CHAPTER 1

Foundations of Law in the United States

Chapter Goals and Objectives

In this chapter, readers will learn that...

It is important that we understand what we mean by the word "law."

- There are a variety of types of law in the United States, and each one has a separate function for society.
- Americans have historically had rather ambivalent attitudes about whether the law should always be obeyed and about whether there are legitimate reasons for ignoring the commands of legal statutes.
- The United States is a very litigious society and that there are reasons why this might be a good thing.

As the COVID-19 virus spread across the country in the spring of 2020, the nation's governors and local officials began issuing restrictions on public gatherings to slow the level of contagion. Texas Governor Greg Abbott was no exception. In an order issued on March 22, the Governor declared that all cosmetology salons, including nail salons, aestheticians, and minisalons, laser hair removal, barbershop, and massage establishments must remain closed until at least May 18.

Governor Abbott's order did not sit well with Shelley Luther, the owner of Salon a la Mode, a fashionable hair styling facility in Dallas, Texas, that listed nineteen employees. Luther did indeed comply with the closure restrictions for a while, but on April 24, she decided to reopen her salon. Luther told CBS news that she was against the "safer-at-home" order due to financial reasons. "Our salon and other small businesses were closed down on March 22, and we have not had any income since," she said.[1] Then on April 25, she received a cease-and-desist order from a Dallas County judge that ordered her to close the salon. Luther, in a public demonstration of protest, ripped up the judge's order. She stated that even if she got arrested for her action, she would not comply with the order. "It's our right to keep the store open," Luther argued. "It's our right for those women to earn income for their families."

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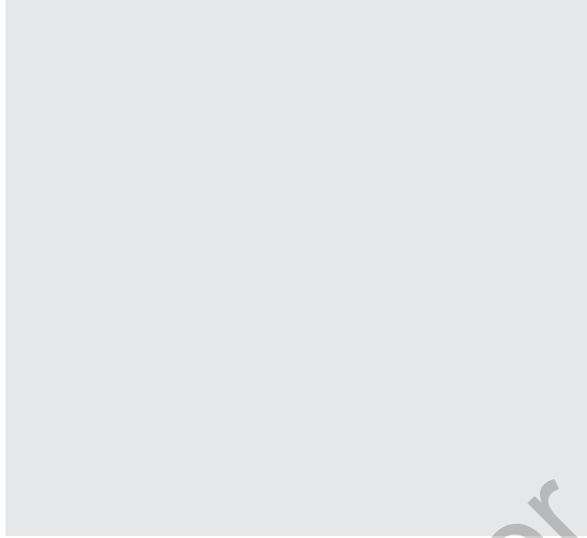

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Shelley Luther defies Texas law requiring the closure of certain businesses during the COVID Pandemic. She claimed that that her Constitutional rights were being violated.

Luther was subsequently arrested and tried before Dallas Court Judge Eric V. Moye. The Judge held Luther in criminal and civil contempt of court and sentenced her to seven days in jail and a fine of $7,000. However, the Judge offered to impose only a fine if Luther apologized, but she refused. Judge Moye called her defiance "selfish," saying she was "putting your own interest ahead of those in the community in which you live."[2] After some legal skirmishing, the Texas Supreme Court "issued a temporary order freeing Luther shortly after Governor Greg Abbott amended his executive order on the closures to prevent **incarceration** as a punishment. "Throwing Texans in jail who had had their businesses shut down through no fault of their own is nonsensical and I will not allow it," declared Abbott."[3]

Although this little saga may seem rather pedestrian, it raises two constitutional principles that are often at loggerheads in contemporary society. The first is Shelley Luther's claim that she has a legal right to earn an honest living free from unreasonable governmental constraint. Support for this right may be found, for example, in Section 1 of the Fourteenth Amendment which admonishes that "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law…"[4] Legal scholars have argued that the right to engage in the lawful employment of one's choice is a "privilege" of US citizenship; and they have further contended that executive action to terminate one's employment is a violation of one's "property without due process of law." On the other hand, the State of Texas (via Governor Abbott's executive orders) claimed it was exercising its lawful authority under the Tenth

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Amendment to the Constitution which confers the "police powers" on state governments. The police power is the legitimate right of the states to provide for the health, welfare, safety, and morals of its citizens. In this instance, the State of Texas, by requiring the temporary closure of selected businesses during a time of grave emergency, was providing for the health, welfare, and safety of its citizens.

