, the members absolutely fail to agree. When this deadlock happens, the trial is at an end; the prosecution will either have to start over again from scratch with a brand-new trial or give up completely. In Kalven and Zeisel's classic study of jury behavior, it was found that juries, overall, hang about 5 percent of the time. They acquit roughly a third of the defendants and convict the rest.[34] More recent figures suggest somewhat higher conviction rates. In federal courts, slightly more than 85 percent of defendants were convicted after a jury trial in 2011–12.[35] The numbers are similar for state courts: in California, for example, in 2013–14, jury trials ended in a felony conviction in 81 percent of the cases, and in a misdemeanor conviction in another 4 percent.[36] Kalven and Zeisel thought juries were more lenient than judges, and more recent figures suggest that the rates of judge-jury disagreement remain about the same as those found in the original study.[37]

How the jury goes about deciding is mostly a secret. Some jurors have been willing to talk about what happened in the jury room, in high-profile cases like that of O. J. Simpson (1995) or George Zimmerman (2013). Social scientists have studied the process with various techniques. One is to look at experimental juries—panels of laypeople who are asked to decide hypothetical cases. Research that uses make-believe cases has obvious drawbacks. But this kind of research does have one powerful advantage: researchers can manipulate variables one at a time, for scientific purposes. This cannot be done with the messy materials of real life.

Some of the research findings are of uncommon interest. They shed light, for example, on the hung jury. If only one juror holds out for conviction or acquittal, the jury does not end up hung. The sole dissenter—the "minority of one"—has a "lonely and unattractive" role. The other eleven are almost sure to convert him or her to their side. (In the classic 1957 movie *Twelve Angry Men*, a lone holdout ultimately brought the rest of the jury around; this is exceedingly rare in real life.) Support from even one other juror, however, makes a big difference to the holdout.[38]

Legally, the power of the jury is clear. If it finds the defendant not guilty, the defendant goes free. The jury decision is final. No matter how wrong or how foolish this seems, there is no appeal; the defendant walks out of the courtroom and the process is at an end. If the jury convicts, the judge sets a date for sentencing. A convicted defendant can also try to appeal on the grounds of error at the trial. Generally speaking, "error" means legal error; it is not enough to say the jury must have been wrong, or failed to do justice, or acted stupidly. An appeals court does not try the case over again, or re-decide

issues of fact; it simply considers arguments about the way the trial was conducted—did the judge's instructions, for example, incorrectly state the law?

The more serious the case, the more likely that the defendant will appeal. Practically everybody sentenced to death will appeal—indeed, the case *must* be reviewed; in every state, an appeal is automatic whenever a death penalty is imposed. But overall only a small minority of losing defendants go on to a higher court. The rest give up and take their medicine.

PLEA BARGAINING AND THE GUILTY PLEA

It is a striking fact that trials, as described above and as the public knows them, are not the usual way a defendant's fate is decided. Most men and women behind bars did not get there because a judge or jury put them there. They got there because they pleaded guilty. Overwhelmingly, this is the case. For the year 2006, only 4 percent of the men and women convicted of felonies in state courts got to that unhappy destination by way of a jury trial. Another 2 percent were convicted at a bench trial, and 94 percent pleaded guilty.[39] In federal courts, the numbers are even more lopsided: more than 97 percent of people convicted of felonies pleaded guilty.[40] The courtroom drama that plays out in the movies remains a fiction for most criminal defendants; their fate is dictated behind closed doors.

How does this happen? Why do defendants give up and call themselves guilty? Sometimes, no doubt, they do so out of shame, hopelessness, or remorse. But mostly the guilty plea is part of a "deal"—part of the practice called "plea bargaining" or "copping a plea." The prosecutor agrees to press for a lighter sentence, or to drop some charges, or to give the defendant a break in some other way; this is in exchange for a guilty plea, which avoids trial by jury. Plea bargaining has pushed the jury trial into a small corner of the criminal process. The big cases, the headline cases, still go before a jury: the trial of John Hinckley, who tried to kill President Reagan, or celebrity defendants like O. J. Simpson and Martha Stewart.[41] Ordinary cases, like the case of our house burglar, are unlikely to go to a jury. And the jury's role has been steadily shrinking over the years.

Plea bargaining is controversial. Some people defend it. Most people arrested, they say, are guilty anyway. Why bother with a trial? Why waste public money? Plea bargaining is a compromise: both sides give a little, get a little. Trials take time; there is always the chance of some slip-up. It is best (for both sides) to avoid it.

On the other hand, many people feel that plea bargaining is a disgrace. "Law-and-order" people think it shows too much softness toward defendants. Dangerous criminals cop a plea and slip through the nets. Others argue that the process is unfair to defendants who are innocent, or who might have a good defense, if they only had a chance to show it. One study claimed that up to one-third of the people who plead guilty would be acquitted if they went to trial.[42]

This is a startling conclusion. But it does not mean that these people were in fact innocent of the crime, only that they had a legal excuse or that the evidence was weak. In any event, plea bargaining (so the argument goes) makes a mockery of criminal process. It certainly does not fit our image of due process or our picture of the adversary system. In general, as Herbert Jacob has put it, in the criminal justice system today "the most important decisions are made in private—either in the prosecutor's office or in the judge's chambers."[43] Justice consists in the main of deals by lawyers in the back rooms or the courthouse corridors.

It is no surprise, then, that demands for reform have come from all sides. It has also been proposed, for example, that plea bargaining should come out of the closet; that it should take place more openly, with the judge participating all along.[44] Some prosecutors have tried to end plea bargaining. In Wayne County, Michigan, the prosecutor ordered his staff not to bargain in any case where the defendant used a gun. The attorney general of Alaska, in 1975, banned the practice of plea bargaining entirely. The voters of California, in a 1982 initiative ("Proposition Eight"), adopted a "victim's bill of rights" that, among other things, restricted plea bargaining. In California, the "three-strikes-and-you're-out" law (1994), which imposed extremely long sentences for three-time felony losers, specifically provided that "[p]rior felony convictions shall not be used in plea bargaining."[45]

But do these reforms actually work? Milton Heumann and Colin Loftin studied the Wayne County experiment. Did it really curb plea bargaining in Detroit? Their answer was, "Sort of." Plea bargaining in the literal sense was cut back. But "other mechanisms came into play" that were, they felt, "functional equivalents" of plea bargaining. Through a "mix" of techniques, the system "managed to digest" the new policies without really changing its ways.[46] The California restrictions of 1982 did not put a serious crimp in the practice. And the total ban in Alaska? As of 1990, a study showed that "limited forms of the practice" had "returned to most areas of the state."[47] At this point, those advocating reform of the plea bargaining system have focused on adding procedural protections for defendants rather than eliminating the practice altogether.[48]

Why did limits on plea bargaining fail? Then again, why do we have plea bargaining in the first place? To many people the answer is simple. They assume that plea bargaining is a recent innovation and that it is a response to crowded conditions in urban courts. They connect plea bargaining with a deterioration in criminal justice over the last thirty years or so. Actually, plea bargaining is not as recent as most people think it is, and it is not found only in crowded urban courts.

In fact, there was never a golden age of full, fair trials. True, in 1800 or 1850 most defendants charged with serious crime did go before a jury. But trials were short, routine, cut and dried. Historical research on this point is skimpy, but consistent. John Langbein found these slapdash trials in eighteenth-century England; another study confirmed this with a bit of research in the late-nineteenth-century records of Leon County,

Florida (Tallahassee is the county seat). The average trial there took about half an hour. Case after case paraded before the jury. Few defendants had lawyers. Justice was careless and swift.[49]

In other words, hasty, routine processing did not begin with plea bargaining at all. Plea bargaining changes the style and the place. Quick, rough justice has moved from the jury box and the courtroom to the corridors of the courthouse, to judges' chambers, to the offices of lawyers.

Plea bargaining itself goes back more than a century. One study found it, for example, in Alameda County, California, in the 1880s.[50] Judges in the county even talked about the way they gave "credit" for guilty pleas. Plea bargaining was not as pervasive as it is now—not even close to it—but it was by no means rare.

There is plea bargaining in England, too, apparently, but in other systems of law, on the continent of Europe, there is nothing exactly like it. Plea bargaining depends on a central feature of our system: the guilty plea. In some legal systems, there is no such plea. Of course, a defendant can confess his crimes, and a confession is powerful evidence of guilt. But, at least in theory, the state must still prove its case. Our system is different. The guilty plea is accepted as truth; except in very rare cases, it puts an end to the proceedings. Once a defendant pleads guilty, the trial is over. There is nothing left but sentencing.

The guilty plea, too, goes back many years. In 1839, in New York State, one out of every four criminal cases ended with a guilty plea. By the middle of the century, there were guilty pleas in half the cases. In Alameda County, one out of three felony defendants pleaded guilty as charged in the decade 1900–10. In the 1920s, guilty pleas accounted for 88 out of 100 convictions in New York City, 85 out of 100 in Chicago, 70 out of 100 in Dallas, and 79 out of 100 in Des Moines, Iowa.[51] It has kept its dominance ever since. In short, we can trace a steady, marked decline in trial by jury from the early nineteenth century on.[52]

THE PROFESSIONALIZATION OF CRIMINAL JUSTICE

Why is trial by jury declining? This is, in part, only one aspect of a larger, long-term trend—the professionalization of criminal justice. If we could go back in time two centuries and watch criminal justice at work, we would be struck by how much it was dominated by laypeople, amateurs. There were no public prosecutors in England. If somebody robbed a storekeeper, the storekeeper himself had to arrange for prosecution. There was nothing like the modern district attorney. If the storekeeper did nothing, the case simply vanished. There were also no defense attorneys; and the jury, of course, was a panel of amateurs.

In the United States, unlike England, there was a public prosecutor, the district attorney, from colonial times on. But even this was usually a part-time job; private prosecution was quite common well into the nineteenth century. Police science as we know it

did not exist in colonial times and in the early republic. Indeed, neither did the police. The first police force, in the modern sense, was established in London, England, in 1829. New York City had a police force by 1845. Even so, the New York patrolman was "essentially an amateur . . . little more than an ordinary citizen delegated with legal power."[53] It was not until the twentieth century that police forces became truly professional, that is, specially trained for their work.[54]

Today the criminal justice system is awash in professionals: public defenders, probation officers, social workers, detectives. Criminal justice makes use of "science" in the most literal sense: ballistics authorities, pathologists working for the coroner's office, fingerprint experts, experts on DNA. In short, the center of gravity has moved dramatically away from a system controlled by laypeople to a system controlled and dominated by experts and full-timers of various sorts. The decline of the jury (and the grand jury, too) is part of this general development. Plea bargaining, then, is merely the modern, professional version of routine processing. It is the same process, in essence, as the slapdash trials of Leon County, Florida, in the nineteenth century, but under new and professional management.

PUNISHMENTS AND CORRECTIONS

Conviction by judge or jury is not, of course, the end of the line. The defendant now faces sentencing. In many ways, this phase of the process is more important to the defendant than what went before. Most defendants, after all, plead guilty. Their only question is, what will my punishment be?

Generally speaking, the law vests great power and discretion in the judge. The judge has many options and much leeway. Some defendants will pay a fine and some will get "probation," a kind of conditional freedom; this will be especially true of first offenders. A lot depends, of course, on what the crime is. "I'm a first offender, give me a chance" is not an argument that works in a murder case: 95 percent of convicted murderers go to prison or jail. For convicted burglars, the figure is 73 percent; for those convicted of larceny, only 64 percent.[55] These figures are for state courts in 2006.

We are used to thinking of prison or jail as the basic punishment for serious crime. Yet before the nineteenth century, imprisonment was rarely used for punishing criminals. Jails were for people who could not pay their debts, or for people waiting for trial who were not out on bail for one reason or another. In colonial Massachusetts, criminals were whipped, fined, put in the stocks, branded with a hot iron, and in especially serious cases banished or hanged. This was true in England, too. The mother country made heavier use of the gallows, and also "transported" convicts to the colonies. Australia began as a penal colony.

The modern prison or penitentiary was a nineteenth-century invention (if "invention" is the right word). The United States was among its social pioneers. An early example was the "penitentiary house" at the Walnut Street prison in Philadelphia, with sixteen little

cells for solitary confinement. The classic penitentiaries of this period, the first third of the nineteenth century, were Cherry Hill in Philadelphia and Auburn and Sing Sing in New York State. These were huge, forbidding structures with thick outer walls and strong cells with iron bars.

In these dour prisons, convicts lived one to a cell. They lived in a world of total silence, and in an isolation broken only by hard labor. During the entire term in prison, and this could be years, not a word was supposed to be spoken. Life in this quiet tomb was completely regimented; each day was exactly like the next, every prisoner getting up at the same time as all others, going to bed at the same time, wearing the same uniform, eating the same food. It was in theory a kind of radical surgery, meant to totally separate the prisoner from the corruption and rot of society. The iron discipline of prison would give the prisoner a chance to repent and to learn new habits of life.[56]

In its classical form, the penitentiary system did not last very long. The "Big House" remained, architecturally speaking; we recognize it clearly in dozens of Hollywood prison movies and from such living museums as San Quentin. By the time of the Civil War, there were clear signs that the "silent" system would have to be abandoned. For one thing, it would not work unless prisoners were housed one to a cell. But this was expensive, and legislatures were far too stingy to provide funds that would make solitary confinement possible for all inmates.

When the silent system disappeared, so did the theory that isolation and regimentation at hard labor would cure criminals of their habits. The late nineteenth century turned to new schemes of reform: parole, probation, the indeterminate sentence. These were geared toward dividing convicts into two classes, the hopeless incorrigibles and those who could be saved and returned to society; the aim of penal practice was to sift out the savable ones and severely punish the others. New York began to experiment with the indeterminate sentence in the 1870s. In its developed form, it rested on a simple idea: the judge would no longer fix the defendant's sentence. Rather, he would prescribe some minimum (one year, as a rule). In prison, the convict would be carefully observed, graded and marked like a schoolchild. If he behaved and showed the right character, he would earn a light sentence and early release. If not, he would rot in prison. Some people, so the theory went, should never be released. That would be as senseless as letting loose "people suffering from leprosy."[57]

The indeterminate sentence spread rapidly among the states. Along with it went the parole system, a program to let promising convicts out early, under supervision. Probation was another reform. It gave convicted criminals (especially first offenders) a chance to escape prison altogether. Probation, too, was (at least in theory) a kind of supervised freedom at the end of a rather taut string: one wrong move and the criminal justice system would jerk its end of the string and the probationer would land in jail. Still another innovation was a special court for young people, called the juvenile court. The first true court of this kind was established for Cook County, Illinois, in 1899. By 1945, every state had juvenile courts.

These reforms had one trait in common: they were relatively professionalized. They also vested great discretion in parole boards or juvenile judges or probation officers. These reforms also shifted emphasis from the offense to the offender. Decisions were highly subjective, and varied from case to case, from defendant to defendant. Probation officers, for example, were not bound by narrow, legal rules of evidence. They were allowed to investigate the whole background and character of the defendants. Early probation reports in California show graphically what kind of evidence a probation officer might gather. One 1907 report, about a sixteen-year-old boy, solemnly announces that he smoked about ten cigarettes a day, masturbated, had been to a house of prostitution three times, and read magazines; moreover, he had no library card.[58] This information was all legally irrelevant, but it could mean the difference between freedom and iron bars.

Still, probation was in many ways a reform, a step toward leniency. In operation, it no doubt often worked in an unfair and arbitrary way. But it kept some people out of prison and saved their lives or their souls. Partly because it was so subjective, so discretionary, a reaction has set in in recent years. Decisions of parole boards, too, have been criticized as far too random, too personal, for a system of justice and due process.

Even more important has been the reaction from the law-and-order side. A rampaging crime rate frightens and outrages people, as it should; fear of crime focuses attention on any part of the system that can be accused (however unfairly) of "coddling criminals." The indeterminate sentence rested on a kind of faith in rehabilitation. At least some prisoners would benefit from prison: prison experience would reform them. Rightly or wrongly, hardly anybody believes this anymore—certainly hardly anybody in the general public.

In the 1980s and 1990s, crime became perhaps the number one domestic issue. In the atmosphere of "toughness" that prevailed at the time, many states, and the federal government, began to take away some of the sentencing discretion from judges. Minnesota pioneered a program of "sentencing guidelines" to promote uniformity in sentences. The federal government jumped aboard with the Sentencing Reform Act of 1984,[59] which led to the adoption of comprehensive sentencing guidelines by 1987.[60] The federal guidelines dictated a set of sentencing ranges for every federal crime that depended largely on the type of crime (and, with drug crimes, the amount of the drug) and the defendant's previous criminal history. (Though termed "guidelines," the federal sentencing scheme was, until 2005, mandatory, removing almost all sentencing discretion from federal judges; the guidelines are now merely advisory, though they continue to influence individual sentencing decisions.)[61]

At the same time, a number of states also began imposing mandatory minimum sentences for certain crimes—drug offenses, or crimes in which the accused used a gun. As early as 1973, New York passed what became known as the Rockefeller drug laws (after then-governor Nelson Rockefeller), which originally demanded a minimum fifteen year sentence for selling as little as one ounce or possessing two ounces of any one of a number

of drugs.[62] But the real push came in the 1980s and 1990s with the "War on Drugs." Scores of states moved to a more punitive approach to drug crimes, including simple possession. Along with mandatory minimums, many states passed "truth in sentencing" laws that eliminated parole and "three-strikes" laws that mandated long prison terms for repeat offenders. The overdose death of rising basketball star Len Bias prompted Congress to pass the Anti-Drug Abuse Act of 1986, which required minimum sentences for possession of even small amounts of drugs, including a scheme that triggered mandatory sentences for crack cocaine possession at 1/100 the amount of powder cocaine.[63] State and federal prisons were soon bursting with new inmates who would be there for a long time, many of whom were convicted of relatively low-level drug offenses. By 2008, the United States had the highest incarceration rate in the world,[64] with one of every hundred adults incarcerated in prisons or local jails.[65]

Like programs to abolish plea bargaining, these changes in law never quite work out as advertised or hoped. Many judges were uncomfortable with the rigidity (and inhumanity) of some of the harsher mandatory laws; it was not just a question of protecting their turf, although that may have been a factor with some. Policymakers from both sides of the political spectrum came to recognize that filling prisons with people convicted of nonviolent crimes, especially drug offenses, was not such a wonderful idea. It did not, for example, seem to have much of an effect on crime rates. The harsh effects of the laws seemed to fall disproportionately on black and Hispanic men. And it cost taxpayers a lot of money to house all the new inmates. Even police and prosecutors—typically the leading edge of tough-on-crime policies—came to recognize the folly of locking everyone up.[66]

In the 2000s, many states reversed course, eliminating mandatory minimum sentences and tweaking other "tough on crime" measures. New York, for example, enacted comprehensive drug policy reforms in 2009 that eliminated most mandatory minimums.[67] California voters twice changed its three-strikes law—Proposition 36 (2000) mandated drug treatment instead of prison sentences for some drug offenders;[68] twelve years later, Proposition 36 (2012)[69] required the "third strike" to be a serious or violent felony to trigger the mandatory life sentence (before the change, one man was sentenced to life in prison for a "third strike" of stealing a pair of socks worth $2.50).[70] Even the federal government began taking limited steps in this direction: in 2010, it reduced the crack/powder cocaine sentencing disparity from 100 to 1 to "merely" 18 to 1.[71]

The most surprising thing about all this? Over the last few decades, whether states were getting harder or softer on crime, the crime rate—especially the violent crime rate—declined dramatically. From 1991 to 2014, violent crime—murder, rape, robbery, and aggravated assault—dropped by more than 50 percent. Crimes against property—like burglary and theft—fell almost as quickly. Of course, there were some variations across crimes, and different places in the country had slightly different stories. Property crimes were down by half, but the decline in motor vehicle theft was especially dramatic: you were three times as likely to have your car stolen in 1991 as you were in 2014.[72]

New York City, once the capital of urban dangerousness, saw its murder and robbery rates fall by over 85 percent in this period,[73] prompting a leading scholar to conclude, a bit optimistically, that "life-threatening crime is not an incurable urban disease in the United States."[74] While crimes did not all decline at the same rate, and not all cities shared equally in the drop in crime, these differences are, on the whole, variations on a single theme: crime is way down.

There is no shortage of theories as to why crime has fallen so dramatically, though none of them, standing alone, seems completely convincing. Some focus on changes in the legal system; others on social and demographic changes. The mass incarcerations surely took some potential criminals off the streets, but that alone doesn't seem to get us very far. Incarceration probably had some effect on the crime rate in the 1990s, but this strategy showed diminishing returns through the 2000s—essentially, there comes a point at which throwing more people in prison has no effect on crime.[75] Others argue that more aggressive policing strategies made the difference, especially when it came to urban crime.[76] There are also demographic explanations. There are lower numbers of the kind of people—namely, young men—who commit crimes; the young men of the post–Second World War baby boom are now senior citizens.[77] John Donohue and Steven Levitt have even suggested that the legalization of abortion in the early 1970s led to fewer "unwanted" children—children who would go on to commit crimes when they grew up.[78] Jessica Reyes has linked the removal of lead from gasoline in the early 1970s to the later drop in crime: exposure to lead (so the argument goes) causes cognitive and behavioral problems, including aggressive behavior.[79] None of these theories, and perhaps not even all of them put together, seem to explain completely why crime has been dropping. But we also do not know why it rose so dramatically in the first place.

And what about the death penalty? This is the most controversial, gaudiest, most extreme form of punishment. Not every state has it—Minnesota, Wisconsin, and Michigan, for example, do not, along with sixteen other states. Of those that do have it, some use it only rarely. We will deal with this king of "corrections" in Chapter 11.

CLASS, RACE, POWER, AND CRIMINAL JUSTICE

The criminal justice system is where law most openly shows its teeth. Here are the clubs and handcuffs of the police, the cells and walls of San Quentin, the gas chamber and the electric chair; here is the jailhouse and the riot squad. The police constitute the armed forces of civil authority. The police have tear gas and Tasers and guns. They are the sworn enemies of crime and disorder. But they can also beat and harass dissenters, they can shoot at targets that they should not shoot at, they can oppress the weak and powerless—minorities, the homeless, the poor. History, alas, makes it clear that society can and does use power for evil ends; very much including police power. The police state is all too real in many parts of the world.

What is the situation in the United States? Does criminal justice treat people fairly? Does it fall more heavily on the poor and the powerless, on black people and other minorities? Does it reflect the values of men rather than women, to the detriment of women? It seems clear that the system is riddled with biases, many of them more or less covert. As to race, the days of lynch mobs are, happily, over. But if racial prejudice is present in society as a whole, and it surely is, why would we expect criminal justice to be free of this curse?

Many studies have tried to measure bias in the system, with some degree of rigor. As noted in Chapter 4, the results are surprisingly inconclusive. One study reviewed more than seventy research projects that had tried to ferret out race prejudice in the sentencing process alone. Some of these studies came to the conclusion that there was race prejudice; some came to the opposite conclusion. There are surely individual judges, however, who betray bias against minorities.[80] But what of the system as a whole?

Bias may come in many forms. There can be bias in the rules themselves. Rules may be tilted in favor of (say) landlords and not tenants, or in favor of the state and not defendants. This bias would affect outcomes even if judges, police, and prosecutors applied the rules fairly and evenly. Or the rules might classify as criminal certain patterns of behavior that are more common in some communities than others. Or crime may be more of a temptation among people who are poor, downtrodden, despised, and shut off from legitimate opportunity. If we look only at the way the rules are applied, the system might seem quite fair, fairer than it really is.

These considerations are not just theory. The "war on drugs" weighed much more heavily on black users and dealers than on whites. More black users and dealers are arrested, proportionately, than white users and dealers. As mentioned above, crack cocaine—associated with blacks—has been treated in the law much more harshly than powder cocaine. In 1992, at the height of the war on drugs, 91.4 percent of all federal crack defendants were black, and only 3.2 percent were white. (Whites, on the other hand, accounted for 32.3 percent of the powder cocaine defendants, compared to 27.2 percent for blacks.) Those kinds of racial disparities among defendants changed very little over the next two decades.[81] And for much of that period, the average sentences for crack cocaine offenders were 40 to 50 percent longer than those for powder cocaine offenders.[82] As a result, thousands of black people, mostly men, were imprisoned, and for longer terms than whites. The sentencing guidelines were enacted with the belief that curtailing judicial discretion would *reduce* the amount of racial discrimination in sentencing. But with the disparate treatment of crack and powder cocaine, the opposite happened. Racial disparities were exacerbated. Individual bias was replaced with systemic bias, bias in the law itself.

Bias can also work more subtly, and at an early point in the process. Suppose the manager of a boutique catches a well-dressed white woman in the act of stealing a hat. He may quietly take back the hat and show the woman out the door with a warning, rather politely. Later he finds a black teenager shoplifting. This time he delivers the teenager straight to the police. If this happened consistently, throughout the city, arrest figures

would suggest that most shoplifters were black. That, of course, would be misleading. The police themselves might have a double standard as between rich and poor, black and white, in deciding whether to book a person or let him go.

That something is wrong, and that race is a factor, is obvious from the most elementary statistics. About 6 percent of the black males ages thirty to thirty-four are in prison; the figure for white men of the same age is about 1 percent. Black men in prison in 2014 outnumbered white men—about 516,900 black men, approximately 60,000 more than whites. (Blacks are about 13 percent of the American population.) A black male aged eighteen to nineteen is over ten times more likely to be in prison than a white male of the same age.[83] Some regions are worse than others. In 1995, 24 percent of the young black men in Georgia were under the jurisdiction of the criminal justice system—almost 9 percent in prison or jail, another 15 percent or so either on probation or on parole.[84] And in Washington, D.C., in 2000, it was estimated that three in four young black men could expect to spend time in prison.[85]

Being locked up is bad, but being convicted of a felony, whether one is locked up or not, carries with it a good deal of what we might call collateral damage. In many situations, both the government and private actors are allowed to discriminate legally against felons—in employment, housing, public benefits, and voting. These effects, coupled with the mass incarceration of a disproportionately black and brown population, led Michelle Alexander to describe the current situation as "the new Jim Crow."[86]

How much of this appalling situation is the bitter fruit of discrimination, direct or indirect? Undoubtedly, although there is a great deal of bias in enforcement and in the norms, African-Americans do seem responsible for more than their share of crimes, including violent crimes. Why is this so? African-Americans are weaker than whites in economic and political power; they have higher rates of unemployment. But as Austin Turk has pointed out, "powerlessness does not explain very much. Women have less power in this society than men, yet women make a very feeble showing at crime."[87] Indeed, from 2004 to 2014, women were only about 7 percent of the country's prisoners.[88] Crime is definitely not an equal-opportunity activity.

Indeed, women's complaints were of a different nature: that the system tended to ignore them as *victims*—that the system makes light of domestic violence, and treats women who are victims of rape and sexual harassment unfairly. In response to these complaints, the laws have been overhauled in major ways in the last several decades; police departments have become more sensitive to domestic violence; they make more arrests, and are less likely to ignore or brush aside brutality against women. And the law of rape has been substantially recast.[89] How deep these changes go, and how effective they are, remains an open question.

The huge disparity between the experiences of blacks and whites in regard to criminal justice is another matter. It is a brute fact, and a disturbing one. Moreover, black and white perceptions of criminal justice are radically different. Most blacks feel that the police, and the criminal justice system in general, are incurably racist. Blacks feel

they know this from their own personal experience, experience that is often confirmed by empirical data. One recent study, for example, found that black drivers were about 30 percent more likely than white drivers to be pulled over in traffic stops, giving some empirical backing to the belief that there really is, in a way, an offense we might call "Driving While Black." That same study showed that, once pulled over, black and Hispanic drivers were almost three times as likely as white drivers to have their cars searched by the police.[90] Stops on the street show a similar pattern. A recent action challenging New York City's stop-and-frisk program revealed that about 83 percent of those stopped by the police were black or Hispanic, even though those two groups made up just over half of the city's population.[91] Indeed, racial bias shows up almost everywhere in the system.[92]

What happens in the street after the police stop and question an African-American can also be troubling; and more than troubling. There have been a number of very disturbing and high-profile events. The Rodney King incident in the early 1990s, for example, reinforced the public perception of racial bias in the criminal justice system. King was a black motorist stopped by policemen in Los Angeles and beaten unmercifully. By chance, a resident of a nearby house captured the incident on video. Even though the policemen had been caught red-handed, an all-white jury, in April 1992, acquitted them, touching off a wild riot in Los Angeles.[93]

Two decades after the Rodney King incident, a new wave of racially charged police encounters riveted the country. In July of 2014, Eric Garner, an unarmed black man suspected of selling "loosies" (single cigarettes) from packs without tax stamps, died in Staten Island after a police officer put him in a chokehold. Despite a video of the incident showing the chokehold and Garner's subsequent pleas that he couldn't breathe, a grand jury decided not to indict the officer.[94] The following month, in Ferguson, Missouri, Michael Brown, an unarmed black man, was fatally shot by Darren Wilson, a white police officer. The exact circumstances have been disputed; but the incident touched off a prolonged period of civil unrest in Ferguson.[95] These and a string of other events, some of them captured on video by police cameras or bystanders with smartphones, gave rise to the "Black Lives Matter" movement, which campaigned against the killings and other police violence against black people.[96] The disaffection of minority communities is likely to continue, as long as incidents of this sort occur—especially if police departments whitewash the officers and sweep the problem under the rug.

THE RIGHTS REVOLUTION

Over the years, there has been much discussion of the "rights revolution," about tenderness toward criminal defendants, about the way courts "coddle" criminals, about the excesses of due process of law. How much of this is real and how much is talk? When we ask whether trials are basically fair, we must remember that most people accused of

crime never go to trial. Their rights are decided in other ways, often through plea bargaining. For those who do go to trial, how much concern does the law show for defendants' rights? And how does this solicitude compare with times past?

The basic rights of defendants are, of course, quite old. The Bill of Rights—attached to the federal Constitution more than two hundred years ago—is a kind of minicode of criminal procedure. It prohibits cruel and unusual punishment, unreasonable searches and seizures, and excessive bail. The Constitution guarantees trial by jury and the writ of habeas corpus (a protection against illegal imprisonment). Compared to justice in other countries, and especially in dictatorships, American criminal justice is a shining example, and always has been.

But no country is perfect, or even close to it. The Bill of Rights is, after all, only text, only a string of words. It expresses a goal, an ideal. Actual practice fell and falls far short. There is much to be ashamed of in our national past. There is, in particular, a sorry record of police brutality and unfair prosecution of unpopular defendants—by no means ended, as the Eric Garner incident shows.[97] There is also a history of lynch law, and a deep, dark stain of racist justice, especially in the South. The vigilantes in the Old West were not as admirable as some people think—they were sometimes little better than a lynch mob themselves. People outside the mainstream have usually found little protection from criminal justice—quite the opposite. Moreover, the system has often cut corners, dealing with people accused of crime in a slapdash, indifferent way. Sometimes, at least, corner-cutting ends up convicting the innocent. Prisons have at times been citadels of cruelty and rape, in which the weak are terrorized by the prison authorities and brutalized by guards and the more vicious prisoners.

But the past is dead. What is the current situation, and in what direction are we going? The *formal* rights of criminal defendants have expanded enormously, especially since the 1950s and 1960s, with the Supreme Court under Earl Warren leading the way. In *Miranda v. Arizona* (1966),[98] the Supreme Court addressed the question of the rights of people arrested by the police. The police must inform the suspect of his constitutional rights, including his right to say nothing. If this warning is not given, the court can refuse to allow the defendant's words to be used as evidence. It has become a standard practice for police to give the "Miranda warning" to anyone picked up for a serious crime.

Has *Miranda* made much of a difference? Possibly it simply requires the police to mumble a verbal formula, while they find newer ways to browbeat the people they arrest.[99] Some scholars think *Miranda* has had an effect—but a negative one, hamstringing the police. Its actual impact is hard to fathom.

Miranda was only one of a whole series of decisions by the Warren Court (and like-minded state courts); the net effect of the cases as a whole might be far greater than the effect of any single decision. Police and prosecutors perhaps have to be more sensitive to due process than in the past, before courts (and civil-rights organizations) were constantly looking over their shoulders. In *Gideon v. Wainwright* (1963),[100] the Supreme Court took another bold step. In this case, out of Florida, the Court decided that a

person accused of a felony has a right to a lawyer. If the defendant has no money to hire one, the state must provide one and pay the bill. This case, at least, did have an effect, if not on the system in general, then on thousands of lives and thousands of cases.

The criminal justice system is headline news, and the subject of great controversy. Crime (especially crime in the streets) is an ongoing social problem. At the same time, the "rights revolution"—the expansion of due process, and a heightened public consciousness of rights—is an established fact. People who speak for the poor, for black people, and for other racial minorities complain bitterly about the behavior of police, prisons, and the rest of the system. The system, in other words, is under attack from both the right and the left, from those who think it is too soft and those who think it is too hard. For a while in the 1980s and 1990s, the hard-liners were definitely in the saddle. Both parties—and the majority of the public—wanted a tighter, tougher system. More recently, though, the excesses of those years are being recognized, questioned, and, in some cases, reversed.

In some regards, however, there is no going back. The "due process" camp won many victories, in and out of court. These legal victories are hard to reverse. In other areas, there have been both reform and reaction. Bail law is one example. A person who is arrested and charged with a crime does not always sit in jail until his case comes up; he is often released "on bail," that is, after he puts up some money as security. He forfeits the bail if he does not show up for trial. The Eighth Amendment forbids "excessive bail," but even a fairly modest amount of bail looks excessive to somebody poor or unemployed. Bail makes a tremendous difference to the outcome of cases. People out on bail can prepare their defense better; they can also go about their daily lives. A person in jail is suffering a kind of punishment, even if he is found innocent in the end. He loses freedom, and he might also lose his job. He might be more likely to accept a plea bargain just to get out of jail. Hence, reformers have proposed letting people go free before trial, on their word of honor, if they seemed like good risks. People with ties to the community are not likely to skip out on the court. Release of this kind was promoted by the Manhattan Bail Project of the 1960s, a project funded by the Vera Foundation. Congress passed a Bail Reform Act in 1966 for the federal courts; other states developed their own versions.[101] But bail reform, too, became a prisoner of the search for toughness. In the 1980s, new bail "reform" laws were passed, this time not so much to help poor defendants as to protect the public from the release of defendants who were potentially dangerous.[102] At this point in the twenty-first century, there are about half a million people in the United States in pretrial detention.[103] Most of those people are there because they cannot afford to arrange for bail, not because they are dangerous.[104]

The prisoners' rights movement is also worth mentioning. It led to the establishment of grievance procedures in prisons and helped curb some of the worst abuses of the prison system. Starting in the 1960s, a dramatic series of cases, brought by and on behalf of prisoners, led to decisions that expanded the scope of due process within prisons and declared illegal some of the most shocking aberrations from humane penal policy.[105]

Congress attempted to reduce the number of lawsuits over prison conditions with the Prison Litigation Reform Act in 1996.[106] Despite the new law, there were over 13,000 federal lawsuits filed in 2014 over prison conditions.[107] No doubt many of these lawsuits have no real basis; but it is also surely true that conditions in many jails and prisons are deplorable—overcrowding, inadequate medical care, gang rule, and violence.

Reforms have a depressing tendency to dribble out into nothing. Malcolm Feeley reviewed the evidence on the impact of bail reform, sentence reform, and "pretrial diversion," that is, the plan to siphon off certain defendants before trial (for example, those with mental problems or alcohol problems) by referring them to more appropriate social agencies. Planned changes or reforms, he concluded, accomplished very little. Of course, the criminal justice system is far from static; changes may emerge quietly, in unanticipated ways, or because of changes going on in society at large.[108]

In truth, the criminal justice system is hard to deal with, in either direction. This is the message of Feeley's book. He looked at hard-line reforms as well as soft-line reforms. As we mentioned, New York, under Governor Nelson Rockefeller, passed draconian drug laws, meant to put pushers in jail. This law (and others like it) had, on the whole, as little effect as the softhearted laws. There was "little measurable deterrent effect on narcotics use"; the law was "astronomically expensive to administer, and it led to harsh sentences for marginal offenders."[109] By the late 1970s, New York legislators recognized the shortcomings in this approach and began the long process of softening the effects of the laws with a series of amendments in 1977, 1979, and, finally, 2009.[110] The California "three-strikes" law, adopted with such fanfare in the 1990s, was almost immediately assailed as a costly failure, for all sorts of reasons,[111] and ultimately watered down by a series of initiatives in 2000 and 2012. Failure has also been the experience, by and large, of perennial attempts to put teeth into laws against drunk driving. Experiments in tougher enforcement sometimes work, as experiments, but the system soon lapses back into its old ways.[112]

We can compare the criminal justice system to a leaky garden hose, full of holes. If you try to turn up the pressure at one end, the extra water simply squirts out of holes in the middle. In many ways, the criminal justice system is just such a leaky hose.

Is it really a *system* at all? The word "system" suggests some sort of rational organization, some sort of overall coordination. Criminal justice is a pseudosystem at best. Nobody is really in charge. Everybody can frustrate the work of everybody else. The legislature can pass laws, but cannot enforce them. The police can arrest people, but they have no way to guarantee prosecution. The prosecutor can prosecute, but cannot be sure the court will convict. The judge can sentence people, but cannot keep them in prison. The jury can disregard the judge; the judge can disregard the jury. And so it goes. The system, in short, is "decentralized, fragmented, made up of bits and pieces." It is "like some . . . primitive beast, with primeval power to regenerate; snip off a leg, an arm, an organ here and there . . . , the missing part simply grows back. No brain is in control, no central nervous system."[113] For better or for worse, this is the system as it is today; and has been, for generations.

10

Constitutional Law and Civil Liberties

NO ONE CAN write about or discuss the American legal system seriously without taking account of a document whose two hundredth birthday has come and gone: the American Constitution. The Constitution dates from 1787, which probably makes it the oldest written constitution still in force. It is certainly the most legally active. It is not, of course, quite the same document it was in 1787. The Constitution has been amended twenty-seven times; some of the amendments (the First and the Fourteenth, for example) have been extraordinarily important. But when we consider how the world has changed since 1787, twenty-seven amendments do not seem like a lot. Twelve of these had been added to the Constitution by 1804; there have been only fifteen since.

A note of caution. When we talk about the influence or effect of the Constitution, we must remember that the Constitution in itself is only a piece of paper. There is no magic in words and phrases. It is not the American Constitution that is powerful, but the American constitutional *system*. It is a system made up, first, of public attitudes toward the Constitution, and second, of behavior patterns and institutions that have grown up around the Constitution. The Constitution itself, important as it is, well crafted as it is, could not and cannot account for the constitutional system, for the living law of the American Constitution.

The experience of other countries proves this point. Dozens of countries have written constitutions, but some of these are little more than bad jokes played on the public. For example, the 1982 constitution of the People's Republic of China is full of glittering, noble phrases. It promises "freedom of speech, of the press, of assembly, of association, of procession and of demonstration" (Article 35). These promises, of course, have very little

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to do with living law or the structure of power in China. In this regard, the Chinese constitution has plenty of company. On the other hand, the British have no written constitution, no firm "guarantees" of liberty. Parliament in theory is utterly supreme, more powerful on paper than the Chinese state. Yet Britain is a pretty democratic place, and the rule of law is healthier there than in many countries with beautiful constitutions.

Whatever the situation elsewhere, constitutional government is a strong force to be reckoned with in the United States. It is part of the fabric of American life. The American Constitution is living law because it is enforced; Article 35 of the Chinese constitution is not. The U.S. Constitution is made into living law through a variety of means. There is, very notably, enforcement through the courts, by means of "judicial review." This refers to the power of the courts to decide if laws and acts of the other branches of government, or of the state and local governments, are valid or not, constitutionally speaking, and to reduce these acts to zero if they fail the test. The courts are not the only guardians of the constitutional system, but they are a powerful and important one. Indeed, when people talk about "constitutional law," they usually mean doctrines and understandings that courts have invented, developed, and spread.

These doctrines and understandings may be rooted in the text of the Constitution (and in theory they must be). But the Founding Fathers would hardly recognize these doctrines and understandings today. As we asked in an earlier chapter, what would Thomas Jefferson say if he were told that today "freedom of speech" seems to mean that magazines can print pictures of naked people making love? What would he make of the argument that "privacy," including the right to an abortion, is guaranteed by the Constitution? Or that the commerce clause allows Washington to tell farmers how many peanuts they can grow?

The Constitution, in short, is what the judges say it is, as Chief Justice Charles Evans Hughes once bluntly put it. What they say is said in the context of actual cases. Actual cases arise out of real disputes between real litigants. They are always a product of their times. They reflect the social issues of the day; hence, realistically, it is these issues that are the immediate sources, or incentives, for the creation of constitutional law.

This is a basic fact of our constitutional system. It is important not to stress judges and courts unduly. Constitutional behavior is more than judicial behavior. Constitutional law begins outside the courtroom: it begins with claims of constitutional right. Also, there are traditions of behavior and understanding, quite independent of judges and courts. The First Amendment guarantees freedom of speech; so do all the state constitutions. Yet the Supreme Court did not decide an important free-speech case until *Schenck v. United States* (1919).[1] Schenck was convicted of violating the 1917 Espionage Act during the First World War. Schenck was an opponent of the war; he mailed a document out to draftees, attacking the war and the draft.

By then, the First Amendment was over a century old. Yet the federal courts had said almost nothing about the meaning and limits of freedom of speech. During those years, the federal government took many actions that would be considered gross violations of

our speech rights today. On the other hand, there was never general censorship of the press during peacetime. Wide-open political debate was always possible, on a scale that few other countries achieve even today. Freedom of speech, then, was part of our basic tradition. That tradition, however, is not immutable; it changes at the margins, and, at times, in its very core. The essential point is this: constitutionalism is more behavior than theory, in every period of history.

But one should look at theory, too. The place to begin is with the Constitution itself. Its basic idea is simple. The Constitution is the supreme law of the land. It is the highest authority. No person and no branch of government—not the president, not Congress, certainly not the police officer on the beat—has the right to set the Constitution aside; its words and its rules are law. In the early republic, the powers and role of the courts—treated only briefly in the constitution itself—were far from settled. In the famous case of *Marbury v. Madison* (1803),[2] the great chief justice John Marshall first exercised the mighty power of judicial review to strike down an act passed by the U.S. Congress. The issue was a technical one: did the Supreme Court have the authority to issue a certain kind of legal writ, called a mandamus, against the secretary of state? An act of Congress gave it the authority; but the Constitution (as Marshall read it) restricted the Supreme Court to appeals, except for a few narrow, specific exceptions. Thus the act of Congress conflicted with the Constitution, and Marshall boldly set the act aside. Many of Marshall's critics attacked this decision as a naked assertion of power, and one that was not justified by anything in the text. But the case—and the principle—held firm.

Judicial review is not, of course, solely a federal power. The state courts exercise it, too; each state, after all, has its own constitution. State legislatures, not to mention city hall and the various state agencies, must conform to the state constitution—and the constitution of Nebraska (to paraphrase Hughes) is what the Supreme Court of Nebraska says it is. The power of judicial review, state and federal, is now so deeply ingrained in our system that it is hard to imagine our legal world without it.

Nonetheless, judicial review is still subject to debate. Not as a general idea; judicial review is accepted by almost everybody. But the scope of judicial review is something else entirely. The courts, it can be argued, carry it much too far. After all, judicial review is "countermajoritarian." Nobody elects the Supreme Court. The voters choose members of congress, senators, presidents to govern them. Why should the Court overturn laws that the people's representatives enact? True, the Constitution is the highest law of the land. But it is naive to claim that the Supreme Court only "interprets" the text, that is, that it does nothing more than ask what the document means or what it meant to the people who wrote it. At his confirmation hearings, Chief Justice John Roberts described his prospective role on the Court as a detached "umpire" whose job is "to call balls and strikes and not to pitch or bat."[3] It was a memorable line, and reassured senators and others that he wouldn't be one of those "activist" justices, but it did not reflect reality; it did not describe what the Court actually does—and perhaps not even what it is supposed to do. The Court goes far beyond anything that can reasonably be called "interpretation."

The Court invents and expands constitutional doctrine, and some of this doctrine is connected to the text by gossamer threads, if at all.

Hence the Supreme Court, and courts generally, have immense power in this society. Some scholars—and many political figures—are wary of this power. They want more "restraint." They want the court to confine itself to what the Constitution "actually means." But this is easier said than done. What *does* the constitution "mean"? Is it even possible to detect a "meaning" for these ancient words? And must the meaning be the same now as it was in 1787? The world has changed enormously since then. Should the Constitution stay the same?

Hundreds of books, articles, essays, statements, manifestos, and judicial opinions have wrestled with the problem of judicial review, and how to justify it in a democratic society. One strong position is that the Court has a duty to give meaning to the constitutional *system*, in particular to enforce basic human rights, and especially the rights of minorities. As far as the text is concerned, those who take this position prefer, of course, to ground the Court's work in the text. But they insist that the text itself allows us to depart from the text, paradoxical as that might sound. The Constitution is a living, evolving document, they say. And it was intended to be such. Its words express principles, not rigid rules.

The point is to prevent the "tyranny of the majority." Majority rule, the argument goes, is a good idea in general, but there is nothing absolute about it. The majority is not always right. Freedom is a value that everybody ought to enjoy, whether most voters in some particular cases think so or not. The rights of minorities are especially important, they would add, in a county like the United States, where people of different races, religions, nationalities, lifestyles, and political beliefs all have to live together. We cannot allow a majority to squash the rights of people the majority does not like, or does not agree with. The Supreme Court must insist that these rights are respected. That is what the constitutional system means.

There is no question that the Court, in large part, agrees with this view—or at least *behaves* as if it did. Indeed, minority rights are one of the great themes of constitutional history. In case after case, issues have turned on the claims of some member of a despised minority, or the litigant was a person who held hateful opinions or was weak, deviant, or powerless. In *Yick Wo v. Hopkins*,[4] a Chinese laundryman in San Francisco made legal history; in *Gideon v. Wainwright*,[5] it was a middle-aged, drunken no-good; in *Terminiello v. Chicago*,[6] a rabid racist and anti-Semite. Through the cases parade an amazing battalion of underdogs: outcasts, the downtrodden, or those who are just plain different—Jehovah's Witnesses, gay people, sharecroppers, pornographers, rabble-rousers, "reds," and born-again troublemakers.

Some scholars also look to the Court as the only place in this society where we can expect cool, rational, high-minded debate on controversial issues. Some of these are issues so hotly disputed that they threaten to tear us apart. The Court and the Court alone is strong enough and independent enough to tackle these issues. The justices have life tenure. They draw their paychecks no matter who is president, no matter who controls

Congress, no matter what the Gallup Poll reports about public opinion. Laurence Tribe, championing the Court and its work, put it this way: "By debating our deepest differences in the shared language of constitutional rights and responsibilities, and in the terms of an enacted constitutional *text*, we create the possibility of persuasion and even moral education in our national life," looking not toward a "permanent reconciliation of conflicting impulses but toward a judicially modulated unending struggle."[7]

This may be more than a trifle overstated or romanticized. The Court is certainly aware of political feeling—indeed, in many ways, it is political to the core. It has done more than its share of backpedaling, and it has certainly been known to give way to sentiments we would now label as prejudice. Its overall record on civil liberties is far from perfect—some would argue that, on balance, and if we put to one side a few famous and atypical cases, the Court has a poor record on resisting popular hysteria. To take just one example, when the government sent Japanese-Americans to internment camps during the Second World War, the Court meekly ratified this grave injustice.[8]

There is no need, then, to romanticize the Court or to put it on a pedestal. But all in all, it does remain a strongly independent body, and its sensitivity to enlightened opinion is not to be sneezed at. In our times, many people feel that social justice, overall, gets a far better shake—or at least a far more sympathetic hearing—in the marble halls of the Court than in the back rooms of political life.

It is possible, then, to justify the astonishing power of courts, even in a democratic society. The power is not random or willful; the Supreme Court (and the other courts) are nothing if not careful and responsible. They consider a wide range of factors—including narrowly legal ones. The debate over the role of the courts goes on, as it has since *Marbury v. Madison*. It will continue. Meanwhile, the Court does its work, and the country, by and large—with a few egregious exceptions—tends to accept the results. Even a highly politicized, controversial decision like *Bush v. Gore*,[9] which resolved the dispute over the 2000 presidential election, had little lasting effect on public attitudes toward the Supreme Court.[10]

Another point is worth making: there is a big difference between long-run and short-run values. The Constitution tried to set up a plan for the long haul. Short-run pressures pour in every day, on Congress, the president, and the rest of the government. This tempts them to hasty actions, actions they might live to regret. Public opinion, too, is excitable, volatile. The Constitution (fiercely guarded by the courts) can cancel or prevent mistakes of the moment; we may all be better off in the end when the courts force us to resist short-term temptation.

An analogy may be helpful. Two friends set out for a party on New Year's Eve. One of them, as he knows, has a drinking problem. He gives his friend the keys to the car, and says: "Don't let me drive if I get drunk, no matter what." At the party, he drinks too much—just as he feared. Drunk, he demands the keys. But the promise was "constitutional"; even though he begs, coaxes, and pleads, the friend refuses to give up the keys. The drunken man is angry, disappointed. He complains loudly that his friend is unfair.

After all, it is his car; they are his keys. But in the cool, pearly light of morning, he will be glad his friend refused him and stuck to his guns.

The Constitution and the courts that give it meaning are, of course, the keepers of the keys.

STEPCHILDREN OF RESEARCH: THE STATE CONSTITUTIONS

If you study constitutional law or constitutional history in college or law school, you study the federal Constitution and the way courts interpret it. Yet every one of the states has its own constitution, too. State constitutions are significant documents in their own right. They are the highest law within each particular state. State courts have the last word, by and large, on questions of state constitutional law. The California constitution affects the rights and duties of more than 35 million residents; this makes the California Supreme Court, prime interpreter of the California constitution, an important institution indeed. The same can be said for the Court of Appeals of New York—or, for that matter, the Supreme Court of Wyoming.

State constitutions are by no means pale imitations of the federal Constitution. Of course, the states have been influenced by the Constitution of 1787. For example, they all have bills of rights, patterned more or less on the federal Bill of Rights. This is, in a way, repayment of an ancient debt; the federal Bill of Rights drew heavily on some of the early state constitutions, for example, Virginia's. Since 1787, the federal Constitution has been a powerful model for the states. But the state constitutions differ greatly from each other and from the federal Constitution, both in structure and in detail.

There are many provisions in state constitutions that have no counterpart in the federal document. Many states, in the second half of the nineteenth century, enacted special restrictions on the power of their legislatures. Some legislatures had been, alas, quite corrupt and richly deserved distrust. Maryland, in 1851, took away the legislative power to grant divorces, set up lotteries, spend money for canals and railroads, and go into debt by more than $100,000.[11] Many states outlawed "local or special laws" or "private" laws. (Congress still has this power; as we saw, it can, and does, pass laws that only apply to a single person, place, or event.)

Many states also put constitutional limits on the *form* of laws. One common provision provides that no law should cover more than one "subject"; this subject has to be "expressed in the title."[12] The point is to keep a crafty senator or assemblymember from slipping some pet provision into a bill and getting it by the senate or assembly unawares. Whether a statute covers more than one topic is a fairly subjective judgment. Hence this provision gives the judiciary another meat ax to butcher legislation.[13] The clause, in state constitutions, has been a fertile source of litigation. It has no equivalent in the federal Constitution.

State constitutions have generally had more tangled histories than the federal Constitution. The federal Constitution has been, on the whole, a model of stability. It has been amended, but never overthrown—though the Civil War, of course, was a major

crisis for the constitutional system. Only a few of the states (Wisconsin is one) have made do with a single constitution. Louisiana, at the other extreme, has had nine or ten, depending on how one counts. The Louisiana constitution of 1864 was replaced in 1868; the constitution of 1868 was replaced in 1879; this one lasted only until 1898. The 1898 version had 326 articles; it fixed the governor's salary at $5,000 and had twenty-eight separate provisions that dealt with the government of New Orleans.

This was a classic case of constitutional bloat. It was a far cry from the federal model, in which the document sets out the core framework of government, lists basic principles and rights, and then leaves it at that. Constitutions like Louisiana's of 1898 are actually a kind of super-statute. No wonder that these constitutions are continually tinkered with or replaced. An overly detailed constitution is almost necessarily a brittle constitution. The federal Constitution, broad and sweeping, bends with the wind and does not break.

AMENDMENTS

The Constitution is the highest law of the land, but it can be amended. Under Article V, Congress can propose amendments, which go into effect when "ratified by the Legislatures of three fourths of the several States." This is the method which up to now has been followed every time. There is an alternate way, which starts out with a constitutional convention; it has never been used. In either case, the amendment process is tough and slow; most proposals never succeed. The Equal Rights Amendment (favored by women's groups) sailed through Congress and won the approval of more than thirty legislatures, but finally died in 1982, a victim of backlash and recalcitrance. Congress has come close on occasion to passing a proposed balanced-budget amendment—for example, in 1995—but this, like most suggestions, never made it out the door.

The states, too, have methods of amending their constitutions. In a few states, notably California, this can be done through an "initiative." This power of voters themselves to propose and pass statutes, discussed in Chapter 5, may also be used to amend the state constitution.[14] Indeed, amending the constitution is almost a way of life in California; in every general election, the California voter finds on the ballot one or more "propositions" to amend the constitution. It takes a big effort to get a proposition onto the ballot—the organizers have to collect voter signatures totaling at least 8 percent of the votes for all candidates in the most recent election for governor—but obviously it *can* be done, since proposed amendments do make it to the ballot. Some are trivial, some significant. Proposition 13 in California cut property taxes to the bone and shook up the whole system of state finance.[15] Each general election brings a new crop of proposed constitutional amendments, to be voted on by the public. In the November 2008 general election in California, Proposition 4 proposed to amend the California constitution to prohibit abortion for minors until forty-eight hours after parental notification (it lost); four years later, Proposition 30 proposed to amend the constitution to raise income taxes on wealthy Californians (it won). In this same 2012 election cycle, Colorado voters

amended their state constitution to legalize the cultivation, sale, and use of recreational marijuana, becoming one of the first states to do so (it is still against federal law).

