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Theories of Law and Justice

TEST YOUR KNOWLEDGE: TRUE OR FALSE?

1. Both natural law and legal positivism consider an unjust law to be a valid law.
2. A legal system based on utilitarianism would provide economic benefits to economic elites that do not benefit most people in society.
3. A society based on Immanuel Kant's categorical imperative likely would provide medical care for everyone in society.
4. Henry Maine's theory that law progresses from "status" to "contract" is illustrated by the transition from slavery to wage labor.
5. Karl Marx viewed law as independent of the economic structure of society.
6. Max Weber made an important contribution to types of authority and to types of legal thinking.
7. Legal realism and sociological jurisprudence focus on factors outside the law to explain how judges decide cases.
8. Functionalism questions whether law is essential to the operation of society.
9. There is little relationship between a country's law and culture.
10. Statistical analysis on how judges decide cases in various areas of the law is an example of legal behavioralism.
11. Libertarianism favors increased government regulation.
12. Critical legal studies, critical race theory, and feminist jurisprudence all endorse the existing legal system.

Check your answers on page 64.

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INTRODUCTION

In this chapter, we review some leading theories of the origins and basis of law. These thinkers and schools of thought address a number of broad questions about the law. As you read this chapter, ask yourself what problem the theorist is attempting to explain and how the various approaches differ from one another. The problems addressed by these various theorists include the following:

- What factors account for the development of law?
- How have laws evolved historically?
- What are the philosophical principles on which law is based?
- Is there a relationship between law and society?
- Can law be used to impact and to reform society?
- What factors account for the decisions of judges and juries?
- What methods should be used to study law and society?
- Is law neutral, or does law serve certain interests in society?

LEGAL SYSTEMS

Before we turn to examine various theories on the origins, development, and purpose of law, it might be helpful to consider that the law is part of a *legal system* with various component parts. Martin Golding proposes that a legal system requires the “jural activities” shown in Table 2.1 (Golding 1975: 17).

Golding notes that not all legal systems satisfy these requirements.

In thinking about legal systems, we tend to focus on legal systems in the United States and in Europe. These legal systems have detailed, written civil and criminal codes drafted by legislatures, interpreted by a network of trial and appellate courts, and enforced by the police and other law enforcement agencies. Administrative agencies regulate areas such as banking, food and drug safety, education, and transportation.

There are other, less detailed systems of law that do not include all the elements thought to be required for a legal system. E. Adamson Hoebel describes the Comanche tribe, whose native land in the nineteenth century was in the headwaters of the Yellowstone and Missouri Rivers. The chieftains in charge of the tribe lacked formal legal authority and exercised little control over members of the tribe. There was no judicial or legislative authority or formal mechanisms for resolving disputes or for establishing the law. The law was enforced by each individual member of the tribe based on customary practice (Hoebel 1979: 127–141). Wife-stealing and adultery were prevalent and at times were used by warriors to assert their masculinity and strength. The warrior in most instances willingly paid reasonable restitution for the “adulterous wife.” If payment was not forthcoming, the husband was entitled to call on friends and neighbors or a “mighty warrior” to exact physical retribution. The husband, in turn, was subject to retaliation from the dead warrior’s friends and family.

Various Eskimo societies lack government, courts, police, or written law. Disputes tend to result from homicide, adultery, and marriage. Conflicts at times are settled as an alternative to blood revenge through wrestling, head-butting, and straight-armed blows to the side of

TABLE 2.1
Components of a Legal System

Laws	The laws define the formal rules regulating society.
Legislation	There is an agency for changing and making laws.
Enforcement	There is an agency for enforcing the laws.
Dispute resolution	There is an agency for settling disputes between individuals.

TABLE 2.2
Phases of Evolution for Legal Systems

Phase	Description
Pre-modern legal systems	These legal systems primarily are found in hunter-gatherer societies in which individuals share a common ethnicity and in which history and individuals are unified by face-to-face cooperation and by a communal lifestyle. Customary law regulates marriage, child-rearing, incest, homicide, and sexual offenses. Individuals resort to self-help to settle disputes.
Transitional legal systems	In the transition to an agricultural society, landowners accumulate wealth, and institutions develop to settle disputes over land, crops, employment, and the sale of goods. Agriculture leads to the development of transportation, banking, consumer goods, and educational institutions.
Modern legal systems	An extensive body of civil and criminal laws develops, and specialized agencies are required to regulate increasingly specialized areas such as banking, food and drugs, and the economy. A system of local, national, and specialized police forces is instituted. Procedural rules for bringing legal cases and the law of evidence are developed, and the court system provides for a system of appeals to ensure fair results. Legal precedents are relied on by courts to ensure predictability and continuity of results.

the head. Other Eskimos settle disputes through “song duels.” The winner is decided by the response of the crowd. In West Greenland, the singer is accompanied by a chorus comprising the entire household (Hoebel 1979: 67–99).

As you can see, legal systems are diverse and different. Legal systems do not evolve by accident. There is fairly widespread acceptance of the notion that legal systems develop in response to the nature of society—some would say in response to the economic requirements of society. Developmental models of law are premised on the view that legal systems move from “simple” to “complex” forms as society evolves. Law, in turn, also can influence society by prohibiting destructive practices and providing conditions for economic development (R. Schwartz and Miller 1975).

As shown in Table 2.2, we can sketch three phases of evolution for legal systems (Hoebel 1979).

Legal philosophers have developed various theories to explain the origin, nature, development, and purpose of law in these diverse systems of justice. Most theories fall far short of providing a comprehensive explanation that applies to all types of legal systems.

These theories are best thought of as ways of thinking about law. You will encounter references to various theories throughout the remainder of the text. We begin with natural law.

NATURAL LAW

The **natural law** school views law as a set of universal principles applicable to all societies in all historical epochs. These principles are discoverable through reason. The ideal society should be ordered in accordance with natural law principles, which reflect the divine will for the ordered plan of the universe. Positive law that is inconsistent with natural law is considered to be unjust and to lack legitimacy and is not to be obeyed.

The notion of natural law is nicely captured by Aristotle, who in describing natural law notes that it “everywhere has the same force and does not exist by people’s thinking this or that.” The Roman philosopher Cicero writes that “there is in fact a true law, namely right reason, which is in accordance with nature, applies to all men and is unchangeable and eternal.” Cicero lists various principles drawn from the law of nature including the obligation to avoid harming others, the right of self-defense and to protect others from harm, and the prohibition on cheating (J. Kelly 1992).

Thomas Aquinas (1225–1274) in *Summa Theologiae*, written between 1265 and 1274, articulated a comprehensive religious statement of natural law. Aquinas contends there are four categories of law: the eternal law (known to God); natural law (eternal law, which may be known to human beings); divine law (revealed in scripture); and human law (law enacted by government authorities). A human law that conforms to eternal or natural law is just because it serves the good of humanity; a law that fails to conform to eternal or natural law is “no law at all.”

Aquinas does not accept that any law that is enacted has the status of law. An unjust law is “violence” rather than “law.” The categories of unjust law include laws intended to benefit lawmakers rather than the common good, laws intended to benefit society but that unfairly burden certain members of society, and laws that go beyond the legal authority of the lawmaker.

Natural law often is identified with the Roman Catholic Church or with other religious traditions although there is not necessarily a relationship between religion and natural law. Secular humanists, for example, argue there are universal values all societies should aspire to achieve, including freedom from hunger, protection against violence and abuse, and access to education and health care. The difficulty, of course, is reaching an agreement on the content of natural law. Natural law experienced a renaissance in the twentieth century, providing an intellectual foundation for the trials of Nazi war criminals at Nuremberg following World War II and for the United Nations adoption of various documents on international human rights. Oxford University legal theorist John Finnis revived natural law theory in his book *Natural Law and Natural Rights*. Finnis argues there are “self-evident” principles that are “really good for human persons” (Finnis 2011). We can see echoes of natural law in the contemporary debate over the “right to die.”

Legal positivism, in contrast to natural law, finds law in the “four corners” of government, laws, orders, and enactments.

LEGAL POSITIVISM

John Austin (1790–1859) was a British philosopher known for his advocacy of **legal positivism**. Positivism is based on the Latin *positum*, which means law as set forth or posited. Austin articulated his views in a set of lectures at the University of London published in 1832 under the title *The Province of Jurisprudence Determined*.

Austin pioneered a branch of legal positivism that is variously termed *formalistic*, *conceptualistic*, or *analytical jurisprudence* (Schur 1968: 26).

