An Introduction to Law and Society

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TEST YOUR KNOWLEDGE: TRUE OR FALSE?

1. Most definitions of law require that a law is an official government act that is fair and just.
2. A primary difference between the common law and civil law systems is that the common law is based on the opinions of judges and the civil law is based on the enactments of legislatures.
3. Three of the important functions of law in society are social control, dispute resolution, and social change.
4. Law can play a dysfunctional (negative) role in society and can work to the benefit of a small number of individuals; it does not always work to the benefit of the majority of citizens.
5. There is no difference between an approach to the study of law that focuses on "black letter" legal doctrine and an approach that focuses on law and society.
6. A lengthy labor strike over wages, working conditions, and a plant's move outside the United States is an example of the consensus view of law in society.

Check your answers on page 41.

INTRODUCTION

We regularly encounter the law in our daily lives in driving cars, in renting apartments, and on the job. Anyone opening the newspaper or reading the news online in recent years would see articles discussing the legal debate over same-sex marriage, abortion, and legalization of marijuana. Other articles would discuss the legality of American drone policy, the latest prosecutions for insider trading by Wall Street investors, the prosecution of detainees at Guantánamo, and various high-profile trials.

This chapter provides the first step in the study of the interaction between law and society. Why are we interested in the influence of law on society and the influence of society on law? Why bother to study the relationship between law and society? Why not limit our study to the "black letter" rules of criminal law or personal injury? Consider the Twitter attack on Leslie Jones based on her performance in *Ghostbusters*. In July 2016, Jones, the comedian, actress, and co-star of the remake of the 1984 film, which featured a cast of all-female leading actors, received an avalanche of attacks from trolls on Twitter. She initially spent an entire day

retweeting what she described as "hateful and racist" tweets and initially announced that she would "leave Twitter tonight with tears and a very sad heart."

Two days later, after meeting with Twitter CEO Jack Dorsey, Jones announced that she was not leaving Twitter and reactivated her account. Jones stated that the insults "didn't hurt me" although "[w]hat scared me was the injustice of a gang of people jumping against you for such a sick cause. . . . It's so gross and mean and unnecessary." She explained that had she not retweeted the messages, "nobody would have ever known" about the attacks.

Dorsey subsequently deactivated many of the accounts that had sent hateful messages to Jones, including the account of conservative commentator Milo Yiannopoulos, then tech editor of the website Breitbart, who reportedly had roughly three hundred thousand followers. Twitter issued a statement: "People should be able to express diverse opinions and beliefs on Twitter. But no one deserves to be subjected to targeted abuse online, and our rules prohibit inciting or engaging in the targeted abuse or harassment of others."

Yiannopoulos responded that "Twitter doesn't stand for free speech. What they do stand for is a carefully crafted facade of leftist approved ideas, and conservatives that don't stray too far from safe (globalist) ideas. Like so many platforms before them, their efforts to enforce groupthink will be their undoing." Twitter later stated that the company was taking steps to improve the ability to act against abusive behavior (discussed in Chapter 12).

A law student reading these facts likely would conclude that although the First Amendment prohibits government abridgement of expression, Twitter as a private company was free to withdraw Yiannopoulos's account. A law and society analysis would place the attacks against Jones in the context of historic slander against African Americans, investigate the cultural significance of the film *Ghostbusters*, and ask why the casting of Jones and an all-female cast had sparked attacks. Other areas of law and society inquiry would include the role of social media in encouraging group attacks and reflect on the unprecedented role of tech companies in regulating speech. Law and society also might examine whether various racial and gender groups believe hate speech should be protected by the First Amendment. A comparative perspective would ask why the United States is one of the few countries that does not impose civil and criminal liability on individuals for discriminatory comments and compare America's general lack of regulation over online speech with the restrictive approach followed in Europe.

This first chapter introduces various building blocks in the study of law and society (see Table 1.1).

Keep the material in this chapter in mind as you read the text.

TABLE 1.1

The Building Blocks in the Study of Law and Society

Definitions of law	Informal and formal methods of establishing and maintaining social control and approaches to defining law.
Legal families	The major global legal traditions.
Functions of law	The functions of law in a society.
Dysfunctions of law	The negative aspects that law may play in society.
Studying law	The three primary approaches to studying law.
Perspectives on law and society	The principal division in thinking about the relationship between law and society.

DEFINITIONS OF LAW

Following World War II, the Federal Republic of Germany confronted the problem of individuals who had cooperated with the defeated Nazi regime headed by totalitarian dictator Adolf Hitler. During the war, a woman reported that her husband violated Nazi law by making remarks critical of Hitler. The so-called vindictive spouse's motive in informing on her husband was to enable her to pursue an extramarital affair. Her husband was convicted, imprisoned, and sent to the Russian front, which constituted a virtual death sentence. He survived the war and filed a criminal action against his wife for the unlawful deprivation of his liberty under the 1871 German Penal Code. A West German court convicted the "vindictive spouse" and reasoned that the Nazi law was contrary to the basic principles of justice.

Prominent Oxford University law professor H. L. A. Hart argued the "vindictive spouse" had followed Nazi law and was improperly convicted (Hart 1958). He reluctantly stated the best course for the new German government would be to pass a law declaring that the Nazi law was "null and void." In response, American law professor Lon L. Fuller contended an immoral law could not be considered a law and that the German court acted properly in convicting the wife (L. Fuller 1958).

The case of the "vindictive spouse" raises questions concerning the definition of law. Is a statute passed by the non-democratic violent and repressive Nazi government a law? How could Nazi law not be considered binding on the democratic German government when the law had been adopted by the governing Nazi regime, enforced by a sitting judge in convicting the husband, and followed by tens of millions of Germans? On the other hand, is an immoral law binding law, or do law and morality exist in separate spheres? Consider that the Nazi regime had passed legislation that authorized the euthanasia of one hundred thousand individuals who were mentally and physically challenged and adopted legislation that authorized the sterilization of as many as three hundred thousand individuals. How can individuals determine whether a law is moral or immoral? Can we expect individuals to determine for themselves whether a law is immoral and whether to obey the law? How can we ask individuals to suffer the consequences of disobeying the law?

There are more definitions of law than we possibly can discuss. Each of the definitions discussed as follows offers an important insight into the definition of law. Influential legal anthropologist E. Adamson Hoebel remarked that to seek a definition of law is akin to "searching for the Holy Grail" (Hoebel 1979: 18). In reviewing these various definitions, think about what a definition of law should include.

Before turning our attention to law, we need to define the related terms *norms*, *mores*, and *folkways*.

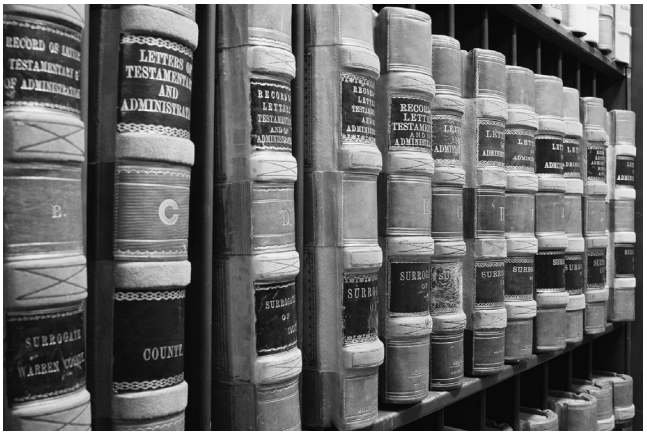

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PHOTO 1.1 How we define the law and what it should include says a lot about our society.

NORMS, MORES, AND FOLKWAYS

Values are the core beliefs about what is moral and immoral, good and bad, and acceptable and unacceptable. In the United States, the central values include justice, equality, individual freedom, and the sanctity of human life. There also is a strong ethic of individual responsibility, a respect for the religious beliefs of others, and a high priority placed on family and patriotism.

Norms are the "action aspect" of values and tell us how to act in a situation. We learn norms of behavior at an early age. One type of informal norm is called a folkway. **Folkways** are the

customs that guide our daily interactions and behavior. This includes the habits that guide our interactions with teachers and family, our style of dress, our use of language, and even the tip that we leave for a server.

The other type of informal norm is a more. **Mores** are deeply and intensely held norms about what is right and wrong. The violation of a more is met with strong condemnation. An example is the sexual exploitation of children. There also is a strong more that protects private property. Mores can evolve and change. At one point in U.S. history, African Americans were viewed as property and lacked rights, and there was a strong more against recognizing slaves as citizens. In recent years, there has been a developing more against capital punishment for all but the "worst of the worst" killers. Mores also can be uncertain and conflict with one another. The more that life is sacred leads some individuals to oppose abortion and euthanasia while other individuals view the opposition to abortion and euthanasia as conflicting with the mores that protect personal privacy and recognize the right of individuals to control their own bodies. Although patriotism is a strong more in the United States, some individuals believe that the burning of the American flag must be tolerated in the interests of freedom of speech.

Norms provide the foundation for many of our laws. The more against taking the life of innocent individuals is reflected in the law of murder. The equality of individuals is enforced by laws against discrimination. Folkways also may be the basis of laws. Consider laws that require people to shovel the snow from their sidewalk, keep their dog on a leash or pick up after their dog, or recycle trash.

As you recall, mores and folkways are informal norms. In contrast, laws are formal norms enforced by the external controls. The government has sole authority to impose **sanctions** such as fines, imprisonment, suspension of a license to practice medicine or law, or deportation of an individual who is living unlawfully in the United States. Formal norms also may be enforced by private organizations or private groups along with or instead of the government. Professional athletic leagues suspend players for drug use, and the use of these drugs may be against the law. A university may adopt a rule against plagiarism and suspend students who violate the norm that individuals should submit their own work. The student in this instance would not be subject to criminal prosecution by the government.

We now can turn our attention to surveying various approaches to defining law. Folkways and mores, as noted, are informal modes of establishing and ensuring order. As a society becomes more complex, reliance may be placed on the formal mechanism of social control of the law (Pound 1943: 20).

There are various approaches to defining the law, and these tend to be closely related to the research interests of the scholar proposing the definition. There is no correct or incorrect definition of law, and each definition contributes to our understanding of law. Each of the theories tends to have a particular emphasis. Robert Kidder observes that the definitions of law are like designing a car. One designer may sacrifice speed for appearance while another designer may sacrifice both appearance and speed for comfort (R. Kidder 1983: 20). Keep in mind there are far more definitions of law than we possibly can discuss in this chapter, and the definitions that follow represent some of the principal approaches to defining law. We will cover the following approaches to defining law:

- Law and Official Authority
- Law in Action
- Law and Physical Force
- Law, Coercion, and Specialization
- Law and Justice
- Law and Social Integration
- Law and Custom

APPROACHES TO DEFINING LAW

Law and Official Authority

Most people, if asked for a definition of law, likely would respond that they consider law to be the statutes, rules, and regulations issued and enforced by the government. We may complain about paying taxes, but we nonetheless accept that "the law is the law." Donald Black, a leading law and society scholar, offers a definition of law that reflects the popular conception of law:

> Law is governmental social control, . . . the normative life of a state and its citizens. (D. Black 1972: 1086)

Black views law as social control by the government. Social control is defined as the regulation over the actions of individuals and groups. The government regulates the actions of individuals and organizations (social control) through official public institutions like courts and police and agencies like the Internal Revenue Service and Department of Motor Vehicles. Consider the web of laws and regulations involved in purchasing, driving, and maintaining an automobile. Black's definition has the benefit of drawing a firm boundary between law and nonlaw by excluding from law the rules enforced by private entities like fraternities and sororities or the rules that a business adopts to regulate the conduct of employees in the workplace. Black's definition also does not recognize customs and traditions as law. For example, it is a tradition to remove a hat during the national anthem. This tradition is enforced by social pressure and will not result in a governmental fine or punishment and, according to Black, should not be considered a law. The logic of Black's argument is that the government is supreme and its official, authoritative rules and regulations take precedence over the practices of individuals and private organizations. The members of a fraternity are free to regulate their own affairs, although in those instances in which the traditional practice of hazing pledges violates the law, the members of the fraternity may find themselves facing criminal prosecution by the government.

The second portion of Black's definition calls attention to the role of the law in shaping the "normative life of a state and its citizens." The law establishes and reinforces the central values and beliefs in society. The criminal law, for example, supports the core religious values and beliefs in the Ten Commandments. This includes the instructions that "thou shalt not kill" and "thou shalt not steal." Black notes that the law relies on various forms of social control, including penal punishment, compensation to an injured party, reconciliation between conflicting parties, therapeutic or involuntary institutionalization, and the issuance and suspension of licenses.

Black's definition of law builds on the famous command theory of the law developed by nineteenth-century British philosopher John Austin that law is the "command of the sovereign." Austin is credited as one of the originators of *legal positivism*, the notion that the law as written is law regardless of the moral content of the rule (discussed in Chapter 2).

Law in Action

Influential Supreme Court justice Oliver Wendell Holmes offered a definition that focuses on law "in action" rather than law "on the statute books":

> The prophecies of what the courts will do in fact and nothing more pretentious, are what I mean by law. (Holmes 1897: 457)

Holmes, like Black, centers his definition of law on an official government institution although he limits his focus to the courts. He differs from Black in that he views law as the actual interpretation of law by the courts rather than law as written in the statute books. Holmes wrote that a "bad man" calculating how to act would want to know how a court will rule and would have little interest in the law as written in the statute books.

The practical approach of Holmes is the foundation of a legal movement called *legal realism* that we will discuss later in the text (see Chapter 2). His puzzling definition actually makes some sense. The First Amendment to the U.S. Constitution provides that Congress shall make no law "abridging freedom of expression." The meaning of the phrase "freedom of expression" requires an examination of Supreme Court cases. The Court has held that freedom of expression does not protect obscenity, child pornography, threats, or incitement to riot. On the other hand, the burning of the American flag is protected symbolic speech. In other words, reading the First Amendment does not give you an understanding of how the courts have interpreted the meaning of freedom of expression. The meaning of freedom of expression is revealed only after examining court decisions, which in Holmes's view involves policy choices and is not merely a mechanical process. The law always is evolving and developing and to some extent remains uncertain. The text of the First Amendment will not tell you whether members of the Westboro Baptist Church have the right to protest at the funerals of members of the military killed in Iraq and in Afghanistan to communicate their view that God hates the United States and hates the U.S. military because of the country's tolerance of homosexuality (*Snyder v. Phelps*, 562 U.S. 443 [2011]).

Holmes is important for pointing out that the meaning of law as written often is clear only after a court decision interpreting the law. Holmes narrowly focused on courts because he reasoned that courts interpret the meaning of laws adopted by the legislature. As the important legal philosopher Karl Llewellyn noted, Holmes draws our attention to the question of "how far the paper rule is real, how far merely paper" (Llewellyn 1962: 24).

Law and Physical Force

Several theorists define law in terms of the application of coercion, particularly physical force. Anthropologist E. Adamson Hoebel writes that a social norm is "legal if its neglect or infraction is regularly met, in threat or in fact by the application of physical force by an individual or group possessing the socially recognized privilege of so acting" (Hoebel 1979: 28).

