CHAPTER 1

The Politics of Law and Courts in Society

In many countries, the law permits adult citizens to make basic choices about how they want to live their life. Such personal decisions include who to marry, what type of career to pursue, or making travel arrangements. One exercising these choices would often reasonably expect that the government will pass laws to regulate these activities without fear of facing legal sanctions. In some countries, however, segments of the population are governed by laws that interfere, and sometimes punish harshly, ordinary activities are taken for granted in other countries. Until recently, for example, women in Saudi Arabia were deprived of the right to vote and faced criminal penalties if they chose to drive a car. Before the ban on driving was lifted, a Saudi female, Shaimaa Ghassaneya, was sentenced to ten lashings for operating a motor vehicle. In other instances, a sixty-seven year old Saudi widowed mother needed written permission from her twenty-seven year old son to board a plane and a thirty-six year old Saudi woman could not renew her passport after she separated from her husband.[1]

Notably, the discriminatory treatment of Saudi women originates from a single passage of the Qur'an, the Islamic religious text that is a basis for the Saudi Arabian theocratic legal system and social governance. The passage, Sura 4 Verse 34 declares that "Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means." Although this religious precept is not codified in Saudi Arabian Basic Law (its foundational law, enacted in 1992), it established a system of male guardianship over women. Under that system, it is customary to subordinate all women under the control of their closest male relative, who becomes their official guardian, or *wali al-amr*. A male *wali al-amr* takes all decision-making away from the woman who must get consent to go to school, get a job, get married, or seek medical treatment. At times, such control is not merely inconvenient, but also life-threatening. In 2006, an abusive husband, who shot his wife three different times

and who later died, escaped prosecution because the Saudi police refused to intervene unless her husband filed an official complaint, which he obviously did not do.[2]

Numerous other events across the globe illustrate the role law and judicial systems play in maintaining social control and ensuring that cultural norms remain intact. In 2020, Indian courts upheld the hanging execution of four men for the rape and murder of young student on a New Delhi bus, a sentence that was condemned by Amnesty International India (who opposes capital punishment) but also one that helped galvanize political and public pressure to reform India's longstanding and antiquated system of criminal punishment that often gave little justice to female victims of sexual violence. In 2017, the Russian Supreme Court upheld the Russian justice ministry's decision to suspend the activities of Jehovah's Witnesses because they violated laws designed to stop extremism. By affirming a nationwide criminal ban on an independent religious minority group, the Court's ruling was immediately condemned as a violation of religious freedom by the European Union and other western democracies.[3]

In the United States, Donald Trump's nativist and populist rhetoric led to executive action that imposed travel bans on immigrants from countries with predominately Muslim populations, prompting a backlash in the lower federal courts that has mostly agreed with the criticism that he was abusing his powers by discriminating against disfavored religious minorities under the pretext of protecting the nation's borders. Still, in *Hawaii v. Trump* (2018),[4] the Supreme Court upheld President Trump's third executive order on statutory and constitutional grounds. But even before President Trump's election, several European countries, as well as parts of Canada, took similar action by enacting bans on the wearing of Muslim headscarves and veils that cover both the face (niqabs) and the full body (burqas), as well as legal edits on wearing other religious symbols, including Jewish yarmulkes, Sikh turbans, and large crucifixes, in public spaces and workplaces. Defenders of these types of prohibitions routinely claim they promote government neutrality, ensure national security, preserve national culture, and discourage separatist movements. Even so, such restrictions increasingly are met with judicial and public resistance. As a result, courts and judges throughout the world are often are called upon to resolve these controversies by trying to strike a balance between preserving public norms and individual rights.[5]

These examples illustrate how the practical application of law is greatly influenced by the historical evolution of cultural and political norms, social behavior patterns, and legal traditions within communities, societies, and

countries. The different ways in which courts resolve disputes and maintain social control within a polity reflects the operation of legal systems.[6]

This chapter examines different kinds of legal systems around the world, and identifies the sources of law, as well as the roles courts play in contemporary societies.

LEGAL SYSTEMS

Given the so-called globalization of law, the differences among legal systems in the world should not be obscured. Every legal system is to a certain extent distinct, simply because each society and its legal norms vary. Yet, generalizations about what constitutes a legal system are still possible. A **legal system** refers to a set of institutional structures for applying the law, legal procedures for administering the law, and substantive legal rules.[7] No less important are how various elements of the legal system (conceptions of law, the legal profession, courts, and the citizenry) interact. Because there are numerous legal systems in the world, and many are of "mixed" character, scholars from various academic disciplines (comparative law, history, or legal philosophy) do not agree on how to classify legal systems or whether it is even possible to do so.[8]

Regardless, a common framework typically depicts legal systems as "families of law."[9] Although legal families evolve over time and may share certain structures, procedures, or rules, a distinguishing factor among legal systems is the law's origin. For example, civil law systems in the Romanic-Germanic family emphasize written civil codes constructed by legislatures, whereas the common law family—including the American legal system—concentrates on the administration of law by judges and lawyers. Before the fall of the Soviet Union in 1989, and in contrast to civil and common law systems, the socialist legal family derived law from Marxism political ideology. Other legal families are rooted in religious sources, as exemplified by the Muslim, Hindu, or Jewish legal systems. Some legal systems are strongly influenced by customary law (law based on social customs enforced by the community), or, as with "mixed" systems, the elements of more than one legal system may operate within a single jurisdiction (see "In Comparative Perspective: Major Global Legal Systems"). The rest of this section analyzes the major legal families by surveying the predominant legal systems and situating them in the global legal order and international law framework.

Civil Law

Most European countries have **civil law systems**. In the sixth century (A.D.), the emperor Justinian sought to restore the glory of Roman law by codifying portions

of it into one source, the *Corpus Juris Civilis* (CJC)—consisting of Institutes (an introduction to basic principles), a Digest (a summary of past Roman scholarship), Codes (a compilation of past Roman legislation, edits, and other laws), and Novels (a section for future legislation after the Code and Digest were completed). After the fall of the Roman Empire, the CJC was rediscovered by scholars at the University of Bologna, Italy, in the eleventh century. The rediscovery coincided with the development of the canon law by the Catholic Church and the rise of commercial law—a set of rules governing commercial relationships across the European continent. In time, the CJC (Roman civil law), canon law, and commercial law helped to produce a common law, the *jus commune* ("law of the community"), which became part of the civil law that was later "received," or adapted, in one form or another by European states. This history shaped the basic codes found in civil law countries, namely, the civil code, the commercial code, the code of civil procedure, the penal code, and the code of criminal procedure.[10]

Two variations of what became the modern civil law system took hold in France and in Germany during the nineteenth century. The French Civil Code of 1804, or *Code Napoléon*, developed under the rule of the emperor Napoléon Bonaparte, eradicated all traces of aristocratic power in French nobility, clergy, and judiciary. It was built on three pillars—codes broadly protecting property, contract, and patriarchal family relationships—that formerly were under the domain of the church or the aristocracy. Since the law was based on universal ideas of natural justice (liberty and equality), it was crafted in simple terms, and it accordingly limited the need for lawyers and courts. The code was thus distinctly antifeudal and antijudicial because French judges were part of the aristocratic class that had too often abused power. The bias against the judiciary is important because it laid the foundation for a tradition that institutionally isolated courts from other branches of government and reduced judges to civil servants.

Whereas the French Civil Code was inspired by revolution and strived to protect rights universally, the German Civil Code of 1896 was more technical. Proponents of the German Historical School, led by Friedrich Carl von Savigny (1779–1861), argued that legal systems must be constructed from historically derived principles of legal science. Accordingly, the German Civil Code of 1896 was a self-contained body of written law: Lawyers or judges did not have to resort to extraneous social, economic, political, or moral values to apply it. Unlike the French code, the German code made clear that the science of law (rules, legislation, and the like) was left to the realm of the lawyer and the judge, not to the common person. Hence, the German Civil Code was detailed, precise, and logical. Definitions and elaborate cross-references (to other parts of the code)

contained pragmatic guides for applying law that was virtually inaccessible except to legal experts.

The civil law tradition remains infused in legal systems throughout continental Europe, Asia, Latin America, South America, and parts of the Caribbean (see "In Comparative Perspective: Major Global Legal Systems"). Until recently, civil law systems did not provide for judicial review—the power to declare acts of the legislature or executive branch unconstitutional. The absence of judicial review is explained by the subordinate role courts play to legislatures. The nature of legal analysis in civil law systems also gives little discretion to courts in interpreting codes and legislation. In other words, modern civil codes are generally a systematic collection of general legal principles and laws enacted by legislative bodies. As one civil lawyer put it: "The Code. . .is a construction of the mind, designed to impose a rational and well-defined legal order on a particular society. It is the materialization of a legal philosophy at one point in time, as well as the solidification of a society's ever-changing morals into a fixed set of written rules."[11] For civil law judges, then, the civil code is both the starting and the ending point for legal analysis.

However, since the second half of the twentieth century, the traditional civil law model has been changing. After World War II, new constitutional courts, along with the power of judicial review, were introduced in Europe (see the "In Comparative Perspective: Constitutional Courts in Europe" box in Chapter Three). As a result, some European constitutional courts, like U.S. courts, are now playing a more dynamic role in interpreting law and making social policy.

Civil law systems are **inquisitorial** in operation and differ from **adversarial** systems used in common law jurisdictions like the United States (as further discussed in the next section). In inquisitorial systems, legal institutions and practices are structured to arrive at legal truths under a written code or by following specific legal procedures. Lawyers, who are trained as specialists in narrowly defined areas of law, earn a formal law degree at a university as undergraduates before they become eligible to practice. Judges are prepared to be civil servants who begin (and often end) their careers in a judicial bureaucracy. Finally, adjudication in inquisitorial civil law systems is proactive in the sense that all who play a role in litigation (especially judges) are active participants in, typically, a three-stage process that usually has a preliminary hearing, an evidence-taking stage, and a decision-making stage. Each stage is structured to engage litigants and judges in an active search for facts and evidence.[12] Except for select criminal cases, there is basically no "trial" process *per se*, and the presence of a lay jury is rare, because judges play the fact-finding role and determine the facts

(evidence) before issuing a ruling. Some of the key differences between inquisitorial and adversarial systems are detailed in Table 1.1.

