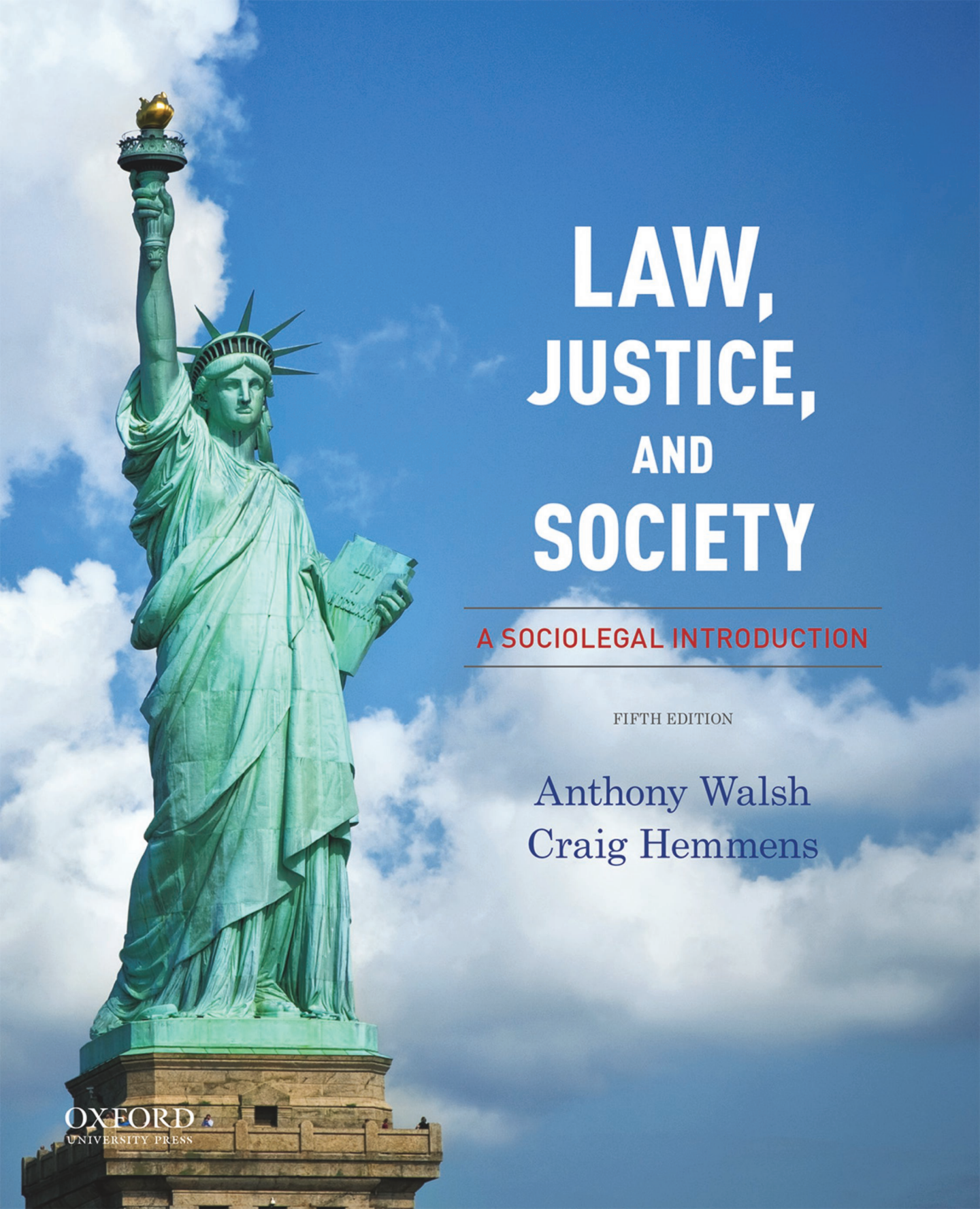

LAW, JUSTICE, AND SOCIETY

A SOCIOLEGAL INTRODUCTION

FIFTH EDITION

Anthony Walsh
Craig Hemmens

OXFORD
UNIVERSITY PRESS

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Dedicated to my drop-dead gorgeous wife, Grace; my sons, Robert and Michael, my stepdaughters Heidi and Kasey; my grandchildren Robbie, Ryan, Mikey, Randy, Christopher, Ashlyn, Morgan, Stevie, Vivien, and Frankie; and my great grandchildren, Kaelyn, Logan, Keagan, Caleb, Luke, and Brayden. I should not forget the spouses that made this all possible: Patricia, Dianna, Sharon, Karen, Collette, Marcus, Michael, Amy, Jenna, and Mary Beth—A. W.

Dedicated to Mary, Emily, Sera, Amber, and Max, and to all my students—C. H.

"What is hateful to you, do not to your fellow man.
This is the law: all the rest is commentary."
Talmud, Shabbat 31a.

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PREFACE

Law, Justice, and Society: A Sociolegal Introduction (fifth edition) is a text designed for use in courses such as Law and Justice, Introduction to Law, and Sociology of Law. Several aspects of this book are not found in competitive volumes. Many texts are written by authors with recognized expertise in only one or two of the areas covered, which results in very good chapters in those areas but also chapters that may contain errors and misunderstandings in others. *Law, Justice, and Society* is a collaborative effort that draws on the expertise of scholars with extensive track records in publishing, teaching, and actual field practice in the topics covered.

Law per se can be a dry topic when approached from a law school perspective. After all, law schools are in the business of turning out professionals who know how to navigate treacherous legal waters on behalf of their clients. This book is not a law book but rather a book *about* law for students wanting to learn the relationship of law to justice and to society. Law school classes focus on the law almost exclusively; our goal is to place the law in its social context. This is a book about how law as a social institution fits into and shapes other institutions. Most students who take a course such as Law and Justice or Sociology of Law have no intention of going to law school and just want to know the relationship of law to their own disciplines and to themselves as citizens, as well as the functions of law in their society. We are all potential witnesses, jurors, victims, or even offenders.

This Fifth Edition has been thoroughly updated in all respects. As usual, we have benefitted greatly from users and reviewers of this book and have incorporated most of the material they suggested to us. Each chapter now includes an "Issue Highlight" page that provides pro and con arguments surrounding a contemporary issue. These issues include sanctuary cities, bathroom laws, regulation reduction, religious accommodations, and so forth. These issues may lead to animated classroom discussions. Another improvement in the Fifth Edition is the inclusion of additional visual material. One of our reviewers of the Fourth Edition opined that the text needs to be broken up more with photos and graphs illustrating the points made in the text. We did just that, and the response was so positive that we added more in this edition.

Chapters 1 and 2 introduce the *idea* of law and justice. These chapters discuss the philosophy, history, and sociology of law. We even look at how some evolutionary biologists have viewed the law and its origin in nature, as opposed to the view that it is purely a social construction. In these chapters, we ask what law and justice are, where they come from, how they have been conceived in the past, and what their functions in society are. Readers will come away from these chapters realizing that few things in modern life are more important than the law.

Chapters 3 through 8 introduce the various aspects of modern American law and justice. Chapter 3 focuses on the process of making law and describes the Bill of Rights. Chapter 4 focuses on the federal and state court systems and the processes that occur within them. Chapter 5 examines criminal law, major crimes, and legal defenses. Chapter 6 looks at criminal procedure, such as the right to an attorney and the exclusionary rule. Chapter 7 covers various aspects of civil and administrative law, such as torts, family law, contract law, and white-collar crime. Chapter 8 focuses on the juvenile justice system.

Chapters 9 through 11 are more sociological and historical in orientation, focusing on how law affects the processes of social change and social control. Chapter 9 investigates the law as a formal method of social control, and focuses primarily on the criminal justice system. Chapter 10 concerns the limits of law as a social control mechanism and explores some so-called vice crimes and the law's differing approach to them across time and place. Chapter 11 explores how the law has been involved in momentous changes in the United States from before the American Revolution to the present day, with special emphasis on the role of the Supreme Court. We also examine the special role of the law in making society possible by its role in social control and the role of social movements in the process of social change.

Chapter 12 takes on a topic sorely lacking in competitive texts—women and the law. Its author, Dr. Mary K. Stohr, is a major figure in feminist criminal justice circles. She has had criminal justice field experience as a correctional officer and counselor and has served as an expert witness in court cases dealing with women's issues.

Chapter 13 provides an overview of the law as it has been applied to racial minorities in the United States from the earliest days of white settlement to the present. It documents the fight against slavery and the Indian fight to maintain cultural independence as well as touching on the Asian and Hispanic experience in the United States. As far as we are aware, this is the only law and society text that devotes a whole chapter to this important topic.

Chapter 14 focuses on comparative law. We learn far more about our own system of law if we know a little about other systems. The chapter looks at law in bands and tribes and in the four major legal traditions in the world today: common, civil, Islamic, and socialist. Students tend to become particularly interested in the practices of non–common law systems.

We hope that at the conclusion of a course based on this book students will have achieved the following primary objectives:

1. **An appreciation of the role of law in society.** Law is arguably the most important of all human inventions, based as it is on our innate sense of fairness, decency, and concern for a peaceable and orderly existence. We have tried to provide you with a "feel" for what law means and where it has come from (both in evolutionary and in cultural terms). Readers will come to a deeper understanding of the legal system as a basic social institution and of its relationship both to other institutions, such as the family, the economy, and government, and to social control and social change. The limits of the law in trying to prevent change and to police private morality also are discussed.

2. **A basic understanding of the courts, lawmaking, and criminal substantive and procedural law.** This book is an introduction to learning *about* law rather than learning law. Learning law is the process of becoming educated and socialized into the legal profession, whereas learning about law is the process of becoming an informed citizen. The student is given the details about the basics of law that every educated adult should know for participation in a democracy. These details are provided with as little legal jargon as possible.