THE FLOWERING OF JUDICIAL REVIEW

Marbury v. Madison,[16] John Marshall's great decision, is a convenient starting point for talking about judicial review. After *Marbury*, despite grumbling in state courts and among Thomas Jefferson's followers, judicial review won general, if gradual, acceptance. It became a swift and mighty sword in the hands of the courts.

But at first the sword almost grew rusty from disuse. It was more than fifty years until the Supreme Court clearly struck down a piece of federal legislation. This was the infamous *Dred Scott* case (1857).[17] The Court, in an opinion written by Chief Justice Roger B. Taney, held (among other things) that the Missouri Compromise (adopted by Congress over thirty years before) was unconstitutional.[18] The case also held that black people could not be citizens of the United States. Taney's views on slavery, race, and territorial politics, as expressed in *Dred Scott*, were totally obnoxious to antislavery forces in the North. No decision in the Court's long history has been so thoroughly vilified, then and now.

During the long latency period between *Marbury* and *Dred Scott*, judicial review was not completely dormant. The Court did use its power, from time to time, to void *state* statutes. Article I, Section 10(1) of the Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." This clause was intended to prevent states from going too far in protecting debtors against creditors, especially during times of economic crisis.

The Supreme Court read the clause very broadly. In *Fletcher v. Peck*,[19] the Court applied the clause to land grants. Georgia's legislature in 1794–95 transferred huge tracts of so-called Yazoo lands to speculators, for a low price. Some of the legislators took bribes. Later the voters turned the rascals out of office. The next legislature tried to undo the land grant, declaring it null and void. By this time, a good deal of the land had passed into the hands of new investors who were not part of the original deal; many of them lived out of state. The Supreme Court labeled the original grant a contract and refused to let Georgia wriggle out of the deal. In *Dartmouth College v. Woodward*,[20] the Court went even further. It held that a legislature could not tinker retroactively with the charter of a corporation (charters were issued, at the time, in the form of statutes). The Court also decided some contract-clause cases that were concerned, more strictly, with debt relief. Here, too, it sometimes boldly overturned the policy of individual states. Contract-clause cases were among the most critical constitutional cases decided before the Civil War. There were also scattered cases on the scope of state and federal power over interstate commerce, and, more generally, on the relationship between the two spheres of government. The issues have an antique flavor: runaway slaves; toll bridges and turnpikes; control of the newfangled steamboats, puffing their way in the

waters between New York and New Jersey. But mapping the jagged boundaries between state power and the federal government is a problem still with us today.

After the Civil War, the triumphant North pushed through three amendments to the Constitution, the Thirteenth, Fourteenth, and Fifteenth. The Thirteenth Amendment abolished slavery and "involuntary servitude," except as punishment for crime. Under the Fifteenth Amendment, the right to vote could not be "denied or abridged" by reason of "race, color, or previous condition of servitude." The Fourteenth Amendment (1868) undid the *Dred Scott* case and made a citizen out of anyone born or naturalized in this country. It forbade states from depriving anyone of "life, liberty, or property, without due process of law." States were also not to "deny" to anyone "within [their] jurisdiction" "the equal protection of the laws." Nine-tenths of modern constitutional law seems to have burst forth like a rocket from the two pregnant phrases "due process" and "equal protection." A massive social revolution would ultimately hang on them, or be made to hang.

The Civil War was itself a source of change. A weak, part-time government, idling in the swampy village of Washington, was forced to mobilize itself and run a great war. The war destroyed slavery and ruined the economy of the South. In the North, an agricultural society, with a few mills and factories scattered about like raisins in a cake, swiftly became the center of an industrial society in the postwar period—a society of mines, railroads, manufacturing plants, and rapid communication. The very basis of social life inevitably altered. The war had not brought this on, of course, but perhaps it speeded up the process. And a dramatic new age of judicial review began.

As late as the 1860s, the Supreme Court decided, on average, only four or five constitutional cases each year; by 1890, it was deciding about twenty-four.[21] Under Chief Justice Fuller, the Court declared five federal acts unconstitutional in a single decade (1889–99), together with four state laws and four municipal ordinances.

This great expansion of judicial review in the late nineteenth century pivoted on the due process clause. Doctrines sprang out of these few words like rabbits from a magician's hat. The draftsmen of the Fourteenth Amendment were almost certainly thinking only of procedure when they used the words "due process." They were thinking of fair trials in courts of law. But by the turn of the century, the phrase had come to mean something quite different, and vastly greater. As the Court saw it, an "unreasonable" or "arbitrary" law amounted to a deprivation of due process. Only the justices, of course, could say what was unreasonable or arbitrary. Too great an infringement of "liberty of contract," for example, violated the Constitution. Out of such bricks, the Court built a structure that, in effect, made rugged free enterprise part of the constitutional scheme.

Not, of course, consistently, and not without loud voices from left and center crying out against the work of the Court. In some notorious instances, the Court used "substantive due process" to tear the guts out of popular laws—laws passed to give labor more power against capital. The high-water mark, perhaps, was *Lochner v. New York*,[22] decided in 1905, a case that has "come to represent the transgressions of an ostensibly

activist judiciary."[23] The issue was a New York statute regulating bakeries. Among other things, it restricted the long, killing hours some bakers worked. Under the statute, no one could be "required or permitted" to work in a bakery more than sixty hours a week, or more than ten hours a day.

The Supreme Court struck down the law. The majority—as Justice John Marshall Harlan pointed out in his dissent—brushed aside evidence of subhuman work conditions: how bakers suffered from flour dust in their lungs; how "long hours of toil" produced "rheumatism, cramps, and swollen legs"; evidence that bakers were "palefaced," had delicate health, and "seldom" lived past fifty. Oliver Wendell Holmes Jr. also dissented; to him, the majority rested its case "upon an economic theory which a large part of the country does not entertain." This was the theory of pure free enterprise. Holmes himself was sympathetic to this theory, but he refused to raise it to the level of constitutional principle. To the majority, however (speaking through Justice Rufus Peckham), none of this mattered. The health arguments were a sham. The statute was fatally flawed. It interfered with "the freedom of master and employee to contract with each other." A regulation of "hours of labor" of this kind violated the Fourteenth Amendment.

Some state supreme courts (Illinois's, for one) were even more active, constitutionally, than the Supreme Court, and along the same lines of doctrine. Labor and social-welfare laws seemed to fall like tenpins at the turn of the century. But it is hard to measure the actual impact of *Lochner* and its fellow travelers. Most statutes, in fact, survived constitutional challenge. Many were never tested at all. On the other hand, we can never know what statutes did not pass—or passed in weakened form—because legislators in Illinois or Tennessee or Rhode Island were afraid the courts would strike them down. Perhaps, too, the opposite sometimes happened: a legislature passed a "radical" law to please some constituents, hoping deep down that the courts would kill it and take legislators off the hook.

One thing is clear: from the 1880s on, constitutional challenges to laws, uncommon before, were now much more common. They became, in effect, part of the life cycle of important laws. There was no turning back. Judicial review did not weaken in the twentieth century; quite the opposite. It grew, first of all, in terms of sheer volume: more statutes reviewed; more statutes struck down; new doctrines, some of them very bold, very sweeping. In a single year (1915), the Supreme Court voided twenty-two state statutes.[24] The pace continued. An active, intrusive Supreme Court became a permanent part of the landscape.

What it is active *about* has also changed, and dramatically. In the Great Depression of the 1930s and during Franklin D. Roosevelt's New Deal, the country shifted to the left. Power flowed from the exhausted cities and states to Washington, D.C. The Supreme Court at first refused to get the message. In a series of cases, the Court nullified key New Deal statutes. For example, in *Schechter Poultry Corp. v. United States*,[25] the Court swept off the books the National Industrial Recovery Act of 1933, a crucial piece of New Deal legislation.

Once more there was great anger in the country—and in the White House, too. Roosevelt hit on a plan: he would "pack" the Court (increase its size) by appointing new justices—men more to his liking, who would neutralize the "nine old men" who were currently sitting on the Court. Under the plan, the president was authorized to appoint one new justice for every sitting justice who was seventy years old or older. There were six of these justices in 1937. But for once, FDR's political sense had failed him; the Court-packing plan was attacked from all sides as a threat to the independence of the justices and to the whole American system. The plan was hastily abandoned and died on the vine.[26]

But in the end, Roosevelt won his war against the Court. He was elected president four times, and the "nine old men" simply did not outlast him. He got his Court without packing it; the Supreme Court after 1937 submitted—at first, rather meekly and reluctantly—to the expansion of national power and the New Deal's experiments in big government. Congress and state legislators could do as they liked with the economy; the Court would not say no. The later justices, President Roosevelt's men, eagerly embraced the new line of doctrine.

A clear expression of the Court's new attitude was the case of *Williamson v. Lee Optical*.[27] William O. Douglas, one of Roosevelt's appointed judges, wrote the opinion. The state of Oklahoma had passed a law regulating the eyeglass business. No one was allowed to make or fit eyeglasses except a licensed optometrist or ophthalmologist, or without having a prescription from one of these. The law was supposed to protect the public, and it had some vague connection with health, but these were rather skimpy grounds. The real motives seemed basically anticompetitive: opticians ("artisans qualified to grind lenses, fill prescriptions, and fit frames") were the target of the law, and it hurt them badly in their business. If this had been 1900, the Supreme Court might have gone over the law with a fine-toothed comb and could well have struck it down. The Court of 1955, on the other hand, was not of a mind to interfere. Douglas brushed aside all objections to the act. Let Oklahoma do what it wants: "The day is gone," he said, when the Court made use of "due process" to "strike down . . . laws, regulatory of business . . . because they may be unwise."

Williamson is still the law of the land, and the Court, so far, has not gone back on it, in spirit or letter. The Court takes a hands-off approach to laws that regulate business—generally speaking. But the energy saved, as it were, simply flowed into other fields of action, into the so-called social issues: race relations (especially after *Brown v. Board of Education* in 1954); the rights of criminal defendants; civil liberties in general; voting rights; sex discrimination; and a motley collection of cases on what we can call, for want of a better term, personal lifestyle.

Here the Court has been active indeed. It has hacked away at dozens of old taboos. Laws against contraception and abortion were declared unconstitutional.[28] *Furman v. Georgia*,[29] decided in 1972, struck down all existing death-penalty laws, although four years later the Court backed off, and gave its approval to a new set of death-penalty laws, carefully tailored to meet the Court's objections in the earlier case. Decisions in

all of these areas have been in the highest degree controversial. Has the Court gone too fast, too far? Many scholars, and citizens, think so. Others defend the Court. The noisy debate goes on.

In the 1980s, it was probably the conservative wing of the country that found the Court offensive. William French Smith, President Reagan's first attorney general, complained in 1981 that the Court had "overstepped the proper bounds." It had made up "fundamental rights" out of thin air, "the right to marry, the right to procreate, the right of interstate travel, and the right of sexual privacy." These rights were highly "subjective"; the Court drained power from Congress and state legislatures and drew this power to itself.[30] Others, of course, disagreed with Smith. They approved of the results, and of the methods too. At any rate, Presidents Reagan and George H. W. Bush used their appointment power to try to redress the balance. The Court became noticeably more conservative. In President Clinton's first term, however, two relatively liberal justices were appointed, and from 1994 to 2005, the composition of the Court remained unchanged and badly splintered. Two conservative appointments by President George W. Bush (2005 and 2006) followed by two liberal ones by President Obama (2009 and 2010) left the Court as divided as ever—where it is headed remains unpredictable. So far, the judicial revolution that began in the New Deal era remains mostly in place; but the Court under Chief Justice John Roberts has a conservative majority, though a slim one; and its decisions have given both liberals and conservatives satisfaction at time, dismay at other times. For a while in 2016, after the death of Justice Scalia, the Court was deadlocked 4 to 4 on many issues.

Still, the Supreme Court has never been quite so powerful, quoted so often, and so much in the public eye. Almost all of its bold cases rest, however precariously, on the two great phrases of the Fourteenth Amendment: "due process" and "equal protection." Modern constitutional law balances on these few words, like an elephant standing on a dime. The Court treats these phrases as wonderfully prismatic. It reads concepts and results into them that would stagger the men who drafted the text.

But this is true of *all* of constitutional law. The death-penalty cases pivoted on the words of the Eighth Amendment, which forbids "cruel and unusual punishment." It never occurred to the Founding Fathers that hanging was "cruel and unusual." The gallows was standard punishment for murder in the eighteenth century. Indeed, at the time the Constitution was adopted there were dozens of capital crimes, including in some states property crimes like burglary. The Bill of Rights itself presupposes capital punishment. This is clear from the very words of the Fifth Amendment. No one can be held to "answer for a capital . . . crime" without "presentment or indictment" by a grand jury. Every state in the Union used the gallows at the time the Constitution was adopted. Hangings had been, at times, great public events.

In this and other instances, the Court inflates the meaning of the text like an accordion. Yet some clauses have expanded only modestly or lie completely inert. In a few instances, the Court has dramatically narrowed the meaning of a provision, or retracted

a previous expansion. This was true of the contracts clause. The Court made heavy use of the clause before the Civil War, as we noted. After the war, the clause cropped up in cases on the debts of southern states, which the bankrupt governments were trying to wriggle out of. Then the clause fell more or less asleep. And in the 1930s, during the Great Depression, the Court nearly destroyed its meaning altogether.

The case was *Home Building & Loan Ass'n v. Blaisdell*.[31] In the background was the agony of economic crisis and the catastrophic collapse of real-estate values. Hundreds of thousands of people could not make payments on their homes or their farms. Banks and creditors threatened to foreclose. Minnesota passed a law in 1933 that, in effect, postponed most foreclosures. This was exactly the kind of law the contracts clause was intended to prevent. But the Court refused to interfere. The Minnesota law was a "reasonable" attempt to "safeguard the economic structure upon which the good of all depends." History and precedent were swept away because of the Court's sense of crisis.

CIVIL RIGHTS AND CIVIL LIBERTIES

We tend to think of the Supreme Court as a strong arm of defense for the downtrodden, as the very soul and armor of civil liberties. Yet this is a surprisingly recent role. Decisions about freedom of speech, freedom of the press, freedom of religion, and the like were extremely rare in the nineteenth century. As we have said, a good case can be made that the Court's record, until the 1950s, was timid and patchy at best on issues of civil rights and civil liberties. There was little in this record to excite the admiration of partisans of such causes.

The Constitution is full of high words and noble sentiments. But words, after all, do not enforce themselves—even constitutional words. Repression of unpopular opinion has been far from unknown in our history. The Sedition Law[32] is a case in point. This law, passed during the presidency of John Adams, made it a crime to publish any "false, scandalous and malicious writing or writings" about the president, Congress, or the government, or any writings intended to defame them or bring them into "contempt or disrepute." The government used the law to harass opposition newspapers. The courts uttered hardly a peep of protest; the law died only because Adams lost the next election, and the incoming Congress repealed the law.

One can add other instances. The South was harsh on abolitionist opinion. Under the Virginia code of 1849, for example, it was a crime for a free person, "by speaking or writing," to "maintain that owners have not right of property in their slaves." Many southern states restricted "inflammatory" (antislavery) writings and newspapers.[33] The first civil-rights laws (passed after the Civil War) were emasculated by the courts.[34] In *Reynolds v. United States*[35] and other cases, the Supreme Court upheld strict laws directed against the Mormons in the period after the Civil War. The justices did next to nothing about the "red scare" during the First World War and the 1920s. "Subversives" and "reds" went

to jail; the Court affirmed their convictions. The Court was less than heroic in the 1950s, during the McCarthy era and throughout the Cold War period.[36] It accepted racial segregation in *Plessy v. Ferguson* (1896) and (as we saw) ratified the disgraceful treatment of the Japanese during the Second World War.[37] These were hardly proud chapters in Supreme Court history.

This point, however, should not be exaggerated. The United States was definitely a free society in the nineteenth century. It was a very paradise of freedom compared to many countries, before and after. History is full of examples of vicious and violent dictatorships (Hitler and Stalin come to mind as extreme cases), evil governments that murder innocent citizens and suppress all opposition. Nothing in our domestic history sinks quite so low, although the treatment of Native Americans and, of course, slavery are egregious examples of aspects of our past we should be mightily ashamed of. Still (though of course this is no excuse) many, if not most, countries have been far, far worse.

The Bill of Rights was never a dead letter. Trials were usually fair, even when they did not meet today's more exacting standards. Concepts of rights change over time. We define liberty today to include rights our grandparents never thought of in that connection—rights of sexual freedom and expression, for example, as we mentioned before.

In the nineteenth century, there was perhaps more consensus than there is today about the *limits* of rights. Of course, we do not have precise information about past public opinion on issues of freedom of speech or defendants' rights. There was no Gallup Poll, and our sources—newspapers, court cases—are almost certainly biased. What we can say is that we do not find much inclination to kick against the traces. In part, this is because the underdogs leave less behind in the way of historical records: it is easier to recover the words of slave owners than the words of slaves; "tramps" and deviants were mostly inarticulate, and the most they hoped for was to stay out of trouble with the law—they did not dare to dream of legitimacy. Courts were not, on the whole, hospitable to rebels. Judicial activism, in the field of civil rights and civil liberties, took a long time to warm up.

At first, federal courts did not have the power (never mind the inclination) to enforce basic rights against the states. This was decided in the famous case of *Barron v. Baltimore*.[38] The Supreme Court held that the Bill of Rights bound the federal government only, not the states. Citizens could not bring actions in federal court claiming that the state had taken their property or infringed their basic rights. The states had their own constitutions, their own bills of rights, to be sure. But *Barron v. Baltimore* closed the door on hope for a single, national standard.

Barron v. Baltimore is still law, technically speaking. But later developments have taken away much of its bite. Today, citizens *can* enforce their basic rights against the states in federal court. Our old friend the Fourteenth Amendment, with its supple, expansive provisions, was the vehicle of change—specifically, its due process clause. In a series of cases, the Supreme Court held that certain aspects of the Bill of Rights were

so "fundamental" that the due process clause scooped them up and swallowed them whole. In this way, the Fourteenth Amendment bypassed *Barron v. Baltimore*. Justice Benjamin Cardozo, in *Palko v. Connecticut*,[39] one of the key cases, said that freedom of speech was "the matrix, the indispensable condition, of nearly every other form of freedom." Hence, said the Court, any state that impairs freedom of speech steps over the line and violates "due process of law." Through cases like this, the First Amendment, which covers free speech, became a *national* standard, as the Supreme Court understands it, and enforced against the states.

Over the years, the Court has slowly but steadily "incorporated" more and more provisions of the Bill of Rights into the Fourteenth Amendment, thus imposing them on all fifty states and vesting enforcement power in federal courts. Most of the provisions on criminal justice have been incorporated bag and baggage. There are a few exceptions. The Fifth Amendment requires indictment by grand jury in criminal cases. In 1884, in *Hurtado v. California*,[40] the Court refused to read this requirement into the Fourteenth Amendment. This decision still stands, and, as we saw in the last chapter, California still makes use of an alternative form of criminal accusation: the information.

So much for the technical side of the story. But "incorporation" is more than a device. It means, first of all, greater sensitivity to rights; it also means that the federal courts have assumed broad *national* powers. The Supreme Court led the way. It built up a rampart of rules giving national scope to the Bill of Rights and lending its weight to one underclass after another: blacks, women, the poor, gay people, and, most particularly, those caught in the web of the criminal law. The most dramatic developments came after 1950. Many are associated with the Court under Earl Warren, appointed chief justice in 1953 by President Eisenhower.

Of course, one man—a chief justice—is never responsible for so strong a trend. Not even the whole panel of nine justices can claim the credit or take the blame. Courts are instruments of social change. They deal with issues that other people raise; they do not, on the whole, invent policies; they have no agenda, no right to bring matters up, unless somebody or some group brings a case. But courts give policies a legal basis and help to carry them out. The 1950s was the decade of the civil-rights movement. Black people had become more militant. This militance was one of the great social realities lying behind the *Brown* case. In the years since then, other minorities and underclasses have claimed their rights. On these social foundations the Court has built its house of doctrine.

The Supreme Court has no power to promote its own docket. It does have the right to pick and choose among the thousands of cases that beg for the ear of the Court. This right to choose, to be sure, is a source of great power. But a case that comes before the Court is at the end of the line, not the beginning. Each case is about a real problem, issue, or claim that began in the world outside the Court. To be sure, when courts show they are receptive to a certain type of claim, they encourage people to bring more such claims to court.

For example, the *Brown* case dealt, on the surface, only with Jim Crow schools. It outlawed segregation in public schools. In fact, for years the courts had only moderate success in forcing the reluctant South to inch slowly toward this goal—so that some have questioned whether *Brown* had any efficacy at all. But the case also delivered a powerful message to the black community: the Court announced it was willing—even eager—to advance the cause of racial justice. Still, it was the black community and its allies that had to act. It takes nothing away from the Court to recognize that it had these partners—groups and individuals who demanded expansion or recognition of their rights. The "rights revolution" is a partnership between an active court and an active society. And the court, very much, is a junior partner.

To explain where law comes from, what it does, and where it is going, one always has to look at social context. The law of obscenity is another example. The Court has been struggling with this issue for over fifty years. The First Amendment protects freedom of speech. In most states the sale of "obscene" books and pictures is a crime. Where is the boundary line between obscenity, which can be forbidden, and free expression, which cannot? How far can people go, in words and pictures, before they lose the protection of the First Amendment?

The Court has never come up with a satisfying answer. The issue is on the whole surprisingly recent. The Supreme Court did not deal with it squarely until 1957, when it decided *Roth v. United States*.[41] Litigation on the point was rare in the nineteenth century. There were dirty books and dirty pictures, but they stayed in the closet, so to speak. Obscenity rarely showed its face in public.

State cases on the subject, apparently, were rare to nonexistent before the early nineteenth century: One case in Massachusetts (1821) dealt with *Memoirs of a Woman of Pleasure*, a book better known as *Fanny Hill*. For more than a century after the Massachusetts case, this famous erotic novel, written by John Cleland, continued its underground life. It passed from clammy hand to clammy hand. In December 1923, two New York booksellers, Maurice Inman and Max Gottschalk, were arrested, convicted, and fined $250 for selling *Fanny Hill* (along with two other "classics," *A Night in a Moorish Harem* and *Only a Boy*).[42] During all this period, rarely if ever did anyone claim that the First Amendment's sweep was capacious enough to cover the adventures of the likes of Ms. Fanny Hill.

Then, in the 1960s, *Fanny Hill* went dramatically public, and this time with a difference. The publishers demanded (and got) constitutional protection. In the years after 1960, there was a great wave of obscenity cases. *Fanny* was the star of some of these cases. And generally speaking, the courts made an honest woman out of her. The First Amendment, it turned out, was broad enough, and broad-minded enough, to protect this "woman of pleasure."[43]

By this time, *Fanny* was about 150 years old—about the same age, in fact, as the First Amendment. Yet their definitive meeting took place only in the 1960s. The texts, both of Cleland's book and of the First Amendment, were the same as they had been since the

eighteenth century. But society had changed, and dramatically; and along with social change came legal change; indeed, the very meaning of freedom of speech had altered in the course of time.

Despite Fanny's triumph, the obscenity issue has never been finally resolved. Legal doctrine on the point is a hopeless muddle. The courts have been unable to find and announce workable rules and workable limits. It is clear, of course, that standards have shifted in extremely significant ways. Some sixty years ago, a mild movie comedy, *The Moon Is Blue*, provoked an uproar simply because the word "virgin" was uttered on the screen (the Catholic Legion of Decency gave it a C rating, for "condemned"). Today, "adult" bookstores exist in most towns of any size, and a wide range of pornography is available on home video or over the Internet. People can view every brand and off-brand of sex without fear of crackdowns or raids. This rank permissiveness shocks and disgusts millions of people; some feminists believe pornography is one key to male domination. Obviously, millions of others disagree, but quietly: they vote by watching hard-core products. Pornography on the Internet is easy to find—there are hundreds of millions of individual porn pages in the United States alone, and a single website claimed to have almost 80 billion video viewings in 2014.[44] Those who prefer traditional morality tend to blame the courts for the flood of pornography, for stretching the First Amendment so that it protects this "filth." No doubt the courts have played a role. The courts have opposed censorship; they have vetoed restrictive laws; they have allowed very broad standards. But the major change has been, unquestionably, not legal but social. There is a demand for these videos, books, and magazines, and, what is more, customers want to buy them cheaply, easily, legally, and openly. For the most part, these views have prevailed.

The issue is by no means a simple one. The Court faces, here as elsewhere, a difficult question: where to draw the line. There are, after all, bluenoses who want to censor Shakespeare, who find *Catcher in the Rye* too raw for high-school libraries, who want to ban any movie that even hints at sex. In one of the Supreme Court's obscenity cases,[45] the movie in question was *Carnal Knowledge*. A major studio produced it; it was a serious, important film on serious themes, starring Jack Nicholson, and obscene by no stretch of the imagination. Yet the defendant had been convicted of a crime for showing this movie in Albany, Georgia. The Supreme Court reversed the conviction. Another case, *Erznoznik v. City of Jacksonville*,[46] wrestled with the problem of (the now almost extinct) drive-in movies. Jacksonville, Florida, banned movies if they showed "the human male or female bare buttocks, human female bare breasts, or human bare pubic areas" whenever the screen was visible from a public street. The Supreme Court felt the rule went much too far: taken literally, it would ban a film containing a "picture of a baby's buttocks . . . the opening of an art exhibit . . . shots of bathers on a beach."

On the whole, the Court has tried to move cautiously in this delicate and controversial field. It does not wander too far ahead of elite public opinion. It does not give either side everything it wants. It certainly rejects the standards of prudery, but it has also never

said that anything goes. It pays at least lip service to the idea of "community standards" of obscenity;[47] but it also held, in 1987, that works that claim literary, scientific, or artistic value were subject to a different standard (that is, if a "reasonable" person might think the work had some sort of merit).[48] In practice, anything goes—though not on prime-time TV; and child pornography is strictly forbidden, and severely punished.

The Court, in this area, has (as we noted) waffled; it has tried to strike some sort of balance. This is often the posture of the Court in civil-liberty cases. The Court can lead public opinion, and it sometimes tries to show the way or act as a (self-appointed) teacher or vanguard. But it cannot march all by itself, way ahead of the rest of the crowd.

This is especially true because courts have only limited power. They make pronouncements, but somebody else must carry them out. Enforcement is crucial. Real rights are more important than rights on paper. What happens to Supreme Court doctrines when they reach the street, the station house, the chambers of trial-court judges? Generally speaking, there is a lot of slippage between command and execution; whether the gap is scandalously large or tolerable depends on the time, the subject, the people, and the place.

One historical example might be useful. The case is *Bailey v. Alabama*,[49] decided in 1911. Lonzo Bailey was a poor black farmhand, working in Alabama for a white landowner. He quit his job in the middle of the growing season and was arrested for breaking his contract "fraudulently." This was a crime in Alabama, under a statute passed with people like Bailey in mind. The whole point was to tie black farmworkers to the land, at least during the growing season—to make it impossible for them to quit, whatever their reasons.

The system smacked of serfdom, or even slavery. It had been going on for years. But a tiny band of progressive lawyers made a test case out of Lonzo Bailey's problem. They took the case all the way to the Supreme Court. Here Alabama lost. The Court declared the Alabama law unconstitutional; the justices felt it was part of a system of peonage, forbidden by federal law, and by the Thirteenth Amendment, which banned slavery and "involuntary servitude." Black people in the South and their allies had won a great victory.

But in fact nothing much happened. The underlying problem did not go away. Bailey, of course, won his case. Alabama tinkered with its law, making small, cosmetic changes. Other southern states simply ignored the decision. The Southern labor system continued just as before. Southern peonage lived on.[50] *Bailey*, in short, was "ahead of its time." It gave liberals a warm glow, a sense of accomplishment. But there was no movement, no organization, no plan to follow through, no muscle and will to enforce the case. Thus, in a real sense, it was an empty victory, dead, as it were, on arrival.

More than forty years later, the Supreme Court decided *Brown v. Board of Education*.[51] Racial segregation in public schools, the Court said, was unconstitutional and had to be ended. *Brown* was also the first of a series of cases that banned segregation everywhere, in all its forms. What happened after *Brown* was nothing short of a revolution—an incomplete revolution, to be sure, but a revolution nonetheless.

Brown, in other words, did not suffer the fate of the *Bailey* case. There is controversy over *exactly* how much *Brown* itself accomplished.[52] There is disillusionment with the results, among many African-Americans. But it is at least clear that *Brown* did not fade away. Why? Not because of anything in the opinion, in the doctrines announced, in the way it was written, in its style, or in its craftsmanship. The answer lies elsewhere, in changed social conditions and, especially, in the civil-rights movement. The great events that followed *Brown*, the sit-ins, marches, protests, the eloquence of Martin Luther King, the constant litigation, the struggle in the South and the North—all of this, and more, put power and passion behind the doctrines expressed in *Brown* and made them more of a working reality. The "revolution" happened because of the partnership between court and constituents, between legal force and social force.

The "revolution," like all revolutions, remains incomplete, as we said. Race is still, in the early twenty-first century, a major issue in the United States, and it is therefore, by an iron law of American society, a major *legal* issue as well. The Supreme Court now wrestles not with issues of segregation but with "reverse discrimination," "affirmative action," and similar issues. In the mid 1990s, the Supreme Court struck down a federal practice of giving "general contractors on government projects a financial incentive to hire subcontractors" who were controlled by "socially and economically disadvantaged individuals" (a code phrase for racial minorities).[53] More recent cases have subjected the affirmative action programs run by colleges and universities to a great deal of scrutiny, though the Court has never completely banned affirmative action programs in universities, and has given at least grudging approval, as of 2016.[54] Surely the last word has not been spoken on this issue.

HERE AND ABROAD

A final word, this time about American constitutional law as an export commodity. Our system is old, as systems go, and since it began, it has served as a model for other nations. When the countries of Latin America broke away from Spain, many adopted written constitutions. The U.S. Constitution was an important source of ideas for these documents. Unfortunately, dictatorships in these countries often made a mockery of constitutional guarantees. The words speak of liberty, equality, and justice. But many countries ignored or suspended those guarantees.

The Latin American countries come out of a different legal tradition—the tradition of Spain and the civil law. Judicial review, American-style, is alien to this tradition. Nonetheless, in some countries (for example, Colombia and Costa Rica) courts have played a strong constitutional role. From 1910 to 1953, the supreme court of Colombia invalidated more than fifty statutes, in whole or in part.[55] In some countries, there is a "diffuse" system of judicial review—the highest court simply adds this function to its workload (as is true of the U.S. Supreme Court). Other countries have a "concentrated" system, in which a special court exercises judicial review.[56]

After the Second World War, Germany, Italy, and Japan also wrote new constitutions. In each case, American ideas about constitutionalism and the rule of law made a deep impression. We had, after all, won the war; we had armies stationed in the losing nations. Bloody, repressive regimes had been overthrown. The United States was bound and determined to install something like its brand of government—which included constitutions, control of centralized power, and bills of rights.

The new constitutions included provisions for judicial review. Germany and Italy established special "constitutional courts" to exercise this power (the "concentrated" system). This was a startling break with national tradition. The German court, after a rather slow start, now shows strong signs of "activism"; it exercises power with a certain relish. For example, it jumped into the abortion issue as boldly as the U.S. Supreme Court. It came out, however, on the other side: in February 1975, it struck down liberal abortion laws, in the constitutional interests of the unborn child.[57] In 1995, the German constitutional court struck down a law in Bavaria, one of the most conservative (and Catholic) sections of Germany, that mandated crucifixes in public-school classrooms; the decision evoked a storm of protest,[58] and a temporary decline in the public's trust in the institution.[59]

Other postwar courts have so far been quite cautious about their new powers. The Japanese court, for the first twenty years at least, was almost inert constitutionally, and remains the most conservative supreme court in the world, striking down only eight statutes on constitutional grounds since its creation in 1947.[60] In general, though, newer constitutional courts (those in Cyprus, Austria, and Spain are examples) tend to grow stronger, more assertive, more self-confident over the years. When the Soviet Union disintegrated, in 1989, and the countries of Eastern Europe overthrew their old regimes, there was a new wave of constitution-building, and constitution-tinkering; here too, American models played a strong role—at least on paper.

We hear a lot about "American influence" in all of this constitutional ferment. Of course, the American example has been significant, and in some cases so have American scholars (and American armies). But it would be wrong to put too much weight on this point. Context is crucial, as always. Societies in the contemporary world are undergoing rapid social change. In many ways, it is possible to speak of a single world culture. In the major industrial countries of the West, and in Japan and the smaller "tigers" of the Far East, populations are much more mobile than before, and wealth is widely, though unequally, distributed. Old patterns of authority are decaying—very fast in some places, more slowly in others. Jet airplanes, computers, satellites, and the Internet have turned the world into a single village, at least in some respects.

In one sense, the U.S. Constitution itself is being left behind: fewer and fewer countries use it as an explicit model.[61] One reason is that the U.S. Constitution is relatively stingy, by modern standards, when it comes to doling out rights.[62] Other countries expressly protect the rights of women and minorities, but then go on to affirm

"human dignity" (quite an elastic notion) and guarantee certain "positive" rights, such as the right to food, education, housing, or medical care. The Second Chapter of the Constitution of Finland, for example, grants "the right to basic education free of charge" as well as "the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider."[63] The Latvian constitution requires the government to "protect human health and guarantee a basic level of medical assistance for everyone."[64] Of course, as we know, just reading the text of a constitution fails to tell the whole story. The U.S. Supreme Court has "discovered" many of the rights enumerated in other constitutions (the right to vote, for example) through the Court's creative "interpretation" of the Equal Protection and Due Process clauses of the Fourteenth Amendment. But these other positive rights—like housing or medical care—are also missing from the text of the U.S. Constitution; and our courts have yet to find them hidden in the document, the way that a right of privacy was "discovered."

Our system of judicial review, though, continues to be widely copied. By now it is a tradition, but it did not spring up in the United States by magic; it was an American innovation, a product of draftsmanship, and the creative work of Supreme Court justices. There was no precedent for judicial review in England, any more than there was in Spain or in Germany. Judicial review developed in this country almost from scratch. It grew because, in some mysterious way, it worked. Certain social conditions (and legal tools) made possible the American pattern. If these conditions reproduce themselves in, say, Germany or Japan, and if the tools are there, we would expect some sort of parallel development. Hollywood movies and Coca-Cola conquered the world because they appealed to people. No one forced them down foreign throats. People in other countries turned out to have much the same tastes, good or bad, as Americans. Judicial review is in a way also an export, like Coca-Cola, though on a higher plane. It reflects a worldwide movement, a rights-consciousness, a culture, that is an aspect of modernity, of democracy, and has spread from country to country in contemporary times.[65]

11

On Legal Behavior

WE HAVE SPENT a good deal of time so far on legal rules and on the structures that make and carry out those rules. But once again, it must be emphasized that a legal system is more than structures and rules. Rules, after all, are supposed to be followed—at least some of the time. The key element in any legal system is behavior—what people actually do. Otherwise rules are nothing but words, and the structures are a ghost town, not a living city. There is no way to understand a legal system, including ours, unless we pay attention to what we might call "legal behavior."[1]

The term "legal behavior," as used in this book, means behavior influenced in some way by a rule, decision, order, or act, given out by somebody with legal authority. If I behave in a certain way, or change my behavior in a certain way, because of something the law commands—or because of some government action, or some message or order coming from government or from the legal system or from some functionary in it—then this is legal behavior. If I am driving along the road and see a speed-limit sign (or spot a police officer) and slow down, this then would be legal behavior.

It would also be legal behavior, though of a somewhat different sort, if I saw the police officer and started going a hundred miles an hour, to try to get away. After all, here, too, I am reacting to something going on in the legal system. It is also legal behavior, of course, to file income-tax returns, sue somebody, register to vote, and do countless other ordinary and extraordinary acts.

There are many things we might want to know about legal behavior. It is obvious that some laws are mostly obeyed and some are mostly disobeyed. How do we account for these differences? Why do people follow some rules and not others? This is an important

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question, because most of us have an interest, most of the time, in seeing that the rules are obeyed. (This is not, of course, universally true.)

Actually, we should try to steer clear of the words "obey" and "disobey." They can be somewhat misleading. Legal behavior is more than a matter of obeying and disobeying. One example will do to show this point. When married life has been too bumpy for a couple, they may consider divorce. In every state today, there is a "no-fault" system, which makes divorce fairly easy to get. It is a matter of filing papers in court, paying a small fee, going through certain formalities, and waiting a while. If neither party makes a fuss, which is usually the case, and if they have come to an agreement, the court dissolves the marriage, splits up the property according to plan, issues custody orders if there are children, and so on. The man and woman are free now to marry again.

Clearly, all of this activity—going to court and getting a divorce—is legal behavior. Certainly the couple followed forms and rules. But we would hardly say they "obeyed" the law. The law does not order anybody to get a divorce. What it does is tell you how to get one if you want one. Thus it makes no sense to talk about obeying or disobeying the law in this instance. Rather, we should talk about using (or not using) the law of divorce. And, in general, except in criminal law and with reference to some rules and regulations, legal behavior is more a matter of using or not using than of obeying or disobeying.

Not that obeying and disobeying are unimportant. It seems clear that the legal system would collapse if everybody disobeyed certain laws, such as the laws against violent behavior, or if so many people disobeyed that the law lost its point completely. There is, in fact, a lot of crime, lawlessness, and deviance in our country, and indeed in any country. But we are still a long way from anarchy; and this is true of most other countries too.

Some laws, of course, are more widely obeyed than others. There are ample examples of laws that "nobody pays attention to." Prohibition is often cited as an example of a major legal arrangement that came to grief because of massive disobedience. Prohibition, the "noble experiment," was a total ban on selling or dealing in liquor. It went into effect in 1920. According to conventional accounts, Prohibition was a dismal failure. Millions of people kept right on drinking. Bootleggers and gangsters took over the liquor business. In 1928, to be sure, there were 55,729 prosecutions for violations of the National Prohibition Act in federal courts, and more than 48,000 convictions. But most of these were resolved by fines, and in any event, prosecutions were a drop in the bucket compared to the number of violations. People made bathtub gin and homemade beer and wine, and they loaded up on medicinal liquor—in 1929, pharmacists filled over 10 million prescriptions for whiskey.[2] Cultural disapproval of drinking tended to deteriorate; many women and college students, for example, were among the avid patrons of the speakeasies.[3] Some scholars even feel that liquor consumption actually went *up* during Prohibition. This was probably not true, but the mere fact that one can make the argument is a sign of how widely the law was violated, especially in the cities.[4]

Prohibition is, of course, not the only example of a law widely flouted. Marijuana laws were once called the "new Prohibition." In 1970, John Kaplan published a book with

that phrase as part of its title. Kaplan reported on a survey in a California city (1967–68), where 49 percent of the males and 32 percent of the females between eighteen and twenty-four had tried marijuana. Yet marijuana was at the time strictly illegal.[5] In 2013, the drug was still banned by federal law; yet almost 20 million Americans aged twelve or older were illegally using the drug.[6] Obviously, if the marijuana laws were enforced, huge prison cities would be needed to hold all the violators. To take a more prosaic example, millions of drivers drive faster than the speed limit allows, every day. Yet these laws are not dead letters: they *are* enforced, even though imperfectly or sporadically or unfairly; or only against egregious violators.

Many "dead" laws are not, after all, as dead as we may think. Even during Prohibition many people (perhaps most) obeyed the law. And the law had an important effect on legal behavior, including the behavior of people who regularly broke the law: it changed the time, manner, and mode of their drinking. After all, before Prohibition, it was legal to drink openly or in public, in saloons and taverns. During Prohibition, drinking had to be kept more or less secret. Today, even in states where laws against marijuana are enforced very weakly, nobody dares light up in front of a police officer at high noon. Similarly, nobody drives a hundred miles an hour when the police are around, and where the speed limit is officially sixty-five.

Obedience and disobedience are not matters of black and white. There are all sorts of shades of gray. We have used the example of speed limits before. The speed limit is sixty-five on many interstate highways, yet by custom, sixty-five means (more or less) seventy. Many people drive at seventy; some drive even faster. Technically, all these drivers are violating the law. But what if the speed limit were raised to seventy-five, or if there were no limit at all? In this case, no doubt some people would drive at eighty-five, or ninety, or one hundred. Probably, then, the speed limit has *some* effect on the behavior of drivers, even though they "disobey" this law. It seems to dampen some of their passion for speeding. How much is an open question.

Similarly, how "ineffective" are the laws against marijuana? In some communities (not all), it is widely believed that these laws are not obeyed at all. But of course this is inexact if not downright wrong. In the last few years, as a few states began to legalize the recreational use of marijuana, we gained some insight into the question of how many people would smoke marijuana if the drug were legalized. Colorado, for example, already had one of the higher rates of marijuana use among adults when it set on the path to legalization. The state moved from a regime of limited medical marijuana (2006) to commercialized medical marijuana (2009) to recreational marijuana (2013). Some early data show there was a 32 percent increase in the number of adults reporting monthly marijuana use between the times before and after the medical marijuana law; there was another 27 percent increase when it became legal to use marijuana recreationally.[7] This suggests that there are some (or many) timid souls who are deterred even by weak enforcement, along with some (or many) who refused to smoke because it was against the law. And everywhere, as we said, illegality tends to affect time, manner, and quantity

of "disobedience." Even some "unenforced" or "unenforceable" laws have a real effect on behavior, including the behavior of violators. These laws influence conduct, for better and for worse. And poor old Prohibition, on history's ash heap, probably made more of a dent on behavior than most people give it credit for.

Much the same can be said about use and nonuse of law. There are rules, doctrines, provisions that are used or not used, as a matter of individual choice. A person can either make out a will or not, as he or she sees fit. The law certainly does not insist on a will. A study of Cuyahoga County (Cleveland), Ohio, which took a sample of 659 estates closed in 1964–65, found that 31 percent of them were intestate—that is, the deceased never bothered to make out a will.[8] A study by the American Institute for Cancer Research, published in 1994, found that fewer than 30 percent of Americans had a valid will when they died. People with large estates were more likely to have a will, but in a study conducted by an insurance company, slightly more than a third of respondents with fairly substantial estates—averaging $280,000—lacked a will.[9] More recently, a 2010 survey revealed that only 35 percent of American adults reported that they had a will.[10] For decades, maybe longer, a substantial number of people have not availed themselves of the option of making out a will. Similarly, when a marriage breaks up, the couple can simply live apart, or they can get a divorce. It is up to them.

The law of divorce is, in a way, a kind of commodity: the legal system offers it for sale to the public like a bar of soap or a car. The public can buy or not, as it chooses. A lot depends on the product and on the price. A divorce costs money. It also has a value: without a divorce, a person cannot legally remarry and start a legitimate new family. The laws of divorce, and rules about divorce procedures, have an impact on what divorce costs (in dollars and in psychic costs) and also on the benefit side: what people *get* from a divorce. These costs and benefits influence whether or not people choose to "buy" a divorce. Since the 1970s, when no-fault divorce came into being, divorce has become easier and cheaper. This influences the number of "sales." But of course a happily married couple does not rush out and get a divorce just because divorce is cheaper than before—or even free.

No law is 100 percent effective. We always have to tolerate a certain amount of slippage. The amount we can tolerate varies tremendously from one type of behavior to another. Let us again take speeding as our example. We tolerate a lot of violation. This does create problems—accidents, for one thing—but though literally millions of people break the law every day, the level of "disobedience" does not produce a crisis in society.

Contrast this with skyjacking. This is a very rare crime, committed by a tiny handful of terrorists, extremists, and disturbed people. The potential pool of violators is and always will be small. But even a tiny violation rate (one out of a hundred thousand flights, or even one out of a million) strikes people as intolerable; it could inflict a great deal of damage; it could throw the transportation system into chaos. When a group of al-Qaeda extremists hijacked commercial airplanes and crashed them into the World Trade Center and the Pentagon on September 11, 2001, they killed nearly three thousand people; the Federal Aviation Administration shut down the entire airspace of the

United States. Since then, society has spent billions of dollars on airport security to prevent such an event from recurring. Toleration for skyjacking, in other words, is very, very low. The same is true of the toleration rate for political assassination.

INFLUENCING LEGAL BEHAVIOR

What can we say about the factors that influence legal behavior? First of all, the law must be *communicated*. It makes no sense to analyze my behavior in terms of obedience, disobedience, use, nonuse, or evasion, if I have no idea what the rule in question is. The rule, in other words, has to be communicated to me, and I must have some knowledge of its contents.

A crucial point in any discussion of the communication of legal rules is the size of the audience. Some rules of law only apply to a few people; others apply to a whole class; some apply to everybody. If a rule only applies to a small group (manufacturers of cars, for example), it is easier to make the rule known to the audience. It is easy to pinpoint and locate *everybody* who falls into the category of "car manufacturer"; the numbers are small, and car manufacturers are not exactly inconspicuous. A rule that is supposed to reach *all* burglars is trickier, and a rule directed at everybody—the whole public—is hard to get across; and quite expensive. The Affordable Care Act was passed in 2010 and launched three years later, but in the spring of 2013, just six months from the launch date, studies revealed that over three-quarters of the public were unaware of their options.[11] A massive information campaign helped, but a balky government website left many people confused; things were eventually straightened out, but the experience shows just how difficult it is, even in an era of cheap and rapid communication, to get word out to large numbers of people. The nature of the rule or law is also vitally important. The Affordable Care Act is enormously long and complicated. Few people were able to cope with it on their own.

The way the rule is communicated is also important. Some rules are, in fact, common knowledge; they are part of very general, very early learning. Most rules, and certainly all technical, detailed administrative rules, have to be specially delivered to their audience. This was certainly true of the Affordable Care Act. For less complicated rules, there are many ways to communicate. A sign that says "No smoking" is one way; a presidential speech is another. Some rules or orders get delivered in the flesh to their audience: a police officer, for example, stands at an intersection, in the midst of traffic, and tells drivers when and how they can turn or continue.

The form of a rule also has an impact on communication. A rule that is specific is better at conveying its message than a rule that is vague and general. The extreme case is a speed limit. It is posted in big letters at the side of the road, and its message is simple and direct: 40 MPH or 65 MPH or 70 MPH. We have little doubt that this rule reaches its audience. At the other extreme are subtle, difficult, vaguely worded doctrines of law. The Uniform Commercial Code, for example, provides that a court does not have to enforce

a clause in a contract if the clause is "unconscionable."[12] Only lawyers, by and large, know that there is such a rule; even they have no way of knowing exactly what it means. There is no earthly way such a rule can reach a larger audience—businesspeople in general, or consumers.

KNOWLEDGE OF THE LAW

How much do Americans know about their own legal system? One survey carried out in Michigan (1973) reported, to nobody's great surprise, that the general public knew less about law than law students did, and that better-educated people knew more about law than the less-educated. This was hardly news, but at least it confirmed people's guesses. The study also provided some bits of detail. People seemed to have a better grasp of criminal matters than of civil matters. Take, for example, this question: "If a person remains silent when questioned by the police, may his silence be used against him in court?" The right answer is no, and 82 percent of the subjects knew this. On the other hand, people were asked whether a car dealer could simply repossess a car parked on the street if the buyer missed a payment; 71 percent said yes, which is definitely the wrong answer.[13]

A Texas survey taken slightly earlier found important class differences in what people knew about law. It is disheartening to learn that poor people know very little about their rights. For example, nearly 40 percent of the low-income blacks who were surveyed thought police had a right to search their houses whenever they wanted to, which is certainly not the law.[14] More recently, day laborers in Arizona were interviewed about knowledge of their rights under labor laws, which had been strengthened to ensure, among other things, that they were paid at least minimum wage. Most of the workers knew nothing of these laws, though the ones who did were more likely to try to use the legal system to improve their work situations.[15] This lack of information may reflect pure ignorance or (sad to say) a degree of realism. That is, low-income people may experience law in a way that leads them to expect injustice. Their answers may be technically wrong, but match their experience of living law.

Knowledge of law, like knowledge of anything else, is a matter of degree. We are not surprised to find that people are fairly ignorant about the legal system; people are fairly ignorant about most things. Lawyers know some law; yet their heads may be crammed full of misinformation about medicine, science, and world history. People in general do tend to have enough working knowledge of law to get by in their daily lives. On the whole, people can be expected to know more about rules that are relevant to themselves, their groups, and their jobs and situations. Taxi drivers are likely to know (more or less) about taxi regulations and the rules about taxi licenses. A police officer knows more about the laws of arrest than a plumber does. A plumber knows more about building codes than the typical police officer. A person in the export-import trade knows very little about taxi licenses, arrests, or plumbing rules, but a lot about export-import law. And so it goes.

What about rules that apply to everybody? Some are common knowledge. The aspects of law "everybody" knows are, in a way, the most primitive—the most closely connected to general customs and norms. Everybody above the age of five or so knows that stealing is against the law; that robbing a gas station is a crime. Details of the law, where to find the law, exactly what the law says—these are things most people probably do not know. They also probably do not know or understand technical distinctions, such as the difference between first-degree and second-degree murder or the nuances that separate robbers from burglars from larcenists. They know that a check has to be endorsed (signed on the back) before it can be transferred, but they may not understand the various refinements of the concept of "negotiability" that lie behind the practice of endorsement. Still, the guts of these rules are part of everyday life in society.

These very basic rules are part of general and early learning. Even grade-school children have some idea about the rules and what they are. One study asked children of various ages, "What is a rule?" A boy in elementary school gave this answer: "A rule is not to run around, not to hit anybody, not to break anything." Another question was "What would happen if there were no rules?" A second-grade girl said: "Then people would go around killing other people, and . . . stealing things, and . . . kidnapping people." These young children, then, have a clear sense that some behaviors (killing, stealing) are forbidden.[16] They learn these things from their parents, teachers, and friends, and from TV.

Not all rules are learned this way, of course; most are not learned at all. Otherwise there would be no need for lawyers and other experts. In fact, nobody can know all the rules, or even 1 percent of them. The federal government alone produces hundreds of new regulations every year, some of them tremendously complicated. The new rules and regulations are printed in the *Federal Register*, which runs to thousands of pages a year, as we have seen. It is also a very technical, very boring book, hardly something to keep on your bedside table. But lawyers will keep up with rules and regulations in areas they specialize in. Food-and-drug lawyers or corporate tax lawyers make sure they know the latest "regs" on their subjects; they might also subscribe to a loose-leaf service with up-to-date material, or learn what's new online. They probably read reports of the latest, most important cases.

These lawyers are important to the business world. They are middlemen—brokers of information. They store up knowledge of legal rules and pass them on to clients when and as needed. In this regard, of course, they are like any other experts—doctors, auto mechanics, engineers. Lawyers are experts on rules and regulations. They are, of course, not the only such experts in society. Tax accountants are experts on tax rules; they compete with lawyers for business. Every big company probably has employees whose job is to keep up with rules and regulations of one kind or another: labor rules, business-law rules, all sorts of rules. Some of these people will be lawyers; some will not.

In short, most people have working knowledge of truly essential rules; lawyers and knowledge brokers take care of much of the rest. Some people learn about relevant rules from newsletters or other communications, from their occupational group, for example.

The California Supreme Court decided, in 1976, that psychotherapists sometimes owed a duty of care to a person killed or injured by a patient. (In the case, a patient whose girlfriend had dumped him told his psychiatrist that he felt murderous urges toward her. The psychiatrist did not report this to anybody, and the boyfriend did murder the woman.)[17] Later studies showed that most psychotherapists knew about the case. They learned about it mostly from professional literature.[18]

The psychotherapists "knew" about the case, but how accurate was their information? Not very, according to the study. Even large, sophisticated corporations do not necessarily get accurate knowledge of legal rules (and legal risks): they overestimate, for example, the legal dangers lurking in the doctrine of "wrongful discharge" of employees, according to a study published in 1992.[19] In general, there are large knowledge gaps about the law, and they can be socially destructive. More sophistication about law and legal process would be useful, if only to educate voters and make them better judges of policy. Ignorance and misinformation can be hazardous to society's health.

Occasionally, mistakes in legal knowledge can be shown to have terrible consequences. Joseph Wambaugh's book *The Onion Field* is the history of a crime, the brutal murder of a policeman in California. The killer, according to Wambaugh, misunderstood the state's "Little Lindbergh Law." This was a law about the punishment for kidnapping. The killer thought he could be sent to the gas chamber just for kidnapping a policeman. If this had been so, he would have had nothing to lose if he got rid of the policeman—besides, he would eliminate a dangerous witness. This was a mistake about the law, and it led to a pointless murder.

People in society probably have many wrong beliefs and ideas about law. There is, in a way, a kind of legal folklore in every society, including ours. The folklore consists of notions about law that are baseless or distorted, for one reason or another. Some people think it is illegal to sign a document in pencil. In fact, this is perfectly okay, though for obvious reasons it is also a bad idea. Or they may think they are not allowed to leave a hospital unless they pay the bills. In fact, they can. The hospital is not a prison and has no right to hold people prisoner. In a study published in 1999, an astonishing 89 percent of workers surveyed in Missouri thought it was against the law to fire an employee simply because the boss felt like it; but this is, in fact, perfectly legal.[20] The folklore of American law is an intriguing subject that has not yet been systematically explored.