Austin was unconcerned with the “goodness” or “badness” of legal rules and considered such questions “extra-legal” (Schur 1968: 26). He took the position that law is the command of the sovereign. A command is an order accompanied by a threat to impose a disability or punishment for disobedience. He believed that even an immoral law enacted in accordance with established procedures should be obeyed. Austin argued to proclaim that laws that are bad or contrary to the will of God are “void and not to be tolerated, [and to obey such laws] is to preach anarchy”



Saint Thomas Aquinas by Carlo Crivelli, 1476.
The York Project via Wikimedia Commons

PHOTO 2.1 Saint Thomas Aquinas (1225–1274) was an Italian Dominican friar and priest who in *Summa Theologiae*, written between 1265 and 1274, articulated a comprehensive religious statement of natural law.

(Austin 1995: 157, 186). There is some confusion because of Austin's use of the term *sovereign*, which he considers to include any individual or specified group of individuals to whom most of society "has the habit of obedience." Contemporary legal scholar Donald J. Black broadens Austin's definition of law by stating that law is "governmental social control." Black's definition has the advantage of clearly indicating that the sovereign includes the executive and legislative branches of government as well as the courts (D. Black 1976).

Austin's theory of legal positivism was anticipated by the famous English political philosopher Thomas Hobbes (1588–1679), who in *Leviathan* viewed people as originally living in a state of nature in which life was "nasty, brutish, and short." Individuals in order to escape this deadly environment formed a social contract in which they traded their freedom for the security of rule by a strong sovereign. The law for Hobbes simply is the commands of the sovereign with which individuals are contracted to obey. He wrote that "[a] law . . . is the speech of him who by right commands . . . to others [what is] to be done or omitted" (J. Kelly 1992: 237).

The benefit of positivism is that it clearly states what constitutes the law and where to find the law. Positivists do not necessarily embrace the existing law; they merely state that it should be obeyed until it is changed or modified.

Hans Kelsen (1881–1973) was an Austrian scholar who taught in Europe and later at Harvard Law School. Kelsen advocated what he called the "pure theory of law." He called his theory a pure theory because he argued that morality should play no role in evaluating the legitimacy of a law. A law is valid so long as it is obeyed (Kelsen 1967).

H. L. A. Hart (1907–1992) endorsed legal positivism although he argued that the law should be viewed as comprising both primary rules (e.g., obligations to act or not act) and what he terms "secondary rules." Secondary rules include rules of recognition that establish standards for identifying what is recognized as a law (e.g., constitutional requirements for a law such as non-discrimination), a rule of adjudication for determining whether a rule has been violated (e.g., courts), and a rule of change (e.g., how rules are modified) (Hart 1961).

Hart's contribution is to argue that the law is more complicated than whatever the sovereign commands.

You can see that there is a tension between natural law, which holds that only laws that are consistent with the natural order are legitimate, and positivism, which stipulates that laws enacted in accordance with established procedures are legitimate and are to be obeyed. This tension often arises when discussing civil disobedience (see Chapter 10).

UTILITARIANISM

Jeremy Bentham (1748–1832) is best known for his utilitarian philosophy and the notion that law should maximize the "greatest good for the greatest number." This greatest happiness principle is the foundation of **utilitarianism** and is based on the belief that individuals in their personal lives act to maximize their pleasure and to minimize their pain. Bentham argued this same principle should guide social policy.

Bentham was a proponent of *legal instrumentalism*, the view that law should be designed to achieve specific goals and purposes. He rejected the notion of natural law and natural rights as "nonsense on stilts" because he argued that rights only exist when embodied in concrete law. He asked how rights can be said to exist when one person's right to food and a loaf of bread may result in the denial of another's right to food and a loaf of bread. Bentham noted that rights inspire people to passionately pursue what they believe they are entitled to possess when the role of law should be to discourage passion and competition.

Martin Golding illustrates Bentham's philosophy by noting that if the fine for "overtime parking" is one dollar and the cost to park in a parking garage is two dollars, then the incentive to violate the law will not be counterbalanced by the incentive to obey the law. On the other hand, Golding notes that a ten-dollar fine may be more than is required to persuade individuals to park in the garage (Golding 1975: 77).

Bentham, along with Italian criminologist Cesare Beccaria (1738–1794), was critical of what he viewed as the lack of fairness in the criminal justice system. Defendants were incarcerated without charge, judges and prosecutors were corrupt and extracted bribes, confessions were obtained through torture, and individuals were incarcerated in atrocious conditions. The death penalty in England was imposed for more than two hundred crimes, including for pickpocketing and stealing food, and sometimes individuals were disemboweled or dismembered before being executed.

Beccaria, in *On Crimes and Punishments* (first published in 1764), argued that criminal sanctions should be proportional to the offense and designed to deter the individual offender and other individuals from committing a crime. The purpose of punishment was not revenge or suffering. Beccaria argued an effective punishment was required to be severe, swift, and certain. The severity of the punishment should slightly outweigh the pleasure of the crime. Punishment beyond this point is unnecessary, excessive, and inhumane. A swift and certain punishment reinforces the connection between the crime and the punishment (Beccaria 1988).

Beccaria's ideas spread across Europe to the United States and inspired Bentham to criticize American criminal justice policies. Utilitarianism continues to have an influence in the debate over deterrence and punishment (see Chapter 9).

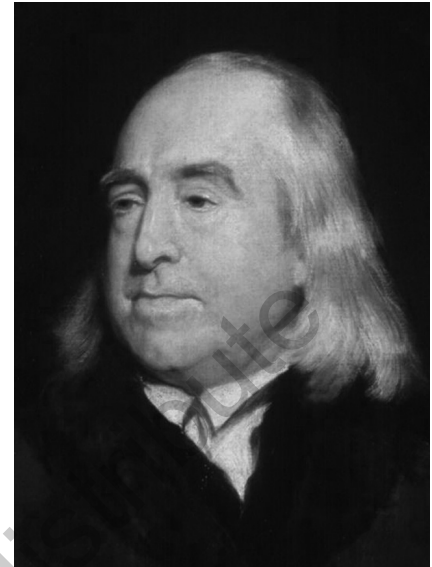


PHOTO 2.2 Jeremy Bentham (1748–1832) was an English social theorist and social reformer known for his utilitarian moral philosophy.

THE CATEGORICAL IMPERATIVE

In 1785, German moral philosopher **Immanuel Kant** (1724–1804) wrote *Grounding for the Metaphysics of Morals*, which was intended as an alternative approach to utilitarianism.

Kant believed human beings are capable of ordering their life based on reason and are not controlled by emotion and impulse. He argued human beings should rely on their capacity for reason and self-consciously act with respect and regard for all individuals at all times and to act as if this was a universal law of nature. Kant writes that human beings are worthy of absolute respect because they are rational and reasoning: “I say that man, and in general every rational being, exists as an end in himself, not merely as a means for arbitrary use by this or that will” (Kant 1993: 30). This “formula of humanity” leads Kant to formulate what he terms the **categorical imperative**: “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.” Kant’s categorical imperative dictates that we treat all human beings, whoever they are and wherever they live, with respect because of their rational capacity (Sandel 2009: 122).

Kant treats human beings as “ends in themselves” and criticizes utilitarianism for a willingness to treat human beings as a “means to an end” (Sandel 2009: 110). For example, Kant would condemn the utilitarian notion that health care should be devoted to the young rather than to the old because the young have a longer life expectancy than the old and likely will make a greater contribution to the future of the country. Law that lacks a moral foundation should not be obeyed because it is the command of the sovereign.

The European historical school, discussed next, was yet another reaction to natural law. This school explained law based on historical forces.

HISTORICAL SCHOOL

The nineteenth-century **historical school** directly linked law to society and located the source of law in the historical development of society. As society develops industrial factories, banking, transportation, and large-scale food production, the historical school argued the legal system

responds by developing laws and regulations that are not required in a simpler agricultural society. For example, once individuals had begun to work in factories and to purchase food at stores or at restaurants rather than gather their own food, a system of food safety inspection and rules was put into place.

Friedrich Carl von Savigny (1779–1861) was an important early advocate of studying law from a historical perspective. Savigny was a German academic at the University of Berlin who researched the history of Roman law and the influence of Roman law on contemporary law in Europe. He rejected the notion there was a uniform and timeless natural law and also dismissed the notion that law was the product of the command of a sovereign ruler. Savigny, instead, contended that law was linked to society and reflected what he termed the “spirit” of the people, which reflected the values, customs, and beliefs of a society. The ruler would have a difficult time imposing a law that conflicts with the “spirit” of a society (Savigny 1975).