This discussion reveals much about the United States and the rule of law, and it suggests themes that we will articulate not only in this chapter but throughout the book. What happens when there are conflicts between two lawful and well-motivated propositions: the desire to engage in a lawful employment and the state's right to protect the public health during the time of a serious pandemic. Both desires are legitimate, but sometimes, they come into conflict with one another. And if distinctions are to be made in our society between an individual's wishes and the general demands of society such as the one described here, which institutions should be empowered to make these determinations: legislatures, courts, local executives, or elections officials?

We begin our discussion of the foundations of law in the United States with a look at the law itself. This is appropriate because without law, there would be no courts and no judges, no political or judicial system through which disputes could be settled and decisions rendered. In this chapter, we examine the sources of law in the United States—that is, the institutions and traditions that establish the rules of the legal game. We discuss the types of law that are used and define some of the basic legal terms. Likewise, we explore the functions of law for society—what it enables citizens to avoid and accomplish as individuals and as a people that would be impossible without the existence of some commonly accepted rules. Finally, we examine America's ambivalent tradition vis-à-vis the law—that is, how a nation founded on an illegal revolution and nurtured with a healthy tradition of civil disobedience can pride itself on being a land where respect for the law is ideally taught at every mother's knee. We also take note of the degree to which American society has become highly litigious and why this is significant for the study of the American judicial system.

Definition of Law

A useful definition of American **law** postulates that "law is a social norm the infraction of which is sanctioned in threat or in fact by the application of physical force by a party possessing the socially recognized privilege of so acting."[5] This definition suggests that law comprises three basic elements—force, official authority, and regularity—the combination of which differentiates law from mere custom or morals in society.

In an ideal society, force would never have to be exercised; in an imperfect world, the threat of its use is a foundation of any law-abiding society. Although substitutes for physical force may be used, such as confiscation of property or imposition of fines, the possibility of physical punishment must nevertheless remain to deter a potential lawbreaker. The right to apply this force constitutes

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the official element of the definition of law. The party that exercises this right of physical coercion represents a valid legal authority. Finally, the term *regularity*, as used in the legal sense, can be likened to its use by scientists. Although the term does not reflect absolute certainty, it does suggest uniformity and consistency. The law calls for a degree of predictability, of regularity, in the way individuals are expected to behave or to be treated by the state. In American society, this emphasis on regularity is manifested by adherence to prior court decisions and precedents (the **common law** doctrine of **stare decisis**) and by the mandate of the Fourteenth Amendment to the US Constitution, which forbids the state to "deny to any person within its **jurisdiction** the *equal protection* of the law" (emphasis added).[6]

Sources of Law in the United States

Where does law come from in the United States? At first, the question seems a bit simpleminded. A typical response might be, "Law comes from legislatures; that's what Congress and the state legislatures do." This answer is not wrong, but it is far from adequate. Law comes from a large variety of sources.

Constitutions

The US Constitution is the primary source of law in the United States, as it claims to be in Article VI: "This Constitution... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Thus, none of the other types of law may stand if they conflict with the Constitution. Similarly, each state has its own separate constitution, and all local laws must yield to its supremacy.

Acts of Legislative Bodies

Laws passed by Congress and by state legislatures constitute a sizable bulk of law in the United States. Statutes requiring the payment of income tax to Uncle Sam and state laws forbidding the robbing of banks are both examples. But many other types of legislative bodies also enact statutes and ordinances that regulate the lives of US residents. County commissioners (also known as county judges or boards of selectmen), for example, act as legislative bodies for the various counties within the states.