Hoebel's definition distinguishes social norms from law based on the fact that a violation of the law regularly is met by physical force. A law that rarely is enforced is not considered law under Hoebel's definition because a law is required to be "regularly enforced." He also limits law to the enactments of individuals or official institutions that are authorized to apply physical force. The law of the Old West in which vigilante justice was the order of the day may not be law under Hoebel's definition. Hoebel's definition presents the problem that some legal violations are not enforced by physical force and instead are enforced by non-physical means such as a fine or forfeiture of property.

Law, Coercion, and Specialization

Max Weber is one of the most influential sociological theorists and articulated his theories on law in his monumental work *Economy and Society.* His definition highlights that physical or psychological coercion is a fundamental aspect of the law. Although Weber's definition of law may appear to be the same as Hoebel's, there is a slight difference. "An order will be called law if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a staff of people in order to bring about compliance or avenge violation" (Weber 1954: 34). Weber's definition focuses on the application of physical or psychological coercion to achieve conformity with the law. Coercion is applied by a "staff of people" or individuals in official positions charged with enforcing the law, such as judges and police. Government authorities are able to employ physical and psychological coercion, whereas individuals in private organizations typically are limited to psychological coercion. Weber recognizes that people obey the law not only because of the threat of physical coercion. Conformity to the law also may be motivated by the desire to avoid embarrassment and humiliation.

Weber differs from Hoebel in providing that law may be enforced by either physical or psychological coercion. Both Weber and Hoebel fail to account for individuals' adherence to rules based on a sense of duty, tradition, and obligation even in the absence of external threat.

Law and Justice

Philip Selznick and other adherents of what has been labeled the University of California at Berkeley school of the sociology of law argue that a definition of law must incorporate a justice or moral component (R. Kidder 1983: 25).

A definition of law that excludes a moral component likely recognizes Hitler's decrees as law. This would mean that the individuals who in 1941 met at the House of the Wannsee Conference in Berlin and drew up the plans for the extermination of the Jews of Europe could plead they were "only following lawful orders." The response of the victorious Allied powers at the Nuremberg trials following the war was to proclaim that mass murder is wrong whatever the requirements of domestic German law and that Nazi officials must have known that their involvement in exterminating Jews, Poles, Russians, and other groups constituted murder. Introducing a moral component into the definition of law provides a basis for distinguishing between the "lawful" and "unlawful" orders and laws (Nonet 1976; Nonet and Selznick 1978; Selznick 1961).

The question in defining law from a moral perspective is not whether the law is issued by a public official and carries a threat of punishment. The question rather is whether the law serves and promotes the dignity and welfare of individuals. A law that lacks a moral content cannot be considered law (Sutton 2001: 150).

An obvious difficulty with Selznick's formula is that individuals inevitably will disagree over whether a law promotes human dignity and the public welfare. There is disagreement, for example, over whether affirmative action promotes equality or is a form of discrimination. Some people believe individuals have the right to die while other individuals view this as a form of murder. Despite the difficulty with determining which laws promote human dignity and the public welfare, Selznick raises the important question whether law can be separated from morality.

Lon Fuller agrees with Selznick that a law must satisfy certain moral standards. Fuller focused on the characteristics of a "good law." Fuller sets forth the standard to be met by a "good law" in his famous parable of King Rex. Rex, on his ascendancy to the throne, wanted to solve the problems of his subjects. He quickly became frustrated by the complexities of drafting a legal code and decided to assume the role of the judge of all disputes. King Rex once again experienced extraordinary difficulties, his subjects talked of open revolt, and Rex died without achieving his aims.

Fuller explains that Rex failed in eight ways to make a "good law." These eight standards comprise what Fuller calls the "inner-morality" of the law. A legal system that fails to satisfy these standards cannot be considered to be just. An example of a violation of "inner-morality" is retroactive legislation. King Rex declared acts unlawful after the fact. Individuals who believed that they were acting lawfully later found that they had broken the law. Another violation of the "inner-morality" of the law is requiring contradictory obligations. An example is a law that requires the installation of new license plates on New Year's Day and a separate statute that punishes individuals who work on New Year's Day (L. Fuller 1964: 33–92).

Law and Social Integration

A very different notion of law is proposed by Bronislaw Malinowski, one of the pioneers of legal anthropology. Malinowski offers the following definition:

> Law is a body of binding obligations . . . kept in force by the specific mechanisms of reciprocity and publicity inherent in the structure of society. (Malinowski 1982: 2, 46–47)

Malinowski studied the islands of the South Pacific. These societies did not possess a formal government, courts or police, or a written set of legal rules. In his study of the South Pacific, Malinowski in a famous example describes how social relationships were maintained through

a complex system of the exchange of necklaces, armlets, fish, and yams. These gifts created social ties between individuals that connected individuals with one another and integrated the society into a cohesive social order. The rules of gift giving were based on the social expectation that individuals share with one another. Individuals learned the rules of gift giving at a young age, and individuals who did not follow the rules regulating gift giving were subject to public embarrassment, ridicule, and rejection.

Malinowski viewed the customary law of gift giving as performing the function of integrating society by creating social relationships and is credited with helping establish the structural functionalist approach to law. In your own experience, you and your friends may take turns paying for dinner checks or bar bills. This exchange helps to create ties that bind you and your friends together. Malinowski's approach has been criticized for blurring the distinction between tradition and customary modes of behavior and the law. On the other hand, Malinowski highlights that the nature of law may differ in small-scale societies from the nature of law in western industrial societies.

Law and Custom

Legal anthropologist Paul Bohannan views law as based on custom. Customs are patterns of behavior that develop in a society.

> Law is custom recreated by agents of society in institutions specifically meant to deal with legal questions. (quoted in R. Kidder 1983: 30)

People learn customary practices through observation and education, and through participation as children in customary practices. Bohannan argues that at some point a conflict arises in a community over whether to continue following a customary practice and the custom is weakened. The custom then is affirmed and strengthened by being incorporated into law. Bohannan terms this process *reinstitutionalization*, or the embodiment of custom into law. Once the custom is incorporated into law, the enforcement of the custom is vested in official institutions such as the police or the courts. Custom, according to Bohannan, is the first step toward law.

Llewellyn and Hoebel illustrate the process of reinstitutionalization by telling the story of Cheyenne brave Wolf Lies Down. Contrary to the customary practice among the Cheyenne, Wolf Lies Down's horse was borrowed by another warrior without his consent. He complained to the Chiefs Society that without his horse he could not hunt or fish. The Chiefs compelled the borrower to apologize, and the borrower offered to return the horse. The Chiefs in response to this incident translated custom into the formal rule that horses should not be borrowed without consent. The individual whose horse is borrowed without consent under this rule is authorized to ask for return of the horse. A borrower who refuses to return the horse is subject to a whipping. The horse is central to the Cheyenne, and the Chiefs recognized that the taking of horses, unless halted, could disrupt tribal society. Custom was translated into a law enforced by the tribal elders (Llewellyn and Hoebel 1941: 18–28).

The relationship between law and custom may be somewhat more complicated than Bohannan suggests. In some instances, the law is a reaction to custom, and law attempts to change customary practice. A frequently cited example is the requirement that Utah, in order to be admitted to the Union in 1896, prohibit the practice of polygamy in its constitution. Various small and isolated Mormon sects defied the Mormon religion's rejection of polygamy and continue to recognize multiple wives.

Consider a more contemporary example. In 2006, in *Georgia v. Randolph*, the Supreme Court held that the police had improperly relied on the consent of the defendant's spouse to enter the couple's home to seize narcotics. The majority held that the "customary expectation of courtesy" is a foundation of the Fourth Amendment and a social guest standing at the "door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying 'keep out'" (*Georgia v. Randolph*, 547 U.S. 103 [2006]).

SUMMARY OF DEFINITIONS OF LAW

In summary, the definitions of law discussed earlier differ from one another. Several of the central differences are summarized in Table 1.2.

TABLE 1.2
Summary of Definitions of Law

Public law and private rules	Some definitions of law are limited to the acts of public officials. Other definitions are sufficiently broad to include private individuals and organizations.
Written law and law in action	Several definitions focus on written laws in the statute books while other definitions focus on law "in action" as interpreted by courts.
Written law and coercion	Some definitions require that law should be written while other definitions consider any rule that is enforced by physical or psychological coercion or force as law.
Morality and law	Most definitions of law do not require law to possess a moral dimension. Other scholars believe that law cannot be separated from morality.
Law and custom	Some definitions are sufficiently broad to include written law as well as customary law.

DEFINITIONS OF JUSTICE

We commonly equate the law with justice and talk about bringing a criminal to the "bar of justice." Observers may greet a verdict that they support by proclaiming that "justice is served" or that the outcome of the case is a "just" result. On the other hand, the losing party in a case may describe the result as "unjust" or complain about the "injustice" of the judge's rulings at trial.

There are more definitions of **justice** than we can possibly discuss ranging from the promotion of virtue to maximizing the welfare of society. Perhaps the most influential definition of justice is articulated in the *Corpus Juris Civilis*, a legal code drafted under the emperor Justinian (ca. 482–565 CE). The so-called Justinian Code defined justice as "the constant and perpetual wish to give everyone that which they deserve." This definition is interpreted by Raymond Wacks as containing three central elements: the importance of valuing individuals, the consistent and impartial treatment of individuals, and the equal treatment of individuals (Wacks 2006: 59).

Wacks notes that the Roman notion of justice is embodied in the figure of Themis, the goddess of justice and law whose statue typically is found at the entrance of courthouses. She customarily is portrayed with a sword in one hand and a pair of scales in the other hand. The sword signifies the power of the judiciary, the scales symbolize the neutrality and impartiality with which justice is administered, and the blindfold highlights that justice is blind and is immune from pressure or influence.

The Greek philosopher Aristotle (384–322 BCE) defines justice as the distribution of equal amounts to those who are equal. Aristotle poses the question of what standard should be used in determining equality and asks how we should determine which of several flute players should be provided with the largest supply of flutes. Should each flute player receive the same supply

of flutes? Should the most promising players who have the greatest potential receive the largest number of flutes? In the alternative, should the best player receive the largest number of flutes? Aristotle points out that using the standard of justice as equality is likely to result in different outcomes in different societies depending on how equality is defined. His personal answer is that the best player should receive the largest number of flutes because he or she will create the highest quality of music and benefit society. The purpose of a flute is to be played, and the best player will realize the true purpose of the flute (Sandel 2009: 186–190).

In 2001, the U.S. Supreme Court was asked to decide whether 25-year-old golfer Casey Martin, who suffers from a congenital circulatory condition, was entitled to use a golf cart rather than walk when competing on the Professional Golfers' Association (PGA) Tour. Martin stated that he was able to hit the ball as well as any other professional golfer but required the golf cart to position himself nearby the ball. The PGA argued that walking tested a competitor's stamina and strength during a round of golf and that walking was an essential part of the PGA competition. Martin contended that under the Americans with Disabilities Act (ADA) he had the right to ride a cart because he otherwise would be unable to compete in professional golf tournaments. He argued that a cart would not provide him with an advantage over the other golfers, and that allowing him to ride in a cart would not fundamentally modify the nature of the competition. The Supreme Court ruled in favor of Martin. Justice Antonin Scalia along with Justice Clarence Thomas dissented and noted that athletic competition is based on physical attributes that are not evenly distributed and that the Court should not be involved in redesigning the rules. What is the just result in the case of Casey Martin (*PGA Tour v. Casey Martin*, 532 U.S. 661 [2001])?

Consider what principle should be used in the distribution of any COVID-19 vaccine that is developed within the United States and globally. For example, should distribution of the vaccine be based on a lottery? Should older Americans because of their age be the last individuals to receive the vaccine? Do you favor all countries having equal access to the vaccine?

The primary categories of justice that we will encounter in reading the text are shown in Table 1.3.

TABLE 1.3

Categories of Justice

Category of Justice	Definition
Comparative justice	Individuals in similar situations should be treated in a similar fashion.
Discriminatory justice	The law is selectively enforced against an individual based on characteristics such as race, class, ethnicity, or gender.
Distributive justice	The government directs resources (e.g., tax deductions, financial assistance) to individuals.
Procedural justice	Government decisions are reached through fair procedures. (See Chapter 6.)
Restorative justice	Individuals who are harmed are compensated for their injuries and for the damage to their property.
Retributive justice	The government punishes individuals who harm others and/or society.
Substantive justice	The fundamental civil and political and property rights of individuals such as freedom of speech and the right to be represented by a lawyer at trial are protected against government interference.

FAMILIES OF LAW

This section discusses **families of law**. There are four major legal traditions in the world: the common law, the civil law, socialist law, and Islamic law. The emerging system of international law also is briefly discussed.

John Henry Merryman, a prominent scholar of comparative law, notes that these different legal families reflect the fact that the globe is divided into countries with their own histories and traditions. Merryman, when he speaks of traditions, means attitudes about how law is made and should be applied and the process of legal change (Merryman and Pérez-Perdomo 2007: 1–5).

The legal systems of England and the United States differ in many respects. Despite their differences, these two legal systems are considered part of the same legal family because they share a common heritage and a commitment to the evolution of the law through the decisions of judges. This is very different from the Islamic law tradition. The Islamic tradition spans the globe and encompasses a wide diversity of legal systems. These diverse legal systems share the views that *Shari'a* law as set forth in the Koran is the word of God as transmitted to the Holy Prophet Muhammad.

Keep in mind that most legal systems are the product of a "mix of traditions." The majority of the countries in the world have been influenced by trade, travel, colonialism, and immigration. Turkey is one of the most influential Muslim countries and a major world power. Turkish law has been influenced by Swiss, German, French, and Roman law along with Islamic law and local customs and more recently by U.S. law and various developments in Europe. The larger lesson is that legal systems continue to grow and change and integrate foreign developments and are not frozen in time (Orucu 2007).

The Common Law

The origin of the English **common law** is traced to the Norman victory in 1066 at the Battle of Hastings by William the Conqueror. At the time of the Norman invasion, English law varied across the country and combined customary practice with the laws of the former Roman and Germanic tribal occupiers along with the lingering influence of the church law introduced during the effort to convert the British population to Christianity. Disputes were settled by the local lords who controlled large tracts of land or by shire (county) courts.

Matters of concern to the king such as the collection of taxes were the responsibility of royal courts. The issues of daily justice were taken care of by decentralized local courts. The royal courts gradually became perceived as fairer than the local courts. As a result, the royal judges of the king's court as they traveled throughout the country began to be asked to decide local disputes. There was no written law, and these royal judges in deciding cases followed the local customs.

The Norman kings, in an effort to unify the justice system, recorded the customary practice and decisions of royal judicial officials. The process of compiling decisions largely was complete by the reign of Henry II (1154–1189), who was known as the "father of the common law." These judgments provided precedents that local judges began to rely on in deciding the cases that came before them. The effect was to unify the law of England. This body of recorded law is known as the common law because it is the law common to all of England. One of the first comprehensive compilations of English law and procedure was authored in 1188 by Ranulf de Glanville, an advisor to King Henry II, who wrote a *Treatise on the Laws and Customs of the Realm of England*. The second important recording of the decisions of local judges was Henry de Bracton's *On the Laws and Customs of England* written between 1220 and 1260.