3. **An appreciation of the concept of the rule of law.** The *rule of law* has been called the most important of all legal concepts. It is imperative that citizens of democracies know what it is, how it has evolved, and the mechanisms in place to ensure its survival. Imbedded in this rule is the relatively modern notion of due process, which involves procedural rules (the legal "dos and don'ts") that must be followed by criminal justice officials to ensure fairness and impartiality in the processing of criminal cases. The evolution of the once-absurd idea of due process is a fascinating story going back as far as the Magna Carta in 1215.

4. **An understanding of comparative law.** Understanding how other cultures view and implement law is one of the most interesting features of the study of law. It has been said that if you know only your own culture, you don't know your own culture. The process of understanding almost anything necessarily involves comparison and contrast. The law in the United States has English common law as its foundation. The most prevalent form of law in the world today is civil, or code, law, which differs in many interesting ways from the common law. However, it differs considerably less from the common law than do Islamic and socialist legal systems.

5. **Knowledge of the law's treatment of minorities and minors.** Racial/ethnic minorities, women, and minors have been excluded from full constitutional protection and historically have been treated in very different ways than have white male adults. This unequal treatment often has been sanctioned and even encouraged by the law. These specialized chapters document how the law has evolved to come to view unequal treatment as morally wrong and how it has gone about rectifying its earlier mistakes.

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We would first of all like to thank Executive Editor Steve Helba. Steve's commitment to the project and tremendous enthusiasm is greatly appreciated (as is his trips to the hinterlands to see his authors "in action"). Our fifth edition copyeditor, Wesley Morrison, spotted every errant comma, dangling participle, and missing reference in the manuscript, for which we are truly thankful, and production editor Jana MacIsaac made sure everything went quickly and smoothly thereafter. Thank you one and all.

We are also most grateful for the many reviewers who spent considerable time providing us with the benefit of their expertise as the text was revised. Attempting to please so many individuals is a trying task, but one that is ultimately satisfying, and one that undoubtedly made the book better than it would otherwise have been. These expert legal scholars include:

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LAW, JUSTICE, AND SOCIETY

CHAPTER 1

LAW: ITS FUNCTION AND PURPOSE

The bomb blast sent Jawad Sabah flying from his seat in Ali's tea shop in Baghdad. Jawad went there daily to seek the solace of relatives and friends following the gang rape and murder of his wife, Abeer, by a marauding militia gang six months earlier. Dusty but uninjured, he picked himself up, saw the flame-engulfed bus, and cried soulfully at the futility and wickedness of the world around him. Jawad wasn't thrilled with life under the brutal dictatorship of Saddam Hussein, but at least Baghdad had been relatively safe and he could drink his tea undisturbed. He remembered the jubilation he felt after the Americans overthrew Hussein in 2003 and his brutal police force melted from the scene. He also remembered the foreboding as looting and vengeance killings began to openly occur as Iraq plunged ever deeper into chaos. What law remained in Baghdad was imposed by the "infidel" Americans or by ineffectual and openly corrupt Iraqi police officers, neither of which could be considered legitimate by those whose behavior they were charged with regulating.

The Unites States' attempt to impose democracy on a country whose values, norms, and customs are at odds with it has not worked out well. The violence peaked in 2006 as Shiites and Sunnis continued to blow each other up, although things significantly improved after the troop surge of 2007. The American military finally withdrew from Iraq on December 15, 2011, ending an action that left thousands of American servicemen and many more thousands of Iraqis dead or wounded. Since the withdrawal of American forces, violence has again escalated across the country, and the Islamic State terrorist group captured large swathes of Iraqi territory, which has since been taken back.

If Iraq is to become a viable state, it must afford its people security, stability, and personal safety; these are the things that law is supposed to provide. The Iraqi Constitution is reasonably democratic for that area of the world, but as with all law, it is just a set of statements on paper without the will of human actors to give it life. For the law to be more than empty words, it needs the respect and awe of all individuals affected by its constraints and obligations.

It requires assurances that the police and judicial processes will be open to scrutiny and will provide equal protections for all citizens. Without such things, government loses its credibility, the economy languishes, organized crime flourishes, vigilantism emerges, and innocent people like Jawad are victimized. This chapter explores the cultural underpinnings and functions of law, describes how ancient philosophers and early sociologists viewed it, and introduces the idea of natural law.

INTRODUCTION

When most people think of law, images of the uniformed police officer or of the pomp and circumstance surrounding the criminal courts tend to dominate. If we ponder a little longer, we may conjure up images and smells of large, dusty books full of sterile rules and a multitude of archaic Latin terms and phrases and conclude that law is a pretty dull subject. Nothing could be further from the truth! Few topics are broader in scope than the law, and none is more important to social life—as Jawad Sabah would doubtless agree. For better or for worse, law insinuates itself into every aspect of social life, governing the relationship between person and person, between institution and institution, and between persons, institutions, and the state; we are all potential victims, witnesses, jurors, and even offenders. The point is that law is a social institution and to study it is to gain valuable understanding of one's society—its heritage, its values, and its day-to-day functioning.

Law has always been considered of the utmost importance in American life. The excerpt from Abraham Lincoln's Lyceum Address, given in 1838 when he was only 28 years old, makes this abundantly clear:

> Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges; let it be written in Primers, spelling books, and in Almanacs;—let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the *political religion* of the nation; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars. (Basler, 2007, p. 6)

Law justly promulgated and justly applied is the bedrock of individual liberty and social progress. Former legal counsel for the British government Phillip Allott (2001) augmented Lincoln's awe of the law when he wrote:

> In the making of the human world, nothing has been more important than what we call *law*. Law is the intermediary between human power and human ideas. Law transforms our national power into social power, transforms our self-interest into social interest, and transforms social interest into self-interest. (p. 19)

Allott is saying that law is a mechanism by which diverse individual and community interests become as close to being the same thing as possible. Law has been

a study of endless fascination, and the subject of endless debate, for generations of philosophers and social scientists—let us join them.

WHAT IS LAW?

What is this thing called *law* of which Allott is so enamored? The question is a simple one with a variety of complex answers. The question also usually leads to others, such as "Where did it come from?" "How did it originate?" "What is it based on?" "Whom does it serve—everyone, or just those with the influence to get laws enacted and enforced?" The next two chapters attempt to answer these questions from a number of different perspectives. But let us first try to define law. The seventeenth-century English philosopher Thomas Hobbes (1952) defined law as "just a statute, commanding those things which are honest, and forbidding the contrary" (chap. 26.1). But law is much more than an aggregate of statutes that multiply promiscuously and then sometimes are sloughed off; "it is crucially the art and technique of applying these heterogeneous [statutes and] norms in the administration of justice" (Murphy, 2006, p. 106). We could provide other definitions that various thinkers have given, but we spare readers that and offer our own definition: **Law** is *a written body of general rules of conduct applicable to all members of a defined community, society, or culture, which emanate from a governing authority and which are enforced by its agents through the imposition of penalties for their violation*. This definition would not be acceptable to everyone. Nevertheless, it is offered as a working definition so that we may proceed with our endeavor.

Our definition is appropriate for all modern systems of law, but it does not completely fit preliterate societies. By definition, such societies do not possess writing, nor do they typically employ agents to enforce rules of conduct. However, law as a system of proscribed and prescribed behavior is certainly not unique to highly developed societies with written statutes and a formal system of law enforcement. All groups of people living together in organized groups have at least some type of rudimentary rules for governing conduct. They would not last very long as organized groups if they did not, for law is at the center of all organized social life. Indeed, the word *law* itself has come to us from a variety of Latin and Nordic words meaning "to bind" (people together). People who are "bound together" share a common culture, and all cultures share certain core elements. Our first task is to see how these common elements are related to law.

THE SIX PRIMARY CHARACTERISTICS OF CULTURE AND THEIR RELATIONSHIP TO LAW

Culture is the totality of learned socially transmitted behaviors, ideas, values, customs, artifacts, and technology of groups of people living in a common society. It is the transmission of all sorts of information from generation to generation by nongenetic means. All cultures possess six primary elements: beliefs, values, norms, symbols, technology, and language. These elements represent critical information that maintains and transmits culture across the generations. Without a general

consensus about the nature of a shared culture in terms of the six primary elements, the socialization process would be a difficult task indeed. All of these elements are related to one another and, most centrally for our purposes, to the law. Let us take these elements one by one and see how they are related to the law.

1. Beliefs

Beliefs are ideas that we have about how the world operates and what is true and false. Beliefs may be about things that are tangible and observable and things that are not. Information that is observable or verifiable may be derived from scientific experimentation or some other type of experience. For example, although we can scientifically demonstrate that the earth is round and that it rotates around the sun, most people in Christopher Columbus's day were convinced that it was flat and that the sun rotated around the earth. However, scientists knew that the world was round long before Columbus's voyage; the Greek mathematician Eratosthenes had calculated its circumference with remarkable accuracy more than 1,000 years earlier. In those days, knowledge and news, and hence beliefs, traveled slowly.

Cultures also communicate shared beliefs about intangible, nonobservable phenomena such as religious and philosophical beliefs relating to "ultimate" questions like "Who am I?" "What is the purpose of life?" "Where will I go when I die?" and "How can I lead a just and good life?" These questions are not amenable to scientific answers, but they have been answered to the satisfaction of millions by religious, spiritual, and philosophical systems of belief that are even more important to understanding culture and law than are beliefs that are open to verification or falsification. They are more important because they are at the core of human concerns and meaning and because they appease the irritation of doubt.