Likewise, city councils serve in a legislative capacity when they pass ordinances, set property-tax rates, establish building codes, and so on at the municipal level. Then there are almost 50,000 "special districts" throughout the country, each of which is headed by an elected or appointed body that acts in a legislative capacity. Examples of these would be school districts, fire prevention districts, water districts, and municipal utility districts.

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Decisions of Quasi-Legislative and Quasi-Judicial Bodies

Sprinkled vertically and horizontally throughout the US governmental structure are thousands of boards, agencies, commissions, departments, and so on, whose primary function is not to legislate or to adjudicate but that still may be called on to make rules or to render decisions that are semilegislative or semijudicial in character. The job of the US Postal Service is to deliver the mail, but sometimes it may have to act in a quasi-judicial capacity. For example, a local postmaster may refuse to deliver a piece of mail because he or she believes it to be pornographic. (Congress has mandated that pornography may not be sent through the mail.) The postmaster is acting in a semi- or quasi-judicial capacity in determining that a particular item is pornographic and hence not protected by the First Amendment.

The US Securities and Exchange Commission (SEC) is not a lawmaking body, either, but when it determines that a particular company has run afoul of the security laws or when it rules on a firm's qualification to be listed on the New York Stock Exchange, it becomes a source of law in the United States. In effect, the SEC makes rules and decisions that affect a person's or a company's behavior and for which penalties are imposed for noncompliance. Although decisions of such agencies may be appealed to or reviewed by the courts, they are binding unless they are overturned by a judicial entity.

A university's board of regents may also be a source of law for the students, faculty, and staff members covered by its jurisdiction. These boards may set rules on matters such as which persons may lawfully enter the campus grounds, procedures to be followed before a staff member may be fired, or definitions of plagiarism. Violations of these rules or procedures carry penalties backed by the full force of the law.

Orders and Rulings of Political Executives

Civics classes teach that legislatures make the law and executives enforce the law. That is essentially true, but political executives also have some lawmaking capacity. This lawmaking occurs when presidents, governors, mayors, or others fill in the details of legislation passed by legislative bodies, and sometimes when they promulgate orders purely in their executive capacity.

When Congress passes reciprocal trade agreement legislation, the goal is to encourage other countries to lower trade and tariff barriers to US-produced goods, in exchange for which the United States will do the same. But there are so many thousands of goods, almost two hundred countries, and countless degrees of setting up or lowering trade barriers. What to do? The customary practice is for Congress not only to set basic guidelines for the reciprocal lowering of trade barriers but also to allow the president to decide how much to regulate a given tariff on any given commodity for a particular country. These executive orders of the president are published regularly in the *Federal Register* and carry the full force of law. In fact, at the national level, more than 70,000 pages of new

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rules are churned out each year.[7] At the present time, the *Code of Federal Regulations*, dealing mainly with economic activity and published in the *Federal Registrar*, now runs 178,000 pages.[8]

In his first several months in office, President Biden made extensive use of his power to issue executive orders. For instance, on January 20, 2021, he revoked President Trump's plan to exclude noncitizens from the census; on January 25, he declared that transgender persons could serve in the military; and on January 27, he ordered that climate change be elevated as a **national security** concern.[9]

Likewise, at the state level, when a legislature delegates to the governor the right to "fill in the details of legislation," the state executive uses his or her **ordinance-making power**, which also is a type of lawmaking capacity. Political executives may promulgate orders that, within certain narrow but important realms, constitute the law of the land. For example, in the wake of the worst drought and water shortage in modern California history, Gov. Jerry Brown on April 1, 2015, "in an executive order directed the state Water Resources Control Board to impose a 25 percent reduction on the state's 400 local water supply agencies, which serve 90 percent of California residents, over the coming year."[10] Although limited and usually temporary, such orders are law, and violations invoke penalties.