Suzanne Samuels illustrates the benefits of a uniform approach to legal decisions. She notes that local English judges adopted various approaches in matters of inheritance.

Estates might be equally divided between the sons of the deceased or transferred to the youngest son, or a portion might be reserved for daughters. Common law judges followed the practice of the Norman conquerors and adopted primogeniture, which reserved the inheritance to the oldest son. The policy, however unfair to the other children, provided certainty and clarity, and uniformity and limited disputes over inheritance. Younger male children realized at an early age that they needed to prepare to make their own way in the world (S. Samuels 2006: 59).

The distinctive aspect of the common law is that it is "judge-made" law. The common law is the product of the decisions of judges providing solutions to practical problems. This contrasts with the civil law tradition (discussed in the next section), which is based on statutes drafted by legal specialists. The common law traces its origins to the experiences and decisions of local judges and is not the product of elites imposing their views on local judges.

A common law judge deciding a case looks to **precedent** (*stare decisis*) and follows the decision of other judges. Precedent ensures a judge bases his or her decisions on the law rather than his or her own personal view. In other words, "like cases are treated alike." The practice of following precedent provides uniformity and predictability in legal decisions and respect for the judicial decisions of other judges and allows a judge to rely on the insights and wisdom of other judges confronting similar problems.

Of course, judging is not an entirely automatic and mechanical process. Deciding a case is not like putting the facts of a case into a slot machine, pulling a lever, and receiving a decision. The facts of each case are different, and a judge may distinguish the case before him or her from the previous case. The mill owner in the precedent case may be liable for failing to grind the farmer's grain as promised. The rule that a mill owner who fails to deliver the grain on time is liable for monetary damages may be modified in a second case where a flood washes out the roads and prevents the delivery of grain. In a third case, a court may find that the mill owner was unable to deliver grain because of a storm that the mill owner should have anticipated. As you can see, the common law has an ever-developing and dynamic character.

Another important aspect of the common law that is discussed later in the text is the adversarial nature of trials. In contrast to other legal traditions, the facts are revealed by the lawyers zealously representing each side of the case through the examination and cross-examination of witnesses. The common law also allows for the participation of members of the community at trial, a practice that developed into the jury system.

The common law tradition embodies a strong concern with individual rights and liberties. The Magna Carta of 1215, known as the "Great Charter," was a significant step in the development of the common law. This document was drafted by English barons to limit the power of King John. The charter established the foundation for certain rights that we take for granted today, including the right to trial by jury, the right against self-incrimination, and limitations on criminal punishment.

A second important event in the development of civil rights and liberties was the Glorious Revolution of 1688–1689, which resulted in the installation of King William II and Mary II and led to the adoption of the Bill of Rights. William and Mary agreed to accept the Bill of Rights and announced that the monarchy would be subject to the laws of Parliament and would not impose taxes without parliamentary approval. The Bill of Rights established a number of rights to protect individuals against the Crown, including the election of Parliament, the prohibition on cruel and unusual punishment, and the right to petition the government for the redress of grievances. These principles proved important when the common law spread to the British colonies in North America.

William Blackstone's *Commentaries on the Laws of England*, written between 1765 and 1769, stands as one of the most significant documents in the spread of the common law to the United States and Canada. Blackstone's four-volume work compiled the common law on

individual rights, torts, legal procedure, property, and criminal law. It is said that only the Bible had a greater impact on the thinking of the Founding Fathers. The vocabulary of "inalienable rights" and the claim of "no taxation without representation" are derived from Blackstone's commentaries and profoundly influenced the drafting of the Declaration of Independence and the U.S. Constitution.

The common law is the predominant legal system in Great Britain, Ireland, Northern Ireland, Canada (except Quebec), New Zealand, Australia, and most of England's former colonies. In reality, there is no pure common law system. In the United States from the early days of the founding of the Republic, there was a distrust of lawyers and a resistance to relying on judge-made law, which was viewed as undemocratic. State legislatures and the U.S. Congress reacted by embodying common law rules in written legislative statutes. American judges continue to use common law precedents and principles in interpreting the statutes passed by the legislative branch. In other countries, the common law tradition has been combined with other influences. South Africa, for instance, combines English common law with Roman-Dutch law, and India combines the common law with Hindu law.

The Civil Law Tradition

Civil law for most Americans means the law that addresses private disputes (e.g., contracts) and wrongs (personal injuries) as distinguished from criminal law, which addresses penal offenses that are prosecuted by the state. The **family of civil law** has a very different meaning.

The family of civil law embodies a legal tradition in which statutes passed by the legislature are the only recognized source of law. The civil law is the oldest and most widely used system of law and is the dominant legal tradition in Europe, Latin America, Africa, and most of Asia (Merryman and Pérez-Perdomo 2007: 6, 23).

The origins of civil law are traced to Rome. The Roman emperor authorized various jurists to issue written opinions that were binding on parties to a dispute. These jurists also were free to write opinions on hypothetical (imaginary) cases. A large body of written opinions was produced, some of which contradicted one another. The emperor Justinian in 527 CE appointed sixteen experts to organize these opinions, resolve conflicts, eliminate wrong decisions, and produce a written legal code. The result was the great *Corpus Juris Civilis*, published in 533 CE. Justinian proclaimed that the code henceforth would be considered the definitive version of legal rules and prohibited any written interpretation or commentary on the document (Merryman and Pérez-Perdomo 2007: 6–14).

Roman law existed alongside religious law. Roman law addressed the secular world although ecclesiastical courts applied canon law and addressed issues of faith. The primary source of religious law was the decrees issued by the Pope. Canon law shared Roman law's written character and was consulted for guidance on secular issues of concern to the Church, such as divorce and child custody (Reichel 2008: 114–115).

Roman law and ecclesiastical law were replaced by Germanic law following the sack of Rome by Teutonic tribes in the fifth century. An interest in these codes was revived during the eleventh-century medieval Renaissance. Thousands of students flocked to Bologna to study Roman and ecclesiastical law and returned to their countries with an appreciation of the value of a written and organized legal code. The secular Roman and religious church law eventually combined with the customary law that developed to regulate commercial relations between merchants in Europe to form the three pillars of a new European-wide legal tradition (Glendon, Carozza, and Picker 2016: 24–27).

The rise of European nationalism in the seventeenth and eighteenth centuries led to the development of European national legal codes. The French Civil Code of 1804, drafted by a commission of four eminent jurists, is considered the first modern civil code. Napoleon viewed the code as his legacy to the French people and claimed the title of

the "great lawgiver." The more than two thousand provisions in the code did not merely summarize existing law. Instead, the Napoleonic Code introduced a profound reform in the French legal system and reflected the values of the French Revolution. Written in a clear and understandable fashion, it was intended to be understood by the average citizen. The code repealed all previous legal enactments and was meant to be a complete and comprehensive statement of the law. The drafting commission stressed that there was no need to look beyond the four corners of the document. In theory, the average person could easily understand the text and could handle his or her own case in the courtroom (Glendon et al. 2016: 24–36).

The Napoleonic Code's concern with individual rights is reflected in the provisions protecting private property and contractual rights. Napoleon viewed the code as a universally applicable set of legal principles that would live forever and imposed the code on conquered territories in Belgium, the Netherlands, Italy, parts of Poland, and the western regions of Germany. French legal influence continued to grow in the nineteenth and twentieth centuries as a result of French colonialism and the spread of French culture to North America, Latin America, Africa, and Asia (Glendon et al. 2016: 39–40, 49–50).

The German Civil Code also proved to be an influential document. The long and complicated code took almost thirty years to draft and went into effect at the dawn of the twentieth century. The drafters of the German code surveyed the entire course of German history and selected the rules that should form the basis of the new code. The code has proven influential in the drafting of legal codes in a number of countries, including Austria, former Czechoslovakia, Greece, Hungary, Italy, Switzerland, former Yugoslavia, Brazil, Portugal, and Japan (Glendon et al. 2016: 39–48, 53–55).

You might already have concluded that there is a philosophical divide between the common law and civil law traditions. The common law is a system that stresses the role of the judge in the development of the law. English law developed as a result of judges addressing practical problems. The civil law system, in contrast, is embodied in a clear written code that addresses every problem and is the product of scholars and legislators. The judge is limited to the code and is not authorized to "make law."

The common law developed through judges applying precedents and gradually developing the law. In the civil law tradition, the "code is king." The judge looks to the code rather than to the decisions of other courts and applies the law as stated in the statute. The Italian Civil Code of 1942 specifies that "no other meaning" can be attributed to a statute "than that made clear by the actual significance of the words . . . and by the intention of the legislature." In practice, the civil code is not always crystal clear, and judges often look to the decisions of other judges (Merryman and Pérez-Perdomo 2007: 44).

In the United States, judges are authorized to review the constitutionality of a statute. The practice of judicial review allows the Supreme Court to find that a state or federal law is contrary to a provision of the Constitution. In most civil law countries, the belief is that courts should not overturn the decision of elected representatives and are not authorized to review the constitutionality of statutes. Higher courts in the civil system may overturn a verdict of a lower court on the grounds that the lower court improperly interpreted the requirements of the statute.

The legal procedures of the courts in the civil law system are discussed in greater detail later in the text. In the civil law inquisitorial system, the judge and lawyers work together and cooperate in gathering information in an effort to compile a full and accurate account of the facts. In contrast, in the common law system, the belief is that the truth emerges in the adversarial competition between opposing lawyers. The civil law provides the accused with a limited number of rights during the investigation of a crime because the stress is placed on developing a truthful account. In practice, common law systems and civil law systems each have adopted aspects of the other approach.

The Rule of Law

A core component of the common and civil law traditions is the "rule of law." The World Justice Project observes that the rule of law involves four universal principles:

1. The government and government officials are accountable under the law for their conduct.
2. The laws are clear, widely available, stable, and fair and protect fundamental individual rights, including the protection of persons and of property.
3. The process by which the laws are enacted, administered, and enforced are public, understandable, efficient, and fair.
4. Justice is delivered by qualified, ethical, independent, and objective individuals who have adequate resources and reflect the composition of the community.

A failure to fulfill one or more of these conditions threatens to undermine respect for the law and the willingness of individuals to obey the law.

The Socialist Legal Tradition

The socialist legal tradition is identified with the political ideology of communism. In this discussion, the terms *communism* and *socialism* are used interchangeably although the two are not identical. There are socialist political parties and governments in Europe that endorse many of the economic aims of communism although they are committed to a democratic form of government.

The central ideas of communism were articulated by the nineteenth-century political theorist Karl Marx and his collaborator Friedrich Engels and in the twentieth century by V. I. Lenin. Any effort to summarize communist ideology inevitably oversimplifies what is a complex doctrine characterized by various schools of thought. Law for Marx and Engels is a mechanism to support the political and economic domination of the powerful ruling class and to exploit the working class. The law, according to Marx and Engels, is a tool to legitimize long and dangerous working conditions, low wages, and exploitation of the working class. Workers accept these conditions because they are taught to believe the law is an objective and fair set of rules. The notion of legal equality and opportunity diverts workers' attention from the inequality of rich and poor. An analysis of law cannot be separated from economics. For example, socialist legal scholars note individuals who own media organizations have a much greater capacity to be heard than does the average citizen. In the famous sarcastic observation of Anatole France, the law in its majestic equality forbids both the rich and the poor from sleeping under bridges, begging on the street, or stealing bread (H. Berman 1963: 20–21).

Marx and Engels believed that workers eventually would begin to recognize they were exploited. They predicted the tension between rich and poor inevitably would lead to a revolt of the working class and to the creation of a classless society. In this communist state, the workers collectively would own the factories and farms and other means of production and would no longer be exploited. There would be no need for law in this utopian society because the only purpose of law is to legitimize the exploitation of workers. Society in the Marxian utopia would be regulated through social pressure and through each individual's commitment to a classless society (H. Berman 1963: 20–21).

Following the Russian Revolution and the overthrow of the czar in 1917, the Soviet Union looked to spread communism across the globe. In the aftermath of World War II, Eastern Europe fell within the Soviet sphere of influence, and Russia used an iron fist to

impose communist rule on Czechoslovakia, East Germany, Hungary, Poland, and Romania, and to some extent on Yugoslavia, Albania, and Bulgaria. Today communism is limited in varying degrees to China, Cuba, Laos, North Korea, and Vietnam. Several other former communist countries are moving rapidly toward introducing western-style market economic reforms (Fijalkowski 2010).

The former Soviet legal code is the oldest and most important of the codes in the socialist legal tradition and is the focus of the discussion in this section. Following the Bolshevik Revolution, the new Russian communist regime continued the traditional system of a written civil code. The code combines the systematic and comprehensive approach of the Germanic code with the revolutionary approach of the Napoleonic code (Glendon, Gordon, and Osakwe 1982: 268).

The philosophy underlining socialist law is that human beings are imperfect and flawed. This imperfection results from the fact that human beings are the product of societies that are characterized by slavery, feudalism, serfdom, and capitalist exploitation. The purpose of socialist law is to cleanse the past and to prepare individuals for the transition to a classless society in which the people collectively own property. In the pure socialist state, the individual has duties and obligations to ensure the success of the socialist state. There is no right to dissent or to protest and to interfere with the transition to a pure communist state.

Socialist law is not neutral and objective; the law advances the political goals of the government and imparts socialist values. For example, the law of self-defense in socialist systems generally does not follow the common law rule that an individual should exhaust every alternative before employing deadly force. In the socialist systems, individuals are expected to "stand their ground" because this rule promotes courage and integrity and wrongdoers forfeit the right to life. There are several fundamental principles that constitute the foundation of socialist law (S. Samuels 2006: 98):

- ***Property.*** The development of an economy based on public ownership of land and industry.
- ***Security.*** The limitation on individual rights and liberties in an effort to safeguard the government against internal and external threats.
- ***Education.*** Promotion of the benefits of socialism and criticism of the negative aspects of free enterprise. The law promotes a spirit of service and self-sacrifice for the welfare of society and patriotism.

Socialist judges are selected by the legislative branch and are subject to removal and punishment if they fail to follow the law. One unique aspect of the socialist legal tradition is "comrade courts," which hear minor disputes. These courts are established in factories, farms, villages, apartment buildings, and unions and hear cases involving vandalism, the use of obscene words in public, neglect of traffic laws, failure to demonstrate respect toward government officials, and misconduct in the workplace. Defendants who are convicted may be asked to apologize or may receive a warning or a fine (Glendon et al. 1982: 300, 309–312).

The socialist legal tradition places a premium on the welfare of society and subordinates individual rights to the "greater good" of society. Individuals have no right to engage in racist or sexist speech or speech critical of the government, which could lead to societal conflict.