Laws are often enacted to support our most deeply held beliefs, and as beliefs change over time, so do the laws that support them. When the established doctrine of the Roman Catholic Church was that the earth was the center of the universe and that the sun revolved around it, astronomers who held contrary beliefs were labeled heretics and had to tread lightly for fear of the possible consequences. Similarly, when slavery was permissible in the United States, laws were made to protect the "property rights" of slave owners. Now that we have ceased to believe in prescientific astronomical notions or in slavery, rules about heresy or property rights over human beings no longer exist in Western societies. Laws against heresy, however, continue to exist in many Islamic societies, and remnants of legally sanctioned slavery still exist in some African countries. The point is that if enough people believe something is real, the consequences are often real—regardless of the empirical validity of the belief. Witches do not exist (at least not in the stereotypical, broom-flying, spell-casting, potion-making sense), but this empirical truth was of no comfort to the many women legally burned over the centuries because people believed witches did exist.

2. Values

Values refer to normative standards shared by the culture about what is good and bad, correct and incorrect, moral and immoral, normal and deviant. Values are more general and abstract than specific beliefs, although values themselves differ in their

generality and specificity. Shared values are an important binding force in culture and an important integrative mechanism that combines the disparate parts of our personalities into a coherent self-concept (Walsh, 2006). American values are based on transplanted and modified Western European values. Examples of broad and general "core" values in all Western societies include the Golden Rule, justice, equality, liberty, and the sanctity of life. Even though everyone defines these core values as good, people of different ideological persuasions may have quite different images in their heads when they talk about them. Take the different views of fairness and equality held by conservatives and liberals. Conservatives view fairness as an equal-opportunity *process*—a nondiscriminatory chance to enter the race; liberals tend to see fairness as equality of *outcome*, which implies that all should cross the finish line at the same time. If everyone is *equally* subjected to the same rules and *equally* judged by the same standards, fairness is achieved, according to conservatives, even if equality of outcome is not. Because they want to achieve greater equality of outcomes, liberals tend to believe in subjecting certain individuals whom they consider disadvantaged to different rules and then judging them by different standards in order to achieve fairness.

3. Norms

Rules governing appropriate conduct that are more specific than values known as norms. A **norm** is the action component of a value or a belief patterning social behavior in ways consistent with those values and beliefs. Some norms have serious moral connotations and are known as *mores* ("more-rays"). These standards are moral imperatives, and violations of them may be met with chastisement or serious punishment. Less serious norms are called *folkways*. Lacking the moral connotations of mores, folkways are habits that many people conform to automatically, such as the little rules of etiquette when meeting your fiancée's parents.

Laws always reflect the core values and mores of a culture. Western core values typically come from its Jewish/Christian heritage (think of the Ten Commandments and the criminal law: "Thou shalt not kill," "Thou shalt not steal," etc.). Few laws are ever passed that contravene deeply held cultural values without significant opposition from large segments of society. Laws assuring abortion rights, for instance, are so hotly debated because they involve conflicting core values: the sanctity of human life versus a woman's privacy and liberty to choose what happens to her body. Similarly, efforts to pass a constitutional amendment banning the burning of the American flag (exemplifying the value of patriotism) run up against the conflicting values of freedom of speech and political protest. Law is thus a social tool in which the norms reflecting a people's deepest values are put down in writing to assure the continuation of patterns of conduct that are deemed socially desirable.

Figure 1.1 illustrates the flow from values and beliefs to law. All societies have behaviors they encourage and behaviors they discourage through the use of informal rules. Discouraged behavior may eventually reach a point that society takes formal action by enacting laws against it and specifying punishments for those who engage in it.

Figure 1.1 The Progression from Informally Encouraged/Discouraged Behavior to Law

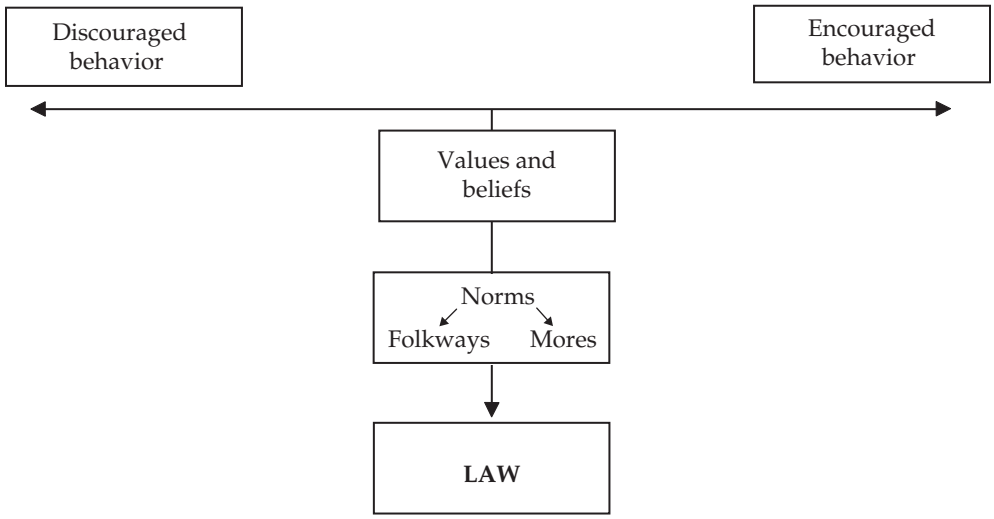


Figure provided by Professor Michael Bogner, Justice Studies Department, Chadron State College (2006).

Legal philosophers differentiate between laws that arise from the norms and customs of a given culture, which is known as **positive law**, and a hypothesized universal set of moral standards known as **natural law**. Legal positivism is a theory that explains law by examining its cultural context and studying the cultural sources of law as it *is,* without passing moral judgments. Natural law adherents philosophize about the law as it *ought* to be. Believers in natural law view it as standing above and placing limits on what is permissible in positive law, whereas positivists draw a distinction between law and morality. It is not that positivists divorce law from morality. Law and morality are always intertwined to some extent, but positivists aver that it is not necessarily so and that law is law if it has the appropriate authority behind it—even if it offends moral sensibilities. Positivists insist that all law is morally relative and must be judged according to the cultural context in which it was made. That is, there are no "good" or "bad" laws judgeable as such outside of their cultural context. The essential feature of law for most positivists is its coerciveness or authoritative power to command compliance, not its moral quality (Leiter, 2001). Legal positivists may well agree that law should be moral but that we should study law as we find it rather than as we would like it to be.

Natural law theorists counter that if everything is relative and no absolute standards exist for deciding among conflicting beliefs of right and wrong, then all cultural value systems are equally valid. This limits discussion of issues of morality and truth to descriptive and nonnormative discourse. It amounts to intellectual laziness hiding behind the mask of tolerance of diversity because we can rest content with "truth" being whatever happens to be true for us or for the culture in question. Since there is no objective way of determining truth and error, relativism relieves us of

the burden of being in error. Such a position, according to natural law adherents, is incoherent because it provides relativists with no defensible grounds for criticizing obnoxious cultural practices (the Holocaust, slavery, the execution of homosexuals, female genital mutilation, torture, cannibalism, and so on). For natural law proponents, we must have bedrock universal moral principles on which to base our law or else "laws" are simply the commands of a sovereign state backed by force. The great British legal philosopher H. L. A. Hart, although an ardent positivist, praised the US Constitution for incorporating moral principles, thus making "morality relevant to determining the law in a manner consistent with positivism" (Soper, 1992, p. 2408).

4. Symbols

Anthropologists and sociologists often refer to nonmaterial culture as symbolic culture. Although the totality of symbolic culture includes nonphysical things such as gestures, language, values, and norms, we concentrate here on physical and tangible **symbols** that are identified with something less tangible. Symbols are concrete physical signs that "stand for" and signify abstractions that range from the mundane and specific, such as the little man or woman painted on the restroom door, to those that are suffused with meaning and can evoke the deepest of feelings, such as a nation's flag. While the figures on the restroom doors point to something useful, they do not capture our emotions. A flag, while less useful in a day-to-day sense, expresses all that it means to be a part of the nation signified by that piece of cloth. A symbol such as a flag may transcend many cultures so that persons living in different ones may understand the symbol within their own cultural context. Think of the different emotional responses evoked in Washington, Paris, and Tehran by seeing a mob burning the American flag. The American flag is recognized as a symbol representative of the American nation in each of those cities, although this recognition has vastly different emotional meanings to their citizens.

Symbols are of vast importance to the law, which is a rather abstract and intangible notion itself. Think of the symbolic meanings involved inside an imposing courtroom, viewing robed (and sometimes bewigged) judges sitting on elevated stages flanked by flags and uniformed law officers. Think of the "sacred" text of the nation's constitution, the pomp, the ritualism, the old-fashioned terminology sometimes used ("Hear ye!"), the formal oaths sworn, all of which symbolically support the notion that the law is of great importance and above any individual. The law must "stand for something" (which is what *symbol* means) that is agreeable to at least the majority of society's members if it is to be considered legitimate.

Finally, we have the symbol of justice in the Greek goddess *Themis* (*Justitia* for the Romans) personifying the divine law established by the gods, whose familiar statue is found atop many courthouses. She is usually depicted carrying scales to weigh truth and fairness in one hand and a sword depicting the state's power to enforce its legal rulings in the other. She is also usually portrayed wearing a blindfold to symbolize the idea that justice should be neutral and meted out objectively, with no concern for the respective status, power, or identity of the parties involved. The symbolism surrounding the law helps those who observe it to "feel" its majesty and awesome power and thus helps to legitimize and sustain it.

5. Technology

Technology is the totality of the knowledge and techniques a people employ to create the material objects of their sustenance and comfort. As Karl Marx was fond of telling us, the different forms of technology employed by a culture (hunting and gathering, agriculture, industrial, postindustrial) create different physical, social, and psychological environments. It should be obvious to everyone that the way we live and work has profound effects on all aspects of our lives, including our beliefs, values, and symbolic interpretations. The material trappings associated with life in a technologically advanced culture connote a special significance to its members that would not be evident to persons in preliterate societies. The more technologically advanced a society, the more complex the relationships among its parts—and the more that society relies on law to monitor those relationships.