Judicial Decisions

Civics classes also teach that judges interpret the law. So, they do, but judges make law as they interpret it. And judicial decisions themselves constitute a body of law in the United States. All the thousands of court decisions that have been handed down by federal and state judges for the past two centuries are part of the **corpus juris**—the body of law—of the United States.

Judicial decisions may be grounded in or surround a variety of entities: any of the above-mentioned sources of law, past decisions of other judges, or legal principles that have evolved over the centuries. (For example, one cannot bring a lawsuit on behalf of another person unless that person is one's minor child or ward.) Judicial decisions may also be grounded in the common law—that is, those written (and sometimes unwritten) legal traditions and principles that have served as the basis of court decisions and accepted human behavior for many centuries. For instance, if a couple lives together as husband and wife for a specified period of years, the common law may be invoked to have their union recognized as a legal marriage.

Types of Law

After examining the wellsprings of American law, it is appropriate to take a brief look at the vessels wherein such laws are contained—that is, to define or explain the formal types of categories of law. (Note that types of law are not necessarily mutually exclusive.)

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Codified (or Code) Law

Unlike the United States, most countries (including most of Europe and Latin America) refer to themselves as code law countries. A code is merely a body of laws, but it is one that consists of statutes enacted by a national parliament. These laws address virtually all aspects of the body politic; are often detailed; and are arranged in an orderly, systematic, and comprehensive manner. The US legal system is often seen from abroad as a hodgepodge of legislative acts, judicial decisions, unwritten legal traditions, and so on.

Statutory Law and Common Law

Statutory law is the type of law enacted by a legislative body such as Congress, a state legislature, or a city council, although it could also include the written orders of various quasi-legislative bodies. The key is that the enactments be in written form and be addressed to the needs of society. Examples of statutory law would be a congressional act increasing Social Security payments or a statute passed by a state legislature authorizing the death penalty for first-degree murder. Statutory law is often contrasted with the common law, which is a less orderly compilation of traditions, principles, and legal practices that have been handed down from one generation of lawyers and judges to the next. Because much of the common law is not systematically codified and delineated, as is statutory law, it is sometimes referred to as the unwritten law. However, this is not entirely accurate. Much of the common law exists in the form of court decisions and legal precedents that are in written form. The common law is known for its flexibility and capacity to change as it evolves in response to the changing needs and values of society.

Civil Law and Criminal Law

Civil law deals with disagreements between individuals—for example, a dispute over ownership of private property. It also pertains to corporations, admiralty matters, and contracts. **Criminal law** pertains to offenses against the state itself—actions that may be directed against a person but that are deemed to be offensive to society. **Crimes** such as drunken driving, armed robbery, and so on are punishable by fines or imprisonment.

Equity

Equity is best understood when contrasted with law; the primary difference between the two terms is in the remedy involved. In law, the only remedy is financial compensation; in equity, a judge is free to issue a remedy that will either prevent or cure the wrong that is about to happen. Because in many circumstances monetary settlements are inappropriate or inadequate, equity allows judges a degree of flexibility that they would not otherwise have. For example, say you were the owner of an old cabin located in the center of town and that this

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structure was the first built in the community. You wish to preserve it because of its historic value, but the city decides to expand the adjacent street and thereby destroy the cabin. Your remedy at law is to ask the city for monetary compensation, but to you, this is inadequate. The cabin has little intrinsic value, although as a historic object, it is priceless. Thus, you may wish to ask a judge to issue a writ in equity that might order the city to move the cabin to another site or to reconsider its plan to widen the street.

Private Law

Private law deals with the rights and obligations that private individuals and institutions have when they relate to one another. Much civil law is in this category because it covers subjects such as contracts between private persons and corporations and statutes pertaining to marriage and divorce.