The Islamic Legal Tradition

Islam means "submission" or "surrender." In relation to the Islamic religion, individuals should "submit" to God. ***Shari'a*** is the term for Islamic law and is translated as the "path to follow" for salvation. In contrast to other legal traditions, Islamic law is contained in a religious text, the Koran. The law is not merely intended to regulate society. The Koran establishes the obligations

of individuals who seek to follow the divine path to human salvation. The text of the Holy Koran regulates all aspects of human existence ranging from religious ritual to diet and sexual relationships (Lippman, McConville, and Yerushalmi 1988: 24–33).

The Koran is the word of God as revealed to the Prophet Muhammad in a series of divine revelations beginning in 626 BCE (which extended over twenty-two years). The Koran encompasses 6,342 verses, most of which address religious values and obligations. *Shari'a* law is set forth in roughly 148 verses: family and civil law in 70 verses; constitutional law in 10 verses; criminal law in 30 verses; legal jurisdiction and procedure in 13 verses; economic and finance in 10 verses; and international relations in 25 verses. The religious basis of *Shari'a* law contrasts with other major legal systems, which are based on the decisions of secular courts and legislatures and leaders (Lippman et al. 1988: 29).

Keep in mind that Koranic law in most Islamic societies exists along with modern legal codes that are based on common or continental law. These European legal codes were first introduced through treaties that were designed to be applied to foreigners living in Islamic societies. European law also was introduced into the Muslim world as a result of the colonial rule of England, France, Italy, and the Netherlands. Muslim countries in recent years also have introduced western commercial law to encourage foreign trade and investment (Lippman 1989: 34–35).

Despite modern legal developments in the Muslim world, *Shari'a* remains highly significant. Islam has a strong emphasis on social justice, and a ruler who deviates from the requirements of Islam forfeits his legitimacy and may be overthrown by the population. Fundamentalist critics attack regimes as illegitimate that fail to follow *Shari'a*. These regimes are viewed as having ushered in a new age of *jahiliyya*, the misguided rule of human "evildoers," rather than the rule of God. *Shari'a* is the symbol of a return to a true Islamic state and is portrayed by dissidents as the central step in the cleansing of western influences from society. Muslim governments typically anticipate criticism and adopt *Shari'a* law to establish their legitimate claim to the loyalty of the population (Ruthven 1984: 361).

Shari'a law at the time of the Prophet was reformist and aspired to limit the system of "blood revenge," which led to endless cycles of retribution and tribal violence. A number of current commentators view various aspects of *Shari'a* as ill suited for a modern society and as contrary to contemporary human rights norms. Islamic religious thinkers, in contrast, insist that *Shari'a* is compatible with human rights norms. They argue *Shari'a* cannot be understood absent an appreciation of the structure of Islamic society. Theft, for example, is harshly punished under Islamic law. However, in theory, stealing should be unnecessary because Muslims have an obligation to make charitable contributions (*zakat*) and an Islamic government has the obligation to care for the disadvantaged. An individual who steals to survive is subject to a more moderate punishment. Muslim legal scholars contend an individual who steals for personal gain under these circumstances demonstrates a dangerous anti-social attitude and deserves to be severely punished. There also is the claim that Muslim societies, because of the harsh punishment for *Shari'a* offenses, have little or no crime (Lippman 1989: 36–37).

The most controversial aspect of *Shari'a* is the criminal law. The four central sources of *Shari'a* law are the Koran, *Sunna*, consensus (*ijma*), and rule by analogy (*qiyas*).

The Koran is the word of God as revealed by the angel Gabriel to the Holy Prophet Muhammad as recorded by scribes. The second most authoritative source of the law is *Sunna*, or the recorded statements, judgments, and acts of the Prophet Muhammad, which explain, elaborate, or reinforce the Koran. The verses of the *Sunna* are called *Hadith* and are ranked according to their degree of authenticity (Lippman et al. 1988: 23–33).

In those instances in which the meaning of the Koran or of a *Hadith* is unclear, there is a resort to consensus. Consensus is the accumulated wisdom of Koranic scholars. It is the basis for setting compensation for injury to a woman at half that of a Muslim male. Analogical reasoning is used to extend the law to similar situations. It was used to expand the Koranic prohibition on alcohol to narcotics based on the fact that both substances produce similar

reactions. There are several other supplementary sources of the law, the most important of which is custom. Custom is employed to adapt *Shari'a* to the practice in a community. It is the basis for determining whether women are required to be veiled or to cover various portions of their body. Keep in mind that there are various schools of Islamic law. Two central disagreements are whether there may be a resort to sources beyond the Koran and *Hadiths* and whether Islamic law should be viewed as continuing to evolve or whether the evolution of *Shari'a* law was halted in 900 BCE (Lippman 1989: 37–38).

Criminal acts are divided into three categories: *Hudud*, *Quesas*, and *Ta'zir*.

Koranic crimes. *Hudud* offenses are crimes against God whose punishment is set forth in the Koran and in the *Sunna.* The state as God's agent initiates prosecution of the accused. *Quesas* are crimes of physical assault and murder that are punished by retaliation, the taking of a life for a life in the case of murder. These offenses are prosecuted by the victim or the victim's family. The victim or his or her family may waive punishment and ask for compensation or pardon the offenders.

Non-Koranic crimes. *Ta'zir* are offenses that are not set forth in the Koran. These offenses, like *Quesas*, are private wrongs, and the victim or the victim's heirs initiate the prosecution and may waive punishment. Punishment for *Ta'zir* is at the discretion of the judge (*qadi*).

Hudud Offenses

The most controversial area of Islamic law are the seven *Hudud* offenses (Lippman et al. 1988: 38–42).

Theft. The taking of designated types of property. The first and second acts are punishable by amputation of the hands, and the third and fourth offenses are punishable by amputation of the feet.

Adultery (zina). Adultery (sexual relations between two individuals, at least one of whom is married) and fornication (sexual relations between unmarried individuals) undermine marriage and may lead to family conflict, jealousy, divorce, illegitimate births, and the spread of disease. Married persons are punished by stoning to death, and unmarried persons by one hundred lashes.

Defamation (qazaf). A false allegation of adultery or illegitimacy of a child is punished by eighty lashes.

Highway robbery (haraba). Highway robbery is punishable by amputation and in some instances by execution. This offense interferes with commerce and creates fear among travelers.

Alcohol (khamr). The drinking of intoxicating beverages is punishable by eighty lashes. Alcohol encourages laziness and inattentiveness to religious duties.

Apostasy (ridda). The voluntary renunciation of Islam by a member of the faith is punishable by death. An individual commits apostasy by converting to a non-Islamic religion, engaging in idol worship, or rejecting the principles of Islam. Apostates are considered legally dead, and if they leave the country, their property is distributed to their heirs. Apostasy is considered high treason and creates conflict and discord.

Rebellion (baghi). The forceful overthrow of a legitimate leader of an Islamic state is a war against Allah and his messenger. The leader is obligated to consider the rebels' demands, and once having concluded that they lack merit, the leader is justified in ordering the army

to attack rebels who refuse to lay down their arms. Rebels who are not killed in combat are subject to beheading. If the rebels' allegations possess merit, the leader is to be removed from office and punished.

Quesas Offenses

Quesas crimes are divided into offenses against the person (murder) and offenses against the body (bodily injury).

Murder. Islam considers murder to be the most serious crime against the person. Muhammad reportedly stated that Allah's first act on the Day of Judgment would be to punish murderers. The killer is executed unless compensation is demanded by the victim's family or they pardon the offenders.

Bodily injury. The offender is subject to the same harm that was inflicted on the victim. The victim may waive punishment and ask for compensation or may pardon the offenders.

Ta'zir Offenses

Ta'zir means "chastisement," and these offenses are contained neither in the Koran nor in the *Sunna.* The power to punish these crimes is based on the sovereign's duty to protect the public welfare. The judge (*qadi*) has discretion to impose a punishment that reflects the seriousness of the offense, the offender's background, and the public interest in deterring the conduct. Punishments entail flogging, banishment, fines, and the death penalty. These offenses include the consumption of pork, demanding excessive interest, false testimony, bribery, and misleading the public through sorcery, fortune-telling, astrology, or palmistry (Lippman et al. 1988: 52–53).

Prosecuting Criminal Offenses

The procedures for prosecuting criminal offenses are not set forth in detail in the Koran and are at the discretion of the ruler. The customary procedure is simple and straightforward. The accused is entitled to the essential guarantees of the right to be informed of the charges, the presumption of innocence, the right to counsel, and the right to be free from abuse and torture during pretrial interrogation. The *qadi*, or judge, is appointed by the ruler and is required to be a virtuous and honest male of religious faith who is well versed in *Shari'a.* The *qadi* is accountable to Allah for his decisions and is subject to punishment for convicting an innocent individual.

The *qadi* convenes the trial in a mosque. The evidence that is introduced at trial is required to possess a high degree of reliability, and a conviction requires a certainty of guilt. If the defendant denies his or her guilt, the prosecution presents its evidence. The number of eyewitnesses are established in the Koran. Adultery and fornication require four eyewitnesses. Other offenses require two eyewitnesses. Eyewitnesses are required to be Muslim males of good character and integrity. Two female witnesses are required for each required male eyewitness. Testimony is limited to direct observation, and all witnesses must agree on the details of the crime. An individual also may be convicted by a confession in open court that is repeated as many times as the number of witnesses required to convict the defendant of the crime with which he or she is charged (Lippman et al. 1988: 68–71).

In those instances in which the plaintiff is unable to produce the required number of qualified witnesses, the defendant is asked to take a religious oath attesting to his or her innocence. If the defendant takes the oath, the case is dismissed; if he or she declines after three requests, a judgment is entered for the plaintiff. Practicing Muslims believe in an all-powerful God who will punish individuals making a false oath. A distinctive aspect of Islamic criminal procedure is the absence of appeal. The remedy for an individual who is convicted lies in a petition to the ruler.

The intensity of feelings surrounding Islamic law is illustrated by the controversy over the blasphemy law in Pakistan. The law was first introduced by colonial English authorities and punished "deliberate and malicious acts intended to outrage the religious feelings of any class by insulting its religious beliefs." In 1977, the Pakistan government amended the law to punish the defiling and desecration of the Koran. In 1986, the law was modified to provide death for defiling Islam. Between 1987 and 2016, roughly 1,549 prosecutions for blasphemy were filed in Pakistan although the death penalty has yet to be imposed.

The United Nations (UN) Committee on the Elimination of Racial Discrimination noted the number of prosecutions of innocent individuals brought by angry or jealous neighbors called for the repeal of Pakistan's blasphemy law. In 2019, Asia Bibi, a Christian, was released from prison by Pakistan after being convicted of blasphemy. She had been sentenced to death and imprisoned for ten years before she was released. Bibi was alleged by a group of Muslim women to have slandered Islam during an argument that was provoked when the women refused to drink water from a cup that Bibi had held in her hand. Bibi's conviction of the capital crime of blasphemy was eventually overturned by the Pakistan Supreme Court, and she was allowed to leave for Canada. Most individuals accused of blasphemy in Pakistan are non-Muslims or members of the Ahmadi sect or other sects, which are not recognized by most Muslims in Pakistan as a reputable form of Islam. The U.S. Commission on International Religious Freedom report for 2017 lists seventy-one countries that have laws against blasphemy, which in a number of instances is punishable by the death penalty (S. Jeffrey 2019).

In 2010, Oklahoma voters supported a referendum to prohibit state courts from referencing *Shari'a* law in their legal decisions. The referendum vote was dismissed by some observers as an irrational overreaction because American courts simply do not decide cases based on *Shari'a* law. Supporters of the referendum pointed to the prospect that judges might consult *Shari'a* law in questions of marriage, child custody, the division of marital property, and the legality of polygamous relationships. A federal court held that the Oklahoma law was unconstitutional because it discriminated against the Islamic religion and that Oklahoma failed to present a single instance in which Islamic law had been applied by an Oklahoma court.

There are eleven states that prohibit the use of foreign law in their state courts. This type of legislation has been introduced in nearly every state legislature since 2010. The American Bar Association (ABA) has opposed legislation prohibiting recognition of foreign law in state courts on the grounds that these laws are unnecessary because American courts as a matter of policy would not enforce foreign laws that conflict with the legal rights, protections, and values of American constitutional democracy. The laws according to the ABA serve no purpose other than to promote anti-Islamic and anti-foreign sentiments.

In the United Kingdom, devout Muslims may agree to bring non-criminal disputes that do not involve children before a Muslim Arbitration Tribunal. Decisions may be appealed to a secular court in those instances in which a decision is alleged to violate human rights or is contrary to the "public interest." There are roughly thirty *Shari'a* courts that individuals may agree to consult to decide issues of divorce, child custody, and family law in accordance with Islamic law.

International Law

International law is the law that regulates the relationships between countries in the world. International law is not considered part of the family of laws although it is increasingly important. The shrinking of the world and the increased interaction between countries in trade, culture, and the movement of people has brought the world closer together. This process is termed *globalization*. In music and in food, for example, there is an interesting fusion of cultures.

In Europe, there is a formal economic integration of countries into the European community. Members of the community are required to open their borders to the movement of goods and people from member countries. The European Court of Human Rights reviews

the policies of European states to ensure that their national law respects rights such as freedom of speech and freedom from torture and abuse (Shaw 1986).

Public international law regulates the relationships between nation-states and encompasses areas such as the law of the sea, trade, and outer space; the treatment of diplomats; the law of war; and the extradition of offenders. Following World War II, a movement developed toward the protection of international human rights. The law of human rights regulates a state's treatment of individuals and contains many of the protections already available to individuals in the United States. *Private international law* regulates businesses across international borders. This law would be relevant to an American corporation doing business in Africa, Asia, or Europe.

The focus in the text is on public international law. The field of international law can be confusing because the international community is not organized like a state political system with a president and legislature that possess the authority and power to tell states and individuals how to act.

The UN is an organization of countries across the globe, and there are regional organizations such as the Organization of American States that are affiliated with the UN. The UN does not have an army to persuade member states to follow the organization's decisions. The UN may be able to pressure a state to comply with its decisions and in extreme situations is able to punish a state economically. In rare instances such as Korea, Kuwait, and Libya, the UN has been able to organize a coalition of member states to act militarily.

The primary sources of international law are treaties or agreements that states agree to accept. The treaty provisions then must be incorporated into a nation-state's domestic law before it is enforceable. An example is the International Convention on the Prevention and Punishment of the Crime of Genocide, which has been incorporated into U.S. federal law.

There also are treaties establishing various international legal institutions that nation-states may voluntarily join. For example, the International Court of Justice is a court that is part of the UN that hears complaints by one state against another state. This may involve a state alleging that another state has unfairly diverted a river and has deprived a state of its fair share of a water supply. The recently established International Criminal Court has jurisdiction over various international crimes committed in the territory of a member state or crimes committed against the nationals of a signatory state.

American laws increasingly are extending their reach beyond the territorial boundaries of the country. Various criminal statutes allow for jurisdiction over crimes committed abroad. An example is the prosecution of individuals residing in the United States for acts of torture or genocide committed outside the country.

One difficulty with formulating and enforcing international law is that the world is composed of a diverse group of states. A claim that the *Shari'a* punishments violate human rights will be resisted by those states that view these punishments as the word of God.