Different stages of technology affect the law in at least three ways (Vago, 1991). First, it supplies technical inventions and refinements (fingerprinting, DNA testing, polygraphy, computerized databanks, and closed-circuit TV cameras) that change ways in which criminal investigations are conducted and the law is applied. Second, technological advances in the media (the ability to televise congressional hearings and courtroom dramas, videotapes of police officers beating suspects) may change the intellectual climate in which the legal process is executed. Third, new technology presents the law with new conditions with which it must wrestle. For instance, modern practices such as artificial insemination and surrogate motherhood bring up issues never dreamt about 50 years ago. If a man donates his sperm, or if a woman carries the fertilized egg of another woman, what are their legal claims to the child? How about other technology-driven issues such as surgical and chemical "cures" for criminals, pornography and fraud on the Internet, human cloning, and the possible uses and misuses of DNA profiling? How about freedom of expression in semipublic venues like Facebook and Twitter? In 2009, bad-girl rocker Courtney Love was sued for libel by a fashion designer for defaming her on Twitter; Love settled out of court. In 2016, Donald Trump ran an "underground" presidential campaign on Twitter, delighting his followers and infuriating his opposition. So what can one say on Twitter?

The challenges that scientific and technological advances present for the law are different from past challenges because many of these advances (nuclear power, genetic engineering, chemical plants, and so on) have potentially catastrophic risks attached to them. In the past, catastrophes (disease, natural disasters, and foreign invasion) came overwhelmingly from events external to the affected society and were accepted as normal, inevitable, and beyond the society's control. Modernization and globalization, however, have brought potential catastrophes that are internally manufactured and have global reach (Giddens, Duneier, & Applebaum, 2005). The nuclear accident in Chernobyl, Ukraine, in 1986; the chemical leakage in Bhopal, India, in 1984; and the toxic waste incident in Love Canal, New York, in 1978 are examples of huge manufactured disasters with consequences that extended beyond national boundaries.

Because these and a host of other potential hazards are manufactured and internal rather than natural and external, we have evolved a **risk society**, meaning a society "increasingly preoccupied with the future (and also with safety), which generates the notion of risk" (Giddens, 1999, p. 3). This does not mean that there are more

risks today than in the past, although arguably there are, but rather that we are more aware that we can do something about them. *Risk* is thus conceptually different from *danger* or *hazard* in the sense that it is bound up with human control and "particularly with the idea of controlling the future" (Giddens, 1999, p. 3). Automobiles are not going to stop pouring excessive carbon dioxide into the air unless the law mandates lower emission levels; the ozone layer will grow and global warming increase unless the law mandates control of chlorofluorocarbons and stops to deforestation. But since these things occur cross-nationally, there is little that the legal system of a single country can do except tend to the problems in its own backyard. The point is that whether problems/risks/hazards are addressed by local, national, or international law, law has an increasingly central role in our lives.

6. Language

Language is a vast repository of information about culture; it is in effect the "storehouse of culture." To develop any kind of culture as we know it without language would be practically impossible. Language is a terribly complex thing, but children learn it almost effortlessly, thanks to Mother Nature's "technology" built in over eons of evolutionary time. Human communication enables us to discuss the simple and the profound, to talk about events and ideas from the past, and to plan for the future, and it provides a way to convey a wide array of ideas and events to others. Language is part of the great biological leap that separates the human species from other species. Although animals communicate with one another and some primates can even be taught to communicate vocally in a rudimentary, humanlike way, only humans are able to express and understand abstract ideas and to communicate them through language.

Words mean what they mean because culture defines the meanings they denote. In cultures with writing—a symbolic representation of the language—information can be recorded and transmitted to future generations. Language thus becomes the vehicle for cultural evolution and transmission across the generations. In a very real sense, cultural definitions existing in the language help to create reality for the members of a culture.

Language is related to law in the most obvious way; it provides us with the ability to formulate, articulate, and understand rules of conduct. Without language, none of the other characteristics of culture would be possible, and our behavior would be regulated only by vague, visceral feelings of right and wrong impinging on us through anger, fear, anxiety, joy, and empathy. Written language is absolutely necessary to the idea of law because written law warns everyone in advance about what is forbidden conduct and what is not. Although preliterate cultures have rules, the simplicity of such cultures necessitates only a few simple ones that everyone understands. The more complex a culture becomes, the more it relies on written codes of conduct. This is a general principle of legal philosophy upheld by all anthropological, historical, and sociopolitical data available to us.

Law, then, is integral to all aspects of culture. Since the dawn of civilization, there has been some form of rules and sanctions designed to ensure socially desirable conduct and thereby bring order to a culture, to define authority and its limits,

and to clarify the responsibilities, duties, and obligations members owe to one another. Given the great importance of law, it is not surprising that philosophers, historians, sociologists, and scholars from many other disciplines have debated the nature and function of law for centuries. The ideas of some of these men are discussed in the following sections. We limit ourselves to what these scholars had to say about topics that have the greatest bearing on the content of other chapters in this book and to a brief discussion of one of the earliest and most famous legal codes.

THE CODE OF HAMMURABI

The first legal codes showed that there were well-advanced societies exhibiting signs of mature civilization many centuries ago. The **Code of Hammurabi** (Hammurabi was a King of Babylonia who lived from 1810 BC to 1750 BC) was long acknowledged as the oldest known written code of law. We now know, however, that other documents of this type existed in the area of the Middle East called Mesopotamia, but no other was so broad in its scope. The code was discovered inscribed on a round pillar, seven feet four inches high. On the top of the pillar was Shamash, the sun god, handing the legal code to Hammurabi. The code of King Hammurabi was not law in the sense that law is understood today—that is, a set of abstract principles applicable to all. Rather, it was a set of judgments originally pronounced to solve particular cases (Bottero, 1973). Nor was it an attempt to cover all possible situations as modern codes are, and as far as we know, it was never copied and distributed to those officials charged with the day-to-day administration of Hammurabi's vast kingdom (Sinha, 1990). Nevertheless, the system of justice contained in the code showed signs of mature rule development in that it governed relationships pertaining to sexual behavior, property rights, theft, and acts of violence. The law forbade retaliatory actions and deadly blood feuds among the people, leaving punishments to be dispensed by the king's agents. The "eye for an eye, tooth for a tooth" (*lex talionis*) concept of justice stated in the code predates the Old Testament passage familiar to Jews, Christians, and Muslims. The law introduced specified standards of conduct and remediation by independent third parties to settle disputes. A written code, theoretically impartial in its application, represented a tremendous advance for society in general and the administration of justice in particular.

Although the laws contained in the code were secular in nature, the law's administration was almost exclusively in the hands of the priesthood. Hammurabi was wise enough to buttress the codes (and his own) authority with the approval of the gods. The linking of the code to an honored deity was a powerful piece of psychological gilding employed by many others before and after Hammurabi. The prologue to the code reads,

> Then Anu and Bel delighted the flesh of mankind by calling me, the renowned prince, the god-fearing Hammurabi, to establish justice in the earth, to destroy the base and the wicked, and to hold back the strong from oppressing the feeble: to shine like the Sun-god upon the black-haired men, and to illuminate the land. (Edwards, 1971, p. 23)

EARLY THINKERS ABOUT LAW

The extent to which law has been deemed important in the affairs of humans can be gauged by noting that every social and political philosopher of any stature has felt compelled to comment on it at some length. They have attempted to come to grips with such topics as where law comes from, what its nature is, what it is for, why it is necessary, whom it serves, and what human life would be without it. Philosophical insights have been important in every field of inquiry as a beginning point, as a basis for examining what may or may not be possible, and as a method by which we clarify our terms and organize our thinking. We begin with Plato and his thoughts about natural law and how it is related to positivist law.

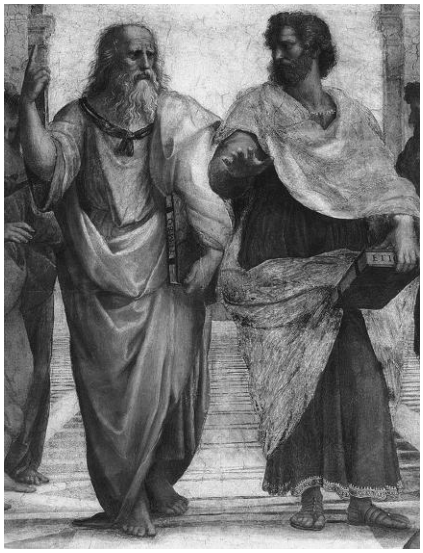
Plato

Plato (427–347 BCE) stands as one of the most influential thinkers in the history of the world. Not only do his writings affect all Western legal systems, but his approach to thinking about legal concepts influences how law is taught and learned in most Western universities. This method of inquiry, known as the "Socratic method," was named after Plato's mentor, Socrates. Rather than define the concepts to be discussed at the outset, Plato's definitions and ideas slowly unfolded in "dialogue" form as he debated them in his imagination with Socrates.

Perhaps Plato's best-known contribution to philosophy is his *theory of forms*. This theory is of interest because it helps us to understand the ideas of natural law and of justice developed by later philosophers and legal theorists. For Plato, all philosophy is an attempt to come to grips with **forms**. Plato's forms are not subjective mental images confined to our minds but are real essences wholly independent of our knowledge about them, which contain the only true and ultimate realities. The things that we perceive through our five senses are corrupt and transitory copies of these ultimate and eternal realities of the forms. Among the imperfect objects we possess is the law. Only by apprehending the nature and substance of the eternal forms can humans act with wisdom, and only by conforming to universal principles (the forms) can the rules of rightful conduct be determined. The task of lawmakers is thus to understand the *form* or *idea* of law so that they can fashion the best possible resemblance of it that humans are capable of making (Lavine, 1989).

