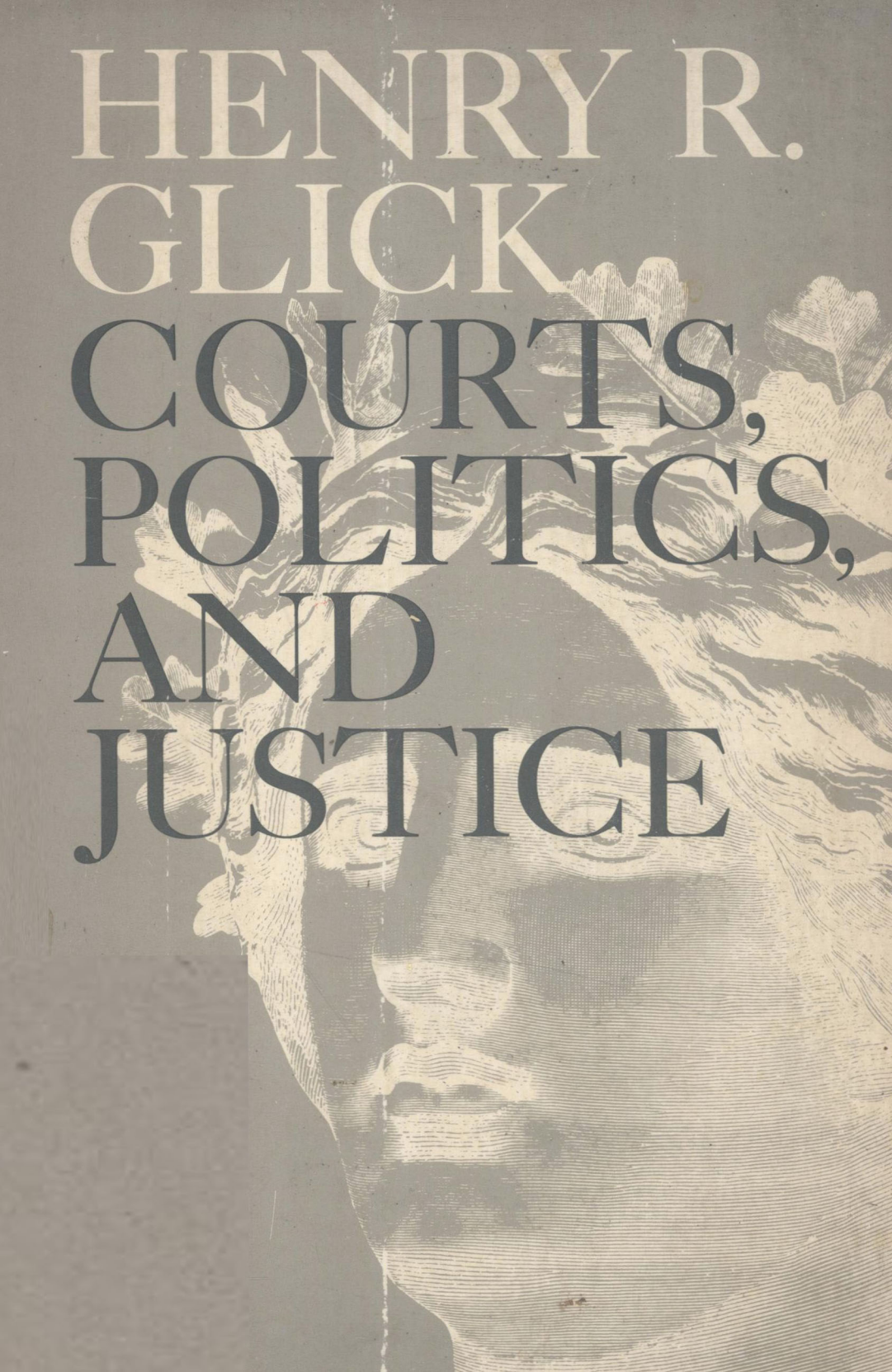
HENRY R. GLICK

COURTS, POLITICS, AND JUSTICE



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TO JOY

PREFACE

Courts in the United States have growing opportunities to decide many new and unusual issues. As society and technology change at an ever faster pace, problems come to judges which most people have never thought much about or imagined before. However, judges often disagree on solutions to new and even customary disputes, and there are many differences in how similar cases are decided. Who uses the courts, what kinds of issues judges decide, how judges form their views, how they apply them to cases, and how their decisions affect society are important parts of *Courts, Politics, and Justice*.