Sir Henry Maine (1822–1888) was an academic at Cambridge University in England who published his lectures in the book *Ancient Law*. Maine argued legal scholars should study the historical evolution of the law, and in his lectures, he traced the development of law from ancient societies to the nineteenth century. He argued societies, although differing in certain respects, evolve in accordance with similar patterns.

Maine’s most famous observation is that society develops from family and status to contract. In a family-based society, individual privilege and opportunity are based on family prestige, power, and reputation. The father of the family exercises absolute authority over his wife and children, and all property is in his name.

Maine argues that as society evolves, powerful families lose their grip on power. Social relations come to be based on contracts or signed agreements between individuals. Maine illustrates his argument by noting that the “status” of the slave is replaced by a contractual relationship between servant and master. Feudal serfs are superseded by unionized workers whose union negotiates their conditions of employment. Maine’s most famous observation is that “the movement of progressive societies has hitherto been a movement from status to contract” (Maine 1970: 165).

Herbert Spencer (1820–1903) wrote at the same time as Henry Maine and provided a detailed description of the historical relationship between law and society. He sketched five stages of legal evolution and, like Maine, believed the process of industrialization leads to a legal system based on inherited status and privilege being replaced by a legal system based on individual equality, rights, and opportunity. A system of laws emanating from the command of the sovereign and on religious principle inevitably would be replaced by a legal system based on the “consensus of society.” Spencer believed that as society develops, there increasingly is less need for government other than to provide public safety (Spencer 1884).

Spencer was an adherent of Charles Darwin and viewed the biological theory “survival of the fittest” as a model for society. He greatly influenced a number of scholars, including William Graham Sumner (1840–1910) of Yale University who is strongly identified with “social Darwinism” and advocated self-reliance and rugged individualism (Sumner 1911).

Sumner articulated a harsh philosophy based on economic competition, the free market, and a limited government that did not intervene to protect the poor and disadvantaged. He opposed government-supported education, health care, and support for the poor and disadvantaged because these activities interfered with the law of natural selection.

CLASSICAL SOCIOLOGICAL THEORISTS

The three leading early sociologists—Émile Durkheim, Max Weber, and Karl Marx—wrote on the relationship between law and society. **Classical sociological theory** accepts the notion that law and society interact with one another. Marx and Durkheim, in particular, theorize that law is influenced by society and that law changes in accordance with the influences of society.

There are few thinkers whose work has been as influential as that of **Karl Marx** (1818–1883). You undoubtedly are familiar with the basic tenets of Marxism. Marx described society as developing through various socioeconomic stages although he concentrated on the transition from capitalism to communism.

Marx's primary focus was the industrial capitalism that existed in England. Under capitalism, the bourgeoisie own the *means of production*, such as tools, machinery, and factories. The proletariat or workers own almost no property whatsoever and work under exploitative conditions in the factories. The bourgeoisie perpetuate this inequity because of their interest in exploiting the workers and maximizing their profits.

Marx argued that under industrial capitalism the elites own the means of production and the working class works long hours for subsistence wages in unsafe conditions. Marx viewed the law as part of the *superstructure*, which is determined by the economic relations (the economic base) between individuals in society. Marx wrote in *The Poverty of Philosophy* (1900: 197) that “legislation . . . never does more than . . . express in words, the will of economic relations.” The law, on the surface appearing to be fair, serves the interests of capitalism. Legal rules are interpreted and used by the economic elites to maintain their control of property and to induce a false consciousness among the proletariat by convincing them that society is fair and just. Marx addressed the bourgeoisie in his famous *Communist Manifesto* and wrote that “jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economic conditions of existence of your class” (Marx and Engels 1955: 47).

Marx wrote a series of newspaper articles criticizing the Forestal Theft Act of 1837 adopted in the Rhineland and similar laws adopted in other German states. The law prohibited the peasantry from engaging in their traditional practice of gathering wood and other materials to help support themselves and to warm themselves in the winter months. The rapid growth of the German economy meant that this material was needed by business for the construction of ships, machinery, and roads. Marx pointed to the law as an example of how law is used by the economic elites to promote their own self-interest. He wrote that criminalizing the gathering of loose wood on the ground resulted in the “sacrifice of the poor to a lie.” Marx also condemned a series of laws censoring the press, arguing that the laws were intended to punish opinions critical of the government (Trevino 2008: 102).

Marx, in *A Contribution to the Critique of Political Economy* (1972: 263), predicted that capitalism would collapse and be replaced by communism, the “dictatorship of the proletariat,” based on the principle of “from each according to his ability, to each according to his needs.” In this stage, private property is abolished, and in this utopian and blissful society, there is no need for law. Marx's theory of “dialectical materialism” is a dialectic that views the revolutionary clash between capitalism and labor as inevitable.

Max Weber (1864–1920) was a prominent German professor of political economy and is regarded as one of the most influential and significant sociological thinkers of the modern age. Weber's most important contribution to law and society is his discussion of political domination, which he defines as the probability that specific commands will be obeyed by a group of persons. Compliance may be obtained through the physical or psychological coercion of reluctant members of the group. A second, less costly way to obtain compliance is through authority or because the commands of a leader are viewed as “rightful” or “deserved.” Weber identifies three types of authority, which help us understand different types of legal reasoning and why people obey the law. In reality, any ruler combines aspects of all three of these types of authority (Weber 1954).

Types of Legal Authority

Charismatic authority. A charismatic authority is an individual whose pronouncements are obeyed because of what are viewed as his or her extraordinary qualities whether based on magic or supernatural or heroic powers of connection with God. The charismatic authority may make decisions based on his or her insights, intuition, or revelations and is not limited

by precedent, logic, or consistency. Weber's primary examples of charismatic authority are the Hebrew prophets Amos, Isaiah, Jeremiah, Ezekiel, and Hosea.

Traditional authority. The legitimacy of traditional authority is based on the status of an individual's office or position, typically an inherited status. Examples are the pharaoh and the feudal lord. The ruler has discretion to decide cases and to make policy based on his or her discretion.

Rational-legal authority. Individuals exercising rational-legal authority come to power in accordance with established procedures and make decisions based on objective and impersonal rules embodied in written documents. Such an individual is obeyed because of the legitimacy of the rules on which his or her decision is reached rather than based on personal loyalty to the ruler.

Weber provides a definition of law emphasizing that law, unlike custom or ethical guidelines, is backed by the power of coercion. "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 1978: 34).

Weber proceeds to develop four ideal types of legal thinking (described as follows). In Weber's typology, legal procedures are either formal or substantive. Formal law proceeds in accordance with established and uniform rules, regardless of the outcome of the analysis. Substantive law involves a case-by-case analysis. Legal procedures also may involve rational or irrational law. Rational procedures involve logical analysis or an established method of analysis. Irrational procedures involve magic, divine revelation, or the supernatural.

Types of Legal Reasoning

Formal irrational thought. Established and strictly required procedures are employed by charismatic or traditional authorities although decisions are irrationally derived without explanation and are based on magic, divine revelation or guidance, or personal insight. A commonly cited example is the Azande tribe in Sudan in which an individual's innocence or guilt is determined by the reaction of chickens who are fed poison in accordance with a ritualistic practice conducted by a religious figure.

Substantive irrational thought. Decisions are made by a charismatic and traditional authority on a case-by-case basis and are guided by ethical, religious, and political considerations rather than on the basis of general rules. There is no concern with consistency between various judgments or with offering an explanation. The legitimacy of the decision is based on the wisdom of the lawgiver. Weber notes this mode of decision-making resembles the *khadi*-justice, or *qadi*, the Muslim judge who arbitrates disputes between buyers and sellers in the market. An example is the biblical story of King Solomon, who is prepared to divide a child in half and give each woman who claims motherhood a portion of the body. In the end, King Solomon gives the child to the woman who wants the child to be given to the rival woman so that the child will be kept alive. The biblical story recounts that the woman who is awarded custody, in fact, is the mother of the child. King Solomon provides no reason for his judgment, but bases it on divine inspiration (Turkel 1996).

Substantive rational thought. Substantive decisions are made by charismatic and traditional authorities and are based on principles drawn from non-legal, political, and religious sources. There is a concern with consistency with religious, ethical, or political ideals rather than with the "factual truth" of the matter. Weber had in mind the Buddhist emperor Ashoka (ca. 264–226 BCE), whose decisions followed the religious and spiritual principles of the Buddha.