Table 1.1 Inquisitorial and Adversarial Systems

Traits	Inquisitorial (Civil Law)	Adversarial (Common Law)
Facts investigation	Collaborative effort with prosecutor and judge discovering facts together	Litigants opposing each other separately discover facts without judge's help
Pretrial process	Less extensive	More extensive
Trial process	More disjointed and costlier	Singular event (after pretrial) and less costly
Judge's role	Active, engaged; more bureaucratic	Passive, neutral; less bureaucratic
Jury	Rarely used	Used often (especially in United States)
Bail	Rarely used	Used often (especially in United States)
Legal education	Undergraduate education	Professional (graduate) education
Attorney's role	More collaborative and less influential	Less collaborative and more influential
Plea bargaining or pretrial settlement	Unusual	Typical

Sources: Herbert M. Kritzer, ed., *Legal Systems of the World: A Political, Social and Cultural Encyclopedia,* Vol. 1 (Santa Barbara, Calif.: ABC-CLIO, 2002), 6–9; Christopher E. Smith, *Courts and Trials: A Reference Handbook* (Santa Barbara, Calif.: ABC-CLIO, 2003), 40–45.

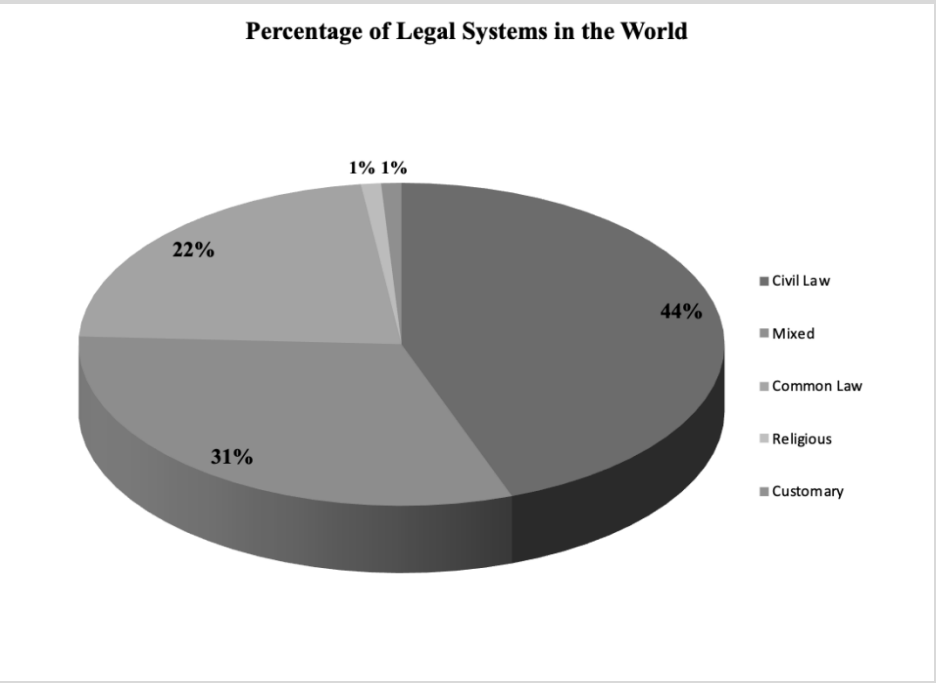
In Comparative Perspective: Major Global Legal Systems

There are 221 different legal systems in the world today. The major legal systems consist of civil law and mixed legal systems, followed by common law, customary, and religious legal systems. As a result of the Soviet Union's collapse in 1989 the Socialist (ideological) legal family is not as pervasive, so it

is excluded from analysis. Muslim law, and to a lesser degree, Talmudic law are identified separately from other religious-based systems because Muslim law is more permanent and widespread, whereas Talmudic law and Israel's mixed legal system are highly distinctive. Other initially religious legal systems are not as unique. As a result, many their defining characteristics have been blended into customary or state systems.

The sources of law for each legal system vary:

- ***Civil law systems*** use written codes created by legislatures
- ***Common law systems*** use judicial decisions by courts
- ***Customary law systems*** use social customs that are enforced by community sanction
- ***Religious legal systems*** are based on sacred religious texts, like the Koran
- ***Mixed legal systems*** are based on a combination of sources of law drawn off various other legal systems.



Legal Systems Throughout the Globe

Type of Legal System	*Examples*
Civil law systems	Brazil, Cuba, Denmark, France, Germany, Russia, Turkey
Common law systems	Australia, Canada, Ireland, United Kingdom, United States
Customary law systems	Andorra, Guernsey Island (U.K.), Jersey Island (U.K.)
Religious legal systems	Afghanistan, Saudi Arabia, Maldives Islands
Mixed legal systems	
• *Civil Law and Common Law*	Philippines, Scotland (U.K.), South Africa
• *Civil Law and Customary Law*	Chad, Japan, North and South Korea
• *Civil Law and Muslim Law*	Egypt, Iran, Iraq, Palestine
• *Civil Law, Religious (Muslim), and Customary Law*	Djibouti, Eritrea, Indonesia, Timor-Leste
• *Civil Law, Common Law and Customary Law*	Cameroun, Sri Lanka, Zimbabwe
• *Religious (Muslim), Common Law, Civil Law, and Customary*	Bahrain, Qatar, Somalia, Yemen
• *Religious (Talmudic and Muslim), Civil Law, Common Law*	Israel

Source: The University of Ottawa, "JuriGlobe—World Legal Systems" available from http://www.juriglobe.ca/eng/index.php (last retrieved January 29, 2020).

Common Law

Whereas civil law systems are based on the primacy of the legislature and a legal code, common law systems are based on the rule of judges. The origin of common law stems from the Norman conquest of the Anglo-Saxons in the Battle of Hastings in 1066 by King William I. After taking control, William I distributed the land only after the fee holders swore loyalty and promised to pay sums of money to the king. In short, William I solved the problem of maintaining order and

earning tax revenue by creating a legal system for resolving private disputes among the landholders. Beginning in 1300, three central royal courts of justice—the Court of Exchequer, the Court of Common Pleas, and the Court of King's Bench—emerged in Westminster Hall, in London, and all were staffed by judges empowered to act in the king's absence. As agents for the king, royal judges had strict instructions on how to handle local legal disputes. Access was also a privilege instead of a right: Citizens had to ask permission from a royal judge to deliver a petition to have a court hearing. What developed was a highly procedural system of writs—or petitions requesting legal relief. For example, to remove a trespasser from land, a writ of ejectment was used. The emphasis on procedure meant that "where there is no remedy there is no wrong," and where there was no remedy there was no right.[13]

The writ system reinforced the king's power and simultaneously consolidated the royal judges' power to make unwritten law as the king's delegates. The judge was a ***de facto*** (in fact) gatekeeper of the judicial process. Over time, the process of determining the facts in disputes fell to juries, and the judge's role was only to apply the law. By the fifteenth century, common law evolved alongside the law of **equity**—a special set of rules permitting relief for those who suffered injustices because of the strict operation of the writs system. For example, if a legal remedy did not address an injury, then an equitable remedy might be available if that injury violated some sense of the king's fairness. There was a separate Court of Chancery to handle such cases.

Accordingly, the judge is the central figure in a common law system. The rulings of early common law judges were "unwritten" in the sense that written law did not exist to guide their discretion. Still, once a ruling was made, it became binding as a precedent for future cases. As more and more cases were decided, "a common law in the realm" emerged. Notably, whereas judges had the obligation to "declare" the law based on precedent, they also had the power to "make" law by creating new precedent if that was necessary to avoid an injustice for litigants. As Judge Benjamin Cardozo remarked, "The power to declare the law carries with it the power, and within limits the duty, to make law when none exists."[14] Striking the proper balance between declaring and making law was conditioned by the norm that the highest court of appeal was not bound by its own precedents and, hence, high courts could reject past decisions. In sum, precedent gives law stability and predictability but remains open to change. As explained further in Chapter Nine, the doctrine of precedent, or ***stare decisis*** ("let the decision stand"), is a key aspect of judicial behavior in the U.S. judicial system and elsewhere.

Apart from England, contemporary common law legal systems include the United States, Canada, Australia, and Ireland (see the "In Comparative Perspective" box on major global legal systems). In the United States, the common law was adopted in conjunction with each colony's distinctive legal heritage. The reception of common law was facilitated by the writings of Sir William Blackstone (1723–1780). Blackstone held the first professorship of English law at Oxford University, where he delivered a series of lectures later published as *Commentaries on the Laws of England* (1765–1769). The *Commentaries* received wide distribution and represented "the most ambitious and most successful effort ever made to reduce the disorderly overgrowth of English law to an intelligible and learnable system."[15] Blackstone's *Commentaries* were also influential in reinforcing an integral aspect of U.S. constitutionalism by emphasizing that judges are the "living oracle of the law," who only "declare" the law, not make it. Indeed, in a classic statement of judicial restraint, Alexander Hamilton asserted in *Federalist* No. 78 that courts have "neither FORCE nor WILL, but merely judgment."[16] However, Blackstone's **declaratory theory of law** was ultimately challenged in the late nineteenth century by judges and legal theorists who advanced a jurisprudence of American legal realism (as explained in Chapter Two).

The complexity of common law produced new pressures in the early nineteenth century to codify a U.S. version of the common law, principally in Massachusetts and then in New York. In 1811, Jeremy Bentham, a noted English legal reformer, went so far as to offer to write a code in a letter sent to President James Madison.[17] Even though Madison declined, the **codification movement**, led by the lawyer David Dudley Field, succeeded in enacting a Code of Civil Procedure in New York in 1848. Field's efforts met harsh resistance from the East Coast legal establishment; yet the Field Codes, as they were called, were adopted toward the end of the century in the Dakotas, Idaho, Louisiana, Montana, and California. Notably, the common law system ultimately survived the codification movement because support for codification waned by the onset of the twentieth century.

Unlike the civil law tradition, common law systems are **adversarial**, so lawyers have considerable power to shape and make the law through a competitive struggle to win a case. Former New York Judge Jerome Frank once referred to this process as the **fight theory** (its application to criminal and civil cases is analyzed in Chapters Seven and Eight). In Judge Frank's view, "The lawyer aims at victory, at winning in the fight, not at aiding the court to discover the facts." In other words, the lawyer "does not want the trial court to reach a sound educated

guess, if it is likely to be contrary to his client's interest." As Frank concluded, "Our present trial method is thus the equivalent of throwing pepper in the eyes of a surgeon when he is performing an operation."[18] As a result, lawyers have more control and influence in common law systems, and judges ostensibly let attorneys "fight it out." In contrast to the civil law system, the common law system lets the litigants and their lawyers, instead of the government, carry the burden of developing facts and defending rights.