But there is much more to courts. The number of disputes or conflicts that are decided by courts drops sharply at each stage of the judicial process. Most disputes never get to court at all but are settled informally. Many cases are settled before trials begin, and only a few trial decisions are appealed. Thus, while Supreme Court and other appellate decisions are important, most disputes are settled informally and locally. The first stop in the courts is usually the last stop.

This book has several objectives that reflect different aspects of courts. *First, it looks at the judicial process in all types and levels of courts in the United States.* Many books concentrate on the United States Supreme Court or the federal courts; but the odds are very high that when people go to court, they go to state court. Therefore, this book presents a broader perspective of the judicial process, and it covers state and federal and trial and appellate courts.

The second objective is to explain what courts do, on the basis of recent social science research. The text describes what goes on in court, but it also is important to explain *why* courts work as they do. There is a great deal of evidence that formal law cannot adequately account for judicial behavior and that social science research provides more complete and realistic explanations. Although the book rests heavily on social science research, it is included in ways that readers without special knowledge of the courts will understand and can use to develop an informed outlook on the judiciary.

The text also includes excerpts from news stories and summaries of actual cases and events involving the courts. They provide vivid examples of the operation of the judicial process and illustrate major points made in the chapters. These examples can also be the basis for class discussion of major topics.

A closely related third objective is to link courts to politics. Explaining judicial behavior means connecting courts to the broader social and political context in which they operate. But it also means seeing courts not just as formal legal institutions that are affected by an outside world of politics, but as major and integral parts of state and national politics.

A number of people have helped me along the way. I appreciate the hard work of George Pruet and Suzy Parker in collecting and organizing much of the background material. The staff of the Department of Political Science "word processor team" never faltered, and I thank Vicki Harley and Yulondia Wilson for their invaluable assistance. Professor Theodore Becker sent me interesting materials on mediation, and Professors Bradley Canon and Charles Johnson shared their latest ideas on the impact of judicial policy. I am especially indebted to Professors Sheldon Goldman, David Neubauer, and Elliot Slotnick, who read several drafts and commented extensively on the entire manuscript. Professors Lenore Alpert, Burton Atkins, I. Ridgeway Davis, David Gow, William P. McLaughlin, and Bruce Murphy read various parts of the manuscript and offered many other helpful suggestions.

Henry R. Glick

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CHAPTER 1

COURTS, POLITICS, AND JUSTICE

Courts and the judicial process usually bring to mind a picture of a judge, draped in a black robe, overseeing a trial. When a judge enters a courtroom, everyone rises and stands quietly until he or she sits behind the elevated bench and raps the gavel to start the proceedings. In courts composed of a number of members, it is common for judges to march in together quickly as if choreographed on cue to take their seats in a flourish of flowing robes. Loud talking or even whispering among court spectators is not permitted. At the U. S. Supreme Court severe-looking ushers holding long sticks roam the aisles, and they poke these sticks at individuals who talk too loudly or distract others from focusing on the front of the large courtroom. Called "the Marble Palace," the U. S. Supreme Court building is very ornate, with high ceilings and decorated walls, polished floors, and long benches that resemble pews in a church. Reverence and respect are expected and enforced. Other courtrooms are less magnificent, but the floor plan, furniture arrangement, and the judge raised above everyone else are similar and clearly show who is in charge and what goes on.

The odds are good that few of us picture a black or a woman presiding over a court. There is an increasing number of female and black judges in the United States, but chances are most of us still envision a middle-aged white man, perhaps slightly overweight, with graying or white hair. Judges are thought to be slightly aloof, but patient, understanding, and unlikely to lose their tempers. They also run their courts fairly but firmly. Judges are not too tall or too short or too thin or bald, and they do not sport beards or styled haircuts. Of course, judges *do* come in all shapes, shades, and sizes, but Chief Justice Warren Burger *really looks* like a judge.

Most judges also do not hold press conferences, give speeches, or write for popular magazines or even law journals to explain their decisions or comment on public issues which may come before the courts. Even a judge who has held many other political positions prior to becoming a judge seems to change into a new person after donning judicial robes for the first time. The once very friendly and outgoing politician becomes a little distant, personally reserved, and removed from the day-to-day hustle and bustle of state or county politics. As the political role changes, the new judge prepares to perform different work according to different standards and expectations about appropriate behavior. Judges are public officials, but most of us expect them to be *different* somehow from other politicians and to take special care about how they act both on and off the court. Judges should act . . . well, like . . . judges.