Formal rational thought. Decisions are based on logical analysis of legal rules found in legal sources with little concern for moral or religious considerations. Universal rules are set

forth in written documents and applied in a uniform fashion. Outcomes have a high degree of predictability. A crucial aspect of formal rational thought is the development of a secular legal system that is separate from religious courts.

Weber connects law to society when he argues that formal rational thought made an important contribution to the development of modern European industrial capitalism. He does not contend that there is a causal relationship between the economy and law. The law is shaped by social, cultural, and political factors. He instead argues that economic development is encouraged by an insistence on clear, certain, definite, and predictable legal rules that regulate relationships between people. Formal legal rationality nonetheless is crucial to the development of industrial capitalism. Individuals can enter into contracts to sell goods when there are universally established and accepted rules regulating the delivery of goods and the payment of monies, and sellers are confident that courts will award damages for a breach of the contract. The number of laws increases as society grows more complex, and the challenge is to ensure that these rules are communicated and explained. Weber recognized that formal rationality can be at odds with substantive justice. Contracts, for example, once entered into by the parties generally are enforced regardless of individual circumstance. Consider the situation of a young person who confronts a difficult financial situation but who nonetheless is legally required to continue to repay a student loan.

Émile Durkheim (1858–1917) is a third leading legal sociologist. Durkheim is considered to be the first French sociologist and was named a professor at the Sorbonne in Paris, where he devoted himself to the scientific study of society. Durkheim in *The Division of Labor* explored social solidarity, the “glue” that keeps a society together.

A society is united by a sense of solidarity, and societies have different types of solidarity as they evolve. Durkheim viewed law as reflecting the type of solidarity in a society. *Mechanical solidarity* exists in small, homogeneous preindustrial societies in which individuals share attitudes, beliefs, values, lifestyles, and habits. People generally engage in identical types of labor, hunting, crop raising, handicraft making, and child-rearing. Individuals adhere to the same values, religion, and lifestyle, and there is little tolerance of dissent or individuality. Durkheim terms the beliefs and sentiments common to the average members of a society “collective consciousness.” Durkheim writes that “we should not say that an act offends the common consciousness because it is criminal, but that it is criminal because it offends that consciousness” (Durkheim 1964: 40).

Organic solidarity, in contrast, is found in large-scale, diverse societies with an economic division of labor. Social cohesion is based on the interdependency of individuals rather than on a shared sense of community and common values. Organic solidarity is characteristic of large, industrial societies. Individuals, although they have different points of view and values, are tied together by the fact that each person is able to perform a task required by other individuals.

Durkheim theorized that societies evolve from mechanical to organic solidarity. Each of these forms of social organization is characterized by a different approach to legal regulation. Mechanical solidarity is associated with repressive sanctions. Repressive penalties are severe punishments that reflect moral outrage and anger over acts that offend social values. Infractions of the rules are an attack on the values that unite society, and for that reason, they are harshly punished to serve as a deterrent against the violation of these rules.

Organic solidarity is characterized by restitution. The stress is on financially compensating individuals for the injuries they suffered. The goal is to achieve reconciliation and restorative justice and to maintain positive social relations between individuals. The primary legal form in societies based on organic solidarity is the contract, which people use to order their interdependent relationships with one another. Criminal punishments involve imprisonment and fines rather than physical punishment because the law recognizes the humanity of offenders. A society based on organic solidarity is more complex than a society based on mechanical solidarity and as a result will have more laws and agencies regulating activities ranging from banking and taxation to transportation.

Durkheim notes we cannot observe a society's form of solidarity. The type of law, however, provides insight into the type of social organization in a society.

LEGAL REALISM

American **legal realism** was a movement that argued that the focus should be actual functioning of the law. Realism united a diverse group of scholars, all of whom believed legal decisions were explained by extra-legal factors, such as a judge's experiences, prejudices, and psychology and powerful social interests and forces, rather than by legal logic or precedent. Scholars accordingly should focus on the "real" reasons that explain the decisions of judges and juries.

Oliver Wendell Holmes Jr. (1841–1935) was son of a justice of the Massachusetts Supreme Judicial Court. He followed in his father's footsteps as a judge on the Massachusetts high court. In 1902, President Theodore Roosevelt appointed Holmes to the U.S. Supreme Court, where he distinguished himself as one of the greatest justices in the twentieth century. Holmes's legal philosophy later became known as "legal realism."

Holmes challenged legal formalism, the notion that legal rules are the product of logical analysis and that the outcome of cases is dictated by the mechanical application of legal rules. He argued the "life of the law has not been logic, it has been experience."

According to Holmes, judges first find a result that reflects their own personal prejudices, political philosophy, or public policy preferences and then find a legal rule that supports and justifies their personal viewpoint. As Edwin M. Schur notes, Holmes argued judges "make" rather than "find" the law (Schur 1968: 43). His philosophy became known as legal realism because he advocated looking at how law actually functioned rather than focusing on the outcome that would result by applying the legal rule.

Law, according to Holmes, is not a mathematical enterprise in which there is a mechanical and predetermined result. In most instances, there is conflict over the legal rules, and the outcome of a case is dictated by powerful political and economic interests. He wrote that "ultimate victory" invariably belonged to the "strongest."

Holmes looked at how courts actually decided cases rather than focusing on legal rules. He wrote that predictions of what courts "will do in fact and nothing more . . . are what I mean by the law." He stated that the lawyer, in predicting judicial decisions, should look at the law from the view of the "bad man" who does not care about moral considerations or ethical rules and only cares about the outcome of the case. In other words, the focus should be on the actual functioning of courts rather than an analysis of legal rules (Holmes 1938: 461).

Holmes argued that juries also decide cases based on their sense of what is right and what is wrong and do not automatically follow the law in reaching a result.

Holmes's focus on how the law actually functioned rather than on legal rules on the books inspired scholars like Karl Llewellyn (1893–1962), E. Adamson Hoebel (1906–1993), and Jerome Frank (1889–1957). Llewellyn and Hoebel are known for *The Cheyenne Way* (1941), their empirical study of the law of the Cheyenne Indians. In *Law and the Modern Mind* (1930) and *Courts on Trial* (1949), Frank focused on judges and juries in trial courts rather than on the decisions of appellate courts and argued lawyers were so intent on winning, the testimony of witnesses was so inaccurate and biased, and the evidentiary record was often so incomplete that the trial process did not necessarily result in a fair and balanced verdict. He compared the unpredictability and reliability of a trial to throwing pepper in the eyes of a surgeon during an operation, and he advocated a radical reform of the trial process. Frank suggested that Freudian psychological analysis might be a fruitful approach to explaining the behavior of judges. Thurman Arnold in a book that continues to be important argued that law plays a symbolic function by focusing attention on the ideals that unite society and by diverting attention from society's shortcomings (Arnold 1962: 23–70).

Holmes and the legal realists were early advocates of the view that is widespread among legal academics today that there is a difference between law on the books and law in action and that judicial decisions are based on factors other than legal logic. He advocated demystifying

the law and viewing legal rules as reflecting choices about public policy rather than viewing legal rules as the product of rationality and logic.

Legal realism made an important contribution in calling for legal scholars to go beyond legal rules and to undertake an empirical study of the decisions of judges and jurors. The realists also believed society continuously evolved and that the law must be adjusted to these new developments. Their concern with public policy and legal reform inspired a number of the individuals who worked for President Franklin Delano Roosevelt during the New Deal.

SOCIOLOGICAL JURISPRUDENCE

Roscoe Pound (1870–1964), professor of general jurisprudence at Harvard Law School, first articulated the ideas that formed the foundation of **sociological jurisprudence** in a 1906 address to the American Bar Association. He argued law should be evaluated based on the “results it achieves” rather than based on the logical consistency of legal rules. The true purpose of the law is to make people’s lives easier and happier. He rejected the notion of law as a “slot-machine” in which the judge pulls the lever and a logically consistent decision emerges from the machine. Pound wanted the law to be engaged in “social engineering,” directed at solving societal problems rather than focusing on the logical consistency between legal rules.

Pound wrote during a period of urbanization, immigration, concentration of economic power and growing poverty, and exploitation of labor. His purpose in writing was to get lawyers and judges to examine the impact of law and to use the law to address social problems.