Historically, a common law attorney's training is also different. Unlike the training for a civil law practitioner, legal education in common law countries is generalist in scope and gained through a graduate degree after earning an undergraduate degree (legal training and its implications are discussed more fully in Chapter Five). Consequently, adversarial systems place great value on practical experience (i.e., apprenticeship and gaining professional experience through the "practice" of law), rather than undergraduate instruction followed by an examination and admission into a **career judiciary** (discussed more fully in Chapter Four). Judges also tend to be selected for service based on their professional accomplishments instead of their formal academic achievements. Thus, all the main protagonists in the common law drama—the lawyer, the judge, and even the jury—wield enormous authority to discover, apply, and "make" law through adjudication. Not only may common law attorneys manipulate precedents through their advocacy, but judges may embrace or reject an advocate's arguments because of the specific facts in a case, and thereby assert the power to make law. Moreover, juries are in a unique position to apply the law to facts as they see fit. The law's evolution in a common law system is therefore fluid, despite the constraints imposed by the doctrine of precedent.

Ideological Legal Systems

Before the fall of communism in central and eastern Europe, scholars generally agreed that socialist law ought to be considered an important third legal system. Although its origin began with the 1917 Bolshevik revolution in Russia, its impact did not become widespread until the end of World War II, when the Communist Party took control in Romania, Bulgaria, Albania, Poland, Hungary, Czechoslovakia, and eastern Germany. The People's Republic of China was also receptive, and it became a foundation for Mao Tse-tung's legal regime. Although the collapse of the Soviet Union in 1989 diminished its global significance, socialist law continues to influence the legal systems in China, Russia, North Korea, Vietnam, Laos, and some other countries.[19]

Socialist legal systems borrow heavily from the civil law system and use of codes. However, their defining characteristic is political ideology and the instrumental use of law in service of the socialist state. In this respect, socialist doctrine cannot embrace a Western conception of law. In this light, law in the Western sense is the foundation of liberal democracy because it limits the operation of government and is a safeguard for individual rights. Conversely, socialist legal ideology denies that law as understood in the West exists and, instead, contends that law is used to enslave the populace.

Accordingly, as it is based on Marxist political and economic principles, socialist ideology rejects outright Western liberal democratic thought. Marxist doctrine was espoused by Karl Marx (1818–1883) and inspired by Friedrich Engels (1820–1895). Marxist ideology theorizes that history is a series of alternating cycles of birth and destruction, in which one economic system is created, destroyed, and replaced by another. Feudalism, for example, was replaced by capitalism as new forms of production took hold. At the heart of socialist ideology is the belief that the wealthy elites in civil society (the bourgeoisie) capture the means of economic production from the working class (the proletariat) and deprive workers from enjoying the fruit of their labor. For socialists, Western law supports capitalist economic arrangements and promotes individuals' alienation by taking away personal liberty.

Marxist theory, therefore, seeks to eliminate the source of the class struggle, namely individual ownership of private property and the accumulation of wealth. Marx hypothesized that capitalism would be replaced after a revolution in which the proletariat overthrew the bourgeoisie and, ultimately, restored freedom through the collective ownership of the economic means of production. An ideal state would then emerge in which law and government would "whither away" because there would be no need for law to maintain social control.

Marxist theory, however, failed to be realized in socialist-influenced legal systems. Nonetheless, Marxism found expression in a principle of socialist legality. That is, the concept of law is meaningful only if it furthers the objectives of the underlying socialist ideology. In the former Soviet Union, the law's purpose was to ensure national security and educate the masses (by force, if necessary) to advance socialist economic development.[20]

Religious Legal Systems

Religion has influenced the development of law and legal systems throughout history. Roman Catholic canon law in continental Europe continues to loom large in the civil law tradition, and, likewise, Hinduism remains an important part of

Indian legal culture. The Bible inspired the development of Anglo-Saxon law. The Talmud, oral interpretations of scriptures committed to writing in Jewish law, helped shape Israel's "mixed" legal system of Talmudic, civil, common, and Muslim law. Muslim or Islamic law as expressed in the Koran, Islam's holy book, is the touchstone for "mixed" legal systems found in Pakistan, parts of Malaysia and Indonesia, northern and eastern Africa, and much of the Middle East.

Indeed, a large proportion of the world's population adheres to the tenets of Islamic religion. Although in its "pure" form it has ostensibly only been in place in Afghanistan (before the U.S.-coalition-led occupation after September 11, 2001), the Maldives Islands, and Saudi Arabia, many of the world's major legal systems embody Islamic law. A personal commitment to the Islamic faith is holistic, involving all aspects of life. "Islam," as has been said, "is a religion, a legal system, and a lifestyle all in one."[21] Islamic law is based on the word of Allah, as revealed to the Prophet Muhammad ibn Abdullah (570–632 C.E.) by the angel Gabriel. The revelations were compiled into Islam's most important sacred text, the Koran, which is supplemented by the Sunnah, which reports the teachings of the prophet Muhammad. Together, the Koran and the Sunnah constitute the basis for Islamic law, the Shariah. As divine law, the Shariah cannot be changed by man. It can be interpreted by scholars, but, by a command from Allah, anything less than total compliance is a violation of the whole Islamic community and subject to severe sanctions not only in this world but also in the next.

The Shariah identifies five pillars of personal responsibility (profession of faith, daily prayer, almsgiving, fasting, and pilgrimage to Mecca), and it provides guidelines for social relations involving family, criminal, contract, and international law. During the nineteenth and twentieth centuries, nations subscribing to Islamic law were greatly affected by their contacts with the West, and consequently many of them incorporated versions of Islamic law in accordance with the civil law tradition. Indeed, the demise of the Ottoman Empire in the early twentieth century helped spur on the emergence of secular codes and parallel court systems that displaced Shariah law in countries undergoing Western modernization. However, the assimilation process generated controversy, and secular Western norms increasingly clash with those of Islamic fundamentalists who advocate returning to a traditional form of Shariah.[22]

Notably, the region now known as the Kingdom of Saudi Arabia was not subjected to pressures other Muslim countries faced in adapting to Western values and secularism. This explains why Saudi Arabian courts have had difficulties in trying to modernize their operations while also attempting to follow the theory and practice of Shariah law. As a theocracy, Saudi Arabia's legal structures and

procedures remain based on an orthodox version of Islamic law. The Basic Law of 1992, for example, is expected to conform to Shariah. Because there is no separation between political and religious life, the legal process aims to reveal religious truths rather than discover empirical facts. Shariah encourages reconciliation, and most disputes are resolved in this manner, rather than in courts. The concept of *sulh*, "compromise, settlement or agreement between the parties," is derived from the Koran. Indeed, one study reports that 99 percent of all civil cases are resolved in this fashion.[23] Lawyers and judges work to reach amicable solutions in an informal manner by emphasizing oral testimony instead of written documents or evidence. In this fashion, *kadi* justice—the law as delivered by judges construing religious doctrine—is neither adversarial (as in common law) nor investigative (as in civil law). Instead, the process is one of religious obligation, aimed at achieving a just result according to the word of Allah.

In 2007, Saudi Arabia enacted a series of legal reforms that underscore the tensions between its religious orientation and the growing influence of Western legal norms. By decree, King Abdullah bin Abdul-Aziz declared a new Law of the Judiciary, which transferred judicial powers from the Supreme Judicial Council to a newly formed Supreme Court; reorganized the old Shariah Review Court into a new court of appeals; authorized a new Judicial Supreme Council to set up specialized courts (previously under the Minister of Justice in the executive branch); and allowed the new Supreme Court to administer government decrees and state legislation. Since Shariah courts and judges have historically valued their autonomy to apply divine law without interference from the state, these reforms have created deep divisions over modernization. Significantly, the trend towards Western democratic modernization has accelerated under the rule of Saudi Crown Prince Mohammed bin Salman, who replaced King Abdullah after he died in 2015. Apart from letting women drive and vote, these reforms include limiting the powers of the religious police and establishing a new Global Center for Combatting Extremist Ideology, where hundreds of analysts monitor Arabic social media traffic for threats presented by extremist groups. The new Saudi Prince also took the bold step of cracking down on government corruption in late 2017 by arresting several hundred wealthy Saudis, some of which that were very prominent princes and cabinet officers and forced them to pay restitution before being released. Notably, the crackdown ended in March 2019, but not until the government received more than 106 billion dollars in settlement monies from senior princes, ministers, and influential business, mainly through forfeiture of real estate, companies, cash and other assets.[24]

Customary and "Mixed" Legal Systems

Although only a few countries base their legal systems on local customs, customary law, or those rules based on social customs and enforced by community sanctions, influences a considerable number of mixed legal systems. Historically, the strongest influences of customary law have been found in sub-Saharan Africa (Ethiopia, Somalia, the Congo, and Madagascar), where customs define social obligations and methods of dispute resolution. Typically, customs are recognized by consensus of the social group, or tribe, often through familial or kinship ties. Accordingly, it was not unusual for African customary courts to appeal to customs in reconciling the competing interests of disputants. However, customs often yielded to other legal traditions brought by the European colonization of Africa and, subsequently, African independence. For example, since achieving its independence from British rule in 1960, Nigeria's constitutional system has been organized around a mixture of common law, Islamic law, and customary law. As a result, Nigeria's judicial system has distinct courts with separate jurisdictions for handling civil disputes. The Shariah Court of Appeal applies Muslim law, whereas the Customary Court of Appeal uses customary law.[25]

The legal systems in China and Israel provide further illustrations of contemporary mixed legal systems. The legal tradition in China is rooted in *Confucianism*, a philosophy derived from the teachings from Master K'ong (Kung Fu-tse), or Confucius (551–479 B.C.). Confucius, a government official and teacher who helped restore order in the Chou Dynasty in the fifth century (B.C.), espoused the principle of social harmony, as expressed through the relativism of *li*—a moral code of socially accepted behavior in order to achieve a harmonious balance between nature and man. *Li* directs people to accept fault instead of assigning blame, which reinforces social harmony. *Li* stands in sharp opposition to law and formal sanctions (*fa*). Instead, *li* makes "law," as understood in the West, superfluous, and, hence, it is frowned upon to resort to courts and formal sanctions. When social harmony is disrupted, order is restored through persuasion and conciliation, rather than formal edicts that traditionally were perceived to serve the selfish aims of rulers.[26]

Such traditional customs inhibited the development of law and a legal profession in premodern China; but they were reinforced through political events that shaped China's legal system in the twentieth century. Whereas the West introduced the civil law system and the codification of law, the socialist legalist principle (borrowed from the Soviet Union) was infused into the country's government during the Cultural Revolution (1966–1976) under Chairman Mao Tse-tung after the creation of the People's Republic of China (in 1949). Under

Mao, political power was consolidated in the Chinese Communist Party, and law became an instrument of the state. Lawyers, who were bourgeois guardians of property rights, were banned from legal practice, and the judicial system was denigrated as well. But since 1979, the legal profession has slowly reemerged because of economic modernization under Deng Xiaoping, Mao's successor, and China's entry into the World Trade Organization in 2001.[27] Still, despite increasing modernization, China's mixed legal system is strongly influenced by cultural norms that tend to reject Western conceptions of law.