Public Law

Public law addresses the relationship that individuals and institutions have with the state as a sovereign entity. The government makes laws in its capacity as the primary political unit to which all owe allegiance; in turn, the government is obliged to preserve and protect the citizens who live within its jurisdiction. Public law also deals with obligations that citizens have to the government, such as paying taxes or serving in the armed forces, or it may pertain to services or obligations that the state owes to its citizenry, such as laws providing for unemployment compensation or statutes protecting property rights. Criminal law also falls into this broad category, as do laws that deal with such diverse subjects as defense, welfare, and taxation. Two subheadings in this category are administrative law and constitutional law.

Administrative Law

The decisions and regulations set forth by the various administrative agencies of the government are the substance of administrative law. Agencies, such as the SEC or a city health department, are empowered to oversee implementation or carry out specific mandates established by a legislative body. When one of these agencies promulgates rules or guidelines about how it intends to carry out its regulatory functions, the rules become part of administrative law.

Constitutional Law

Basically, constitutional law is the compilation of all court rulings on the meaning of the various words, phrases, and clauses in the US Constitution. Although all courts have the authority to perform this function, the US Supreme Court has the final say about questions of constitutional law. For example, in

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1952, during the Korean War, the United States was faced with a strike by the unions against the nation's steel producers. President Harry S. Truman believed that a steel strike would impair the production of armaments needed for the war. He decided to seize and run the steel mills in the name of the United States. He claimed that he had "inherent powers" under Article II of the Constitution to do this—for example, his power as "Commander in Chief of the Army and Navy" and the fact that "the executive power shall be vested in [the] president." The Supreme Court disagreed with Truman and ruled that the chief executive did not have inherent authority to seize and operate the steel mills—even in times of emergency—without specific congressional authorization.[11]

State Law and Federal Law

Laws passed by one of the fifty state legislatures, ordinances promulgated by a state governor, and decisions handed down by a state court all constitute the corpus juris of a single state. They are compelling only for the citizens of that state and for outsiders who reside or do business there. State laws must not conflict with either federal law or anything in the US Constitution. Examples of state law are Illinois' income tax for those who reside within its boundaries and Utah's new law that approves the use of firing squads for executions "when no lethal-injection drugs are available."[12] Federal law is made up of acts of Congress, presidential orders, US court decisions, and so on. This body of law applies throughout the United States and usually pertains to topics that are relevant to persons in more than just one state. Examples include a congressional act forbidding the transportation of a stolen car across state lines and a US Supreme Court decision outlawing prayer in the public schools. As with state law, federal law must be in harmony with the strictures of the US Constitution.

Functions of Law

What is the function of law in the United States (or in any country, given that the function of law is universal)? What would the negative consequences be if there were no law? Or conversely, what positive things could be done through law that would be impossible without it? Few would deny that, in today's world, law is essential for ensuring that people live together amicably. As populations expand and modern transportation and communication link people together even more, every action that everyone takes affects others, either directly or indirectly, possibly causing harm. When conflict results, it must be resolved peaceably, using a rule of law. Otherwise, disorder, death, and chaos reign. Some common set of rules must exist that all agree to live by—in other words, a rule of law and order.

But what kind of law and order? Anarchists (those who are opposed to laws in general) argue that laws restrict personal freedom, and certainly in many cases

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that is so. If there are too many rules, laws, and restrictions, totalitarianism results. This result may be just about as bad as a state of anarchy. The trick is to strike a balance so that the positive things that law can do are not strangulated by the tyranny of the law and order offered by the totalitarian state.

Assuming, then, that both anarchy and totalitarianism are rejected, what are the positive functions of law when it exists to a reasonable degree? Legal theorists denote several benefits.

Providing Order and Predictability in Society

The world is chaotic and uncertain. People win lotteries while the price of oil collapses; more and more people are living to the age of one hundred, while millions in today's world have died of COVID; some ranchers manage to enlarge their herds at a time of a beef shortage, while farmers in California suffer from the worst drought in memory. Laws can neither avert most natural disasters nor prevent random episodes of misfortune, but they can create an environment in which people can work, invest, and pursue happiness with a reasonable expectation that their activity is worth the effort. Without an orderly environment based on and backed by law, the normal activities of life would be lacerated with chaos.