Pound urged lawyers and judges to consult the new and growing literature in political science, sociology, and economics and to analyze the relationship between law and society, a project that he labeled sociological jurisprudence. Pound advocated an action-oriented and practical jurisprudence in which laws and judicial rulings were designed and evaluated based on their impact on society rather than based on legal analysis (Pound 1908: 605).

Pound drew on psychology to identify various social interests—such as physical safety, economic progress, and environmental conservation—that were central to society and theorized that the function of law was to secure these interests to individuals and to adjust the competing claims, such as demand for economic development, against the claims of environmentalists to conserve resources.

A lasting impact of sociological jurisprudence is to link the study of law and the social sciences and to pioneer the use of social science data in legal briefs and decisions. Sociological jurisprudence also is important for drawing attention to the gap between law on the books and law in the books.

Oxford professor A. V. Dicey (1835–1922) in a series of lectures at Harvard Law School argued that the development of English law was dependent on public opinion. He contended that at any given time there is a dominant set of beliefs, sentiments, and accepted principles, which together “make up the principle of public opinion of a particular era.” These ideas shape the law and originate in the ideas of a single thinker or group of thinkers. Dicey had in mind the influential thinkers who have changed the way we look at the world—for example, Charles Darwin with his theory of evolution. These ideas are repeated and spread by disciples. The success of these new ideas in persuading public opinion depends on the strength of the ideas, the enthusiasm of adherents, and, most important, the changed circumstances that cause people to question their beliefs. Shifts in public opinion and the resulting change in the law move at a slow pace except when society is confronted with an emergency or crisis. Judges, because of their legal training, view the law and society as evolving in a deliberate and gradual fashion and are particularly reluctant to embrace rapid change.

Legal innovation, according to Dicey, typically is the product of the ideas that lawmakers acquire in their youth and only implement decades later when they assume positions of influence and power. The ability of the older generation fully to implement their ideas is limited

by the influence exerted by the younger generation who, because of their different social circumstances, typically hold a different point of view. A successful change in the law, however, encourages a change in public opinion, which, in turn, becomes receptive to even more far-reaching reforms (Dicey 1905: 1–42).

FUNCTIONALISM

Functionalism was the predominant approach to law and society in the 1940s and 1950s. The origin of this approach can be traced to the work of French scholar Auguste Comte (1798–1857). Comte made an analogy between the biology of the body and the social organism of society. Each of the various parts of the body performs a function that is essential to the maintenance of the body just as various social practices and institutions perform roles that maintain society. Education, for example, is important for transmitting skills, attitudes, values, and history.

Functionalism views law as performing an important function that assists in keeping the social system in equilibrium and performing in an effective fashion. Émile Durkheim, discussed earlier in the chapter, provided a unique perspective on crime, arguing that deviance plays an important role in ensuring a healthy and fully functioning society. Durkheim asserted that the condemnation and punishment of deviance helps to reinforce social values, unites people against a common threat, creates jobs for criminal justice professionals, and may lead activists to protest the law and to bring about social change.

Functional analysis was applied by prominent social anthropologist Alfred R. Radcliffe-Brown (1881–1955) and by Bronislaw Malinowski (1884–1942) in his study of the Trobriand Islanders (Malinowski 1982: 46–47).

An interesting modification was introduced by sociologist Robert K. Merton. Merton called attention to the fact there are “manifest functions” and “latent functions.” Manifest functions are those “consequences which make for the adaptation or adjustment of the system.” Latent functions are those outcomes that are “neither intended nor recognized.” Merton also notes that a social practice or institution may have a dysfunction, which “lessens the adaptation or adjustment of the system” (Merton 1968).

Talcott Parsons (1902–1979) was perhaps the most influential advocate of functionalism. Parsons, in his 1951 book *The Social System*, viewed society or any part of society as a social system. Law may be viewed as a subsystem of society or, in the alternative, studied as a separate social system. Parsons wrote at a high level of abstraction, and in this discussion, we address only the broad generalities of Parsons’s complicated functional theory in which law was only one of a number of important components.

Parsons theorized that to survive and prosper, social systems and subsystems must satisfy four functional imperatives (AGIL):

1. The law performs an **adoptive** function by continually adjusting subsystems to ensure that they address current challenges.
2. The legal system helps achieve normative consistency, promoting values such as liberty and freedom and respect for individuals that are cherished by most Americans (**goal attainment**).
3. The law performs an **integrative** function by settling disputes and by maintaining harmony and order between the various subsystems.
4. It also functions as a form of social control, meaning that the law regulates what is considered deviant behavior and channels individuals to act in a lawful fashion (**latency**).

The law, in functional analysis, is part of the glue that binds society together and keeps society from breaking apart. Consider how the law settles disputes between consumers and

businesses and between labor and business and has responded to changed circumstances by prohibiting unscrupulous business practices and by outlawing the exploitation and abuse of workers.

Karl Llewellyn, whom we discussed earlier, developed the notion of “law-jobs” to describe the various functions performed by law. Llewellyn’s approach was followed by important scholars E. Adamson Hoebel and J. Vilhelm Aubert (1922–1988). Lawrence M. Friedman lists a number of functions performed by the law (L. M. Friedman 1977: 17–20). This includes settling disputes, social control, creation of norms and values, recording the thousands of transactions that take place, announcing the rules and standards that help people decide how to act, and providing people and groups with the fair adjudication of disputes.

Functionalism’s view that law maintains social balance and equilibrium is at odds with theories that view society in constant stress, conflict, and disagreement.

We next turn our attention to more recent approaches to understanding law. English jurisprudential scholar Roger Cotterrell notes that these approaches owe much to the work of the legal realists (Cotterrell 1989: 207).

LAW AND CULTURE

The study of law and society is described as having taken a “cultural turn” in recent years with an increased interest in the relationship between law and culture (Calavita 2016: 173–177). The examination of the relationship between law and culture, or **cultural law**, is traced to Baron de Montesquieu (1689–1755), who is best known for theorizing that political stability is most effectively guaranteed by the separation of powers and checks and balances between various branches of government (Montesquieu 1886).

The study of “cultural law” examines how a country’s legal culture reflects, reinforces, and in some instances is at odds with a society’s larger culture. Culture is recognized as a “tricky” concept to define and is broadly conceived as a “way of looking at the world” that is a product of a society’s history, values, political and religious traditions, and social, economic, and political structure. Culture, in turn, helps to create a “legal culture,” or way of looking at the role of law in society (L. M. Friedman, Pérez-Perdomo, and Gómez 2011: 117–170; Geertz 1989: 214–216; Nafziger, Paterson, and Renteln 2010). An example of the study of the relationship between law and culture is an early study of European countries that identified distinct differences in how individuals in various countries viewed the law. Ninety-three percent of the British strongly disagreed with the assertion that it is acceptable to break a law you disagree with so long as you do not get caught. At the other end of the spectrum, roughly one-quarter of the respondents in France, Luxembourg, Belgium, and Portugal strongly agreed with this proposition. The differences among the views of the law in these various European countries were attributed to various factors, including the degree of trust in a country for the government (Gibson and Caldeira 1996). Another study found United Nations diplomats from countries whose population accepted a high level of corruption tended to violate parking rules more often than United Nations diplomats from countries with less tolerance for corruption (Fisman and Miguel 2006).

The influence of culture in a U.S. Supreme Court decision is illustrated by *Reynolds v. United States* in which the Court invoked culture as part of the basis for affirming the constitutionality of a prohibition on polygamy in the United States as well as in the territory of Utah. Polygamy, according to the Court, is alien to European culture and “has always been odious among the northern and western nations of Europe, and . . . was almost exclusively a feature of the life of Asiatic and of African people. . . . It [polygamy] is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world” (*Reynolds v. United States*, 98 U.S. 145 [1878]). Keep in mind that plural marriage across the world as well as in isolated communities in the United States was and continues to be an accepted cultural practice that in some instances is viewed as biblically inspired (L. Rosen 2006).



PHOTO 2.3 What comes to mind when you think of American culture? What do you think is the relationship between law and culture in the United States?

A recent focus of law and society is how popular culture and personalities influence the law (Sherwin 2000). In the trial of Roger Stone, an intimate of President Donald Trump, the prosecution unsuccessfully attempted to use an excerpt from the iconic film *The Godfather* to make a point about witness tampering, thinking that this was the most effective way to communicate with the jury (LaFraniere 2020; Sherwin 2000).