Although never wavering from his theory of forms, Plato did not neglect to analyze and dissect the tangible world and the imperfect reality it contained. Because human beings as they exist in the transitory world are imperfect copies of the idea of humanness, their behavior is less than perfect. And to regulate the self-interested, contentious, and sometimes evil mortals, law is necessary even if it is also less than perfect, as all man-made things are. Plato (1952) offered one of the most comprehensive ideas of law in ancient times in a treatise on government:

> When men have done and suffered injustice and have had experience of both, not being able to avoid the one and obtain the other, they think that they had better agree among themselves to have neither, hence there arise



Plato and Aristotle

> laws and mutual covenants; and that which is ordained by law is termed by them lawful and just. This they affirm to be the origin and nature of justice—it is a mean or compromise, between the best of all, which is to do injustice and not be punished, and the worst of all, which is to suffer injustice without the power of retaliation; and justice being at a middle point between the two, is tolerated not as good but as the lesser evil, and honored by reason of the inability of men to do injustice. (p. 311)

Plato further argued that the state was virtuous, and that only through the state could the behavior of the citizenry be regulated. The state was superior to the individual because only it could lay down a set of workable rules to govern the complex behaviors of human beings. Anarchy and chaos would be the inevitable result if law was not present to restrain the insatiable desires of the citizenry. Without the law, human nature would run amok, since it always sought to satisfy its appetites without much regard for the concerns of others. Plato felt that humans lacked the power to distinguish good from evil, for if they had the power to comprehend the difference, there would be no need for law. Plato's concept of positivist law and of its necessity due to the insatiable and selfish appetites of human nature would be given its greatest impetus by the British philosopher Thomas Hobbes many centuries later—and later yet by the French sociologist Émile Durkheim.

Aristotle

Aristotle (384–322 BCE), who was a pupil of Plato, assumed that the state was created not only so that individuals could simply live but so that they could live well, and he agreed with his master that law must be something more than mere convention, a simple codification of custom. Aristotle disagreed with Plato on a number of other law-related issues, however. Whereas Plato was an elitist who favored the rule of an elite class (*philosopher-kings* and *guardians*) whose great wisdom would guide the city state, Aristotle favored an egalitarian system in which the rulers would be subservient to the law. This faith in the common person and in the ultimate authority of the law was a very radical idea, one that is difficult to find in the writings of any other legal philosopher until John Locke's work 2,000 years later. Aristotle knew that laws passed by rulers tended to favor the interests of their own class, and he warned that legislators must guard against these tendencies. Accordingly, the goal of the legislature must be to provide for the greatest happiness of the greatest number (Aristotle, 1952). Aristotle's ideas were given impetus by British philosopher

and lawyer Jeremy Bentham, who popularized the "greatest happiness for the greatest number" principle in the early nineteenth century.

Aristotle (1952) equated the concept of law with justice:

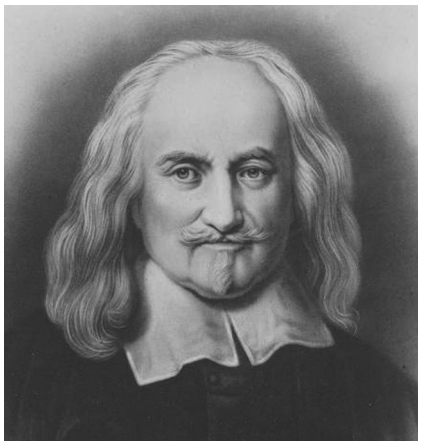
> Since the lawless man was seen to be unjust and the lawful man just, evidently all lawful acts are in a sense just acts; for the acts laid down by the legislative art are lawful, and each of these we say is just. (p. 377)

Persons acting unlawfully receive "too much" from society, and victims of their behavior receive "too little." The goal of law was to see that everyone receives what they justly deserve by their actions. These just desserts may be in the form of rewards, if acting justly, or punishments, if acting unjustly. Aristotle's ideas of justice are expanded in the next chapter.

Thomas Hobbes

English philosopher Thomas Hobbes (1588–1679) was perhaps the most important of the seventeenth-century legal philosophers. In his famous book *Leviathan* ("commonwealth" or "state"), we see Hobbes's view of human nature lead him to ideas of law quite different from those of Plato and Aristotle, although he mirrored Plato in advocating an all-powerful sovereign. Hobbes considered humans to be a selfish lot concerned only with their own interests. According to Hobbes, the "state of nature" (i.e., precivilized life) was a "war of all against all" and was "nasty, brutish, and short." Fear of violence and death under such conditions drove human beings to devise a **social contract** with one another to create a state that could protect them from predation and exploitation.

Hobbes had a great concern for order in society (he had witnessed the bloody English civil wars of 1642–1645 and 1648–1649) and argued for a strong sovereign capable of enforcing the social contract and thus providing security from disorder and anarchy. Hobbes (1952) disavowed any notion of natural law and was very much a legal positivist, arguing that there are no laws until a government is formed: "When a Commonwealth is once settled, then are there actually laws, and not before; as being then the commands of the Commonwealth; and therefore also civil laws: for it is the sovereign power that obliges men to obey" (p. 131). Justice is thus identified with positive law, the form of which was to be determined by a strong sovereign (in the modern sense, the state), rather than with some set of universal principles, as in the natural law of Plato and Aristotle. Laws are the commands of the sovereign—nothing more, nothing less. The sovereign's subjects are morally obliged to obey because they are parties to the social contract.



Thomas Hobbes

Hobbes's overweening concern for order and security can be gauged by his opinion that *any* government providing these things for its citizens, by whatever means, was just. According to Deininger (1965):

> The theme in Hobbes's *Leviathan* is that men are normally better off even in a despotic state than they would be in the absence of a political organization. Hobbes believes men are weak and cowardly, even subject to moments of sheer irrationality—thus needing for their protection a political structure which, by its coercive might, can minimize disorder by restraining the rash actions of individuals and groups as well as by laying an obligation to act when security is at stake. (p. 153)

Hobbes's defense of absolutist monarchy was published in 1661, just 12 years after Charles I was beheaded by the English Parliament for trying to practice what he preached. In many ways, Hobbes served to galvanize the thoughts of the Parliamentarians about what it was they were fighting for. Hobbes's liking for unquestioned obedience to authority and for peace at any cost provided them with an articulated agenda they could oppose item by item. One person whose work can be construed as a response to Hobbes is fellow English philosopher John Locke.

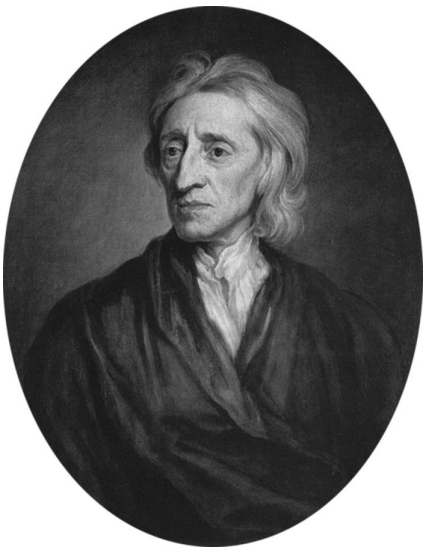
John Locke

John Locke (1632–1704) held a much more optimistic view of human nature than Hobbes. Because of his views about the common person and the law, Locke's writings have been interpreted by a number of individuals as providing justification for the Glorious (English) Revolution of 1688, the American Revolution of 1776, and the French Revolution of 1789 (Lavine, 1989). In *The Second Treatise on Government,* originally published in 1690, Locke described the state of nature as inferior to the organized political state only because of its lack of law, not because it was "nasty" and "brutish." Locke believed that our minds and personalities are like "blank slates" when we arrive in this world; what we become and how we behave is entirely the result of our past experiences interacting with our present circumstances. Locke's (1952) conception of the state of nature, human nature, and the necessity of law is captured in the following passage:

> Though man in that state [of nature] has an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for. The state of nature has a law of nature to govern it, which obliges every one; and reason, which is that law, teaches all mankind who will but consult it that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions; for men being all the workmanship of one omnipotent and infinitely wise Maker—all the servants of one sovereign master, sent into the world by his order, and about his business. (p. 5)

Contrary to Hobbes, Locke postulated that this state of nature had natural laws based on moral obligations that governed conduct and logically preceded an

established political system. This led Locke to one of his most important conclusions regarding the state of nature and the formation of a government. The central question of his *Second Treatise* is "Why would men, living in a state of nature with harmonious relationships form a political system to govern them?"



John Locke

> Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent. The only way whereby any one divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties and a greater security against any that are not of it. This any number of men may do, because it injures not the freedom of the rest; they are left as they were in the liberty of the state of nature. (Locke, 1952, p. 54)

For Locke, human beings enjoy freedom and independence in the prepolitical state of nature, and they do not have to surrender their liberty in order to live in a political community, as Hobbes supposed. Like Hobbes, Locke assumed that individuals enter into a social contract with the government to be governed, but the government must protect individual freedoms, not curtail them in the name of security and order. Furthermore, since the social contract is entered into freely, it can be broken by the governed if the state does not maintain its part—that is, if it acts despotically and arbitrarily. This principle became extremely important to the American colonists, and later to the framers of the US Constitution, who were trying to deal legally with what they considered to be the oppressive laws, policies, and decrees of the British Parliament. The influence of Locke on the writing of such American authors of the Constitution and the Bill of Rights as Thomas Jefferson and James Madison was great (Pojman, 1989).

John Rawls

The eminent American legal philosopher John Rawls (1921–2002) theorized broadly about justice from a liberal position without being explicit about natural law. However, he did allude to it when he compared law to a scientific theory: "A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust" (1999, p. 3). Laws and institutions must thus be evaluated

according to the principles of justice, as scientific theories are judged by truth. Of course, both truth and justice are intangible and open to subjective interpretation.