As a result, China's contemporary legal system is an amalgam of civil, customary, and socialist legal traditions. Although there has been state-led reform favoring Western-style adversarialism, the legal process remains inquisitorial in practice, and judges preside over trials in accordance with code law established by the National People's Congress. By some estimates, in a nation of over 1.3 billion, there are only approximately 230,000 lawyers and 210,000 judges, and the average number of cases handled by judges on an annual basis remains low (less than a hundred per year, in contrast to the thousands of cases U.S. judges adjudicate annually). Although graduate training is available, legal education is primarily based on the civil law model of university instruction, so traditionally most lawyers are trained to be "state legal workers" ("*guojia gongzuo renyuan*") or specialist bureaucrats. Yet China's trajectory toward market reform has grown, so Chinese lawyers have been able to diversify their legal practice into the private sector and become more independent "professionals serving society" ("*wei shehui fuwude zhiye renyuan*").[28]

In late 2013, leader Xi Jinping and the Chinese Communist Party announced a series of political, economic, and legal reforms designed to increase market prosperity and reduce party interference with legal institutions and human rights. The legal reforms, which included ending a state reeducation through labor program for criminal offenders and proposals to centralize court funding and judicial appointments to reduce local corruption, purport to improve judicial independence and promote the rule of law. Whether they ultimately have that effect is uncertain because the legal profession remains tightly regulated by the state and the political persecution of human rights' activists has not stopped since the reforms were proposed. In early 2018, the Chinese legislature instituted more sweeping reforms by approving major changes to the Chinese Constitution. These included the removal of term limits on leader Xi Jinping, thus allowing him to stay in office beyond 2023. Other amendments, moreover, created an anti-corruption agency that is infused with influence from the Communist Party's Central Commission for Discipline Inspection (with the power to investigate and detain

suspects without access to lawyers), as well as inserting a statement of Xi's political theory ("Xi Jinping Thought on Socialism with Chinese Characteristics for a New Era") about how the Chinese government should operate, directly into the Constitution. For some global observers and critics, the revisions have further reinforced the Communist Party's and Xi's grip on the country and have muted efforts by political reformers to separate Party control from government structures. The historical evolution of the Chinese constitution and the different influences at work in its mixed legal system is detailed in the In Comparative Perspective box, "China's Written Constitution Without Constitutionalism" in this Chapter.[29]

Israel's mixed legal system incorporates Talmudic, civil, common, and even Muslim law elements. Prior to Israel's independence in 1948, its territory was under Palestinian control as part of the Ottoman Empire. Because Ottoman law contained Muslim as well as European law components, until 1948 the territory had a combination of civil law, English common law, and Muslim law. Since independence, Israel's constitutional system has been constructed by codifying its basic laws and through the development of an Israeli common law. Moreover, the Israeli system has a separate body of religious courts that adjudicate disputes involving marriage and divorce. In other domestic relations cases, Talmudic law applies only if the parties consent. In recent years, Israel has witnessed the emergence of many new nonstate Jewish religious courts offering adjudication of private and commercial law disputes according to Jewish law (Halacha). Accordingly, in the words of Aharon Barak, the former president of the Supreme Court of Israel, Israel stands apart from most Western legal systems because it has a "duality of civil and religious law" along with common law tradition.[30]

In Comparative Perspective: China's Written Constitution Without Constitutionalism

After the 1949 revolution by the Chinese Communist Party (CCP), the new People's Republic of China (PRC) began a process of developing a new constitutional and legal structure. In doing so it at once abandoned the 2,000 year-old tradition of Confucianism's teaching of *li* ("rites" or "propriety"), which had formed the basis for a kind of social constitution, on the one hand, and, on the other, rejected "Western rule-of-law constitutionalism" as imperialistic. In the last sixty years, China has had one provisional and four formal constitutions.

Initially, a provisional Common Programme was enacted in 1949. It proclaimed the "people's democratic dictatorship" and laid out, in seven chapters and sixty articles, principles that became the basis for later constitutions. In 1954 the National People's Congress (NPC) adopted the first written constitution, containing 106 articles in four chapters. That constitution, however, was neither seriously implemented nor provided a barrier to the abuse of governmental power and denial of human rights. Subsequently, Mao Zedong initiated a series of political campaigns—from the "anti-rightists movement" (1957) to the "Great Leap Forward (1958) and the "great Proletarian Cultural Revolution" (1966–1976)—resulting in a Chinese Holocaust and eliminating virtually any basis for the constitutionalism.

A second constitution was adopted shortly before the end of the "Cultural Revolution." The 1975 Constitution was actually more of a political outline and basically removed most of the 1954 Constitution's provisions for individual rights and institutional powers, with only 30 articles remaining. After Mao's death in 1976, the NPC enacted a third constitution. The 1978 Constitution included 60 articles-deleting some of the previous constitution, adding some human rights and institutional provisions, and laying down "Four Modernisations" as primary objectives in the area of agriculture, defense, industry, and science and technology. Subsequently, that constitution was revised and amended in 1979 and 1980, and then replaced in 1982.

The 1982 Constitution is in some respects a return to the pre-"Cultural Revolution" period in establishing the People's Congress, a dualist judiciary, and tripartite national administrative structure: (1) the State President (largely symbolic); (2) the State Council, which wields substantial powers in operation as the Central People's Government (CPG); and, (3) a separate Central Military Commission (CMC), which actually overlaps with the CCP. This constitution was subsequently amended in 1988, 1993, 1999, and 2004. Most of the amendments in various ways primarily promoted a market economy-moving away from communal or collective ownership, particularly in rural areas—and, at least until the 2004 amendments, paid little attention to human rights.

In 2018, the 18th National People's Congress of the Communist Party approved further constitutional amendments that made it possible for President Xi Jinping to hold a third or more terms, in contrast to prior constitutional limitations on two terms; created a party-controlled National Supervision Commission, above the judiciary, to combat corruption; and provided for legal reforms, including greater professionalism and transparency within the judiciary.

The Chinese judiciary remains weak, when viewed in terms of Western standards. The Communist Party controls all judicial appointments, assignments, and reappointments. There is no power of judicial review, akin to that established in *Marbury v. Madison* (1803), the European Court of Justice, and elsewhere. China remains influenced by the civil law tradition, and neither do judges exercise "judicial independence," nor are thy bound by "precedents," as in common law countries. Over the last decade, the People's Supreme Court has developed a system of "guiding cases" but they are only *de facto* binding—that is, only in the sense that they must be considered by lower courts.

In sum, the socialist legal system and constitutionalism in China bears, as often is said, distinctive "Chinese characteristics."

Sources: See Qianfan Zhang, *The Constitution of China: A Contextual Analysis* (Oxford: Hart Publishing, 2012); Qianfan Zhang, "A Constitution without Constitutionalism? The Paths of Constitutional Development in China," 8 *I*Con* 950–976 (2010); Note, "Chinese Common Law? Guiding Cases and Judicial Reform," 129 *Harvard Law Review* 2213–2234 (2016); and Tu Yunxin, "Guiding Cases in Chinese Legal System." Other important insight, which David M. O'Brien has gained and is indebted to receiving, comes from Professor Tu and to Fundan University, where Professor O'Brien worked as a Visiting Senior Fellow, 2017–2018.

LEGAL SYSTEMS AND GLOBALIZATION

Scholars have long recognized the significance of the role that law plays in an increasingly complex global legal order. Yet, the precise meaning of international law, generally understood as "those rules of law applicable to relations among sovereign states,"[31] is less clear today than it was in the early twentieth century. The binding effect of rules of international law—mostly consisting of treaties, customary international law, generalized legal principles, and decisions of international organizations or tribunals—has become more complicated, especially for domestic national courts trying to apply them in a transnational legal environment.[32]

The trend toward globalization has brought significant evolutionary changes to the modern international legal system, including: (1) the increasing codification of international law, thereby pushing courts to rely less on custom as a basis for their decisions; (2) the rapid growth of new global and regional institutions; (3) the development of international human rights and criminal law; (4) the growing acceptance of executive agreements and instruments created apart from the formal treaty processes; and, (5) the growing presence of international administrative or regulatory bodies, such as the International Civil Aviation Organization (a specialized agency of the United Nations that sets safety standards for international air travel). The demands placed on the global legal order have

also brought a proliferation of multinational corporations, specialized law firms, and courts dealing with specific areas of international law and foreign affairs, such as the European Court of Human Rights, the Inter-American Court of Human Rights, the International Criminal Court, and the European Court of Justice.

One consequence of these changes is the growing fragmentation or disaggregation of sovereignty among nation states and, thus, the increasing role of nontraditional actors, such as nongovernmental organizations (NGOs). Accordingly, global governance increasingly is defined by the existence and influence of transnational or transgovernmental networks, which directly interact with each other through a myriad of cross-border and supranational alliances. These linkages affect global politics and policy by enhancing the quality of information among international institutions, promoting the international enforcement of policy initiatives, and facilitating international consensus and problem solving using "soft law" techniques (e.g., memoranda of understanding) that respond to challenges without going through established hierarchical channels. Such transnational networks promote the cross-fertilization of constitutional ideas and an evolving "community of courts." Not surprisingly, such networks have been reinforced by the Internet and electronic legal databases, such as Lexis Nexis and Westlaw, which provide rich databases of information that judges increasingly draw upon. Consequently, "(l)egal systems and actors within these legal systems are increasingly interconnected" which, in turn, "have obliged highest courts to develop expertise concerning the application of legal sources elaborated outside of their national legal system."[33]

THE NATURE AND SOURCES OF LAW

The preceding discussion of global legal systems and their interrelationships underscores that the nature of the law is socially constructed and registers the prevailing values of the larger culture of communities and countries. Most Americans would consider a legal system that punishes a woman for driving a car with a whipping to be barbaric and one that violates basic human dignity. Yet, for many Saudi Arabians, under Shariah law, the ban is a religious edict that commands obedience because Shariah is synonymous with preserving law and order, respecting government legitimacy, and achieving prosperity. As a result, its effect on the most powerless in society, such as women, is arguably irrelevant in Saudi Arabia.[34]

The differences in legal systems may be explained by identifying the sources and nature of law within a country. The former dean of Harvard Law School Roscoe Pound once observed that "laws are general rules recognized or enforced

in the administration of justice."[35] While there is no universally accepted definition of law, a common understanding of it is that "law" is a rule of conduct, or societal norm, enacted by government that details what is right or wrong, and which is enforced through the imposition of a penalty. Those subject to the law's command obey it because it is just to do so; and complying with the law is the basis for political obligation. The law's legitimacy is also intertwined with the law's social purpose. Hence, the law's purpose is critical to appreciating how law regulates human activity, while simultaneously maintaining social order and securing justice. In conventional terms, "justice" is understood in two ways: corrective and distributive. Corrective justice "fixes" a wrong that has harmed an innocent third party. If someone has stolen a car or vandalized public property, corrective justice is delivered by punishing the offender. Distributive justice, on the other hand, rectifies an inequality existing between parties because it is just to do so.[36]

In the United States, law originates from the U.S. Constitution and Bill of Rights, as well as state constitutions. In addition to federal and state constitutions, law is made by legislatures, administrative agencies, and, on occasion, the president, as well as the courts. These various sources of law (detailed in Table 1.2) are analyzed in terms of typologies of law that broadly describe the U.S. legal system of public and private law.