LEGAL BEHAVIORALISM

Political scientists engaged in the study of judicial politics have pioneered the quantitative analysis of judicial decisions. Statistical techniques are relied on in *judicial behavioralism* to test whether there is a correlation between the personal characteristics of judges and the content of their judicial opinions.

Categorizing judicial opinions as “liberal” or “conservative” provides insight into whether party identification, gender, race, or religion is correlated with judges’ decisions. This quantitative approach assumes that a judge’s social and political beliefs, rather than legal analysis, determine how the judge decides a case (Epstein, Landes, and Posner 2013).

Judicial behavioralism is one aspect of **legal behavioralism**, a larger empirical approach to the study of law and society. Legal sociologist Donald J. Black in a 1972 article argued the sociology of law should be objective and value-free and rely on quantitative measures of law. Issues of public policy, morality, and justice cannot be reduced to quantitative measurement and should not be the concern of sociologists. This approach was roundly rejected by Philippe Nonet, who argued for a normative approach in which sociology of law addresses the moral and public policy issues confronting society (Nonet 1976).

Black, in several important books, measures law by the frequency with which laws are passed, regulations are issued, complaints are filed, calls for police service are made, prosecutions are initiated, individuals are convicted, and civil actions are filed and a verdict is returned. He theorizes that different societies have different quantities of law.

Black presents a complex framework for measuring the quantity, direction, and style of law. *Quantity of law* refers to whether a type of conduct is regulated by law and whether or not a sanction is imposed. *Direction* relates to whether there is a social distance between the parties to a conflict. The *style of law* can be penal, compensatory, therapeutic, or conciliatory. Black uses a complex framework to develop various propositions about the law. These propositions are based on the variation in stratification (inequality), morphology (division of labor), richness of the culture (diversity of backgrounds in society), formal organization (centralization in political and economic spheres), and non-legal social control (peer pressure).

An example of Black’s “geometry of the law” is a crime by a homeless person against a wealthy individual. Black argues that, in measuring the “amount of law,” the social distance between a victim and an offender is more important than the seriousness of the crime. A crime with an “upward direction” committed by the homeless person against the wealthier individual will involve more law than a crime with a “downward” direction. The wealthier individual who is a crime victim is more likely to call the police, insist that the prosecutor file charges, file a suit for civil damages, and appear at court for sentencing. In contrast, a crime by the wealthier individual against the homeless person likely will result in a fine (compensatory), mediation (conciliatory), or psychological counseling (therapeutic). Black’s framework predicts that the same crime will result in different types of legal actions and different punishments depending on the class position of the offender and of the victim (D. Black 1976: 28). A significant number of studies cited in the text that involve quantitative or statistical analysis are part of the behavioral approach to legal analysis.

LIBERTARIANISM

The core principle of **libertarianism** is the maximization of individual freedom. According to libertarianism, individuals possess the right to do whatever they want and to use their personal property however they choose so long as they do not interfere with the freedom of other individuals or harm other individuals. Libertarians believe government should be limited to combating crime, protecting private property, enforcing contracts, and safeguarding the national defense. They object to various types of government policies (Sandel 2009: 60):

Paternalism. Laws intended to prevent individuals from harming themselves are unjust. This includes laws requiring seat-belts, motorcycle helmets, and the purchase of insurance. Individuals who risk personal injury or harm are required to assume responsibility for their own medical expenses and may not impose this cost on society.

Morals legislation. Libertarians view laws that use the power of the state to promote virtue or morality as unjust. They accordingly oppose laws that prohibit prostitution, narcotics, and same-sex marriage.

Redistribution of income. Libertarians oppose laws that require people to assist others, most notably the use of taxation to redistribute wealth. Individuals' tax dollars should not be used to support low-cost housing, public education, or health care for others.

Freedom. Individuals also should not be prohibited from discriminating based on race, ethnicity, or gender in employment and should decide for themselves whom they serve in their business. Libertarians also oppose licensing. The government should not prevent individuals from working as a hairstylist, plumber, or real estate agent.

Robert Nozick in *Anarchy, State, and Utopia* (1977) articulates what Michael Sandel observes is the “moral crux of the libertarian claim,” the notion of self-ownership. Nozick reasons that when taxing money produced by an individual's labor for purposes of redistribution, the government in essence is requiring an individual to engage in work without compensation: “If people force you to do . . . unrewarded work, . . . this . . . makes them a part-owner of you; it gives them a property right in you” (quoted in Sandel 2009: 65).

Each of us may be willing to pay a dollar to see the Rolling Rocks rock group perform. In time, the Rolling Rocks will be wealthier than other individuals. Nozick argues a system of redistribution of the money earned by the Rolling Rocks to a less successful band will distort the free decisions of the individuals who paid a dollar to see the Rolling Rocks. Karen Lebacqz notes that for Nozick, “justice is determined by how the distribution came about, not by what the distribution is.” The fact that some people are more prosperous than others may be “unfortunate,” but it is not “unfair” (Lebacqz 1987: 56–58).

Free market philosophy advocates agree with libertarians that the free exchange of goods maximizes individual freedom. They also argue the primary benefit of markets is that they promote the general social welfare and result in the delivery of better services.

An example is “school choice” in which parents are issued vouchers that may be used at any public school or partially to offset the cost of a private education. In theory, parents will use their vouchers to send their children to the “best” schools, which will provide an incentive for schools to improve their performance. Poor-performing schools will not attract students and will be unable to continue.

Libertarianism was challenged by John Rawls (1921–2002) in his controversial volume, *A Theory of Justice* (1999). Rawls wipes the slate clean and returns all of us to the state of nature. He asks what principles we collectively would agree on as the foundation of a new society if we were unaware of our individual age, nationality, race, gender, income, and other characteristics. Rawls finds two principles that he believes would be chosen. The first is that each person is to have an equal right to the most “extensive basic liberty compatible with a similar liberty for

others.” The second principle is that, although equality of wealth and income is not required, any inequalities must work to the benefit of the least affluent members of society.

Rawls’s “difference principles” dictate that as an accident of birth some people may have certain inherited financial and intellectual advantages over other people. As a result, people begin the race of life at different points. He argues these advantages are undeserved and in a free market system these individuals enjoy advantages in areas such as college admissions. Rawls believes these advantages should be viewed as a community resource and everyone should share in these individuals’ achievements. The privileged individuals accordingly should be expected to pay higher taxes to compensate, to provide special programs like childhood education, and to create economic growth for the less advantaged.

Rawls notes that the talents rewarded in society are somewhat accidental. In another country, a skilled baseball player or popular television personality would not be worth the millions of dollars that she or he earns in the United States. The tax system and system of compensation that favor the wealthy reflect a decision to organize society in a certain fashion. Rawls contends this organizational scheme is not written in stone and that we should share the benefits of our natural advantages with the entire society.

In thinking about Rawls, consider how professional sports leagues regularly change the rules to attract fans to the game. We grumble at the modification of the rules but accept that the rules regularly are changed to make the game more attractive or to shorten its length.

LAW AND ECONOMICS

Law and economics applies economic principles and econometric quantitative analysis to legal rules. One branch of law and economics attempts to demonstrate that existing legal rules are based on economic principles, and the other branch proposes reforms of legal principles to make them more efficient. This theoretical approach has the advantage of using quantitative techniques and evidence to evaluate the merits of legal rules (R. Posner 1973).

Law and economics is heavily based on the thinking of Italian economist Vilfredo Pareto (1848–1923) and is premised on several principles:

- **Efficiency.** The law should attempt to achieve the most efficient results rather than focus on individual rights.
- **Private resolution.** Disputes are best settled through private negotiation and the free market rather than through governmental regulation.
- **Data.** Legal analysis should rely on quantitative analysis rather than rely solely on logical analysis.

A major focus of law and economics has been the law of torts or personal injury, although in recent years scholars have applied economic principles to a range of legal areas (Calabresi 1970).

The influence of law and economics can be illustrated by a familiar approach to the deterrence of crime. Gary Becker in his 1968 article “Crime and Punishment: An Economics Approach” argues that criminals are “utility maximizers” and base their decision of whether to commit a crime on opportunity and the costs and benefits of criminal activity. Becker contends that criminal activity like any other economic activity may be increased or decreased by adjusting the “price” or likelihood and amount of criminal punishment. Under this approach, the price of criminal activity will be increased until most criminal activity is deterred. Critics of Becker’s approach argue that the question of limitations on police tactics and on the fairness of the length of criminal punishments is subordinated to efficiency in preventing crime (G. Becker 1968).