What is justice for Rawls? Just like the social contract theorists we have discussed, he found it necessary to propose a time in history during which humans did not live in organized political societies. Rawls shapes his theory of justice with the use of a thought experiment conjuring up a hypothetical situation he called the **original position**. In Rawls's state of nature, individuals were neither brutal beasts nor noble savages, but were equal, rational, and self-interested with "a capacity for a sense of justice and for a conception of the good" (Rawls, 1996, p. 19). He wanted to go beyond thinkers like Hobbes and Locke to describe in some detail the nature of the contract in terms of the kind of society the contract would specify. In elucidating the terms of the contract, Rawls strongly favored equality over meritocracy, but without belittling the latter. He envisioned a just society as one that arranged social institutions so that even the least advantaged members of society would reap fair benefits (without spelling out exactly what "fair" means in this context) and in which all social positions would be open to all people under conditions of equal opportunity.

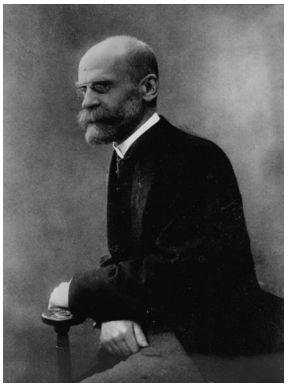
Rawls was uneasy with the idea of equal opportunity as a nondiscriminatory *process* because, as he points out, some individuals have greater natural talents than others and, according to him, that is unfair. He asserted that we have done nothing to earn our natural talents, and thus we are not fairly entitled to all the benefits that those talents could bring us. Rawls was aware that in coming together to write this hypothetical social contract, rational self-interested individuals will try to do so in such a fashion as to privilege themselves and their descendants.

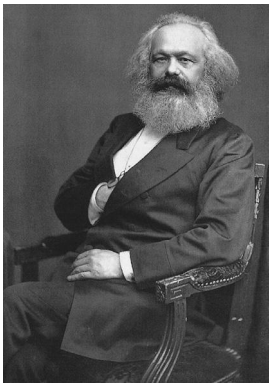
How might it be possible to prevent them from doing this? Rawls asks which principles of justice would rational and self-interested individuals choose to regulate social institutions if they had to make that choice behind a **veil of ignorance**. By the veil of ignorance, Rawls means that in determining the nature of their society, individuals would not know what their ascribed roles (race, class, gender), or even their personal characteristics (intelligence, strength, conscientiousness, etc.), would be. In other words, what kind of society would people endeavor to make in complete ignorance of their future place within it? Rawls argues that they would choose exactly the same liberties and opportunities for everyone because each of them would be that "everyone." They would choose a society in which the most disadvantaged would be afforded special help and opportunities because they just might be one of the disadvantaged. We expand on Rawls's ideas of justice and equality when we debate the concept of "social justice" in chapter 11.

SOCIOLOGICAL PERSPECTIVES OF LAW

The law is one of the six social institutions (the others are the family, education, religion, the economy, and the polity). All institutions make rules regulating conduct within them, but in modern democratic and secular states, only the rules contained in the law enjoy the enforcement power of the state. In many ways, law serves the purposes of the other institutions, such as regulating what constitutes a legal marriage, defining what is permissible in schools, defining the relationship between


Max Weber


Émile Durkheim


Karl Marx

church and state, making sure contracts are adhered to, and determining voter eligibility. Because the law serves these purposes, sociologists specializing in the study of these other institutions should have an understanding of the law. Sociologists also recognize that law is written by humans who bring ideological biases and personal baggage to the task and thus recognize that laws should be critically analyzed.

Early sociological luminaries such as Karl Marx, Émile Durkheim, and Max Weber were steeped in law and "regarded the sociology of law as an integral part of social theory" (Schluchter, 2002, p. 257). They all wrote at times when other social institutions appeared to be radically changing, and they sought to understand why. All three saw law as a method of redefining relationships between persons and institutions. But according to their own ideological leanings, they viewed law as either greasing the squeaky wheels of change to make the passage quieter for everyone or as a weapon to maintain the power and privilege of the few. These early social thinkers saw law as both a product and a producer of social change as well as a response to, and sometimes a cause of, social unrest. In fact, nineteenth-century sociology was so immersed in the law that Donald Kelly (1990) has characterized modern sociology as "the ghost of jurisprudence past" (p. 275).

Max Weber

Few scholars have had greater influence on contemporary legal thinking than German sociologist and lawyer Max Weber (1864–1920). In his most famous work, *Economy and Society* (1905/1978), Weber argued that the law was different from other kinds of rule-following behavior in three fundamental ways. First, regardless of whether or not persons want to and habitually do or do not obey the law, they face external pressures to do so. Second, these external pressures involve the threat of coercion and force. Third, these threats are carried out by agents of the state charged with that specific duty. Nowhere in Weber's writings do we see allusions to natural law by which unjust laws may be invalidated.

Weber's major interest was in the increasing rationalization of the world. He wanted to explain how the world had changed from a hierarchical model of lords

Table 1.1 ***Summary of Max Weber's Decision-Making Typology***

	Irrationality	**Rationality**
Substantive	Decisions made subjectively by nonlegally trained individuals on a case-by-case basis.	Decisions made on a case-by-case basis guided by logically consistent principles (bureaucratic rules, religion, ideology) other than law.
Formal	Decisions based on formal rules that are not based on logic (superstition, magic, ordeals, oath-swearing, etc.).	Decisions based on formal logical rules and principles made by legally trained persons bound by those rules but with a high degree of independence.

and peasants overwhelmingly concerned with the afterlife to a one of technical progress and capitalism firmly planted in this life (Collins & Makowsky, 1993). The progress and expansion he saw around him was possible only if the people responsible for it could plan ahead secure in the knowledge that if all citizens followed certain binding rules, things would happen in a relatively predictable fashion. Without such predictability, economic progress and expansion cannot happen, and the economy is destined to remain at the level of barter. Predictability and progress can only occur under a binding code of conduct rationally derived from the minds of individuals schooled in legal and administrative theory and practice and enforced by a cadre of honest and professional state agents. As Robert Gordon (2012) sees it:

> The rule of law then came to be seen as crucial to modernization and the building of viable capitalist societies. The difference between dynamism and stagnation, prosperity and poverty boiled down to a few simple variables—*legal* variables regulating a free and competitive market. (p. 211)

Weber was very interested in how authorities in various cultures made decisions when confronted with issues of contention and how the decision-making process that was employed accelerated or retarded modernization (rationalization) in those cultures. Weber is perhaps best known in legal circles for his fourfold typology of legal decision-making. As expected, the two fundamentals of Weber's typology are the *rationality* or *irrationality* of legal procedure. Rational procedures rely on logic; nonrational procedures rest on mysticism, faith, or superstitions. Rational or irrational procedures may be either *formal* or *substantive*. *Formal* refers to decision-making on the basis of established and inflexible rules and implies the independence of the legal system from other social institutions. *Substantive* refers to decision-making that takes the substance of individual cases into consideration rather than relying on general legal principles (Turkel, 1996). Table 1.1 presents a summary of Max Weber's decision-making typology.

The four methods of legal decision-making derived from these elements can be described in more detail as follows:

1. **Substantive irrationality**: This method is the least rational of the four types. It is based on case-by-case political, religious, or emotional reactions on the

part of a nonlegally trained person acting without a set of legal principles. The biblical story of King Solomon, who was asked to solve the dilemma of two women claiming maternity and possession of the same infant, is an example of substantive rationality. Solomon ordered the baby to be sliced into two and divided between the women. One woman agreed to this solution, while the other begged Solomon to give the infant to her rival. Solomon reasoned that the second woman must be the true mother and that the first woman could not possibly be and made his decision in favor of the second woman. Because Solomon's decision was shorn of any legal rules, it was irrational, and because it was decided on a case-by-case basis, it was substantive. However, the decision was the essence of justice and wisdom.

2. **Formal irrationality**: This method is based on such concepts as religious dogma, magic, oath-swearing, and trial by combat or ordeal. There are certain formal rules to be followed, but they are not based on reason or logic. The process of oath-swearing (discussed in chapter 14), used to settle cases in some Islamic countries, is an example of formal irrationality.

3. **Substantive rationality**: This method is guided by a set of internally consistent general principles other than law. Examples of this type would be decision-making applied on a case-by-case basis according to the logic of some religious, ideological, or bureaucratic set of rules. The principles that are seen in the Code of Hammurabi indicate that substantive rationality was the method of legal decision-making used. Much of American administrative law is of this type when dealing with issues involving complex technological issues (see chapter 7).

4. **Formal rationality**: This is the most rational and ideal of all four types. It combines a high degree of independence of legal institutions with a set of general rules and procedures applicable to all. Those who make the decisions on these grounds are monitored by others trained in the law. All Western legal systems fall into this category (Evan, 1990). Table 1.1 presents a summary table of Max Weber's decision-making typology.

Although Weber clearly favors Western formal rationality, the other three methods are not necessarily "wrong" or unjust; all four methods must be evaluated in the context of the culture in which they are being used. Weber was primarily concerned with identifying the kind of legal reasoning best suited to modern capitalism and not necessarily passing judgment on these decision-making methods as functional or dysfunctional in the cultural contexts in which they were employed. As we shall see in the next chapter, cases settled exclusively on the basis of formal rationality may sometimes be at odds with justice.