THE FUNCTIONS OF LAW

Law serves various "jobs" or functions in society (Hoebel 1979; Schur 1968). The **functions of law** include social control, dispute resolution, and social change.

Social Control

Social control is the process of ensuring individuals engage in "right conduct." In small-scale societies in which the population shares a similar background, ethnic identity, and values, social control may be achieved through social pressure from friends and neighbors. Individuals who challenge the values of the group tend to be expelled from the community (banishment), and less serious violations of the group's values may result in shaming the individual as a method of deterring others from violating the law. A small-scale society simply cannot tolerate dissent that challenges the core beliefs and may create divisions within the group (L. M. Friedman 1977: 11).

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PHOTO 1.2 The law as pictured here affects our daily lives in various major and minor ways ranging from traffic tickets, to picking up after dogs, to access to marijuana. Despite frustrations with the legal system, Americans express respect for the rule of law.

In a larger and more diverse society, social pressure remains important. People respond to the critical remark of a friend or relative and are inspired by the praise of a teacher or parent. Individuals in a large-scale society live a portion of their lives in various institutions, each of which may have its own methods of social control. An employee who constantly is late may be fired or suspended or may suffer a loss of pay, returning books late to the library may result in a fine, a bar may refuse to serve a troublesome or inebriated patron, a hotel may cancel the reservation of an individual who arrives late in the evening, and a restaurant that fails to meet health standards may have its license suspended. A parent may "ground" a son or daughter who does not return home on time from a date.

The law is the primary institution that is relied on to ensure social control in large and diverse societies. People have different values, income levels, and attitudes, and informal social pressures often may not be sufficient to ensure social control. An individual may identify with a subculture that encourages and supports the use of drugs or dogfighting. Lawrence M. Friedman lists the functions of the law in maintaining social control. First, the law defines, usually in written form, the deviant behavior that is subject to legal punishment. Second, the law defines the institutions and procedures that will punish individuals who engage in deviant behavior. This typically is a court and may involve lawyers and a jury. Third, the law defines the procedures that are used to investigate and detect crime. For example, the law defines the ability of the police to conduct searches and seizures and to interrogate suspects (L. M. Friedman 1977: 11).

Of course, merely because a law is passed does not mean that the law will succeed in the social control of deviant behavior. Controversy was stirred in various cities when local ordinances required dog owners to pick up the defecation of their canines. A vocal group of dog owners resented being forced to pick up the waste of their dogs, and sanitation workers did not want to handle the waste in the garbage. New York City responded to these complaints by imposing fines as high as $250 for a failure to pick up after your pet. Most dog owners undoubtedly comply with the "poop scoop" law. The law nonetheless is difficult to enforce, and compliance in many cases depends on social pressure from neighborhood residents and other dog owners.

Friedman notes that the law performs the additional function of secondary social control. A thief sentenced to prison is both punished and taught a lesson. The lesson is communicated to the thief as well as everyone who attends or reads or hears about the conviction. The conviction encourages law-abiding behavior and deters violations of the law (L. M. Friedman 1977: 14).

The law also controls behavior through rewards. Individuals may obtain tax deductions for contributing money to a charitable cause or for installing solar panels on their house.

Dispute Resolution

A second function of the law is dispute resolution. Friedman defines a dispute as the "assertion of inconsistent claims over something of value." He notes that disputes can be "dangerous" because they can easily get out of hand and lead to retaliation and to violence. An example is dueling, which was an accepted method of vindicating an individual's honor and settling disputes in the United States until well into the nineteenth century, when every state passed laws prohibiting the practice (L. M. Friedman 1977: 12).

Friedman distinguishes between minor disputes involving small-scale disagreements over contracts, divorce, and land ownership and major disputes involving fundamental disagreements between workers and employers or between consumers and the manufacturers of a defective product.

Disputes and conflicts may be resolved through negotiation between the parties. A dispute or conflict that is translated into a legal disagreement may lead to a complaint before a court. The parties to the case may settle the suit rather than pursue a time-consuming or expensive legal action and may want to avoid the uncertainty of a court decision.

The legislature also may intervene to resolve a dispute by passing a law that resolves a conflict. The U.S. Congress responded to pressure from the African American community and declared Martin Luther King's birthday a federal holiday in 1983. The effort to persuade Congress to recognize King's birthday as a federal holiday was first proposed in 1968, and it required six million signatures on a petition and fifteen years of lobbying to pass the law. Arizona did not recognize the Martin Luther King holiday until 1993, and South Carolina finally acknowledged it in 2000 (L. M. Friedman 1977: 12).

Social Change

A third function of law is social change. The U.S. Supreme Court ordered the desegregation of American schools in *Brown v. Board of Education* while Congress in a series of laws ensured equal access to restaurants, hotels, and other facilities across the country and protected the right of individuals to vote. Law also can be used to bring about less far-reaching change such as requiring drivers to wear seat-belts or to require hands-free use of cell phones while driving. There is a question whether law is effective in bringing about social change absent support from a political movement that supports the change (L. M. Friedman 1977: 12–13).

Brown v. Board of Education and civil rights legislation told the states and private businesses that "thou shalt not" discriminate. Friedman observes that the law also "creates rights." Congress may pass a law that enables a wounded veteran to receive medical care for post-traumatic stress disorder (PTSD) or to receive pension payments for the disabilities associated with PTSD. Section 1983 of the U.S. Code allows individuals to sue state and local governments for the violation of their civil rights and liberties (L. M. Friedman 1977: 13).

An additional function of the law identified by Friedman is record keeping. The state keeps track of births, deaths, marriages, house sales and purchases, and professional licenses (L. M. Friedman 1977: 13–14).

THE DYSFUNCTIONS OF LAW

Law does not always protect individuals and result in beneficial social progress. Law can be used to repress individuals and limit their rights. The respect that is accorded to the legal system can mask the **dysfunctional role of the law**. Dysfunctional means that the law is promoting

inequality or serving the interests of a small number of individuals rather than promoting the welfare of society or is impeding the enjoyment of human rights.

The early legal history of American Indians in the United States reflects nineteenth-century biases and prejudices. In 1823, in *Johnson v. M'Intosh* (21 U.S. 543 [1823]), the U.S. Supreme Court held that North America had been discovered by Christian Europeans and that the indigenous inhabitants of the United States did not possess title to the land they occupied. Justice John Marshall wrote that American Indians were "an inferior race of people…under the perpetual protection and pupilage of the government" who "could have acquired no proprietary interest" in the land that they "wandered over." American Indians were tenants who occupied the land at the pleasure of their government landlords.

In 1830, President Andrew Jackson obtained congressional endorsement for the Indian Removal Act, which authorized him to transfer American Indians living east of the Mississippi River to unoccupied lands west of the Mississippi in Oklahoma. Between 1838 and 1839, four thousand of the fourteen thousand Cherokees who were forcibly removed perished during what is known as the Trail of Tears. The General Allotment Act of 1887 allowed the U.S. government to allot land on reservations to individual American Indians and to sell the remainder of the land to outsiders. The act permitted the federal government to seize nearly ninety million acres of reservation land, most of which was sold to white farmers and developers. In 1903, in *Lone Wolf v. Hitchcock*, the U.S. Supreme Court held that Congress was authorized to seize and to sell the land on which American Indians resided. The Court held that the "power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell" (*Lone Wolf v. Hitchcock*, 187 U.S. 553 [1903]).

The judicial decisions that allowed the dispossession of American Indian land were based on the principle that American Indians lacked written deeds and documents to establish their ownership over the land on which they resided. North America under the common law was considered to have been unoccupied territory that had been "discovered" by Europeans. As a result, American Indians had no rights to the land and, as tenants, could be removed by the federal government (Harring 1994; L. Robertson 2007; Wilkinson 1987).

In the early twentieth century, children worked in dangerous jobs in the mines and toiled for long hours in textile mills, glass factories, and oyster and shrimp canneries. The young workers were paid subsistence wages, suffered damage to their health, fell victim to industrial accidents, and were provided little or no education. The U.S. Supreme Court in the early labor case of *Hammer v. Dagenhart* (247 U.S. 251 [1918]) held that a federal law prohibiting the shipping in interstate commerce of goods manufactured by child labor was unconstitutional. The Court reasoned that the power to regulate the hours of labor of children in factories and mines within the various states is a "purely state [matter]" that is beyond the powers of Congress.

The decision in *Dagenhart* was influenced by the free market approach to industrial regulation that found full expression in the famous case of *Lochner v. New York* (198 U.S. 45 [1905]). *Lochner* addressed the plight of bakery workers who labored for long hours for low wages in small dimly lit spaces in which the air was filled with dust and fumes. In many instances, the bakers were required to sleep in the shops where they worked. These conditions resulted in a significantly lower life expectancy for bakery workers than for workers in other industries. New York, in 1895, passed legislation limiting the working hours and conditions of bakery workers. A five-judge majority of the U.S. Supreme Court held that the requirement of the New York law that the working hours of bakery employees were to be less than ten hours a day and sixty hours a week was an "unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual [baker] to contract." The fact that there was a "possible existence of some small amount of unhealthiness" did not justify "legislative interference with liberty [of contract]."

The *Lochner* and *Dagenhart* cases have long since been disavowed by the Supreme Court although the abandonment of the doctrines established in these decisions came too late to help workers like Reuben Dagenhart, who at age 20, having worked twelve hours a day since the age

of 12, proclaimed, "Look at me! A hundred and five pounds, a grown man and no education. I may be mistaken, but I think the years I've put in the cotton mills have stunted my growth. They kept me from getting my schooling. I had to stop school after the third grade and now I need the education I didn't get" (Millhiser 2015: 63–106).

In 1927, revered Supreme Court justice Oliver Wendell Holmes, writing for an 8–1 majority, held that Virginia was constitutionally justified in carrying out the sterilization of Carrie Buck, a "feeble minded white woman." Holmes wrote that this operation was required because heredity plays an important role in the "transmission of insanity" and "imbecility." The sexual sterilization and discharge of Buck and others like her would permit them to be self-supporting and prevent them from continuing to present a "menace." Holmes noted that given the self-sacrifice required of the "best citizens" to fight for their country, "it would be strange if it could not call upon those who already sap the strength of the State" for "lesser sacrifices . . . to prevent our being swamped with incompetence." He ended his opinion with a famous epigram: "It is better . . . [if] instead of waiting to execute degenerate offspring for crime or to let them starve . . . society can prevent those who are manifestly unfit from continuing their kind. . . . Three generations of imbeciles are enough" (*Buck v. Bell*, 274 U.S. 200 [1927]).

Virginia by 1979 had sterilized 7,450 individuals, and nationally a total of between 60,000 and 70,000 individuals had been sterilized, 20,000 in California alone. In 2002, Governor Mark Warner of Virginia "sincerely apologized" for the Commonwealth's practice of eugenics. Two state legislators presented a commendation from the General Assembly to Raymond W. Hudlow, who was sterilized against his will as a runaway at age 16 and went on to become a decorated soldier in World War II. Virginia subsequently agreed to provide $25,000 to each surviving victim, and North Carolina earlier had apologized and agreed to provide $50,000 to each surviving victim (Cohen 2016).

Courts in other instances are employed as conscious instruments of repression. In Nazi Germany during the twelve years of the Third Reich, at least thirty-two thousand individuals were sentenced to death because of protest against the regime or because they were Jews or political dissidents. Individuals who committed anti-Semitic acts of violence were acquitted and praised. In other instances, individuals were criminally convicted because of "who they were" rather than "what they did." In 1942, Oswald Rothaug, head of the Special Court in Berlin, convicted Leo Katzenberger, the leader of the Berlin Jewish community, of the racial defilement of Irene Seiler, age 32. The evidence indicated that Seiler was a family friend of Katzenberger and that he had kissed her on the cheek and as a youngster she had sat on his lap. Although racial defilement was defined in the law as sexual relations between a Jew and an Aryan, and although evidence indicated that Katzenberger was medically incapable of committing such an act, Rothaug nonetheless ruled that the "Jews are our misfortune" and that any physical contact between a Jew and a German was sufficient to constitute racial defilement. Katzenberger was executed by use of the guillotine (Lippman 1997).

Courts also can be used to stifle freedom of expression. Roughly thirty U.S. states have laws against so-called strategic lawsuits against public participation (SLAPPs). These legal actions are used to intimidate critics of businesses and organizations. Legal actions typically are dropped if the critic will enter into an agreement to halt his or her criticism. Justin Kurtz, a 21-year-old college student, was sued by a towing company for $750,000 after he created a Facebook page that criticized the company for allegedly unlawfully towing his automobile. The company dropped its legal action after Kurtz agreed to take down his Facebook page and to stop criticizing the towing company.

One of the most prominent SLAPPs involved a legal action brought by Texas ranchers against Oprah Winfrey for $12 million in damages after she commented that she would not eat a hamburger following a program on "mad cow disease." A jury found in favor of Winfrey. Individuals posting critical reviews on Yelp have been the target of recent legal actions. There is a trend for doctors and other professionals to have patients sign an agreement that they will not post negative reviews online.

At least thirty states have anti-SLAPP laws that provide individuals with varying types of protection. California has the most far-reaching law that allows courts to dismiss legal actions found to be motivated by intent to punish and to deter individual comment on matters of "public interest."

Several of the dysfunctions of law are listed in Table 1.4 (L. M. Friedman 1977: 15–16).

TABLE 1.4
Dysfunctions of Law

Harassment	Legal actions may be brought to harass individuals or to gain revenge rather than redress a legal wrong.
Bias	The law may reflect biases and prejudices or reflect the interest of powerful economic interests.
Repression	The law may be used by totalitarian regimes as an instrument of repression.
Rigidity	The law is based on a clear set of rules. Self-defense requires an imminent and immediate threat of violence. Battered women who have been subjected to a lengthy period of abuse and who, as a result, kill their abuser while he is asleep typically are denied the justification of self-defense. The denial of self-defense to "battered women," according to some legal commentators, is unfair because the women reasonably can anticipate that the abuser will continue the pattern of violence in the near future.
Precedent	The law, because of the reliance on precedent, may be slow to change. Judges also are concerned about maintaining respect for the law and hesitate to introduce change that society is not ready to accept. In 1896, in *Plessy v. Ferguson*, the U.S. Supreme Court held that the Constitution's prohibition on racial discrimination under the Fourteenth Amendment is satisfied by separate but equal facilities (*Plessy v. Ferguson*, 163 U.S. 537 [1896]). The Supreme Court slowly limited this precedent, and in 1954, *Brown v. Board of Education* finally broke with precedent and ruled that separate educational facilities were not equal educational facilities (*Brown v. Board of Education*, 347 U.S. 483 [1954]).
Unequal access to justice	An individual who is able to afford a powerful law firm and talented private attorneys and who can afford to retain experts and investigators has a better chance of being acquitted of a criminal charge or winning a civil suit than an individual who lacks resources. In the criminal arena, a defendant who can afford bail has a better chance of being acquitted than a defendant who is forced to remain in jail while awaiting trial.
Conservatism	Courts are reluctant to second-guess the decisions of political decision-makers in times of war and crisis. The U.S. Supreme Court during World War II upheld the internment of 112,000 Japanese immigrants and Japanese Americans (*Korematsu v. United States*, 323 U.S. 214 [1944]).
Decrease political activism	A reliance on law and courts can discourage democratic political activism. Individuals and groups, when they look to courts to decide issues, divert energy from lobbying the legislature and from building political coalitions for elections. The reliance on unelected judges to make public policy decisions is criticized as undemocratic.
Impede social change	The law may limit the ability of individuals to use the law to vindicate their rights and liberties. For example, in 1996, Congress passed the Prison Litigation Reform Act, which was intended to limit the ability of state prisoners to sue in federal courts for the violation of their civil rights. The number of federal lawsuits filed dropped from forty-two thousand in 1995 to twenty-six thousand in 2000 (Calavita 2010: 40).
Failure to act	Researchers have documented 4,084 lynchings of African Americans in twelve southern states between 1877 and 1950, only a small number of which resulted in the criminal prosecution and conviction of the perpetrators. The federal government did not adopt a federal lynching law until Congress passed the Emmett Till Antilynching Act in 2020.