Much of what people know about law, or think they know, comes from the media. The O. J. Simpson trial, in 1994–95, was supposed to be a great educational experience; in fact, it was a highly misleading one, as we have seen. Coverage of important legal news is spotty at best. The media does not routinely report on court decisions, except in sensational cases; and even important cases tend to be reduced to slogans and sound bites.

A lot of the press reports are propaganda or worse. Reports of tort-law horror stories fueled a panic over liability insurance. There was, for example, a story about a psychic who had a CAT scan, lost her psychic powers, sued, and got $1 million from a Philadelphia jury. This was widely reported, but turned out to be extremely inaccurate.[21]

A few years later, the media turned its attention to the sensational case of McDonald's and very hot coffee. Stella Liebeck, seventy-nine years old, bought a cup of coffee at a drive-through window at a McDonald's in Albuquerque, New Mexico. The lid of the coffee came off, spilling scalding hot coffee into her lap; this caused third-degree burns and partially disabled her. She complained to the company about the coffee, and asked McDonald's to cover her medical bills; McDonald's stonewalled and offered her $800. She hired a lawyer, sued, and won her case—there was evidence that McDonald's knew its coffee was dangerously hot. The jury awarded compensatory and punitive damages (the judge, however, reduced the amount of the punitive damages). The press, and the media in general, had a field day. Stella Liebeck became the poster child of a tort system run amok, filled with shyster lawyers, gullible juries, and million-dollar payouts to greedy, reckless plaintiffs. This, of course, was false to the realities of her case, and indeed to the tort system at large.[22]

There is often a substantial gap between media coverage of trials and the way actual trials come out. One recent study found that media descriptions of employment discrimination cases reported plaintiff victories 98 percent of the time; in truth, plaintiffs were successful in only 41 percent of jury trials in federal courts.[23] Of course, misinformation is an important social fact: people believe what they want to believe, and what fits in with their values and worldviews. And businesses, often on the losing end in tort cases, have an economic interest in promoting the idea that the system needs serious reform.

SANCTIONS

Suppose a norm or rule has been communicated to the necessary audience. People now know it, at least well enough to understand what is expected of them. At this point, the choice is theirs—to obey or not to obey, to use or not to use. Which will they choose? For simplicity, let us concentrate on criminal law, and the issue of compliance or noncompliance with the rules.

First of all, there is probably no rule or law in the land that everybody follows all of the time. If such a rule existed, there would be no point making it a law in the first place; people would obey it on their own. At the same time, it is hard to think of a rule or law that *nobody* obeys. Almost everything falls in the middle. Of course, that middle is very broad. Every driver has broken traffic rules, and probably more than once. On the other hand, few people (fortunately) have tried their hand at murder.

What is it that moves people to make the choices they do? What pushes them in the direction of obeying or disobeying this or that norm? Why are some laws observed more than others? The simplest and most general explanation is in terms of "sanctions," that is, rewards and punishments. People follow rules because they are afraid of what will happen if they don't. In other words, the law and its sanctions deter them.

The word "deterrence" conjures up certain images: we think of fines, jail, and other forms of punishment. The word "sanctions," however, covers more than punishment. It

also includes rewards. The positive side of sanctions (rewards, incentives) is less obvious, because the literature tends to stress criminal law, and ordinary people, when they think of the law at all, tend to think in these terms as well. But incentives are an important part of the legal system. Government at every level hands out billions of dollars in subsidies. To save energy, we might give people a tax break if they insulate their homes—rather than (for example) putting them in jail if they are wasteful of energy. If farmers are growing too much cotton or peanuts, we might pay them to put land in the "soil bank." To get men and women for the army, we can force them in with a "draft," or persuade them to volunteer with good pay, signing bonuses, and other incentives.

Do rewards and punishment work? Of course they do, as a general proposition. There is plenty of proof, in case we needed it—first, in everyday experience, and second, in the scholarly literature. We know that many people hesitate to cheat on their income tax, not out of patriotic zeal, but because they are afraid of the IRS. We know that nobody speeds when the police car is watching.

We can take the following for granted: if there is a certain level of punishment for breaking a rule, and we increase the punishment, keeping all other factors the same, the deterrent effect will increase. That is, some people (not everybody) will stop doing the deed, out of fear of the punishment. Similarly, an increase in rewards will stimulate a desired behavior (again, holding all other factors constant). If a state offers $10 apiece for coyote skins, it will get a certain number of skins. If it raises the offer to $1,000 a skin, and nothing else changes, there will be a bigger harvest of skins. If we raise the fine for overtime parking from $5 to $20, at the same level of enforcement, some people will think twice about violating the rules. If we get serious and start towing cars away, there will be an even greater effect.

So much is obvious. The real issues are more difficult and complex. We know that threat of punishment deters people, but we do not know how much, in any given case. Nor do we understand who is deterred, and why. Yet these are crucial questions. Argument rages over whether capital punishment is an effective deterrent or not, or effective enough to be worthwhile. At one point, the Supreme Court, by a 5-to-4 vote, threw out all of the country's death-penalty laws. This was *Furman v. Georgia*, decided in 1972 (the death penalty, as we shall see, made a comeback a few years later).[24] Thurgood Marshall, one of the majority justices, claimed that the death penalty simply did not deter. This is, in fact, a hotly disputed issue. Some scholars agreed with Marshall; some disagreed. One economist, Isaac Ehrlich, went so far as to claim that every execution prevents between eight and twenty murders.[25] His methods and findings, however, have been vigorously—and plausibly—attacked.

The death penalty is an emotional issue; feelings run high on both sides. It is not easy to sort out facts from emotions. Probably capital punishment, as a general proposition, does, in principle, deter—that is, it does have an impact on behavior. If a dictator suddenly announced that anybody on the streets after dark would be shot, and if he meant business, people would scurry for cover as soon as the sun started sinking in the west. There would be an obvious impact on behavior—no question.

But this is not really the issue in the United States of America. The issue is not whether the death penalty is effective compared to no punishment at all. Nobody suggests letting murderers go free or punishing them with a slap on the wrist. The question is whether capital punishment adds much of an *extra* deterrent, compared to life imprisonment or a long "jolt" in prison. Or, if it adds something, does it add enough to make it worthwhile? Does capital punishment simply cost too much? Does it have negative side effects? On these questions, the jury (so to speak) is still out. The death penalty has not been used that much in this country over the last twenty years or so—its use is concentrated in a handful of states, mostly in the South—and we frankly do not know how much, if at all, it enters into the calculations of potential criminals. Most members of the public seem to favor the death penalty—at least they say they do. A minority, but a very committed one, objects to killing prisoners, on moral grounds. Statistics and survey research, of course, cannot resolve the ethical issues that the death penalty raises; nor can politics, or, for that matter, econometrics. These techniques, to be sure, are relevant to the debate; but they cannot resolve it.

We talk about the way punishment deters people; but what we really mean is the threat of punishment. After all, *most* people do not actually go to prison or suffer legal punishments. The literature on crime speaks about two kinds of deterrence, "general" and "specific." General deterrence is deterrence in advance: people obey the law because they know there is such a thing as punishment. Specific deterrence is after the fact: a criminal is caught and sent to jail. If he "learns a lesson" and goes straight, he has been specifically deterred.[26]

General deterrence is more important than special deterrence. Sending a thief to jail may or may not get thievery out of his system. There are, in fact, lots of backsliders ("recidivists"). What the thief does, however, is far less important than the presumed effect of jails and punishment on millions of other people, who think twice before stealing, out of fear. The Internal Revenue Service, with a loud clang of publicity, often indicts a few prominent tax evaders right before April 15. The idea is general deterrence: putting the fear of the Lord, so to speak, into taxpayers. It probably works, at least on some people.

The actual sanction is, of course, less important than what people *think* it is: what people know or think about sanctions—the knowledge and notions they carry around in their heads. A completely secret system of punishment, if such a thing were possible, would not change anybody's behavior. This points up a weakness in much of the literature on deterrence. Scholars have tried to prove that harsh punishments cut down the crime rate. They cannot run experiments, so they try to find "natural" experiments. They compare, for example, the situation in two or more states. They look at the average prison term in state A, and compare it with the term in state B; then they look at the crime rates in these states. Does the tough state have less crime?[27]

But this is tricky business. In the first place, it is not easy to measure crime rates with precision. Comparing the rates of two or more states makes this problem worse. Secondly, all sorts of other factors besides punishment influence crime rates. Thirdly,

unless the differences in prison terms from state to state are extremely great, criminals are unlikely to know the differences. Suppose state A gives out, on average, prison sentences 12 percent more severe than those in state B. If burglars and thieves are not aware of the different levels of severity, why should we expect any difference in the behavior of potential criminals in the two states? And if it takes a team of social scientists to discover the precise levels of severity, would a pickpocket or shoplifter know the same facts simply by intuition?

The reverse of this point is a kind of scarecrow or bogeyman effect. People are deterred by sanctions that are not really there—people only think they are. A study of subway crime in New York City found this "phantom effect." When the city put more police officers in subway cars, the crime rate went down, even during hours when the police were not actually there.[28] Of course, a phantom effect is not likely to last; it will wear off as soon as people learn the true picture. This is, alas, the fate of many of the campaigns against drunk driving. The zeal dribbles away, and then so too does the deterrent effect.[29]

When people talk loosely about the punishment for some particular crime, they often mean the official level of punishment—that is, the simple, blunt words on the law books ("five years in prison"). But punishment is both more and less than those five years. It is a complex process—a whole package of events—that an arrest sets in motion. A woman is picked up for shoplifting; she is taken to a strange, scary place; she is held in a cold, filthy cell; her name gets into the newspapers; she misses work and may lose her job; the neighbors gossip about her case; her husband files for divorce. All this can happen even if the police or the prosecutors or a jury let her go in the end without any "punishment." As Malcolm Feeley put it, in a study of a New Haven court, in the "lower criminal courts the process itself is the primary punishment."[30]

Process is punishment, no question. This makes it even harder to compare deterrent effects across state lines. It is easy to compare the *words* of the statutes of, say, Connecticut and Mississippi; harder, but still possible, to compare average sentences in the two states; much harder, and almost impossible, to compare real punishments. Shoplifting may carry more shame in a small town than in a big city, where life is more anonymous. Even "one year in prison" is not the same thing everywhere. Some prisons are harsher than others. There are maximum-security prisons where life is as tough and brutal as outside on the streets. Some prisons are filthy and corrupt; their guards are vicious; prisoners are victimized and raped. Then there are "model" prisons, well run, with more freedom and humanity. In theory at least, the kind of punishment experienced in prison should make a difference, both to general and special deterrence.

Deterrence is a psychological concept, at bottom. It is a guess about the way people will react to certain expectations. It obviously varies with the individual. People do not all react alike. Punishment, for example, is stigmatic: it imposes shame. But the impact of stigma is quite variable. An arrest might ruin a respectable businessman for life. It might humiliate him to the point of suicide. On the other hand, a young, streetwise

thief might accept arrest as a kind of cost of doing business. These assumptions are at least plausible.

People are frightened and worried about crime. There is no question that the rates of serious and violent crime exploded in the period from the Second World War to the early 1990s. This may, in fact, have been more or less a worldwide trend; the crime rates in London, Stockholm, and Sydney, though much lower than ours, also rose dramatically in that period, according to a careful study.[31] But since peaking in the 1990s, both violent and property crimes rates reversed course, and have declined dramatically. In some places, like New York City, the drop in crime has been especially marked.[32] Why did violent crime rise so spectacularly? And why did it suddenly start to go down? The causes of both the rise and the fall are, frankly, rather obscure, though there is no shortage of theories. Moreover, for most Americans, news of the decline hasn't really sunk in: a solid majority still believes that violent crime is rising.[33] Headline images of the latest lurid crime probably make more of an impression than more obscure articles on crime statistics.

What is to be done about crime? For many people the solution has always been obvious: tighten the screws. Punishment deters; we need more punishment. Put more people in prison. Put more people to death. Lengthen the sentences. Make prison harsher, more austere. These ideas are simple and seem very attractive. The question is, do such tactics really work?

For better or for worse, tightening the screws is more easily said than done. The legislature can try to toughen the system, by passing harsh laws, but it cannot always make punishments stick. The legislature does not catch or prosecute criminals, or carry out trials, or run the jails. The individual parts of the system can all frustrate each other. The system, to repeat the analogy we used in Chapter 9, is like a leaky hose.

Evidence of this fact keeps mounting up. Malcolm Feeley, who studied reforms in criminal justice, found a record of repeated failure. Laurence Ross, who analyzed studies of traffic crackdowns on speeders and drunk drivers, found that most of the crackdowns ultimately failed, as we noted before. Often, when there is a move to control discretion at one point in the system, discretion simply shifts to another point: "The serpent held by one coil of his body may wriggle more energetically elsewhere."[34]

We can call this the problem of the "cadres." We talk as if a law or rule is a simple order that goes directly from some commander (the legislature, say) immediately to a subject—someone supposed to listen and obey. But in fact the process is rarely that simple, at least in our legal system. The process is more like clusters of complex molecules. When the legislature orders longer jail sentences for drug pushers, it sends a message down the chain of command. The people in charge at each stage (the cadres) have the power to misunderstand, to pervert, to divert, to drag their feet, to frustrate the order. They may do this either consciously or unconsciously. It is a general problem of bureaucracy, and is especially severe in criminal justice because the system is so loose, so gangly, so uncoordinated.

This is not to suggest that programs of toughness *always* fail to increase the incidence and severity of punishment. There is, for better or for worse, ample evidence that the toughness campaign of the late 1980s and early 1990s did have an impact—prison populations skyrocketed, after all. The laws resulted in some 2 million people behind bars—an extraordinary and unprecedented number. What is less certain is what, if anything, was accomplished by way of deterrence and "incapacitation."[35] Indeed, most studies show that mass incarceration was a surprisingly minor factor in the great decline in crime.[36]

There is another problem with "tightening the screws." The layman forgets that punishment can be self-defeating; it may have toxic side effects. In theory, a vicious, brutal prison should do a better job of deterring than a country-club prison, but it may also make inmates more brutal, more antisocial—more likely to commit crime when they get out. We frequently hear that juvenile halls and jails are schools for crime; if this is so, it is another side effect of harshness. Probation, after all, whatever its failings, is not in itself a school for crime. And, as we've seen, mass incarceration may sweep up disproportionate numbers of poor, black, and Hispanic young men, which may have devastating effects on particular communities, effects that eventually reverberate more broadly through society.

The stigma and shame of a criminal record are also punishments, in theory, and should deliver extra deterrence. In practice this, too, does not quite work out. The stigma can close so many doors that the ex-con is forced back to crime. Prison records make it harder to find a decent job or secure certain government benefits. In many states, ex-cons are not allowed to vote, even long after serving their time. These side effects are hard to measure, to be sure. But if these side effects are real, we might try, instead of more punishment, programs of jobs, rehabilitation, and reintegration into society. Alas, these seem out of step with the public mood.

THE DETERRENCE CURVE

Another point about rewards and punishments is worth making. We assume that if we jack up the threat of punishment, or punishment itself, we get some additional deterrence. That is, if we make a parking ticket $20 instead of $5, fewer people will park overtime. Can we tell in advance how much more compliance we will get?

The simple answer is no. Everything depends on the social setting, the circumstances, who the people are. But even if we know all this, we have no way to predict the amount of deterrence that more punishment buys. One thing is clear: the relationship is not simple and linear. Doubling the fine does not double the effect. It may produce more than double, or very much less. There is no known way to predict.

Can we say anything about typical patterns? Often, the patterns are more or less curvilinear. Suppose there is a $5 fine for parking overtime on Main Street; suppose the

police catch one out of every three violators. Suppose, too, that half the drivers disobey the rules. They have two chances out of three of succeeding, and if they are caught, the fine is low. (Assume, to keep things simple, that the drivers know these facts.) What happens if enforcement stays the same, but we raise the fine to $50? Do we get ten times more compliance?

Almost certainly not. Half the drivers are already obeying, despite the pitiful fine. They are already deterred, or are law-abiding people for other reasons. We are concerned, in other words, with only half the drivers. They may be a tougher and more daring and less law-abiding group.

Still, $50 is real money. We cannot expect ten times more results, but we can expect some improvement in the situation. Suppose now we find that only one out of four drivers is willing to take the risk and park overtime. Raising the fine to $100 would flush out a few more—but probably not many, since only hard-core cases are left. To get at *this* group, we might start towing cars away. This is a big leap forward. Overtime parkers now have to pay a big fine and run around the city to reclaim their cars—a colossal nuisance. Nonetheless, a tow-away system brings about little change, because there are not many drivers left to deter. The curve has flattened out. If we try punishments that are even more severe—taking away driver's licenses, or putting the drivers in jail—we would get only piddling results. There are too few violators left to deter. At some point, the curve becomes almost perfectly flat.

Let us transfer this reasoning to a more serious crime, for example, arson. The punishment for arson, assuming we catch most arsonists, is, let us say, five to ten years in prison. This is already pretty severe. Very few people burn down buildings. The people who do are sick, violent, or unconscionable people. Morality and fear of punishment already prevent most arson. Only a small group of people are left for fresh deterrence to work on. Some of these are hard-core cases—perhaps people who have trouble controlling their urge to burn things down. If we double the punishment and make this new punishment stick, we might get a bit more deterrent effect, but probably not very much. The curve has already flattened out. In theory, the effect of greater punishment will never be zero, but in practice, for some crimes, the effect comes close to zero. We may have reached that point, or almost reached it, for certain very serious crimes—rape, for example, or murder—at present levels of punishment.

When the deterrence curve flattens out, it means a few people are left, who are, we might say, undeterrable. Who are these people? In certain, extreme situations, they might be people with nothing left to lose. A man facing a firing squad will do anything to save his skin. Some scholars have argued that criminals on the whole are impulsive people with low self-control; they do not make a careful analysis of the costs and benefits of committing a crime—they just do it.[37] There is some evidence that violent criminals are more difficult to deter than white-collar criminals; they "do not act rationally" and are often "unaware of the punishment for their conduct."[38] These impetuous people may be the ones who commit crimes after the deterrence curve has flattened out.

CAPITAL PUNISHMENT

The debate about capital punishment is so loud and so passionate that it is worth spending a little more time on the subject.[39] For some people, the basic issue is moral. They think it is wrong for the state to kill, regardless of the deterrent effect. Similarly, some people favor capital punishment whether it deters or not; they feel that cruel, savage killers have forfeited the right to live. To put this scum to death is a simple matter of justice. But there is also a group in between, who might be for or against, depending on whether the penalty works or not.

Does fear of the gallows, the gas chamber, the electric chair, the firing squad, or lethal injection keep people from killing? (Except for crimes against the state like espionage, treason, and terrorism, murder is the only capital crime left in this country.)[40] Our homicide rate is scandalously high. We kill each other in shocking numbers compared to (say) the Japanese or the Belgians. The murder rate has declined from its modern heights in the early 1990s, but it is still much higher than it was in the nineteenth and early twentieth centuries. Violence may be as American as apple pie, but this kind of pie has been unusually popular. In Philadelphia, for example, in the years 1839–1901, on average only 3 persons per 100,000 were accused of criminal homicide each year.[41] In 1991, the murder rate for Philadelphia peaked at 31.7 persons per 100,000.[42] By 2014, the murder rate had gone down considerably; but at 15.9 persons per 100,000, it was still higher than that of the late nineteenth century.[43] (Other cities, have not been as fortunate as Philadelphia: the 2014 murder rate in Detroit was 43.5 persons per 100,000.)[44] Government statistics estimate there were about 8,000 homicide victims nationally in 1950; then came the murder boom, and in 1975 there were more than 20,000 victims; the peak came in 1991, when almost 25,000 people were killed. That was the golden age of murder. Things have, as we said, improved considerably since then; but we still kill each other at a rate higher than other modern democracies.[45]

Crime is always in the news; yet the actual number of murders and murderers, considering the size of our population, is nonetheless quite small. It is not hard to think of reasons why. Moral scruples, fear of revenge, and the likelihood of severe punishment, short of the death penalty, are more than enough to keep most of us away from violent crime. The curve, in other words, has flattened out enormously. This means that the added bang which the death penalty might provide is not likely to produce much *fresh* deterrence. In other words, a person can argue against the death penalty on many grounds—moral or social scruples or assumed side effects—but also because it may not work very well. It is not necessary to argue that the death penalty flatly does not deter. This would be questionable in principle, and it skates on very thin empirical ice.

Most discussions of the death penalty are, in a way, unnecessarily abstract. They ignore the facts of this particular society. The death penalty may work efficiently in some societies—societies that use it quickly, mercilessly, and frequently. It cannot work well in the United States, where it is relatively rare, slow, and controversial. This point gets lost in the shouting and the arguments.

To deter, a threat must be real. If we ticket an illegal parking spot once every thirty years, we cannot expect anybody to be afraid to park there. Except in a few states (Texas, very notably), the death penalty is not often carried out in the United States. In California, with over 10 percent of the nation's population (and a big contingent on death row), there had been, as of the beginning of 2016, just thirteen actual executions since 1976 (and none in the last ten years). This means that in California, the death penalty has to be considered fairly feeble as an extra deterrent. In order to pack more muscle, we would have to put the death penalty into effect reasonably often, though how often is not easy to say. But because this form of punishment has some intense and dedicated enemies, and because it is hedged about with so many procedural safeguards, the number of executions is likely to stay quite limited, at least in the foreseeable future.

In fact, the death penalty was never as common in this country as it was in England in early modern times. Americans did, however, make more use of it in the past than they do now. At the time of the American Revolution, people could be hanged for dozens of crimes; there were 113 separate offenses that carried the death penalty in South Carolina in 1813. By 1850, the list was down to twenty-two.[46] The northern states were stingier with capital offenses. In practice, murder and rape were the only important crimes that carried the death penalty. As far back as the early nineteenth century, there was a movement to get rid of the death penalty. Some states—Wisconsin is one—have never had it at all.

A law on the books is one thing; actual hangings are another. Here, too, the South was more lavish with death penalties than the North. The chief victims were slaves. In Virginia, between 1706 and 1865, 628 slaves were hanged.[47] South Carolina put 296 slaves to death between 1800 and 1855—sixty-four for murder, forty-six for insurrection, thirty-one for burglary, twenty-eight for assault, seventeen for arson, twenty-one for poisoning, seventeen for rape. (In seventy-two cases, the exact crime was unknown.) By contrast, Massachusetts, with a white population twice as large as the black population of South Carolina, executed only twenty-eight people between 1801 and 1845.[48] This is fewer than one a year.

Public opinion, especially in the past, is a slippery and elusive topic. There were, of course, no opinion polls in the nineteenth century. But we do know something about how the system actually behaved, and we know the rhetoric of public debate. Behavior and rhetoric both suggest that support for the death penalty suffered a long-term decline in America. The number of people actually put to death went down steadily. In the decade of the 1930s, 1,667 prisoners were executed. As late as 1951, there were 105 deaths from capital punishment. In 1966, there was only one. After that time, capital punishment almost, though not quite, ground to a halt.

The main reason was the success of the legal campaign against the death penalty. In 1972, in the famous case of *Furman v. Georgia*,[49] the Supreme Court, as we mentioned before, dropped a bombshell. The Court struck down as unconstitutional every death-penalty law in the country and made a clean sweep of death row. It was a startling

decision, but also a close one: a bare five out of nine justices formed the majority; and the reasoning of the decision was so fragmented that it was hard to tell exactly what was decided and why. In fact, every justice wrote a separate opinion.

A few justices felt that the death penalty was "cruel and unusual," or had somehow become cruel and unusual in the course of social evolution. This made capital punishment unconstitutional under the Eighth Amendment, in all circumstances. Most justices did not support this view. In fact, the five justices on the winning side said all sorts of things, some contradicting what the others said. One basic theme was too much discretion in the system. States imposed the death penalty in arbitrary, unpredictable, almost irrational ways. It also fell too heavily on black people, on underdogs, on the unpopular. Some justices argued that it was a poor deterrent, or that it was immoral, or that enlightened public opinion had turned against it, and so on.

Some of these arguments rested on empirical assertions—statements of fact—at least in part. For example, was it really true that the death penalty offended "enlightened" public opinion? Of course, there is no standard for judging what is and what is not "enlightened." What is "enlightened" to one person is foolish or bigoted to another. At any rate, only one thing was clear after *Furman*: for the time being, capital punishment was dead.

It did not stay dead. The soaring crime rate breathed new life into it. Public opinion (enlightened or otherwise) apparently turned. Capital punishment began to do better in public-opinion polls. Most state legislatures showed their disagreement with *Furman* in the most direct possible way: they passed new death laws. They had to take into account what the Court said in *Furman*, as best they could; hence they tried to write less offensive statutes. In this sense, at least, the decision was a powerful force for change. But it failed to put the issue to rest.

In 1976, the Supreme Court decided a new batch of cases on the death penalty. The lead case was *Gregg v. Georgia*.[50] In many ways, the results were just as chaotic as in *Furman*. The Court split badly, and the justices wrote many separate opinions, ranging all over the lot. The Court ruled on several new kinds of statute. It accepted some and struck down others. Most of the justices were not willing to go the last step and destroy the death penalty absolutely and finally and under all circumstances. Beyond this, the law was left rather murky. The Court has spent a fair amount of its time since then trying to clear up the murk.

Since *Gregg*, the issue has remained alive and very active politically. With the surge in violent crime through the 1980s into the 1990s, the popularity of the death penalty grew and grew, as did the number of people sentenced to death and actually executed. By the middle of the 1990s, 80 percent of the public favored the death penalty for a person convicted of murder, and over three hundred criminal defendants per year were sentenced to death. The number of people actually executed topped out in 1999, when state governments put ninety-eight people to death. Since that time, though, support for the death penalty has steadily declined, as have the number of people sentenced to death and the number actually executed. In 2015, just 61 percent of the public supported capital

punishment; forty-nine people were sentenced to death, and twenty-eight people were executed (thirteen of those by the state of Texas, which continues to have a particular zeal for this form of punishment).[51]

Support for the death penalty also seems to be waning among lawmakers. A number of states have gotten rid of it in recent years, including Illinois (2011), Connecticut (2012), Maryland (2013), and Nebraska (2015). And several others, including California, have used it rarely; of the thirty-one states that still have the death penalty, only six executed someone in 2015.[52] Even the Supreme Court seems to be moving to restrict use of the death penalty—over the last few decades, they have prohibited the execution of minors,[53] people with intellectual disabilities,[54] and people convicted of a crime other than murder.[55] And a couple of justices recently concluded, more generally, that it was "highly likely that the death penalty violates the Eighth Amendment."[56]

The death penalty, though, remains the law in most states. But even in Texas, the state with the biggest appetite for executions, it is not a quick and easy form of punishment—no matter how vicious the criminal and how heinous his crime. Mostly these prisoners wait, and wait, and wait. There are endless court hearings, appeals, and re-appeals. Relatively few are actually put to death; blizzards of suits, claims, writs, and petitions pile up delay after delay. In the 1950s, it was already possible to hold the executioner off for years, with one legal move after another. A famous instance was the case of Caryl Chessman. Chessman was sentenced to die in California on May 21, 1948. Not until twelve years later, in May 1960, did he lose his final hope and die in the gas chamber.

Today, there are dozens and dozens of Chessmans—men (and a few women) who have spent years and years on death row, fighting their fate. The average time between sentencing and execution keeps growing. In 1985, it was a little under six years; by 2011, it was over sixteen years.[57] Lester Bowers Jr., executed in Texas in 2015, had been on death row for over thirty-one years.[58] The end of the torture, one way or another, is still in doubt for most of the death-row denizens. They sit tight and struggle on from court to court. A substantial proportion of the men and women sentenced to death succeed on appeal—they get a new trial; or, quite often, a lesser sentence.

Thus, it is too simple to say flatly that the United States "uses the death penalty." Capital punishment, in most states, either does not exist—some nineteen states lack it entirely—or is half dead, as in California. Only in some of the southern states is it much of a working reality. It is tied up in knots that have proved very difficult to unravel. A death penalty of the American sort cannot act as much of a deterrent, compared to the toughest form of life sentence—life without possibility of parole. A real death penalty—one that worked, one that had a strong effect on criminal behavior—would have to be more certain and more swift.

There is very little chance of a death penalty of this sort in the United States. Many people (including judges and juries) find the death penalty awesome, frightening, and extreme. No doubt many people who tell pollsters they favor the death penalty would shrink from it on an actual jury. Our tradition of due process, whatever its deficiencies,

stands in the way of any "quick and dirty" solutions. Is there anybody who thinks a person sentenced to death should *not* have a careful review, and at least one appeal to a higher court? Yet all this takes time—lots of time—and a shortage of lawyers to handle such cases is one of the prime causes of delay.

The situation, then, is confused, uncertain, endlessly complex—and as a result, frustrating to both sides of the argument. The pros and the cons both grumble and complain, and no wonder: neither side can, for the moment, win a meaningful and decisive victory. Yet this situation reflects current social reality. Society is of two minds on the subject. The law faithfully mirrors public hesitation, disagreement, and doubt, just as it reflects its deeper convictions.

The death penalty is an extreme example of a more general issue in deterrence theory, and it also points up problems in the popular idea that the system can become more effective if we give it more muscle and bite. Deterrence is no humbug: if we jack up real penalties, we will definitely scare away some customers for crime, just as a stiff rise in the price of lettuce or toys scares off some buyers. In the real world, this is a mighty big if. "Severity" is easier said than done. The system is too complex to move easily and quickly. And severe laws can produce nasty, unwanted side effects. All of this makes deterrence hard to measure and hard to predict, and also hard to harness and control.

12

Legal Culture: Legitimacy and Morality

NOT ALL LEGAL behavior can be explained in terms of reward and punishment. To some extent, we are indeed animals that respond to the carrot and the stick. But we are also moral and social beings. We react to messages we get from other people—to what other people think and say—and we also listen to the voice of conscience, to messages from inside. These messages are extremely important in explaining how we respond to legal acts. They may be, in fact, more important than rewards and punishments.

The "social" factor, reduced to its simplest form, simply means that people care what other people think. No man or woman is an island. We are all powerfully influenced by family, friends, neighbors, coworkers, fellow students, members of our church. All of us feel the silent and not-so-silent pressure of the people who co-inhabit our lives. This pressure may push us to obey the law or to disobey, or to use the law in particular, patterned ways.

There has been much talk, for example, about the influence of peer groups—a phrase that refers, basically, to the people around us, the people we consider to be our group ("peers" means equals). We know from everyday experience that the peer group has tremendous influence. To say that somebody is a member of a "delinquent subculture," for example, is merely an elegant way to express the idea that the person is part of a peer group that pushes him to violate some of society's rules. Why does this person obey his "subculture?" Because if your friends taunt you, laugh at you, treat you as inferior, that is a form of punishment; or if you disappoint them; or if they feel you are a traitor. Conversely, it is a real and strong reward when they admire you and praise you.

American Law: An Introduction. Third Edition. Lawrence M. Friedman and Grant M. Hayden.

To a boy growing up in a poor urban neighborhood, the pressure to join a gang can be overwhelming, and, once in, the pressure to conform is intense.[1] If the gang has a code that gives high marks for macho behavior—breaking the law, acting tough, defying the police—but low marks for tattling or being "yellow" or refusing to go along with some illegal caper—you are certainly more likely to break the law than if you were not a member of the gang. This is because breaking the law in your case represents conformity to group norms, and if you conform to *official* norms—that is, if you act "good"—you are breaking the law of your group. In Clarendon Heights, a housing project in a Northeastern city, a member of the "Hallway Hangers" reported, "You hafta make a name for yourself, to be bad, tough, whatever. . . . If you're to be bad, you hafta be arrested." Thus "good grades in school can lead to ostracism, whereas time spent in prison earns respect."[2]

Even outside the gang context, similar ideas can help account for delinquency: the adolescent chooses rebellion because it "allows conformity to the standards of an alternate social system," which (for a number of reasons) suit his psychological and other needs more than the mainstream system.[3] And the delinquency label, once pinned on an adolescent, only serves to isolate him from respectable society and makes it more likely that his real rewards will come from the members of his group, and only from them.

There is nothing startling, then, in all this, either as theory or as practice. Everybody likes to be rewarded and practically everybody wants to avoid punishment; a whipping is a whipping whether it comes from the state or from the people next door. The groups we belong to are, in a way, miniature societies, with tiny "governments" and "laws" of their own. If we follow gang norms instead of the norms of the "real" government, we are in a way simply acting as the subjects of competing rulers. Very often, the scarier and more threatening "government" is the one that sits on our doorstep. After all, for most people, it may be easier to avoid or evade the police than to get out from under disapproval (or worse) coming from friends, neighbors, or parents. In many prisons, gang leaders are more effective and powerful rulers of prison society than the warden or guards.

This much seems fairly obvious, and research confirms the fact that peer pressure influences a person's legal behavior. Johannes Feest, for example, did a little study of traffic behavior in Berkeley, California. His study showed that people drive one way when they are alone, quite another when other people sit next to them. Among drivers who were alone, only one out of ten came to a full stop at a stop sign; when someone shared the car with the driver, full stops rose to 21 percent.[4]

In other words, people do not obey traffic rules solely because they are afraid of the police. They also respond to the person sitting next to them—to what that person thinks and feels, what that person might say about the driver's behavior. Some of us will go through a red light late at night, with nobody around and nobody with us, although we would never do the same by day, police or no police.

Feest gathered his data by sitting in a parked car and watching how drivers behaved. He did not talk to the drivers, and we do not know who the other people were who influenced the drivers. No doubt they were relatives or friends. A study by Lionel Dannick,

however, suggests that even a stranger can affect behavior, simply by being nearby. Dannick did research on pedestrians in New York City. Pedestrians often crossed the street illegally, that is, when the sign said "Don't Walk." But if the experimenters planted somebody to stand on the corner and cross only when the sign said "Walk," the rate of violation dropped dramatically. Contrariwise, when the "plant" clearly broke the rule, the rate of violation went up.[5] Violators, in other words, "reinforce" other violators, and compliers do the same.[6]

This effect is not limited to traffic laws. Three political scientists carried out a large-scale experiment, reported in 2008, which involved 180,000 Michigan voters, designed to test their motivation for voting. The researchers divided the voters into a large control group (100,000 voters) and four "treatment" groups of 20,000 voters. Treatment one was a simple postcard with a reminder to vote; treatment two added a note to the postcard saying that researchers were watching the election to learn about turnout; treatment three replaced that note with one that reminded voters that "who votes is a matter of public record," listed the recipients' voting record, and said that it would send an updated list after the election. These treatments increased turnout relative to the control group by 1.8 percent, 2.5 percent, and 4.9 percent, respectively. These results were all significant, yet they were dwarfed by the effect of treatment four. Voters in the treatment four group received a letter that listed the recipients' voting record and the voting record of those living nearby, and promised to update the list in a new letter after the election—clearly implying that the recipients would know their neighbors' voting records, and, importantly, that their neighbors would know theirs. The promise to publicize their turnout to their neighbors drove up participation by a whopping 8.1 percent (enough that it caught the eye of political consultants, who began using versions of the tactic in their own campaigns).[7] These findings, according to the researchers, demonstrated "the profound significance of social pressure as an inducement to political participation."[8]

We have to draw a distinction, of course, between the effect of other people on our own behavior and the effect of our own ideas about right and wrong. Of course, what we usually see and measure is behavior—whether we are standing on the corner, or peeking out from a parked car, or checking on whether someone votes. The actual motives are invisible. Why does somebody stop himself from jaywalking when he sees other people who obey the rule? Perhaps he wants to avoid embarrassment; it is embarrassing if people see you breaking rules. But the "good" people are also teachers, of a sort: they show us that the rule is alive, that it means something to them, that they choose (for whatever reason) not to break it. That may influence the way we feel about the rule.

The point, in other words, is that peer pressure (or other messages from the crowd) may in the long run change our thoughts as well as our behavior. The civil-rights laws forced hotels and restaurants to open their doors to people of all races; there was a time when many of them—and not only in the South—refused to let black people in. The fact that these hotels and restaurants are no longer allowed to discriminate does not in itself change bigots to nonbigots; the owners may still feel the same way about race. But

coercion creates a new situation—it changes public behavior—and when this happens, real or imagined peer pressure may start to work on people's minds. A segregated restaurant first becomes illegal, then impossible, and finally unthinkable. Somewhat similarly, corporations, mindful of antidiscrimination laws, set up offices and departments to deal with "equal opportunity" within the company, and these bring in committed people and set up waves of dynamics that may well impact the behavior of companies, employees, and everybody they come in contact with.[9]

LEGITIMACY AND MORALITY

As we have suggested, ideas about right and wrong, about morality, about legitimacy, are very important in explaining how people behave. This is plain common sense. Most of us (one hopes) would not steal, cheat, murder, or set fire to buildings, whether or not there was any chance the police would catch us and whether or not there was any chance that peers would find out and disapprove. We would do the right thing because we want to, because of the voice inside, because we have been taught to avoid evil deeds, and the lessons of our childhood took hold.

The penal code, in other words, is not the only source—or even the main source—of our ideas about right and wrong. We learn the moral code from our parents and teachers, and we drink in ideas simply by living in society. Every community has its own definitions of right and wrong, and every community has its own way of imparting them to members. Ideas of right and wrong are constantly in flux; it is interesting to watch them shift, bend, and change colors. Some norms (about killing and stealing) are very stable, of course; others (about sexual behavior, for example) seem much more changeable, and have in fact changed radically over time.

In any event, our consciences are powerful motors. Most of us want to do what is right, and if this means obeying the law, then we will obey. Conversely, there may be times when people feel strongly that the law is wrong or immoral. Conscience can lead to disobedience as well as obedience. There are many examples in our history. People have often gone to jail as a matter of conscience. In protest against the war in Vietnam, for example, many men refused to register for the draft. It was a way to oppose what they felt was an immoral war; they were willing to suffer punishment rather than obey. Some people are so appalled by abortion that they are willing to disrupt family planning clinics, even if it means going to jail. A few fanatics have even been willing to kill.

We obey—and want to obey—what we think is *right*; and also what we consider *legitimate*. These two words do not mean the same thing. Social scientists and legal scholars—at least since the days of Max Weber, the great German sociologist—talk a great deal about legitimate rules and about legitimacy in general. But the words are not always used very precisely; there are many definitions floating about in the literature. At least one scholar, Alan Hyde, feels that the whole concept should be junked as useless and confusing.[10] But the concept does have a valuable idea at its core. Basically, when

people say that laws are "legitimate," they mean that there is something rightful about the way in which the laws came about. In other words, legitimacy is mostly used as a procedural concept—or, if you will, a legal one.

An example will make this clear. What makes a law passed by Congress "legitimate"? Not what is in the law—that might be foolish, shortsighted, or deficient in all sorts of ways. No, the law is legitimate because Congress passed it; for most of us that is enough in itself. In other words, we do not question the legitimacy of a law so long as it was regularly passed by Congress or a state legislature or a city council.

We can push this idea further and ask *why* congressional action makes a law "legitimate." If we put this question to people, they might answer with something like this: Congress has the right to do this because the people elected its members, or because the law reflects what the majority of people want. Very few members of the public have thought deeply about political theory, but they do have vague, commonsense ideas floating around in their heads. In any case, the legitimacy of law rests on the way it comes to be: if that is legitimate, then so are the results, at least most of the time. And what is true for legislative bodies is also true for actions of the president, rules of the Seattle school board, and decisions of the Supreme Court of Arkansas: all are legitimate insofar as the public accepts them as part of the normal, rightful way of doing public business.

The binding force of these legal acts comes, then, from the procedure or from the institution, not from what the acts do or say. Obeying a rule because it is legitimate is not at all the same as obeying it because it is moral or ethical, or even because it is fair. In fact, we should probably distinguish carefully between various ways in which a rule or act can be "right." People in their legal behavior do follow the voice of conscience. But conscience is a complicated organ; its voice is made up of many tones.

Legitimacy is only one of these factors of conscience. Another we can call "civic-mindedness." This is the notion that we ought to obey some rules for social or patriotic reasons. Civic-minded people are willing to take fewer showers and let their lawns die in times of severe shortages of water; civic-minded people vote; they enlist in the army during wartime; they resist the impulse to throw beer cans on the trail in Yellowstone; they pay taxes on time and in full. For some people, this is a powerful impulse, even in situations where there is no chance they would get caught if they broke the rules, and no peers are around to wag their fingers. For others, of course, such a motive is weak or absent.

"Morality," strictly speaking, is a somewhat different motive. This may be the most powerful and important factor of all: obedience to rules for moral or religious reasons. It is our moral training that explains why most of us do not cheat, steal, murder, or lie. It is why devout Mormons refuse to drink, why Orthodox Jews refrain from eating pork, why observant Catholics do not divorce, why Muslim women wear headscarves. The normative structure of society is as important as its political structure, and just as essential.

"Fairness" is still another concept. Sometimes I might feel that a rule deserves support because of some purely formal characteristic—for example, because it affects everybody in the country, and why should I be different? If the government imposed a $5 tax on every man, woman, and child, some people might decide to pay because they felt it was only fair to do so, whether or not they thought the tax made sense, was morally sound, or was good for the country. Still another conscience factor is what we might call "trust." This is the feeling that we should go along with some rule or order because of faith in the authorities. They know so much and we know so little. If they tell us to do something, they must have a good reason, and we should go along, whether we understand the reasons or not.

These factors are all different from legitimacy, and they are all motives for obeying or disobeying law. Motives are invisible, but motives or attitudes are social facts as much as behavior is. What people think is as real as what they eat and how they vote or swim, only harder to observe or to measure. Like all attitudes, attitudes toward laws and rules are not poured in concrete. They change over time. Different ages and types of people have them in different degrees, and they also rise and fall with the social tides.

Many people feel, for example, that trust is in short supply today. Studies have suggested that people have gotten more cynical over the years. They are less likely than before to say that they trust or believe in the authorities. One standard survey question over the years has asked people how much of the time they trust the federal government to "do what is right." In 1964, 77 percent said "nearly always" or "most of the time." Over the next decade, a period that included the Watergate scandal and the Vietnam War, that number dropped precipitously. By the end of the 1970s, only about 25 percent of the public expressed the same level of trust. Public trust in government rebounded a bit in the 1980s, fell again in the early 1990s, and then briefly spiked following the September 11, 2001, terror attacks. The long-term trend, though, has been a marked erosion in public trust. By 2015, trust in government was extremely low: only 3 percent of Americans said they could trust the government to do what is right nearly always, and only another 16 percent trusted the government most of the time.[11]

What follows from a loss of confidence in government, or, more broadly, in experts and authorities of all sorts? It can certainly affect behavior. For example, in 1981, the governor of California (after much controversy) gave an order to spray pesticides from the air, over parts of northern California. The problem was the insidious medfly, whose larvae threatened to chew the fruit industry to death. The public was told that the spray was harmless, that there was nothing to fear. A generation earlier, almost everybody would have accepted this as gospel; it was the governor's word and the word of the scientists employed by the state. In 1981, many people simply refused to believe; some people left the area in panic; blind faith was in short supply.

If people are distrustful of government, and dissatisfied, do they tend to break the law? Not necessarily. People can comply even if they are more or less fed up with the system.[12] There is some reason to be skeptical about the so-called spillover effect. This is the

hypothesis that people who think one part of the legal system is unfair or illegitimate, or who do not trust it in one regard, will disobey or lose faith in the rest of it.

In a way, this seems plausible. People frequently make this point about laws that are badly or unfairly enforced; they claim that this leads to disrespect for law in general. Supposedly, this was a side effect of Prohibition. We hear the same argument about criminalizing marijuana. In fact, there is little or no evidence for the spillover effect. If you think the marijuana laws are unfair or ridiculous, are you more likely to cheat on your income tax, park overtime, or shoot your brother-in-law? It seems unlikely. There may be spillover into "neighboring" areas of legal behavior: a person with contempt for marijuana laws may be more likely than others to use cocaine or break the liquor laws. Somehow, we feel sure a dope pusher will not shy away from breaking vice laws. But we are not sure how far these "neighborhoods" extend or what constitutes a neighborhood.

It is logical to assume some connection between the way we behave and what we think about legitimacy and the moral status of law. In one classic study, Harry V. Ball studied landlords in Honolulu. The city was under rent control at the time. Which landlords overcharged their tenants? The landlords, Ball found, who thought rent control was unfair; these were the ones who proceeded to violate the law.[13]

This shows a relationship between attitude and behavior. But exactly what *was* the relationship? We have a chicken-and-egg puzzle here. Which comes first, the moral attitude or the lawbreaking? A landlord might soothe a guilty conscience by deciding the law was unfair. Ball assumed that the sense of unfairness came first, and led landlords down the path to lawbreaking; but the causation might go the other way around: landlords who violated the law came to excuse themselves by blaming bad law. The Honolulu data do not show which way the causal arrows point.

In an important study published in 1990, Tom R. Tyler studied residents of Chicago to try to find out (among other things) whether legitimacy and other such factors influenced actual obedience to law. He found that most people—over 80 percent—agreed that people "should obey the law even if it goes against what they think is right." He also found that there was a relationship between *belief* in compliance and *actual* compliance—at least with the handful of rules he actually studied (for example, rules against drunk driving and overtime parking).[14] Tyler's book attracted a good deal of scholarly attention; and a fair amount of further research.[15]

THE INVERSE FACTORS

We have discussed a variety of inner motives for legal behavior—morality, fairness, trust, civic-mindedness, legitimacy. Each of them, as the discussion implies, also has its opposite: mistrust, illegitimacy, a sense of unfairness, and so on. We assume that the more people think of a law as moral, trustworthy, and legitimate, the more likely it is that they will comply, and there are bits of evidence that support this proposition. Similarly, an

increase in a sense of unfairness or illegitimacy should weaken the feeling of duty, leading to less obedience (or none) or—if the moral feelings are strong enough—to actual defiance or revolt.

This is plain common sense. It is confirmed by experience as well. If Tyler's findings are true, people in general do think they ought to obey the law, whether they like the law or not. But there seem to be limits—at least for some people. As we said, there are men and women so ardently opposed to legal abortion that they are willing to terrorize family planning clinics. There are also people so fanatically opposed to government that they are willing to bomb federal installations; this happened in Oklahoma City, in 1995, with a serious loss of lives. Dissent can, of course, take milder forms: refusal to pay income tax, court cases attacking the constitutionality of statutes, and so on; some of these methods (the court cases) are plainly legitimate and operate wholly within the system.

Sometimes the political reaction to a new law or judicial decision may end up undercutting the effectiveness of the law. This "backlash" theory suggests that the school desegregation decision, *Brown v. Board of Education*, might have done more harm than good, by provoking a violent reaction.[16] But while there was certainly strong and even violent resistance to the changes signaled by *Brown*, it is hard to believe that the decision, over the long run, actually impeded the cause of desegregation, in schools and elsewhere. More recently, when same-sex marriage became a possibility in Hawaii (and, then, a reality in Massachusetts and a handful of other states), the reaction was swift: Congress passed the Defense of Marriage Act (DOMA), and over forty states passed statutes or amendments to their state constitutions banning same-sex marriage.[17] These changes were real, tangible setbacks to gay couples who were newly married (or hoping to become so).[18] But the court cases that accepted same-sex marriage also helped mobilize and encourage gay rights advocates, and they began to win victories in the courts, at the polls and, eventually, in the hearts and minds of the public. In 2013, the Supreme Court invalidated a portion of DOMA,[19] and in 2015, the Court made same-sex marriage the law of the land.[20] The backlash theory may describe the short-term consequences of a controversial judicial opinion. But the long-run reactions to cases like *Brown* do not seem to confirm the backlash theory; and the same is true of the legal history of same-sex marriage.

For most people, loss of faith is not necessarily across the board. When people become disgusted with or mistrustful of one law or one part of government, they do not necessarily turn into actual outlaws. Most people simply grumble and accept things as they are. Some turn to other channels and other ways of expressing their displeasure. The courts, for example. Sometimes, then, there occurs what one might call a *transfer* of legitimacy. People who lose faith in Congress, city hall, or the bureaucracies turn to the judges in hopes of salvation. That is, they "judicialize" their problems.

In the medfly crisis in California, which we mentioned a few pages back, the state government announced it would spray a pesticide (malathion) over the counties near San Francisco Bay. They assured the public that malathion was safe. Many people did

not believe them. They suspected the government was lying, to protect big fruit growers. As it happens, the spraying went off as planned. But those who opposed it did not take it lying down. They went to court.

This strategy for the disgruntled has become more common. It is the way the battle against capital punishment is carried on. It was the keystone of the civil-rights movement and, decades later, of the movement for same-sex marriage. As the malathion case shows, the strategy does not always work (the case was lost), but it can at least achieve delay. And delay is often valuable—if the goal is to stop some action dead in its tracks. Those who opposed nuclear power achieved quite a bit of success by driving up costs and delaying the construction of future power plants; court tactics make nuclear power more expensive through delay and through obstructive measures that are all perfectly legal, though sometimes rather technical and legalistic. The enemies of the death penalty, too, count on delay. They try measure after measure to keep the convicts on death row alive (and, in that regard, they have been quite successful).

Some of this litigation reflects a loss of faith and trust in government. Yet, in one crucial sense, it implies *more* trust, not less: trust in the courts. Environmental groups, prisoners'-rights groups, civil-liberties groups—these bands of activists would not waste time and money on litigation if they had cynical views about court systems, or if they trusted the courts as little as they trusted certain other agencies of government. In many societies, there would be no such faith in the courts—not in their will nor in their power. The trend toward judicialization indicates, to some extent, loss of legitimacy and trust in government, or in legislatures, or in the bureaucracy. But it can also be a sign of what we called a transfer or shift of legitimacy to courts.

LEGITIMACY AND CONSCIENCE: HOW STRONG?

How strong are our feelings of legitimacy or trust, or conscience in general? Common sense tells us that we are more attached to some norms than to others. Most of us would not kill except in a dire emergency, if then, but we are nonchalant about breaking the speed limits. These differences make it hard to say much, in general, about how people resolve conflicts *among* the various motives for legal behavior. Everything depends on the circumstances, the situation, and the particular rule. People who feel that speeding is dangerous and antisocial, and who are afraid of the police, are still willing to go at lightning speed if the situation is serious enough.

If sanctions, the people around us, and our inner feelings all pull in the same direction, then the norm will be tough and durable indeed. This is basically the case with norms against killing. The law takes murder very seriously and punishes it severely. Conscience is against it, too, and neighbors and friends share the general revulsion against killing. Hence this norm is one of the strongest known.

It is not easy to go much beyond this simple point. Suppose conscience pulls one way and the law, with its sanctions, pulls another: Who wins? Is the threat of punishment

more powerful than an appeal to conscience? There is no general answer. An occasional researcher has tried to study the question experimentally. In one such project, two researchers used college students in Florida as their guinea pigs. The students were allowed to grade their own quizzes in a course. Without the students' knowledge, the teachers were able to check the real scores against self-graded ones and find out how much cheating was going on. Quite a bit, it turned out. Some students were then threatened with spot checks and punishment; this cut down cheating considerably. Others were given a moral pep talk. This hardly worked at all. Threat of punishment was much more powerful than appeals to conscience.[21] In another study, the researchers probed to see whether students (always handy subjects) were likely to violate certain norms—drunk driving, petty theft; they were then asked questions about whether shame (inner guilt), embarrassment (peer pressure), or legal sanctions were likely to present a "problem." In this study, "shame" seemed to make a difference; "embarrassment" did not count for very much at all.[22]

But these studies hardly prove the general case—or any general case. In fact, the general case is unprovable, because the terms "punishment," "conscience," and "peer group" do not refer to single or constant factors. There are many types of conscience, and many ways to try to stir it into action. They cannot be summed up in a single formula. Sometimes, in the midst of a war, appeals to the public for sacrifice have been tremendously successful; people have been willing, after all, to die for their country or for a cause. At other times and under other circumstances, moral appeals and sermons simply fall on deaf ears. Wage-price guidelines, for example, have often been dismal failures; they need strong sanctions to back them up.

Also, sanctions themselves come in all shapes and sizes, from money rewards to fines, jail, whippings, and even the threat of death. Some sanctions terrify us; some have very little bite. Some incentives are strong and some are weak. Again, much depends on the circumstances.

These studies of student behavior, then, cannot provide us with general answers to the questions we are asking. At best, they pit one sort of moral appeal against one sort of sanction, or one form of peer-group pressure against one form of moral appeal, and in only one or two types of situation. We do not know what happens when there is conflict between state sanctions and private conscience, between conscience and the pull and tug of group loyalty, between peer pressure and the government, in a variety of *different* situations. Conflicts of this kind are everyday occurrences. Nothing is more common than to find ourselves in the middle, torn between a feeling that we ought to obey (or disobey) the law, and contradictory messages coming from the people around us or from our own inner feelings. There are no rules on how to resolve these conflicts; no research findings tell us how people resolve them in general.

Civil disobedience is an important social fact in American history. Civil disobedience is an open challenge to law, but one based on principle. People who civilly disobey do not deny that they are violating laws that are formally valid. But they feel that the laws are so repulsive morally, or so harmful to society, that the citizen has a higher duty to disobey.

The higher duty may be grounded in religion. The Mormons in Utah in the nineteenth century believed that God permitted and encouraged their leaders to marry many wives. The idea was enormously offensive to the rest of the country, but the Mormons stuck to their guns and defied the authorities for many years, and in the face of tremendous persecution. The Boston Tea Party, the abolitionist movement, the civil-rights movement, draft protests, the right-to-life movement—the historical record is full of examples of civil disobedience. Some of it has been extremely effective in changing the law or in teaching the larger society a moral lesson. It is enough to mention Martin Luther King Jr. and the black protest movements of the 1950s and 1960s.