Émile Durkheim

French sociologist Émile Durkheim (1858–1917), a contemporary of Weber's, was interested in the relationship between types of law and types of society. Durkheim's basic theme is that all societies exist on the basis of a common moral order, not on

the basis of rational self-interest as implied in the "social contract" theses of Hobbes or Locke. In his famous book *Division of Labor in Society* (Durkheim, 1893/1960), he set out to examine the effects of the division of labor on social solidarity. By *social solidarity*, Durkheim meant the degree to which people feel an emotional sense of belonging to their groups. The strength of social solidarity depends to a great extent on the kind of economic system a society has and on the stage of its development. Durkheim divided societies into two types: the nonindustrial societies of earlier times, characterized by what he called **mechanical solidarity**, and modern or industrial societies, characterized by **organic solidarity**.

In nonindustrial societies, social relations were based mostly on primary group interactions (frequent face-to-face contact with the same people), which tended to result in strong emotional bonds. Such societies had only a simple and limited division of labor; individual differences were minimized. Since people were involved in a limited range of occupations, most looked at life in the same predictable way. Social relations were personal and uncomplicated for the most part, with strong norms leaving little leeway for deviant behavior. Mechanical solidarity thus grows out of sameness—out of a commonality of experience—and produces a very strong *collective conscience* or *collective consciousness* (in French, they mean the same thing; Collins & Makowsky, 1993).

With the onset of the Industrial Revolution and the factory system came a broad division of labor, which resulted in a shift from mechanical to organic solidarity. Durkheim chose the term *organic* to illustrate this type of solidarity because it was consistent with his functionalist view of society as an organism consisting of interdependent parts. Organic solidarity is characterized by *secondary* relationships in which people interact for brief periods to accomplish specific goals such as exchanging services (workers in factories, students in schools, shoppers in stores, repairmen in homes, etc.). The collective consciousness is weakened because of this basically unemotional pattern of temporary and goal-directed interaction. Additionally, because of occupational specialization, people began to conceive of themselves less in terms of the groups to which they belong and more as individuals. Organic solidarity thus grows out of differences and a sense of social interdependence rather than from shared experiences and a common identity.

With changes in patterns of interaction came changes in the form of social solidarity, which in turn generated changes in the law. The greater the complexity of a society and the greater the shift from predominantly primary to secondary interaction, the more laws are required to regulate the different kinds of relationships among citizens. Growth in social and economic complexity almost by definition requires growth in legal complexity. For instance, the efforts of the Chinese government to modernize and to develop a market economy resulted in thousands of new laws, and the number of lawyers in the country more than doubled (Turkel, 1996).

Different types of social solidarity generate changes in the criminal law as well. In preindustrial societies, the community exercised great power over the life of the individual. Because of the strong collective conscience, norm violations generated great moral outrage, and punishments were extremely harsh. Durkheim called this pattern of response to violations of the collective conscience *retributive* or *repressive* justice (Durkheim was too Eurocentric here; many preliterate cultures stressed

arbitration and reconciliation over harsh punishments). Punishments, according to Durkheim, functioned to reaffirm the righteousness of the moral norms that had been violated. But as the collective conscience became weaker under the increased division of labor in industrial societies, so did the strength of collective moral outrage. The lessening of moral outrage led to more tolerant attitudes toward minor rule breakers and to a more humanitarian form of justice that was *restitutive* rather than retributive. The old notions of retributive justice, however, are still in evidence in some Islamic countries that continue to lop off the hands of thieves, stone adulterers to death, and apply the lash to users of alcohol (Fairchild & Dammer, 2001).

ISSUE HIGHLIGHT

American Civil Liberties Union: Good or Bad for America?

It is great to have a trusted and allegedly neutral legal system, but it might be even better if we also had an organization not officially a part of that system to monitor it—guarding the guardians, so to speak. The American Civil Liberties Union (ACLU) sees itself in that role. Founded in 1920, its stated mission is "to defend and preserve the individual rights and liberties guaranteed to every person in this country by the Constitution of the United States."

The ACLU is either loved or hated. The major criticisms are its involvement with cases in which it represents peoples and organizations that promote offensive behaviors and views and its efforts to purge religion from the public square. Is the ACLU—on balance—good or bad for America?

Bad

At the beginning of the ACLU, Roger Nash Baldwin its primary founder, said, "Communism, of course, is the goal." The ACLU is not communist today, but it is decidedly leftist in its implicit opposition to the family and to Christianity by its muscular defense of atheism. It is the biggest legal advocate for pornography, claiming that it is a form of free speech, yet rarely defends Christian speech and never defends speech that is critical of homosexuality or that advocates intelligent design (a supposed alternative to Darwinian evolution). The ACLU has been a major player in every federal court case on the side of those seeking to eliminate religion completely from the public square. It has defended the Man/Boy Love Association that advocates "Sex before eight, or else it's too late," but has fought against the Boy Scouts of America holding their Jamborees on government property because they have the audacity to pray and swear an oath of "duty to God." It has defended illegal immigrants and terrorists and has done everything it can to undermine the Patriot Act designed to protect Americans after 9/11. Famous liberal lawyer Alan Dershowitz (2018) claims that the ACLU has become a hyperpartisan political advocacy group and has become involved in supporting hard-left candidates and agendas. The list could go on for pages, but we'll let the ACLU's primary opponent, Alliance Defending Freedom, have the last word: "Far from the noble protector of our constitutional rights many Americans believe it to be, the ACLU has from its earliest days deliberately and patiently chipped away at the legal, moral, and religious foundations of our Republic."

Good

The ACLU is indeed composed mostly of leftist liberals, but it is conservative in the sense that it fights to preserve civil liberties for everyone. It did begin with communist aspirations, but as Roger Baldwin became disillusioned with it, he led a campaign to purge the ACLU of

communists. It defends some very unpopular causes and speech, but free speech should not be just for views that are popular. Who will speak up for despised people's rights if not the ACLU? It has been accused of attempting to rob America of its Judeo-Christian heritage but does not attack Christianity; rather, it believes that religion should be confined to the home and to the places of worship and has no place in the public square. The ACLU's position is that although religion is important for social morality, it violates the Establishment Clause of the First Amendment to have prayer or "moments of silence" in schools and to display crosses and the Ten Commandments on government property. Following the lead of our opponents, we will let the ACLU speak for itself: "For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country."

TWO OPPOSING PERSPECTIVES: CONSENSUS AND CONFLICT

Sociologists who study the law as a social institution and its function as a social control mechanism tend to view it in terms of one of two broad perspectives. Which perspective a scholar favors tends to depend on his or her more fundamental perspective on society. Some scholars view society as basically good, just, and providing equal opportunity for all individuals; this is the consensus view of society. Others view society as basically unjust, unequal, and discriminatory; this is the conflict view of society.

Consensus theorists emphasize how society is structured to maintain its stability and view it as an integrated network of institutions (the family, church, school, economy, government) that function to maintain social order and the system as a whole. Social stability is also achieved in this view through cooperation, shared values, and the cohesion and solidarity that people feel by being part of a shared culture. Consensus theorists are aware that conflicts often arise in social life, but they stress that such conflicts are temporary and both can be and are solved within the framework of shared fundamental values as exemplified by a neutral legal system.

Conflict theorists consider society to be composed of individuals and groups with sharply different interests and to be characterized by conflict and dissension. People and groups everywhere, these theorists maintain, seek to maximize their interests. Since resources are limited, conflict between different individuals and groups is inevitable and continuous. The stability and order that consensus theorists see is only temporary and is maintained by coercion rather than consensus—that is, by the ability of more powerful people and groups to impose their will upon the less powerful.

Which view is correct? The simple answer is that it is impossible to say without specifying what society we are talking about. All societies are characterized by both consensus and conflict; it is almost impossible to imagine any society in which they are absent. Max Weber recognized the dual nature of society when he defined law in a manner that encompasses both consensus and coercion: "Laws are 'consensually valid in a group' and are 'guaranteed through a coercive apparatus'" (Turkel, 1996,

p. 8). We have to remember that these two competing models are examples of what sociologists call *ideal types*. Ideal types are abstract conceptual tools that accentuate, purely for analytical purposes, the phenomenon being studied; they lay no claims to mirror the day-to-day reality of any concrete example of that phenomenon. Let us examine law in the context of these two ideal-type models of society.

The Consensus Perspective

All of the legal theorists we have encountered thus far have been proponents of the consensus perspective. The **consensus perspective** views law as basically a neutral framework for patching up conflicts between individuals and groups who primarily share the same set of fundamental values. Law is viewed in a manner analogous to the immune system of the body in that it identifies and neutralizes potential dangers to the social body before they can do too much damage. Thus, law is a just and necessary mechanism for controlling behavior detrimental to peace, order, predictability, and stability and for maintaining social integration. Specific legal codes are assumed to express compromises between various interest groups regarding issues that have been contentious in the past, not to codify the victories of some groups over others. Law is also seen as reflecting the community's deeply held values and as defining the rights and responsibilities of all those within it, and it is considered a legitimate expression of morality and custom. If coercion is sometimes needed to bolster conscience, it is because the individual, not the law, is flawed. The law is obeyed by the vast majority of people not out of fear but out of respect, and it is willingly supported by all good people.

Perhaps the main reason we have not yet encountered any theorist with a conflict view of the law in this chapter so far is that these theorists were all members of privileged classes, which naturally endears the status quo to them. Except for Aristotle's brief note of concern that legislators should guard against laws favoring their own class, any hint in the works of these writers that the law could unfairly serve the needs of the elite comes percolating from below the surface. We see this in Thrasymachus, Plato's antagonist in the dialogue on justice contained in *The Republic* (1960, book 1). Thrasymachus argues that the law is merely the legalizing of the interests of the stronger. For the conflict perspective to be given full voice, it had to wait for writers arising from the less privileged classes, which could only come after education became more widespread.