Table 1.2	Types of Law
Public Law	**Subject Matter**
Constitutional law	Interpretation of constitutional documents
Administrative law	Enforceability of agency action or regulation
Criminal law	Enforcement of public moral code through sanction
International law	Maintaining stability of various legal relationships between nation and states
Taxation law	Collection of public revenues
Bankruptcy law	Discharge or reorganization of corporate and individual debt due to financial hardship
Antitrust law	Facilitation of free market competition between business competitors
Private Law	**Subject Matter**
Contract law	Enforceability of private agreements
Tort law	Imposition of liability for unreasonable acts between private individuals that proximately cause harm
Corporation law	Maintaining stability of various legal relationships affecting private enterprise and business corporations
Probate law	Facilitation of transfer of property upon death or disability
Family law	Maintaining stability of various legal relationships affecting families, including marriage, dissolution, and child custody
Property law	Facilitation of the various legal relationships affecting the possession and transfer of real (land) or personal (tangible items) property

Sources: Lawrence M. Friedman, *American Law: An Introduction,* 2nd ed. (New York: Norton, 1998), 163–79; Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989), 7–8.

Public Law

Law affecting the government embodies **public law**—that is, the legal relationships among governments and between governments and individuals. Statutory law, or legislation enacted by legislatures, is the major source of public law. The Americans with Disabilities Act (1990),[37] a federal statute designed to

protect disabled persons from employment discrimination, is an example of statutory law. Federal and state constitutions delegate authority to legislatures to enact statutes. Article I of the U.S. Constitution, for instance, vests the U.S. Congress with broad legislative powers. Yet, because statutes are drafted in general language, they are often ambiguous and require administrative and judicial interpretation. The interplay between the legislative, executive, and judicial branches in determining the meaning of statutes raises important questions of separation of powers and, sometimes, of constitutional law.

Public law includes distinct but interrelated subcategories, such as constitutional law, administrative law, and criminal law, among others, that merit further discussion.

Constitutional Law

In the United States, constitutional rights, duties, and obligations are given final effect by the Supreme Court. The Court's rulings are binding as the "supreme Law of the land" under Article VI of the U.S. Constitution. Notably, though Article III vests judicial power in "one Supreme Court," the Constitution is silent on whether the Court has the authority to determine the constitutionality of legislation or official executive action.

In addition, because of the system of **judicial federalism**—that is, separate federal and state constitutions and courts (as further discussed in Chapter Three)—the highest state courts apply the law and exercise judicial review under their respective state constitutions. For instance, in 1892, before his appointment to the U.S. Supreme Court and while serving as a state supreme court judge, Oliver Wendell Holmes, Jr., rejected a policeman's claim that a New Bedford, Massachusetts, mayor improperly fired him under a state law prohibiting policemen from soliciting money for "any political purpose whatever." Judge Holmes ruled that the policeman has "a constitutional right to talk politics, but he has no constitutional right to be a policeman."[38] In one respect, Judge Holmes's decision settled the dispute at hand—the aggrieved policeman lost the case as well as his job because his free speech rights under the state constitution did not trump the mayor's power to dismiss him. But, in another respect, the outcome reaffirmed the legislature's power to condition the employment of public servants because, Judge Holmes ruled, the state constitution and constitutional law recognized the legislature's authority to define individual rights, duties, and obligations.

The Supreme Court asserted that power in the landmark case of *Marbury v. Madison* (1803).[39] In declaring that it is the Court's duty "to say what the law is" under the Constitution, Chief Justice John Marshall elucidated the enduring

principle of **judicial review**. Since judicial review enables courts to check majority will and laws from the political branches, it remains a controversial and formidable power of appellate court policymaking (for a full discussion on appellate courts, see Chapter Nine; and, judicial policymaking, see Chapter Ten).[40]

Administrative Law

Although the U.S. Constitution omits any reference to a government bureaucracy, the realities of governing necessitated the creation of administrative agencies. At the federal and state level, the legislature makes statutory law, but administering or implementing it requires the creation and existence of agencies. Executive agencies play a formidable role in Washington, D.C., as well as in most state capitals, because they possess delegated legislative authority to make law. In the federal government, there are numerous executive departments, such as Commerce, Defense, Energy, Labor, Education, Justice, and Transportation. In addition, there are several independent agencies and government corporations (which compete with private enterprise), as well as a host of other boards, commissions, and advisory committees that perform specialized bureaucratic tasks and a range of services. The Environmental Protection Agency, the Federal Communications Commission, the Nuclear Regulatory Commission, the Securities and Exchange Commission, and the U.S. Postal Service are familiar examples of independent agencies and government corporations that have been delegated specific powers to regulate environmental protection, public broadcasting, nuclear energy and safety, financial securities in the marketplace, and the nation's postal service. Similar bureaucratic entities are infused into state legal systems.

Under the federal Administrative Procedure Act,[41] and similar state laws, administrative agencies are key sources of law because they are empowered to make administrative regulations. Federal regulations, which are published in the *Federal Register* and are accessible in the *Code of Federal Regulations*, are based on broad legislative mandates that are expressed in statutory law. Because Congress lacks the institutional capability to review the application of all the statutes it enacts, it falls to administrative agencies to interpret and implement them. As a result, agencies also have quasi-judicial functions in resolving disputes with other agencies, interest groups, and the public, typically after agency hearings before promulgating regulations.

A recurring constitutional issue affecting agency regulations in the modern post-New Deal era since 1937 is the amount of judicial deference courts owe to agencies when agency powers are questioned in litigation. The growth of the

institutional presidency and the expanding role of the federal government since World War II have placed increasing pressure on courts to act as guardians or overseers of the administrative state. The battleground for testing the constitutional limits of agency power generally revolves around statutory interpretation (a topic discussed further in Chapter Nine). Agencies must construe and apply legislation, and in doing so, they issue rules and regulations that have binding legal effect. but which also may be legally challenged in federal courts. When reviewing the legality of agency interpretations and regulations, courts are generally deferential, which means that agency action will be upheld by the courts if challenged in a lawsuit. In theory, courts afford deference to agency decision-making because agencies are implicitly given delegated powers by legislatures to solve complex regulatory problems that are best resolved by the expertise agencies bring to any given area of public policy. By affording deference, courts are signaling that they do not want to second-guess the judgments of experts in the political branches; but there is also a risk that they are rubber-stamping executive action and ceding too much power to agencies.

Notably, in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* (1984),[42] the Supreme Court established guidelines that frame judicial review of agency statutory interpretation. If Congress's legislative intent is clear, then the courts should defer to an agency's construction of the statute; but if the statute is ambiguous, then courts should only overturn an agency's action if its interpretation of the statute is unreasonable. Even though the Supreme Court continues to interpret the precise scope and application of the *Chevron* rule in subsequent cases, the judiciary still retains significant control over agency regulations and lawmaking.

Still, the exercise of judicial power in relation to the *Chevron legal* standard is increasingly politically controversial. Scholars, along with several conservative businesses and Supreme Court justices—most notably, the recent appointment of Justice Neil Gorsuch in particular, as well as Justices Clarence Thomas and perhaps even the Court's newest member, Brett Kavanaugh—have questioned its wisdom, constitutionality, and scope, mostly because it gives too much legislative authority to the executive branch and raises other constitutional difficulties, including separation-of-powers' conflicts. Even so, and while its precedential force remains uncertain, some empirical studies find that agency interpretations prevail most of the time in federal circuit courts that decide cases under the *Chevron* principle; and, as evidenced by *Kisor v. Wilkie* (2019)—a case involving the Department of Veteran's Affairs denial of benefits to a veteran with Post-Traumatic Stress Disorder-the Supreme Court, at least in some legal contexts,

seems committed to a deference principle. Although the case was remanded to the lower courts for further review, the Court, in *Kisor*, did not overrule a line of precedents that held that courts should defer to an agency's decision, even when it was interpreting its own admittedly ambiguously written rules.[43]

Criminal Law

Criminal law deals with the use of governmental power to enforce violations of federal and state penal codes. The legal guilt for committing a crime is defined under statutory law that covers different kinds of illegal behavior, ranging from traffic offenses to capital murder. Generally, crimes are categorized in accordance with the harm they cause. Felonies, such as arson, rape, aggravated assault, and grand larceny, are serious offenses, punishable by lengthy prison sentences. Misdemeanors involve less property or bodily harm and include minor offenses, such as disorderly conduct, possession of marijuana (in small amounts), loitering, and public intoxication. Accordingly, misdemeanors carry less severe punishments, typically with shorter incarceration (less than one year) or the payment of restitution.

"[If] the Government becomes a lawbreaker," Justice Louis Brandeis once said, "it breeds contempt for the law."[44] Perhaps more than any other aspect of American jurisprudence, courts must ensure that those accused of a crime are treated fairly and swiftly. As Justice Brandeis recognized, courts are obliged to strike a balance between individual freedom and public safety in criminal law. From the time of arrest until sentencing or acquittal, courts exercise their discretion in different phases of the trial process in deciding the scope and application of criminal defendants' substantive and procedural rights.

For example, in *Gideon v. Wainwright* (1963),[45] a landmark case guaranteeing the right to counsel for indigent defendants, the Court protected Clarence Gideon's right under the Sixth Amendment to have an attorney appointed for him at trial. The rulings in *Mapp v. Ohio* (1961),[46] which upheld the exclusionary rule (requiring the exclusion at trial of evidence obtained from an unreasonable search or seizure under the Fourth Amendment), and *Miranda v. Arizona* (1966),[47] which requires police to read defendants their "*Miranda* warnings" in order to prevent violations of the Fifth Amendment's privilege against self-incrimination, are other oft-cited examples of cases expanding defendants' rights. Because the accused is presumed innocent and the government has the burden of proving guilt beyond a reasonable doubt, courts pay careful attention to whether rules of legal procedure and evidence are fairly applied in accord with constitutional requirements. Under the Sixth Amendment, for instance, defendants are entitled

to "a speedy and public trial, by an impartial jury." In enforcing the right to a "speedy" and "public" trial with an "impartial jury," courts create legal standards to guarantee that the government respects those rights. *Batson v. Kentucky* (1986),[48] to illustrate further, held that the prosecution cannot use peremptory challenges—procedural requests to exclude persons from jury service for any reason—to remove African Americans from juries because racial considerations violate the defendant's right to an impartial jury. The Court's rulings pertaining to the process of arraignment, bail, and the introduction of evidence at trials are further examples of legal procedures that have significant consequences in criminal law (criminal procedure is further considered in Chapter Seven).