Popular views of courts also include the belief that when a citizen gets his or her day in court, a good attorney can get any "nice" or "good" person out of trouble. TV programs such as the Perry Mason series, *The Advocates*, and others about courts and lawyers almost always focus on the intelligent, hard-working, and dedicated criminal defense lawyer who always finds the truth by the end of the program and just barely prevents conviction of the innocent, usually white, middle-class defendant. The police and prosecutors are portrayed as decent people too, sometimes not quite as bright or as dedicated, but they do their job in a scramble for clues, culprits, and crime. Opposing attorneys are pictured as cordial adversaries who, like knights of old, joust before a judge and jury. The defense lawyer, often spurred on by a fair lady, always comes out on top. Justice triumphs in the end and the truly guilty get their just desserts.

Justice triumphs in the ideal judicial world also because decision making is seen as *objective and impartial*. Unlike legislators or governors, who are expected to be partisan or to campaign for particular policies, judges are viewed as neutral referees and appliers of the law. Often in conjunction with juries, they review the facts, examine the law, and reach proper decisions without favoritism to anyone. Judicial decisions are based on what the law requires, not on political promises, policy preferences, or personal sympathy. Equal treatment before the *law*, justice according to *law*, a government of *laws*, not of men, are the watchwords of American justice.

COURTS AND LEGAL CULTURE

Beliefs in equal justice and the rule of law, jousting lawyers (called the adversary process), and objective decision making are parts of *legal culture*.[1] Social scientists use the term "culture" to refer to basic values, beliefs, and expectations about social behavior. Legal culture deals with particular values and perspectives about how disputes are settled, how courts work, the content and role of law, and the behavior of people who manage the judicial process.

The idea of legal culture distinguishes between *judicial and nonjudicial ac-*

tivities and helps us to understand the special place of courts, judges, and lawyers in the larger social and political systems. Although judges have certain things in common with other public officials—for example, being elected or appointed to office—they usually behave very differently from other politicians in their political campaigns and on the job. For instance, lobbyists approach legislators directly and personally to influence their decisions, and they probably call legislators by their first names after becoming personally acquainted and familiar. But a lobbyist who telephones a judge to influence a certain decision risks conviction for contempt of court! Influencing courts simply is not done that way. Decision making in a legislature also is different from the judicial process. Different procedures, different sources of information, different kinds of political authority, and differences in the scope of decisions all distinguish legislatures from courts.

While legal culture helps us to see the special characteristics of courts and to account for differences between courts and other government activity, legal culture also is filled with *many myths*, which makes the judiciary appear to be a totally isolated part of human activity. In this view, terms like "judicial politics" are a hopeless contradiction. Judicial pomp and circumstance, public reverence, and the reassuring appeal of law and justice wrap the courts in a self-contained bubble or cocoon that separates and protects the judicial process from the larger context in which it really exists. Viewed as a television drama, it is as though the general public goes through life "off camera" but occasionally comes onto the stage of the judicial system to deal with crime or to handle a personal conflict or problem that is too big or difficult to manage privately. They turn their problems over to legal experts, who find the correct legal solution and then send the parties on their way.

Legal culture assumes that litigants and the rest of us are outsiders who cannot hope to understand the specialized and mysterious workings of the courts. Law has its own unique methods, procedures, and logic, and only those with proper training and experience can learn to unlock its secrets. This view was summarized well by a law school dean who was asked a few years ago to help arrange interviews with judges for a social science research project on the courts. He replied that it was not necessary for anyone to interview judges about their work, since everything a person needed to know about courts was contained in law books. Besides, it was improper for anyone to talk to judges about what courts did. But legal culture does not account for all of our attitudes or views of the judicial process.

COURTS AND POPULAR POLITICAL CULTURE

To most Americans, the United States is the world's stronghold of democracy and representative government. From the early 1800s we have elected most public officials and required them to obtain voter approval often to stay in office.

We also have limited the number of terms a President or governors may serve, preferring turnover in office as a way of avoiding executive domination. Voting in many referendums to approve state constitutional amendments, special revenue bonds, etc., also is common throughout the nation. It seems that we are constantly being called to the polls. We also generally believe that public opinion should influence government decisions and that voting helps to shape future policy. Popular government, meaning government by the people and for the people, is the foundation of our political system.