For example, rules must be established that determine which side of the road to drive on, how fast cars can safely go, and when to slow down and stop. Without rules of the road, horrible traffic jams and terrible accidents would result because no driver would know what to expect from the others. Without a climate of law and order, no parent would have the incentive to save for a child's college education. The knowledge that the bank will not close and that one's savings account will not be arbitrarily confiscated by the government or by some powerful party gives the parent an environment in which to save. Law and the predictability it provides cannot guarantee a totally safe and predictable world, but they can create a climate in which people believe it is worthwhile to produce, to venture forth, and to live for the morrow.

Resolving Disputes

No matter how benign and loving people can be at times, altercations and disagreements are inevitable. How disputes are resolved between quarreling individuals, corporations, or governmental entities reveals much about the level and quality of the rule of law in a society. Without an orderly, peaceful process for dispute resolution, there is either chaos or a climate in which the largest gang of thugs or those with the strongest fists prevail.

Suppose a new fraternity house is built next to the home of Mr. Joe Six-Pack, a man who likes his peace and quiet. After Joe's sleep has been disrupted for the umpteenth time by loud music coming from the fraternity house, Joe decides to get even. About sunrise one Sunday, after another sleepless night, Joe angrily runs over to his neighbors' driveway and systematically begins to let air out of the tires

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of the students' cars—"just to teach those damn kids a lesson." He is caught in the act by several well-soused fraternity boys marking the end of a raucous night. Angry words are exchanged; "manhood" and "right-and-wrong" are at stake. A brawl ensues, resulting in bloodshed and injury all around. How much better the outcome would have been if Joe had turned this grievance over to the police, the courts, or campus authorities—all empowered by the law to peacefully resolve such matters.

Protecting Individuals and Property

Even libertarians, who take a narrow view of the role of government, will readily acknowledge that the state must protect citizens from the outlaw who would inflict bodily harm or steal or destroy their worldly goods. Because of the importance of the safety of persons and their property, many laws on the books deal with protection and security. Not only are laws in the criminal code intended to punish those who steal and do bodily harm, but civil statutes also permit many crime victims to sue for monetary **damages**. The law has created police and sheriffs' departments, district attorneys' offices, courts, jails, and death chambers to deter and punish the criminal and to help people feel secure. This is not to say that there is no crime; everyone knows otherwise. But without a system of laws, crime would be much more prevalent and the fear of it would be much more paralyzing. Unless everyone could afford to hire his or her own bodyguards and security teams, people would be in constant anxiety about the potential loss of life, limb, and property. However imperfect the system of law, prevention, and enforcement may be, it is certainly better than none.

Providing for the General Welfare

Laws and the institutions and programs they establish enable a society to do corporately what would be impossible, or at least prohibitive, for individuals to do. Providing for the common defense, educating young people, putting out forest fires, controlling pollution, and caring for the sick and aged are all examples of activities that could be done only feebly, if at all, by an individual acting alone but that can be done efficiently and effectively as a society. Citizens may disagree about which endeavors should be undertaken through the government by law. Some may believe, for example, that the aged should be cared for by family members or by private charity; others see such care as a corporate responsibility. Although citizens can disagree about the precise activities that the law should require of government, few would deny that many significant and beneficial results are achieved through corporate endeavors. After all, the foundation of the American legal system, the Constitution, was ordained to "establish Justice, ensure domestic tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to us and our Posterity."