This introductory chapter thus far has provided a foundation for the study of law and society. You might want to review the definitions, families, and functions and dysfunctions of law. In the next section, we discuss the three principal approaches to studying law.

THE STUDY OF LAW

There are various approaches to the study of law. This section distinguishes between the study of legal doctrine, jurisprudence, and law and society. This distinction is somewhat overstated because any study of law likely will combine elements of all three types of analysis.

The Study of Legal Doctrine

The typical law student is interested in the **"black letter" law**, the rules that are followed in writing a will, drafting a contract, or determining the liability of a driver involved in an automobile accident. Law school education focuses on rules and applying the rules to various situations that may arise. The rules are found in cases and legislative statutes and, in some cases, in regulations issued by government agencies.

The study of legal doctrine is an applied and practical discipline intended to train practicing attorneys. Law students typically have little tolerance for the history of the law or philosophical questions on the definition of law. They want to walk out of class knowing the difference between the elements of larceny, robbery, and burglary.

The common law that was transported to the colonies from England provided a comprehensive set of legal rules. In the United States, there was a distrust of judges and a desire for the law to be accessible to the average person. The common law was incorporated into laws or statutes adopted by state legislatures and the U.S. Congress. These materials were supplemented by administrative regulations issued by government agencies regulating areas such as trucking, standards for radio broadcasting, food safety, and grazing and oil exploration on public lands.

The study of law is based on various areas of study or foundation building blocks that will be discussed later in the text. The two primary divisions in the law are public law, which addresses the relationship between the citizen and the state, and private law, which addresses the relationship between individuals and groups in society.

Public law. Public law is composed of three areas. Criminal law and criminal procedure focus on the definition of criminal conduct and the punishment of crimes and on the procedures for the investigation and detection of crime. Constitutional law focuses on (a) the structure and functioning of the branches of government, (b) the interrelationship between the branches of government, and (c) the limits of governmental power and the rights of individuals. Administrative law governs the authority of government to regulate various activities. Agencies regulate virtually every aspect of society, from consumer protection and broadcasting to the conduct of elections and the environment and taxation.

Private law. Private law includes the areas of contract, torts, and property. Contract involves the formation and enforcement of agreements between individuals and between organizations. Torts address rights and remedies for injuries to the person, property, privacy, reputation, and mental harm to individuals. The law of property defines what is property (e.g., whether an idea is property), who owns property, and what the rules are for resolving ownership disputes. There are other areas that might be included in private law—for example, corporate law, which deals with the organization and functioning of businesses and partnerships. Family law regulates marriage, divorce, children, and the claims to marital property, and copyright and patent law protects the creators of creative works.

In law school, students study the written appellate opinions of judges in legal cases interpreting statutes and regulations and provisions of the Constitution. In interpreting these

materials, judges rely heavily on the precedent created by the decisions of other judges in deciding similar cases. The appellate opinions of judges generally assume the facts are clearly established and focus on the law. The opinions in most instances employ technical legal terms and phrases and are not easily comprehended by the average reader. Limited attention is paid in legal education to the trial process.

In the minds of students and law professors and most of the public, the law is viewed as a logical system in which legal precedents and other materials will provide an answer, much like putting money in a slot machine. A law student learns various methods of logical reasoning that are used to reach a result. Legal decisions for the "black letter" lawyer are determined by the law, and a judge's personality or political point of view has little role in determining the outcome of a case. In 2005, Supreme Court chief justice John Roberts, in his confirmation hearing, stated that like an umpire who calls balls and strikes, he would fairly and objectively apply the law.

We will return to the notion that law is a science later in the book. Most law professors today would recognize that precedent is a starting point that may not always provide the answer to a problem. A judge inevitably will bring a measure of independent judgment to the task of deciding a case. Allan Hutchinson observes that law is a "living tradition" that is never complete. He compares the law to a work-in-progress in which judges are constantly adapting the law to changed conditions and new challenges (Hutchinson 2011: 1–8).

In the famous 1805 case of *Pierson v. Post*, Lodowick Post was foxhunting with his friends on Long Island, near New York City. The hunting party had scented a fox and was in hot pursuit along a beach. Jesse Pierson, a local resident who harbored resentment toward new residents like Post, suddenly appeared and shot the fox, grabbed the carcass, and ran away. Who was the rightful owner of the fox: Post, who had detected the fox and was closing in for the kill, or Pierson, who killed the fox?

Judge Daniel D. Tompkins in a 2–1 decision in favor of Pierson drew on Roman and common law texts and held that the fox is a natural and free animal and that the property right over the fox is determined by "occupancy only." "Pursuit alone" does not constitute ownership. Dissenting judge Henry Brockholst Livingston based his decision on custom. He argued the fox was the enemy of the world and that Post should be rewarded for making the effort to rid the community of this pest. *Pierson* remains the rule on ownership of wild animals—the legal right is vested in the individual who deprives the animal of its natural liberty and subjects the animal to control. Ownership is lost if an animal escapes. Cases have awarded possession of a school of mackerel to the fisher who netted the fish rather than to the fisher who tracked and enclosed the fish. In cases of whales, courts have followed Judge Livingston and recognized the custom among whale hunters that ownership resides in the individual who harpoons the whale rather than in the individual who secures the carcass on the beach.

Pierson v. Post reappeared on the legal landscape in 2001 when Barry Bonds of the San Francisco Giants hit a record-breaking seventy-third home run into the stands of Pac Bell Park. Fans struggled for the ball, which was valued in the six figures. Alex Popov caught the ball in his mitt, and in the pushing and shoving, the ball was grabbed by Patrick Hayashi. Popov sued Hayashi and claimed he was the rightful owner. Major League Baseball (MLB) also filed an ownership claim to the ball. Who is the owner of the ball? Judge Kevin McCarthy held that the ball had been abandoned by MLB when it left the park, that Popov had only momentarily caught the ball, and that Hayashi had taken legal possession. The judge, however, split the difference and divided the $450,000 auction price between Popov and Hayashi (Hutchinson 2011: 67–88).

The Study of Jurisprudence

The term **jurisprudence** is derived from the Latin word *jurisprudentia*, or "the study, knowledge, or science of law." Jurisprudence typically involves a consideration of the philosophical questions that underlie the law. One branch of jurisprudence involves normative questions

or the ethical aspects of the law. In Plato's dialogue *Crito*, Socrates is in jail awaiting the punishment of death by poison. He has been convicted of the crime of corrupting the youth of Athens. Socrates's student Crito visits him and tells him that he has arranged for Socrates to escape from prison. Socrates asks whether it is right for someone who has been convicted of a crime, however unjustly, to avoid punishment? Socrates also poses the questions of whether there is an obligation to obey the law and what are the consequences for society of disobeying the law. Other questions arise during their dialogue, such as how to determine whether a court's decision is unjust and whether justice is a necessary aspect of law. What are the permissible goals of punishment? Under what conditions is the death penalty justified? These are normative questions, or questions that relate to the ethical aspects of the law. Jurisprudence also includes what are termed *analytic questions*. These are questions that involve a study of the definition of law, the origins of law, and how judges reason and make decisions (Golding 1975).

One of the most famous cases in legal history is the English case of *The Queen v. Dudley and Stephens* (14 Q.B.D. 273 [1884]). Australian maritime lawyer John Henry Want purchased the fifty-two-foot, twenty-ton boat the *Mignonette* while in England and hired Captain Tom Dudley to find a crew and to sail the vessel back to his homeland. Dudley hired a three-man crew consisting of Edwin Stephens, Edmund Brooks, and a 17-year-old orphaned cabin boy named Dick Parker. The light and small ship was considered somewhat flimsy to navigate some of the globe's most treacherous waters (Hutchinson 2011: 13–39).

The ship set sail on May 19, 1885, and on July 5, the vessel was hit by a gigantic wave and a large hole was punched in the lee bulwarks. Dudley ordered the crew to abandon ship. The *Mignonette* sank within five minutes, and the crew was left in the middle of the South Atlantic 680 miles from the nearest landmass with two cans of turnips and no water, no shelter, and no fishing equipment. After several days at sea, they managed to capture and kill a turtle, which along with the remaining turnips was the only food they had to sustain themselves.

The crew became desperate after not having eaten for eight days or drunk any water for five days. Parker became seriously ill and delirious from drinking seawater. Dudley raised for the second time the question whether they should follow the customary practice among sailors and draw lots to determine which member of the crew should be killed and eaten. Stephens was receptive to the proposal although Brooks continued to express his opposition. On the twentieth day, Dudley argued that if no vessel appeared to rescue them, he would take responsibility for killing Parker and explained that he would only be accelerating Parker's anticipated death by a few days. Stephens hesitated and agreed; Brooks remained silent and did not respond.

Dudley proceeded to slit Parker's throat, and Dudley, Stephens, and Brooks drank Parker's blood and consumed Parker's remains over the next three days. On the fourth day after Parker was killed, the three men were losing hope when they were rescued by the German freighter the *Montezuma*, and by September 1885, the surviving crew members arrived back in England.

Despite the ordeal that the three sailors had endured, they were brought to trial and charged with killing Parker. The case made its way to a five-judge appellate court, which in a unanimous decision convicted the three defendants. The court, although recognizing the suffering the defendants endured, held they had no right to kill a "weak and unoffending boy" to ensure their own survival. The judges rejected the argument that the defense of necessity permitted taking one life to save a greater number of individuals. The judges asked, "By what measure is the comparative value of lives to be measured? Is it strength, or intellect or what?" The court could find no justification for singling Parker out to be eaten and sentenced the three defendants to death. The court asked the Crown to exercise mercy and to spare the three defendants, and as a result, their sentences were commuted to six months in prison.

The defense of necessity recognizes that a crime at times may be required to avoid a greater and imminent crime. *Dudley and Stevens* established the principle that continues to be followed by American, Canadian, and English judges that necessity does not justify the taking

of human life. The fear is that recognizing that necessity may justify that the taking of human life is a slippery slope that may lead to the killing of a grandparent or physically challenged child because of the economic burden on a family. On the other hand, the challenge confronting the crew of the *Mignonette* is difficult to compare with any other situation. The crew may have found themselves in a state of nature in which they exercised their natural right of self-preservation.

Other courts also have struggled with conditions justifying the taking of human life. In the famous case of *Repouille*, Louis Repouille chloroformed to death his 13-year-old child who was born with a brain injury and whose four limbs were deformed. He was blind and mute, and he had no control over his bladder and bowels. The child's entire life was spent in a crib. Repouille explained that he killed the child because the time and expense involved in caring for his son left him unable to adequately provide for his four other children. The jury declined to convict him of intentional homicide and instead convicted him of negligent or reckless homicide, which clearly did not fit the facts, and recommended the "utmost clemency." The judge stayed Repouille's prison sentence and placed him on probation for five years. Repouille subsequently applied for citizenship under the Nationality Act, which requires "good moral character." The legendary federal jurist, Learned Hand, wrestled with the question of how to determine whether Repouille possessed a "good moral character" (*Repouille v. United States*, 165 F.2d 152 [2nd Cir. 1947]; see also Minow 2019: 147–150). What is your view?

In 2000, an English court deviated from the precedent in *Dudley and Stephens* and held that conjoined twins might be separated although one would die. A failure to separate the twins would have resulted in the death of the healthy twin as well as the weaker twin, who suffered from an undeveloped brain and lacked a functioning heart and lungs.

In another interesting case, Israeli agents in 1961 unlawfully abducted Adolf Eichmann, one of the central figures in the Nazi extermination of six million Jews. Eichmann had been openly living in Argentina where he had fled following World War II. He was brought to Israel and tried for war crimes and crimes against humanity committed between 1939 and 1944 against the Jewish people and other groups. Eichmann was prosecuted under an ex post facto law adopted in 1950 for crimes committed in Europe before Israel was recognized as a nation-state against individuals who at the time were citizens of European countries rather than citizens of the state of Israel. His claims that he had merely followed orders and that as a government official he was immune from legal liability were rejected by the court. Eichmann was unanimously convicted by three Jewish judges and remains the only individual executed in the history of the state of Israel. The *Eichmann* case raises a host of interesting jurisprudential issues, including whether Israel was justified in abducting, prosecuting, and executing Eichmann. The reality is that if Israel had not acted, Eichmann likely would not have been brought to the bar of justice. The question remains whether the ends justified the means in the *Eichmann* case (Lippman 2002).

In the "German Border Guard" cases, the European Court of Human Rights (ECHR) confronted a case in which individuals' obedience to higher orders clashed with fundamental legal principles. In 1990, the communist East German Democratic Republic (GDR) and the democratic West Federal Republic of Germany (FRG) signed a unification treaty in which the GDR was absorbed into the FRG. In 1961, the GDR had ordered border guards to arrest or "annihilate" individuals attempting to breach the Berlin Wall dividing the two countries in an effort to enter the FRG. The GDR viewed individuals who sought freedom in the FRG to be "subversives" and "dangerous traitors" to the communist cause. Between 1961 and 1989, 264 individuals were killed attempting to flee the GDR to the FRG. Following unification, those responsible for this "shoot to kill" policy along with border guards responsible for killings were prosecuted for murder. Several former border guards appealed to the ECHR, which held that "even a private soldier could not show total, blind obedience to orders" (*Streletz, Kessler and Krenz v. Germany*, [2001] 33 EHRR 31).

The Study of Law and Society

Both "black letter" law and jurisprudence consider law to be a self-contained system that is isolated from economics, politics, psychology, and history. Law and society takes the opposite approach and studies the influence of external events on the law. In the words of Kitty Calavita, law and society examines the "influence on law of forces outside the box." In pursuing this project, law and society takes a multidisciplinary approach and draws on anthropology, history, political science, psychology, sociology, and philosophy, as well as law and jurisprudence (Calavita 2010: 4–5).

Calavita illustrates her point by pointing to the First Amendment protection of freedom of speech, a constitutional provision that is considered a defining aspect of American democracy. She notes that freedom of speech has been reduced or expanded by the courts depending on the political climate (Calavita 2010: 4–5).