Private Law

Private law regulates the affairs of citizens in a variety of legal areas. It is the primary mechanism by which individuals resolve personal disputes. It defines personal obligations to other citizens, groups, or business entities. At the same time, it also gives citizens vested interests in remaining safe from physical or material harm. The law regulating corporate behavior is private law, as is the law establishing the rules governing civil marriage, divorce, and child custody. The assets and liabilities of a person's estate are distributed in accordance with the law of probate, another subunit of private law. These typologies and others (listed in Table 1.2) are also considered civil law.

Notably, civil law, as used here, has a different connotation from that of the (code-based) European civil law tradition, and it is most easily understood in contrast to criminal law. In criminal law, the government has an interest in the prosecution of offenders who commit crimes. Conversely, in civil law, the government's interest usually only extends to providing citizens with the means of resolving a private dispute. To illustrate, a person failing to fulfill a contract or causing personal injuries by acting negligently (a tort action) is a civil action in private law. Upon a finding of civil liability, the aggrieved party may seek to recover the monies lost upon breach of contract; or, in a negligence lawsuit, try to recover an amount of money that "compensates" them for the harm they suffered by being kept out of work, or losing a limb, due to the defendant's irresponsible conduct (civil litigation is further discussed in Chapter Eight).

Contract Law

The modern law of **contracts** grew out of the common law tradition. In the United States, contract law underwent a major transformation in the late eighteenth century. Under prior doctrine, contracting parties could avoid

performing their agreements if it could be shown that the terms were clearly unfair. The emerging doctrine, often referred to as the "will theory of contracts," instead recognized that the law should honor agreements based on the intent of the parties. The inherent fairness of the exchange thus became less important than whether the contracting parties in fact made an agreement. Accordingly, the "convergence of wills"[49] became a basis for modern contract law. Because the intent to make a contract determines its enforceability, agreements reached in principle but not yet performed—so-called executory contracts—became enforceable as well. In short, in making contracts, parties may now be certain that their agreements would be legally binding documents.

Will theory had enormous consequences. One effect was to transform the judicial function: Courts began to share the responsibility with legislatures in determining statutory law. Hence, "antebellum judges dethroned the English common law by Americanizing it,"[50] a process hastened by the judiciary's rising stature as agents of economic lawmaking in all aspects of capitalism, including contract, antitrust, labor, bankruptcy, and commercial law. By the outbreak of the Civil War, contract law had become the predominant source of private law. A corresponding legal change occurred in the law of torts as well, particularly in the states.

Between the mid-nineteenth and early twentieth centuries, state courts were at the forefront of preserving the sanctity of private agreements. Federal courts also helped lay the basis for the expansion of capitalism and the sustained protection of private property by affirming Congress's power to enforce public contracts and, later, by preventing states from passing laws that would deny individuals the "liberty of contract" in the beginning of the twentieth century. Two decisions, *Fletcher v. Peck* (1810) and *Trustees of Dartmouth College v. Woodward* (1819),[51] interpreted Article I, Section 10, of the U.S. Constitution, which bars states from impairing the obligations of contracts, to hold that states could not deny the validity of public as well as private contracts—specifically, the land grant given to investors by the Georgia legislature in *Fletcher* and the English royal charter that devolved into an agreement with the state of New Hampshire to set up a college in *Dartmouth College*. Moreover, in *Allgeyer v. Louisiana* (1897),[52] the Fourteenth Amendment's due process clause was broadly construed to create a "liberty of contract" that protected "all contracts which may be proper, necessary, and essential" to a citizen's right to "be free in the enjoyment of all his faculties." The principle was, then, used to nullify a New York labor law regulating the number of hours bakery workers could work in *Lochner v. New York* (1905).[53] These early decisions underscored the vital role that federal and state courts played

in developing the law of contracts as well as the general economic liberty principles of constitutional law.

Tort Law

Tort law provides remedies for private civil injuries and can be traced back to 1850 when it was recognized as a separate category of law. Before then, most legal claims seeking relief for harm caused by acts that did not arise from contract law—such as injury to a person's reputation (slander or libel), a threat to do bodily harm (assault), or harmful physical contact (battery)—were typically adjudicated under the common law system of writs, such as "trespass" (directly violating a person's property interest) or "trespass on the case" (indirectly violating a person's property interest). Advances in technology and industrialization after the Civil War exposed the difficulties of litigating newly discovered tort claims—often caused by steamboats, railroads, and industrial accidents—with the arcane rules of common law pleading. The law of torts thus emerged and eventually expanded to include fault-based conceptions of legal liability, like **negligence**, and related issues of the foreseeability of harm, such as "proximate cause."[54]

Under common law, tort claims did not have to prove fault or intent because rules of strict liability applied. That is, all an injured plaintiff had to show was that the defendant committed the act in question, without regard to fault. In *Brown v. Kendall* (1850),[55] however, the Supreme Court of Massachusetts helped revolutionize the law of torts by holding, in the words of Chief Justice Lemuel Shaw, "the plaintiff must come prepared with evidence to show either that the [defendant's] intention was unlawful or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable." The controlling standard of legal liability for the tort of negligence, he wrote, was that the parties exercise "ordinary care," or "that kind and degree of care, which prudent and cautious men would use, such as is required by the exigency of the case, and such as is necessary to guard against probable danger." In other words, a plaintiff could only win if there was proof that the defendant did not use ordinary care. Moreover, Chief Justice Shaw added there would be no liability if the plaintiff helped cause the accident—that is, if there was no "contributory negligence."

The new standards for tort liability, however, generally permitted corporate and business defendants to escape liability, while promoting the development of capitalism in the mid nineteenth and the early twentieth centuries. By fashioning rules based on fault liability and intentional conduct, courts rewrote tort law by creating precedents that transferred the cost of having accidents from employers

to insurance companies and, sometimes, to injured plaintiffs. Such early common law decisions laid the basis for distinguishing three general types of torts that structure today's modern tort law: *Intentional torts* are those causing harm by intentional conduct. Familiar examples include assault and battery, trespassing, and false imprisonment. *Negligent torts* involve the imposition of liability without regard to legal intent. *Strict liability torts* are like common law torts of trespass in the sense that liability is imposed without regard to legal intent or fault. Simply engaging in the activity is enough, typically because it is abnormally dangerous or hazardous. To illustrate, product liability cases—those lawsuits that hold manufacturers strictly liable for the injuries they cause by making defective products—arise, for example, when harm is caused by a car's defective braking system or through an explosion resulting from a faulty fuel tank on a jet.

Incurring tort liability remains a contentious public policy issue that often pits trial lawyers against the insurance industry and business interests. In establishing the rules of tort liability, judges and legislators alike determine the legal standards by which individuals and corporations are held financially liable. Over the past generation, extensive efforts have been made to reform tort law (the politics of "tort reform" is discussed in the context of the civil litigation in Chapter Eight).

THE ROLE OF COURTS IN CONTEMPORARY SOCIETY

The different typologies and sources of law, just discussed, are the touchstone for the way courts function in the United States and elsewhere. Moreover, all courts function and discharge their duties in accordance with established judicial roles, or a "set of expectations, values, and attitudes about the way judges behave and should behave."[56] While not an exhaustive list, courts perform several functions and roles, the most important of which are as mediators of conflict, creators of legal expectations, guardians of individual and minority rights, therapeutic (problem-solving) agents, and policymakers.

Mediators of Conflict

The most basic function of a court is to resolve disputes or conflicts. As arbiters of private and public disputes, they not only provide security by preventing vigilantism but also help set priorities in public policy and distribute societal resources among competing interests. In the U.S. and the common law tradition, the courts perform this function through an adversary process that allows judges to render impartial decisions after gathering the facts and applying the law in cases.

Not everyone who believes he or she may have suffered some harm through the misfeasance of others seeks the help of attorneys and courts in civil actions, however (see "Contemporary Controversies over Courts: The Dispute Pyramid" in Chapter Eight). For those who do seek legal relief, the main participants in adversarial litigation (parties, lawyers, and judges) participate in criminal and civil cases—though, the lawsuits in those types are different because in criminal cases the law is enforced to maintain the public peace; whereas, in civil cases a private claim is asserted seeking monetary damages for a legal injury. In both types of cases, parties reach settlements either informally (before a trial) or formally (after a trial). Some disputes having significant legal ramifications, such as contract enforcement in construction projects, or property division in divorce cases, are resolved without invoking the full expense of the formal trial process through *alternative dispute resolution* (ADR) mechanisms, sometimes connected to court forums, but many times not (in private settings). The similarities and differences between adversarial litigation in criminal and civil cases, and the ADR alternatives, are analyzed further in Chapters Seven and Eight.

Creators of Legal Expectations

Courts create and order legal and social expectations through dispute resolution. Citizens know that legislatures make law and are aware that courts apply the law or establish rights. In defining the scope of legal duties and rights, courts thereby create and reinforce public expectations about the law. In this regard, the published opinions of courts are valuable in not only justifying their decisions but also orienting social behavior and enabling citizens to know the probable consequences of their actions.

The Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)[57] is illustrative. There, in an unusual plurality-joint opinion by Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter, the Court employed the doctrine of ***stare decisis*** to uphold *Roe v. Wade*, a 1973 ruling recognizing a woman's fundamental right to choose an abortion. The decision to affirm *Roe*'s "central holding" registered the Court's reluctance to upset legal and social expectations by changing the legality of a controlling common law precedent in abortion cases. In the words of the plurality opinion in *Casey*:

> For two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of

> the Nation has been facilitated by their ability to control their reproductive lives. . . .The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

In addition to concluding that the social cost of overruling *Roe* was too great, the Court pragmatically recognized that reversing *Roe* would significantly damage the public's confidence in the Court as an institution. Although the dissenting justices thought otherwise, the plurality asserted that the Court's institutional legitimacy depends on fulfilling the expectations that courts create by demonstrating a commitment to existing precedent.