Civil disobedience is not always nonviolent. The Boston Tea Party destroyed private property. John Brown was willing to kill innocent people in his crusade against slavery. In many places, and many times, nonviolence may add moral strength to civil disobedience. This was the lesson taught by Mahatma Gandhi in India, and applied since then in other societies. One reason is that nonviolence expresses, in a particularly dramatic way, the morality of civil disobedience. It expressly denies any spillover effect. It is a way of saying, "We object to *this* law, but not to law in general." The protesters, in fact, are deeply committed to order, justice, and organized society. Indeed, they may often appeal—as did Martin Luther King Jr.—to a higher but secular law (the Constitution, for example). This legitimates their disobedience to local laws that, they claim, are themselves illegitimate. In any event, they assert, with their words, body language, and actions, that some laws, though superficially valid, are simply too morally corrupt to deserve one's allegiance.

LAW AND MORALITY

We often hear talk about the conflict between law and morals. Many writers stress how different law is from morality, and how much the legal code differs from the moral code. Some scholars, however, insist that law cannot be separated from morality, or even that unjust rules or an unjust regime cannot be law. There are complex and fascinating issues here, which are at the core of much discussion among philosophers of law.[23]

The relationship between law and morality is far from simple; but the law definitely embodies a moral code, and does so explicitly. The law books of any state and of the federal government (and of other countries, too) make this point in the most elementary way. Murder, theft, rape, and income-tax fraud are immoral acts, and they are certainly illegal as well.

But every complicated society (and ours is certainly complicated) has more than a single moral code: it has many different ones. People disagree, sometimes quite bitterly, about issues of right and wrong, morality and immorality, and how to deal with situations in which the various versions clash. Some disagreements over norms can be compromised; some norms can be treated as deserving equal treatment. The law, for example, is neutral on the subject of religion, by and large. It does not require anyone to practice

any faith, and there is no official church or statement of faith. In many societies there were, or are, state religions, and those who hold unorthodox beliefs and follow unorthodox practices are persecuted, sometimes to the point of death. There is certainly no "separation of church and state" in Iran, or in Saudi Arabia.

But there are situations, in the United States, where neutrality is impossible. The law cannot be both for and against something at the same time. This means that conflicts arise continually between law and morals, or rather between law and the morals of *some* part of the population. The polygamy dispute in territorial Utah can serve as a good historical example. Before the Civil War, abolitionists clashed with those who defended slavery. There have been innumerable other instances, up to the present day.

One of the most poignant instances is the abortion controversy. The Supreme Court, in *Roe v. Wade*,[24] held that the Constitution, our highest law, protects a woman's right to have an abortion, at least in the early months of pregnancy. The Court struck down state laws that interfered with this right. Many people approve of the decision; they feel that *Roe v. Wade* was a wise, just, and even moral decision. But many people were, and continue to be, outraged. To them, abortion is a form of murder; and any law that permits it permits the worst possible crime, the slaughter of innocent beings. Obviously, these believers in the "right to life" cannot accept present doctrine, which goes against their moral code. "Pro-choice" people, on the other hand, may believe just as strongly in the justice of their cause—in the sanctity of a woman's right to control her own body. These battles continue today, nearly fifty years after the Court issued its decision.

In certain other cases, law and morality seem to clash, even without sharp differences of opinion of the sort that surround the abortion decision. Most of us would probably agree that it is wrong to tell lies or to cheat at cards. Neither of these is a crime; neither is found in the penal code. Some lies are so gross or harmful that they may amount to slander, and card-cheating may, under some circumstances, amount to fraud, but these are exceptional situations. Why does the law leave lying and cheating alone? Why not at least a small fine? Is overtime parking really worse than cheating at poker or bridge?

Perhaps these examples prove that law and morality are different spheres and have different aims. But there is another way to describe the situation. If we made card-cheating a crime, we might do more harm than good. People might start informing on other people. We would give the police enormous discretion and power if we let them arrest people for lying. We might open the door to blackmail and corruption. We might punish people beyond what they deserve.

Notice that all these statements about adverse side effects are also statements about morality—about what is right and what is wrong, just and unjust. In other words, when "immoral" acts are left out of the penal code, it might not mean there is some inherent difference between law and morality; it might simply mean that there are competing moral principles and we have to make choices among them. Society makes these choices all the time; and it does not always choose correctly, by any means. The Mann Act, passed in

the early part of the twentieth century,[25] made it a federal crime to "transport" a woman across state lines "for the purpose of prostitution or debauchery, or for any other immoral purpose." This law was supposed to help stamp out "white slavery" (note the racist overtones of this popular phrase): the practice of forcing women into the degrading status of prostitution. The act probably had no impact on prostitution. It probably did open the door to blackmail, which is another evil, and a serious one. The law also permitted the harassment of defendants who offended public opinion—Jack Johnson, for example, the boxer, and Chuck Berry, the rock-and-roll star; these were black men involved with white women. In 1986, in the face of changing ideas about sexual morality, and in the light of the act's checkered history, the Mann Act was substantially revised and defanged.[26]

The legal system is based on social norms; it has to be. It reflects moral principles and ideas. But not necessarily moral ideas which everybody subscribes to. Morality is an abstraction. Debates and conflicts are hard, specific, and concrete; they are about abortion, the death penalty, same-sex marriage; about drug laws, gambling, pornography on the Internet, gays in the military, prostitution, air pollution, endangered species, the war against terrorism. The list is long and the struggle is hard. But the issue is not whether law should enforce morality. Of course it should; it must. The issue is, whose morality, and how?

To put it another way: in a complex, pluralistic society—a society made up of all sorts, shapes, and tastes of people, with many ways of life—how far should the legal system go in upholding a single, official moral code? Many people would answer rather quickly, "Not far at all." We should live and let live. An open, democratic society can and should tolerate different ways of life.

Not everybody, of course, would agree with this philosophy. In fact, nobody agrees with it entirely. After all, there are people whose personal moral code allows or even requires them to rob banks, burn buildings, and skyjack planes "for the cause"; the 9/11 skyjackers were willing to die for their cause. The Ku Klux Klan and the American Nazi Party both have "principles," though the rest of us find these principles repulsive and dangerous. There are people who actually *believe* in sex with children. We can argue that people who hold these views have the right of free speech—they can say what they want. But beyond that, there is no reason to accommodate or legitimate the behaviors and principles in question. Nor do we.

On the other hand, a live-and-let-live philosophy, and a democratic society, *will* accommodate a range of viewpoints—a variety of beliefs, opinions, and styles of life. It is not a case of one code of norms, or else anything goes. The issue is not that general. Minorities have rights—including moral minorities. But only up to a point. Our legal system is supposed to be based on the idea of limits: the majority has moral and physical power, but the wishes and needs of certain types of minorities must be protected, too. Where are the limits? No one can say exactly. There have been times when tolerance, despite our lip service to minority rights, has been in very short supply. Today, many strident conflicts turn on issues of the "social revolution," which is considered in Chapter 14.

13

The American Legal Profession

THE AMERICAN LEGAL profession is the largest in the world, in absolute numbers. It may also be the largest in the world in proportion to population. There were over 1.2 million lawyers in the United States in 2010; the 2015 estimate was nearly 1.3 million. Despite a decline in law school applications, the number of lawyers continued to grow through the Great Recession that began in 2008.[1]

Technically, of course, there is no such thing as an "American lawyer"; every state admits its own, and a lawyer licensed to practice in Florida is strictly speaking a layperson as far as Alabama or Alaska is concerned. Nonetheless, in the aggregate, this is a vast army of law-trained men and women. The growth of this profession, what lawyers do (and don't do), and the professional ethics and practices of the bar cannot be ignored, then, in any discussion of the nature of American law.

THE AMERICAN BAR: A THUMBNAIL HISTORICAL SKETCH

There was a time, long ago—a golden age, if you will—when there were very few lawyers in what is now the United States. In some colonies, especially those dominated by the clergy, there was a good deal of hostility to lawyers. It may or may not be significant that Plymouth Colony, in the seventeenth century, expelled its first lawyer, Thomas Morton, for various "misdemeanors," including trading with the Indians, drinking to excess, and other "beastly practices."[2]

American Law: An Introduction. Third Edition. Lawrence M. Friedman and Grant M. Hayden.

Yet the lawyers found a niche for themselves, despite their unpopularity, as they would do time and time again. By the eighteenth century, they had become quite indispensable in a country whose lifeline was the sea and which depended heavily on trade with the West Indies and the mother country. Wherever there is business, trade, or dealings with government, the American lawyer plays a role. After independence, the legal profession took a quantum leap in size. There were only fifteen lawyers in Massachusetts in 1740, serving a population of about 150,000. In 1840, a century later, there were 640 lawyers, ten times as many in proportion to the population. The big push came after the Revolution.[3]

What was true in this one state was no doubt true in other states as well. In the nineteenth century, lawyers increased far faster than population. Sometime before 1900, their numbers crossed the 100,000 mark. In the twentieth century, and especially in recent years, growth has been even more explosive. The total number of lawyers doubled in the last thirty years or so, rising from 647,575 in 1984 to 1,300,705 in 2015.[4] In 1950, there was about one lawyer for every 700 people in the country; in 1980, one for every 400 or so;[5] in 2012, about one for every 260 people.[6] About 20,000 new lawyers a year are added to the swarm.[7] If this trend continues, the whole country might in the end consist of nothing but lawyers. Fortunately, that day is a long way off.

Where are these lawyers, what are they up to, and what kinds of work do they do? They are mostly in big cities, mostly in private practice, mostly handling the affairs of business firms. Some private practitioners are "solos," who work by themselves. Others work in law firms as partners or as "associates"—lawyers who work for the partners, on a salary basis. Most of these associates are young, and hope to "make partner" someday. A smaller number of lawyers work as "in-house counsel." That is, they are lawyers on the payroll of one particular company. They are lawyers with a single client, their company. The number of these lawyers also seems to be growing fast. In 1951, there were 11,000 lawyers working as house counsel; in 1979, 50,000. By 1991, there were over 70,000 lawyers who worked as house counsel in private industry,[8] though that number appears to have leveled off somewhat over the last two decades.[9] A 2011 study of general counsel offices of the top companies found that the median size of a legal department was thirty-five lawyers, but that some firms outsourced almost all their legal work to private law firms while others maintained a large in-house staff—in a few cases, a staff of over a thousand lawyers.[10] Governments—state, federal, and local—also hire thousands of lawyers. Other members of the bar have jobs related to law, but not quite of it; these include insurance-claims adjusters and FBI agents. A few lawyers teach or write about law. A few lawyers serve as judges of high and low courts. And, of course, some lawyers never quite make it, or choose not to; they dribble out of the profession into business, real estate, or insurance; they make pottery, or sell shoes, or teach school.

The work habits, lifestyle, and collective behavior of lawyers has, naturally, changed a good deal over the years. Nowadays, many lawyers never see the inside of a courtroom. They give advice and, if possible, keep clients out of litigation. In the early nineteenth century, lawyers' work centered much more on the courtroom than today. Judges in

many parts of the country "rode circuit." That is, they went from county seat to county seat, hearing cases. Lawyers traveled along with them. Abraham Lincoln rode circuit in Illinois before he went into politics.

In such a system, bench and bar formed a cozy little unit. The lawyer had no clients "on retainer." He picked up clients as he went along—if he was lucky. When he came to the county seat, and if he was well known, two or three clients who needed his services would approach him, almost before he had a chance to get down from his horse. A good lawyer, with a quick mind and aggressive tactics, could earn a reputation on circuit and get clients and business this way.[11]

The traveling lawyer, of course, had no time or place to do research; he had few books, or none, and no staff of clerks to help him. His brains and his mouth were his assets. Speeches to the jury were important; a silver tongue was a definite advantage. The most famous lawyers in the first half of the nineteenth century were the ones who became known as great orators. Daniel Webster was one of these talker-lawyers. In the higher courts, speeches might go on for hours, even days. Alexander Hamilton argued for six hours before a New York court in Albany, in a criminal libel case (1804). In the *Dartmouth College* case (1818), Daniel Webster spoke on behalf of the college for three to five hours; his speech, especially its ending, has gone into legend. According to one account (probably exaggerated), the audience "dissolved in tears"; when Webster finished, the whole courtroom was so overcome with emotion that for a while no one could speak.[12]

Some such courtroom speeches have come down to us; by modern standards, they seem flowery and overblown, full of purple passages. But in the days before radio and television, these speeches were not merely the key to a lawyer's reputation, a way to catch the eye and ear of potential clients, they were also a form of public entertainment.

Lawyers, of course, were more than orators. Law was a job for quick, clever people, young men (and, at the time, only men) with good heads on their shoulders, who knew their way around. Law was an easy profession to get into. Lawyers scrambled for any kind of work they could get. They investigated real estate titles; they defended petty criminal cases; they collected debts. They oozed into any crack or cranny of the business world they could find. They bought land and sold land, on their own or for investors. George Gale, a Vermont lawyer who settled in Trempealeau County, Wisconsin, in 1851, "acted as a kind of real estate broker . . . as a one man mortgage company . . . as a collection or serving agent on the lands."[13] Lawyers also went into politics, and took political jobs when they could. They swarmed all over Congress, the statehouses, the county seats, the city halls, the territorial governments.

Even before the Civil War, of course, not all lawyers were cast in the mold of Abraham Lincoln—country lawyers who rode from town to town on horseback. There were rich, established lawyers in big cities, harvesting the commercial practice of the seaports. Alexander Hamilton, in the years around 1800, was one of these lawyers. He dealt, for example, with problems of marine insurance—policies written on ships and cargo. This lucrative work, with its tang of salt water and money, was worlds

apart from the petty land deals and debt collection that were staple work for the prairie lawyers.[14]

A few lawyers, as early as the first half of the nineteenth century, avoided the courtroom altogether. They specialized in office work, business planning. After the Civil War, the rise of big business created new legal demands, and hungry lawyers rushed to fill these demands. In this period, from roughly 1870 on, the "Wall Street lawyer" came into prominence. This new breed of lawyer had a new style of work. Practice and professional life revolved around clients, mostly businesses and businessmen, not around judges and fellow lawyers.

It was a natural process. Businesses needed skilled hands to solve the thousand and one legal problems that confronted them. A big company like Standard Oil or Sears Roebuck or United States Steel, as it traveled the road from shop or store to interstate giant, had the greatest needs of all. Lawyers had skills that were useful to these big businesses. The legal problems of a large enterprise are many, and they are continuous. Lawyers for big business were not hired for this case or that; rather, they were kept on retainer.

The great enterprises were willing to pay well, and they wanted to stay out of court. They wanted their counsel to know their business inside and out; they wanted to steer a clear course among the reefs and shoals of the law and the hazards of competition. Lawyers were valuable to big business not because of any gift of gab but because they were shrewd at business deals, creative in drawing up papers, nimble at finance and the securities market, sophisticated about government and rules. Railroad receiverships, deeds of trust, municipal-bond issues—none of these had the glamour of a murder trial or the homely interest of a suit to replevy a horse. But Wall Street was built on these drab, essential pillars of paper, sweat, and guile.

Daniel Webster and Alexander Hamilton worked by and for themselves. The Wall Street lawyer worked, more and more, in partnership. Before the Civil War, there were a few two-man firms. Once in a while, the partners tended to specialize: one acted as the courtroom man, the other as the office or inside man. After the Civil War, there was a slow expansion of firms. By 1900 or so, all major cities had firms of some size. New York, of course, led the way. The firm of Carter, Hughes, and Dwight listed fourteen lawyers in *Hubbell's Legal Directory* for 1903—eight partners and six associates. Sullivan and Cromwell had ten lawyers on its payroll. The biggest firm in Denver, Colorado, was Dines and Whitted—two lawyers and three associates. In Chicago, two firms had seven lawyers each.

Size carried definite advantages. One man could have only so much knowledge and skill. A large bank or steel mill needed more skills and knowledge than one man could provide: a firm of lawyers could better cover the relevant aspects of law. And only a firm was likely to have manpower and brainpower enough to cope with a major bond issue, or to merge two giant businesses, or to reorganize a sprawling network of railroads.

It was almost as if a hormone were at work on the legal profession, pushing the growth of firms. The process continued. In the 1960s, according to one survey, there

were forty-three American law firms with fifty or more lawyers each. Twenty of these were in New York City. The largest law firm, Shearman and Sterling, was made up of 125 lawyers—thirty-five partners and ninety associates on salary.[15] This seemed immense at the time, a "law factory" of massive proportions. But the biggest firms today utterly dwarf it in size. In 1980, Baker & McKenzie, with headquarters in Chicago, had 512 lawyers and branches in eleven cities.[16] In 2014, Baker & McKenzie was still the largest firm, but now it had 4,245 lawyers and branches or affiliates in forty-seven countries; there were over two hundred lawyers in Chicago, more than three hundred in Hong Kong, all the way down to one lawyer in Yangon, Myanmar.[17] Twenty-two other American law firms had more than a thousand lawyers, and over sixty more could boast more than five hundred lawyers.[18]

The very large firms, with their exotic branches, are unusually cosmopolitan. Most law firms stick to a single office. At most they have a branch or two. But the habit of branching is definitely on the march. In 1982, Sullivan and Cromwell, besides its mother office on Wall Street, had branches in Washington, D.C., London, and Paris. By 2015, it had added Los Angeles, Palo Alto, Frankfurt, Melbourne, Sydney, Tokyo, Hong Kong, and Beijing.[19] The San Francisco firm of Morrison & Foerster (with around a thousand lawyers) had branches as close as Palo Alto and as far away as Brussels and Singapore.[20] This is at the upper end of the scale. At the popular end, there are now a number of "law clinics," with offices in many neighborhoods. There was even, at one time, talk about putting mini-offices in department stores so that a person could buy underwear, get glasses, eat a sandwich, and consult a lawyer, all under a single roof. The Wall Street lawyer of 1900 would surely whirl in his grave at the very thought.

WHAT LAWYERS DO

The big firms grow bigger, but thousands of lawyers still work on their own, as "solos." There are also tiny firms and middle-sized firms. Some of the small firms are general firms—they will take on any kind of work. Others are "boutique" firms—highly specialized in some small corner of the practice. There are lawyers in big cities and lawyers in sleepy towns. Thousands of young people pour out of law schools every year and take the bar examination. In California alone, 5,204 men and women passed this test in 2015.[21] These new recruits take up all sorts of jobs and fill many slots. Not all of them, of course, will stay in law.

The profession is, and always has been, quite diverse. There are many legal worlds. To begin with, there is the world of the big firm, the "Wall Street lawyer." There are, of course, "Wall Streets" all over the country—La Salle Street in Chicago, Montgomery Street in San Francisco. There are "Wall Street" firms in Houston, Atlanta, Boston, Los Angeles, Denver, and so on.

These big firms recruit their lawyers, by and large, from the "national" law schools—schools with big reputations and long traditions, like Harvard and Yale, and brash newcomers like Chicago and Stanford. A few state schools have elbowed their way into the ranks of the elite (Michigan, Berkeley). We know in general who the clients are: big corporations and wealthy families. We know in general what the work is: it includes securities law, antitrust law, bond issues, mergers, tax work, and international trade. But we have little systematic knowledge about the details. Researchers find it hard to pierce the curtain of privacy that surrounds these firms. Their taste for publicity is muted (though it seems to be growing). There is also the reason—or excuse—that much of the information is confidential. Sociological literature on the big law firm is not as large as one would like, but the volume is increasing.[22]

In both big and little firms, there will probably be some litigation. How much is uncertain. Business lawyers used to pride themselves on staying out of court. But there has been a litigation boom since at least the 1970s at some of the larger firms. In 1978, at the Cravath firm in New York, a very large firm, 10 percent of the lawyers were working on litigation, double the manpower effort of the past.[23] Cravath was up to its neck at the time in a monster lawsuit (the government's attempt to hack IBM's "monopoly" to pieces, an attempt that ultimately failed) and the workload in litigation was probably somewhat out of the ordinary for the time, but other firms also reported increases in their trial and courtroom work. That increase continued through the end of the century—by 2016, Cravath reported that well over a third of its lawyers were in the litigation practice group.[24] In many large firms, especially those outside New York City, a majority of the lawyers are now devoted to litigation.[25] This is a response, among other things, to increased regulation and to new causes of action. Sears Roebuck, after all, had no sex-discrimination suits in 1930.

Another staple of law practice is real estate: buying and selling houses or (on a more sophisticated level) concocting elaborate deals for shopping centers, suburban developments, and office buildings, or converting luxury apartments into condominiums. Estate work was once also common to big firms and little firms alike—writing wills and trusts, guiding the dead through the dark rivers of probate. Big firms handled these affairs for captains of industry and for great old families. Middle-sized firms did the same for the medium-rich—manufacturers of plastic novelties, owners of restaurants, car-wash companies, apartment buildings. Small-town lawyers handled farm estates. And so on. Today, much of the high-end business has been sloughed off to "boutique" firms, which specialize in crafting estate plans and smoothing the transitions of wealth from generation to generation.

Big firms and solo practitioners are alike, curiously enough, in one key regard: they tend to be generalists. In medicine, the specialists have more prestige and make more money than "GPs," or doctors who practice "family medicine." The legal profession is somewhat different. Big firms make the most money and enjoy the highest status, yet they are general firms, or at least general-business firms. Their senior partners can earn

as much as several million dollars per year. Specialization is not the way to the top, for firms. On the other hand, big law firms are *internally* specialized. They are rather like clinics, hospitals, or health maintenance organizations. This is one reason why the firms grew large in the first place.

Some branches of practice, to be sure, do tend toward specialization. There are lawyers who carve out niches in almost any and every conceivable area of law. Lawyers have specialized in patents, will contests, tax appeals, divorce, and civil rights. There are lawyers who work on export-import trade, on chartering ships, on show business ("entertainment law"), on trademarks and copyrights. Some boutique firms, especially in Washington, D.C., specialize in administrative law. There are "PI" (personal-injury) lawyers, who confine themselves to tort cases growing out of accidents or who bring products liability cases, or who sue doctors and hospitals for malpractice. There are lawyers who do nothing but sue airlines. Then there are firms that handle masses of small lawsuits in torts, making money through settling case after case for small potatoes.[26]

On the other hand, most lawyers are not totally specialized. This is one finding from a massive study of the Chicago bar. Criminal lawyers generally stick to criminal work and do not stray into other fields. But even patent lawyers have more than one string to their bow; only 40 percent of those in the survey restricted themselves totally to patents. Only 22 percent of the corporate tax specialists did nothing else.[27] If there is a trend, though, it is toward greater specialization.[28] A more recent study of thousands of lawyers across the country found that, by their twelfth year of practice, 75.5 percent spent at least half of their time in one area of the law.[29]

Big-firm lawyers cover many fields and many problems. But there are areas they definitely do not touch. One is divorce. Wall Street does very little family law, except perhaps to mop up the financial fallout when multimillionaire couples split apart. It is the lawyers in smallish firms and in law clinics, and the solos, who handle "one-shot" clients—couples who want a divorce, victims of car crashes, immigrants facing deportation, people arrested for drunk driving.

Some lawyers with one-shot clients struggle to make ends meet; others earn heaps of money. The better-known personal-injury lawyers do very well indeed. They take cases on a "contingent-fee" basis. That is, the lawyer gets nothing if the client loses, but if the client wins, the lawyer takes a hefty chunk of the winnings, often one-third. This is true whether the case goes to trial or is settled out of court. If the recovery is big—if it is one of the rare multimillion-dollar recoveries, in a medical-malpractice case, or a products-liability case—so is the fee. It does not take many cases of this type to put a lawyer in clover.

Money, of course, is not everything, and "PI" work never carried the prestige of a Wall Street practice. Partly this is because Wall Street has a richer, more elegant clientele. Tort lawyers serve all classes, top to bottom. Criminal lawyers, in particular, dirty their hands with the problems of our less savory citizens. And all "one-shot" lawyers constantly face the problem of finding new business. Their clients come and go; the lawyers need

continuous infusions of fresh blood. After all, no one gets run over by trains, divorced, or arrested for murder consistently. Many Wall Street firms keep their clients "on retainer"; their business is steady, year in and year out. Of course, they scramble for new business and fight to keep old business. But the struggle has been, on the whole, genteel. What is more, they tend not to hustle in public. In fact, they hate publicity. A flamboyant style hurts them more than it helps. The opposite is true for tort lawyers, criminal lawyers, and divorce lawyers.

In recent years, however, the nature of the practice, even for the very big firms—or especially for them—has been changing. More and more, some of these firms are dependent on large, one-time transactions—a giant merger, for example. Hence these huge firms are becoming more like "one-shot" firms writ large. Their business has become more volatile and precarious. They may not advertise, but they hire public-relations firms, and they welcome publicity. The quiet, lucrative practice of the 1950s looks more and more like the "good old days," forever gone.

WHO ARE THE LAWYERS?

Since the early nineteenth century, law has been a prominent way to get ahead in this society, a means of upward mobility. Young men on the make have shimmied up this greasy pole, which has been a bit easier and less slippery than other alternatives. Who were these men? In the first place, the word "men" has to be taken literally. For much of our history, lawyer meant "white male." Not a single woman was admitted to the bar before 1869, and precious few blacks.

Indeed, when women tried to break into this all-male club, they met resistance and reluctance, to say the least. One pioneer was Myra Bradwell, wife of an Illinois lawyer and mother of four children, who applied for admission to the bar in 1869. She passed the exam, but the Supreme Court of Illinois turned her down. Women, especially married women, did not make suitable lawyers. Like lunatics and children, they were under "disability"; they lacked full legal rights themselves. Besides, the very idea of a woman lawyer was repulsive to most male lawyers. Law practice would endanger the "deference and delicacy with which it is the pride of [the] . . . ruder sex to treat her." Mrs. Bradwell appealed to the U.S. Supreme Court, but did no better there. The traditional family, according to Justice Bradley, was "founded in the divine ordinance, as well as in the nature of things." This meant that women belonged inherently to "the domestic sphere" (the kitchen, in other words), not to the world of public affairs, and certainly not to the world of the law.[30]

Opinion changed, but slowly and grudgingly. In the same year that Myra Bradwell was shut out in Illinois, Iowa admitted Arabella Mansfield to practice after she challenged the state law that excluded her. The first woman lawyer in Illinois was Alta M. Hulett (who was unmarried); she broke the barrier in 1873. The first woman lawyer

in California was Clara Shortridge Foltz.[31] The University of Michigan decided to admit women to its law school in 1870; Yale's law school followed in 1886, Cornell's in 1887.

Despite this, the bar remained basically a man's world. As recently as 1960, less than 3 percent of the country's lawyers were women. Change did not take place until the 1970s. In 1965, 4 percent of the country's law students were women; in 1973, 16 percent; in 1979, 32 percent; in 1995, 42 percent; and in 2013,[32] 47 percent. Slightly over a third of the lawyers practicing law in 2015 were women, and as the older men die off or retire, the percentage is bound to grow.[33] Meanwhile, from the 1960s on, a trickle of women began to show up on law faculties, in big firms, and on the bench. In 1981, President Reagan appointed Sandra Day O'Connor of Arizona, a graduate of Stanford University's law school, to the U.S. Supreme Court. She was the first woman ever to sit there. Ruth Bader Ginsberg, appointed by President Clinton in 1993, was the second. President Obama appointed the third (Sonia Sotomayor) and fourth (Elena Kagan), though by the time of their appointments, Justice O'Connor had already retired from the bench. The chief justice of California during the late 1970s and early 1980s was a woman, Rose Bird, and by 2014, almost a third of the judges on state supreme courts were women.[34] In 1967, no American law school had more than two women on its faculty. Most had none at all. By 2016, the situation had changed quite dramatically; there were, for example, 28 women on the faculty at Harvard (out of 111), 23 at Stanford (out of 74). Women are, to be sure, nowhere close to parity, but female deans are no longer a novelty, and the trend lines are pretty clear and dramatic.

Black lawyers were rare, too, in American history. John Mercer Langston was one of the first black lawyers. Langston was the son of a white plantation owner and a slave woman. He became a lawyer in Ohio in 1854; later, he served as the first head of the law department of Howard University, which opened its doors after the Civil War and trained a small but crucial corps of black lawyers.[35]

Progress here, too, was painfully slow. In 1965, blacks made up 11 percent of the population, but less than 2 percent of the legal profession and only 1.3 percent of the law students, nearly half of these in all-black law schools. At this point, the doors began to open a bit wider, both in law schools and at the bar. Some law schools devised special programs to get and train black students and help correct the extreme imbalance at the bar. In 1977, about 5 percent of the law students in the country were black; many of these—perhaps most—would have been shut out of places in law schools if the schools admitted students purely "by the numbers."[36] Hispanics would have fared just as badly. By 2014, the situation had improved: nationwide, 8 percent of the law students were black, and almost 9 percent were Hispanic.[37]

Law firms, in the past, were as discriminatory as law schools, and even more so. Through the 1950s, most were solidly WASP. Jews were taboo, Catholics suspect and rare. Jews tended to have their own firms, some quite large. Barriers against Jews in the big firms have by now totally crumbled. Barriers against blacks are more stubborn: over the long term, they are receding, though that progress has slowed in recent

years. In 2015, for example, only 3.95 percent of the associates and 1.77 percent of the partners in major law firms were black.[38] At any rate, the barriers are no longer as blatant and overt. True, many firms settle for a "token" black lawyer. But even a token is important; it proves to the firm of Chicken and Little that the sky will not fall if the firm is no longer lily-white. Discrimination against women has also become much less pronounced—partly because of the sheer number of women pouring out of law schools. Women now hold about 45 percent of the associate-level positions nationwide;[39] in certain markets, like San Francisco, they make up a majority of the associates.[40] Nonetheless, a recent, large-scale study indicated that women continue to have significant earnings disparities: within two to three years of practice, there was a 5 percent gap between the incomes of men and women. That gap increased to 15 percent after seven years and 20 percent after twelve years.[41] Women also seem to be slower to make partner—one hears a lot about the "glass ceiling"—and it is still more difficult for women compared to men to "have it all" (career *and* family). Only about 21 percent of the partners in major law firms are women.[42] But the times are definitely, and dramatically, changing.

Still, equality of opportunity is not an easy goal to achieve, especially with regard to barriers of class. There are structural hurdles. The cost of legal education is one of these barriers. Tuition alone at top private schools was over $50,000 a year in 2015–16. The Chicago survey reported some disquieting facts. Lawyers tend to come from the families of businessmen, teachers, professionals; they are not sons of grocery clerks or the daughters of coal miners. Over 73 percent of the practicing lawyers in Chicago came from "solidly middle-class or upper-middle-class homes," far more than if lawyers were selected from Chicago families at random. Many came from lawyerly or professional backgrounds. And the percentage of lawyers from working-class backgrounds was probably going down, not up, at least at the time of the Chicago survey.[43] A more recent study, which tracked more than five thousand lawyers in eighteen geographic regions over the first twelve years of their careers, revealed similar patterns.[44] Law school graduates tend to come from privileged backgrounds: nearly 70 percent had fathers who were managers or other professionals (compared with 20 percent of those in the workforce in general); only 15 percent had fathers who worked in blue-collar occupations.[45]

BECOMING A LAWYER

The English legal system historically made a sharp distinction between two kinds of lawyer: barristers and solicitors. Barristers, in their wigs and robes, acted as courtroom lawyers; solicitors did everything else, but could not appear before the higher courts. Solicitors, on the whole, were less tony and prestigious than barristers, but only solicitors dealt with clients face to face on a regular basis. A few American states once made distinctions between ranks or classes of lawyers (New York, New Jersey, Massachusetts,

Virginia), but by the middle of the nineteenth century these had all died out and we were left with a single category: lawyer.

It was not a hard label to earn. In the nineteenth century, the law, compared to other professions, was fairly wide open (at least for white males). To some extent, it flatters the nineteenth-century lawyer to call him a professional at all. Nowadays, the road to the bar is a long, hard grind—first college, then three years of law school (if you can get in), then a cram course, then the bar examination itself. In many states, the bar exam is quite a hurdle; 53.4 percent of those who took the California bar exam in July 2015 failed to pass.[46]

Admission to the bar was a different beast entirely in the nineteenth century. Legal education as we know it basically did not exist in 1800. The way to the bar was through apprenticeship. The young man who wanted to be a lawyer "read law" in a lawyer's office. He sat in the office for a period, and plowed through a number of law books. Often the apprentice made himself useful doing the lawyer's drudge work: copying documents, writing out pleadings, running errands. In the days before typewriters, telephones, stenographers, copy machines, and word processors, a lawyer *needed* clerks. If the clerk was lucky, he got some actual training out of the deal. Not all clerks or apprentices were lucky.[47]

In most states, the bar examination did not do much filtering; it was hardly a significant hurdle. A few states (Indiana, for one) got rid of it altogether for a while. Elsewhere, it was short and not very tough. Young Salmon P. Chase, later chief justice of the U.S. Supreme Court, was admitted to the bar in Washington, D.C., around 1829. Seldom, he wrote, "has any candidate for admission to the bar presented himself for examination with a slenderer stock of learning." Chase had spent time in the office of William Wirt, then attorney general, as a "student-at-law." He read Blackstone and a few other books. Wirt "never examined me. Only once did he put a question to me about my studies." The "bar examination" itself was just as perfunctory. Justice Cranch asked him a few questions; Chase answered them, though "not very well." The judge said, "You must study another year." But Chase begged for mercy: "I have made all my arrangements to go to the Western country and practice law." The judge "yielded," and Chase was sworn in.[48] Those were the good old days.

Legal education in a school setting developed only slowly, though in a sense it can be traced to the end of the eighteenth century. Two streams of education ultimately flowed together. The first was a kind of glorified clerkship. It came about this way: A few lawyers discovered that they really liked teaching clerks, and were good at it. They spent less and less time with clients, more and more time with their clerks. They took on extra clerks, for pay, in order to teach them law. Finally, the law practice withered away, and the office turned into a school.

This is more or less the story of the famous Litchfield School, the first law school in the country. It was founded by Judge Tapping Reeve in Litchfield, Connecticut, in 1784. It lasted until 1833, and was quite successful in its day. The Litchfield School had little

in common with modern law schools. In looks, it was modest: a simple frame building, much like a country schoolhouse. There were no entrance requirements, no prerequisites, no final examinations. Litchfield used the lecture method. The full course took a bit more than a year. There were lectures every day. Students copied down as much of the lectures as they could. On Saturdays, there were quizzes covering the work of the week. Instruction was, needless to say, intensely practical.

A number of other schools rose up, in other parts of the country, more or less on the Litchfield plan. Eventually, they died out. Their influence merged with the other stream—instruction in a university setting. Here William Blackstone was an early model. He gave lectures on law, at Oxford, in the middle of the eighteenth century. To be sure, these lectures were not meant to train lawyers. They were supposed to be part of the education of young laymen: landed gentry, who needed to know something about the common-law system. Still, his example gave a strong push to the notion of learning law at a university. Blackstone's lectures were the source of his *Commentaries*, in four volumes; Blackstone's *Commentaries* were fantastically successful on both sides of the Atlantic. American colleges and universities began to copy the Blackstone idea. The first American chair of law was at William and Mary College. A holder of this chair, St. George Tucker, published an American edition of Blackstone in 1803, up to date and with American notes and additions.

Harvard, however, was the first university with a separate department of law. In its early years, from about 1816 on, legal education at Harvard was a kind of mixture of Litchfield and Blackstone. Its intellectual pretensions, of course, went beyond those of Litchfield, especially under Joseph Story. Story was the first professor to occupy a new chair endowed by Nathan Dane (1829). Story was a justice of the Supreme Court of the United States, and he wrote many learned (though somewhat ponderous) legal treatises. Despite Story and his successors, Harvard Law School in the middle of the nineteenth century was not the tough, rigorous Harvard of *The Paper Chase*. When Joseph Hodges Choate entered Harvard Law School in 1852, he found the standards "very low." "There were absolutely no examinations to get in, or to proceed, or to get out. All that was required was the lapse of time, two years, and the payment of the fees."[49]

All this changed radically in 1870. In that year, legal education as we know it was born. It sprang from the brain of Christopher Columbus Langdell, who became dean of Harvard Law School in that year. Langdell worked a revolution in legal education. He invented the case method, practically speaking—instead of listening to lectures, students read and discussed published reports of cases decided by appellate courts. These cases were collected in casebooks, and Langdell put the first one of these together. He also insisted on the so-called Socratic method of teaching—teaching through questions and answers. Lectures were out.

He also, in a way, invented the law professor. Before Langdell, judges and practicing lawyers taught law. Usually they kept their "real" jobs; teaching was a sideline. Joseph Story, as we mentioned, was a sitting justice of the Supreme Court during the years he

taught at Harvard. Other professors taught after successful careers in practice or on the bench. Chief Justice Joel Parker of New Hampshire was appointed to a Harvard chair in 1847, at the age of fifty-two.[50] Langdell put an end to this practice at Harvard. He hired James Barr Ames, a young recent graduate of the law school, to join Harvard's faculty. Ames had no practical experience at all. Langdell believed in him—not as a lawyer but as a teacher. Law, to Langdell, was a science; it had to be taught by people adept in the science. Whether they had dirtied their hands in practice was irrelevant.

Langdell's methods were novel and disturbing; they evoked bitter opposition, even at Harvard. Gradually, the opposition died down, and the Langdell method won out over all of its rivals. By the second decade of the twentieth century, the Harvard case method was almost universal in American law schools. It remains dominant to this day. To be sure, there have been many changes in curriculum. Some schools have experimented with a more "clinical" or "experiential" approach, teaching a few courses through real or simulated work on actual cases. The casebooks contain a lot of material that would have shocked and horrified Langdell: besides the cases themselves, we find much more in the way of notes, questions, and explanatory material along with excerpts from articles, mostly "legal" but occasionally economic, historical, or sociological. The curriculum has changed greatly, too: nobody taught environmental law in Langdell's days, or feminist jurisprudence. Still, the core of the Langdell method has been remarkably resistant to change, and the titles of required first-year courses in virtually every American law school would, on the whole, be perfectly familiar to him if he came back to life.

Law schools also tightened their standards after the Langdell revolution. A definite curriculum was established; each class was topped off with a final exam. The Langdell method was austere, abstract. Langdell's conception of law as a science divorced the study of law from the grubby world of practice—and also from politics, history, economics, and anything that smacked of social context. His schools taught only legal principles; everything else was banished from the law school, exiled to the rest of the university—for example, to departments of politics or government. Yet in other ways the new-model law schools were tied more closely to their universities. Nineteenth-century university law schools were independent kingdoms, on the whole. They ran themselves; they collected their own fees; they had almost nothing to do with their universities, except to share a famous university name.

Meanwhile, law school pushed out clerkship as the high road to the bar. In 1850 there were fifteen law schools in the country; in 1870, thirty-one; in 1900, 102. In 2016, the American Bar Association (ABA) accredited 207 schools. Apprenticeship is theoretically possible as a path to the bar in a few states, but in practice it is virtually extinct. In a few states, there are some number of unaccredited law schools. (California had twenty-two of these in 2016.) Some of these schools are "proprietary"—that is, they make money, or try to. Their entrance requirements are low, but so are their success rates in turning their students into lawyers. For example, 85 percent of the students of California's unaccredited law schools dropped out before obtaining a degree (compared to about 12 percent

of those at ABA-accredited schools).[51] Of those who graduated from the unaccredited schools, only 22 percent who took the July 2015 bar exam passed it on their first attempt (compared to 68 percent of those from accredited schools).[52]

There are law schools in every major city and in almost every state; Alaska is the only one that lacks this modern amenity (though Seattle University School of Law now has a satellite campus in Alaska). These law schools are all different in some ways; but in many ways much the same. They are remarkably similar in curriculum and method. They also tend to impose the same general requirements: a college degree and the Law School Admission Test (LSAT). This test began its reign of terror around 1950; a good score is a must for entry into all but the weakest law schools. Law schools on the other hand, vary greatly in prestige, money, and power—and in quality of faculty and students, at least on paper. A tremendous surge of applicants in the 1960s and 1970s battered at the doors of law schools. The stronger, older schools were able to "skim off the cream." More recently, after a bit of a lull in the late 1990s, applications took off again, peaking in 2009–10 when the Law School Admission Council administered over 170,000 LSATs, and about 88,000 students applied to accredited law schools (60,000 were admitted). After that, the fallout from the Great Recession caught up with the legal market, and applications plummeted for several years, falling dramatically before beginning to level off at around 55,000 by 2015;[53] in response, many law schools were forced to reduce the size of their incoming classes, to keep the quality of students up to the standards they wanted to maintain. Other schools, however, simply let more students in, standards or no standards. In many ways, the schools are prisoners of *U.S. News & World Report*, whose ranking of law schools terrorizes deans and faculties. Where you stand in the rankings has consequences: for student applications, for alumni satisfaction, for the reputation of the dean, and in many other ways. Many legal scholars deplore the tyranny of the ranking system; but nobody has thought of a way of getting rid of it.

Law schools, as we said, have some basic similarities; but it would be naive to pretend that money and prestige make no difference. Harvard, Yale, Berkeley, Stanford, and Chicago can afford huge research libraries and databases, along with big clinical programs; small schools have no such good fortune. Salaries are higher; teaching loads lighter at elite schools. For a long time, the rich (private) schools were mostly schools for the rich, but public legal education also has a distinguished history, especially in the Midwest (Michigan, Wisconsin, Minnesota) and the West (California). In the late nineteenth century, many schools were founded to teach law at night. There were twenty of these schools by 1900. (Many of them survive to this day, though they usually offer day courses, too.) Their students were mostly drawn from the working class. Out of these schools came the immigrant lawyers, Polish, Italian, Jewish, Irish, and Greek, who often went back to their neighborhoods and served their ethnic constituents. Graduates of these schools rarely made it to Wall Street or La Salle Street. The big firms were and are staffed with graduates of national schools, not these "local" schools.[54] But the night

schools and other local law schools have been breeding grounds for local judges and politicians; thus, in their own way, they wield great influence and power. Their alumni run the statehouses, or at least city hall.

THE ORGANIZED BAR

Lawyers, like Americans in general, are joiners. Yet the bar did not have a strong, permanent organization until the 1870s. The first modern bar association was the Association of the Bar of the City of New York. It was founded in 1870 by what one lawyer called "the decent part of the profession." This "decent part" had boiled over in indignation because of the plague of corrupt lawyers, judges, and politicians in Boss Tweed's New York City. A few years later, in 1878, "seventy-five gentlemen" of the bar, meeting in Saratoga, New York, founded a national group, the American Bar Association.

Bar associations in their early days made no attempt to recruit the mass of American lawyers. They were basically clubs of like-minded, high-class lawyers. Indeed, that was their point: they kept the riffraff out and admitted only the "best elements" of the profession. The purpose was reform—drafting better laws, fighting against corruption, raising the prestige of the profession.

They had other, less defensible, ideas. The ABA had at one time a rather shameful history of snobbery and bias. In 1912, through carelessness, the ABA admitted to membership three black lawyers; when the leadership realized what had happened, they tried to undo this dreadful mistake, since the "settled practice" was to "elect only white men." The three black lawyers were allowed to remain, but future applicants had to reveal their race, to prevent any more such "mistakes." The ABA also took reactionary stands on matters of free speech and political dissent. Its record during the Cold War was unenviable. Instead of standing up for the Bill of Rights, the ABA resolved, in 1950, "that all lawyers attest to their loyalty with an anti-Communist oath."[55]

The ABA, in short, represented the conservative upper crust of the profession for most of its history. It stood for elite values and goals. Early on, the ABA promoted codes of ethics for the bar and tried to upgrade the lawyer's reputation by defining, and upholding, ethical conduct. This had its good side and its bad side. The good side was the struggle for honesty and higher standards. The bad side was elitism, a kind of dogged conservatism on professional issues, and a failure to consider the rights of consumers of legal services. Even the ethics were class-biased. Under the old ABA canons of ethics, advertising was forbidden. Wall Street, after all, did not need to advertise. The small lawyer did, but the ABA was not concerned with his wishes. Ordinary laypeople, too, were disadvantaged: it was hard for them to find out what lawyers had to offer. The rule, in other words, made sure that "knowledge would remain unevenly, and unfairly, distributed."[56] The bar did not like price competition, either. In many states there were tables of minimum fees. Price-cutting was unwelcome.

The ABA today has come a long way since the 1950s. But it is still not an association of all American lawyers. No one has to join. In 2015, it had a huge membership—over 415,000—but this was less than half of the vast army of American lawyers. Under pressure from inside and out, the ABA has tried to become more representative. It is no longer a club for white males; it is definitely open to any American lawyer. It was a sign of the times that in 1995 a woman, Roberta Cooper Ramo, was elected president of the ABA.

The bar has also done some re-examination of its ethical codes. The so-called Kutak Commission proposed a major revision; the bar in 1983 refused to accept it, but the debate opened up discussion on matters the bar once accepted without question. The outside world, too, has intervened. In 1976, the Supreme Court struck down minimum fee schedules.[57]

The next year, the Court killed the ban on advertising, too. This was the case of *Bates v. State Bar of Arizona*.[58] John R. Bates, with his partner Van O'Steen, ran a "legal clinic" in Phoenix, Arizona. His ads in the paper ("Do You Need a Lawyer?") touched off the case. Bates won, arguing that his truthful advertising should be protected speech under the First Amendment of the Constitution, and since then more and more lawyers have taken advantage of these decisions, and advertise their wares. Obviously, their ads are not aimed at rich Americans, let alone Walmart or General Motors; the ads appeal, for example, to people arrested for drunk driving, or people with work injuries, or immigration problems—people who never, perhaps, dealt with a lawyer before, and have only the vaguest idea how to get one.

Right after the *Bates* decision, the advertising was mostly done by lawyers who, like Bates and O'Steen, ran legal clinics; evidence suggested that the resulting competition lowered the cost of legal services. But since the early 1990s, personal injury attorneys have flooded the airwaves in search of new clients.[59] Any kind of advertising makes old-time lawyers squirm, but some of the more recent commercials have gone over the top. Jim "The Hammer" Shapiro, a personal injury attorney from Rochester, New York, ran a commercial on television where he shakes his fist, points into the camera, and shouts "Hurt? I cannot rip out the hearts of those who hurt you! I cannot hand you their severed heads! But I can hunt them down and settle the score!"[60] This type of ad, striking and eye-catching, has probably not reduced the cost of legal services—in fact, there is some evidence that personal injury lawyers who advertise may actually charge higher contingency fees.[61] In any case, lawyers now spend billions of dollars on advertising. It has become an important part of the delivery of legal services to masses of people. Indeed, Nora Freeman Engstrom recently argued that *Bates* and related cases "have had a bigger practical impact on contemporary legal practice—and thus on the transmission of legal services—than any other line of cases in American history."[62] The white-shoe firms, however, still avoid selling their wares in this way.

The ABA is a national organization of lawyers; there are also state, county, and city bar associations. They too have expanded, and have tried to shed their image

of elitism.[63] In more than half the states, starting with North Dakota in the early 1920s, the bar has been "integrated." This has nothing to do with race; it means that lawyers cannot practice unless they join their state bar and pay dues. The integrated bar uses these forced contributions for a number of purposes; disciplinary processes eat up a lot of the money. In theory, an integrated state bar is better able to control its members and keep them on the straight and narrow path. Some lawyers are skeptical. Some states have rejected the idea, and the plan has been attacked as a kind of "closed shop" for lawyers—an infringement of individual rights and autonomy. The debate continues.

Lawyers have always insisted, to a skeptical world, that they are mostly honest, skilled, and high-toned. The public, perhaps, disagrees. Lawyers do not have a good reputation. Lawyers are probably no better or worse than other professionals. There are, of course, rotten apples in every barrel. But the bar insists on the right to pick them out itself. The bar's record in doing so is spotty, at best. State bar associations and state judiciaries are the ultimate enforcers; the ultimate sanction is disbarment, that is, losing the right to practice law. In 1961–62, the fifty states disbarred seventy-four lawyers and suspended nine.[64] In 1978, according to Deborah L. Rhode, agencies received 30,836 complaints serious enough to warrant opening a file, but only 124 lawyers in the whole country were disbarred.[65] The pace of complaints has increased—there were over 100,000 complaints in 2014—but the penalties continue to be infrequent and light.[66] Some of the states, however, are more active than others. In 2014, there were 5,921 complaints received by the Attorney Registration and Disciplinary Commission in Illinois. In that year, the Supreme Court of Illinois disbarred twenty-five lawyers, suspended fifty-eight, censured or reprimanded twenty, and put thirteen on probation. The most common sanctioned offenses were "fraudulent or deceptive activity," "criminal conduct," "failure to communicate with client," and "improper management of client or third party funds."[67]

It is hard to be sure, but it does seem that relatively few lawyers pay for their sins. Most complaints go nowhere. Disciplinary proceedings are a drop in the bucket. Unless lawyers are impossibly honest and the clients impossibly demanding and neurotic, something is amiss. The disciplinary agencies are, in Rhode's view, "grossly unresponsive" to clients and their complaints. Lawyers punish other lawyers for very flagrant violations—stealing a client's money, for example. For most other offenses, and for plain incompetence, lawyers are (understandably) rather gentle with themselves. And many rules are simply not enforced.

For example, under professional codes of ethics, it is wrong for a lawyer to farm out a case to another lawyer and split the fees. That is, if a client brings a case to Lawyer X, Lawyer X is supposed to handle it himself. But if he does bring in another lawyer for some reason, they must divide the fees in a way that reflects the actual work done by each of them. In New York, according to a study of personal-injury lawyers published in the 1970s, the rule was "systematically broken." Moreover, there was, it seemed, a "tacit

understanding" not to treat this violation "as a serious matter"; the organized bar would discipline only truly outrageous cases.[68]

Clients, however, can sue lawyers for malpractice; and this does happen at times. Moreover, in 1992, an event occurred that shook the Wall Street bar to its foundations. A government agency, the Office of Thrift Supervision (OTS), brought an administrative action against Kaye, Scholer—a major Wall Street firm. The firm had represented a failed savings-and-loan association, and the OTS claimed that what the firm did on behalf of its client crossed the line between honest advocacy, into the realm of fraud or malpractice. Faced with possible disaster, the firm settled with OTS for $41 million.[69] Whatever the facts of the case, it was a signal to the upper bar that its ethical practices were not beyond question or dispute. A more recent study has confirmed that while large corporate firms face fewer malpractice claims, when something *does* go wrong, the potential losses are enormous. Big firms, however, almost always carry malpractice insurance and develop internal systems of checks to prevent malpractice issues from arising. Malpractice claims are more frequently brought against firms that handle the legal work of individuals and smaller businesses and, though the losses are smaller, clients who win have a more difficult time collecting their damages, in part because many smaller law firms and solo practitioners carry no malpractice insurance at all.[70]

THE SOCIAL ROLE OF LAWYERS: DO LAWYERS RUN THE COUNTRY?

From the very beginning of the republic, lawyers have swarmed all over government, at federal, state, and local levels. In Indiana, for example, seven out of the first eight governors were lawyers, eleven out of the first thirteen lieutenant governors, eight of the first nine senators, and forty-five out of sixty-one congressmen, up to the 1850s.[71] Many presidents, from John Adams to Richard Nixon, Gerald Ford, Bill Clinton, and Barack Obama, have been lawyers; no other profession has contributed so many presidents. Abraham Lincoln and Franklin D. Roosevelt were lawyers. Lawyers have served in droves as secretaries of state and cabinet members. President Clinton, on his election in 1992, promised to give America a cabinet that looked like them. He meant women and minorities; what his cabinet mostly looked like was a meeting of lawyers. Over 75 percent of the cabinet members were lawyers, as were more than 35 percent of key subcabinet posts.[72] President Obama has continued this practice—in 2016, eleven of his sixteen cabinet members had law degrees.[73] In general, lawyers have occupied political offices, down to the lowliest township level, in numbers far, far outstripping their "proper" share.

This is no accident. For one thing, the business of lawyers is intimately connected to the business of government. Government makes and administers law; law is what lawyers know. For many lawyers, too, a political career goes hand in glove with a private career. If a Chicago woman who is a doctor or dentist goes down to Springfield to serve in the Illinois General Assembly, her career will suffer badly. If she is a lawyer, it

may have the opposite effect; politics may be good for an assemblywoman's law business, especially if she has partners back home. She gets a reputation as somebody who knows the right people and who knows the ropes—a lawyer who can get things done.

This works for federal service too. Lawyers appointed to a high position in the State Department or the Department of Transportation or the Department of Housing and Urban Development are not interrupting their careers. The job may in fact be a step up the ladder. The lawyer learns what to do, whom to know. When these lawyers leave government service, they often get fat partnerships in major law firms. Experience in a regulatory agency like the Securities and Exchange Commission or the Internal Revenue Service or the antitrust division of the Justice Department makes a lawyer more valuable to private clients. Lawyers often end up working for companies they used to regulate. It is no surprise when an attorney general becomes chief counsel for IBM, or when a manpower specialist at the Pentagon becomes a partner in a firm whose clients build missiles and tanks.

In recent years, lawyers have lost a little of their dominance in Congress and state legislatures. In 1966, 26 percent of state legislators were lawyers; in 1986, 16.4 percent; in 2014, it was down to 14.4 percent.[74] By 1980 or so, lawyers made up less than half the members of Congress for the first time in years.[75] In 2015, 40 percent of the members of Congress held a law degree.[76] One reason for the decline may be that these jobs (Congress, the state legislatures) have gotten tougher. They are definitely full-time now—certainly Congress is. And for the first time in our history, state political positions may interfere with a lawyer's career. The decline in lawyer-legislators, apparently, leveled off a bit in the 1990s. It is also highly variable at the state level. In 2015, lawyers made up 30 percent of the New Jersey legislators, but only 3 percent of those in New Hampshire.[77] Nonetheless, it is still fair to say that lawyers are as common as sparrows in government; wherever one turns, one stumbles over lawyers, either inside the bureaucracy or outside of it, acting as lobbyists or attorneys for companies with government business.