These values have been applied to courts too, and voters in many states elect judges, prosecutors, public defenders, and court clerks. Even when judges are appointed, it is by elected governors and Presidents, who regularly give most posts as rewards to people closely connected with the executive's political party and who supported the victorious campaign. Many political elites want to keep using elections or executive appointments for judges. Some groups also believe that judicial elections permit periodic review of judges and keep courts close to the people. These kinds of values are part of what we shall call the *popular political culture*. It is a belief that government officials, including judges and other court personnel, ought to be chosen directly by the voters and that public opinion ought to influence what government does. *Popular political culture extends the principles of representative democracy to the courts*.

We often think of judicial elections as the main feature that makes courts "political," but popular political culture operates throughout the judicial process. For example, the basic organization and authority of American courts is tied very securely to politics and society. Not only are judges chosen by various democratic methods, elected state legislatures and Congress largely determine the kinds of cases courts may decide (*jurisdiction*). Enlarging court jurisdiction increases judicial opportunities to become involved in new areas of public policy. This has been a crucial concern in the growth of federal courts during our 200-year history. Courts also have limited geographic jurisdictions and usually hear cases only from relatively small and local regions. Georgia county courts hear only Georgia county cases, and courts in New York City hear only cases begun there. (Federal courts, however, hear some cases involving people from different areas.) This means that local economic and political systems and styles of life provide the setting for the kinds of cases that get to the courts. Disputes everywhere are put into a similar legal framework to fit the form of the judicial process, but the actual social or economic issues and the litigants involved are likely to vary around the country. For instance, courts in small towns and cities rarely hear cases involving corporations and the practices of big business, whereas courts in large metropolitan areas frequently deal with these kinds of cases.

The content of court decisions also is likely to depend upon the *social context* in which courts operate and the major values of people in the area. Many of us

would guess that judges and juries, in small communities composed mainly of whites and Protestant fundamentalists, are likely to see divorce, homosexuality, crime, and other issues more traditionally than judges and juries in large cities, where more lenient or "live and let live" policies probably prevail. There probably are differences also among particular cities, depending on the values and lifestyles of the people who settled there, traditions built up over the years, and the kinds of people who are chosen as judges.[2]

Courts also are included in the popular political culture because *judicial decisions frequently conflict with popular beliefs and attitudes about important social problems*. Courts often create controversy. For example, since the 1950s, the U. S. Supreme Court has made a number of decisions designed to protect criminal defendants from excessive police pressure and unfair judicial procedure. Requirements that criminals have access to lawyers shortly after arrest, that police not pressure defendants to confess, and limitations on obtaining evidence are important examples of legal rules called "due process of law." During this same period, however, crime rates generally have risen throughout the United States and they have reached extremely high levels in certain cities. Many people believe the courts are responsible for increasing crime because judges "handcuff the police" by their rules and let criminals off because of "technical" violations of law.[3] Popular beliefs link courts to the crime problem. These criticisms were a major part of Richard Nixon's presidential campaigns. Court decisions involving abortion, civil rights, pollution control, and other issues also routinely involve the courts in political conflict.

Everyone is obligated to obey court decisions, but the actual extent to which people comply depends partly upon political and social environments and the attitudes of other elites. Despite U. S. Supreme Court rulings, for example, which require that public education and religious instruction be kept separate, there are many school districts where prayer, Bible reading, and religious pageants go on as before. Most of these have been small, socially similar communities where no one objects to religion in the schools and there is no outside enforcement of court rulings.[4] In larger cities, however, with a much greater variety of students in the schools and many different points of view about religion and education, there is likely to be much less religion in public education. The same has been true of court-ordered desegregation. Most southern school districts remained segregated for about 10 years after *Brown v. Board of Education* was decided in 1954, and many cities continue to resist busing to achieve racial integration. In many instances, people rationalize their refusal to obey by attacking courts as undemocratic or for being insensitive to public opinion or local culture, or they argue that "everyone" is satisfied with existing arrangements, suggesting a sort of informal democratic consensus on what judicial policy should be. Whatever their explanations may be, they all reveal a close connection between courts and popular political culture.

LAW AND POLITICS

The legal and the popular political cultures do not fit together very easily, yet both of them are basic parts of American courts. And, like lots of things in life, many of us would like to have our cake and eat it too. We often want both sets of values to apply to the judicial process at the same time. For instance, we want to elect judges and have them be responsive and concerned with community opinion and preferences, but we also expect judges to be independent and to make proper legal decisions. Various groups call on courts to make new policies in controversial areas such as abortion and discrimination, while others severely criticize courts for going beyond what they see as the proper judicial role of interpreting or applying existing law. We value due process of law, but also want to get tough on crime. These kinds of demands seem to go in opposite directions, and understanding courts requires careful consideration of the impact of *both* law and politics.