Guardians of Individual and Minority Rights

Constitutional framer Alexander Hamilton thought that the responsibility of courts was to act as "faithful guardians of the Constitution." In defending the judiciary's power to exercise judicial review, he observed that courts safeguard the values underlying the Constitution by exercising the authority to overrule laws originating from "occasional ill humors in the society." Since the Constitution provided for judicial independence from the other branches of government, Hamilton believed the judiciary was a bulwark against legislation threatening to compromise constitutional rights and the rule of law. In defending the role of courts in *Federalist* No. 78, he observed that "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in the capacity to annoy or injure them." In democracy with separation of powers, the courts are limited in what they can do. As Hamilton further explained:

> The judiciary. . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[58]

Although Hamilton favored what is called **judicial self-restraint** (i.e. that courts should defer to the legislature and the laws it creates on behalf of the people it represents in the democratic process), there is little doubt that the court's exercise of judicial review enables the judiciary to assume the important role of safeguarding individual and minority rights against dominant political majorities in the legislative process. In *United States v. Carolene Products Co.* (1938) and its

famous "Footnote Four" (of that decision), the U.S. Supreme Court signaled that the Court has a special obligation to safeguard the rights of "discrete and insular minorities" when they are diminished by legislative action in the political system—otherwise known as the "preferred freedoms" doctrine. Under Footnote Four's rationale, courts are obliged to invoke strict scrutiny (a rigorous standard of judicial review) to test the constitutionality of laws that may infringe upon fundamental rights. Accordingly, since World War II, the Court's agenda and decision-making has become more progressive in scope: Instead of mostly deciding constitutional cases testing the limits of economic regulation, increasingly the Court has reviewed civil rights and liberties appeals that implicate the scope of the Court's guardian role in affirmative action, free speech, and other cases.[59]

The guardian role of courts inherently requires the judiciary to seek justice within a constitutional and public policy framework that is dynamic, challenging, and complex. Judges are often called to decide cases that strike a difficult balance between majority rule and minority rights. In some instances, the judicial lines that are drawn in reconciling competing interests, such as the government's interest in protecting public safety while preserving a respect for individual rights, are influenced by the unique character of the court and its operation in the legal culture or political system. One such United States court, the Foreign Intelligence Surveillance Court (FISC), is tasked under law to review wiretap applications submitted by the federal government in order to gather intelligence that may lead to a criminal prosecution of foreign agents or spies that seek to harm the United States in terrorist plots or other illicit activity. Its importance has grown significantly in the post-9/11 era because it plays a key role in high profile criminal activity or preventing terrorist attacks to the homeland. Unlike other courts in the public domain, it operates in secrecy and it does not typically afford the targets of the surveillance the due process right to be notified (or be represented by counsel) when the government asks the court to review and grant or deny its wiretap application, which sometimes are directed against U.S. citizens. Also, while a record of kept of the judicial proceedings, the judicial opinions it writes do not ordinarily get published in the public domain since much of what it reviews involves classified information or other sensitive law enforcement matters. But, in some instances, the work that the secret court does is thrust into the public eye for political reasons. The legal and public policy implications of the FISC's role in safeguarding public safety while trying to protect basic rights is illustrated by the highly unusual decision to criticize the court through the release of the so-called "Nunes memo" in the second year of the Trump administration (see in the Contemporary Controversies over Courts box, The Secret Foreign Intelligence Court and its Politicization in the Trump Era).

Contemporary Controversies over Courts: The Politics of Secret Foreign Intelligence Surveillance Court During the Trump Administration

Shortly after Donald Trump's historic 2016 presidential victory, the U.S. House of Representative Permanent Select Committee on Intelligence and its chair, Devin Nunes (R-CA), released a memorandum to the public alleging that the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) abused their law enforcement powers by conducting wiretap surveillance of Carter Page, a U.S. citizen and former Trump foreign policy advisor, during the presidential campaign process. The January 18, 2018 memorandum, which contained classified material of the FBI's surveillance of Page under the Foreign Intelligence Surveillance Act (FISA), questioned the "legitimacy and legality of certain DOJ and FBI interactions with the Foreign Intelligence Surveillance Court" (FISC) and concluded that there was "a troubling breakdown of legal processes established to protect the American people from abuses related to the FISA [probable cause] process." By taking the unusual step of publicly disclosing the Nunes memo, Republicans sought to discredit political critics alleging that the DOJ and FBI are biased and conspiring against Trump during Special Counsel Robert Mueller's investigation of Russian meddling in the presidential election campaign.

The allegations asserted that the initial FISA surveillance application (and three other successive renewals) was improperly granted by FISC because the DOJ and FBI omitted facts showing political animus against Trump. According to the Nunes memo, the Page FISA applications relied heavily upon the information gathered from a "dossier" compiled from Christopher Steele, an FBI informant that was paid $160,000 by the Democratic National Committee and the Hillary Clinton campaign (through the Perkins Cole law firm and Fusion GPS) to do opposition research against candidate Trump (that aimed to expose Trump's close political ties to Vladimir Putin and Russia). Also, the memo alleged that the Page FISA application did not disclose other facts revealing that Steele, and some FBI personnel that were part of or close the application process, exhibited clear anti-Trump bias which, in turn, show that Steele and the FBI were unreliable and ideologically driven. Because of these omissions, the Nunes memo asserted that the FISC, which is special tribunal of federal judges that are appointed by the Chief Justice of the U.S. Supreme Court and reviews in secret applications to surveil persons (including U.S. citizens) that are suspected of spying as foreign agents against the United

States, wrongfully approved of each application because it lacked the necessary legal probable cause to do so.

After President Trump decided to de-classify its contents, the Nunes memo was released to the public against the advice of federal law enforcement and national security officials or advisors. For critics, these actions were misleading because the memo did not outline what the facts were that led the FISC to grant the first Page FISA application or the successive ones that are legally required to demonstrate that the continuing investigation and surveillance are producing viable intelligence. As Stephanie Douglas, a former senior FBI official in charge of counterintelligence operations observed, the Nunes memo "nicely sits together to support a narrative that obviously is very consistent with what politics wants it to be consistent with, at least the Republican version."

Subsequently, House Democrats prepared a counter-memo in reply, but President Trump refused to de-classify and release the document to the public, citing national security concerns. Trump defended his decision by tweeting, "The Democrats sent a very political and long response memo which they knew, because of sources and methods (and more) would have to be heavily redacted, whereupon they would blame the White House for a lack of transparency. Told them to re-do and send back in proper form!" In a response tweet, House Minority Leader Nancy Pelosi (D-CA) countered, "The hypocrisy is on full display. What does the President have to hide?"

The political saga continued with the House Intelligence Committee's release of a heavily redacted version prepared by Democrats. In addition to contesting their rendition of the facts surrounding the FISA surveillance process, the Democratic memo, dated January 29, 2018 and styled "Correcting the Record—The Russia Investigation," chastised Republicans for releasing the Nunes memo, calling is "a transparent effort to undermine [the FBI and DOJ], the Special Counsel, and Congress' investigations." Predictably, Republicans countered that the Democratic version was just another attempt "to undercut the president politically." In a tweet, President Trump wrote that "The Democrat memo response on government surveillance abuses is a total political and legal BUST. . .Just confirms all of the terrible things that were done. SO ILLEGAL!" These events, thereafter, spurred on a Department of Justice Inspector report criticizing the FBI's handling of sensitive evidence in surveillance cases and, predictably, generated ongoing calls for Congress to reform the operation of the Foreign Intelligence Surveillance Court.

The politicization of the Nunes memo controversy raises important questions about the propriety of handling of foreign intelligence information at the highest level of government and the role that the FISC plays in authorizing surveillance warrants that are done in proceedings that are held in secret, purportedly in the interest of protecting national security. From one perspective, FISC court operations are defensible because their secret deliberations—which also in practice result in the majority of wiretaps sought by the U.S. government being approved without the target of surveillance (or their counsel) even knowing about the investigation or grounds for securing a wiretap—represent the best chance to uncover illicit foreign activities which, in turn, prevent foreign attacks from happening. Yet, the secret and *ex parte* nature of the proceedings (not allowing any defense or objection by the surveillance target or his or her counsel in the FISC) are criticized for expanding or abusing government powers while undermining due process and other constitutional rights. For some observers, as well, the extraordinary circumstances surrounding the Nunes memo controversy generates fundamental questions about the political legitimacy of this special tribunal and whether it has an institutional duty to launch its own investigation about its own procedures and perhaps order the government to take remedial action so that it can preserve the integrity of the judicial function in a nation governed by the rule of law.

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Therapeutic (Problem-Solving) Agents

In recent years, one of the most important trends in the U.S. courts has been the growing acceptance of therapeutic jurisprudence, or "the role of the law as a therapeutic agent."[60] Increasingly, problem-solving courts, which let judges use the law as a form of mental health therapy to enhance individual well-being, are becoming a significant part of the legal landscape. Most, but not all, problem-

solving courts are specialized courts that assist underage offenders, defendants accused of domestic violence or drug crimes, and those with mental health problems. Several states use such courts to address problems of homelessness, prostitution, sexual predators, gambling, and (through so-called reentry courts) offenders who have been released from prison but cannot assimilate into the community. Since 1993, at least seventy nonspecialized problem-solving courts also have been created. Styled as "community courts," these judicial bodies tackle broad social problems relating to crime, public safety, and quality of life at the neighborhood level.[61]

While the origin of problem-solving courts can be traced back to the creation of juvenile courts in 1899, they have gained wider appeal since the opening of a drug court in Dade County, Florida, in 1989. In response to the problems of recidivism and prison overcrowding, the basic model of therapeutic courts aims to let problem-solving judges manage their **dockets** and impose sentences requiring long-term monitoring instead of incarceration. That court's success encouraged others to adopt similar programs.