Many people think lawyers have too much influence in America. Lawyers, on the whole, have a terrible image. The poet Carl Sandburg asked rhetorically why the hearse horse "snickers" when he carries the lawyer's bones. Even worse things are said about lawyers. "Superlawyers," the powerful Washington firms, are suspected of running the country, and on behalf of their big, nasty clients. Lower down, we hear about shysters, ambulance chasers, ticket fixers. The criminal bar has its own special, odious image. Lawyer-politicians combine two bad reputations in one. The Watergate scandal made matters worse: the connivers who surrounded Richard Nixon—and President Nixon himself—were mostly members of the bar, their morals dulled by "blind ambition." Lawyer jokes (none of them complimentary) are so common that whole books of them are published. Marc Galanter, in *Lowering the Bar*, analyzed hundreds of jokes about lawyers. Lawyers appear in these jokes as shrewd perhaps, cunning perhaps; but unscrupulous, devious, tools of the devil. There is really nothing comparable for architects, accountants, or even doctors.[78]

Still, the ethical practices of lawyers may not be any worse than those of other professions. Lawyers bring some of the trouble on themselves by claiming too much—by claiming, in a sanctimonious way, that they are interested only in justice, not power or wealth. They also suffer guilt by association. Their clients are often people in trouble. Saints do not need lawyers; gangsters do. Companies that wheel and deal—or pollute rivers—need lawyers more than stable, law-abiding firms. Happy couples do not consult lawyers; divorcing couples do. And so it goes.

Despite the joke books and the endless complaints, most people who use lawyers seem to be satisfied with them, according to surveys. Or, perhaps, they *want* a shrewd, perhaps devious, battler to represent them—to fight their battles and win. On the other hand, in 2014, 56 percent of the population thought there were too many lawyers (only 9 percent thought there were not enough lawyers);[79] and a 2015 survey revealed that only 21 percent of the public rated the honesty and ethical standards of lawyers "high" or "very high" (putting them ahead of car salespeople, telemarketers, and lobbyists, but below most other professions).[80] Apparently, most people think *their* lawyers are helpful, but that lawyers in the aggregate do more harm than good.

Is this the case? Are lawyers making things better, or worse? What difference do lawyers make, anyway? Would society be better off if we had fewer lawyers? It is not easy to answer these questions. A few studies give a clue or two. Some scholars have tried to measure the behavior of lawyers in state legislatures and compare this to the behavior of nonlawyers. Do lawyers in the Tennessee assembly, say, vote and act in ways systematically different from the other assemblypeople? If they do, we might decide that legal training shapes a certain personality, a certain cluster of opinions; if you fill up a legislature or agency with people of this type, you bend it in some particular way.

On the whole, the studies turn up negative results. There are few, if any, differences between the way lawyers and nonlawyers vote and behave in state assemblies.[81] The job of being a legislator and the social situation—pressure from voters, for example—bend the lawyer, not the other way around. A few studies *have* come up with differences: lawyers are more independent politically, more reform-minded, more effective, and more active in sponsoring legislation, than nonlawyers.[82] They are, however, less likely than nonlawyers to support laws that restrict tort litigation.[83] But even these results do not show that lawyers share some special ideology or that they influence how the country runs.

Most of the criticism these days focuses on lawyers *outside* the government: on those lawyers who are supposedly ruining the country by fomenting wild and harmful lawsuits, bankrupting respectable businesses, and driving municipalities to the wall. There have been attempts to show that lawyers and their machinations cost the country countless billions of dollars a year, and that the lawyers really *are* ruining the economy. These demonstrations are, however, based on tenuous and dubious statistics.[84] Nor do these arguments take the *benefit* side of lawyering into account. It is easy to add up the costs, if lawsuits force a company to retool the design of its autos, or take breast implants off

the market, but isn't society better off? Discrimination lawsuits add to the cost of doing business, but what about the increase in social justice? Unfortunately, these benefits are not easy to measure.

It is interesting to compare the American profession with the bar in other countries. Japan is an amazing contrast. In 1960, Japan had a population of over 90 million and only 9,114 lawyers, concentrated in a few large cities.[85] In 1986, despite the tremendous increase in the Japanese economy, there were only about 13,000 lawyers;[86] by 2002, that number was still below 20,000. In the last decade or so, there has been an effort to reform the Japanese legal system, including a call for more lawyers. Between 2002 and 2015, the number of lawyers almost doubled to over 36,000. Despite this push (and a more recent belief in Japan that they now have too many lawyers), there are still more than ten times as many lawyers in the United States per 1,000 population.[87]

Yet Japan is no primitive country. It is an industrial giant. Its huge industrial firms sell cars, machinery, and electronics all over the world. Sony and Toyota, if they were American companies, would have hundreds of lawyers on their payroll or at their beck and call on Wall Street. (Perhaps their American subsidiaries do.) Obviously, lawyers in the United States do things that are not done—or not done by lawyers—in Japan.

It is not clear what these things are. Supposedly the Japanese do not like to litigate, but neither do American businesses, and actual litigation does not begin to account for the vast number of American lawyers. Obviously, the two countries define lawyers' work very differently. The Japanese have plenty of laws, rules, and regulations, but they seem to do quite nicely without an American-type legal profession. We can conclude that there is no inevitable, necessary connection between a legal profession of the American type and modern society, or capitalism, or the welfare state, or industrial society. Rather, our profession is at least in part unique or peculiar, shaped to the characteristics of American society. But exactly how, or what these features are, is not at all clear.

This is not to say that lawyers make no difference to the United States. Clearly they do. A million lawyers do not sit around twiddling their thumbs. They work; they accomplish; they do. A culture has grown up in this country that somehow depends on this crowd of lawyers. *Our* business system, unlike Japan's, cannot get along without lawyers, and the social system, too, is curiously dependent on the bar. Would we be better off, then, with fewer lawyers? There is no way to answer this question. Without the lawyers, this would be a different society, in a different sort of world.

And it is interesting to note that the sheer *number* of lawyers is rising, and rapidly, in many other countries. According to one accounting, from about 1970 to 2000, the number of lawyers increased in every one of twenty-two countries studied, including doubling in Austria and Japan, growing by tenfold in several Latin American countries, and increasing by three or four times in a number of other countries, including Canada, Germany, South Korea, and the United Kingdom.[88] And the American style of law firm, once almost unique, has now spread to other parts of the world. Indeed, the global megafirms born in the United States, like Baker & McKenzie, may

soon be dwarfed by their foreign-born counterparts. Indeed, in late 2015, Dentons, a large Swiss association of legal entities, merged with China's Dacheng law firm. That merger, along with the addition of a 500-lawyer Australian firm and 200-lawyer Singaporean firm, will create the largest law firm in the world, with over 7,200 lawyers.[89] International business, more and more, speaks and acts American; and its lawways look American, too.

LAWYERS AND SOCIAL JUSTICE

The business of lawyers is justice. That, at least, is what they claim. A man or woman accused of crime or of tax fraud, or hounded by government in some way, or sued by a nasty neighbor, wants fairness, justice, a crack at vindication. Only a good lawyer can get these. Of course, a smart lawyer can pervert justice, too, in some cases. This certainly happens.

In fact, the business of lawyers is both justice and injustice. They are on all sides of every issue, on both sides of every case. Some lawyers are attracted to lost causes like moths to a flame—men like Clarence Darrow, "attorney for the damned," who defended anarchists and murderers.[90] There have been left-wing lawyers, like the late William Kunstler, who took up the causes of clients despised by most of the rest of society. There are American Civil Liberties Union (ACLU) lawyers, who defend free speech for left wing and right wing alike; some of their clients—American Nazis, for example—spit on everything the ACLU stands for.

Thousands of lawyers, however, work for the status quo. They represent American business, especially big business, and the people who own great wealth. They work for oil interests, computer companies, and real-estate syndicates. We sometimes hear it said that lawyers are by nature conservative. It is more accurate to say that lawyers, like most people, are anxious to make a living. They go where the money is, and the money is concentrated at top levels of business and society. Lawyers gravitate to whatever regime is in power; in this sense they are conservative, but only if the regime is conservative. In Communist countries, the lawyers tended to be faithful party members. And of course there are exceptions to every generalization. There are, as we said, left-wing lawyers, dissident lawyers. Some lawyers have even been prominent revolutionaries—like Fidel Castro or India's Nehru.

Law and lawyers are expensive. Many people who want or need a lawyer have trouble paying the price. Justice is for sale, but most people would agree that in a just society it should not be *totally* for sale. Hence the state provides a lawyer, free of charge, to anyone accused of a serious crime who cannot afford to pay on his own. Many states had long recognized such a constitutional right; in 1963, as we have seen, the Supreme Court, in the famous case of *Gideon v. Wainwright*,[91] imposed it on all the states. Today, "public defenders," who are on the state payroll, defend millions of people charged with crimes every year.[92]

For civil cases, the situation is more complicated. A few lawyers have always made it a practice to do some work free for poor clients. Since the late nineteenth century, some cities have had programs of legal aid. The Legal Aid Society of New York began as an organization called Deutscher Rechts-Schutz Verein, in 1876, to help out German immigrants. It broadened its scope over the years and changed its name officially in 1896. By 1913, there were forty active societies, all over the country, and growth continued afterward.[93] But though these societies did good work, they merely scratched the surface. The poor were basically shut out of civil courts. Even the small-claims movement was not much of a help.

A major change came during the "War on Poverty," in the 1960s, under President Lyndon Johnson. The Office of Economic Opportunity established neighborhood law offices to serve poor clients. Bright young lawyers staffed these offices. In 1974, the work was transferred to a new body, the Legal Services Corporation (LSC), chartered and paid for by Congress. In the early 1980s, the corporation funded 320 legal-aid programs and 1,200 neighborhood offices all around the country. It paid for 5,000 lawyers and 2,500 paralegals. The price tag was $300 million a year.

From the start, there was controversy over the program. Landlords were annoyed when poverty lawyers helped tenants fight evictions. Conservatives thought it was absurd to pay one agency of government to bring lawsuits against another part of the government, or against government in general. They considered poverty lawyers radicals, who were mainly in the business of drumming up "activist" lawsuits, instead of helping poor people with their legal problems. Many political leaders agreed. LSC lawyers had the annoying habit of fighting city hall. City hall was not amused. Some governors, too, tried to get rid of the program in their states. One of these was the governor of California, Ronald Reagan. Later he became president, and as president he proposed cutting off all federal money, leaving the states to support legal aid if they felt like it. Congress balked at the plan, and the program continued. But the opposition made its mark. Since that time, LSC funding has ebbed and flowed with the political tides, and Congress has imposed a number of restrictions to rein in some of its more visible—and effective—tactics. Congress prohibited the LSC from lobbying, representing prisoners, bringing class actions, and engaging in welfare-reform litigation (though that last restriction was struck down by the Supreme Court in 2001).[94]

The public-interest lawyer is another departure from past practice. There are now a number of law firms organized for the "public interest." They do not represent private clients. Rather, they represent "the public" (as they define it): people who want to preserve wilderness lands in Alaska or who oppose nuclear power plants, for example. They speak up for the snail darter and the black-footed ferret; they tilt lances against government red tape in housing and welfare administration. They fight for convicted murderers and for victims of discrimination.

Who pays for these lawyers? The government itself contributes something; foundations contribute something; members of organizations (the Sierra Club, for example)

contribute their share. There were, originally, only a handful of these firms. One study found about "forty charity-supported public-interest law firms" in 1973. They averaged ten lawyers each.[95] Since that time, the number of such firms has grown quite a bit, though, unlike their corporate counterparts, most continue to be smallish outfits. A 2009 study claimed a mean size of eight lawyers with a median of three. More significantly, many now rely upon fees rather than charitable donations. These "private public interest firms" are organized both to make money (sometimes through representing plaintiffs in tort actions) and to advance a public mission.[96] These are truly little Davids, up against the Goliaths of government and big business. Their opponents have thousands of lawyers and tremendous resources. Financially speaking, too, the public-interest bar generally leads a hand-to-mouth existence.

Yet these firms have accomplished miracles; they have done heroic work (some think too heroic). They have brought giant enterprises to a halt. They delayed the building of a pipeline in Alaska. They have helped kill nuclear power plants and helped thwart projects that might despoil our wilderness areas. They have forced the government to shift direction or change programs in many different ways. They have won landmark cases in employment discrimination and civil rights. They have helped revolutionize the law of landlord and tenant. They have monitored the work of dozens of government agencies.

One sign of their success is the bitterness of the opposition. Another is the rise of conservative counterparts. "Public-interest" firms on the right have sprung up to counterbalance the liberal firms. The Mountain States Legal Foundation in Denver, Colorado, was one of these counterbalances. James G. Watt, President Reagan's first secretary of the interior, served as its president before he entered the cabinet. The foundation was formed to defend "free enterprise." It believed in "privatization" of the public domain; in assigning more of the public lands to "mineral development" or leaving the land in the hands of ranchers.[97] It was, in other words, as if the Environmental Defense Fund or the Natural Resources Defense Council had been turned on its head. The Center for Individual Rights, founded in 1989, brought lawsuits that attacked affirmative-action programs at the University of Texas[98] and, later, at the University of Michigan.[99] This and other groups are conservative versions of the NAACP Legal Defense Fund or the American Civil Liberties Union. They file amicus briefs on the conservative side of many issues. They too have had considerable success. Imitation is the sincerest form of flattery.

14

Law and Social Change

IT IS OBVIOUS to the naked eye that we live in a period of very rapid social change. There is change in every aspect of life—social life, the family, sex, technology, politics, the economy. Why the world is changing so fast, compared to older times, is a complicated question. But whatever the reason, mankind and womankind are speeding along on a fast-moving train, and there are no signs that the train is slowing down. Nor is there any way to stop it and get off. Since law is a mirror of society, rapid social change means rapid legal change as well. This chapter will explore a few facets of the way in which social change and legal change are related.

First, a theoretical question about the relationship. Does law lead in the process of social change, or does it simply follow along? In other words, can we point the finger of praise, or of blame, at law and the legal system for what is happening in the world? Is law a motor—or one of the motors—generating social change? Or does social change always originate in the larger society, spilling over into the legal system only afterward? Is the legal system a system that merely adjusts or accommodates itself to big changes taking place outside it?

Nobody can give full, final answers to these questions. As a matter of general theory, this book takes the point of view that major social change begins outside the legal system, that is, in society. The legal system is not basically autonomous. It is not a world in itself. It is not insulated from outside influence. Quite the contrary.

To be sure, many people argue that the law is tough, conservative, and resistant to change. To them, the legal system has a great deal of autonomy. Experience suggests a rather different story, at least over the long haul. The legal systems of Western countries

American Law: An Introduction. Third Edition. Lawrence M. Friedman and Grant M. Hayden.

have been completely transformed since the Middle Ages, most notably in the years since the Industrial Revolution began. When we look at the changes, it is clear that as the centuries rolled on, great waves of social force carried the legal system along. Social movements have swept across it with the strength of a mighty sea. The legal system may seem like a powerful warship to those on deck, but its power shrinks to nothing compared with the might of the ocean it sails on and the wind and weather all about.

Of course, we can carry this point of view too far. We need not downgrade the power and importance of law—in this culture, at least. We must keep in mind the tremendous size of the legal profession; the thousands of laws, regulations, and doctrines that make up the body of the law, the striking way in which political, social, and economic issues somehow end up as lawsuits; the massive activity of administrative agencies; the ceaseless creation of new norms by Congress, states, and cities. All of this must have some independent impact on society.

What *is* the place of law in society? A purely social theory of law, taken to an extreme, would look at the legal system as if it were some kind of puppet, dancing on its master's strings. The puppetmaster is the larger society. This picture may be at least somewhat overdrawn. A parable may provide a better image. Imagine a town on the banks of a swift, wide river. The people who live in the town want some way to cross the river. They want to reach people on the other side, to buy and sell goods, to travel to other places, and so on. The only way across is by ferry, which is slow and inefficient. The townspeople get together and demand a bridge. Taxes are levied; contracts are let; the bridge is built. Now both sides of the river are linked.

Clearly, the bridge did not get built by itself. It owes its existence to the political process; ultimately, a social demand—a social force—called the bridge into being. But once the bridge is in place, spanning the river, it begins inevitably to have its own, independent effect on community life. People construct their lives around the bridge. They move back and forth across the river. Some people live on one side and shop on the other. Some people commute to jobs on the opposite side. The towns on both sides grow larger and become more interdependent.

The bridge is now a familiar presence; it is part of consciousness and tradition. Poets write poems about it. Young people cannot remember a time when the bridge was not there. They expect a bridge; they find it natural. They take for granted the flow of people, goods, and cars from bank to bank—the freedom to cross the river at will. The bridge determines once and for all exactly where and how people cross. It excludes all other crossing points. The ferry is long since gone. The bridge has drilled itself into people's minds and taken root there. In other words, it affects more than their way of life; it affects the way they look at the world—what they expect, how they live, how they think.

This bridge can serve as a metaphor for law and the legal system. Social forces in the larger society create it, shape it, twist it and turn it, pull it and push it. But what these forces produce becomes a part of social life; once in place, the system works its own influence on society, on how we live, how we think, how we feel. This independent effect of

the legal system does not mean that there is something wrong with the theory that shifts the burden of causation from "law" to "society." The legal system is not independent of society. It is not a system all to itself, insulated from the life of society. The legal system does not march to its own separate drummer. It is a part of the social order, a soldier in the army of society. But its sheer size and presence, its importance, its scale, its interactions with the rest of the social organism give it an impact and a meaning beyond that of some limp marionette. Law is society's servant, to be sure. But it is not a quiet, invisible servant in an old-fashioned household; it is the noisy, bumptious workforce of a modern factory.

The legal system has clearly played an important role in the dramatic development of American society and economy over the years. J. Willard Hurst wrote a classic study of the lumber industry in Wisconsin, full of lessons on this point.[1] Many aspects of law were relevant to this industry. But these aspects of law did not create the lumber industry; it would be more accurate to turn this sentence around—that is, the law was bent to suit the needs of the industry. This was because citizens who counted, who were politically and economically active, wanted it that way. But like the bridge in the story, once the legal system was in place, it channeled development along set lines. There were old, familiar notions of contract and property, and although the law was sometimes changed and restructured to meet what the business wanted, these changes took place within a specific and definite tradition of law and legal action. So, for example, the legislature had the long-standing power to grant franchises; it made use of this power to give exclusive rights to lumber enterprises, rights to improve streams and use these streams for the transport of logs.[2] Law also "offered ordered procedures for exploring facts, mustering evidence, defining values and the range of value choices, and setting decent bounds and terms for controversy."[3] In other words, the legal order defined the rules of the game, and in the short run at least, the players all accepted these rules, just as one accepts—and must accept—the bridge, and where it is, in the game of crossing the river.

In some respects, of course, the metaphor of the bridge is misleading. Generally speaking, law is far more flexible than an ordinary bridge. It is perhaps more like a pontoon bridge—a bridge that is not totally fixed; it can be moved somewhat, upriver or downriver, if the need is great.

In short, the general thesis of this book is that law follows social change and adapts to it. Yet the legal system also crystallizes and channels social change, and plays an important role in community life. After all, it is through law, legal institutions, and legal processes that customs and ideas take on a more permanent, rigid form, like the bridge—or the pontoons—in our story. The legal system is a structure. It has shape and form. It lasts. It is visible. It sets up fields of force. It affects ways of thinking. When practices, habits, and custom turn into law, they tend to become stronger, more fixed, more explicit. They can be imposed on people who do not share these customs and habits or are downright hostile to them. Law has its hidden persuaders—its moral basis, its legitimacy, its ideology—but in the last analysis it has force, too, to back it up. Custom can

also be powerful, but in complex societies custom is far too flabby to do all the work—to run the machinery of order. Law carries a powerful stick: the threat of force. This is the fist inside its velvet glove.

HIDDEN PERSUADERS

The interplay between law and social change is complicated. The law affects social change by making clear that certain behaviors will be rewarded, other behaviors punished. Rewards, for example, are often built into the tax system. People are more likely to buy a house, or buy a bigger house, because they know they can deduct mortgage interest on their income tax returns, and lower the bite of the tax. Punishments come in a great variety—a tax, a fine, a lawsuit, prison time, and, in extreme cases, death. These aspects of the law reinforce behavior in straightforward ways, though—as we have seen throughout this book—the details can be complicated.

Sometimes, though, the law affects behavior and social change in more subtle ways. It can channel behavior by making compliance easier than noncompliance. It can dictate certain outcomes when people forget to do things or otherwise fail to act. There are also laws and legal structures that remain largely out of sight, but which serve to lock in existing social and economic conditions in ways that inhibit social change. The law is riddled with these hidden persuaders—gentle "nudges" that, collectively, have an enormous impact on people's behavior.[4]

The withholding system in tax law is a familiar and powerful method of channeling behavior. Taxes are automatically deducted from the paychecks of wage-earning employees. This pay-as-you-go system, administered by a third party (the employer) who also reports the figures to the government, results in near perfect compliance—99 percent of the true income of these workers is reported to the Internal Revenue Service. Self-employed workers report only 44 percent of their true income; and those engaged in cash businesses report only 19 percent.[5] Ordinary workers are probably not, as a rule, more honest than their self-employed counterparts—they are just part of a withholding and reporting system that makes greater compliance almost automatic.

Default rules are another kind of law that channels behavior. These are the rules that come into play when the subjects of the rule simply do nothing. Default rules are, typically, supposed to mimic what we think people would have wanted had they taken the time to act. The law of succession—which determines how property gets passed from one generation to the next—is a good example. One way to pass along property is to make out a will. But what if you are one of the millions of people who die without a will? Or what if the validity of your will is successfully "contested," and is thrown out? If you die "intestate," the state will distribute your property for you according to a fixed set of default rules. Most states distribute this property to the nearest surviving relatives—starting with your spouse and children and working down to distant cousins. This isn't a perfect system—perhaps you really wanted to leave everything to your best friend

Milo—but it largely follows how most people would want their property distributed. The law, in other words, presumes you have the intent of an average person: if you want to disinherit your children, which you can do under American law, you had better make out a will.

Voting rules are another example. In most every state (North Dakota is the exception), citizens must register in order to vote. Under federal law, states must offer eligible voters the ability to register at the department of motor vehicles when they receive or renew their driver's licenses. Traditionally, it has been the obligation of the voter to register—the default rule, in other words, is that a citizen has to register, following the state's registration process, or else he is not allowed to vote. Recently, though, a number of states have moved to a system of automatic registration. Oregon, for example, has a new system in which all eligible voters are automatically registered to vote when they obtain or renew their driver's license. They are notified of this by mail, and have a chance to opt out, but this is something most people do not do. By simply switching the burden of registration from the individual to the state, Oregon registered nearly four times as many people at the Department of Motor Vehicles as it did under the old system.[6]

Default rules, in many areas of law, play a significant role in guiding behavior, channeling action in certain directions, and advancing or holding back certain kinds of change. What happens, for example, when an employment contract is silent on whether the employer needs a good reason to fire a worker; or may fire him for any reason at all ("at will")? The presumption in every state except Montana is that an employment contract is "at will," meaning an employer may fire his worker for a good reason, bad reason, or no reason at all. The contract, of course, can override this default rule; but, unless a union insists on this, it doesn't happen, and most employees in the United States, consequently, have little or no job security. Default rules help dictate the direction of people's behavior, sometimes through sheer inertia, but also because they may serve as an implicit endorsement of some rule and help set expectations.[7]

Defaults are an example of hidden law. Many aspects of legal structure fade into the background, so to speak; they seem so much a part of the landscape that we forget they are not natural features of the world, or that they even exist at all. There was a time when it was simply taken for granted that women, on the whole, did not work, and had no right to vote, serve on juries, or hold office. Racial caste lines, too, seemed to many members of the majority utterly normal: simply part of the way the world worked. Hidden legal structures rest on unconscious thoughts and norms that are taken for granted; while they last, they reinforce the existing social and economic order; they lock old patterns of race, sex, and class into place; they channel behavior, but the channel is more like a rut.

Consider the existence, and persistence, of municipal boundary lines. The borders of a town or village—the city limits—are often taken for granted. They seem natural, and, in fact, their squiggly lines often follow natural features like rivers or mountain ranges. But ultimately, there is nothing "natural" about them—they are legal creations that define political space. Local boundary lines give powers and rights to those within the

lines and exclude those outside the lines—you live in Moneyville, you get Moneyville services—its police and fire departments, its parks, its roads and sidewalks, and, importantly, its schools and easy access to employment opportunities; outside, you get none of these things. This much is obvious, and does much to guide where people want to live.

What is less obvious is that these local boundary lines, very often, are purely artificial; they perpetuate racial and class segregation. The federal government, to its discredit, once discouraged integration in public housing, in mortgage policy, and in other ways. These policies were eventually outlawed, but lines drawn around certain areas continued to preserve residential segregation. The social and economic disadvantages between these racially identified spaces become compounded because local entities tax their own people, and spend for their benefit. And those invisible boundary lines—along with zoning policies and land use policies that keep out the poor—serve to preserve the "culture" and "ambience" of the place, and exclude "undesirables" from the town.[8]

To take another example, the law has long drawn a distinction between public and private, between the realm of the public marketplace and that of the private family and home.[9] Legal doctrine developed to keep the long arm of the law away from private, family affairs. Husbands and wives could not sue each other. A husband could not be convicted for raping his wife; in the eyes of the law, no such thing was possible. These rules, which by now have been largely eliminated, shielded violence against women—much of which is perpetrated by intimate partners[10]—from the eyes of the law. The federal Violence Against Women Act (1994)[11] was designed to strengthen legal remedies and improve responses by police and prosecutors to violence against women. This law was controversial, in part because it allowed the federal government to intrude into private, family affairs.[12] To this day, in some states, many police officers are reluctant to intervene in domestic disputes; they think it is better to let the parties work it out among themselves. Legal change is not always smooth; and the past is not always easy to overcome.

All modern, developed countries are welfare states; they have old-age pensions, free public education, and (for the most part) free or heavily subsidized medical care. But the rich and the powerful still, in many ways, benefit more from the legal system. Income from the sale of investments ("capital gains") gets taxed at lower rates than income from wages and salaries. Tax shelters are for those with big incomes to shelter. Campaign finance laws tend to give the rich a much louder voice in the elections and political debates. And, of course, this political power can be used to further consolidate social and economic gains.

REVOLUTION AND EVOLUTION IN LEGAL CHANGE

Thus far, the term "social change" has been used without explanation. Of course, there is no single process of social change. There are many kinds of change. Some social change is total, cataclysmic—revolutionary, in a word—breaking sharply with the past. Other

forms of social change are incremental, evolutionary, and step-by-step. There are also many grades and levels in between. Unless appearances deceive us, social change in the modern world—despite what we said about the way the law preserves the status quo—is racing along faster than in older, traditional societies. We live in an age of constant revolution.

There are legal revolutions as well as social revolutions. The Russian Revolution (1918) destroyed czarist society, and the czarist laws came tumbling down as well. The Soviets wiped out all the old codes and—temporarily, at least—established a new, radical form of justice. When the Soviet Union disintegrated, around 1990, there were again radical changes in Russia and the surrounding new countries. The whole socialist order was dismantled, and the successor states embarked on a feverish course of writing new constitutions and new laws.

No sudden changes on this scale ever took place in this country. Our own revolution was not as sharp a break with the past, legally speaking. Independence brought about a change in government, of course, and some dramatic innovations (the Constitution, for example), but the ordinary legal system kept going with business (almost) as usual. Rules, court procedures, daily routines were hardly disturbed, except where there was actual fighting. The common law was like a clock that kept on ticking all through a raging storm.

A real revolution, with guns and mobs, can bring about drastic, sudden change. But we often talk, somewhat dramatically, about "revolutions" that are legal, social, economic—bloodless "revolutions" like the civil-rights revolution, the Industrial Revolution, even the so-called sexual revolution. These expressions are a bit overheated, but they make an important point. Social change does not move at a uniform pace. It accelerates and decelerates. There are fairly static periods and periods of rapid change. In American history, the Civil War and the two world wars, the Great Depression, and the New Deal of the 1930s, were probably periods of unusually active and dramatic change. Major changes in social relations and in the economy almost inevitably produce major *legal* change. Between 1954 and 1970, the law of race relations altered completely. The sexual revolution made its mark at about the same time; it, too, has had major legal fallout. Neither of these "revolutions" has been completely successful, and both are still engaged in skirmishes if not outright struggle of one sort or another. Plenty of counter-revolutionaries are fighting rearguard actions against the race revolution and the sexual revolution.

This seems to be an age of constant acceleration—a restless, even frantic era of perpetual change. And, after all, even small differences year by year add up to big ones over time. If we compare American law today with the law as it was in 1800, we are necessarily struck by the fact of change—enormous, fundamental, revolutionary change. But no single step was of revolutionary size; there was nothing to compare with what happened in Russia in 1918 or 1989, or China in the late 1940s, when the whole order crumbled at once.

RACE RELATIONS

Exactly how does law respond to social change? What is the mechanism? There are no general answers. One can trace some aspects of the relationship by following the course of race relations in the United States. We will, for the sake of relative simplicity, confine ourselves to black-white relations. This is only part of the story (the treatment of Hispanics, of Native Americans, of Asians, is left out), but this part, of course, is long and complex enough for our purposes. In many ways, it is an ugly and depressing tale. Most black Americans are descendants of slaves. Slaves were brought to this country from the seventeenth century on. They were Africans, kidnapped, turned over to slave traders, and transported here or to the West Indies in the dirty, crowded holds of slave ships.

The law of slavery was discussed in Chapter 3. As we pointed out there, slavery was unknown to England or to the common law. Many whites, however, came to the colonies as indentured servants. Servitude was a kind of temporary slavery: a servant was bound to a master or mistress for a specific term of years. The master was supposed to feed and clothe the servant, but paid no wages. Nor could a servant quit his job. But when his term was over, the servant went free. Some blacks probably had this status in the seventeenth century.

But from the beginning, too, there were signs of a different status for blacks, and from the very first, the line between servant and slave was in part a color line.[13] By the middle of the seventeenth century, it was clear that some blacks were slaves, not servants. A slave is a servant for life, a servant who can never work off his status. In Virginia, at least some African blacks were treated as slaves before there was any evidence that slavery was officially recognized as a legal status. Perhaps as early as the 1620s, there are hints of a custom of slavery; court records from about 1640 on show this custom clearly.[14] In 1644, there is mention of a mulatto boy named Manuel, sold "as a slave for-Ever."[15] In 1662, a Virginia statute made one aspect of the relationship official: children of a black slave mother would be slaves themselves from birth. The same statute recognized the color line in another way. Anyone who committed "fornication with a Negro" was to be fined twice the usual fine for fornication.[16]

Another law, in 1667, dealt with Christian slaves. Suppose a black slave became a Christian. Was he then free "by vertue of baptisme"? The answer was no: baptism did not "alter the condition of the person as to his bondage."[17] The slave might be free in heaven, but not here on earth. Later laws hammered home the legal reality of slavery. Slaves could not vote, hold office, own property. They were chattels, pieces of property; they could be bought and sold, given away, mortgaged, or rented out. They could be left to an heir by will or transferred by deed. The colonies spelled out these rules in elaborate codes of laws.

Meanwhile, slaves arrived by the boatload, and the local slave population multiplied. On Southern plantations, slaves made up the basic workforce. They provided the

muscles for planting and harvesting; they were the servants in the master's great house or in town. In fact, there were slaves in every colony—in New York, Massachusetts, and Rhode Island, as well as in the South. But only in the South—in Maryland, Virginia, the Carolinas, Georgia—did slaves make up the bulk of the labor force. In the middle of the eighteenth century, blacks made up 40 percent of the population of Virginia; some 96 percent of these blacks were held as slaves.

The differences between North and South became sharper after the Revolution. All of the northern states abolished slavery. There was some reaction in the South, too, against slavery. Some slaveholders took seriously the rhetoric of the Revolution, with its talk about inherent, inborn rights. A few Southern slave owners set their slaves free or wrote freedom for slaves into their wills. George Washington was one of these; his will provided that at the death of his wife all the slaves he owned "shall receive their freedom."

But these were exceptions. Slavery kept a powerful hold on the Southern mind, and the economy needed black bodies. King Cotton demanded slaves. Slave codes became stricter and stricter in the nineteenth century. In the years leading up to the Civil War, fear of slave rebellion and of Northern abolitionists made the South more stubborn and defiant. Slave states by law discouraged manumission (setting slaves free), and even moved to abolish the practice. There were free blacks in every southern state—descendants of other free blacks, or slaves freed by their masters. But these free blacks were barely tolerated, and were at best semi-free. Like slaves, they could not vote or hold office. They could not testify in court against a white man. In many southern states, a freed slave was required by law to leave the state and never return. The actual practice was somewhat more lenient, but the message was clear: slavery was the natural condition of the blacks. Finally, Arkansas, just before the Civil War, passed a law to expel its few free blacks.[18]

The South imposed many restrictions on antislavery activity. It resisted attempts to reform or limit slavery. The slavery question, in general, poisoned relations with the North. Two issues, perhaps, stand out: the problem of the fugitive slave, and the spread of slavery to the territories. Northern abolitionists were dead set against sending runaway slaves back to their owners; slave-owners, on the other hand, insisted on their rights; Northern courts were caught in the middle. The territorial question raged on for at least forty years, from the Missouri Compromise (1820) to the Civil War, in 1861. The South, of course, lost this long and bloody war. Slavery was finally abolished; emancipation was rammed down white Southern throats.

But the white South did not give up its privileges so easily. When the war ended, the old oligarchy held fast to power—at least for a while. The defeated states (starting with Mississippi) passed new race laws in 1865 and 1866, the so-called Black Codes. In these laws, the white legislatures somewhat grudgingly conceded that slavery was dead; they allowed blacks to marry and to own certain kinds of property. But they tried to keep the old social system alive, as far as they could. Blacks would be slaves without slavery—landless peasants, forced to work for white masters. In Mississippi, "freedmen, free Negroes and mulattoes" who were over eighteen but had no "lawful employment or

business" were declared "vagrants." A vagrant was liable to be fined, up to $50. A vagrant who could not pay—and few blacks had any cash—would be hired out to anybody who was willing to pay off the fine. The employer (often the vagrant's old master) would recoup the fine from the black man's or woman's wages. Through this and other legal arrangements, the South tried to force blacks back to work on white farms, under conditions of virtual serfdom.

But war emotions were too fresh in the North for these laws to prevail. The North insisted on repeal of the Black Codes. The South was forced to accept three new amendments to the federal Constitution, which ended slavery and guaranteed civil liberties to the blacks (the Thirteenth, Fourteenth, and Fifteenth Amendments). Blacks were to be full citizens; they were given the legal right to vote and to share in political life. Federal troops patrolled the South.

Blacks were indeed legally free, as never before. They could go to school, start businesses, come and go as they pleased. At least this was true on paper. But Southern blacks were still at the bottom of the heap, still poor and illiterate, still treated as inferior by whites. During Reconstruction, blacks voted in some numbers. Blacks sat in Southern legislatures and even on Southern courts; a black man, J. J. Wright, was a justice of the Supreme Court of South Carolina. These were important developments. In the long run, black political power might have led to better, more equal relationships with whites. But this was not to be.

Racial equality, North or South, was in fact a house of cards. It fell apart at the touch. White people, whether high or low in the social scale and regardless of where they lived, were overwhelmingly opposed to full racial equality. Blacks had never been really welcome in the North, and Northern blacks were nowhere treated as equals. School segregation, for example, was an invention of the North, not the South—though in fairness, the North was also the first to repudiate it. The South made little attempt to educate black children, segregated or not.

The legal structure of equality was also a house of cards. When the federal troops marched home, in the late 1870s, white supremacy came back to the South with a vengeance. Black workers were tied to the soil, as before. They were tenants or sharecroppers; they lived from hand to mouth, desperately poor, completely dependent on white landowners. A network of laws and legal techniques helped keep blacks in their place; the crushing weight of the law-enforcement system added to poverty, illiteracy, and social prejudice, reinforcing the structure of discrimination.

Laws against "vagrancy," for example, were still on the books. Other laws made it a crime for black workers to "defraud" employers by quitting their work on white farms. It was also illegal for outsiders to "entice" workers away from their jobs—by offering them better jobs, for example. In practice, then, black farmhands were chained to white masters.[19]

The formal legal system was hardly any help. In the Reconstruction period, Congress passed a number of civil-rights laws. The Civil Rights Act of 1875 banned discrimination

in "inns, public conveyances on land or water, theatres, and other places of public amusement." But in the *Civil Rights Cases* (1883),[20] the Supreme Court declared the law unconstitutional. Congress, said the Court, had overstepped the bounds of the Fourteenth Amendment. The amendment applied only to "state action," that is, to acts of public authorities; it banned "discriminative and unjust laws" but not "individual offenses." People were still free to "discriminate," if they wished—in their homes, their social lives, their businesses; the Fourteenth Amendment had no power to reach discrimination in these domains.

By this time, Reconstruction was in full retreat. The resurgent South swept off the table whatever crumbs of political influence blacks had picked up. There would be no more black faces in Southern legislatures, no more black judges in courtrooms. Some black officeholders were voted out; a few were impeached. Toward the end of the nineteenth century, the South began to weave a tight new fabric of legal segregation—the Jim Crow laws. These crystallized and formalized the attitudes and customs of the dominant whites. They made a rigid set of rules out of fluid social practice.[21] Any dissenters, white or black, had to face the fact that law as well as custom was against them. Blacks sank further into a swamp of oppression and injustice.

A few black voices were raised in protest in the courts, but the courts turned a deaf ear. In 1890, Louisiana passed a Jim Crow railroad law, an "Act to promote the comfort of passengers." Its message had nothing to do with comfort, however, and everything to do with segregation. Blacks were no longer free to sit in the same railroad cars as whites; the only exception was for "nurses attending children." All other blacks had to be rigidly separated from the whites. A light-skinned black named Homer Plessy ran afoul of the law. He tried to sit in the white section of a train; he was thrown off, and his impudence landed him in the parish jail of New Orleans. His protests ultimately reached the U.S. Supreme Court, whose famous (or infamous) decision, *Plessy v. Ferguson*,[22] was handed down in 1896.

By a vote of 8 to 1, the Supreme Court gave a green light to segregation. Nothing in the Constitution made Jim Crow laws illegal, said the Court. So long as facilities were "equal," it did not matter that they were "separate." The law could take into account the "established usages, customs and traditions of the people," especially when "the preservation of the public peace and good order" were at stake. What these words meant was clear: the Southern (white) way of life would prevail. The struggle for racial equality suffered a deadly blow; the highest court in the country accepted, and even praised, the American brand of apartheid.

John Marshall Harlan wrote a passionate, vigorous dissent. He insisted that the Constitution was "color-blind." It neither "knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law." The Louisiana statute, "under the guise of . . . equal accommodation," was oppressive; it was a device to compel blacks "to keep to themselves while travelling." This, Harlan thought, violated the spirit and letter of the Civil War amendments to the Constitution. It was an evil act, and it would encourage race hatred and violence for years to come.

Harlan's predictions were accurate, but he was swimming against the tide. *Plessy v. Ferguson* encouraged the Southern program of segregation. Soon every southern state had an arsenal of Jim Crow laws. Even jails were segregated: Arkansas law called for separate "apartments" for white and black convicts, "separate bunks, beds, bedding, separate dining tables and all other furnishings."[23]

At the same time, the southern states stripped blacks of any chance at political influence. They ended the voting rights of blacks. This was, in theory, illegal, but the South found ways to do it: poll taxes, literacy tests, sometimes sheer terror. Whites were generally excused from literacy and other tests, sometimes by virtue of "grandfather clauses." The Oklahoma version required voters to be able to read and write any section of the Oklahoma constitution. But it exempted anybody who was entitled to vote on January 1, 1866, in any country, and anybody descended from such a voter. Of course, this meant that almost all whites were excused and hardly any blacks. The tactics worked. The number of black voters in most southern states dropped off to almost nothing. The Supreme Court, despite the express protections of the Fifteenth Amendment, turned a blind eye in 1903.[24] The rest of the country stood silent.

Stripped of political rights, the Southern black was now helpless. A black who dared cross the color line or who outraged local opinion ran the risk of sudden death. The bloody law of lynch mob and rope enforced the grim Southern code. Lynching was at its height around the turn of the twentieth century. Hundreds of prisoners, most of them black, were dragged from prison and hanged or burned, sometimes after almost unbelievable acts of torture and brutality;[25] local authorities looked the other way. The North was uncomfortable with lynching; many voices, black and white, cried out against the practice; but the Southern system was deeply, firmly entrenched, and the national will to oppose it was weak and diffuse.

White supremacy was the cornerstone of Southern culture—and the Southern economy. Segregation survived legally because strong social forces held it in place. A counterattack began early in the twentieth century. It was slow and tortuous at first, but it, too, was persistent. Like segregation itself, it had an important legal aspect and embodied an important legal strategy. The fight for racial justice was a fight for power in society, but part of its strength came from its appeal to morality and its firm commitment to law.

The National Association for the Advancement of Colored People (NAACP) was founded in the years before the First World War. From the start, it had a strong legal arm. The NAACP defended black rights in court; it also tried to expand those rights through lawsuits. Not all these lawsuits were successful, but some were, and spectacularly so. In *Guinn v. United States* (1915),[26] the NAACP took part in the fight against Oklahoma's grandfather clause and won the case. But even victories in the courts did not produce real change in race relations. Southern states, despite cases like *Guinn*, had plenty of ways to keep blacks out of the voting booth. The U.S. Civil Rights Commission, in a report issued in 1961, found sixteen counties in the Deep South in which not a single black was registered to vote, even though blacks were a majority in these counties.[27]

Time, however, was ultimately on the side of the NAACP and the black population. The world outside the courtroom was rapidly changing. By 1950, the plantation system was dying in the South. In the twentieth century, blacks migrated north in great numbers, looking for work. The Second World War drew more blacks to the North, with the promise of factory jobs. The black community developed more militance, more cohesion, in the course of time. Internationally, colonialism was in decline. The Second World War was in part a war against racist ideology. It was jarring and discordant to fight the war with segregated troops, but the system of segregation hung on. President Harry Truman ordered the army, navy, and air force desegregated, though he did so only after the end of the Second World War. By then, broad change was in the air.

A climax was reached in 1954, when the Supreme Court, on one of its most historic Mondays, announced the stupendous, unanimous decision in *Brown v. Board of Education*.[28] There was only one opinion. By Supreme Court standards, it was short and direct. The chief justice, Earl Warren, recently appointed by President Eisenhower, wrote the opinion of the Court, but he spoke for a united body.

The *Brown* case dealt with segregated schools. In the Deep South and in some border states, black and white children, by law, had to go to separate schools. Oliver Brown, the black plaintiff, lived in Topeka, Kansas; his daughter, Linda, went to a segregated school.

The Court in *Brown* gave the plaintiffs, and their attorneys, a smashing victory and boosted, immeasurably, the cause of racial equality. Segregation in the schools, the court said, was illegal—unconstitutional. That was startling enough—a massive shock to the South. But *Brown* was only the beginning. A chain of decisions struck down race discrimination and segregation in every aspect of public life—in parks, swimming pools, beaches, municipal services. Despite howls of protest from the South, the Court never backed down, never looked back. The cases sent an important signal to the black community and its allies: federal courts would not waver in defense of minority rights. Their doors would be open to blacks, for the enforcement of racial equality. The promise of the Fourteenth Amendment would at last be fulfilled. And something more: courts would redefine and expand the classic rights.

Enforcement of *Brown* was never easy. The South resisted, dragged its heels, dug in. "Massive resistance" was the slogan in the former Confederacy. In 1962, eight years after *Brown*, not a single black child went to school with whites in Mississippi, Alabama, or South Carolina. Even colleges and universities in these states were still rigidly segregated.[29] There are those who argue that *Brown* was, in fact, ineffective.

Civil rights had become, quite literally, a struggle. At times blood was shed. Civil-rights workers were harassed, beaten, ostracized. Martyrs died for the cause, most of them black. A church was bombed and black children died. There were sit-ins, marches, petitions, riots; nonviolent protest spread throughout the South. Meanwhile, legal struggles went on in the law courts. Both modes of battle were vital. Neither was sufficient in itself: the marchers and battlers needed lawyers, and the work of the lawyers meant nothing without action on the streets. Perhaps a third element should be added: the

civil-rights struggle was carried on in the age of television. When civil-rights workers were beaten, and when howling mobs screamed at little black children, neatly dressed, marching to school under the protection of federal marshals, the whole country watched what was going on.

More than sixty years have passed by since *Brown* was decided. School desegregation is still controversial, still an issue in the country. Housing patterns are one of the problems. The school bus can be used as a technique to mix the races, but it has been bitterly resisted—and not always only by whites. The Supreme Court approved of busing in 1971,[30] but this did not end the debate or the constant stream of lawsuits. The Court itself has become, in recent years, more hesitant about this remedy; in 2007, it restricted the ability of school districts to implement school desegregation plans voluntarily.[31] There are still hundreds of all-black (and all-white) schools. Many now are in the North. They are products of the neighborhood school system, segregated housing patterns, and "white flight"—that is, the migration of the white middle class to the suburbs. Segregation has also increased in the South. In 1988, 44 percent of black southern students were in majority-white schools; by 2011, that number was back down to 23 percent, its level in 1968 (though still a far cry from the zero percent in 1954).[32]

In many big cities, public-school children are, in numbers, overwhelmingly black. Integration in the *Brown* sense is no longer even possible, at least not inside city limits. Yet this does not mean that *Brown* has failed. All-black schools are not segregated schools, in the older sense. They have integrated staffs, and the school boards tend to treat them fairly. Indeed, in some cities, blacks control the boards of education. Black schools face immense problems, but they are not Jim Crow schools in the same sense that they were in the South. Whether these differences matter that much to the children sitting in inner-city classrooms is an open question.

Race relations are in constant evolution. The Civil Rights Act of 1964 was a great leap forward. Title II outlawed race discrimination in "any place of public accommodation." This included inns, hotels, motels, restaurants, cafeterias, lunch counters, soda fountains, "any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment," and "any gasoline station." The law was, of course, soon challenged in court. But this time the Supreme Court upheld the statute, and in sweeping terms.[33] The challenger in the second of these cases was a "family-owned restaurant in Birmingham, Alabama," Ollie's Barbecue by name, which specialized in "barbecued meats and homemade pies." This kind of small, local eatery stood at the very limit of the law, but the Supreme Court was willing, even eager, to declare the law valid, and strike a blow against segregation and race discrimination. The Court rested its decision on Congress's power to regulate interstate commerce. Even a greasy-spoon restaurant used food products that had crossed state borders, and any motel was, after all, open to interstate travelers.

This time, the barriers in public places really did collapse. The Civil Rights Act took hold. A black man for the first time could drive a car across the country and eat at almost

any restaurant, stay at almost any motel. Another provision of the Civil Rights Act, Title VII, prohibited discrimination in employment. This was meant to open economic opportunities for black workers. Title VII also established the Equal Employment Opportunity Commission, a new federal agency, to administer and enforce laws against discrimination on the job. Employers could no longer advertise jobs for whites only. Segregated workplaces—from large corporations to government agencies to mom-and-pop establishments—began to become more integrated.

A strong Voting Rights Act (1965) put another nail in the coffin of the old order. After several failed attempts to give blacks voting rights, the new act meant business—and set up an ingenious mechanism to enforce its general provisions, which outlawed discrimination in voting rights and procedures. A special provision applied to certain jurisdictions—essentially, those where less than half the eligible voters actually voted, and which had in place schemes to accomplish voter suppression. Any such jurisdictions were, essentially, under federal control. Most states and counties in the South were subject to this control.[34] These "covered jurisdictions" were not allowed to use any "test or device," such as a literacy test or character test, in the registration or voting process; this ban was extended nationwide in 1970. More importantly, in the covered jurisdictions, any *change* in the voting process—from redrawing congressional districts to moving a single polling place across the street for a village election—had to be "precleared" through the federal government, which would check to see whether the change had the purpose or effect of diminishing minority voting rights.[35] The Voting Rights Act finally gave the federal government the muscle to squash any Southern attempts to suppress the black vote. The preclearance process was enormously successful; black participation soared to levels unseen since the Reconstruction.[36]

The Voting Rights Act has been called the most successful civil rights law in the history of the country.[37] Blacks began to appear once more in legislatures and city halls, where they had been gone since Reconstruction. A black man, Douglas Wilder, served a term as governor of Virginia. The political power of African-Americans also increased in the North, especially where there were concentrations of black voters. Black mayors were elected in Detroit, Atlanta, Los Angeles, Newark, Cleveland, Chicago, New York, Philadelphia, and Washington, D.C. Many cities that elected black mayors had black majorities, or close to it. In a few instances—San Francisco in 1995, for example—a city in which blacks were a rather small minority nonetheless put a black mayor in City Hall. And, most spectacularly, a black man, Barack Obama, was elected president of the United States in 2008; and re-elected in 2012.

Race is still a burning issue in American life. Social and legal change have generally moved in the direction of racial equality. But the movement has not been smooth, especially in recent years. There have been many zigs and zags. Segregation is officially dead. There is no chance it will come back to life—officially. But a huge black underclass still exists in every major city and in the rural South; there is still a wide gap between the

incomes of blacks and of whites. There are too few black doctors, lawyers, business executives, scientists, architects. More black babies die than white babies. Twice the percentage of blacks are unemployed. The prisons are jammed with black men; as we saw in chapter 9, they continue to suffer much higher rates of incarceration than whites, which, along with the collateral consequences of being ex-felons, has led to a situation described as "the new Jim Crow."[38]

Are stronger measures called for? Many blacks (and white liberals) have said yes. What is needed is an extra helping hand—something that goes beyond desegregation. It is not enough to dismantle legal barriers. Affirmative steps are needed, positive programs of help. But this touches a raw nerve. Many whites fear and resent these "favors" to blacks. They feel threatened in their jobs or their homes. "Affirmative action" has always generated a certain amount of powerful backlash.

The issue first came to a head in the famous *Bakke* case (1978).[39] Allan Bakke, who was white, applied to the medical school of the University of California at Davis. Davis had a special admissions program for minorities; it had, in fact, a quota. A certain number of places in each entering class were set aside for blacks and other minorities. Davis rejected Allan Bakke's application, but at the same time (he claimed) the school admitted blacks with lower grades and scores than his. This, he felt, violated his constitutional rights.

The Supreme Court was obviously troubled by the case. Its decision was fragmented and confused. The Court struck down the Davis system of quotas and (by a bare majority) ordered the school to let Bakke in. But the justices wrote several separate opinions, and there was no true majority on any major point. A bare majority of the justices felt that some forms of "benign" discrimination were legal; quotas were probably not acceptable, but exactly which forms could be adopted, and how far a school could go in its affirmative-action programs, remained an unanswered question.

In a sense, then, the *Bakke* case settled nothing, except for Allan Bakke himself, who forced open the door to a medical career. Affirmative action and benign discrimination remained living issues, very much unresolved. (The issue was posed as well with regard to women, and other racial minorities.) Most blacks feel strongly that affirmative action is desirable—and deserved. They feel the need for measures to undo centuries of injustice and to counteract the racism that still poisons American life. Blacks tend to think that equality, economic and political, is still a far-off goal. They are afraid that progress has ground to a halt. In the 1990s, a more conservative Supreme Court seemed to be turning back the clock. In 1995, the Court disapproved of "minority set-asides" in public contracts;[40] the Court also voiced disapproval of congressional districts that had been drawn in the South, districts with crazy boundaries that had been gerrymandered to make sure they had a majority of black voters and complied with the Voting Rights Act.[41] A lower federal court, in 1996, ordered Texas to stop affirmative action programs in public universities; the Supreme Court refused to intervene.[42]

More recently, the Supreme Court has been critical of affirmative action plans at universities (though it has refused to ban them completely),[43] and it has criticized programs

where local school districts voluntarily used racial classifications to better integrate their schools.[44] Even the mighty Voting Rights Act suffered at the hands of a Court that had moved away from race-conscious solutions. In 2006, Congress reauthorized the act, as it had done several times before, this time with an overwhelming (and bipartisan) vote.[45] Despite the power of Congress, under the Fourteenth and Fifteenth Amendments, to enforce the mandates of these amendments, which guarantee the right to be free from racial discrimination in voting,[46] the Supreme Court struck down the coverage formula in 2013, gutting the most effective part of the Voting Rights Act. The Court felt the country had outgrown the preclearance provisions of the act. They were no longer needed. The Voting Rights Act had done its job.[47] For the dissent, this was confusing cause and effect: "Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet."[48] Within hours of the decision, Texas, for one, went forward with a strict new voter identification law, demanding a photo ID to register to vote—a law that had previously been blocked because of its racial impact on voting.

Yet despite shifts in this or that direction, immense changes in race relations—in law and fact—have undeniably taken place since *Brown*. Unlike many legal "victories" before *Brown*, the earth did move; the landscape shifted in a permanent way. How much of this was because of *Brown*? How much credit goes to courts, to law and legal process? The question has been vigorously debated, and there are those who feel that the role of the Court has been vastly exaggerated.[49]

It is impossible, of course, to separate cause and effect. The *Brown* case did not start the civil-rights movement; that much is obvious. The movement came first, and it "caused" *Brown*, if the word "cause" is appropriate at all. The civil rights movement, led by men like Martin Luther King Jr., deserves most of the credit. But *Brown* was not irrelevant. Once in place, *Brown* and later cases played a role in the developing drama, something like the bridge in our parable. Congress added to the structural framework by passing strong new laws on civil rights. This tough, bony structure of law helped channel and concentrate power and influence in society. As more black people voted, it became more difficult for candidates to run for office on a white-racist basis. Segregationists gradually disappeared from public life. Senator Strom Thurmond of South Carolina ran for president in 1948, as a "Dixiecrat," in support of white supremacy and states' rights. Yet in the 1990s the same Senator Thurmond vigorously championed a conservative black man, Clarence Thomas—indeed, a black man who was married to a white woman—for a position on the Supreme Court of the United States. Race prejudice did not disappear, by any means; rather, on the whole, it went underground.