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Protecting Individual Liberties

Law should protect the individual's personal and civil rights against those forces that would curtail or restrict them. These basic freedoms might include those provided for in the Bill of Rights, such as freedom of speech, of religion, and of the press; the right to a fair trial; and freedom from cruel and unusual punishment. They might also include some that are not stated in the Bill of Rights but are implied, such as the right to personal privacy, or they might be rights that Congress has provided through legislation, such as the right to be free from job discrimination based on gender or ethnic origin. Potential violators of these freedoms might be the government itself (for example, a law denying American citizens accused of terrorist acts the right to a civilian trial) or one's fellow citizens (for example, a conspiracy among private individuals to discourage certain persons from voting). Although disagreement may arise about which freedoms are basic or about how extensively they should be provided for, it is fair to say that unless the law protects certain basic immutable rights, the nation's citizens are no more than cogs in a machine. It is the meaningful provision for these basic liberties that ensures the dignity and richness of the life of the individual.

The United States and the Rule of Law

Americans pride themselves on being a law-abiding people, and to the casual observer, they are. Few would question Abraham Lincoln's admonition that respect for the law should be taught to every child at his or her mother's knee, and most are glad to proclaim that the United States has a government of law, not of individuals. The fact that the United States is now paying over $200 billion a year to arrest, try, and incarcerate almost a quarter of the world's prisoners, even though it's home to only 5 percent of the world's inhabitants, is seen not as evidence that society is lawless but as proof that in the United States respect for the law is paramount and disobedience of the law is punished.[13] A careful analysis of US history and traditions reveals, however, that this view of the law has in reality been ambivalent. A few examples will illustrate Americans' love–hate relationship with the rule of law.

The Revolutionary War

An appropriate place to begin is the Revolutionary War. Few Americans can look back on that seven-year struggle and feel anything but pride when certain images come to mind: the bold act of defiance of the Boston Tea Party; the shot fired at Concord, Massachusetts, that was "heard 'round the world;" and George Washington's daring attack on the Hessian troops at Trenton, New Jersey. Despite the goose bumps raised in this patriotic reverie, one bothersome fact is lost: the Revolution was illegal. The wanton destruction of private property wrought by

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the Boston Tea Party and the killing of British troops sent to America for the colonists' protection were illegal in every sense of the word. The founders were so keenly aware of this fact that they prepared a Declaration of Independence to justify to the rest of the world why a bloody and illegal revolt against the lawful government is sometimes permissible:

> When during human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, a decent respect to the opinions of humankind requires that they should declare the causes which impel them to the separation.... [W]hen a long train of abuses and usurpations.... evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.

The irony of America's birth is often overlooked. This citadel of law and order was born under the star of illegality and revolution.

John Brown at Harpers Ferry

Another example is John Brown's famous raid on the US arsenal at Harpers Ferry, West Virginia, in the fall of 1859. With thirteen White men and five Black men, this militant opponent of slavery launched his plan to lead a mass insurrection among the slaves and to create an abolitionist republic on the ruins of the South and its plantation economy. After a small but bloody battle that lasted several days, Brown was captured, given a public trial, and duly hanged for murder and other assorted crimes. But were Brown's flagrantly violent and illegal actions justifiable, given the nobility of his vision? Many in the North believed so. Its moral and cultural elite took the line that Brown might have been insane, but his acts and intentions should be excused on the grounds that the compelling motive was divine. Horace Greeley wrote that the Harpers Ferry raid was "the work of a madman," but he had not "one reproachful word." Ralph Waldo Emerson described Brown as a "saint." Henry David Thoreau, Theodore Parker, Henry Wadsworth Longfellow, William Cullen Bryant, and James Lowell—the whole Northern pantheon—took the position that Brown was an "angel of light," and that it was not Brown but the society that hanged him that was mad. It was also reported that "on the day Brown died, church bells tolled from New England to Chicago; Albany fired off one hundred guns in salute, and a governor of a large Northern state wrote in his diary that men were ready to march to Virginia."[14] Again the ambivalence is evident. One ought always to obey the law—unless one hears a divine call that transcends the law.