The Conflict Perspective

Underlying the **conflict perspective** of the law is the view that law functions to preserve the power and privilege of the most exploitive and duplicitous, not to protect the weak and helpless. As we have seen, although thinking of social processes in terms of conflict between rival factions (usually between social classes) goes back as far as Plato, the more formal treatment of conflict as a concept traces its origin to the thought of the nineteenth-century German philosopher Karl Marx. Marxist legal scholars agree that law exists to settle conflicts and restore social peace but insist that conflicts are always settled in favor of the ruling class in any society, even if it may sometimes look like other segments of society also benefit (e.g., a general tax cut in

which the wealthy gain millions while the working person gains a dollar or two every paycheck). The basic proposition of the conflict perspective was set down by Marx and his coauthor Friedrich Engels (1888/1972) in *The German Ideology*: "The ideas of the ruling class are in every epoch the ruling ideas; i.e., the class, which is the ruling material force of society, is at the same time its ruling intellectual force" (p. 136).

For Marx and Engels, society is divided into two classes: the rulers and the ruled. The ruling class, by which Marx and Engels meant the owners of the means of production (factory owners and entrepreneurs), control the "ruling material force of society." Because these individuals control the means of production, they are able to buy politicians, the media, the church, and all other social institutions that mold social values and attitudes and thus law. The relationship between power and lawmaking has been described (perhaps cynically) as the "Golden Rule," which posits that "those with the gold make the rules."

Marx and Engels explain why "the exploited" do not recognize their exploitation with reference to the idea of **false consciousness**, by which they mean that the working classes have accepted an ideological worldview that is contrary to their best interests. Workers have been duped into accepting the legitimacy of the law by the ruling classes and are not aware that the law does not serve them. They blindly and docilely obey the law and believe that they are behaving morally by doing so. The ruling class is able to generate the false consciousness of the workers by virtue of its control over key institutions such as education, religion, the media, and of course, the law itself. These institutions define what is right and what is wrong, and they control the flow of information so that it conforms to the worldview of the ruling class.

A school of legal thought premised on Marxist/conflict views is **critical legal studies** (CLS) or critical legal theory. CLS emerged during the tumultuous years of the late 1960s and early 1970s in law schools that challenged the status quo and rejected much of positive and natural law. This school of thought claims that law is politics by other means in the sense that it is a way the "privileged classes" maintain their favored place in society and a way to "legitimately" keep the working class down. Legal rules are not the codification of cultural custom, as positivists claim, but rather a series of statutes legitimizing exploitation and designed to maximize economic growth and efficiency, which is a bad thing for CLS theorists because they believe it is done to the detriment of the workers. CLS theorists look almost exclusively at what they consider defects in the law and ask "how law legitimates power in both senses of the word: how it shapes, channels and restrains power and how it mystifies, disguises, and apologizes for it" (Balkin, 2008, p. 1).

A sort of radical left-wing legal realism (a system of thought we will meet in the next chapter), CLS maintains that judges do not simply apply logic to the law as written but rather seek to impose rulings that support and reinforce the status quo by looking for provisions in the law that will support their interpretation. Today, CLS has more or less vacated the legal academy, with the space being rented out to a variety of other radically critical legal schools such as critical race; critical gender; and critical lesbian, gay, bisexual, and transgender studies (Gordon, 2012). Needless to say, these offshoots of CLS have strong views of their own that look for examples of how the law has thwarted their agendas, at least according to them, and they are definitely not supporters of the status quo.

We do not have to be Marxists, or even liberals, to agree that great wealth confers special privilege on its possessors or that history is replete with class struggles. In Athens in 594 BCE, Plutarch wrote of the great disparity of wealth between classes and the dangerous conflict it generated (Durant & Durant, 1968, p. 55), and President John Adams (1778/1971) wrote that American society was divided into a small group of rich people and a large mass of poor people engaged in a constant class struggle. Neither do we have to be conservatives to realize that any society without a fairly strong moral consensus will not last very long.

Because both consensus and conflict are ubiquitous and integral facts of social life, we must address both processes in this book while attempting to remain agnostic with respect to which process "really" characterizes social life in a general sense. In reality, conflict and consensus/cooperation resemble the Chinese concept of the interdependent unity of yin and yang; we cannot have one without the other. Hopefully, it will become clear to the reader that the consensus perspective is most suitable for explaining certain sets of facts and the conflict perspective is better suited to explaining other sets of facts. We hope that it will also become plain that conflict is as necessary as consensus to maintain the viability of a free society. In fact, conflict may form the very foundation of later consensus in pluralistic societies such as the United States, since justice for all is usually unattainable unless the oppressed agitate strongly for it (Rawls, 2003). This principle is illustrated in subsequent chapters discussing the rights of workers, racial minorities, and women.

SUMMARY

Law is a written body of rules of conduct applicable to all members of a defined community, society, or culture that emanate from a governing authority and are enforced by its agents through the imposition of penalties for their violation. We looked at the six primary characteristics of culture and their relationship to law. These characteristics are beliefs, values, norms, symbols, technology, and language. Our discussion of these characteristics showed that law is, and always has been, an integral part of culture. Examining law as a social construct is known as legal positivism.

We traced thinking across the centuries about various aspects of the law from Hammurabi to the more recent sociological writing of Weber and Durkheim. The law was relatively well developed in Hammurabi's Code, replacing a system of personal vengeance with a system in which a neutral third party was charged with making decisions in both criminal matters and business transactions.

Plato felt that although justice and wisdom were part of the perfect order of the universe, humans could approach these ideals only through reason. Humans had the capacity to emulate the good and the just, but they rarely did. Plato thus reasoned that if law did not exist, society would degenerate into chaos. To some extent, he articulated an idea that was given its greatest impetus about 2,000 years later by Thomas Hobbes.

Aristotle equated the concept of law with justice. He assumed a very strong utilitarian interpretation of the law, going much further than Plato in terms of arguing for the rights of ordinary people. For Aristotle, the most important goal of the legislature was to provide for "the greatest happiness of the greatest number" in society.

He also offered the "radical" notion that even the rulers of a nation should not be above the law.

Thomas Hobbes disavowed any belief in natural law or justice. He saw the "state of nature" as a warlike state where only the strong survive. Because of this warlike state, people agree to engage in a social contract in which they surrender many of their freedoms in exchange for protection. Hobbes argued that the main goal of government under this contract was to provide for the security of the individual and that any state doing so was just by definition. Hobbes believed that the sovereign was an absolute ruler who could employ oppressive tactics in the service of obtaining an orderly society.

The work of John Locke stands in sharp contrast to the work of Thomas Hobbes. Locke both refuted the absolute right of monarchs and reconciled strong government with the liberty of the individual. In contrast with Hobbes's brutish state of nature, Locke's was one in which individuals enjoyed liberty and harmony and was only inferior because it lacked law. States or governments develop and exist by virtue of the social contract, according to the terms of which individuals maintain most of their liberties while voluntarily surrendering to a civil government their power to punish transgressors themselves. Locke also wrote that when governments overstep their powers, individuals have the right to reconstitute that civil government based on the moral force of natural law. Locke's version of natural law, liberty of individuals, and the proper role of civil society provided the ideas and justifications for the British, American, and French revolutions.

Max Weber asserted that if a society is to advance into a more modern and complex structure, it must be governed by rational law. For the modern capitalistic economy to develop, it needed a predictable and dependable legal system. Natural law may be the philosophical "touchstone" of a society in terms of individual rights and responsibilities, but the development of any complex capitalistic economy depends on a predictable, rational system of law. Weber's four types of legal decision-making, ranked from the least to the most rational, are substantive irrationality, formal irrationality, substantive rationality, and formal rationality.

Émile Durkheim was interested in the relationship between law and social solidarity. He postulated two types of social solidarity: mechanical and organic. Mechanical solidarity is associated with preindustrial societies and grows out of the sameness of everyone's experiences; organic solidarity is associated with industrial societies and develops from the interdependence of individuals that exists due to an advanced division of labor. The growing complexity of industrialized societies required the increasing reach of civil law to regulate the great variety of transactions that occurred in such societies.

Criminal law also changes with the type of solidarity within a society. Societies characterized by mechanical solidarity have a very strong collective conscience, which leads to great moral outrage when norms are violated and to a retributive or repressive form of justice. A weakening of the collective conscience follows a change to organic solidarity, which leads to the more tolerant and humanitarian restitutive form of justice.

Most sociological students of the law conduct their analyses from one of the two general sociological models of society: the consensus model or the conflict model. The consensus model views society as an integrated network of institutions held together by a common set of values. The law is seen as a neutral protector of the continuity and stability of these institutions and values. This perspective also views society as

basically good and just. The conflict model holds the opposite view: conflict rather than consensus is the main characteristic of society, and the law serves the purposes of the ruling classes. This view is presented most forcefully in the works of Marx and Engels. We indicated that all societies are characterized by both conflict and consensus, with one process dominating at one time and the other at another time.

DISCUSSION QUESTIONS

1. What do you think are the main differences between legal rules and other kinds of rules?
2. Give one or two examples of how changing values and/or technologies have led to changes in the law.
3. In what ways are (a) Plato and Hobbes and (b) Aristotle and Locke alike in terms of their views of human nature and the law?
4. Do you believe that the "ruling class" (decide for yourselves who these people may be) unfairly pass laws favorable to themselves and detrimental to the rest of us? If they do, what can we do about it?
5. In what ways can conflict be beneficial to a society? Can conflict actually support consensus?
6. Would you choose to live under a brutal dictator such as Hitler, Stalin, or Saddam Hussein or suffer the chaos of a society without any kind of law?

CHAPTER TERMS

Beliefs
Code of Hammurabi
Conflict perspective
Consensus perspective
Critical legal studies
False consciousness
Formal irrationality
Formal rationality
Forms
Language
Law
Mechanical solidarity
Natural law
Norm
Organic solidarity
Original position
Positive law
Risk society
Social contract
Substantive irrationality
Substantive rationality
Symbols
Technology
Values
Veil of ignorance

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