But this was not an unimportant development. Law was not only an expression of power; it also expressed ideals, and when power and ideals united in favor of racial equality, white supremacy was reduced to a fringe movement, almost an outlaw movement. Outlaws sometimes wield a kind of sinister strength. But in this case, they lost their legitimacy, and that loss can be crucial. The chain of events since *Brown* helped

transform people's thoughts and ideas, their concepts of legal right; it modified their view of law and what they expected the law to perform. Social processes lay behind these changes in legal culture, but legal culture, like the bridge, reinforced these processes, and in time and in turn it led to further social change.

LAW AND THE SOCIAL REVOLUTION

Culture, lifestyle, and social behavior have always undergone tremendous changes in recent years. The civil-rights revolution may have played a role in mobilizing other aspects of social change. Suppressed minorities had risen up; and their struggle stood for something larger: a revolution in hearts and minds, in customs and habits of life, a general striving for self-realization. Notoriously, this led to the so-called sexual revolution. Traditional morality weakened; old taboos were broken. At the core is the idea that certain standards of conduct, once widely accepted in the United States, or at least not often challenged, are now "in play," in dispute, or have simply broken down. Specifically, what has changed is, first, the idea that a single official code of personal behavior governs (or should govern) the country; second, that the code more or less coincides with the moral commands of traditional Christianity, overlaid with a dose of Victorian morality; and third, and most relevant for our purposes, that government has the right—indeed, the duty—to turn these precepts into legal rules and to enforce them as best it can.

The changes have been dramatic. Thousands, then millions, of young couples and not-so-young couples openly, blatantly lived together in sexual unions, without bothering to get married. The gay-rights movement demanded legitimacy for the "sexual minorities." Pornography came out of the closet; it began to be peddled more or less out in the open—and was protected, to a large extent, by law. The double standard of sexual morality declined precipitously. The dreaded specter of AIDS may have altered behavior somewhat, and for a time, in a "conservative" direction; but it has hardly affected, at all, the *ideology* of the sexual revolution. Promiscuous, unsafe sex may be hazardous to one's health, but the effect on the soul is another matter.

Our concern is with law—more specifically, with the role legal institutions play either in helping to bring these changes about, in resisting them, in adapting to them, or in altering their form. The rules and doctrines that buttressed traditional morality came under siege; and in the end, the fortresses were stormed. The collapse of the rules of sexual morality, legal rules as well as social rules, has been the most dramatic instance. But there are other examples. Consider, for example, gambling, once almost totally illegal, now a major industry—state lotteries, Las Vegas and Atlantic City, riverboat casinos, casinos on Indian reservations. Consider, too, the legal and social position of minority religions. There was never, of course, any official religion in the United States, and in theory total freedom of religion is the rule. The First Amendment makes a bold, positive statement: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Some state constitutions are even more emphatic.

The Wisconsin constitution states that "the right of every person to worship Almighty God according to the dictates of conscience shall never be infringed." The state cannot give "preference" to any religion or spend any public money on any "religious" society.[50] In fact, however, there has always been a semiofficial range of religions in the country, and Americans have found it hard to tolerate "free exercise" for religions that seemed too strange—that wandered too far from the familiar course.

The troubled history of the Church of Jesus Christ of Latter-day Saints, usually called the Mormons, is a case in point. Joseph Smith founded this religion around 1830. From the beginning, his followers were persecuted; Smith himself was murdered by a mob. The Mormons traveled west, hoping to find a sanctuary. They founded a community in the basin of the Great Salt Lake, in what is now Utah. They wanted to make their own way in the world, but the world did not let them. The Mormon leaders practiced polygamy, which was, they believed, a duty imposed by God. But this was too much for the rest of the country to stomach. "Mormonism," one Protestant minister proclaimed, is a "great surge of licentiousness . . . it is the concentrated Corruption of this land, it is the brothel of the nation, it is hell enthroned."[51] The "free exercise" of polygamy went against the grain of American opinion. There was no way the majority could tolerate polygamy; this meant that the Mormons themselves were not to be tolerated.

In 1862, Congress passed the Morrill Act, aimed explicitly at the Mormons; it effectively outlawed polygamy in the territories, including Utah.[52] A man named George Reynolds was indicted, accused of marrying two women, convicted, and sentenced to prison. He appealed to the U.S. Supreme Court. His defense was freedom of religion—his rights under the First Amendment. In *Reynolds v. United States*,[53] the Supreme Court affirmed Reynolds's conviction. Polygamy was "odious"; Congress was right to declare it a crime. Merely because polygamy was a tenet of someone's religion did not excuse the practice: if a person believed that "human sacrifices were a necessary part of religious worship," was that an excuse? Or if a wife "religiously believed it was her duty to burn herself upon the funeral pile of her dead husband," would the state allow this to happen?

The Mormons believed, with a good deal of justice, that they were not licentious people at all; they were religious people who had the highest moral standards. They put enormous stress on wholesome, traditional family life. But the rest of the country refused to believe them. Polygamy, to the ordinary American, was a barbaric custom, and socially dangerous besides. In the *Reynolds* case, the Court noted that polygamy was "exclusively a feature of the life of Asiatic and of African people"; it also "led to the patriarchal principle . . . which . . . fetters the people in stationary despotism."

Here, as is usually the case, the Court no doubt reflected opinion in the country as a whole. The *Reynolds* case demonstrated the limits of national tolerance, which stopped far short of allowing multiple wives. Tolerance meant the right—for white people, at least—to blend into the dominant culture without barriers of caste or class. It did not imply the right to "do your own thing," that is, to live as a free, unconventional spirit.

It never occurred to the justices that "Asiatic and African people" might claim the same level of civilization (and legality) as white Christians from northern Europe.

Wisconsin v. Yoder[54] is a more modern case (1975), and it, too, deals with offbeat religion. The contrast with *Reynolds* is striking. Jonas Yoder was a member of a minority religious group, the Old Order Amish. Another defendant, Adin Yutzy, belonged to the Conservative Amish Mennonite Church. The defendants lived in Wisconsin. Under state law, children had to go to school until sixteen. The defendants refused to keep their children in school past the eighth grade. They were fined $5, and appealed. The case (clearly a test case) went all the way to the U.S. Supreme Court.

The defense, once again, was freedom of religion. Public high school, or any advanced schooling, was "contrary to the Amish religion and way of life." If defendants obeyed the Wisconsin law, the Amish argued, it would "endanger their own salvation and that of their children." The Amish insisted on living in their own church community, "separate and apart from the world and worldly influence."

This time, the Supreme Court was willing to accept the claim. The First Amendment guaranteed the right to live outside the "conventional 'mainstream.'" The state had no power to impose its will on a religion and a way of life "that is odd or even erratic but interferes with no rights or interests of others." The Wisconsin school law was a valid use of state power in general, but the Amish also had rights, and they were entitled to be exempted from the law.

The opinions in the *Yoder* case, as some have pointed out, can be reconciled with some quite conservative features of American culture. The Amish are intensely religious, rural, old-fashioned people. Their values do not offend the majority; in some ways they are merely extreme forms of values that the dominant culture at least ostensibly admires. Could the same have been said about the Mormons? Polygamy itself was a Biblical practice, after all. But its overtones of lust and profligate behavior, even though perhaps unfair, were too much for a nineteenth-century court to swallow. It seems fair to say that the 1970s Court was less wedded to the idea of cultural assimilation, more open-minded, more willing to tolerate groups different in lifestyle from the rest of the country, than it was in the nineteenth century.

Even today there are limits to freedom of religion. It is of course still true that no court would accept human sacrifice or the burning of widows, in the name of religion, any more than in 1878. There is a deep suspicion of "cults." At Jonestown, Guyana, in November 1978, hundreds of Americans, followers of a fanatical leader, committed suicide at his orders, by drinking poisoned Kool-Aid.[55] Nearly twenty years later, thirty-nine members of a UFO religious millenarian group, Heaven's Gate, committed mass suicide in San Diego, California, in an attempt to reach an extraterrestrial spacecraft they believed to be following the recently discovered Comet Hale-Bopp.[56] Nonstandard religions have long made most Americans fearful, suspicious. The Unification Church (the "Moonies") provoked intense legal action in the 1970s. Desperate parents snatched their children out of the clutches of this church and had them "deprogrammed." Since

the "Moonies," and members of other "cults," are over eighteen, how could the parents legally do this? Young people certainly have the right to choose their way of life; if so, how can parents insist that their children submit to deprogrammers? The Unification Church was under the wing of the First Amendment, to be sure, but to what extent? Were the tactics of this church—its aggressive recruiting, its dictatorial demands on its members—protected by law? Somewhat reluctantly, the courts, on the whole, refused to take the side of parents and deprogrammers. Adults, they concluded, could not be forced to leave their religion.[57]

But, to this day, some religious groups just go too far. The FLDS Church, the largest fundamentalist Mormon denomination, has thousands of members, many of whom live in communities on the Utah-Arizona border. The church practices plural marriage; men take multiple wives. And this was tolerated, uneasily, for a time. All that ended, though, in the early 2000s when law enforcement began investigating, and eventually convicting, many of the men in the church, including its leader Warren Jeffs, for various crimes involving sexual contact with minors.[58] The law tolerates religious diversity, but only up to a point. Can devout Christian Scientists, who refuse standard medical treatment, and rely solely on prayer, be convicted of child abuse or neglect if a child dies of some disease a dose of antibiotics could have cured?[59]

Changes in laws about obscenity and sexual deviance also bring the legal system face to face with the social revolution. Chapter 9 discussed the rise and fall of laws against victimless crimes and the upsurge of interest, starting in the late nineteenth century, in enforcing the traditional moral code. Sex and obscenity laws were tightened in this period; abortion was criminalized; states also enacted stronger laws against gambling and Sabbath-breaking. This movement, which began around 1870, may have been the last gasp of a dying social order. Or, perhaps, it was the last stand of a beleaguered concept—the notion that there was, and ought to be, a single basic moral code for the country, essentially the code of Protestant America.

Millions of immigrants, many from Southern and Eastern Europe, swarmed into the United States in the late nineteenth century. These immigrants brought their own cultures with them; these cultures differed from the culture of the older Americans in certain crucial respects. Joseph Gusfield argued that this culture clash explains why the temperance movement became so strong in this period. He saw the temperance movement as a kind of Protestant backlash, which snowballed until it reached its peak in the passage of the Prohibition amendment.[60]

The Harrison Narcotics Tax Act (1914) was another "triumph" of morality; it made criminals out of drug addicts, and was perhaps an even greater disaster than Prohibition in the long run. Culture clash was perhaps a factor in the war on "dope" and "dope fiends." The earliest drug laws—for example, the laws in California[61]—were directed against "opium dens." The Chinese ran these dens; white Californians hardly cared about this habit, so long as it was confined to Chinese immigrants; the problem was that white people too, and even white women, began to patronize these dens. Cocaine, marijuana, and heroin seemed

like even greater dangers; and the fear of "pushers," who would entice young people into a lifetime of addiction, helped fuel the war on drugs, a war that has never ended.

The old moral code, however vigorous it was in the pulpits, decayed in the outside world. Behavior, as usual, precedes new law and is decisive in creating new law. Ideas and attitudes shift along with behavior. At one time, there was a standard notion of what respectable behavior meant. Respectable people had moderate sex lives, within the boundaries of Christian marriage. They did not get drunk and disorderly. They did not gamble or take drugs. They worked hard and obeyed the law. Of course, society had plenty of dirty secrets. There were millions of heavy drinkers. Prostitutes sold their bodies on the streets, or in brothels—some of which were elegant houses, patronized by social elites.[62] Gambling and vice were available in every city. There were tramps and hoboes who drifted from place to place. But hardly anybody openly *defended* vice and drink. People either behaved according to the code or, what is almost as important, they accepted it as right and authoritative; they pledged allegiance to it even if and as they broke every single commandment.

What happened from the late nineteenth century on was perhaps a subtle change in the legitimacy of the traditional code. More people began to question it, and not just through their conduct; they questioned the code as the norm, the ideal, as well—they attacked its official status. Italian Catholics, for example, saw nothing wrong in a glass of wine. Others attacked "Puritanism" and "prudery" more broadly. Most of the habits and norms of the new immigrants were not offensive, either to them or to many other people; there was nothing to compare with Mormon polygamy or the alleged Chinese opium culture. Nonetheless, the old elites may have felt that the sun was setting on their empire of values, that the fine old house of American culture was rotting away.

They did not accept their fate lying down. If rot was attacking the house, then the timbers needed reconstruction. The majority turned to law to enforce their code and to shore up their monopoly of moral legitimacy. Law acts as a substitute for informal norms, in a complex society. It is used to keep a diverse population glued together in some reasonable working order, despite differences in values and habits between groups. It replaces informal methods—those methods that worked well enough on the tiny island of Tristan da Cunha, or among little clans and groups of hunters and gatherers, or in clubs, families, and groups of friends.

Society turns to law for help in shoring up its house—in preventing further decay. But the law does not necessarily work as expected. Cultural diversity, the very fact that stimulates the use of formal law, dooms the legal process to imperfect performance. If the law chooses sides, if it outlaws the codes and customs of a minority, it can meet with severe resistance. Most people think Prohibition was a dismal failure, and in many ways it was. The Harrison Narcotics Tax Act and the severe modern drug laws have had an even more depressing history. Most fair-minded experts concede this point. The "war on drugs" created a black market in drugs. It drove addicts into lives of crime; it contributed to urban decay. The policy not only failed, it did incalculable harm. The effect on

African-Americans has been particularly harsh; by 1992, near the peak of the "war," blacks made up 40 percent of the men and women arrested for drug abuse—out of all proportion to their share of the population, and out of all proportion to their actual use of drugs.[63] There may not be an easy solution to the drug problem,[64] but that does not alter the fact that drug laws have a lot to answer for. In 2014, years after the peak of the drug war, there were still over 96,000 people in the federal prison system whose most serious crime was a drug offense: about 74,000 of those inmates were black or Hispanic; only 21,000 were white.[65]

On issues of sexual morality, law necessarily reflects what is happening in the larger society. The sexual revolution, it turns out, was not a one-night stand, so to speak. The old morality decayed and went right on decaying; in the last two generations, there has been tremendous pressure to change the law, to take the stigma of criminality (and stigma in general) out of behavior that does not fit the old models. That famous lustful couple, "consenting adults," no longer risks arrest and prosecution, no matter what they do with or to each other, and whether they are gay or straight.[66] The last word, of course, has not been spoken. "Moral" forces have counterattacked, and vigorously. Pornography is still controversial. Although Supreme Court decisions now protect gay rights, a rear-guard action continues. Whether a bakery can refuse a wedding cake for a gay couple about to get married has become a live issue. Abortion remains a deeply controversial issue, too. Abortion rights were created by the Supreme Court in the 1970s, but the "pro-life" movement has never given up, and, to this day, many states continue to test the bounds of what, exactly, constitutes an undue burden on the right; states with conservative legislatures have passed, and continue to pass, laws that chip away at the right, and which aim to drive abortion clinics out of business. Many legal battles still lie ahead in Congress, in the courts, and in the public mind.

THE DECAY OF AUTHORITY

What lies behind the social revolution? Some see it as part of a long-term trend, a general weakening of authority in the United States. This trend began, perhaps, early in our history. The clergy dominated the Puritan colonies; but the control by the clergy did not last very long. When the country became independent, it was a nation without an established church, a nobility, or an aristocracy of birth or merit. Nineteenth-century visitors such as Alexis de Tocqueville were amazed at how "democratic" this country was, which meant, among other things, that the population showed little respect for traditional authority, compared to countries like France. It was a nation of social and political equals, or at least it looked that way to a European, despite the slaves in the South. (The subordinate position of women was a feature most men never paid attention to.)

Every society has an authority structure. Every society has high and low. No society even comes close to pure equality. For many people, the old ways, or what they understand as the old ways, are a powerful source of control. Shifts in patterns of authority

are relative, not absolute. There were and are many kinds of authority, many forms of hierarchy, in this country. Millions of Americans are deeply religious, and are faithful to the word of their churches. Learning, skill, and money all command respect. So does political power. There is also the authority of custom, and the authority of traditional morality. These form a kind of inner monarchy, whose commands are passed along by parents, teachers, and preachers. There is also the monarchy of money—the awesome power of the "1 percent." Authority is hard to measure. Undoubtedly, some traditional institutions have been slowly loosening or losing their grip, over time. Family authority, for example. Clearly, family authority is very much alive. Father's word may not be "law" anymore, or mother's, but most children do obey their parents, and they care what their parents think and say. They do their homework and they listen to teacher in school, even if they do not show old-fashioned respect or obey like little Prussians. There are millions of single-parent families and unorthodox families, but they are families nonetheless. The family changes in form, but it is still a great power. Most people, too, follow a definite code of behavior, and it is a fairly traditional one. The decline of authority is, as we said, a matter of degree. Studies suggest a decline in respect for governmental authority, a decline in trust, a crisis of legitimacy; but this loss of faith seems to be selective, not total.

Legal process, in a sense, rushes in to fill a vacuum of authority. "Law" has in many ways replaced other forms of authority. In the colonial period, officials swore to be loyal to their king; they had a personal bond to the crown. The president of the United States, however, takes an oath to support the Constitution. His "king" is a legal document, a symbol of law, rather than any human authority. In this country, ultimate power is supposed to rest with the people; more concretely, it lies in the legal structure of society, and in the laws themselves. We pledge allegiance to the flag, but true allegiance runs not to a piece of cloth, or even to the president, or to some sacred text in the National Archives. Rather, our commitment is to a way of governing, a process, a set of procedures, a way of making decisions—in other words, to *law*. There is a shared understanding that we obey and respect the rules of the game.

These rules hold society together. They are essential nuts and bolts that keep the structure from falling apart. As other forms of authorities weaken, the role of some aspects of law becomes stronger—becomes recognized as an impartial, impersonal arbiter of disputes. Law is a way out of the dilemmas of politics and controversy. The idea is that law stands above and beyond all politics—and even if this idea is, to a large extent, a myth, it is nonetheless powerful. It is a way to appeal to people's inner voices, to motives higher than their crude self-interest. All this may explain a striking American trend: all sorts of social and economic issues end up in court. And, in court, these questions get *answers*; moreover, both sides usually respect what the courts decide. Other countries do not have quite the same system. De Tocqueville noticed the American habit in embryo in the nineteenth century. There is no political or social question in America, he said, that does not turn into a judicial one. Today de Tocqueville's insight seems even more

obviously true. Of course, not everybody celebrates the American reliance on courts; we have noted before the cries of alarm and shouts of panic.

Still, in any event, law and (rather surprisingly) the courts stand in the center, the core of crucial decisions, in the United States, in instance after instance. The courts are intimately concerned with such sticky issues as obscenity, abortion, sexual deviancy, personal morality, and drug laws—in short, with the whole social revolution. They are just as closely connected with the economy. They are players in the game of politics as well—they even decide whether states have drawn the right lines around congressional districts, or whether Congress can regulate campaign finance. Their work is controversial: but it stands. In most instances, there is no practical appeal from a decision of the U.S. Supreme Court.

LAW AND SOCIAL CHANGE: SOME RECENT EXAMPLES

Social forces constantly make and remake law. Changes in morals, morality, ways of life—changes in culture and expectation—create new demands that press in on legal institutions, including the courts. These institutions then change their behavior, as they are pushed and pulled by rival social forces. Legal rules, processes, and behaviors shift; they move right or left, up or down. The new legal situation freezes customs into more solid forms, reinforces certain expectations, sends out new messages, subtly alters culture. It changes ways of thinking and looking at life the way a prism alters beams of light. This is a constant process in society.

We can see this happening, before our very eyes, so to speak. One example of this from the 1970s was the notorious "palimony" case of *Marvin v. Marvin*.[67] A well-known movie actor, Lee Marvin, and Michele Triola, a singer, lived together in a single household for seven years. They never actually married. But Michele Triola called herself Michele Marvin, and they behaved in all respects like man and wife. Then the relationship ended. In 1970, Michele Marvin sued Lee Marvin, demanding half of his earnings—more than $1 million—for the years they lived together. She claimed he had promised her this share in return for *her* promise to come and live with him, a promise which she of course kept.

The trial court, in Los Angeles, dismissed the case. The judge relied on a long line of prior decisions refusing to enforce such agreements. To live together outside of marriage was immoral in the eyes of the law; any supposed contract to live together could not be legally enforced. Michele Marvin appealed, and the California Supreme Court, by a 6-to-1 vote, reversed the lower court's decision. The trial court, it said, had acted too hastily; Michele should be allowed to prove her case. They sent *Marvin v. Marvin* back to the lower court, to begin all over again.[68]

The California Supreme Court wrote an opinion that is at certain points blunt and direct, at other points technical and full of legal nuances. All the subtleties were lost, of course, on millions of people who read about the case in the newspapers or heard about it on the evening news. Only a handful of lawyers read or have read the actual text. The

public did understand one thing, however: Michele's case had opened the door to a new kind of lawsuit. Cohabitation was no longer an outlaw status, on the fringe of respectability and legality. It was or could be a definite legal relationship; rights and duties might flow out of it, and a court could enforce reasonable arrangements that partners made with each other.

The Supreme Court of California had changed legal doctrine: But why? One point seems obvious to layman and lawyer alike: times had changed, morals had changed. The Census Bureau estimated that 2.2 million unmarried couples were living together as of 1978, two years after the *Marvin* case was decided.[69] Cohabitation, once shunned in respectable society, had become exceedingly popular. It still is—only more so.

The California Supreme Court is made up of people, who live in society along with the rest of us. The justices have eyes and ears; they read newspapers and watch TV. The justices who decided the *Marvin* case surely knew people—their own children, perhaps—who lived together without bothering to get married. Cohabitation had become a way of life, like it or not, and it had spread among all classes of society. When social arrangements change, it is no surprise that legal rights and duties rearrange themselves. The California court argued at various points in its opinion that *Marvin v. Marvin* was not really a break with past law. Courts like to stress the continuity of law, even when they are actually changing it and creating new doctrines. But at other points in the opinion the court frankly referred to the altered social context, to the "radical" changes taking place in "the mores of society."

The social revolution had touched one field of law, at one point in space and time. Duties and rights were realigned. The exact realignment was not, as far as we can tell, foreordained with iron logic. The spread of cohabitation meant that the issue was sure to bob to the surface somewhere in the legal system. Legal change was bound to happen, but the California solution was by no means inevitable or predetermined. No one can say the new legal pattern had to take exactly this form, at this time, or that this was the best way to handle the situation. We can say only that arrangements were bound to change—bound to take some new form, a better fit with society than the old forms, the old doctrines, the old way of law.

What effect, in turn, did *Marvin v. Marvin* have on society? The case was famous—notorious, in fact. The *New York Times* ran seventeen articles on the case between 1976 and 1979. *Time* magazine featured it in a story; so did *Playboy*; comedians told jokes about it on TV; cartoons appeared in magazines. The word (or at least some word) got around. Millions of people learned that the law had changed. They learned this vaguely and inaccurately, but they did smell something happening. What took place next is hardly surprising. Other disappointed lovers took their cue from *Marvin v. Marvin*. In the two years after the California case, about a hundred lawsuits of the *Marvin* type were filed in various courts.[70] Others were probably settled before getting that far. In many states, cases went up to higher courts on appeal. There the outcomes were mixed. Some states stuck to their guns, at least for the time being.

Others climbed on the new bandwagon and followed the line laid down in *Marvin v. Marvin*. Legislatures also took notice. Some were hostile to the new line of cases. Minnesota, in 1980, made these contracts enforceable only if they were "written and signed by the parties" and ordered the courts to dismiss any lawsuits based on claims that did not comply with this law.[71] In 1987, Texas, too, closed the door on such contracts unless they were in writing. But even in these states, what worried the legislators was fear of blackmail, fraud, and false claims—not the morality of couples who lived together without getting married.

Did people change their actual behavior after *Marvin*? Some probably did. Some wealthy people with "live-ins" no doubt became more cautious about what they said and did. The case probably stimulated a few people to go to their lawyers for advice. A few cohabitors probably decided to draw up contracts, spelling out rights and duties and making explicit their claims, if any, on the other partner. Once again, we can invoke the metaphor of the bridge. Social forces bent the law in one direction, but once the law changed, new forces and new alignments emerged; law itself became an influence on conduct. The decision of the California Supreme Court was itself a response to social change. The court formalized and restated the problem, redefined the issue, and (in a blaze of publicity) gave rise to new expectations. The case also probably helped in a minor way to legitimize a way of life that once scandalized respectable people. It was definitely a sign of the times that when the American Bar Association published, in 1993, a "guide" to drafting and enforcing premarital agreements and the like, it included a chapter that discussed *Marvin*-like contracts for same-sex couples.[72] To be sure, there are, to this day, many people who think cohabitation is immoral. No doubt they dislike the *Marvin* case and what followed it. But the California court, of course, did not invent, or spread, cohabitation.

This process occurs time and time again: social forces push the law in some direction; and then, in turn, legal change makes a contribution to social change. Another example is the issue of surrogate motherhood. A New Jersey case of 1988, the "Baby M" case, made as many headlines as the *Marvin* case had done. In *Baby M*, a married couple paid a woman to bear a child, using the husband's sperm. When a little girl was born, the surrogate mother, who provided both the egg and the womb, refused to give her up. Was this kind of contract, the surrogacy contract, legal? The highest court of New Jersey said no. No such contract was enforceable. But it then treated the case as an ordinary custody dispute, between a biological father and a biological mother (and awarded custody to the father).[73]

This was New Jersey. Other states soon faced the same issue; and responded with conflicting sets of statutes and judicial opinions. The widespread use of in vitro fertilization made things even more complicated. Now the egg mother and the womb mother could be two different women. New York passed a statute in 1992 that completely banned surrogacy.[74] The following year, California's highest court went in the other direction. It enforced a surrogacy agreement; it held that the intended parents—not

the surrogate—were the child's legal parents.[75] Many states now appear to be settling into an approach by which they permit surrogacy agreements but regulate them.[76] But the debate goes on, and the law continues to evolve. The whole issue would have been unthinkable as late as, say, 1950.

To take still one more example, the legal rights of same-sex couples have been radically transformed over the last few decades. A generation ago, many states had sodomy laws that made same-sex sexual behavior a crime—often a serious crime. In 1986, the Supreme Court turned a blind eye, refusing to strike down Georgia's criminal sodomy law.[77] Less than thirty years later, the Court declared such state laws unconstitutional[78] and made same-sex marriage the law of the land.[79] That kind of fundamental change in the law doesn't happen without a significant change in underlying social attitudes. In 1996, when Congress passed the Defense of Marriage Act (to ward off the possibility that Hawaii might allow same-sex marriages), only 27 percent of the population thought marriages between same-sex couples should be legally valid; by 2006, the number in support rose to 42 percent; and by the end of 2012, more people supported it (53 percent) than were opposed (46 percent).[80] Of course, the legal changes also helped accelerate (and, sometimes, hold back) these changes in social attitudes. The emergence of civil unions—a half-measure first adopted by Vermont and later by several other states—laid some of the groundwork for the growing acceptance of same-sex marriage. And when Massachusetts and a few other states adopted full marriage equality, and the sky did not fall, some of the opposition began to moderate. By the time the Supreme Court announced its opinion in *Obergefell* in 2015, 60 percent of the public supported same-sex marriage.[81]

How this happened so quickly is an open question. Perhaps it had something to do with the social and legal efforts of the gay rights movement. Maybe people began to see parallels between state bans on same-sex marriage and the anti-miscegenation laws of an earlier era, and didn't want to end up on the wrong side of history in a civil-rights fight. Younger people always showed a greater acceptance of both gays and lesbians and same-sex marriage—to them, it was no big deal.[82] And perhaps the 24/7 news cycle just sped everything up. In any case, the speed of the social and legal changes regarding same-sex couples was nothing short of astonishing.

Environmental law is a whole new field that has sprung up in the past generation or two. It cannot be understood without reference to the environmental *movement*. This movement did not begin inside the legal system. It began outside, in society. It burst into consciousness and spilled over into law. Today this field of law is a big, important, tangible reality. Lawyers and the public talk about "impact statements," "endangered-species lists," "clean-air amendments," the "superfund," and so on. Environmental *law*—a complex, technical body of rules and procedures—in turn provides hooks or handles, which environmental groups use to put pressure on society, pressure to move still further in a particular direction. During the Obama administration, there were struggles over pipelines, over wilderness areas, over global

warming, and over pollution of air and water. The environmental movement has had its ups and downs. Both sides push and pull—in the courts, in legislatures, in the election booth. As they do, they push and pull at the doctrines and rules, the raw material of law. Environmental law is in constant flux.

Every major change in social behavior has an impact on law. And every major change in law has its roots in changes outside of it, in social behavior. The "medical-malpractice crisis" is on the surface purely a crisis over law, litigation, legal doctrines. In the late twentieth century, there was a rash of lawsuits against doctors and hospitals; these stimulated, or panicked, insurance companies; insurance premiums for many doctors went sky-high; the doctors fought back, demanding legislative curbs on tort suits—with considerable success. But the whole dance of action and reaction would be inconceivable without deep changes in the organization of medicine. The changing structure of medical practice, the growth of specialization, the development of modern surgery and pharmacology, and the rise of health insurance have all altered the way doctors and patients relate to each other, and the legal rules of the horse-and-buggy days were bound to be swept away.

The struggles over the death penalty and over abortion rights also demonstrate how courts and law are exposed to outside pressure. In these battles, the courts are often in the spotlight. But in an important sense, they are really not the major actors in the drama. The crime rate, its effect on public opinion, vast shifts of political force; the sexual revolution, modern birth control, the women's and gay rights movements—all of these are backstage, so to speak, pulling the strings. Still, the sheer mass, the volume, of law seems to keep growing, one way or another. Where is it leading us? And can we say anything about future trends?

15

Epilogue: The Future of Law in the United States

MANY PEOPLE FEEL that law is too much with us, that Americans are too involved with law, litigation, and legal process for their own good. This is a complaint we have noted several times in this book. To be sure, to the naked eye American society seems trapped in a net of law—more than is true of other countries or was true in the United States in older times. Some people think we are sinking deeper and deeper into legal quicksand. A few decades ago, there was a lot of agitation over an explosion of lawsuits, a development that, in the opinion of no less than the president of the United States (George H. W. Bush), was bound to slow "the engine of growth."[1] A national magazine at the time bewailed our "suing society" in which "trust [was] undermined and creativity discouraged" because of endless litigation.[2] This was the era of the widely reported (and often distorted) McDonald's hot coffee case. More recently, the complaints focus on a rising tide of statutes and regulations, all part of "hyperlexis," a dreadful disease smothering the economy.[3] The president of the U.S. Chamber of Commerce ominously likened our regulatory system to a "plaque that slowly and silently accumulates in the arteries" that will eventually "silence the heartbeat of our economy."[4] Of course, not everybody thinks this way. Some people take the growth of the American legal system as rather a matter of pride, a sign of commitment to justice. How well the system works—and who it works for—is, of course, a matter of intense controversy.

The first fourteen chapters of this book emphasized the dependence of law on social forces, but despite this—or because of it—these chapters also stood for the proposition, among other things, that law, legal process, and legal institutions are crucially important in making American life what it is. Even the simple acts of everyday life—a trip to

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the grocery store—presuppose a vast superstructure of law. In this society, law touches both on the ordinary and the extraordinary. Much of the news on an average day is news about law, to an astonishing degree. Most of what makes news is what is public; nowadays what is public is almost sure to be legal or governmental, or to have some legal or governmental angle. This is even true when natural disasters occur—so-called acts of God, floods, hurricanes, earthquakes; or when major accidents happen—plane crashes, fires, collapsing walls. Always law somehow gets involved. We cannot avoid the role of the Federal Aviation Administration, air traffic controllers, fire ordinances, disaster relief, government inspection of dams and levees, and so on. A plane crash or any other tragedy is bound to produce a flurry of investigations. It will also surely bring about a flock of lawsuits. These are now almost as certain as death and taxes.

Everybody talks about the "litigious society" and about "too much law." Is this just talk? Is there something more systematic we can say about the volume of law? Can it be measured rigorously? There is no real way to take a yardstick to the legal system and measure it. It has no definite beginning, middle, and end. But there are some crude ways to show the fact of growth. There are now over a million practicing lawyers. They must be doing *something*. Statutes, state and federal, turn into printed books—a physical bulk that can be seen and its dimensions taken. Of course, it is more and more the case that new law turns into electric blips off in the cloud somewhere; the sheer volume of the online material may be even more staggering than the printed material. Still, the states continue to publish their statutes in hard covers. In 1847, the collected statutes of New Jersey fit into one snug volume of about a thousand pages. Today, the statutes of New Jersey fill an entire shelf or more.

The population of New Jersey has also grown since 1847. The 1850 census recorded a population of 489,555 in New Jersey; it is nearly 9 million today. But growth in the laws is more than a question of keeping up with population. Many aspects of life that are densely regulated today were left untouched by the statutes of 1847. If a state passes a law regulating dry cleaners, the law will apply whether there are thirty dry cleaners in the state or thirty thousand. Of course, regulation is unlikely if there are, in fact, only thirty dry cleaners. The growth of law is not unrelated to population size, but the relationship is not a simple one.

There were no dry cleaners at all in 1847. There were also no telephones, computers, automobiles, nuclear wastes, oral contraceptives, television sets, and so on. There were no surrogate mothers, no genetic engineering, no Internet. The astonishing changes in science and industry since 1847 have blown apart the old limits of law. There was a little bit of traffic law before the automobile, but machines that swarm the streets by the millions and can speed at a hundred miles an hour create problems much greater than the problems of the horse and buggy days.

The automobile also expands the zone of personal freedom, in ways we take for granted. For centuries, most people in the world were tied to the soil almost literally. There was no easy way to see the world beyond the crest of some small hill near the

family shack or hut. In 1847, even New Jersey farmers, and textile workers in Lowell, Massachusetts, were essentially tied to home base. Travel was difficult and slow. Americans have always been great travelers; most were immigrants, or the children of immigrants, after all; and the population, in the course of the nineteenth century, spread from coast to coast. But this was never an easy process. Crossing the country took equipment and guts. For most people, it was out of the question.

Technology, however, has now vastly expanded the mobility of the average person. The railroad was already a great advance, but it was the automobile that worked the most fantastic change in American lives. Today, most families own or have access to a car. They can move from city to country, country to city, state to state, almost at will. The car means freedom to explore parks and museums, to visit relatives who moved to Colorado, to go camping, to live in the suburbs and commute to work in the city.

At the same time, the auto generates a need for an immense body of rules—rules about auto accidents, rules about auto safety, rules of the road, traffic regulations, parking restrictions, rules about driver's licenses and drunk driving, and so on. All this is part of the price for the vast extension of freedom the automobile has brought with it. It is not so obvious, then, that more laws, more rules, as such, cut down on personal freedom. This may or may not be true. Some level of regulation is a natural product of new technology—a cost or side effect of machines that expand our freedom and our possibilities. Computers and mobile devices open the door to communication with vast numbers of other people at almost instantaneous speed and over enormous distances. They also raise the issue of Internet pornography and "sexting," something the bluenoses of the nineteenth century did not have to contend with. Law is essentially about rules of the game in a complex society. The question of freedom and its limits is one that is, in our society, almost impossible to resolve. This book has touched on this big question here and there, but certainly has not and cannot give a definitive answer.

Crude as they are, then, all indicators strongly suggest great growth in the outer aspects of law: the rules themselves, the personnel, the institutions. The legal system has swollen in size over the years, growing faster than the population, and the rate of growth itself seems to be growing. Administrative law came up almost out of nothing and is now a major force in society. Particularly striking is the explosion in federal law in the last three generations, roughly since the New Deal. The Reagan administration took office in 1981 with a firm resolve to cut and slash. It is a popular idea, and later administrations (Republican or Democratic) have not dared to disagree very much. But cutting government has not gotten very far. And no one even dreams of rolling the federal government back to the days of Warren G. Harding and Calvin Coolidge. No such reversal is possible. Conservative governments can only hope to privatize a bit, deregulate a bit, send some tasks back to the states; for the rest, they can only hope to keep the federal government from swelling up dangerously, and from interfering too much or in wrong-headed ways with individual liberty.

THE LITIGATION EXPLOSION: FACT AND FICTION

One special area of growth may be litigation. The clamor over litigation and litigation rates is especially great. Litigation, people say, is rising rapidly, faster than courts can cope, faster than is good for us. We are faced, as we mentioned already, with what some have called a "litigation explosion." We could ask two questions: First, is there in fact an explosion of lawsuits? And second, why would this "explosion" be bad for us?

On this second question, many answers have been given. First of all, lawsuits might overwhelm the courts and interfere with the orderly administration of justice. Second, the flood of cases might disrupt and destroy the ordinary processes of government. Courts take over roles that do not belong to them: They meddle in affairs of state. They move into areas that should be left alone or handled by others. Third, lawsuits can disrupt and destroy normal social relations. Suing your physician, for example, does not make for good relations between doctor and patient. Moreover, it leads doctors to practice "defensive medicine," that is, to call for unnecessary procedures and otherwise act too cautiously, which drives up the healthcare costs of the nation. Fourth, excessive litigation is bad for the economy—this was President Bush's point. Lawsuits and the fear of lawsuits distort the allocation of resources; litigation drives good products off the market, stifles innovation, and acts as a kind of tax on business.

The people who complain come up with many horror stories to drive home their point. Some use as an example the busing of schoolchildren—a (possibly) harmful and expensive practice that the courts have imposed on various cities. Some cite the way courts stop or delay big projects; some refer to the death-penalty cases or the abortion cases; some point to the "crisis" in malpractice and the high cost of medical insurance; some think the law of products liability is doing damage to business; some cite frivolous suits for damages, or to endless litigation by "jailhouse lawyers," and so on. Judges themselves have complained of a crisis in the courts. They talk of a crushing burden of lawsuits.

The insurance industry and other business interests have helped foment this impression of a litigation explosion.[5] The media picks up the general story, then sprinkles in some examples of frivolous lawsuits to prove the point. And this notion that our court system is being overwhelmed by sleazy attorneys filing baseless lawsuits resonates with an American public that values individual responsibility and self-reliance.[6] But is the impression an accurate one? Has our society really become more litigious in recent decades?

Actually, we know surprisingly little about litigation rates in the United States and even less about the way these rates change over time. There is really no solid proof of a "litigation explosion."[7] The gross amount of litigation has certainly been rising over the years. But when we talk about a litigation rate, we must mean some sort of relationship between the number of lawsuits and the population. Here the talk about "explosions" has nothing much to back it up. Judicial statistics are poor. Historical statistics (where

we have any) are almost worthless. It is hard to say anything much about long-term trends.

Litigation rates are definitely rising, to be sure, in one court system, the federal courts. These courts on the whole keep good records. In 1900, the U.S. District Courts disposed of 29,094 cases. The volume rose to 152,585 in 1932 (swelled artificially by Prohibition cases), dropped to 69,466 in 1942, and then began rising again. In 1971 it reached 126,145.[8] By 2015, 279,036 civil cases were filed in federal court, along with 80,069 criminal cases. In addition, the federal system handled 860,182 bankruptcy matters.[9]

This boom in federal cases helps give the impression of a litigation explosion. But there is only one federal system, and there are fifty states. The states account for over 90 percent of the lawsuits in the country. Studies of state courts are sparse and somewhat inconclusive. In St. Louis, for example, Wayne McIntosh found a high litigation rate in the early nineteenth century, until 1850. The rate then declined, and bottomed out in the 1890s. After 1900, there was an upward trend, but an extremely modest one. Essentially, he concludes, the litigation rate remained "fairly stable" in the period of the twentieth century his study covered, roughly to the late 1970s.[10] No explosion here. Nor was any explosion found in a study of two California counties, Alameda County and San Benito County, for the period 1870–1970.[11] More recently, and more broadly, the National Center for State Courts reported that the total incoming caseload reported by state courts across the country, once adjusted for population, was unchanged from 2001 to 2010;[12] a later study found that total number of incoming cases actually declined 15 percent from 2008 to 2013, largely due to the great recession.[13]

In fact, the litigation rate is a rather elusive figure. It is hard to measure "litigation," as it happens. For one thing, what do we mean by "litigation"? For example, there is a high divorce rate in the United States. The courts churn out hundreds of thousands of divorces. Almost all of them are uncontested. Each is a "case," in the sense that somebody files a piece of paper in court, the clerk opens a file, and *Smith v. Smith* gets a case number. But most of the time, nothing will actually happen in court that deserves to be called litigation. The case is completely cut and dried. The Smiths and their lawyers have worked out everything far in advance. There is legal behavior here, but should we call it litigation?

Other uncontested matters, though they get funneled through court, hardly deserve to be called "litigation": adoption proceedings, petitions to change one's name, and so on. Most tort cases, as we noted, are settled out of court. Even most of those that are filed in court drop out before trial. But each of these gets a file number from a court clerk, and these "cases" get tallied in court statistics. Yet when people talk about litigation, they probably have in mind real disputes that actually get resolved in the courtroom by a judge, or a judge and jury. Are *these* cases increasing in number? Nobody really seems to know. But there is no concrete evidence of a litigation explosion. Nor is it fair to describe Americans as "litigious."

Of course, some kinds of litigation *are* increasing. Judicial review is more common than in the past, as we have seen. In an important way it feeds on itself. If courts are

willing to monitor, revise, and oversee what Congress, legislatures, and administrative agencies do, then they encourage social groups to bring their demands into court. People band together to challenge a law they do not like—to stop a highway or an airport, to force the state of Arkansas to clean up its prisons, to get Alabama to reform its mental hospitals, to prevent the execution of a murderer, and so on. This is a strong trend, and a growing one. It is part of an international trend, but it is perhaps strongest in the United States.

Whenever and wherever a new "field" of law emerges, or a new cause of action, a bulge in cases at the trial level may result. These cases may make a social splash even when they are not statistically significant. Chapter 14 discussed *Marvin v. Marvin*. This case opened a door that had once been shut; it probably led to some new litigation—several hundred cases, perhaps. This is in many ways an important development. But a few hundred cases would not show up at all in judicial statistics. Filings in the United States are in the millions; a few hundred cases are a spit in the ocean.

What is important, then, is not the numbers but the *types* of cases filed—especially the new areas of litigation that have opened up in the last decades. Malpractice and products liability have blossomed. The Civil Rights Act of 1964 and associated laws inspired a good deal of novel cases. Before the 1960s, there was the merest handful of cases about race discrimination, and there were basically none at all on sex and age discrimination, or discrimination against the people with disabilities—the most recent federal development. Congress and the courts have created new rights. Discrimination in the job market was outlawed—first for race and sex and religion, then for other categories. Today, employment discrimination is a major field of law. It gives work to many lawyers and has hatched a whole battery of lawsuits. Compared to the number of divorces, the numbers are insignificant. But many of these cases are huge, class-action cases against great corporations, involving millions of dollars and the structure of whole job markets. Numbers do not do justice to the situation. There are more mice in the world than there are elephants, but each elephant makes a good deal more of a splash.

In general, "megacases" are increasing: monster lawsuits, massive and incredibly expensive. Private antitrust suits are one prominent example. The Sherman Act (1890)[14] made monopoly and restraint of trade a crime. The government, of course, had primary powers of enforcement. But Section 7 of the law gave private citizens or companies the right to sue for damages against any person or company who had "injured" them by violating the act. Indeed, the plaintiff could collect three times the actual damages. This was meant to provide an incentive to sue and also to be a sort of punishment for wrongdoers. Yet private suits were not common for many years. They averaged one hundred a year in the 1940s. At one time—1979—there were as many as 1,300 or more; in 2015, the number had dropped to 893, but it was still substantially greater than during the first half-century of the Sherman Act.[15]

Private antitrust suits tend to be elephant cases. Some may drag on for months, even years. The biggest of them can cost each side tens of millions of dollars. The amounts at

stake can be staggering—in the millions or billions. Tons of documents may be filed in court. Whole platoons of lawyers might be thrown into the fray. Some public antitrust cases are also supercases. One prime example was the great IBM case. It began in 1969, and became a champion lawsuit in size. The documents might have filled a dozen warehouses. Costs on both sides were staggering. At one time it looked as if the case would never end—that it would literally go on forever. But in 1981, the Reagan administration threw in the towel and the mighty lawsuit fizzled out, after millions of dollars, millions of documents, and millions of hours. This case too made no dent on judicial statistics. It was essentially one case. More recently, beginning in 2011, two hi-tech companies, Apple and Samsung Electronics, each a colossus, have been battling in the federal courts over alleged patent infringement.

Obviously, it does not take many megacases of this sort to give off the smell of an "explosion." The same can be said of some of the massive, class-action tort suits. In the "Agent Orange" case, veterans sued chemical manufacturers. They were exposed in Vietnam to a pesticide called Agent Orange, and they claimed it harmed them physically. The case was "actually a consolidation into one class action of more than 600 separate actions originally filed by more than 15,000 named individuals," plus 400 additional individual cases. The plaintiffs were represented by a network of about 1,500 law firms; the defendants spent, it is estimated, about $100 million on their defense. After six years of litigation, a settlement *was* reached in 1984, creating a fund of $180 million with interest.[16] The Agent Orange settlement, large as it was, was dwarfed by the 1998 tobacco settlement; here the four largest American tobacco companies agreed to pay $206 billion over twenty-five years to settle a case brought by forty-six states, demanding the recovery of healthcare costs that they blamed on tobacco.[17]

On the other hand, lawsuits of some sorts may be traveling in the opposite direction, that is, decreasing. Apparently, courts are handling fewer cases of types that were once quite common—ordinary contract cases, disputes between landlord and tenant, quarrels between two people who claim the same piece of land, arguments over Uncle Harry's will. The evidence is imperfect here, too; but clearly many staples of nineteenth-century litigation have all but disappeared from the dockets. Debt collection, for example, has been "routinized," and "contested litigation" on this subject has declined dramatically since the nineteenth century.[18]

Not everybody, by any means, is convinced that there is too much suing going on. There are those who think there is too little—that the courts and the legal profession are falling down on their jobs. The ordinary person cannot get justice. Courts are too slow and lawyers are too expensive. Businesses would, on the whole, not disagree with the point about costs; they tend, if at all possible, to avoid the courts and to use arbitration or other alternatives to lawsuits.

The courts, then, may be neglecting "issues that affect the quality of everyday life." The phrase is from Laura Nader, in the preface to a book that explores "alternatives"—ways

of handling disputes and grievances outside of the court system, everything from the Better Business Bureau to the activities of a congressmember's office.[19] Chapter 2 of this book also looked briefly at "informal justice." From time to time, there are plans to improve or revivify the courts or to provide more effectively for popular justice. In 1977, the Department of Justice set up, on an experimental basis, three Neighborhood Justice Centers. They were located in Atlanta, Kansas City, and Los Angeles and were supposed to be alternatives to courts for resolving minor disputes.[20] Only the Atlanta center was still around as such in 2016, but meanwhile, local mediation and dispute-resolving bodies have multiplied like weeds. Thirty-eight states now have access-to-justice commissions devoted to making sure that legal services are available to the poor; there are also community mediation centers on the state and local level; not to mention law school clinics that stress alternative dispute resolution; and there are, in addition, faith-based dispute resolution services.[21] The American Bar Association has over 18,000 registered "dispute resolution professionals" ready to provide service.[22]

Perhaps the courts are not doing a good job in small cases, and not doing as much to provide justice for the little guy; their role in society at large, on the other hand, has grown quite a bit. They are muscling their way into more and more of the business of government, sometimes by invitation. They provide some sort of check or control over the work of those who do govern. Of course, their power to do this work, and particularly their power to follow through, leaves a lot to be desired. Still, the boundaries between what is traditionally thought of as stuff fit for courts and what is not seems to be eroding. Areas of life that were off limits to courts in the past are no longer immune to intervention.

We see constant signs of this evolution. The media reports the extremes. One man threatened to sue a young woman because she stood him up on a date. Another man tried to sue his own mother and father for "malpractice." They botched the job of bringing him up, he said, and turned him into a psychological wreck. A Yale graduate, disgruntled at something or other, wanted a federal court to wipe his degree off Yale's records.[23] In 2014, a man caught on television sleeping in his seat during a baseball game between the Boston Red Sox and the New York Yankees sued ESPN and its announcers for $10 million dollars. He claimed substantial injury to his character and reputation.[24] According to a magazine story quoted earlier, the parents of a nine-year-old girl in Indiana filed a lawsuit because the girl found no prize in a box of Cracker Jack.[25] (This may be apocryphal.)

The courts usually (though not always) throw out the weirdest of such cases. The cases are oddities, freaks; after all, that is why they appear in the newspapers and "go viral" on the Internet. Some of the worst reported "freaks" never actually happened—they are urban legends. Still, these cases and these reports do illustrate one general point: almost anything can end up as a court case today. No area of life is sacrosanct. Courts routinely make decisions about the inner workings of factories, hospitals, schools, and prisons. Decision on these subjects would have been unthinkable a century ago. These subjects

were "private" and beyond the reach of courts—or, in some cases, were within the unrestrained discretion of public officials.

Courts even intervene in what were once very private family affairs. In a 1972 case, a fourteen-year-old girl in Minnesota sued her parents in juvenile court. The parents had built themselves a boat and were about to go off with their daughters on a cruise around the world. The girl, Lee Anne, wanted to stay at home with her friends. She went to court and won a partial victory. The juvenile judge allowed her to stay behind, in custody of an aunt.[26] In 1992, a twelve-year-old boy, Gregory Kingsley, went to court in Florida to "divorce" his mother and father and get himself adopted by his foster parents; the Florida courts indeed agreed to terminate his parents' rights.[27] And in 2014, a New Jersey college student sued her estranged parents to get them to pay for her college tuition (she won).[28]

These cases are striking, perhaps alarming and deplorable. We can see why many people think it would be better if courts refused to meddle in private, family affairs. In other areas, it seems easier to defend an active, even intrusive judiciary. After all, despite all the talk of "downsizing" government and shrinking the federal monster, it is still the case that hardly any area of life is beyond the scope of government at *some* level. The more the government does, the more we need to control it. In some countries, courts do not exercise this power, or do it only feebly. In modern countries, especially developed countries, governments are powerful, gargantuan in size, and quite pervasive. The ordinary citizen has few ways to get somebody in government to listen, let alone persuade government to see things the citizen's way. There is no meaningful judicial review in much of the world, even though the habit has spread dramatically in recent decades; it is now common in Europe, in much of Latin America, and in such Asian and African countries as India and South Africa. The European Court of Human Rights does not hesitate to tell European governments that their actions violate the European charter of rights. In one-party systems—in China, for example, home to about 1.4 billion people—courts of justice essentially carry out the will of the regime.

Courts in the United States, for all their faults, give people at least some realistic way to right wrongs done by the government and by private centers of power. There are, in some countries, other means for keeping Leviathan under control. But courts are part of *our* system of control, geared to our needs and traditions.

Regular courts may be too expensive and formal for ordinary cases and for day-by-day disputes. But they are well suited for big cases, group claims, class actions. As for the little cases, we do need fresh ideas and new institutions; we need debate and research about dispute settlement, grievance procedures, access to law. Ideas are in the air; some are getting a hearing. We have seen some examples. "Alternative dispute resolution" is not just a buzzword; it is a growing institution. The question is whether it will end up empowering or disempowering the little guy.

There is, for example, lively dispute over the role of arbitration, which many companies insist on as a method of handling disputes. Use of arbitration has exploded; it is

ubiquitous in some industries—cell phone service, credit cards, and cable services—and is increasingly being used in other purchase or rental agreements, employment contracts, and brokerage service agreements.[29] These arbitration clauses are not usually negotiated in any real sense of the word—they are often just dropped into sales or employment contracts on a take-it-or-leave-it basis. This means that many consumers and employees waive their rights to bring lawsuits to enforce violations of consumer protection, antidiscrimination, or antitrust laws; their only remedies are through private arbitration. More recently, the Supreme Court has upheld arbitration clauses that include class-action waivers, which mean that consumers and employees with small claims are forced to arbitrate them individually instead of being allowed to combine them into a collective action.[30] In practice, this means many of the claims just disappear; it is rarely worth one person's time and money to pursue a small claim (and he would never find a lawyer to take such a case). Of course, that is one of the main reasons companies put such clauses into their contracts to begin with.

THE SOCIETY OF STRANGERS

A society like ours is one of great interdependence. All of us are in the same boat, in many ways. Imagine, at one extreme, a pioneer family in the nineteenth century—a family, let us say, living miles away from its nearest neighbor, building its own house, growing its own food, weaving its own clothing. The parents themselves taught the children to read and to do figures, they provided their own entertainment, acted as their own doctors, dentists, barbers, nurses—they did everything, took every role.

This is an extreme case, and was rare even in the past. But it points up how different our way of life really is. The world of the early twenty-first century is a far cry from the world of these pioneers. It is a far cry, too, from the way of life of many tribal societies, where custom rules, where life is bound to a tiny village and a few miles of woods all about it. Village life is life lived wholly in the so-called primary group—in face-to-face culture. Each man, woman, and child is related by blood or marriage or clan to everybody who matters to that person. Similarly, on the island of Tristan da Cunha, the primary group was the only group. In our society, to be sure, we are profoundly dependent on each other, just as much as people in some small island culture. The difference is this: most of the links in our chain of dependence are links to strangers, not kinfolk or friends.