Law and economics often is criticized as unduly harsh although its principles have been extremely influential in debating the need for government regulations in areas such as the environment. Should we think about “cost maximization” and weigh the expense of worker safety rules against the financial burden involved for industry?

CRITICAL LEGAL STUDIES

The **critical legal studies** (CLS) movement was initiated at a 1977 meeting in Madison, Wisconsin. Alan Hunt writing in 1989 found roughly seven hundred articles in print whose authors identified themselves as “Crits.” Hunt notes there are various strands to CLS, which loosely are united by an “uncompromising offensive on law and legal theory” (Hunt 1989: 3).

CLS has been called a direct descendant of American legal realism and shares the view that politics and law are one and the same. CLS differs from realism in that it focuses more intently on legal reasoning and on the substance of legal rules. There are several themes that characterize the CLS movement (Trevino 2008: 391–398):

Indeterminacy. There is no single correct answer. Judges may reach various decisions while appearing to rely on the law. This is referred to as the “flippability” of the law.

Antiformalism. Law is not a logical and rational system of reasoning. Judges employ the law to reach decisions that reflect their own ideology.

Contradiction. There are no consistent values underlying the approach to legal issues. In some instances, legal rules regarding search and seizure seem to be concerned about individuals’ rights, and in other instances, the rules seem to tilt in favor of the police.

Marginality. Most people do not consult the law in their interpersonal relationships, and the importance of the law is exaggerated. A significant part of our interpersonal relationships are conducted through a “handshake” and trusting one another.

Ideology. Law provides an ideology—a set of values, beliefs, and categories that are used to benefit the powerful and wealthy. The United States celebrates freedom of expression. The category of freedom of expression, however, has been interpreted by the U.S. Supreme Court to permit individuals to contribute unlimited amounts of money to politicians based on the view that money is a form of speech. Equal protection of the law, which prohibits discrimination, is not interpreted as preventing more money from being spent on wealthy suburban schools than on urban schools.

Trashing. CLS scholarship reveals the gap between the assumptions underlying the law and social reality. The notion that all individuals are equally positioned to compete for entry to college and that affirmative action is unnecessary is an example of the difference between the law and the barriers to upward mobility confronting economically disadvantaged minorities.

Utopian reform. Roberto Unger, a central figure in CLS, proposed “deviationist doctrine,” the application of principles from one area to another area. He argued, for example, that democratic principles should be extended from the public sphere to the workplace (Unger 1986).

Feminists and critical race theorists take issue with the fact that CLS does not pay sufficient attention to discrimination and its issues.

CRITICAL RACE THEORY

Critical race theory (CRT) focuses on race and the law. CRT grew out of CLS and shares the view that the law is neither neutral nor objective but rather is a mechanism for supporting the dominance of powerful economic and political interests. CRT differs from CLS in that race is viewed at the center of U.S. law and law is viewed as a primary mechanism to perpetuate racism, which it views as a permanent and deeply embedded aspect of American society rather than the product of isolated, discriminatory decisions. Racism is viewed as a “multi-headed hydra.” One head consists of racism and oppression of minorities, and the other head focuses on the “white privilege” that supports and perpetuates racism. CRT views the law as a mechanism for supporting and perpetuating racism in virtually every area of American life, questions whether law has the capacity to modify patterns of discrimination and segregation that are deeply embedded, and is more concerned than CLS with public policy reform. The concept of “interest convergence” is that because racism advances the interests of whites, they have little incentive to eliminate discrimination and that because racism is deeply embedded, whites are unable to recognize or respond to racism. The notion of “differential racism” asserts that racism is a dynamic phenomenon and at various points in time certain racial groups may be somewhat accepted while other racial groups are discriminated against.

CRT has pioneered reliance on telling the story of victims to convey the impact of racism. This methodology is a technique for articulating the voice of individuals who in the past were excluded from the academic literature. Storytelling brings home the reality of racism without the weightiness of a technical legal discussion.

Richard Delgado and Jean Stefancic list several characteristics of CRT, including skepticism of the legal system’s endorsement of color blindness and merit-based achievement as an effective antidote to racial disenfranchisement and disadvantage; documentation of how the history of racism continues to impact the law and to perpetuate “white privilege”; a reexamination of events to reveal America’s pattern of historical racism; recognition of the knowledge and insights of ordinary people who have been the victims of racism; and social activism directed at the elimination of “racial oppression” (Delgado and Stefancic 2001: 6–12, 2017: 19–34).

CRT also developed the notion of intersectionality, which looks at how race, gender, class, sexual orientation, and national origin can work in combination to compound discrimination (Crenshaw 1995).

FEMINIST JURISPRUDENCE

Feminist jurisprudence was developed by scholars who concluded CLS was not adequately addressing the “gendered” nature of the law and legal system. Feminist legal scholars are dedicated to documenting how the law has been used to subordinate women.

There are various approaches to feminist legal theory, all of which are committed to reformulating the approach of the law to gender. It is not possible in this brief overview to adequately represent the thinking of this diverse group of scholars. These different perspectives all share a concern with the role of the law in subordinating women to men (Chamallas 2012; Levit and Verchick 2016).

Liberal feminists and *equal treatment feminism* are committed to reforming the legal system to ensure equality between men and women. Liberal feminist lawyers successfully challenged laws excluding women from juries and from various occupations. They also worked to reform laws that victimized women. An example is the repeal of state statutes that provided “marital immunity” for men charged with the rape of their spouse. Another set of laws were challenged that were intended to protect but actually disadvantaged women such as by limiting the number of hours that they could work. The struggle for equality is far from finished: women still lack equal pay for equal work, continue to encounter a “glass ceiling,” and are not provided with adequate maternity and parental leave and access to day care.

Cultural feminism or difference feminism challenges the notion that men and women are the same and advocates a wholesale transformation and “feminization” of legal doctrine. Cultural feminism argues that formal legal equality does not ensure that women are treated fairly. For example, judges typically calculate monetary damages for injuries resulting from torts based on anticipated future earnings. This approach disadvantages injured women whose damages typically are discounted based on projected work absences during child-rearing. Individuals who voluntarily leave a job are disqualified from unemployment compensation, a requirement that disadvantages women who leave work because of the demands of family life.

The solution for cultural feminism is to treat women differently than men based on their different circumstances.

The notion that men and women are not the same is heavily influenced by the “different voice” theory of educational psychologist Carol Gilligan. Gilligan argues that girls and boys differ in their moral development. Girls are taught compassion, empathy, and community. In contrast, boys are inculcated with individualism and independence. Women as a result of their early influence are characterized by an “ethic of care” and with a sense of connection and concern for the welfare of other individuals. Men, in contrast, possess an “ethic of justice” and are concerned with concepts like rights, rules, and obligations. In other words, women are about people, and men are about abstract rules (Gilligan 1982).

Dominance feminism views legal doctrine as a matter of power. Men dominate society and the legal system and as a result have developed legal rules and procedures that reflect male values. Dominance feminists point to the law on pornography and administration of the law in the areas of domestic violence, sexual harassment, prostitution, and rape. The existing adversarial legal system and male-designed legal rules cannot provide for female equality with men, and the entire justice system requires a feminist reformation.

“Anti-essentialist” and “intersectionalist” feminist scholars argue that there is no uniform feminist position and that any analysis should include an exploration of how race and class interact with gender to impact women. Critical race feminists, for example, argue that the study of housing discrimination should consider how gender, race, and income all combine to affect the ability of single mothers of color to rent an apartment. In other words, any analysis must consider how various factors interact together. It also is important to appreciate that each and every woman does not confront the same situation.

The notion of “multiple consciousness” was developed by Professor Mari Matsuda to advocate the analysis of laws from the perspective of groups whose point of view often is not appreciated or taken into consideration by scholars. The concern that raising the minimum wage for female fast-food workers will result in higher prices for consumers should be balanced by an appreciation of the difficulty confronting single mothers to support themselves and their children on current minimum wage salaries. The process of adopting multiple perspectives is part of the process of “consciousness raising” or developing a sense of the solidarity of women and the various challenges that women confront (Matsuda 1989).