Courts, for example, are particularly concerned with protecting national security during wartime. Geoffrey R. Stone of the University of Chicago, a leading constitutional lawyer, describes how the Supreme Court during World War I retreated from protecting freedom of expression in the interests of protecting national security (G. Stone 2004: 135–234). The late Harry Kalven observes the decisions are "dismal evidence of the degree to which the mood of society" can "penetrate judicial chambers" (Kalven 1988: 147). In *Schenck v. United States*, Charles Schenck distributed a pamphlet that strongly denounced the draft and called on individuals to write their members of Congress to repeal what he termed a monstrous wrong. The Court noted that "when a nation is at war many things that might be said in time of peace . . . will not be endured so long as men fight and no Court could regard them as protected by any constitutional right" (*Schenck v. United States*, 249 U.S. 47 [1919]).

Another example of outside wartime influences on legal decisions is the internment of Japanese Americans during World War II. President Franklin Delano Roosevelt, following the Japanese attack on Pearl Harbor in Hawaii, signed Executive Order 9066, which led to the removal of 120,000 individuals of Japanese descent—primarily from California, Washington, Oregon, and Arizona—and their assignment to detention camps. Two-thirds of the individuals removed and detained were U.S. citizens. The wholesale internment was intended to counter a threat to national security although the FBI opposed mass internment and had already detained two thousand individuals of Japanese ancestry who the agency determined posed a threat to the United States. The U.S. Supreme Court in *Hirabayashi v. United States* (320 U.S. 81 [1943]) and in *Korematsu v. United States* (323 U.S. 214 [1944]) held that the internment was based on national security rather than on racial prejudice. The dissenting justices asked how individuals could be detained without proof that they constituted a threat to national security. Justice Frank Murphy denounced the decisions as the "legalization of racism" and pointed out that only those German and Italian residents who were considered to pose a threat to the United States had been interned.

In 1944, after the Roosevelt administration announced it was releasing the internees, the U.S. Supreme Court ordered the release of Mitsuye Endo, who the court determined was a loyal American and posed no threat to national security (*Ex parte Endo*, 323 U.S. 283 [1944]). The Court noted that loyalty is "a matter of the heart and mind, not of race, creed, or color." A number of liberal Supreme Court judges later would write that they regretted their decisions approving the internment of Japanese Americans.

In 1988, President Ronald Reagan in signing the Civil Liberties Act declared that the Japanese internment had been a "grave injustice" that was based on "racial prejudice, wartime hysteria, and a failure of political leadership" rather than on the grounds of national security. The act provided a presidential apology and reparations to Japanese Americans. Federal courts later set aside the convictions of Fred Korematsu and Gordon Hirabayashi, both of whom had refused to comply with internment orders, based on the government's suppression of evidence that indicated that Japanese Americans did not pose an internal threat (G. Stone 2004: 283–307).

In 2018, in *Trump v. Hawaii* the U.S. Supreme Court upheld the constitutionality of President Donald J. Trump's ban on individuals from a number of predominantly Muslim countries entering the United States. Chief Justice Roberts observed in his majority opinion that *Korematsu* was "gravely wrong" and "has been overruled in the court of history" and has "no place in law under the Constitution" (*Trump v. Hawaii*, 585 U.S.__ [2018]).

The examination of the impact of wartime on judicial decisions challenges the notion that legal decisions are as mechanical as an umpire's calling balls and strikes. The law instead is influenced by a range of factors, including the pressures of wartime; the desire of judges to maintain public support; the pressure to support the decisions of the president, Congress, and the military; and racial stereotypes.

Lawrence Friedman and his co-authors provide another way to think about law and society. They distinguish between *internal* and *external* approaches to law. Internal scholarship focuses on court cases, statutes, and constitutional provisions and aims to provide an answer to a legal problem. Law and society relies on the tools of the social sciences and looks at law from the "outside" and explores the *external* social factors that influence the law and how law influences social attitudes and practices (L. M. Friedman, Pérez-Perdomo, and Gómez 2011: 2–3).

In the next section, two perspectives on law and society are sketched that you might find helpful as you read the remainder of the text.

TWO PERSPECTIVES ON LAW AND SOCIETY

Law and society scholars tend to view the relationship between law and society through the lens of two opposing theoretical perspectives. The **consensus perspective** views society as sharing common values and as relatively stable. Law is a mechanism for resolving the occasional disputes that may arise and serves to keep society stable and balanced. A central function of law is to help ensure that people will cooperate with one another and that society will operate in a smooth and integrated fashion.

At the other end of continuum is the **conflict perspective**. Conflict is viewed as a central aspect of society. This is the mirror opposite of the consensus model. Society is viewed as composed of competing groups, and the law is an instrument of coercion that is employed by dominant and powerful groups to maintain their power and control.

The debate between these two perspectives has been a persistent theme in law and society and is unlikely to be resolved. The consensus and conflict approaches provide two useful perspectives through which to view the relationship between law and society.

A Consensus Perspective

The consensus perspective views society as based on shared values. Americans, despite their diversity of race, religion, and attitudes, share common beliefs including principles embodied in the First Amendment such as freedom of religion and expression and a belief in individual responsibility.

Roscoe Pound is the theorist most closely identified with the consensus perspective: the view that the role of law is to reconcile interests and to ensure that society remains in balance. This at times requires that individuals' rights and desires be compromised to ensure society remains strong and stable. Law is like a respected friend who smooths over the occasional misunderstandings that may arise between his or her friends and ensures disputes are settled without resort to bitterness or force. The role of the judge or legislator is to engage in "social engineering" and to find a balance between the claims of the individual and society to achieve social harmony. Pound measured law by how effectively it served society (Pound 1942, 1943, 1954).

Pound identified six "social interests" that are promoted by law and are essential to the maintenance of a secure and stable society. A social interest is a "claim, a want, a demand, an expectation" and encompasses a broad range of areas. Interests include the quality of life,

preservation of morals, and conservation of resources. The interest in security includes providing individual health and safety and enforcing contractual obligations. At times, these interests may conflict, and a balance must be struck. Individuals boarding a plane are subjected to searches of their person and property in the interest of countering the social threat of terrorism. In this instance, the law limits individuals' privacy and freedom from intrusion in the interest of the safety and welfare of society.

The notion that society is based on consensus should not be mistaken for a stagnant society stuck in the past or present. Pound used the term *socialization of law* to describe the continuing growth and expansion of the law to respond to various interests and to provide for individual fulfillment. In the past decades, American society has been relatively stable although we have seen an expansion of the rights of women, minorities, individuals who are physically and mentally challenged, consumers, and even animals.

Pound viewed law as the most important of various mechanisms of "social control" that ensure that the societal machine functions smoothly and efficiently. He perhaps underestimates the role of other mechanisms of social control. For example, education imparts a historical understanding and provides the skills that are needed for individuals to become productive members of society. Along with religion, education helps to shape our values and beliefs.

Talcott Parsons elaborates on Pound's vision and describes law as integrating society to ensure a cooperative community of individuals. Law is the tissue that keeps the parts of the body functioning and cooperating together. Individuals on a daily basis obey the rules of the road, businesses follow the terms of contracts, and landlords and tenants respect the terms of a lease. In other words, law establishes the understandings and expectations that keep society functioning in a smooth and integrated fashion (Parsons 1962).

John Sutton views the expansion of voting rights to African Americans living in the South as an example of how the law responds to integrate individuals into society and to protect the interest in maintaining the integrity of the political process. In 1947, only 12 percent of the voting-age African American population was registered to vote in the eleven states of the old Confederacy, and only 1 percent of the voting-age population in Mississippi was registered to vote. A variety of mechanisms were used to disenfranchise African Americans; these mechanisms included a poll tax on African Americans, a literacy test, and the use of so-called white primary elections that excluded African American voters. Congressional efforts to protect voting rights in 1957 and 1960 proved ineffective because the laws depended on individuals to bring legal actions in each county where election officials discriminated against African Americans. The atmosphere changed with the reelection of President Lyndon Baines Johnson in 1964, whose own impoverished background had given him a deep and abiding commitment to equal rights. Public opinion galvanized behind voting rights for African Americans after witnessing the beating of civil rights activists marching from Selma to Montgomery, Alabama. Congress responded by overwhelmingly supporting a strong voting rights measure that authorized the federal government to take control of the voting process in jurisdictions with a history of discrimination. The Voting Rights Act of 1965 transformed politics in the South by increasing African American voting registration and breaking the back of white domination of the political process. The voting rights bill was an important step toward the end of second-class citizenship for African Americans and reflects a strong belief in the right of each individual to participate as an equal in the political process. American democracy could not retain legitimacy in the eyes of the world so long as African Americans, comprising a significant percentage of the population of southern states, were excluded from the political process (Sutton 2001: 163–174).

In 2013, the Supreme Court held that a central provision of the Voting Rights Act was unconstitutional. Justice Roberts explained that this so-called pre-clearance provision that required the "covered" states to obtain the authorization of the Department of Justice before changing voting laws no longer was required. The registration and voting of African Americans and the election of African American political officials had improved dramatically in these states and "approach[ed] parity" with that of whites. Justice Ruth Bader Ginsburg in dissent

noted that Congress in reauthorizing these provisions found that African Americans continued to confront barriers to voting. The decision left intact the provisions of the act that authorized legal actions to challenge practices that abridge or deny any individual to vote on account of race (*Shelby County v. Holder*, 570 U.S. 529 [2013]). Justice Roberts may have been overly optimistic about the fact that there no longer was a need for the pre-clearance provision of the Voting Rights Act. The Brennan Center for Justice at New York University Law School continues to find that states previously covered by the pre-clearance requirement have engaged in "significant efforts to disenfranchise voters" (Brennan Center for Justice 2018).

In another example, Lennard Davis traces the history of the Americans with Disabilities Act and ADA Amendments Act of 2008. Davis notes that people with disabilities are the nation's largest disadvantaged minority. They historically were among the poorest citizens, had limited access to public transportation, found buildings inaccessible, and confronted barriers to education. The ADA recognized that disability was a civil rights issue and established the equal rights of individuals with disabilities. The act prohibits private and public discrimination in employment, requires accessibility of public accommodations and private facilities, and requires access to telecommunications. Davis notes that the ADA has provided a uniform set of standards, and although it falls short in ensuring employment for people with disabilities, the ADA has been responsible for ramps, electronic doors, curb cuts, accessible bathrooms, and American Sign Language interpreters at public events (L. Davis 2015).

In 2004, in *Tennessee v. Lane*, the U.S. Supreme Court upheld the constitutionality of the ADA. George Lane suffered a crushed hip and pelvis during a car accident. Both of Lane's legs were in a cast, and because he was confined to a wheelchair, he was unable to climb the stairs to the second floor of the courthouse. The judge and courthouse personnel reportedly laughed at him as he dragged himself up the stairs for his arraignment. On the trial date, Lane refused to scale the stairs and was arrested for a failure to attend his trial and later pled guilty to driving with a revoked license. His lawyer during the trial shuttled up and down the stairs to communicate with Lane. The U.S. Supreme Court held in a 5–4 decision that Congress had acted in a constitutionally appropriate fashion to protect the fundamental right of an individual with a disability to gain access to court proceedings and that Tennessee was required to provide reasonable means of access in public buildings to individuals with disabilities. Justice John Paul Stevens wrote that the legislative record demonstrates that "discrimination against individuals with disabilities persists in such critical areas as . . . education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. This finding, together with the extensive record of disability discrimination . . . makes clear . . . that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation" (*Tennessee v. Lane*, 541 U.S. 509 [2004]).

Lawrence Friedman and Jack Ladinsky's article on the law of industrial accidents is a classic example of law balancing the interests of business and workers (L. M. Friedman and Ladinsky 1967). Workers who were injured in industrial accidents could sue their employer for damages. However, the fellow-servant rule provided that a worker could not sue an employer for injuries caused by fellow workers. During the Industrial Revolution in the nineteenth-century United States, workers suffered an increasing number of accidents. Industrialists avoided liability by blaming the injury on workers in the plants. As a result, workers with disabilities were left without compensation for debilitating injuries. This type of situation, however unfortunate, was viewed as the price of economic growth and progress (L. M. Friedman and Ladinsky 1967).

Courts began to create exceptions to the fellow-servant rule under pressure from the rising number of victims of industrial accidents. It is estimated that beginning in 1900, thirty-five thousand deaths and two million injuries resulted from workplace accidents. The injury rate for railroad workers doubled between 1889 and 1900. Industrialists confronted growing unrest among workers along with the prospect of escalating legal fees and jury awards and the rising costs of insuring their businesses against litigation costs. The solution was for states to adopt workers compensation schemes that strictly limited the amount an employee could receive

while recovering from an accident. In Wisconsin, if an accident caused partial disability, the worker received 65 percent of his or her weekly loss in wages during the period of disability. Fixed death benefits were payable to the worker's dependents.

Friedman and Ladinsky note that neither industry nor workers viewed workers compensation as an ideal solution. However, the scheme offered a compromise that was acceptable to both sides, and reaching an agreement was preferable to continued struggle and conflict over the issue of worker health and safety. The legal system responded to a problem by offering a solution that averted labor unrest and continued litigation over industrial responsibility for injuries to workers. Friedman and Ladinsky note that "solutions" very often are compromises that both sides find acceptable.

There are an array of social programs that have benefited both individuals and society like the "GI Bill of Rights," which provided military veterans returning from World War II with money for education and loans to start a business or to purchase a house and funded additional Veterans Affairs hospitals. The "GI Bill" provided a transition for millions of military veterans to civilian life and provided an educated workforce that helped to make the United States the most powerful economy in the world, which was responsible for rebuilding war-ravaged Europe (L. M. Friedman 2005: 562–563).

Despite Pound's optimism, he recognized that law could not solve every problem or provide redress for every grievance. Filing a legal complaint or lobbying for legal reform is expensive and time-consuming and is beyond the financial capacity of most individuals. In other instances, individuals recognize that "you can't fight city hall" and accept injustice. Government agencies suffer from limited budgets and are unable to enforce laws protecting the environment and the health and safety of workers in factories and miners in coal country.

The conflict approach challenges the view that law is a mechanism that provides for social stability and integration. The conflict perspective views disagreement and tension as a central characteristic of society. Recent conflicts over gun rights, abortion, the right to die, and the federal deficit raise the question whether any consensus that may have existed in the past has broken down.

A Conflict Perspective

The conflict perspective is based on the view that society is characterized by competition over money, power, and values. Society is shaped like a pyramid, with the wealthy and the powerful at the top and the mass of people near or at the bottom. The law is one tool used by the powerful to maintain their dominance and to attain their goals.

The noted late radical historian Howard Zinn writes that in the past it was obvious to serfs that they were being exploited by their royal masters who expropriated much of the produce from the land on which the serfs worked. In the modern era, most people tend to view the law with awe and with respect and do not fully grasp that the law is one of the primary instruments used to exploit them. The ability of individuals to understand the law is limited by confusing complexities and by the endless "library of statutes." Most people likely only are vaguely aware of the provisions of the tax code that benefit large corporations. The corporate share of the tax receipts in the United States declined from 30 percent of all revenues in the mid-1950s to 6.6 percent in 2009. General Electric, the largest corporation in the United States, in 2010 paid no taxes on its $14.2 billion in profits and claimed a tax benefit of $3.2 billion. Zinn captures this critical perspective by offering an anecdote involving a powerful mine owner who, when asked why the coal mine operators pay so little in taxes while the local people starve, replied, "I pay exactly what the law asks me to pay." The question Zinn asks is who makes the law and who benefits from the law (Zinn 1971: 18).