We are, in short, a "nation of strangers, a country where the greatest number of potential abuses occurs between people who are strangers to each other."[31] Most of us work for big companies. We buy ready-made food and clothing. Strangers made these. Strangers protect us, as police, or threaten us, as criminals, when we walk the streets. Strangers put out our fires. Strangers teach our children, build our houses, invest our money. Strangers on radio and TV or in the newspapers and on the Internet give us our news of the world. When we travel by bus or train or plane, our lives are in the hands of strangers. If we fall

sick and go to the hospital, strangers cut open our bodies, wash us, nurse us, kill us or cure us. When we die, strangers lower us into the earth.

We accept all this. We are used to it. The massive role of strangers is part of our lives. There is, in a way, a clear division between our intimate lives, the lives we spend with family, friends, and partners, and life in the public sphere. But the line between these two spheres is growing a bit more indistinct. Strangers sometimes intrude on the most private, inward corners of our lives. Love, sex, and marriage are not immune. Social workers, psychiatrists, marriage counselors—there are thousands of "experts" in these matters, and millions of people, at one point or another in their lives, take their personal problems to these experts. Sometimes, in extreme cases, people can be forced to go. Consider, for example, the law of divorce, child custody, guardianship. More and more, a technical, professional, bureaucratic world elbows its way into the outskirts of the last of the private sanctuaries.

This does not mean that there is less space for us to grow as individuals, less scope for us to experiment with ways of life, or less room for the personal in American society. Quite the contrary. There is probably far greater room for personal autonomy than ever before in history. Certainly there is far more than in tribal societies, or even among the pioneers, whose lives were rigidly constrained and whose energies were absorbed by sheer survival needs—growing food, keeping warm, and staying alive. There is far more leisure today, and more options for the average person. But the boundaries between what is supposed to be private and personal and what is not are no longer quite so clearly marked.

And law moves along, following society, responding to the social facts of our times. In the early twenty-first century, no zone is so intimate, personal, or private that it is completely immune from the staring eye of law. And why not? "Custom" is what we call the norms that regulate face-to-face relationships; "law" is the word for norms that regulate relations among strangers. When customary norms break down, society turns to law. This is the central thesis of this book. A small society, a tribe, a tiny island can go on from year to year on the basis of shared norms, unspoken premises, rules of behavior made sacred through tradition. Our society cannot do this. Americans hold many things in common—there *are* shared norms—but not enough to make it possible for the country to run itself automatically. The country is just too big. There are too many of us, and we are too different from each other. We need (or feel we need) formal, structured ways to govern ourselves. And this means law.

No doubt a lot is gained and a lot is lost in a social order built up in this way. This is not the place to explore the gains and the losses in detail. Many economists and many people in general feel that a regulated economy is less efficient and perhaps less just than an economy that is basically free, that is run almost entirely by the "invisible hand." But even the "invisible hand" needs some help: law and order, a court system, enforcement of contracts, a framework of rules. And almost everyone would have to concede that if we want to craft a fairer and more equitable—or safer and healthier—society, we need some kind of structure, some methods of control. Some kinds of collective control are

virtually beyond controversy. We simply must have police. A few zealots of the right would just about stop there (maybe adding an army, navy, and air force); a small, diminishing band on the left would like to see massive collective control, perhaps even an end to private property. The rest of us want an active government of some sort; for most of us, neither extreme is palatable. But how much government, and what kind, and where to draw the line: that is the question. It is the subject of constant political debate; it is one of the major cleavages in democratic society.

In a complex world, freedom does not necessarily mean no government control. Paradoxically, law may be needed to maximize freedom. The air people breathed was at one time fresh and clean; nothing much had to be done to keep it that way. Streams ran pure and clear; there seemed to be no end to wildlife, trees, and space, or to oil, gas, and coal. Those times have passed. Air and water pollution can kill. The invisible hand cannot prevent this. Only government can. Whether it does it well, or the right way, is another question.

The automobile has generated not only new freedom but also new rules. The courts and the legislatures have created or expanded many rights and doctrines in an attempt to deal with collective problems, like dirty air, and to counterbalance the strength of big government, big business, and other large collectivities. Other rules and doctrines deal with the rights of minorities—and, at times, of majorities. There is, and will be, constant tension between freedom and control. But there is no escape from interdependence. The people of this country are tied together in organic knots, and forever. Nobody expects "the law" to wither away.

The specific role of courts in our society is hard to predict. The future is, as always, cloudy. The particular jobs courts do now may change. Nothing is engraved in stone. Some of the present trends—the heavy use of judicial review, for example—will probably continue into coming years, as far ahead as we can see. The courts are responding to certain felt needs, and these needs are not going to become obsolete. If not the courts, then some other agency will take over the social functions that the courts now perform. Nor are the other branches of government going to shrivel and shrink very much, if at all, in the predictable future. These branches, in the aggregate, are more important than the courts. This will certainly continue.

Law is a creature of society. Society is changing, and rapidly. But it shows no signs of going back to the simple habits of the past. Nor does anybody really expect a utopia in which government would disappear. Law, legal process, and the legal system are facts of life in the United States. They have a central place, and that is likely to continue. Perhaps the role of law will grow, perhaps not, but it is not about to vanish, or even to contract in size. The legal system will continue to bend and turn in response to social change. Institutions may twist and warp a bit (or a lot); they may change functions; taxes may go up, or down; government may expand into this area, retract its horns from that. But short of some mammoth reworking of our way of life, law will be with us for as far ahead as we can see—a massive presence in our lives.

NOTES

CHAPTER 1

1. Donald Black, *The Behavior of Law* 2 (1976).

2. H. L. A. Hart, *The Concept of Law* 89–96 (1961).

3. See "When the Rules of the Road Are a Big Blur," *Los Angeles Times*, July 6, 1996, Part A, at 1.

4. 408 U.S. 238 (1972). Legal citations, like this one, usually begin with a volume number (here 408). They then give the name of the collection of volumes of which the volume is a part. United States Supreme Court cases are collected in a series that is abbreviated "U.S." Lower federal court cases are in series abbreviated "Fed." or "F. Supp." The second number in the citation is the page number in the given volume (here 238). Last comes the date.

5. See Lawrence M. Friedman, *Impact: How Law Affects Behavior* (2016).

6. Richard L. Abel, "A Comparative Theory of Dispute Institutions in Society," 8 *Law & Society Review* 217, 227 (1973).

7. John M. Broder, "Lawmaker Quits After He Pleads Guilty to Bribes," *New York Times*, Nov. 29, 2005.

8. Blanks v. Richardson, 439 F.2d 1158 (5th Cir. 1971).

9. McIlvaine v. Pennsylvania State Police, 454 Pa. 129, 309 A.2d 801 (1973). Note the abbreviation for the state ("Pa."), which identifies the series of volumes that sets out the decisions of the highest court of Pennsylvania. "A." stands for "Atlantic"; the reference is to a series of volumes that groups case reports by region of the country (Pennsylvania, Delaware, and New Jersey are among the states in the Atlantic region). When there are many volumes in a series, the numbering sometimes starts over, with a second ("2d") or even third or fourth series. There are many other tricks and conventions of citation, but those listed in these notes are perhaps the most basic.

American Law: An Introduction. Third Edition. Lawrence M. Friedman and Grant M. Hayden.

10. 415 U.S. 986 (1976).

11. John H. Merryman & Rogelio Perez-Perdomo, *The Civil Law Tradition* 10 (3d ed. 2007).

12. See Inga Markovits, *Imperfect Justice* (1995), for an account of the demise of East German law.

13. For a perhaps too glowing account of Cuban socialist law, see Marjorie S. Zatz, *Producing Legality: Law and Socialism in Cuba* (1994).

CHAPTER 2

1. Lon L. Fuller, *The Morality of Law* 106 (1964).

2. Quoted in Stewart Macaulay, "Private Government," in *Law and the Social Sciences* 445, 450 (Leon Lipson & Stanton Wheeler eds., 1986).

3. Richard Behar, "Thugs in Uniform," *Time*, Mar. 9, 1992, at 44.

4. For 2013, the Bureau of Labor Statistics reported that 1,066,730 people worked as security guards and 635,380 were police and sheriff's patrol officers. *Occupational Employment and Wages, May 2014: Security Guards*, Bureau of Labor Statistics, http://www.bls.gov/oes/current/oes339032.htm (last updated Mar. 25, 2015); *Occupational Employment and Wages, May 2014: Police and Sheriff's Patrol Officers*, Bureau of Labor Statistics, http://www.bls.gov/oes/current/oes333051.htm (last updated Mar. 25, 2015).

5. Frank Morn, *The Eye That Never Sleeps: A History of the Pinkerton National Detective Agency* (1982).

6. Goss v. Lopez, 419 U.S. 565 (1975).

7. Nina Bernstein, "College Campuses Hold Court in Shadows of Mixed Loyalties," *New York Times*, May 5, 1996, at 1; Nina Bernstein, "Behind Some Fraternity Walls, Brothers in Crime," *New York Times*, May 6, 1996, at 1.

8. Richard Perez-Pena & Ian Lovett, "2 More Colleges Accused of Mishandling Assaults," *New York Times*, Apr. 18, 2013.

9. Jennifer Steinhauer & David S. Joachim, "55 Colleges Named in Federal Inquiry into Handling of Sexual Assault Cases," *New York Times*, May 1, 2014.

10. Leigh-Wai Doo, "Dispute Settlement in Chinese-American Communities," 21 *American Journal of Comparative Law* 627, 647–48 (1973).

11. Geoff Williams, "Should You Hire Your Own Private Judge?," *U.S. News & World Report* (July 18, 2013), http://money.usnews.com/money/personal-finance/articles/2013/07/18/should-you-hire-your-own-private-judge.

12. *About JAMS*, JAMS, http://www.jamsadr.com/aboutus_overview/ (last visited Feb. 21, 2016).

13. The term is from Robert Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," 88 *Yale Law Journal* 950 (1979).

14. Austin Sarat & William L. F. Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* 146 (1995).

15. Vice Commission of Chicago, *The Social Evil in Chicago* 329 (1911).

16. Richard Maxwell Brown, *Strain of Violence: Historical Studies of American Violence and Vigilantism* 95–133 (1974). On the vigilantes, see also Lawrence M. Friedman, *Crime and Punishment in American History* 186–87 (1993).

17. Odie B. Faulk, *Dodge City: The Most Western Town of All* 152 (1977).

18. Brown, *supra* note 16, at 129.

19. Peter Kerr, "Citizen Anti-Crack Drive: Vigilance or Vigilantism?," *New York Times*, May 23, 1988, at B1.

20. Charles M. Blow, "The Curious Case of Trayvon Martin," *New York Times*, Mar. 17, 2012, at A21.

21. Timothy Egan, "Wanted: Border Hoppers. And Some Excitement, Too," *New York Times*, Apr. 1, 2005.

22. Brown, *supra* note 16, at 150–51; Friedman, *supra* note 16, at 186–87.

23. John C. Schneider, *Detroit and the Problem of Order, 1830–1880*, at 26–27 (1980).

24. Joseph Berger, "Modesty in Ultra-Orthodox Brooklyn Is Enforced by Secret Squads," *New York Times*, Jan. 29, 2013.

25. Trymaine Lee, "Rumor to Fact in Tales of Post-Katrina Violence," *New York Times*, Aug. 26, 2010.

26. See George P. Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (1988).

27. Adam Nossiter, "Bronx Jury Orders Goetz to Pay Man He Paralyzed $43 Million," *New York Times*, Apr. 24, 1996, at A1.

28. See Pauline Maier, "Popular Uprisings and Civil Authority in Eighteenth-Century America," 27 *William and Mary Quarterly* 3 (1970).

29. See Allen G. Bogue, "The Iowa Claim Clubs: Symbol and Substance," 45 *Mississippi Valley Historical Review* 231 (1958).

30. Peter A. Munch, "Sociology of Tristan da Cunha," in 1 *Results of the Norwegian Scientific Expedition to Tristan da Cunha, 1937–1938*, at 305 (Erling Christophersen ed., 1946). Since then, of course, life on the island is much less isolated—and social life has changed accordingly. See Conrad Glass, *Rockhopper Copper* (2005), written by the "policeman and former Chief Islander" of Tristan da Cunha.

31. Quoted in Friedman, *supra* note 16, at 37.

32. On this theme in general, see Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture* (1990).

33. Breen v. Kahl, 419 F.2d 1034 (1969).

CHAPTER 3

1. On the history of American law, see, in general, Lawrence M. Friedman, *American Law in the 20th Century* (2002); Lawrence M. Friedman, *A History of American Law* (3d ed. 2005); Kermit L. Hall & Peter Karsten, *The Magic Mirror: Law in American History* (2d ed. 2008).

2. On the legal history of slavery, see the comprehensive study by Thomas D. Morris, *Southern Slavery and the Law, 1619–1860* (1996).

3. Douglas Greenberg, *Crime and Law Enforcement in the Colony of New York, 1691–1776*, at 43 (1976).

4. See Friedman, *A History of American Law, supra* note 1, at 41–46; on the system in general, see Richard B. Morris, *Government and Labor in Early America* (1946); on the fate of the indentured servitude system, see Robert J. Steinfeld, *The Invention of Free Labor* (1991).

5. Julius Goebel Jr., "King's Law and Local Custom in Seventeenth Century New England," 31 *Columbia Law Review* 416 (1931); see David Grayson Allen, *In English Ways* 208–10 (1981).

6. Richard B. Morris, *Studies in the History of American Law* 75–81 (2d ed. 1959).

7. See Herbert A. Johnson, *Imported Eighteenth-Century Law Treatises in American Libraries, 1700–1799* (1978).

8. See Benjamin H. Hibbard, *A History of the Public Land Policies* 1–14 (2d prtg. 1965).

9. George Dargo, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions* 156ff (1975).

10. Leon Litwack, *North of Slavery: The Negro in the Free States, 1790–1860*, at 3 (1961).

11. See Morris, *supra* note 4; on the criminal law of slavery, see Philip J. Schwarz, *Twice Condemned: Slaves and the Criminal Laws of Virginia, 1705–1865* (1988).

12. On auction sales, Thomas D. Russell, Sale Day in Antebellum South Carolina: Slavery, Law, Economy, and Court-Supervised Sales (1988) (Ph.D. dissertation, Stanford University).

13. Latimer v. Alexander, 14 Ga. 259 (1853).

14. See Jerome H. Skolnick, *House of Cards: The Legalization and Control of Casino Gambling* (1978).

15. On this point, see Lawrence M. Friedman, *The Human Rights Culture* 69–75 (2011); Lawrence M. Friedman, "Is There a Modern Legal Culture?," 7 *Ratio Juris* 117 (1994).

16. See Norma Basch, *In the Eyes of the Law: Women, Marriage and Property in Nineteenth-Century New York* (1982).

17. See Pete Daniel, *The Shadow of Slavery: Peonage in the South, 1901–1969* (1972).

18. See Stuart Banner, *How the Indians Lost Their Land* (2005).

19. Hibbard, *supra* note 8, at 102–03.

20. *Id.* at 118.

21. On the rise of divorce in the nineteenth century, and other aspects of family law, see Richard H. Chused, *Private Acts in Public Places: A Social History of Divorce in the Formative Era of American Family Law* (1994); Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (1985); Joanna L. Grossman & Lawrence M. Friedman, *Inside the Castle: Law and the Family in 20th Century America* 159–231 (2011).

22. J. Willard Hurst, *Law and Social Process in United States History* 69 (1960).

23. Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge, 11 Pet. 420 (1837).

24. The case is discussed in Stanley I. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (1971).

25. Oscar Handlin & Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774–1861*, at 62 (1969). An important study of regulation and government activity in the nineteenth century is William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (1996).

26. Stuart Bruchey, *The Roots of American Economic Growth, 1607–1861*, at 132 (1968).

27. See, for example, William E. Forbath, *Law and the Shaping of the American Labor Movement* (1991).

28. ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803. Some of the functions of the ICC were transferred to a Surface Transportation Board, within the Department of Transportation.

29. See, in general, Edwin B. Firmage & Richard C. Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints* (1988).

CHAPTER 4

1. Bill Heltzel, "Who Qualifies Is a Question of a Degree in Monroeville and Pitcairn," *Pittsburgh Post-Gazette*, May 12, 2005.

2. Maureen Mileski, "Courtroom Encounters: An Observation Study of a Lower Criminal Court," 5 *Law & Society Review* 473 (1971).

3. K. Babe Howell, "Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing," 33 *N.Y.U. Review of Law & Social Change* 271, 294–99 (2009).

4. Beatrice Moulton, "The Persecution and Intimidation of the Low-Income Litigants Performed by the Small Claims Court in California," 21 *Stanford Law Review* 1657, 1662 (1969).

5. Peter A. Holland, "The One Hundred Billion Dollar Problem in Small Claims Court: Robo-Signing and Lack of Proof in Debt Buyer Cases," 6 *Journal of Business and Technology Law* 259 (2011).

6. Beth Healy, "Dignity Faces a Steamroller: Small-Claims Proceedings Ignore Rights, Tilt to Collectors," *The Boston Globe*, July 31, 2006.

7. U.S. Government Accountability Office, GAO-09-748, Credit Cards: Fair Debt Collection Practices Could Better Reflect the Evolving Debt Collection Marketplace and Use of Technology 41 (2009).

8. See Roselle L. Wissler, "Mediation and Adjudication in Small Claims Court: The Effects of Process and Case Characteristics," 29 *Law & Society Review* 323 (1995).

9. John A. Goerdt, "The People's Court: A Summary of Findings and Policy Implications from a Study in 12 Urban Small Claims Courts," 17 *State Court Journal* 38 (1993); see also Susan E. Elwell & Christopher D. Carlson, "The Iowa Small Claims Court: An Empirical Analysis," 75 *Iowa Law Review* 433 (1990).

10. Judicial Council of California, 2014 Court Statistics Report: Statewide Caseload Trends, 2003–2004 through 2012–2013, xv–xvii, http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf.

11. Ron Malega & Thomas H. Cohen, Bureau of Justice Statistics, "Special Report: State Court Organization, 2011" 3 (2013), http://www.bjs.gov/content/pub/pdf/sco11.pdf.

12. Cal. Const. art. VI, § 11.

13. See John A. Stookey, "Creating an Intermediate Court of Appeals: Workload and Policymaking Consequences," in *The Analysis of Judicial Reform* 153 (Philip L. Dubos ed., 1982).

14. Administrative Office of the Illinois Courts, *1978 Annual Report of the Illinois Courts* 104, 106.

15. See "Appellate—Grand Total Court Caseloads" and "Appellate—Opinions Reported," in "State Court Caseload Tables, 2010, State Court Caseload Statistics," *Court Statistics Project*, http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx (last visited June 2015).

16. There are also "senior judges," who have retired and taken "senior status" but may continue to be more or less on active duty, taking cases if they wish to do so.

17. The 2013 statistics are taken from U.S. Supreme Court, 2014 Year-End Report on the Federal Judiciary 13–14, http://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf. The statistics from 1880 and 1974 are from Gerhard Casper & Richard A. Posner, *The Workload of the Supreme Court* 3, 59 (1976).

18. U.S. Const., art. III, § 2, cl. 2.

19. Arizona v. California, 373 U.S. 546 (1963).

20. Neb. Rev. Stat. § 24-204.

21. "Council of Probate Court Judges of Georgia," *Judicial Council of Georgia, Administrative Office of the Courts*, https://www.gaprobate.org (last visited Mar. 12, 2016).

22. West Huddleston & Douglas B. Marlowe, National Drug Court Institute, "Painting the Current Picture: A National Report on Drug Courts and Other Problem-Solving Court Programs in the United States" 6, 21, (2011), http://www.ndci.org/sites/default/files/nadcp/PCP%20Report%20FINAL.PDF.

23. On state court organization, see Malega & Cohen, *supra* note 11, which is the source of much of the material in the text. The National Center for State Courts also provides a number of resources on their website, http://www.ncsc.org/.

24. John Henry Merryman & Rogelio Perez-Perdomo, *The Civil Law Tradition* 104 (3d ed. 2007).

25. Sheldon Goldman, "Judicial Appointments to the United States Courts of Appeals," 1967 *Wisconsin Law Review* 186.

26. A. G. Sulzberger, "In Iowa, Voters Oust Judges over Marriage Issue," *New York Times*, Nov. 3, 2010.

27. A. G. Sulzberger, "Ouster of Iowa Judges Sends Signal to the Bench," *New York Times*, Nov. 4, 2010.

28. Lawrence M. Friedman, "Benchmarks: Judges on Trial, Judicial Selection and Election," 58 *DePaul Law Review* 451 (2009).

29. James Sample et al., *The New Politics of Judicial Elections, 2000–2009: Decade of Change* (Charles Hall ed., 2010).

30. E. Sebastian Arduengo, "WSJ Editorial Board Wrong, Again, on Judicial Selection," ACSblog, Apr. 5, 2013, http://www.acslaw.org/acsblog/wsj-editorial-board-wrong-again-on-judicial-selection.

31. Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

32. *Id*. at 884.

33. U.S. Const., art. III, § 2, cl. 2.

34. Harry Kalven Jr. & Hans Zeisel, *The American Jury* (1966).

35. Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 265 (1994).

36. See Theodore F. T. Plucknett, *A Concise History of the Common Law* 673–707 (5th ed. 1956).

37. "Court Filings Decrease in Fiscal Year 2012–13," *California Courts: The Judicial Branch of California*, http://www.courts.ca.gov/26853.htm (last visited Mar. 12, 2016).

38. Joe Forward, "The Disappearing Jury Trial: Implications for the Justice System and Lawyers," *InsideTrack* (March 19, 2014).

39. "Federal Judicial Caseload Statistics 2014," *United States Courts*, http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2014 (last visited Mar. 13, 2016); "Table C-4—U.S. District Courts—Civil Federal Judicial Caseload Statistics (March 31, 2014)," *United States Courts*, http://www.uscourts.gov/statistics/table/c-4/federal-judicial-caseload-statistics/2014/03/31 (last visited Mar. 13, 2016).

40. Richard E. Miller & Austin Sarat, "Grievances, Claims, and Disputes: Assessing the Adversary Culture," 15 *Law & Society Review* 525, 544 (1981).

41. See H. Laurence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment* (2d ed. 1980), for a general description of the process in automobile-accident cases.

42. Robert H. Mnookin & Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," 88 *Yale Law Journal* 950 (1979).

43. Judicial Council of California, *supra* note 10, at 71–72, 75, 79–80, 82, 138; R. LaFountain et al., *Examining the Work of State Courts: An Overview of 2012 State Trial Court Caseloads* 3, 8 (National Center for State Courts 2014).

44. LaFountain, *supra* note 43, at 8.

45. Wayne McIntosh, *The Appeal of Civil Law: A Political-Economic Analysis of Litigation* 124 (1990).

46. Brian J. Ostrom & Neal B. Kauder, *Examining the Work of State Courts, 1994: A National Perspective from the Court Statistics Project* 28 (1995).

47. Packing Company Cases, 105 U.S. 566 (1881).

48. Robert A. Kagan et al., "The Business of State Supreme Courts, 1870–1970," 30 *Stanford Law Review* 121 (1977).

49. Herbert M. Kritzer et al., "The Business of State Supreme Courts, Revisited," 4 *Journal of Empirical Legal Studies* 427, 429, 432 (2007).

50. See Lawrence M. Friedman, *Total Justice* (1985).

51. On jury research, see Rita J. Simon, *The Jury: Its Role in American Society* (1980); Valerie P. Hans & Neil Vidmar, *Judging the Jury* (1986); Abramson, *supra* note 35.

52. Kalven & Zeisel, *supra* note 34, at 286–97; Lawrence M. Friedman & William E. Havemann, "The Rise and Fall of the Unwritten Law: Sex, Patriarchy, and Vigilante Justice in the American Courts," 61 *Buffalo Law Review* 997 (2013).

53. Abramson, *supra* note 35, at 58–59.

54. Theodore Eisenberg & Geoffrey P. Miller, "Reversal, Dissent, and Variability in State Supreme Courts: The Centrality of Jurisdictional Source," 89 *Boston University Law Review* 1451, 1469 (2009).

55. Edward C. Voss, ' "Dissent: Sign of a Healthy Court,'" 24 *Arizona State Law Journal* 643, 679–80 (1992).

56. Lawrence M. Friedman et al., "State Supreme Courts: A Century of Style and Citation," 33 *Stanford Law Review* 773, 785–92 (1981).

57. Elliot E. Slotnick, "Media Coverage of Supreme Court Decision Making: Problems and Prospects," 75 *Judicature* 128 (1991).

58. Cass R. Sunstein et al., *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (2006).

59. Lee Epstein et al., *The Behavior of Federal Judges: A Theoretical and Empirical Study of Rational Choice* 8 (2013).

60. 531 U.S. 98 (2000).

61. See Christina L. Boyd et al., "Untangling the Causal Effects of Sex on Judging," 54 *American Journal of Political Science* 389, 389–411 (2010).

62. Adam N. Glynn & Maya Sen, "Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?," 59 *American Journal of Political Science* 37, 38 (2015).

63. See, for example, Pat K. Chew & Robert E. Kelley, "Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases," 86 *Washington University Law Review* 1117

(2009); Adam B. Cox & Thomas J. Miles, "Judging the Voting Rights Act," 108 *Columbia Law Review* 1 (2008).

64. John Hagan, "Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint," 8 *Law & Society Review* 357 (1974).

65. On the research in general, see Cassia C. Spohn, *How Do Judges Decide?: The Search for Fairness and Justice in Punishment* 106–110 (2002); Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America* 68–70 (1995).

66. Ilene H. Nagel, "The Legal/Extra-Legal Controversy: Judicial Decisions in Pretrial Release," 17 *Law & Society Review* 481 (1983).

67. See Walter F. Murphy, *Elements of Judicial Strategy* (1964).

68. Justice Stephen Breyer, joined by Justice Ruth Bader Ginsburg, openly questioned the constitutionality of the death penalty in a dissent from a 2015 case upholding the use of certain drugs in Oklahoma's lethal injection protocol. Glossip v. Gross, 125 S. Ct. 2726, 2776-77 (2015) (Breyer, J., joined by Ginsburg, J., dissenting).

69. Todd S. Purdum & Robin Toner, "Senators to Question 1st Supreme Court Nominee in 11 Years," *New York Times*, Sept. 13, 2005.

70. Henry R. Glick, *Supreme Courts in State Politics: An Investigation of the Judicial Role* (1971); see also James L. Gibson, "The Role Concept in Judicial Research," 3 *Law & Policy Quarterly* 291 (1981).

71. Brent E. Newton, "Law Review Scholarship in the Eyes of the Twenty-First-Century Supreme Court Justices: An Empirical Analysis," 4 *Drexel Law Review* 399, 404 (2012).

72. Adam Liptak, "The Lackluster Reviews That Lawyers Love to Hate," *New York Times*, Oct. 21, 2013.

73. 135 S. Ct. 2584 (2015).

CHAPTER 5

1. *Public Sector California* (Christie Glenny ed., 2013).

2. "Fingertip Facts on Education in California—*CalEdFacts*," *California Department of Education*, http://www.cde.ca.gov/ds/sd/cb/ceffingertipfacts.asp (last updated Sept. 21, 2015).

3. State of California Office of the State Controller, *Special Districts Annual Report* (62d ed. 2011–12), http://www.sco.ca.gov/Files-ARD-Local/LocRep/1112_special_districts.pdf.

4. 369 U.S. 186 (1962).

5. "Initiative, Referendum and Recall," *National Conference of State Legislatures* (Sept. 20, 2012), http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx.

6. For a general background on direct democracy, see David B. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (1984); Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (1999).

7. These criticisms are discussed extensively by both Magleby, *supra* note 6, and Cronin, *supra* note 6. For one of the more skeptical views of the modern initiative process, see David S. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* (2000).

8. Broder, *supra* note 7, at 45–52.

9. *Id.* at 52–89, 164–97.

10. Norimitsu Onishi, "California Ballot Initiatives, Born in Populism, Now Come from Billionaires," *New York Times*, Oct. 16, 2012.

11. These points are also discussed by Magleby, *supra* note 6, and Cronin, *supra* note 6. For a relatively recent defense of the initiative process, see John G. Matsusaka, *For the Many or the Few: The Initiative, Public Policy, and American Democracy* (2004).

12. Cal. Const. art. XXI.

13. U.S. Const., art. V (providing that "no State, without its consent, shall be deprived of its equal suffrage in the Senate").

14. James Bryce, *The American Commonwealth* 190 (2d ed., vol. 1 1891).

15. "The State Legislature," *California State Legislature*, http://www.legislature.ca.gov/the_state_legislature.html (last visited Mar. 22, 2016).

16. On this development, see Lawrence M. Friedman & Jack Ladinsky, "Social Change and the Law of Industrial Accidents," 67 *Columbia Law Review* 50 (1967).

17. Quoted in Charles M. Cook, *The American Codification Movement: A Study of Antebellum Legal Reform* 75 (1981).

18. Priv. L. No. 109-1, 120 Stat. 3705 (2006).

19. Priv. L. No. 112-1 (2012).

20. 1849-50 Ala. Laws 335.

21. 1849-50 Ala. Laws 392.

22. Ill. Const. of 1870, art. IV, § 22.

23. 26 U.S.C.A. § 170(d)(2)(A) (2015).

24. See, for example, on the allocation of radio channels, 47 U.S.C.A. § 303 (2010).

25. For the background of the Sherman Act, see William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965).

26. Ohio Rev. Code Ann. § 3715.59 (West 2001).

27. 427 U.S. 273 (1976).

28. 443 U.S. 193 (1979).

29. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 222–23 (1995).

30. Fisher v. University of Texas, 136 S. Ct. 2198 (2016); Fisher v. University of Texas at Austin, 133 S. Ct. 2411 (2013); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

31. McBoyle v. United States, 283 U.S. 25 (1931).

32. 18 U.S.C.A. § 2312 (2006).

33. Ohio Rev. Code § 3763.01(A) (2003). "Betted" as the past tense of "bet" sounds strange to our ears, but apparently not to the people who drafted this statute.

34. Karl Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed," 3 *Vanderbilt Law Review* 395 (1950).

35. James J. Brudney & Lawrence Baum, "Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras," 55 *William & Mary Law Review* 483, 491 (2013).

36. Taniguchi v. Kan Pacific Saipan, Ltd., 132 S. Ct. 1997 (2012).

37. 481 U.S. 604 (1987).

38. *Id.* at 611.

39. Brudney & Baum, *supra* note 35, at 491, 494.

40. Nicholas S. Zeppos, "The Use of Authority in Statutory Interpretation: An Empirical Analysis," 70 *Texas Law Review* 1073, 1138–39 (1992).

41. Holger Fleischer, "Comparative Approaches to the Use of Legislative History in Statutory Interpretation," 60 *American Journal of Comparative Law* 401, 418–21, 430–31 (Spring 2012).

42. Quoted in Harry W. Jones, John M. Kernochan, & Arthur W. Murphy, *Legal Method: Cases and Text Materials* 432 (1980).

43. Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

44. Robert A. Dahl, *Pluralist Democracy in the United States: Conflict and Consent* 24 (1967).

45. Nicholas Confessore & Derek Willis, "2012 Election Ended with Deluge of Donations and Spending," *New York Times*, Dec. 7, 2012.

46. McCutcheon v. Federal Election Commission, 134 S. Ct. 1434 (2014) (striking down aggregate limits on the amount an individual may contribute to multiple candidates and parties combined); Citizens United v. Federal Election Commission, 558 U.S. 310 (2010) (striking down restrictions on political expenditures by corporations, unions, and other associations).

47. The lobbying and disclosure provisions are found in 2 U.S.C.A. § 1603 (2007) and 2 U.S.C.A. § 1605 (2008).

48. Lee Fang, "Where Have All the Lobbyists Gone?," *The Nation*, Feb. 19, 2014.

49. John A. Ferejohn, *Pork Barrel Politics: Rivers and Harbors Legislation, 1947–1968*, at 2 (1974).

50. See, in general, James Buchanan & Gordon Tullock, *The Calculus of Consent* (1962). This is largely a theoretical, model-building account; for empirical confirmation, see Thomas Stratmann, "The Effects of Logrolling on Congressional Voting," 82 *American Economic Review* 1162 (1992).

51. Pub. L. No. 111-148, 124 Stat. 119 (2010).

CHAPTER 6

1. Herbert Jacob, *Law and Politics in the United States* 259 (2d ed. 1995).

2. Eric Lipton, "With Obama, Regulations Are Back in Fashion," *New York Times*, May 12, 2010.

3. Clyde H. Farnsworth, "Washington Talk: The Bureaucracy; Promise of Deregulation Proved Tough to Keep," *New York Times*, Aug. 18, 1988.

4. Tenn. Code Ann., § 63-18-102 (3) (1995).

5. Listing of Color Additives Exempt from Certification; Spirulina Extract, 80 Fed. Reg. 50762 (Aug. 21, 2015).

6. Special Conditions: Bombardier Aerospace, Models BD-500-1A10 and BD-500-1A11 Series Airplanes; Installed Rechargeable Lithium Batteries and Battery Systems, 80 Fed. Reg. 52615 (Sept. 1, 2015).

7. Sheet Metal Workers International Association, Local 15, 356 N.L.R.B. 1290 (2011).

8. J. Willard Hurst, *Law and Markets in United States History: Different Modes of Bargaining Among Interests* 107 (1982).

9. Leonard D. White, *The Federalists: A Study in Administrative History* 177 (1948).

10. Quoted in Leonard D. White, *The Jacksonians: A Study in Administrative History, 1829–1861*, at 550 (1956).

11. 1822 Conn. Pub. Acts 3ff.

12. 1854 Conn. Pub. Acts 240.

13. Spencer L. Kimball, *Insurance and Public Policy* (1960).

14. 1866 Conn. Pub. Acts 182.

15. 1871-72 Ill. Laws 618, 635, 769.

16. 94 U.S. 113 (1876).

17. 24 Stat. 379 (1887).

18. 1851 N.J. Laws 37.

19. 1858 N.H. Laws Chap. 1777.

20. Gabriel Kolko, *Railroads and Regulation, 1877–1916* (1965).

21. Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877–1920*, at 121–62 (1982).

22. See, in general, Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900–1933* (1990).

23. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stats. 241, tit. VII, §§ 701, 705.

24. Michael Pertschuk, *Revolt Against Regulation: The Rise and Pause of the Consumer Movement* 5 (1982).

25. Eugene Bardach & Robert A. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* 11–12 (1982).

26. Texas Nat. Res. Code Ann. § 85.046(10) (West 1977).

27. David E. Sanger, "U.S. Maritime Agency Moves to Bar Most Japanese Cargo Ships from American Ports," *New York Times*, Oct. 17, 1997.

28. *Id.*

29. 49 U.S.C. § 106(e) (2015).

30. Cal. Bus. & Prof. Code § 3010.5 (West 2016). Members of the faculty of a school of optometry are also eligible, but no more than two of these can be on the board at the same time.

31. Marver H. Bernstein, *Regulating Business by Independent Commission* (1955).

32. David Serber, "Resolution or Rhetoric: Managing Complaints in the California Department of Insurance," in *No Access to Law: Alternatives to the American Judicial System* 317, 339 (Laura Nader ed., 1980).

33. Richard B. Stewart, "The Reformation of American Administrative Law," 88 *Harvard Law Review* 1669 (1975).

34. Sidney A. Shapiro, "Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government," 48 *Kansas Law Review* 689, 692–96 (2000).

35. Ronald Reagan, Inaugural Address (Jan. 20, 1981).

36. See Bardach & Kagan, *supra* note 25.

37. Shapiro, *supra* note 34, at 697–720.

38. Daniel A. Farber & Anne Joseph O'Connell, "The Lost World of Administrative Law," 92 *Texas Law Review* 1137, 1162–67 (2014).

39. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

40. See Farber & O'Connell, *supra* note 38.

41. 15 U.S.C.A. § 45.

42. "Safety Panel Eases Rules for Power Lawn Mowers," *New York Times*, Oct. 31, 1981, at 10.

43. The request was contained in the House of Representatives' Fiscal Year 2010 Appropriation Conference Committee report, H.R. Rep. No. 111-316 (2009) at 109, and in the House Appropriations Committee report on the same legislation, H.R. Rep. No. 111-180 (2009) at 99–100.

44. The notice to provide comments on the draft study appeared in the Federal Register, Notification of Teleconferences and a Public Meeting of the Science Advisory Board Hydraulic Fracturing Research Advisory Panel, 80 Fed. Reg. 32111 (June 5, 2015).

45. 92 Stat. 1101 (codified at 305 U.S.C. app. § 3 at lff).

46. Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477, 586 (2010) (Breyer, J., dissenting).

47. Jeffrey S. Lubbers, "APA-Adjudication: Is the Quest for Uniformity Faltering?" 10 *Administrative Law Journal of American University* 65 (1996).

48. 38 U.S.C.A. § 211(a) (1964).

49. On the development of rules of standing, see Stewart, *supra* note 33, at 1723–47 (1978).

50. North Shore Gas Co. v. EPA, 930 F.2d 1239, 1242-3 (7th Cir. 1991).

51. 295 U.S. 495 (1935).

52. William H. Allen, quoted in Walter Gellhorn, Peter L. Strauss, & Clark M. Byse, *Administrative Law: Cases and Comments* 343 (7th ed. 1979).

53. 467 U.S. 837 (1984).

54. Peter H. Schuck & E. Donald Elliott, "To the *Chevron* Station: An Empirical Study of Federal Administrative Law," 1990 *Duke Law Journal* 984.

55. See Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

CHAPTER 7

1. Malcolm Feeley & Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (2008).

2. Leonard D. White, *The Federalists: A Study in Administrative History* 123 (1948).

3. James S. Young, *The Washington Community, 1800–1828*, at 28, 31 (1966).

4. Mary K. Bonsteel Tachau, *Federal Courts in the Early Republic: Kentucky, 1789–1816* (1978).

5. Thomas W. Church Jr. et al., *Justice Delayed: The Pace of Litigation in Urban Trial Courts* (National Center for State Courts, 1978).

6. *Id*. at 83.

7. See Jack W. Peltason, *Fifty-eight Lonely Men: Southern Federal Judges and School Desegregation* (1961); see also Michal R. Belknap, *Federal Law and Southern Order: Racial Violence and Constitutional Conflict in the Post-*Brown *South* (1987).

8. Edwards v. California, 314 U.S. 160 (1941).

9. U.S. Const., art. IV, § 2.

10. *Id*.

11. See Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (1981).

12. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

13. United States v. Windsor, 133 S. Ct. 2675 (2013).

14. 135 S. Ct. 2584 (2015).

15. Paul v. Virginia, 75 U.S. 168 (1868).

16. See, in general, Gilman M. Ostrander, *Nevada: The Great Rotten Borough, 1859–1964* (1966).

17. Lawrence M. Friedman, *A History of America Law* 380–81 (3d ed. 2005); Glenda Riley, *Divorce: An American Tradition* 62–67 (1991).

18. Adam Nagourney, "Crowds Return to Las Vegas, but Gamble Less," *New York Times*, July 31, 2013.

19. Alan Peters & Peter Fisher, "The Failures of Economic Development Incentives," 70 *Journal of the American Planning Association* 27, 32 (2004).

20. Louise Story, "United States of Subsidies: As Companies Seek Tax Deals, Governments Pay High Price," *New York Times*, Dec. 1, 2012.

21. "Directory of State Laws," *American Pyrotechnics Association*, http://www.americanpyro.com/state-law-directory (last visited Apr. 3, 2016).

22. Stacy Cowley, "Fireworks Prohibitions Ease in Many States," *New York Times*, June 26, 2015.

23. *Id.*

24. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 27 ff (rev. ed. 2009).

25. "Rural Opportunity Zones," *Kansas Department of Commerce*, http://www.kansascommerce.com/index.aspx?nid=320.

26. N.Y. Dom. Rel. Law § 170.7 (2010).

27. 247 U.S. 251 (1918).

28. 156 U.S. 1 (1895).

29. The Civil Rights Cases, 109 U.S. 3 (1883).

30. 379 U.S. 294 (1964).

31. The case was United States v. Lopez, 514 U.S. 549 (1995).

32. United States v. Morrison, 529 U.S. 598, 613 (2000).

33. Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

34. Dean Milk Co. v. Madison, 340 U.S. 349 (1951).

35. Wyoming v. Oklahoma, 502 U.S. 437 (1992).

36. Philadelphia v. New Jersey, 437 U.S. 617 (1978).

37. Maine v. Taylor, 477 U.S. 131 (1986).

38. Baldwin v. Fish & Game Commission of Montana, 436 U.S. 371, 390 (1978).

39. 64 Stat. 1100 (1950).

40. Pub. L. 89-10, 79 Stat. 27 (1965).

41. 20 U.S.C.A. § 6301 et seq.

42. Pub. L. No. 114-95, 129 Stat. 1802 (2015).

43. On the development of the federal role in crime control, see Lawrence M. Friedman, *Crime and Punishment in American History* ch. 12 (1993).

44. Pub. L. 90-351, 82 Stat. 197 (1968).

45. City of Boerne v. Flores, 521 U.S. 507 (1997).

46. Kimel v. Florida Board of Regents, 528 U.S. 62 (2000).

47. Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001).

48. John F. Manning, "Federalism and the Generality Problem in Constitutional Interpretation," 122 *Harvard Law Review* 2003, 2020–38 (2009).

49. New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997).

50. Alden v. Maine, 527 U.S. 706 (1999).

51. Richard H. Fallon Jr., "The 'Conservative' Paths of the Rehnquist Court's Federalism Decisions," 69 *University of Chicago Law Review* 429, 430 (2002). The initial decision, National League of Cities v. Usery, 426 U.S. 833 (1976), invalidated some provisions of the Fair Labor Standards Act as applied to state and local governments. Less than a decade later, it was reversed by Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).

52. Shelby County v. Holder, 133 S. Ct. 2612 (2013).

CHAPTER 8

1. See Craft v. Elder & Johnston Co., 38 N.E.2d 416 (1941).

2. Richard A. Lord, *Williston on Contracts* (4th ed. 2016).

3. Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study," 28 *American Sociological Review* 55 (1963). See Mark H. Van Pelt, "Law, Private Governance and Continuing Relationships," 1985 *Wisconsin Law Review* 461, assessing the Macaulay thesis some twenty or so years later.

4. Farwell v. Boston & Worcester R.R. Corp., 45 Mass. 49 (1842).

5. See Lawrence M. Friedman & Jack Ladinsky, "Social Change and the Law of Industrial Accidents," 67 *Columbia Law Review* 50 (1967).

6. For a study of personal-injury law in the courts, see Randolph E. Bergstrom, *Courting Danger: Injury and Law in New York City, 1870–1910* (1992); John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (2004).

7. Mark A. Peterson & George L. Priest, *The Civil Jury: Trends in Trials and Verdicts, Cook County, Illinois, 1960–1979*, at 13 (1982).

8. Lynn Langton & Thomas H. Cohen, "Civil Bench and Jury Trials in State Courts, 2005," Bureau of Justice Statistics Special Report (Oct. 2008), http://www.bjs.gov/content/pub/pdf/cbjtsc05.pdf.

9. Neil Vidmar, *Medical Malpractice and the American Jury* 25 (1995).

10. Langton & Cohen, *supra* note 8.

11. Cynthia G. Lee & Robert C. LaFountain, Medical Malpractice Litigation in State Courts, Court Statistics Project 1 (vol. 18 2011), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/Highlights/18_1_Medical_Malpractice_In_State_Courts.ashx.

12. Under Article VII of this constitution, men could vote for representatives if they possessed a freehold of the value of £20.

13. Stuart Banner, *Who Owns the Sky? The Struggle to Control Airspace from the Wright Brothers On* (2008).

14. See, in general, Lawrence M. Friedman, *Dead Hands: A Social History of Wills, Trusts, and Inheritance Law* (2009).

15. Marvin B. Sussman, Judith N. Cates, & David T. Smith, *The Family and Inheritance* 63 (1970).

16. Ashlea Ebeling, "Americans Lack Basic Estate Plans," *Forbes.com* (Mar. 1, 2010), http://www.forbes.com/2010/03/01/estate-tax-living-will-schiavo-personal-finance-no-estate-plans.html.

17. See Richard H. Chused, *Private Acts in Public Places: A Social History of Divorce in the Formative Era of American Family Law* (1994).

18. On the history of divorce, see, generally, Glenda Riley, *Divorce: An American Tradition* (1991).

19. Citizens United v. Federal Election Commission, 558 U.S. 310 (2010); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

CHAPTER 9

1. A few types of murder are, however, federal crimes—the trial of a man who took part in the bombing of the Boston Marathon took place in a federal court, where he was charged with

and found guilty of a number of federal crimes, including use of a weapon of mass destruction, a crime under 18 U.S.C. § 2332a.

2. Ga. Code Ann. § 16-11-61 (2010).

3. Ga. Code Ann. § 16-6-7 (2010).

4. N.Y. Penal Code § 10.00(5) (2016).

5. E. Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* 28 (1954).

6. Eric H. Monkkonen, "A Disorderly People? Urban Order in the Nineteenth and Twentieth Centuries," 68 *Journal of American History* 539 (1981).

7. 20 R.I. Gen. Laws Ann. § 20-7-10 (West 1956).

8. Jennifer Sullivan, "Enumclaw-Area Animal-Sex Case Investigated," *Seattle Times*, July 15, 2005.

9. Wash. Rev. Code § 16.52.205 (2015). Two years later, a movie was released about the incident. Dennis Lim, "Film; A Lyrical Approach to a Subject That Shocks," *New York Times*, Apr. 1, 2007.

10. Fla. Stat. Ann. § 379.2431 (West 2013). This statute also protects porpoises; another section requires any person "engaged in gathering sponges by use of a hook" to use "a hook 5 inches wide": "[N]o hook of other dimensions may be used." Fla. Stat. Ann. § 379.248 (West 2008).

11. "Uniform Crime Reports, 2014 Crime in the United States, Table 29," *Federal Bureau of Investigation*, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-29. Some numbers are rounded in the text.

12. Jennifer L. Truman & Lynn Langton, Bureau of Justice Statistics, *Criminal Victimization, 2014* 7, Table 6 (2015), http://www.bjs.gov/content/pub/pdf/cv14.pdf.

13. Strategic Services Division of the Portland Police Bureau, *Portland Police Bureau Annual Report 2014*, at 27, http://www.portlandoregon.gov/police/article/548323.

14. See, in general, Lawrence M. Friedman, *Crime and Punishment in American History* (1993).

15. Essex Institute, *Records and Files of the Quarterly Court of Essex County, Massachusetts* 380 (George Francis Dow ed., vol. I, 1636–56 1911).

16. Mark T. Connelly, *The Response to Prostitution in the Progressive Era* 3 (1980).

17. 1907 Ark. Acts 380.

18. 36 Stat. 825 (1910). A fine study of the origins of the Mann Act and its subsequent history is David J. Langum, *Crossing Over the Line: Legislating Morality and the Mann Act* (1994).

19. 38 Stat. 785 (1914).

20. On the upsurge of interest in victimless crime, see Friedman, *supra* note 14, at chs. 6, 15.

21. "How Criminal Cases Work," *California Courts, The Judicial Branch of California*, http://www.courts.ca.gov/1069.htm (last visited Apr. 21, 2016).

22. Vera Institute of Justice, *Felony Arrests* 3 (rev. ed. 1981).

23. University at Albany, State University of New York, Hindelang Criminal Justice Research Center, "Characteristics and Distribution of Persons Arrested," *Sourcebook of Criminal Justice Statistics*, Tables 4.19.2011 and 4.20.2011, http://www.albany.edu/sourcebook/tost_4.html#4_q.

24. Tex. Code Crim. Proc. Ann. art. 19.06 (West 2015).

25. Cal. Const. art. I, § 28(d). The U.S. Constitution, though, may mandate the exclusion of relevant evidence that violates the federal constitutional rights of the accused. Thus, in practice,

California's victim's bill of rights ensures only that the state's rules concerning the exclusion of evidence are no more strict than those demanded by federal law.

26. Brian A. Reaves, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2009—Statistical Tables*, 24, Table 21 (2013), http://www.bjs.gov/content/pub/pdf/fdluc09.pdf.

27. "State Court Organization," *National Center for State Courts*, Tables 51a (Felony Juries) and 51b (Misdemeanor Juries), http://www.ncsc.org/microsites/sco/home (last visited Apr. 22, 2016).

28. Minn. Rules Crim. Proc., R. 26.02(6).

29. See Batson v. Kentucky, 476 U.S. 79 (1986) (race), and J.E.B. v. Alabama, 511 U.S. 127 (1994) (sex). The Minnesota criminal-procedure rules just quoted also provide that "[n]o party may purposefully discriminate on the basis of race or gender in the exercise of peremptory challenges." Minn. Rules Crim. Proc., R. 26.02(7)(1).

30. See Laurence J. Severance & Elizabeth F. Loftus, "Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions," 17 *Law & Society Review* 153 (1982).

31. See "State Court Organization," *supra* note 27.

32. La. Const. art. I, §17(A) (1974).

33. Or. Rev. Stat. §136.450.

34. Harry Kalven Jr. & Hans Zeisel, *The American Jury* 56 (1966).

35. Mark Motivans, Bureau of Justice Statistics, *Federal Justice Statistics, 2012 - Statistical Tables* Table 4.2, 17 (2015), http://www.bjs.gov/content/pub/pdf/fjs12st.pdf.

36. Judicial Council of California, *2015 Court Statistics Report: Statewide Caseload Trends 2004–2005 through 2013–2014*, at 47, http://www.courts.ca.gov/documents/2015-Court-Statistics-Report.pdf.

37. Theodore Eisenberg et al., "Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's *The American Jury*," 2 *Journal of Empirical Legal Studies* 171, 180–83 (2005).

38. Rita J. Simon, *The Jury: Its Role in American Society* 70 (1980); Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 202–205 (1994).

39. University at Albany, State University of New York, Hindelang Criminal Justice Research Center, "Judicial Processing of Defendants," *Sourcebook of Criminal Justice Statistics*, Table 5.46.2006, http://www.albany.edu/sourcebook/tost_5.html#5_0.

40. See Motivans, *supra* note 35, at 17, Table 4.2.

41. Lawrence M. Friedman, *The Big Trial: Law as Public Spectacle* (2015).

42. Michael O. Finkelstein, "A Statistical Study of Guilty Plea Practices in the Federal Courts," 89 *Harvard Law Review* 293 (1975).

43. Herbert Jacob, *Urban Justice: Law and Order in American Cities* 103 (1973).

44. See Anne M. Heinz & Wayne A. Kerstetter, "Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining," 13 *Law & Society Review* 349 (1979).

45. Cal. Penal Code § 1170.12(e). Sec. 1192.7 (a) of the code prohibits plea bargaining in any "serious felony," or one in which the defendant used a gun, or in drug or drunk-driving cases, unless "there is insufficient evidence to prove the people's case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence."

46. Milton Heumann & Colin Loftin, "Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute," 13 *Law & Society Review* 392, 424–26 (1979).

47. Teresa W. Cams & John A. Kruse, "Alaska's Ban on Plea Bargaining Reevaluated," 75 *Judicature* 310 (1992).

48. See, for example, Stephanos Bibas, "Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection," 99 *California Law Review* 1117, 1151–60 (2011).

49. John H. Langbein, "The Criminal Trial Before the Lawyers," 45 *University of Chicago Law Review* 263 (1978); Lawrence M. Friedman & Robert V. Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870–1910*, at 194 (1981).

50. Friedman & Percival, *supra* note 49, at 176–78; on the history of plea bargaining, see George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (2003).

51. Raymond Moley, *Politics and Criminal Prosecution* 159–64 (1930).

52. Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," 1 *Journal of Empirical Legal Studies* 459 (2004).

53. Wilbur R. Miller, *Cops and Bobbies: Police Authority in New York and London, 1830–1870*, at 16 (1977).

54. See Robert M. Fogelson, *Big City Police* (1977).

55. See University at Albany, *supra* note 23, at Table 5.47.2006.

56. See David J. Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (1971); Adam J. Hirsch, *The Rise of the Penitentiary: Prisons and Punishment in Early America* (1992).

57. Quoted in Lawrence M. Friedman, "History, Social Policy, and Criminal Justice," in *Social History and Social Policy* 203, 209 (David J. Rothman & Stanton Wheeler eds., 1981).

58. *Id.* at 207.

59. Pub. L. No. 98-473, 98 Stat. 1987 (1984).

60. See Friedman, *supra* note 14, at 412.

61. The Supreme Court decided in United States v. Booker, 543 U.S. 220 (2005), that the mandatory nature of the sentencing guidelines violated the Sixth Amendment right to a jury trial.

62. See Spiros A. Tsimbinos, "Is It Time to Change the Rockefeller Drug Laws?" 13 *St. John's Journal of Legal Commentary* 613 (1999), for a brief history of the drug laws.

63. Pub. L. No. 99-570, 100 Stat. 3207 (1986).

64. Adam Liptak, "Inmate Count in U.S. Dwarfs Other Nations'," *New York Times*, Apr. 23, 2008.

65. Lauren E. Glaze & Danielle Kaeble, Bureau of Justice Statistics, *Correctional Populations in the United States, 2013*, at 4 Table 2 (2014), http://www.bjs.gov/content/pub/pdf/cpus13.pdf.