Lots of Law

Relying on law and legal culture for information about the judicial process usually leaves many unanswered questions about courts. If everything we needed to know about courts were found in the law books, for instance, we indeed may wonder why there is ever any disagreement on what the law is. Well-trained lawyers ought to be able to save their clients a lot of expense and personal misery *before* a lawsuit is filed if they advised them exactly what the law required. But many court decisions are difficult to explain through law. For example, it has been common in the fifty states since the early 1900s for government to pay for public education mostly with money raised locally through property taxes. But supreme court judges in some states have ruled recently that since property taxes produce unequal amounts of revenue, because of local variations in the value of property, they also produce unequal education. This, they have argued, is forbidden by the U. S. Constitution. But judges in other states and the U. S. Supreme Court have decided that taxation and education are unrelated or that the Constitution does not refer to tax policy for education. Therefore, the law does *not* prohibit the use of local property taxes. The Supreme Court has had the final say on this issue, but there still is disagreement on what the law requires and how education should be supported.

Not only do various courts disagree on what the law says, judges on appellate courts hearing the identical case frequently disagree among themselves and write *dissenting opinions* that reach conclusions exactly opposite from those of the majority. How do we explain dissents through law? Is it that some judges are right and others are wrong, that some read the law correctly and that others somehow miss the boat? Perhaps appellate cases are controversial and the law is unsettled, but even trial judges deciding hundreds of similar cases in the same city, or in different cities in the same state, frequently sentence criminals to

vastly different jail terms. Are some judges misreading the criminal statutes?

When people talk about "the law," they imply that there is a single set of authoritative rules created and enforced by a government. These rules are supposed to determine how people ought to behave, or what is permissible, and how judges should settle conflicts brought to them in cases. Law is seen as a body of logical, systematic, and clearly identifiable prescriptions, or a repair manual for solving social problems and disputes. We often speak glibly about "what the law requires" or "what the law says on this or that," etc., as if we could go to an encyclopedia and look up the single authoritative definition or solution. The legal system is seen as a kind of computer that is programmed to deal with any problem that litigants feed into it, and lawyers and judges are the technicians.

This view of law may be comforting and reassuring because it is so simple and sure, but law cannot be found in a single place or source. *There are many sources or bits and pieces of law.*[5] For instance, law includes the U. S. Constitution, state constitutions, legislative statutes, executive orders, administrative rules, and previous decisions of many courts (*precedents*). Federal, state, and local governments all produce their own laws. These general sources of law include many individual laws or rules that often are vague, at odds with each other, and contribute to confusion and conflict.

The use of previous judicial decisions (precedents) as law illustrates the confusion and disagreement. The rule of precedent, or *stare decisis*, means that past court decisions that relate to a current case are to be used as guidance for settling the current controversy. The rule is part of the English legal tradition found in most of the nations originally colonized by the British. The principle of *stare decisis* is supposed to provide continuity in the law so that people can gauge their current behavior according to principles that have been followed in the past. That is fine in theory, but we need to know more specifically how it affects particular judicial decisions. Major questions are: How do judges select from thousands of previous cases? How are old cases supposed to relate to current ones? The same facts; the same principles; the most recent cases? Which ones provide "true" guidance and which ones should be ignored? Should judges use cases from their own court or their region of the country only, or can they use any precedent anywhere that they believe fits the case currently before them. Unfortunately for the predictive power of law, there are no precise standards or rules for using precedents, and different judges use various criteria as well as different precedents. Many lawyers and judges also believe that for any legal situation brought before a court and for any solution that judges might conceivably impose, there are dozens or even hundreds of previous court decisions that would justify and support their action.[6]

A study of southern state supreme court decisions in race relations cases during the early days of the civil rights movement illustrates that many different legal rules can be used to support different decisions. State supreme courts in the border states of the south were likely to order desegregation of public facilities

and to say that federal court decisions and the U. S. Constitution required them to do so. Deep south supreme courts that ordered desegregation often referred to state statutes and state constitutions to support their decisions rather than to national civil rights rulings, which probably would have been less acceptable in their state. However, other southern courts defied U. S. Supreme Court policy altogether and continued to rule in favor of segregation. They based their decisions on state court decisions or state laws upholding segregation.[7] The key difference among the southern courts in this period is their civil rights policies. All of them had the same sources of state and federal law and court decisions available to them. However, they chose different ones to rationalize or support their rulings. The decisions in these cases strongly indicate that judges chose first to rule in favor of or against segregation and then selected the necessary legal rules to support their decisions afterward.