Feminist methods are used to reveal aspects of legal issues that typically are not revealed by traditional (male) modes of analysis. This involves “asking the women’s question,” which involves analyzing an issue from the perspective of a female rather than from the perspective of a male, which is the predominant mode of analysis. This involves reviewing the data on the impact of a law or policy on women. The first question is whether the law is being enforced in a differential fashion. Is child custody in most instances awarded to a man rather than to a woman? Are more men than women promoted or more girls than boys expelled from school? The next question is whether the difference in the application of a law or policy is justified by the evidence or whether it is based on a discriminatory application of the law. Pregnant women, for example, earlier in the twentieth century were denied the opportunity to use disability leaves from work based on what proved to be the false assumption that pregnancy leaves were longer and more expensive than other health-based disabilities.

An important part of feminist methods is telling women's personal stories to document the impact of a law or policy and to identify discriminatory laws or policies that may not be apparent until women share their stories. These conversations can result in an awareness that women share a common experience such as sexual harassment in the workplace and lead to women joining together to address the discriminatory actions. Keep these perspectives in mind as you read about topics such as abortion in the text (see Chapter 10).

The developing field of international feminist studies focuses on the global socioeconomic oppression of women and the failure of domestic and international law to protect women. International feminist studies examine issues like the global feminization of poverty; the lack of health care for women; food insecurity; and the failure of governments to intervene to stop repressive societal practices that victimize women such as child brides, "bride burning," honor killings, sexual slavery, domestic abuse, and female genital mutilation. Other areas of compelling concern are women and international migration and women as victims of rape in war (Wing 2000).

LAW AND HUMANITIES

Law and humanities is a movement that draws on the insight of art, media, English, and philosophy to understand the law (Sarat, Anderson, and Frank 2014).

Judith Resnick and Dennis Curtis illustrate how art and architecture provide insight into the view of the law in various cultures. An example is an exploration of why justice historically has been portrayed as a lady with a sword (law's violence) and scales (law's fairness) and why "Lady Justice" has been portrayed with and without a blindfold at various points in time. The blindfolded Lady Justice, which initially was a symbol of the ability to trick and fool judges, gradually took on the symbolism of a law that meted out justice in a fair and neutral fashion. In recent years, there has been a return to the view that the blindfold needs to be removed so that Lady Justice is no longer prevented from confronting the truth of the inequities in the legal system (Resnick and Curtis 2013: 62–105).

2.1 You Decide

The four defendants are members of the Speluncean Society, a group of amateurs interested in the exploration of caves. The four defendants, along with Roger Whetmore, another member of the society, entered into a limestone cavern. A landslide trapped them in the cave. Heavy boulders blocked the entrance to the cave. The secretary of the Speluncean Society became alarmed when the five failed to return as scheduled. A rescue party was organized, and workers and machines were transported to the cave. The rescue effort was obstructed several times by fresh landslides. One landslide killed ten of the workers. The treasury of the Speluncean Society was quickly exhausted, and additional money was raised from the public and from the government. On the thirty-second day, the

explorers were rescued. The total cost of the rescue was \$800,000.

Following the rescue, the defendants recounted their experience inside the cave. The explorers reported that they quickly exhausted their provisions. On the twentieth day, it was learned that they had a portable machine with them capable of receiving and sending information. The rescuers made contact with the five men inside the cave. The men asked how long it would be before they were rescued, and the engineers in charge of the rescue effort replied that it would take ten more days even with no additional avalanches. The men asked to speak to a doctor and asked whether they could live for ten additional days without food. The physician replied that it was doubtful. The machine went silent for eight hours.

The cave explorers asked a doctor whether they could live for ten days if they ate one of the individuals who were trapped. The doctor reluctantly answered yes. Whetmore asked the doctor whether it was advisable to draw lots to determine who would die. None of the doctors involved in the rescue effort was willing to answer the question. The trapped men asked to speak to a judge, minister, or priest, but none was willing to advise the men inside the cave.

There was no further communication from the cave. It was discovered on the twenty-third day after their entrance into the cave that Whetmore had been killed and eaten by his colleagues. It was Whetmore who had proposed that one of the explorers should be eaten to allow the others to survive. He had a pair of dice, and the five eventually agreed on a procedure to determine who would be eaten. Whetmore withdrew from the plan before the

dice were rolled and explained that he favored waiting another week. The other explorers accused him of acting in bad faith because he had proposed the plan and now wanted to withdraw. They rolled the dice for Whetmore after he was asked whether he objected to someone throwing the dice for him, and he expressed no objections. The throw went against Whetmore, and he was killed and eaten.

The four defendants were charged and convicted of murder. The statute reads that “[w]hoever shall willfully take the life of another shall be punished by death.”

As a judge, would you recommend to the chief executive of the country that the four defendants be given clemency, which has the effect of releasing an individual following the service of less than his or her complete criminal sentence? In answering the problem, explain which legal theories will prove helpful.

CHAPTER SUMMARY

There is significant diversity among legal systems. There are various theories that explain the origin, evolution, function, and nature of law. A number of these approaches to law may best be considered perspectives on law rather than comprehensive explanations.

The natural law school views law as a set of universal principles that are discoverable through human reason and applicable to all societies in all historical epochs. This contrasts with legal positivism, which views law as officially declared rules and regulations.

Utilitarianism focused on public policy and asked, “What is the greatest good for the greatest number?” Immanuel Kant directly criticized utilitarianism’s willingness to disadvantage some individuals to benefit a greater number of individuals and argued that all human beings are deserving of respect and should be treated as “ends” rather than “means.”

The nineteenth-century historical school linked law to society and found the source of law in the historical development of society. The legal rules in an agricultural society are different from those required in an industrial society. Classic sociological theorists took the next step in directly connecting law and society. Marx and Durkheim in particular viewed law as a product of the economic arrangement of society. Weber explored the nature of authority and the sources of obedience to law.

Legal realism liberated legal analysis from an analysis of legal rules and argued that the decisions of judges

and juries could be explained by extra-legal factors. Oliver Wendell Holmes Jr. argued that the law is not a mathematical enterprise in which there is a mechanical and predetermined result. He asserted that the outcome of cases in most instances is dictated by powerful political and economic interests. Sociological jurisprudence analyzed law as embedded in society and focused on the social influences on the law and, most important, on how law could be used to improve society. Functionalism views law as performing important roles that assist in keeping the social system in equilibrium.

Libertarianism is based on maximization of individual freedom. According to libertarianism, individuals possess the right to do whatever they want and to use their personal property however they choose so long as they do not interfere with the freedom of other individuals or harm other individuals. Law and economics focuses on using the law to achieve the most efficient use of resources and agrees with libertarianism that this is achieved through the private market rather than through government regulation.

The libertarian platform of liberating individuals from as much legal regulation as possible contrasts with critical legal studies, critical race theory, and feminist jurisprudence, which, though viewing law as protecting class, race, and political privilege, fundamentally believe law can be used as an instrument of social change and improvement. Law and humanities highlights the contribution of the arts and humanities to our understanding of law.

CHAPTER REVIEW QUESTIONS

1. Compare and contrast natural law and legal positivism. How would these two theories differ in their approach to a state statute authorizing the death penalty for atrocious and cruel acts of murder?
2. How would a utilitarian analyze the desirability of a law providing for the euthanasia of older individuals who have a limited life expectancy and whose medical treatment is paid for by federal funds? How would an approach based on the categorical imperative differ?
3. Explain the thinking of Henry Maine.
4. Briefly summarize the contributions to law and society of Karl Marx, Émile Durkheim, and Max Weber.
5. Summarize the contribution of legal realism and sociological jurisprudence to law and society. How do these approaches differ from legal positivism?
6. How do functionalists view the role of law?
7. Explain how “cultural law” views the relationship between law and culture.
8. What is legal behavioralism? How does this relate to legal realism and sociological jurisprudence?
9. Summarize the underlying philosophy of libertarianism.
10. List the distinguishing characteristics of critical legal studies and critical race theory.
11. What is the unifying theme of feminist jurisprudence?
12. Which of the theoretical approaches discussed in the text most closely describes your view of the nature of law?

TERMINOLOGY

categorical imperative 47	functionalism 54	libertarianism 57
classical sociological theory 48	historical school 47	Marx, Karl 49
critical legal studies 59	Kant, Immanuel 47	natural law 44
cultural law 55	legal behavioralism 56	sociological jurisprudence 53
Durkheim, Émile 51	legal positivism 45	utilitarianism 46
feminist jurisprudence 60	legal realism 52	Weber, Max 49

ANSWERS TO TEST YOUR KNOWLEDGE

1. False
2. False
3. True
4. True
5. False
6. True
7. True
8. False
9. False
10. True
11. False
12. False