66. Timothy Williams, "Police Leaders Join Call to Cut Prison Rosters," *New York Times*, Oct. 20, 2015.

67. Rockefeller Drug Law Reform Act of 2009, L 2009, ch. 56.

68. Substance Abuse and Crime Prevention Act of 2000, Proposition 36.

69. Three Strikes Reform Act of 2012, Proposition 36.

70. "A Voice for the Forsaken," *The Economist*, June 11, 2009.

71. Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

72. Figures for 2014 from Federal Bureau of Investigation, "2014 Crime in the United States," *Uniform Crime Reports*, table 1, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1; figures for earlier years from Federal Bureau of Investigation, "Crime—National or State Level," *Uniform Crime Reporting Statistics*, http://www.ucrdatatool.gov/Search/Crime/State/StatebyState.cfm.

73. Figures for 2014 from Federal Bureau of Investigation, "2014 Crime in the United States," table 8, *Uniform Crime Reports*, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-8/table-8-by-state/Table_8; figures for earlier years from Federal Bureau of Investigation, "Crime—Large Local Agencies," *Uniform Crime Reporting Statistics*, http://www.ucrdatatool.gov/Search/Crime/Local/JurisbyJurisStepTwoLarge.cfm.

74. Franklin E. Zimring, *The City That Became Safe* 217 (2012).

75. Oliver Roeder et al., *What Caused the Crime Decline?* 15–41 (Brennan Center for Justice, 2015); Franklin E. Zimring, *The Great American Crime Decline* 46–56 (2007).

76. Zimring, *supra* note 74.

77. See, for example, Alfred Blumstein & Richard Rosenfeld, "Factors Contributing to U.S. Crime Trends," in *Understanding Crime Trends: Workshop Report* 14–18 (2008); Zimring, *supra* note 74, at 56–63. Roeder et al., *supra* note 75, at 56–58, summarizes much of the research on the issue.

78. John J. Donohue III & Steven D. Levitt, "The Impact of Legalized Abortion on Crime," 116 *The Quarterly Journal of Economics* 379 (2001).

79. Jessica Wolpaw Reyes, "Lead Exposure and Behavior Effects on Antisocial and Risky Behavior Among Children and Adolescents," 53 *Economic Inquiry* 1580 (2015); Jessica Wolpaw Reyes, "Environmental Policy as Social Policy? The Impact of Childhood Lead Exposure on Crime," 7 *The B. E. Journal of Economic Analysis & Policy* 1 (2007).

80. Alfred Blumstein et al., *Research on Sentencing: The Search for Reform* 88ff (vol. 1 1983).

81. United States Sentencing Commission, *Report to Congress, Cocaine and Federal Sentencing Policy* 15–16 (2007); United States Sentencing Commission, *2014 Sourcebook of Federal Sentencing Statistics*, table 34, http://www.ussc.gov/research-and-publications/annual-reports-sourcebooks/2014/sourcebook-2014.

82. *Report to Congress, Cocaine and Federal Sentencing Policy, supra* note 81, at 12–14.

83. E. Ann Carson, Bureau of Justice Statistics, *Prisoners in 2014*, at 15 (2015), http://www.bjs.gov/content/pub/pdf/p14.pdf.

84. Rhonda Cook, "Young, Black and Not Free," *Atlanta Journal*, Dec. 31, 1995, at E8.

85. Michelle Alexander, *The New Jim Crow* 6–7 (rev. ed. 2012).

86. *Id.* at 1–2.

87. See Austin Turk, *Criminality and Legal Order* 165 (1969).

88. Carson, *supra* note 83, at 4.

89. Friedman, *supra* note 14, at 429–34.

90. Lynn Langton & Matthew Durose, Bureau of Justice Statistics, *Police Behavior during Traffic and Street Stops, 2011*, at 3, 9 (2013), http://www.bjs.gov/content/pub/pdf/pbtss11.pdf.

91. Floyd v. City of New York, 959 F. Supp. 2d. 540, 573–574 (2013).

92. See Alexander, *supra* note 85, at 97–139.

93. *Los Angeles Times*, Apr. 30, 1992, at A1; *Los Angeles Times*, May 1, 1992, at A1.

94. J. David Goodman & Al Baker, "Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case," *New York Times*, Dec. 3, 2014.

95. "Officer Darren Wilson Shoots Michael Brown," *St. Louis Post-Dispatch*, Aug. 9, 2014; "Day Four Wrapup: Protesters, Police Again Facing Off in Ferguson," *St. Louis Post-Dispatch*, Aug. 13, 2014; Steve Giegerich, "Ferguson Continues to Reel from Michael Brown Shooting," *St. Louis Post-Dispatch*, Sept. 27, 2014.

96. Joseph P. Williams, "What Does the Black Lives Matter Movement Really Want?," *U.S. News & World Report*, Aug. 24, 2015.

97. See, in general, Jerome H. Skolnick & James J. Fyfe, *Above the Law: Police and the Excessive Use of Force* (1993).

98. 384 U.S. 436 (1966).

99. See David Simon, *Homicide: A Year on the Killing Streets* 193–207 (1991).

100. 372 U.S. 335 (1963).

101. John Kaplan & Jerome H. Skolnick, *Criminal Justice: Introductory Cases and Materials* 351–58 (1982).

102. See John S. Goldkamp, "Danger and Detention: A Second Generation of Bail Reform," 76 *Journal of Criminal Law and Criminology* 1 (1985).

103. Shima Baradaran, "The State of Pretrial Detention," in *The State of Criminal Justice 2011*, at 187, 190 (Myrna S. Raeder ed., 2011).

104. American Bar Association, Criminal Justice Section, *State Policy Implementation Project*, 2, http://www.americanbar.org/content/dam/aba/administrative/criminal_justice/spip_pretrialrelease.authcheckdam.pdf.

105. See Ronald Berkman, *Opening the Gates: The Rise of the Prisoners' Movement* (1979); Friedman, *supra* note 14, at 310–14.

106. Title VIII of Pub. L. 104–134, 110 Stat. 1321-66 (Apr. 26, 1996).

107. United States Courts, "Federal Judicial Caseload Statistics 2014," Table C-2, 3, http://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2014/03/31.

108. Malcolm Feeley, *Court Reform on Trial: Why Simple Solutions Fail* 131 (2013).

109. *Id.* at 81.

110. See Tsimbinos, *supra* note 62, at 624–27; Rockefeller Drug Law Reform Act of 2009, L 2009, ch. 56.

111. See *New York Times*, Sept. 10, 1996, at Al, A15.

112. See H. Laurence Ross, *Deterring the Drinking Driver: Legal Policy and Social Control* (3d ed. 1984), for American and foreign examples; H. Laurence Ross, "The Philadelphia Story: The Effects of Severe Punishment for Drunk Driving," 12 *Law & Policy* 51 (1990).

113. Friedman & Percival, *supra* note 49, at 325.

CHAPTER 10

1. 249 U.S. 45 (1919).

2. 5 U.S. (1 Cranch) 137 (1803).

3. Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Senate Committee on the Judiciary, 109th Cong. 55 (2005).

4. 118 U.S. 356 (1886).

5. 372 U.S. 335 (1963).

6. 337 U.S. 1 (1949).

7. Laurence H. Tribe, *American Constitutional Law* 14–15 (2d ed. 1988).

8. Korematsu v. United States, 323 U.S. 214 (1944).

9. 531 U.S. 98 (2000).

10. Nathaniel Persily, "The Legacy of *Bush v. Gore* in Public Opinion and American Law," 23 *St. Thomas Law Review* 325 (2011).

11. Fletcher M. Green, *Constitutional Development in the South Atlantic States, 1776–1860*, at 285–86 (1966).

12. See, for example, Ind. Const. art. IV, § 21 (1851).

13. Lawrence M. Friedman, *A History of American Law* 267-68 (3d ed. 2005).

14. Cal. Const. art. 2, § 8.

15. Cal. Const. art. 13A, approved by the voters June 6, 1978.

16. 5 U.S. (1 Cranch) 137 (1803).

17. 60 U.S. 393 (1857).

18. A masterful and exhaustive treatment of the case is Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (1978).

19. 10 U.S. (6 Cranch) 87 (1810).

20. 17 U.S. (4 Wheat.) 518 (1819).

21. Charles Fairman, *Mr. Justice Miller and the Supreme Court, 1862–1890*, at 62 (1939).

22. 198 U.S. 45 (1905).

23. Howard Gillman, *The Constitution Besieged: The Rise and Demise of* Lochner *Era Police Powers Jurisprudence* 4 (1993).

24. William Finley Swindler, *Court and Constitution in the 20th Century: The Old Legality, 1889–1932*, at 344–45 (1969).

25. 295 U.S. 495 (1935).

26. See William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (1995).

27. 348 U.S. 483 (1955).

28. Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973).

29. 408 U.S. 238 (1972).

30. "Excerpts from the Attorney General's Remarks on Plans of Justice Department," *New York Times*, Oct. 30, 1981, at 10.

31. 290 U.S. 398 (1934).

32. 1 Stat. 596 (1798).

33. Va. Code § 22 (1849); Russel B. Nye, *Fettered Freedom: Civil Liberties and the Slavery Controversy, 1830–1860*, at 156 (1963).

34. The Civil Rights Cases, 109 U.S. 3 (1883).

35. 98 U.S. 145 (1878).

36. See Stanley I. Kutler, *The American Inquisition: Justice and Injustice in the Cold War* (1982).

37. See Peter Irons, *Justice at War: The Story of the Japanese-American Internment Cases* (1983).

38. 32 U.S. (7 Pet.) 243 (1833).

39. 302 U.S. 319 (1937).

40. 110 U.S. 516 (1884).

41. 354 U.S. 476 (1957).

42. Paul S. Boyer, *Purity in Print: Book Censorship in America* 136 (1968).

43. See, for example, A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts, 383 U.S. 413 (1966).

44. "Naked Capitalism," *The Economist*, Sept. 26, 2015.

45. Jenkins v. Georgia, 418 U.S. 153 (1974).

46. 422 U.S. 205 (1975).

47. Miller v. California, 413 U.S. 15 (1973).

48. Pope v. Illinois, 481 U.S. 497 (1987).

49. 219 U.S. 219 (1911).

50. William Cohen, "Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis," 42 *Journal of Southern History* 31 (1976).

51. 347 U.S. 483 (1954).

52. See Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2d ed. 2008); James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (2001).

53. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); see David A. Strauss, "Affirmative Action and the Public Interest," 1995 *Supreme Court Review* 1.

54. Fisher v. University of Texas, 136 S. Ct. 2198 (2016); Fisher v. University of Texas at Austin, 133 S. Ct. 2411 (2013); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

55. David S. Clark, "Judicial Protection of the Constitution in Latin America," 2 *Hastings Constitutional Law Quarterly* 405 (1975).

56. See Allan R. Brewer-Carias, *Judicial Review in Comparative Law* chs. 13, 22 (1989).

57. An English translation of this decision can be found in 9 *John Marshall Journal of Practice and Procedure* 605 (1976).

58. "World News Briefs; Bavaria Schools to Keep Crucifixes Despite Ruling," *New York Times*, Sept. 8, 1995, at A10.

59. Cornelia Koch, "The Sky Is Falling If Judges Decide Religious Controversies!—Or Is It? The German Experience of Religious Freedom Under a Bill of Rights," in *Freedom of Religion Under Bills of Rights* 212–14 (Paul Babie & Neville Rochow eds., 2012).

60. See Lawrence W. Beer, "Japan's Constitutional System and Its Judicial Interpretation," in *Law and Society in Contemporary Japan* 14–17 (John Owen Haley ed., 1988); David S. Law, "The Anatomy of a Conservative Court: Judicial Review in Japan," 87 *Texas Law Review* 1545, 1547 (2009).

61. Adam Liptak, "'We the People' Loses Appeal with People Around the World," *New York Times*, Feb. 6, 2012.

62. David S. Law & Mila Versteeg, "The Declining Influence of the United States Constitution," 87 *New York University Law Review* 762 (2012).

63. Const. of Finland, Ch. 2, §§ 16 & 19.

64. Const. of the Republic of Latvia, Ch. 8, § 111.

65. See Lawrence M. Friedman, *The Human Rights Culture: A Study in History and Context* (2011).

CHAPTER 11

1. See generally Lawrence M. Friedman, *Impact: How Law Affects Behavior* (2016).

2. Louise Chipley Slavicek, *The Prohibition Era: Temperance in the United States* 2–3 (2009).

3. Jack S. Blocker Jr., "Did Prohibition Really Work?: Alcohol Prohibition as a Public Health Innovation," 96 *American Journal of Public Health* 233 (2006).

4. For a general treatment of the background and impact of Prohibition, see Daniel Okrent, *Last Call: The Rise and Fall of Prohibition* (2010). On the effectiveness of Prohibition, contrast Andrew Sinclair, *Prohibition: The Era of Excess* (1962), with J. C. Burnham, "New Perspectives on the Prohibition 'Experiment' of the 1920s," 2 *Journal of Social History* 51 (1968).

5. John Kaplan, *Marijuana: The New Prohibition* 25 (1970).

6. "DrugFacts: Nationwide Trends," *National Institute on Drug Abuse* (June 2015), http://www.drugabuse.gov/publications/drugfacts/nationwide-trends.

7. Kevin Wong & Chelsey Clarke, Rocky Mountain High Intensity Drug Trafficking Area, Office of National Drug Control Policy, *The Legalization of Marijuana in Colorado: The Impact* 62 (vol. 3, Sept. 2015).

8. Marvin B. Sussman, Judith N. Cates, & David T. Smith, *The Family and Inheritance* 64 (1970).

9. *Sunday Advocate* (Baton Rouge), Dec. 11, 1994, at 111; *Greensboro News & Record*, July 18, 1994, at 4.

10. Ashlea Ebeling, "Americans Lack Basic Estate Plans," *Forbes.com* (Mar. 1, 2010), http://www.forbes.com/2010/03/01/estate-tax-living-will-schiavo-personal-finance-no-estate-plans.html.

11. Robert Pear, "Racing to Spread the Word About New Health Plans," *New York Times*, Apr. 23, 2013.

12. U.C.C. § 2-302.

13. Note, "Legal Knowledge of Michigan Citizens," 71 *Michigan Law Review* 1463 (1973).

14. Martha Williams & Jay Hall, "Knowledge of the Law in Texas: Socioeconomic and Ethnic Differences," 7 *Law & Society Review* 99 (1972).

15. Mary Nell Trautner, Erin Hatton, & Kelly E. Smith, "What Workers Want Depends: Legal Knowledge and the Desire for Workplace Change among Day Laborers," 35 *Law & Policy* 319 (2013).

16. June L. Tapp & Lawrence Kohlberg, "Developing Senses of Law and Legal Justice," 27 *Journal of Social Issues* 65 (1971).

17. Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334 (1976).

18. See Daniel J. Givelber, William J. Bowers, & Carolyn L. Blitch, "*Tarasoff*, Myth and Reality: An Empirical Study of Private Law in Action," 1984 *Wisconsin Law Review* 443.

19. See Lauren B. Edelman, Steven E. Abraham, & Howard S. Erlanger, "Professional Construction of Law: The Inflated Threat of Wrongful Discharge," 26 *Law & Society Review* 47 (1992).

20. Pauline T. Kim, "Norms, Learning and Law: Exploring the Influences on Workers' Legal Knowledge," 1999 *University of Illinois Law Review* 447; the text of the survey is at 508.

21. See Robert M. Hayden, "The Cultural Logic of a Political Crisis: Hegemony and the Great American Liability Insurance Famine of 1986," in *Studies in Law, Politics, and Society* 95 (Austin Sarat & Susan S. Silbey eds., vol. 11 1991).

22. William Haltom & Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* 183–226 (2004).

23. Laura Beth Nielsen & Aaron Beim, "Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation," 15 *Stanford Law & Policy Review* 237, 252 (2004).

24. 408 U.S. 238 (1972).

25. See Gordon Tullock, "Does Punishment Deter Crime?" 36 *Public Interest* 103 (1974); John J. Donohue & Justin Wolfers, "Uses and Abuses of Empirical Evidence in the Death Penalty Debate," 58 *Stanford Law Review* 791, 794 (2005).

26. Herbert L. Packer, *The Limits of the Criminal Sanction* 39 (1968).

27. See, for example, George Antunes & A. Lee Hunt, "The Impact of Certainty and Severity of Punishment on Levels of Crime in American States: An Extended Analysis," 64 *Journal of Criminal Law and Criminology* 487 (1973).

28. J. Chaiken, M. Lawless, & K. Stevenson, *The Impact of Police Activities on Crime: Robberies on the New York City Subway System* 23 (1974).

29. See H. Laurence Ross, *Deterring the Drinking Driver: Legal Policy and Social Control* (3d ed. 1984).

30. Malcolm M. Feeley, *The Process Is the Punishment* 199 (1979).

31. Ted R. Gurr, *Rogues, Rebels, and Reformers: A Political History of Urban Crime and Conflict* (1976).

32. Franklin E. Zimring, *The City That Became Safe: New York's Lessons for Urban Crime and Its Control* (2012).

33. Justin McCarthy, "Most Americans Still See Crime Up over Last Year," *Gallup* (Nov. 21, 2014), http://www.gallup.com/poll/179546/americans-crime-last-year.aspx.

34. H. Laurence Ross, "The Neutralization of Severe Penalties: Some Traffic Law Studies," 10 *Law & Society Review* 403–404 (1976).

35. See Franklin E. Zimring & Gordon Hawkins, *Incapacitation: Penal Confinement and the Restraint of Crime* (1995).

36. *Id.* at ch. 9.

37. Michael R. Gottfredson & Travis Hirschi, *A General Theory of Crime* (1990).

38. John N. Gallo, "Effective Law-Enforcement Techniques for Reducing Crime," 88 *Journal of Criminal Law and Criminology* 1475, 1475–76 (1998).

39. See Stuart Banner, *The Death Penalty: An American History* (2003).

40. Kennedy v. Louisiana, 554 U.S. 407 (2008).

41. Roger Lane, *Violent Death in the City: Suicide, Accident, and Murder in Nineteenth-Century Philadelphia* 79 (1979).

42. Crime reported by Philadelphia Police Dept. in Federal Bureau of Investigation, "Crime—Large Local Agencies: Single Agency Reported Crime," *Uniform Crime Reporting Statistics*, Pennsylvania, http://www.ucrdatatool.gov/Search/Crime/Local/RunCrimeJurisbyJurisLarge.cfm (last visited May 13, 2016).

43. Federal Bureau of Investigation, "2014 Crime in the United States: Pennsylvania," *Uniform Crime Reports*, table 8, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-8/table-8-by-state/Table_8_Offenses_Known_to_Law_Enforcement_by_Pennsylvania_by_City_2014.xls (last visited May 13, 2016).

44. Federal Bureau of Investigation, "2014 Crime in the United States: Michigan," *Uniform Crime Reports*, table 8, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-8/table-8-by-state/Table_8_Offenses_Known_to_Law_Enforcement_by_Michigan_by_City_2014.xls (last visited May 13, 2016).

45. Federal Bureau of Investigation, "Crime—National or State Level: Data with One Variable," *Uniform Crime Reporting Statistics*, http://www.ucrdatatool.gov/Search/Crime/State/RunCrimeTrendsInOneVar.cfm (last visited May 13, 2016).

46. Jack K. Williams, *Vogues in Villainy: Crime and Retribution in Ante-Bellum South Carolina* 100 (1959).

47. Philip J. Schwarz, *Twice Condemned: Slaves and the Criminal Laws of Virginia,1705–1865*, at 15 (1988).

48. Michael S. Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767–1878*, at 156–58 (1980).

49. 408 U.S. 238 (1972). See, on this case and what followed, Evan J. Mandery, *A Wild Justice: The Death and Resurrection of Capital Punishment in America* (2013).

50. 428 U.S. 153 (1976).

51. Data on public support for capital punishment come from "Death Penalty," *Gallup*, http://www.gallup.com/poll/1606/death-penalty.aspx (last visited May 13, 2016). Data on capital sentences and executions come from "Death Sentences by Year: 1976–2014," *Death Penalty Information Center*, http://www.deathpenaltyinfo.org/death-sentences-year-1977-2009 (last visited May 13, 2016).

52. *Death Penalty Information Center, supra* note 51.

53. Roper v. Simmons, 543 U.S. 551 (2005).

54. Atkins v. Virginia, 536 U.S. 304 (2002).

55. Kennedy v. Louisiana, 554 U.S. 407 (2008).

56. Glossip v. Gross, 125 S. Ct. 2726, 2776–77 (2015) (Breyer, J., joined by Ginsburg, J., dissenting).

57. "Time on Death Row," *Death Penalty Information Center*, http://www.deathpenaltyinfo.org/time-death-row (last visited May 13, 2016).

58. The Associated Press, "Texas: Killer of Four Men Is Executed," *New York Times*, June 3, 2015.

CHAPTER 12

1. See, for example, Ross L. Matsueda & Kathleen Anderson, "The Dynamics of Delinquent Peers and Delinquent Behavior," 36 *Criminology* 269 (1998); Paul B. Stretesky & Mark R. Pogrebin, "Gang-Related Gun Violence: Socialization, Identity, and Self," in *In Their Own Words: Criminals on Crime* 301–302 (Paul Cromwell & Michael L. Birzer eds., 6th ed. 2014).

2. Jay MacLeod, *Ain't No Makin' It: Aspirations and Attainment in a Low-Income Neighborhood* 28 (1995).

3. Victor Eisner, *The Delinquency Label: The Epidemiology of Juvenile Delinquency* 105 (1969).

4. Johannes Feest, "Compliance with Legal Regulations: Observation of Stop Sign Behavior," 2 *Law & Society Review* 447 (1968).

5. LioneI I. Dannick, "Influence of an Anonymous Stranger on a Routine Decision to Act or Not to Act: An Experiment in Conformity," 14 *Sociological Quarterly* 127 (1973).

6. See C. W. Kohfeld & T. W. Likens, "Mass Compliance and Social Interaction: A Dynamic Formulation," 4 *Law & Policy Quarterly* 353 (1982).

7. Todd Rogers & Adan Acevedo, "In Iowa, Voting Science at Work," *New York Times*, Feb. 5, 2016.

8. Alan S. Gerber, Donald P. Green, & Christopher W. Larimer, "Social Pressure and Voter Turnout: Evidence from a Large-Scale Field Experiment," 102 *American Political Science Review* 33, 33 (2008).

9. See Lauren Edelman, "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law," 97 *American Journal of Sociology* 1531 (1992).

10. Alan Hyde, "The Concept of Legitimation in the Sociology of Law," 1983 *Wisconsin Law Review* 300.

11. Pew Research Center, "Trust in Government: 1958–2015," *Beyond Distrust: How Americans View Their Government* (Nov. 23, 2015), http://www.people-press.org/2015/11/23/1-trust-in-government-1958-2015/.

12. See Austin Sarat, "Support for the Legal System: An Analysis of Knowledge, Attitudes, and Behavior," 3 *American Politics Quarterly* 3 (1975).

13. Harry V. Ball, "Social Structure and Rent-Control Violations," 65 *American Journal of Sociology* 598 (1960).

14. Tom R. Tyler, *Why People Obey the Law* (1990).

15. See Tom R. Tyler, *Why People Obey the Law* (2006 ed.).

16. Michael J. Klarman, "*Brown*, Racial Change, and the Civil Rights Movement," 80 *Virginia Law Review* 7, 85 (1994).

17. Joanna L. Grossman & Lawrence M. Friedman, *Inside the Castle: Law and the Family in 20th Century America* 146–52 (2011).

18. Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage* (2013).

19. United States v. Windsor, 133 S. Ct. 2675 (2013).

20. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

21. Charles R. Tittle & Alan R. Rowe, "Moral Appeal, Sanction Threat, and Deviance: An Experimental Test," 20 *Social Problems* 488 (1973).

22. Harold G. Grasmick & Robert J. Bursik Jr., "Conscience, Significant Others and Rational Choice: Extending the Deterrence Model," 24 *Law & Society Review* 837 (1990).

23. See, for example, H. L. A. Hart, "Positivism and the Separation of Law and Morals," 71 *Harvard Law Review* 593 (1958).

24. 410 U.S. 113 (1973).

25. 36 Stat. 825 (1910).

26. David J. Langum, *Crossing over the Line: Legislating Morality and the Mann Act* 179–88, 242-60 (1994).

CHAPTER 13

1. American Bar Association, "ABA National Lawyer Population Survey, Historical Trend in Total National Lawyer Population 1878–2015," http://www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2015.authcheckdam.pdf.

2. Anton-Hermann Chroust, *The Rise of the Legal Profession in America* 72 (vol. I 1965).

3. Gerard W. Gawalt, *The Promise of Power: The Emergence of the Legal Profession in Massachusetts, 1760–1840*, at 14 (1979).

4. American Bar Association, *supra* note 1.

5. Barbara A. Curran & Clara N. Carson, *The Lawyer Statistical Report: The U.S. Legal Profession in the 1990s* 1 (1994).

6. Debra Cassens Weiss, "Is Legal Profession Shakeout Long Overdue? Ratio of Lawyers to American is 1 to 257," *ABA Journal* (Apr. 19, 2012), http://www.abajournal.com/news/article/is_legal_profession_shakeout_long_overdue_ratio_of_lawyers_to_americans_is_/.

7. American Bar Association, *supra* note 1.

8. Curran & Carson, *supra* note 5, at 7.

9. Steven L. Lovett, "The Employee-Lawyer: A Candid Reflection on the True Roles and Responsibilities of In-House Counsel," 34 *Journal of Law and Commerce* 113, 115 (2015).

10. John C. Coates, Michele M. DeStefano, Ashish Nanda, & David B. Wilkins, "Hiring Teams, Firms, and Lawyers: Evidence of the Evolving Relationships in the Corporate Legal Market," 36 *Law and Social Inquiry* 999 (2011).

11. Lawrence M. Friedman, *A History of American Law* 231–32 (3d ed. 2005).

12. Claude M. Fuess, *Daniel Webster* 232 (vol. 1 1930).

13. Merle Curti, *The Making of an American Community* 23 (1959).

14. On the practice relating to marine insurance, see *The Law Practice of Alexander Hamilton: Documents and Commentary* 391ff (Julius Goebel Jr. ed., vol. 2 1969).

15. Quintin Johnstone & Dan Hopson Jr., *Lawyers and Their Work: An Analysis of the Legal Profession in the United States and England* 35 (1967).

16. James B. Stewart Jr., "Inside the World's Largest Law Firm," *American Lawyer*, Jan. 21, 1980, at 21.

17. "Chart: The 2015 NLJ 350," *National Law Journal* (June 8, 2015), http://www.nationallawjournal.com/id=1202728576002/Chart-The-2015-NLJ-350?slreturn=20160413142405; Baker & McKenzie, http://www.bakermckenzie.com (last visited May 13, 2016).

18. "Chart: The 2015 NLJ 350," *supra* note 17.

19. "Offices & International Practices," *Sullivan & Cromwell, LLP*, https://www.sullcrom.com/offices (last visited May 13, 2016).

20. "Offices," Morrison & Foerster, http://www.mofo.com/offices (last visited May 13, 2016).

21. "Statistics," The State Bar of California, http://admissions.calbar.ca.gov/Examinations/Statistics.aspx.

22. There is a classic study by Erwin O. Smigel, *The Wall Street Lawyer. Professional Organization Man?* (1964); more recently, see Robert L. Nelson, *Partners with Power: Social Transformation of the Large Law Firm* (1988); Marc Galanter & Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (1991); Peter D. Sherer & Kyungmook Lee, "Institutional Change in Large Law Firms: A Resource Dependency and Institutional Perspective," 45 *Academy of Management Journal* 102 (2002).

23. Marc Galanter, "Mega-law and Mega-lawyering in the Contemporary United States," in *The Sociology of the Professions: Lawyers, Doctors and Others* 152 (Robert Dingwall & Philip Lewis eds., 1983).

24. NALP Directory of Legal Employers, http://www.nalpdirectory.com/ (last visited May 13, 2016).

25. For example, Morrison & Foerster reported that slightly more than half of the lawyers in its San Francisco office were in the litigation department; Norton Rose Fulbright reported a similar breakdown in its Houston office. *Id.*

26. Nora Freeman Engstrom, "Sunlight and Settlement Mills," 86 *N.Y.U Law Review* 805 (2011); Nora Freeman Engstrom, "Run-of-the-Mill Justice," 22 *Georgetown Journal of Legal Ethics* 1485 (2009).

27. John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* 26 (rev. ed. 1994).

28. Timothy Hia, "Que Sera, Sera? The Future of Specialization in Large Law Firms," 2002 *Columbia Business Law Review* 541.

29. Bryant G. Garth, Robert L. Nelson, Ronit Dinovitzer, & Rebecca Sandefur, American Bar Foundation & NALP Foundation for Law Career Research and Education, *After the JD III: Third Results from a National Study of Legal Careers* 35 (2014).

30. Bradwell v. State, 83 U.S. 130 (1873).

31. Barbara Babcock, *Woman Lawyer: The Trials of Clara Foltz* (2011).

32. American Bar Association, Commission on Women in the Profession, *A Current Glance at Women in the Law* 4 (2014), http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_july2014.pdf.

33. "Lawyer Demographics Table, 2015," *American Bar Association*, http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer-demographics-tables-2015.pdf (last visited May 13, 2016); American Bar Association, Commission on Women in the Profession, *supra* note 32, at 2.

34. American Bar Association, Commission on Women in the Profession, *supra* note 32, at 5.

35. Maxwell Bloomfield, *American Lawyers in a Changing Society* 302–39 (1976).

36. Allan P. Sindler, *Bakke, DeFunis, and Minority Admissions: The Quest for Equal Opportunity* 141 (1978).

37. "Statistics," *American Bar Association*, http://www.americanbar.org/groups/legal_education/resources/statistics.html (last visited May 13, 2016).

38. Press Release, NALP, Women, Black/African-American Associates Lose Ground at Major U.S. Law Firms (Nov. 19, 2015), http://www.nalp.org/lawfirmdiversity_nov2015.

39. *Id.*

40. Press Release, NALP, Diversity Numbers at Law Firms Eke Out Small Gains—Numbers for Women Associates Edge Up After Four Years of Decline (Feb. 17, 2015), http://www.nalp.org/lawfirmdiversity_feb2015.

41. Garth, Nelson, Dinovitzer, & Sandefur, *supra* note 29, at 67.

42. Press Release, NALP, *supra* note 38.

43. Heinz & Laumann, *supra* note 27, at 186, 190.

44. Ronit Dinovitzer, Bryant G. Garth, Richard Sander, Joyce Sterling, & Gita Z. Wilder, The NALP Foundation for Law Career Research and Education & the American Bar Foundation, *After the JD: First Results of a National Study of Legal Careers* (2004); Ronit Dinovitzer, Robert L. Nelson, Gabrielle Plickert, Rebecca Sandefur, & Joyce Sterling, American Bar Foundation & NALP Foundation for Law Career Research and Education, *After the JD II: Second Results from a National Study of Legal Careers* (2009); Garth, Nelson, Dinovitzer, & Sandefur, *supra* note 29.

45. Dinovitzer, Garth, Sander, Sterling, & Wilder, *supra* note 44, at 20.

46. "Statistics," *supra* note 21.

47. On apprenticeship, see Lawrence M. Friedman, *A History of American Law* 238 (3d ed. 2005).

48. J. W. Shuckers, *The Life and Public Services of Salmon Portland Chase* 30–31 (1874).

49. Edward S. Martin, *The Life of Joseph Hodges Choate* 81 (vol. 1 1920). See, in general, Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983).

50. Arthur E. Sutherland, *The Law at Harvard: A History of Ideas and Men, 1817–1967*, at 149–50 (1967).

51. Jason Song, "State's 22 Unaccredited Law Schools Will Be Required to Show Dropout Rates in June," *Los Angeles Times*, Mar. 11, 2016.

52. "Statistics," *supra* note 21.

53. "End-of-Year Summary: ABA (Applicants, Applications & Admissions), LSATs, Credential Assembly Service," *Law School Admission Council*, http://www.lsac.org/lsacresources/data/lsac-volume-summary (last visited May 13, 2016).

54. Frances K. Zemans & Victor G. Rosenblum, *The Making of a Public Profession* 101 (1981); Dinovitzer, Garth, Sander, Sterling, & Wilder, *supra* note 44, at 42.

55. Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 65–66, 239 (1976).

56. *Id*. at 287.

57. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

58. 433 U.S. 350 (1977).

59. Nora Freeman Engstrom, "Attorney Advertising and the Contingency Fee Cost Paradox," 65 *Stanford Law Review* 633, 657–59, 665–66 (2013).

60. Andrew Adam Newman, "Lawyers Use Humor to Plead Case," *New York Times*, Jan. 19, 2010. To watch a video of the commercial, see *Jim "The Hammer" Shapiro video #4* (June 4, 2006), https://www.youtube.com/watch?v=Q5hn8bhEpMY.

61. See Engstrom, *supra* note 59, at 667–71.

62. See *id*. at 640–41 & n.30.

63. See, for example, Michael J. Powell, *From Patrician to Professional Elite: The Transformation of the New York City Bar Association* (1988).

64. Johnstone & Hopson, *supra* note 15, at 72.

65. Deborah L. Rhode, "Why the ABA Bothers: A Functional Perspective on Professional Codes," 59 *Texas Law Review* 689, 718 (1981).

66. Data from every state except California, Connecticut, Kansas, North Dakota, Ohio, and part of New York from the American Bar Association, *2014 Survey on Lawyer Discipline Systems (S.O.L.D.)* 5, 15 (2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2014_sold_final_results.pdf. Data from California from the State Bar of California, *Attorney Discipline Report for Year Ending December 31, 2014*, at 1–2 (2015), http://www.calbar.ca.gov/LinkClick.aspx?fileticket=zZMLDYTCmJQ%3d&tabid=224&mid=1534.

67. Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, *Annual Report of 2014*, at 12, 31 (2015).

68. Douglas E. Rosenthal, *Lawyers and Clients: Who's in Charge?* 100 (1974).

69. See Brian W. Smith & M. Lindsay Childress, "Avoiding Lawyer Liability in the Wake of Kaye, Scholer," 8 *St. John's Journal of Legal Commentary* 385 (1993).

70. Herbert M. Kritzer & Neil Vidmar, "When the Lawyer Screws Up: A Portrait of Legal Malpractice Claims and Their Resolution," Duke Law School Public Law & Legal Theory Series No. 2015-29 (2015), http://ssrn.com/abstract=2627735.

71. Chroust, *supra* note 2, at 127.

72. Stewart Macaulay, Lawrence M. Friedman, & John Stookey, *Law and Society: Readings on the Social Study of Law* 816 (1995).

73. See The White House, "The Cabinet," https://www.whitehouse.gov/administration/cabinet (last visited May 13, 2016).

74. Andrew Blum, "Losing Its Allure: Lawyer/Legislators Are a Dying Breed," *National Law Journal*, Sept. 7, 1992, at 1; Jen Fifield, "State Legislatures Have Fewer Farmers, Lawyers; But Higher Education Level," *The Pew Charitable Trusts* (Dec. 10, 2015), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/12/10/state-legislatures-have-fewer-farmers-lawyers-but-higher-education-level.

75. Stephen Barks, "Where Have All the Lawyers Gone?," *National Law Journal*, Jan. 19, 1981, at 13.

76. Jennifer E. Manning, Congressional Research Service, *Membership of the 114th Congress: A Profile, Congressional Research Service* (2015), https://www.fas.org/sgp/crs/misc/R43869.pdf.

77. Fifield, *supra* note 74.

78. Marc Galanter, *Lowering the Bar: Lawyer Jokes and Legal Culture* (2006).

79. "56% Think There Are Too Many Lawyers in U.S.," *Rasmussen Reports* (Apr. 8, 2014), http://www.rasmussenreports.com/public_content/lifestyle/general_lifestyle/april_2014/56_think_there_are_too_many_lawyers_in_u_s.

80. "Americans' Faith in Honesty, Ethics of Police Rebounds," *Gallup* (Dec. 21, 2015), http://www.gallup.com/poll/187874/americans-faith-honesty-ethics-police-rebounds.aspx?g_source=lawyers&g_medium=search&g_campaign=tiles.

81. Heinz Eulau & John D. Sprague, *Lawyers in Politics: A Study in Professional Convergence* (1964); Justin J. Green, John R. Schmidhauser, Larry L. Berg, & David Brady, "Lawyers in Congress: A New Look at Some Old Assumptions," 26 *Western Political Quarterly* 440 (1973).

82. One such study was Patrick F. O'Connor, Richard L. Engstrom, Justin J. Green, & Chong Lim Kim, "The Political Behavior of Lawyers in the Louisiana House of Representatives," 39 *Louisiana Law Review* 43 (1978).

83. Ulrich Matter & Alois Stutzer, "The Role of Lawyer-Legislators in Shaping the Law: Evidence from Voting on Tort Reforms," 58 *Journal of Law and Economics* 357 (2015).

84. See Charles R. Epp, "Do Lawyers Impair Economic Growth?," 17 *Law and Social Inquiry* 585 (1992); Frank B. Cross, "The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System," 70 *Texas Law Review* 645, 672–76 (1992).

85. Richard W. Rabinowitz, "Law and the Social Process in Japan," *Transactions of the Asiatic Society of Japan* 5, 49–50 (3d ser., vol. 10, 1968).

86. John O. Haley, *Authority Without Power: Law and the Japanese Paradox* 103 (1991).

87. "Inside Japan's Legal System," *Columbia Law School* (Feb. 12, 2016), https://www.law.columbia.edu/media_inquiries/news_events/2016/february2016/japan-legal-system.

88. Marc Galanter, "More Lawyers than People: The Global Multiplication of Legal Professionals," in *The Paradox of Professionalism: Lawyers and the Possibility of Justice* 68, 70 (Scott L. Cummings ed., 2011).

89. Susan Beck, "It's Official: Dentons Merger with Dacheng Creates Global Giant," *The American Lawyer*, Nov. 10, 2015. The new law firm will surely replace Baker & McKenzie in the next global ranking of largest law firms.

90. Kevin Tierney, *Darrow: A Biography* (1979).

91. 372 U.S. 335 (1963).

92. Donald J. Farole Jr. & Lynn Langton, Bureau of Justice Statistics, *Census of Public Defender Offices, 2007: State Public Defender Programs, 2007* (2010), http://www.bjs.gov/content/pub/pdf/spdp07.pdf; Donald J. Farole Jr. & Lynn Langton, U.S. Bureau of Justice Statistics, *Census of Public Defender Offices, 2007: County-Based and Local Public Defender Offices, 2007* (2010), http://www.bjs.gov/content/pub/pdf/clpdo07.pdf.

93. John M. Maguire, *The Lance of Justice: A Semi-Centennial History of the Legal Aid Society, 1876–1926*, at 70 (1928).

94. Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001).

95. Joel F. Handler, Ellen J. Hollingsworth, & Howard S. Erlanger, *Lawyers and the Pursuit of Legal Rights* 70 (1978).

96. Scott L. Cummings & Ann Southworth, "Between Profit and Principle: The Private Public Interest Firm," in *Private Lawyers & the Public Interest: The Evolving Role of Pro Bono in the Legal Professions* 183–210 (Robert Granfield & Lynn Mather eds., 2009).

97. Tamar Lewin, "Talking Business with Roger J Marzulla of Mountain States Legal Foundation Free Market Philosophy," *New York Times*, July 20, 1982, at 30.

98. Roger K. Newman, "Public-Interest Firms Crop Up on the Right," *National Law Journal*, Aug. 26, 1996, at A1, A22. The case was Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

99. Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

CHAPTER 14

1. J. Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915* (1964).

2. *Id*. at 190.

3. *Id*. at 607.

4. Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (2008).

5. Kathleen Delaney Thomas, "Presumptive Collection: A Prospect Theory Approach to Increasing Small Business Tax Compliance," 67 *Tax Law Review* 111, 112 (2013); see also I.R.S., *Tax Gap Estimates for Tax Years 2008–2010* (2016), https://www.irs.gov/PUP/newsroom/tax%20gap%20estimates%20for%202008%20through%202010.pdf.

6. Jonathan Brater, "Automatic Voter Registration in Oregon a Huge Success," *Brennan Center for Justice* (Apr. 8, 2016), http://www.brennancenter.org/blog/automatic-voter-registration-oregon-huge-success.

7. *Id*. at 17–24.

8. Richard Thompson Ford, "The Boundaries of Race: Political Geography in Legal Analysis," 107 *Harvard Law Review* 1841 (1994).

9. Sally F. Goldfarb, "Violence Against Women and the Persistence of Privacy," 61 *Ohio State Law Journal* 1 (2000); Reva B. Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy," 105 *Yale Law Journal* 2117 (1996).

10. Michele C. Black et al., National Center for Injury Prevention and Control, Centers for Disease Control and Prevention, *The National Intimate Partner and Sexual Violence Survey: 2010 Summary Report (2011)*, http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.

11. See generally Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902.

12. Goldfarb, *supra* note 9, at 51–54.

13. On the legal history of slavery, see Thomas D. Morris, *Southern Slavery and the Law, 1619–1860* (1996). There was, of course, slavery in the northern colonies too up to the time of the Revolution; see Lawrence M. Friedman, *A History of American Law* 46–49 (3d ed. 2005).

14. Morris, *supra* note 13, at ch. 2.

15. Herbert S. Klein, *Slavery in the Americas: A Comparative Study of Virginia and Cuba* 43 (1967).

16. 1662 Va. Acts XII.

17. 1667 Va. Acts III.

18. Ira Berlin, *Slaves Without Masters: The Free Negro in the Antebellum South* 372–74 (1975).

19. See Pete Daniel, *The Shadow of Slavery: Peonage in the South, 1901–1969* (1972); Daniel A. Novak, *The Wheel of Servitude: Black Forced Labor After Slavery* (1978).

20. 109 U.S. 3 (1883).

21. See, in general, C. Vann Woodward, *The Strange Career of Jim Crow* (2d ed. 1966).

22. 163 U.S. 537 (1896). On the background of this famous case, see Charles A. Lofgren, *The Plessy Case: A Legal-Historical Interpretation* (1987).

23. 1903 Ark. Acts § 5901.

24. Giles v. Harris, 189 U.S. 475 (1903). Years later, as discussed below, the Supreme Court did strike down a "grandfather clause" in Guinn v. United States, 238 U.S. 347 (1915).

25. Leon F. Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (1998).

26. 238 U.S. 347 (1915).

27. United States Civil Rights Commission, *Voting: 1961 Commission on Civil Rights Report* 143 (1961).

28. 347 U.S. 483 (1954). On the background of the case, see Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* (1976).

29. J. Harvie Wilkinson III, *From Brown to Bakke: The Supreme Court and School Integration, 1954–1978*, at 65 (1979).

30. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

31. Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

32. Gary Orfield & Erica Frankenberg, with Jongyeon Ee & John Kuscera, Civil Rights Project/Proyecto Derechos Civiles, *Brown at 60: Great Progress, a Long Retreat and an Uncertain Future* (2014), https://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf.

33. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).

34. Voting Rights Act of 1965 § 4(b), 43 U.S.C. § 1973b(b).

35. Voting Rights Act of 1965 § 5, 43 U.S.C. §1973c.

36. Chandler Davidson, "The Voting Rights Act: A Brief History," in *Controversies in Minority Voting* 7, 21 (Bernard Grofman & Chandler Davidson eds., 1992).

37. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, "The Voting Rights Act in Winter: The Death of a Superstatute," 100 *Iowa Law Review* 1389, 1390 (2015).

38. Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 6–7 (rev. ed. 2012).

39. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

40. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

41. See, e.g., Shaw v. Reno, 509 U.S. 630 (1993).

42. The case is Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

43. Fisher v. University of Texas, 136 S. Ct. 2198 (2016); Fisher v. University of Texas at Austin, 133 S. Ct. 2411 (2013); Grutter v. Bollinger, 539 U.S. 306 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

44. Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

45. The House passed the reauthorization by a vote of 390 yeas to 33 nays [152 Cong. Rec. H5207 (July 13, 2006)], and the Senate passed it by a vote of 98 to 0 [152 Cong. Rec. S8012 (July 20, 2006)].

46. The Fifteenth Amendment does this rather straightforwardly; the Fourteenth Amendment's Equal Protection Clause has also been interpreted to prohibit race discrimination in voting.

47. Shelby County v. Holder, 133 S. Ct. 2612, 2625-27 (2013).

48. *Id*. at 2650 (Ginsburg, J., dissenting).

49. See, for example, Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991).

50. Wis. Const., art. 1, § 18.

51. Quoted in Leonard J. Arrington & Davis Bitton, *The Mormon Experience: A History of the Latter-day Saints* ch. 9 (1979); see also Edwin Brown Firmage & Richard Collin Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of the Latter-day Saints, 1830–1900* (1988).

52. 12 Stat. 501 (1862).

53. 98 U.S. 145 (1878). Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth Century America* (2002).

54. 406 U.S. 205 (1975).

55. Jon Nordheimer, "Leader of Sect Dies: Parents Reported to Give Children Poison Before Dying Beside Them," *New York Times*, Nov. 21, 1978.

56. Gustav Niebuhr, "On the Furthest Fringes of Millennialism," *New York Times*, Mar. 28, 1997.

57. Katz v. Superior Court of San Francisco, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977); see Joseph E. Broadus, "Use of the 'Choice of Evils' Defense in Religious Deprogramming Cases Offends Free Exercise While Ignoring the Right to Be Free from Compelled Treatment," 1 *George Mason University Civil Rights Journal* 171 (1990).

58. James C. McKinley Jr., "Polygamist Sect Leader Convicted of Sexual Assault," *New York Times*, Nov. 5, 2009.

59. Shawn Francis Peters, *When Prayer Fails: Faith Healing, Children, and the Law* (2008).

60. Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (1963).

61. See Cal. Penal Code § 387 (1881).

62. For an example, see Maryjean Wall, *Madam Belle: Sex, Money, and Influence in a Southern Brothel* (2014).

63. Michael Tonry, *Malign Neglect: Race, Crime, and Punishment in America* 108–109 (1994).

64. See the discussion in John Kaplan, *The Hardest Drug: Heroin and Public Policy* (1983).

65. The remainder were American Indians and Alaska Natives; Asians, Native Hawaiians, and other Pacific Islanders; and persons of two or more races. E. Ann Carson, Bureau of

Justice Statistics, *Prisoners in 2014*, at 17, table 12 (2015), http://www.bjs.gov/content/pub/pdf/p14.pdf.

66. Lawrence v. Texas, 539 U.S. 558 (2003).

67. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

68. Michele Marvin's victory in the California Supreme Court did not settle her claim. It now had to be assessed on the facts. The new trial was long and bitter. It made headlines, and was rich in gossip and scandal. Legally speaking, the outcome was something of an anticlimax. Michele Marvin won a modest victory, so modest it was almost defeat. She was awarded something on the order of $100,000. This was small potatoes, compared to the size of her claim (and considering her lawyers' fees). Probably she failed to win big money because her evidence was weak. She insisted she and Lee Marvin had come to an "agreement," but she had no convincing proof. In the end, both sides claimed victory. One thing was clear, though it was cold comfort for Michele Marvin: the law had changed. No moral or legal barrier stood in the way of claims like hers, at least in California.

69. Bureau of the Census, *Marital Status and Living Arrangements: March 1978*, Current Population Reports, P20-338, 3, Table D (1979).

70. *National Law Journal*, Apr. 16, 1979, at 14.

71. Minn. Stat. Ann. §§ 513.075, 513.076.

72. Minn. Stat. Ann. §§ 513.075, 513.076; Mike McCurley, "Same-Sex Cohabitation Agreements," in *Premarital and Marital Contracts: A Lawyer's Guide to Drafting and Negotiating Enforceable Marital and Cohabitation Agreements* 195 (Edward L. Winer & Lewis Becker eds., 1993).

73. In the matter of Baby M, 537 A.2d 1227 (N.J. 1988).

74. New York Dom. Rel. Law, art. 8, §§ 121–124.

75. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

76. Joanna L. Grossman & Lawrence M. Friedman, *Inside the Castle: Law and the Family in 20th Century America* 297–302 (2011).

77. Bowers v. Hardwick, 478 U.S. 186 (1986).

78. Lawrence v. Texas, 539 U.S. 558 (2003).

79. Obergefell v. Hodges, 135 S. Ct. 2584 (2015). For a concise legal history of this development, see Joanna L. Grossman, "From Zero to Fifty in Eleven Years: The Supreme Court Declares the Right of Same-Sex Couples to Marry in *Obergefell v. Hodges*," *Justia's Verdict*, June 26, 2015, https://verdict.justia.com/2015/06/26/from-zero-to-fifty-in-eleven-years.

80. "Marriage," *Gallup*, http://www.gallup.com/poll/117328/marriage.aspx (last visited May 18, 2016).

81. *Id*.

82. "Changing Attitudes on Gay Marriage," Pew Research Center, http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage/ (last visited May 18, 2016).

CHAPTER 15

1. President George H. W. Bush, quoted in Marc Galanter, "The Assault on Civil Justice: The Anti-Lawyer Dimension," in *Legal Culture and the Legal Profession* 87 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996).

2. *U.S. News & World Report*, Dec. 20, 1982, at 58. See also Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (1991).

3. Mila Sohoni, "The Idea of 'Too Much Law,'" 80 *Fordham Law Review* 1585 (2012).

4. Thomas J. Donohue, President and CEO, U.S. Chamber of Commerce, The Regulatory Tsunami—How a Tidal Wave of Regulations Is Drowning America (Oct. 6, 2010), https://www.uschamber.com/speech/regulatory-tsunami-how-tidal-wave-regulations-drowning-america.

5. Eugene Pavalon & Stephen Middlebrook, "The Insurance Industry: Do Its Ads Undermine Jury Impartiality?," 75 *American Bar Association Journal* 46 (1989); Deborah L. Rhode, "Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution," 54 *Duke Law Journal* 447, 451–52 (2004).

6. William Haltom & Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* 61 (2004).

7. *Id.*; Marc Galanter, "The Hundred-Year Decline of Trials and the Thirty Years War," 57 *Stanford Law Review* 1255 (2005).

8. David S. Clark, "Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century," 55 *Southern California Law Review* 65, 86–88 (1981).

9. Administrative Office of the United States Courts, "Judicial Business 2015," *United States Courts*, http://www.uscourts.gov/statistics-reports/judicial-business-2015 (last visited May 24, 2016).

10. Wayne V. McIntosh, *The Appeal of Civil Law: A Political-Economic Analysis of Litigation* 165 (1990).

11. Lawrence M. Friedman & Robert V. Percival, "A Tale of Two Courts: Litigation in Alameda and San Benito Counties," 10 *Law & Society Review* 267 (1976).

12. R. LaFountain, R. Schauffler, S. Strickland, & K. Holt, National Center for State Courts, *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads* 2 (2012), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx.

13. R. LaFountain, S. Strickland, R. Schauffler, K. Holt, & K. Lewis, National Center for State Courts, *Examining the Work of State Courts: An Overview of 2013 State Court Caseloads* 3 (2015), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/EWSC_CSP_2015.ashx.

14. 22 Stat. 209 (1890).

15. See Lawrence M. Friedman, "The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America," 39 *Maryland Law Review* 661, 661–72 (1980); Administrative Office of the U.S. Courts, *Federal Court Management Statistics December 2015* (2015), http://www.uscourts.gov/file/19809/download (last visited May 24, 2016).

16. Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* 4–5 (1986).

17. Barry Meier, "Cigarette Makers and States Draft a $206 Billion Deal," *New York Times*, Nov. 14, 1998.

18. Robert Kagan, "The Routinization of Debt Collection: An Essay on Social Change and Conflict in the Courts," 18 *Law & Society Review* 323 (1984); Mary Spector, "Debts, Defaults and Details: Exploring the Impact of Debt Collection Litigation on Consumers and Courts," 6 *Virginia Law and Business Review* 257 (2011).

19. *No Access to Law: Alternatives to the American Judicial System* 5 (Laura Nader ed., 1980).

20. See Janice A. Roehl & Royer F. Cook, "The Neighborhood Justice Centers Field Test," in *Neighborhood Justice: Assessment of an Emerging Idea* 91 (Roman Tomasic & Malcolm M. Feeley eds., 1982).

21. Task Force on Access to Justice and Alternative Dispute Resolution, ABA Section of Dispute Resolution, *Access to Justice through Alternative Dispute Resolution White Paper*, http://www.americanbar.org/content/dam/aba/images/dispute_resolution/publications/A2J_%20white_paper.pdf.

22. "Section of Dispute Resolution: Membership," *American Bar Association*, http://www.americanbar.org/groups/dispute_resolution/membership.html (last visited May 24, 2016).

23. *Washington Post*, Aug. 18, 1981, at 1; *New York Times*, June 16, 1980, at 16; *New York Times*, Nov. 3, 1979, at 44.

24. James C. McKinley Jr., "Fan Sues After Untimely Nap Brings Unwanted Attention," *New York Times*, July 7, 2014.

25. *U.S. News & World Report*, Dec. 20, 1982, at 58.

26. See Friedman, *supra* note 15, at 667.

27. The trial court granted his request. Anthony DePalma, "Court Grants Boy Wish to Select His Parents," *New York Times*, Sept. 26, 1992, at 1. An appeals court decided that Gregory had no right, as a minor, to sue on his own, but did find a way to affirm the decision terminating his parents' rights. Kingsley v. Kingsley, 623 So. 2d 780 (Fla. 1993).

28. Michael Boren, "Judge: Parents Must Pay Daughter's County College Tuition," *Philadelphia Enquirer*, Dec. 10, 2014.

29. Christopher R. Leslie, "The Arbitration Bootstrap," 94 *Texas Law Review* 265, 269–71 (2015).

30. American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2012); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

31. *No Access to Law: Alternatives to the American Judicial System, supra* note 19, at 5.

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