One of the foremost proponents of a conflict approach is the criminologist Richard Quinney, who writes that criminal law and presumably law in general is an "instrument" of the ruling class and of the state to support the "existing" political and economic arrangements. The law for Quinney lulls people into the false belief that the system is fair and that all individuals

possess equal rights and are able to influence the law. Consider the familiar observation that freedom of speech only is meaningful if you possess a printing press (Quinney 1974: 16, 24).

A number of propositions underlie the conflict theory (Quinney 1974: 16; F. Williams 1980: 214–215):

1. Society is characterized by conflict and conflicting groups.
2. Society is dominated by groups with the greatest economic and political power, and these groups draft and enforce the law and use the law to promote their own self-interest and point of view.
3. Dominant groups use the police and other social control agencies to enforce the laws that promote their self-interest and values.
4. The less powerful groups in society possess limited political power and exert little influence on the formulation of law and on the enforcement of the law.
5. Dominant groups define criminal and unlawful behavior, and the behavior of groups that lack power is more likely to be considered criminal and the members of these groups are more likely to be punished more harshly. An example of a dual standard of justice is the failure to pursue criminal charges against the individuals on Wall Street responsible for the mortgage schemes that led to the global economic downturn.
6. People tend to view the prevailing legal structure as the natural and inevitable order of society and do not stop to ask whether the existing legal structure is fair or just and cannot even imagine how things could be different.

Quinney's views are echoed by Alec Karakatsanis, founder of the progressive Civil Rights Corps, who based on his experience argues that there is a vast criminal justice "punishment bureaucracy" that has a vested interest in the current system of mass incarceration and control. Meaningful social transformation will require addressing disparities in wealth, education, health care, and housing along with sexism and racism and a willingness to apply the criminal law against the wealthy on Wall Street (Karakatsanis 2019).

An example of conflict theory is the Black Act in eighteenth-century England. English historian E. P. Thompson in the highly influential legal history *Whigs and Hunters* describes how the Black Act adopted by the English House of Commons in May 1723 served the interests of the king as well as the landed gentry in asserting the exclusive right of these wealthy elites to hunt and to fish and to exploit and to expand control over forestland, which customarily had been freely available to the rural population. Resources like timber, quarries, and peat bogs and other natural resources were viewed by these entrepreneurial elites as valuable economic resources to be protected, developed, and sold. The hunting of deer became valued both as a form of elite entertainment and as a means of obtaining the increasingly valuable commodity of venison. In most instances, the gentry enclosed the properties with walls, fences, and hedges. The Black Act, which was not repealed until 1823, employed the criminal law to protect the enclosed land and created over fifty offenses, many of which carried the death penalty. These crimes primarily punished unauthorized hunting of deer, the poaching of hares or fish, and the illicit exploitation of timber and other natural resources.

Local farmers and hunters who resisted the law were known as the "Blacks" because they disguised themselves by darkening their faces with soot and with grease. The Blacks found themselves labeled as common criminals for refusing to accept the gentry's encroachment on the land that the Blacks as freeborn inhabitants of England had traditionally relied on for economic sustenance.

Thompson concludes that law in the case of the Black Act was used by the privileged class as an instrument of naked class interest and power against the less privileged rural population (Hay et al. 2011; Thompson 1975).

William Chambliss's essay on the English law of vagrancy is another classic study of the role of the law in serving the interests of dominant economic groups. In 1348, the Black Death (the bubonic plague) ravaged Europe and killed roughly 50 percent of the population of England and drastically reduced the number of available workers. Chambliss argues that vagrancy laws were passed to ensure a continuing supply of cheap labor. In 1349, a vagrancy law was adopted in England that required individuals to work at the pre-epidemic wage level and forbade individuals from moving to a better-paying job or accepting a higher wage. The law also attempted to force individuals to work by declaring it a crime to give alms to the unemployed. In 1360, the punishment for violation of the work provisions by an individual under 60 years of age was fifteen days. In 1499, the law was modified to provide that violators were to be secured in the stocks without bread or water for three days and released (Chambliss 1964).

As the years passed, the vagrancy laws rarely were enforced. Feudalism was being rapidly replaced by an industrial factory economy. The new industrialists and merchants had little interest in tying workers to the land because they required a free and mobile workforce that was available to work in factories and shops. Serfdom gradually declined and was abolished in the sixteenth century.

The Chambliss essay is a case study of how the law of vagrancy initially served the powerful economic interests of feudal landlords and later shifted to protect the interests of the new merchant class. The other message from Chambliss's work is that the law of vagrancy discriminated against and disadvantaged the poor while favoring the "wealthy and the powerful" (Deflem 2008: 123).

In the United States, vagrancy laws historically adopted the language of English statutes and were used against the homeless, beggars, prostitutes, gamblers, the unemployed, gang members, and individuals regarded as a "nuisance." Vagrancy laws in the United States were employed as in England to control crime, to force individuals into the labor force, and to segregate undesirables from the rest of society by consigning them to "skid rows" and "red light districts" (Foote 1956). The laws' broad and elastic language eventually led to their being declared unlawful because they provided the police with an unconstitutional degree of discretion (*Papachristou v. Jacksonville,* 405 U.S. 156 [1971]).

Keep in mind that the conflict model views competition between groups as political as well as moral. Joseph Gusfield (1986), in his classic study of the temperance movement, argues that the "dry forces" primarily were composed of rural, middle-class evangelical Protestants who were threatened by the arrival of urban immigrant Catholics and German Lutherans. Although they lacked political and economic power, these immigrant groups posed a long-term threat to the dominance of rural Protestants. The Protestant groups responded by attempting to reform these "hard-drinking" and "immoral" immigrants and to encourage them to embrace middle-class American values.

In the 1840s and 1850s, rural, evangelical Protestant groups promoted abstinence from alcohol as a status symbol and as a central characteristic of middle-class America. At the beginning of the twentieth century, the United States was rapidly becoming increasingly urban and Catholic. Protestant groups feared their influence was slipping away and confronted the reality that they would soon lose political control. They responded by successfully pushing for passage of the Eighteenth Amendment to the Constitution, which prohibited the manufacture, sale, and transportation of alcohol. Gusfield argues the debate over prohibition, although formally about the dangers of "demon alcohol," really symbolized a struggle between the middle-class Protestant culture of abstinence and the immigrant, working-class drinking culture. The prohibition of alcohol assured Protestants that their way of life would be preserved despite the influx of Southern and Eastern Europeans (Gusfield 1986). A central target of the prohibition forces was the local saloons, which were the center of immigrant culture and political organizing. Immigrants were portrayed as threatening the American way of life as a result of their alleged immorality, criminal activity, Catholicism, and lack of work ethic. The anti-alcohol campaigns in the southern states targeted African Americans and working-class whites and in California targeted Hispanics (McGirr 2016).

The repeal of the Eighteenth Amendment fourteen years after its ratification marked a decline in the supremacy of Protestant middle-class abstinence as a sign of social acceptability and the simultaneous increase in the influence of urban immigrant groups and drinking culture. Can you find a contemporary struggle that is reminiscent of the conflict between Protestants and immigrant Catholics described by Gusfield?

The conflict approach asks us to consider who wins and who loses when considering the law and legal system. Critics of the conflict approach are understandably critical of the notion that law and enforcement of the law can be understood as nothing more than servants of the rich and powerful. You nonetheless should keep the critical perspective along with the consensus perspective in mind as you continue to read this textbook.

1.1 You Decide

Lon Fuller, in one of his well-known jurisprudential problems, recounts the dilemma of the "grudge informers." He asks the reader to assume the role of the Minister of Justice in a country of twenty million people (L. Fuller 1964: 245–253). The country was characterized by a peaceful and democratic government. A deepening economic depression led to the formation of various small activist groups divided by race, religion, and politics and to a breakdown of stability. The Headman and his Purple Shirt party emerged out of the disorder and promised to restore peace, order, and stability.

The Purple Shirts swept into power based on various falsehoods, misrepresentations, and the physical intimidation of the opposition, which kept many people away from the polls. After assuming power, the Purple Shirts did not change the constitution or civil and criminal codes and did not remove any government officials or remove judges from the bench. Elections were held as scheduled, and votes were accurately counted.

The Purple Shirts, however, subjected the country to a reign of terror. Judges whose decisions were in disagreement with the policy of the Purple Shirts were beaten and murdered. The laws were interpreted to enable the jailing of political opponents, and secret statutes were adopted, the content of which was known only to the Purple Shirt government elite. Retroactive statutes were adopted that declared as crimes acts that were legally innocent when committed. Opposition political parties were outlawed, and thousands of political opponents were executed following their criminal conviction or were assassinated. A general amnesty was declared for individuals who were Purple Shirt loyalists who had been convicted of crimes in defense of the "fatherland against subversion."

At one point, members of the former Socialist-Republican Party, which had been the most formidable opposition force to the Purple Shirts, were physically intimidated into transferring their property to Purple Shirt activists. These strong-arm tactics later were legalized by a secret statute ratifying the transfer of the property to members of the Purple Shirts.

The Purple Shirts subsequently were overthrown, and a democratic and constitutional government was installed. During the Purple Shirt regime, a number of individuals retaliated against individuals against whom they had grudges by reporting them to authorities. These individuals were accused of such acts as criticizing the government, listening to foreign radio broadcasts, associating with known opponents of the regime, hoarding more than the authorized amount of eggs and other food, and failing to report lost identification papers within five days. These acts were subject to capital punishment. In some instances, the penalties were imposed pursuant to "emergency" statutes adopted by the Purple Shirt regime, and in other instances, the penalties were imposed by legally installed judges without any written law.

As Minister of Justice under the new democratic government, you must decide whether the "grudge informers" who reported violations of the law should be prosecuted although they were following the law under the Purple Shirt regime.

1.2 You Decide

In *Wisconsin v. Yoder* (406 U.S. 205 [1972]), the U.S. Supreme Court addressed whether parents who are members of the Old Order Amish religion and the Amish Mennonite Church in Green County, Wisconsin, were constitutionally entitled to disregard the Wisconsin compulsory school law, which required all children to attend a public or private school until the age of 16. The defendants declined to send their children, ages 14 and 15, to public school beyond the eighth grade and were convicted of violating the compulsory-attendance law and fined $5 each. The defendants contended that sending their children to a public high school would expose them to a way of life that was contrary to tenets of the Old Order Amish and would endanger their salvation as well as the salvation of their children.

The Amish trace their origins to the Swiss Anabaptists in the sixteenth century and seek to return to the early Christian religion, which de-emphasizes materialism, competitiveness, and modern technology. They believe that salvation requires that they live a life in the church community separate and apart from the world and worldly influences. Adult baptism takes place in late adolescence, and at that time a young person assumes adult obligations.

The Amish object to formal education beyond the eighth grade because they believe that this exposes their children to an environment that is based on "self-distinction, competitiveness, worldly success and social life with other students." Amish society stresses "informal learning through doing; a life of 'goodness,' rather than a life of intellect; . . . community welfare, rather than competition; and separation from, rather than integration with contemporary worldly society." Once having obtained basic educational skills, the Amish believe that Amish young people do not require additional formal education. Education beyond the eighth grade takes the children away from the Amish community at a time when the children need to learn the skills required of Amish men and women. The Amish fear that exposure of their children to the temptations of the larger society while in high school will result in young people leaving the community and jeopardizing the continued existence of the Amish way of life.

The Amish community has preserved a way of life for over three hundred years that is based on farming and crafts. They reject telephones, automobiles, radios, and television and computers and possess distinctive dress and speech that sets them apart from the larger society.

There are as many as 351,000 Amish living in the United States and in Canada. They are in thirty-one states, although 60 percent live in Pennsylvania, Ohio, and Indiana.

The U.S. Supreme Court affirmed the constitutional right of the Amish to freedom of religion and to remain exempt from being required to educate their children beyond the eighth grade. The Court reasoned that "secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his [and her] integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child."

Justice William O. Douglas in a dissenting opinion objected that the Court decision addressed the religious rights of parents but disregarded the rights of Amish children who should be provided the alternative of either following the dictates of their parents or continuing to attend school. Justice Douglas pointed out that a child who is denied educational opportunity likely will find it difficult to reenter the larger society and to pursue another way of life and a career. "It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his [or her] child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. . . . It is the student's judgment,

(Continued)

(Continued)

not his [or her] parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny."

The Pennsylvania Amish subsequently reached an agreement with the School District of Lancaster that after the eighth grade, students could attend an Amish school where they would learn the skills required of the Amish.

Was the decision in Wisconsin v. Yoder *an example of the consensus or conflict approach to law? An example of the dysfunction of law? (see Norgren and Nanda 1996: 119–137). What of states that provide for religious exemptions from COVID-19 directives limiting "social gathering"? (see* South Bay United Pentecostal Church v. Newsom, *__U.S. __(2020).*

CHAPTER SUMMARY

The establishment and maintenance of order in society is based on a combination of informal and formal modes of social control. As society becomes more complex, greater reliance is placed on the formal mechanism of social control of the law.

There are various approaches to defining the law, each of which tends to reflect the perspective of the individual proposing the definition. One focus is on formal rules enforced by authoritative governmental institutions; other definitions focus on rules enforced by coercion or force.

The law, however defined, performs various functions in society: social control, dispute resolution, and social change. The law, despite its importance, also can be dysfunctional or have a negative impact on society. A clear example is the use of law as a mechanism of repression.

The legal systems of countries across the globe may be categorized as failing within various legal traditions. A tradition is an attitude about how law is made and should be applied and the process of legal change. The four primary traditions or families of law are the common law, civil law, socialist law, and Islamic law. International law plays a role in regulating the relationship between nation-states. There are various perspectives on analyzing a legal system. The focus may be on the study of legal principles, jurisprudence, or law and society.

The various approaches to studying the relationship between law and society generally can be categorized as reflecting a consensus perspective or a conflict perspective. Keep these approaches in mind as you read about theories of the relationship between law and society. In the next chapter, we review the primary theoretical approaches to law and society.

CHAPTER REVIEW QUESTIONS

1. Discuss the various approaches to defining law.
2. Distinguish between norms, mores, and folkways.
3. Compare and contrast the common law, civil law, and social law legal traditions.
4. Does international law have the central characteristics of law?
5. List the functions of law.
6. Compare and contrast the approaches to defining justice.
7. Distinguish between the study of legal doctrine, the study of jurisprudence, and the study of law and society.
8. Compare and contrast a consensus perspective with a conflict perspective on law. Which approach most accurately describes law in the contemporary United States?

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ANSWERS TO TEST YOUR KNOWLEDGE

1. False
2. True
3. True
4. True
5. False
6. False