Vague Principles of Law

In addition to having numerous and often contradictory sources of law, judges, lawyers, and other officials often have to interpret and use rules that are very general or vague and do not tell them specifically how to act. The U. S. Constitution, in particular, is a very general set of principles that have been interpreted and applied in many different ways throughout our history.

Some legislative and executive rules are vague because lawmakers cannot agree on more specific regulations. They often compromise by creating very general rules and allow others, often judges and lawyers, to interpret what the rules mean in particular circumstances. Other rules intentionally provide only general principles or guidelines so that they can be applied to many similar, but somewhat different circumstances. Criminal codes are examples of this kind of lawmaking. Criminal acts are defined by legislatures, but the penalties for the same crime may range from fines and probation to many years in prison. Judges are free to hand down sentences that fall within the range specified by the legislature and to make the punishment fit the crime and the criminal. It is possible and perfectly legal, therefore, for judges to sentence defendants convicted of the same crime to vastly different prison terms. A particular decision depends on the personal values and choices of judges, prosecutors, and defense lawyers and the compromises that they produce among themselves. Whatever they decide within the broad range of sentences fixed by the legislature will be lawful.

Other vague legal principles also give judges lots of room to make decisions they believe are proper or right. For instance, the principle of *equity* gives judges almost complete freedom to decide what is best. Equity generally means fairness or doing right. The rule comes from old England and the American colonies where separate equity courts once heard certain types of disputes but also had the special power to ignore laws that judges believed were unjust in particular cases. Today, separate equity courts are rare, but *the equity idea still permits judges to*

acknowledge formal law, but to avoid it selectively in the name of fairness. Who decides what is fair? Judges do. The insert "Formal Legal Rules and Equity in Conflict" illustrates the use of equity even when formal legal rules seem very clear.

Equity also operates in many cases where there is little statutory law to tell judges how to decide a case. There usually are lots of precedents, but the chances are good they lead in lots of different directions and provide no clear guidance or inescapable rule. In these cases, judges decide on their own what is the fairest, best, or most equitable way to resolve a conflict. An example of this kind of

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FORMAL LEGAL RULES AND EQUITY IN CONFLICT

Fedo and Hattie Mae Kenon lived in a small, ramshackle frame house in rural north Florida. They had worked most of their lives picking tobacco for local farmers and existed now on about $400 per month in Social Security payments. Their house was worth $7500, and they were required to pay $3.05 each year in county property taxes. Fedo Kenon, aged 65, somewhat retarded and a patient in various mental hospitals over the years, paid the tax each year except in 1975. Mrs. Kenon was unaware of the missed tax payment.

John G. Barrow, a local investor, noticed the Kenon property listed in a legal advertisement containing property with overdue taxes. *Following a long-standing state statute and routine legal procedure*, he paid the tax himself and received a certificate from the county tax collector which gave Barrow the right to collect the back taxes from the property owner plus interest. The law stated that if the property owner fails to pay the amount due for two succeeding years, Barrow could apply for a tax deed giving him lawful ownership to the property.

After waiting three years instead of the minimum of two, Barrow paid required fees of $102 to the clerk of the court and received a tax deed giving him ownership of the Kenon home. Barrow informed the Kenons that he owned their house and gave them notice to buy the property from him or to move within a specified time. The Kenons were unable to pay or to afford other housing and they refused to move. Their plight made the national news and the Kenons began to receive financial contributions. They also obtained free legal services from a local legal aid organization. Barrow sued to assert his lawful right of ownership and to move the Kenons from the house.

The trial court judge decided that although Barrow had followed proper procedures sanctioned by state law, the doctrine of *equity* required that he be prevented from acquiring the Kenon home. Not only was the amount of money paid for the property very small, but giving Barrow title to the property would impose a terrible burden and hardship on the Kenons. Investor Barrow appealed, but the higher court affirmed the trial judge's decision. The Kenons kept their home and planned to use some of the $11,000 raised in contributions to make long-needed repairs. The state legislature also enacted a new law designed to prevent similar tax sales from recurring. Barrow got nothing.