In general, problem-solving courts have three characteristics: (1) intensive judicial monitoring, requiring offenders to report to the court regularly on the status of their efforts in drug treatment, securing employment, completing restitution, and the like; (2) aggressive professional outreach, involving judicial efforts to create a symbiotic relationship with off-site professionals, such as social workers or social scientists; and, (3) community engagement, involving judicial efforts to establish a relationship with community leaders and laypersons and encouraging them to participate actively in the justice system. These traits enable a better informed and trained staff to give immediate, hands-on intervention, an approach that provides individualized justice in a well-structured collaborative program that can take into account a participant's progress by constant evaluation and supervision.[62]

Most significantly, problem-solving courts are nonadversarial and aim at solving the underlying problems contributing to a crime, instead of focusing on assigning guilt or innocence. They also differ from traditional adversarial processes and courts, which are essentially backward looking in resolving legal disputes involving the claims of only a few participants. Therapeutic or problem-solving courts are forward looking in focusing on dispute avoidance and reaching results based on a collaborative process that serves the interests of individuals and the larger community.[63] In problem-solving courts, trial judges function more like social workers. Instead of simply handing down sentences or verdicts without getting to the root of a defendant's problems, problem-solving judges embrace a

holistic approach in addressing an offender's problems by providing motivation, monitoring progress, and connecting the offender to social services. In contrast to the adversarial approach, which contemplates taking a dispassionate stance and impersonal attitude towards the offender, the problem-solving judge takes a direct interest in securing the well-being of the offender through empathy, and by keeping an open line of communication and dialogue with the litigant, counsel, and program participants. During the process, judges also educate the public about the best methods to prevent antisocial behavior. Notably, offenders in therapeutic programs are expected to fulfill the conditions of treatment while in the program; and, the failure to do so will mean that their original criminal sentences will be re-instituted, with no leniency. New York's innovative "Opioid Intervention Court," begun under the leadership of the Honorable Janet DiFiore, the Chief Judge of the N.Y. Court of Appeals, is a successful illustration the operation of a problem-solving approach in response to that state's Opioid and Addition Crisis in recent years.[64] Another is the growth of Veteran's Courts, discussed in the "Contemporary Controversies over Courts: Veteran Treatment Courts" box in this Chapter.

Advocates of problem-solving courts argue that they are a necessary response to the failures of traditional courts and the adversary process, which exact great costs and emotional toll from defendants, their families, and communities. In this respect, they are a more efficient and humane method of providing justice. Although the evidence is mixed, they also may help to reduce crime rates, prevent prison overcrowding, and address caseload problems typically found in adversarial courts. The promise of therapeutic courts is evident from the over 3,000 problem-solving courts currently in operation.[65]

Still, therapeutic courts remain controversial. Critics assert that the advantages of such courts are offset by judges having to assume the time-intensive role of a collaborator—a task for which they are untrained. Some victims and victims' rights groups also oppose them for moving away from the traditional function of courts, namely, serving justice by handing down penalties and other kinds of punishment. Other criticisms include that it is improper for the government to be paternal in delivering legal services; that the problem-solving approach wrongly diverts public funds and judicial resources away from other areas of criminal justice; and that defendants are basically coerced into sacrificing their due process rights by agreeing to participate in treatment programs that they may not fully understand.[66]

Contemporary Controversies over Courts: Veteran Treatment Courts

There are over 3,000 problem-solving, or treatment courts, throughout the United States. The most common are drug (44%) and mental health courts (11%); but family (9%), youth specialty (8%), hybrid DWI/drug (7%), DWI (6%), domestic violence (6%), veterans (4%), tribal wellness (1%), and other miscellaneous types of treatment (5%) courts are available as well. The success of drug courts, which treat substance addition as a disease that needs treatment instead of as a moral failing that deserves punishment, has been responsible for the growing trend to apply non-adversarial methods to resolve the problems that cause criminal misconduct. Generally, they follow a diversionary format: if eligibility is established and the court's guidelines for treatment are followed, participants may avoid criminal prosecution or incarceration after they complete a collaborative treatment plan by social service counselors, court personnel and former veterans that have experienced similar difficulties. Though not without their critics, supporters hail them as a justice reform movement by saving lives and tax dollars, along with enhancing public safety by reducing crime and recidivism.

Among treatment courts, the emergence of veteran treatment courts—which stand apart from U.S. military courts and remain independent from the Department of Veterans Affairs (but supported by the U.S. Department of Veterans Affairs program, an organization of direct outreach for veterans caught in the criminal justice system)—is a significant development in the American judicial process. The opioid crisis, which has reached epic proportions in the United States, underscores their importance for veterans, policymakers and the justice system. The first veteran treatment courts (VTC) opened in Anchorage, Alaska (in 2004) and Buffalo, N.Y. (in 2008). Since then, there has been a rapid growth of VTCs, with most opening after 2009. Thus, VTCs are found in nearly all the U.S. states and territories.

Today, there are over 461 VTCs, which include veterans drug courts, veterans mental health courts, and general veterans courts. While sometimes they work with active-duty personnel and violent offenders, a majority of VTCs try to aid veterans that are facing prosecution for less serious crimes stemming from substance abuse or mental health disorders. While the eligibility and court procedures vary by jurisdiction, typically VTCs treat veterans with post-traumatic stress and traumatic brain injuries, along with non-combat issues of substance abuse, financial difficulties, unemployment, homelessness, or

suicide. After acceptance into the program, veterans may avoid incarceration or having their charges reduced if they successfully complete an individualized treatment program. In this respect, they operate differently than traditional criminal courts, which adjudicate questions of guilt or innocence in a punitive and adversarial framework. Instead, VTCs use principles of restorative justice that are designed to permit the offender to reintegrate into the community after treatment. VTCs adopt a collaborative approach, uniting the community, victim and offender in a common plan for treatment that lets the offender back into society. Who helps veterans while in treatment is also an important characteristic of VTCs. After a veteran is screened for their willingness and commitment to participate in the treatment plan, veteran mentors, sometimes called "Veterans Service Representatives," work as counselors or caseworkers along with other professionals to assist the mentees progress through the treatment plan and VTC judicial process.

While critics of VTCs claim they only reinforce negative stereotypes and strain judicial resources while affording special treatment to only a certain segment of the community, supporters laud that their non-confrontational approach to identifying and resolving the roots of criminal misfeasance, including the restoration of personal empowerment and hold out the promise that veterans, which comprise eight percent of all inmates in federal and state prisons, will not return to jail after receiving treatment. Yet the evidence is mixed as to whether VTCs accomplish their goals. While some research indicates that there is no significant difference in outcomes in VTCs as opposed to traditional criminal courts, other studies show that VTC treatment plans have a moderate but positive effect in improving veteran lives in their experiences in the criminal justice system or as they try to secure various housing, employment, and VA benefits. Still, VTC participants with histories of prior incarceration or a track record of violating probation or parole conditions, or those with chronic substance abuse or mental health problems, predictably tend to fare worse.

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Policymakers

Courts not only decide what the law means in legal judgments or judicial rulings and opinions; they also create and enforce public policies by deciding disputes. Judicial policymaking occurs in all courts and at all levels of the state and federal judiciaries. Although courts decide only particular cases and controversies raised by the parties in a lawsuit seeking judicial relief, their decisions and outcomes often have wider public policy implications, especially in dealing with politically highly charged controversies, like abortion, affirmative action, and governmental surveillance. For example, in a study of U.S. district courts' decisions in cases challenging the USA PATRIOT Act (the key antiterrorism legislation enacted in the aftermath of September 11), political scientists Christopher Banks and Steven Tauber found that district court judges are highly deferential to law enforcement officials during times of emergency and "war," while nonetheless forging judicial policy in the fight against international terrorism.[67] The national opioid crisis, as well, has forced some trial court judges, such as U.S. District Court Judge Dan Aaron Polster of the Ohio Northern District to don the unconventional role of using judicial power to solve social problems. In 2018, Judge Polster was tasked in multi-district litigation to supervise over four hundred lawsuits brought against manufacturers and distributers of prescription opioids that grossly misrepresented the risks of using them. In doing so, he irked the parties' legal counsel by expediating the cases and putting them on a fast-track of limited discovery (the process by which information is gathered to resolve the case), soliciting the input from state attorneys general (even though they are not directly involved in the federal action), and immediately commencing settlement discussions. After reading the transcript of Polster's first settlement hearing, one law professor aptly captured the high stakes of the litigation and the daunting challenges the court faced in the opioid litigation by observing, "We say we want judges to be umpires, [b]ut when there's a large social problem at stake, judges can be umpires for only so long, before they decide that it has to be solved." A former law clerk of Polster, too, was not surprised by how the judge opted to solve an intractable social issue. As he recounted, "At the end of a long day where it looked like there wouldn't be a settlement, he'd walk out with one [a]nd he'd wink and say, 'Sometimes it takes a federal judge.' "[68]

Likewise, federal and state appeals courts, especially the U.S. Supreme Court and state supreme courts, have assumed important roles in public policymaking

(as further analyzed in Chapters Nine and Ten). They have creatively established new legal rules in a variety of controversial areas of social policy, such as school desegregation, abortion, gun rights, and same-sex discrimination and same-sex marriage, among other hotly contested areas of public policy. However, judges, which are presumed to be impartial arbiters of the law that merely "declare" the law, run the risk of being labeled "judicial activists" whenever they decide cases that "makes" law by advancing rights or justice in these areas of contentious social policy. Also, among academics, the role courts play as policymakers and whether they actually "create" social change through their decision-making is a topic of intense debate (see Contemporary Controversies over Courts: Do Courts Forge Major Social Change? in Chapter Ten).

Chapter Summary

The nature and sources of law and relation to diverse legal systems are examined. The main legal systems are based on common law, civil law, customary law, or a mixture of either or any of those plus religious law. Two principal categories of law are public law (which involves disputes between the government and individuals or groups) and private law (which involves disputes between two private parties), including common law and civil law. Within each of those categories, there are different types of law: Public law includes constitutional law, statutory law, and criminal law, among others, while private law includes contract law and tort law, among others. Courts employ different methods and processes. The two most notable are the adversarial system, in which judges act as impartial arbitrators of disputes, and which is used in the United States and other common law countries, and the inquisitorial system, in which judges are proactive, as generally found in civil law countries. Courts and judges may play various roles in society. Besides being adjudicators of disputes, they may serve as mediators of private and public conflicts, creators of legal expectations, guardians of individual and minority rights, and agents of therapeutic justice as well as important makers of legal and public policy.

Key Questions for Review and Critical Analysis

1. What are some of the problems nations face in applying the law if they have a mixed legal system?
2. Why is it important to distinguish public law from private law?
3. Is the adversarial legal system in the United States better than the inquisitorial systems used in other parts of the world?

4. Relative to the roles courts play in society, do judges simply "declare" the law instead of "making" it, especially in high-stakes political or policy issues?
5. What are the strengths and weaknesses of having problem-solving courts in a common law adversarial system?

Web Links

1. Supreme Court of the United States home page (www.supremecourt.gov)
   - A rich source to learn about the U.S. Supreme Court, its justices, how it performs its judicial role, and how it decides constitutional law cases. The site contains past and present judicial opinions from the Court and has links to other legal and judicial information.
2. World Legal Systems, by University of Ottawa Law Faculty (www.juriglobe.ca)
   - A comprehensive explanation and listing of all world legal systems.
3. National Center of State Courts (www.ncsc.org)
   - An exhaustive repository of information pertaining to the work and policymaking of all state courts in the United States. The site is home to the *Justice System Journal*, an important publication outlet for academic studies related to key issues confronting state judiciaries.

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