The Civil Rights Movement

The civil rights movement beginning in the 1950s caused many Americans to be torn between their natural desire to obey the law of the land and their call to

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change the system. As the Reverend Martin Luther King, Jr. sat in a Birmingham, Alabama, jail, he wrote a now famous letter to supporters who were disturbed by his having disobeyed the law during his civil rights protests:

> You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we would diligently urge people to obey the Supreme Court's decision in 1954 outlawing segregation in the public schools, at first glance it may seem rather paradoxical for us consciously to break laws. One may well ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. I would be first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. Thus, it is that I can urge men to obey the 1954 decision of the Supreme Court [*Brown v. Board of Education*, 347 U.S. 483 (1954)], for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong.[15]

Even a member of the Supreme Court of the United States sanctioned civil disobedience during the heady days of the civil rights movement. Justice Abe Fortas said,

> If I had been a Negro living in Birmingham or Little Rock or Plaquemines Parish, Louisiana, I hope I would have disobeyed the state laws that said that I might not enter the public waiting room in the bus station reserved for "Whites." I hope I would have insisted upon going into parks and swimming pools and schools which state or city law reserved for "Whites." I hope I would have had the courage to disobey, although the segregation ordinances were presumably law until they were declared unconstitutional.[16]

More recently, we note the action of a forty-nine-year-old Kentucky county clerk, Kim Davis, who refused to issue marriage licenses to same-sex couples based on her beliefs as an Apostolic Christian. In September 2015, a federal judge temporarily jailed her for contempt of court because of her refusal to obey his orders to issue the contested marriage licenses.

We should also note that in today's world, civil disobedience to morally offensive statutes are not limited to the United States. For example, in 2007, former pope Benedict XVI told a group of Catholic pharmacists that they have a moral right to use "conscientious objection" to avoid dispensing emergency contraception or euthanasia drugs, and that they should also inform patients of the ethical implications of using such drugs. "Pharmacists must seek to raise people's awareness so that all human beings are protected from conception to natural death, and so that medicines truly play a therapeutic role," Benedict said. He added that conscientious objector status would "enable them not to

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collaborate directly or indirectly in supplying products that have clearly immoral purposes such as, for example, abortion or euthanasia."[17] Civil disobedience does not need a divine call. Ample illustrations exist of the wholesale avoidance of laws that were thought to be economically harmful and unfair or that were seen as beyond the rightful authority of the state to enact.

Examples of Civil Disobedience in the United States

American farmers are probably as law-abiding a segment of the population as any, but they too can thwart the law when their economic livelihood is at stake. During George Washington's administration, state militias were activated and sent out to quash what came to be known as the Whiskey Rebellion, a series of lawless acts by tillers of the soil who objected to the federal tax on their homemade elixirs. And during the terrible Great Depression of the 1930s, when, for example, one-third of the state of Iowa was being sold into bankruptcy, farmers often revolted. Thousands with shotguns held at bay local sheriffs who tried to serve papers on fellow farmers about to be dispossessed.

During the Prohibition era, from 1919 to 1933, many Americans refused to obey a law they regarded as unfair and more than the legitimate bounds of state authority. Not only did the laws prohibiting the production and sale of alcohol prove to be ineffective and unenforceable, but Americans also seemed to relish flouting the law. The statistics on Prohibition enforcement reveal how the laws were honored in the breach. In 1921, the government seized a total of 95,933 illicit distilleries, stills, still worms, and fermenters; this number rose to 172,537 by 1925, and it jumped to 282,122 by 1930.[18] By 1932, President Herbert Hoover, who had originally supported Prohibition, began to talk about "the futility of the whole business."[19] More recently, the "occupy movement" has been a focus of civil disobedience in the United States (and elsewhere in the world). Beginning in September 2011, literally tens of thousands of Americans have "camped out" in public places such as parks or in private and public buildings to protest what they believe are severe inequalities in our economic and social systems. There were almost 8,000 arrests in 122 different cities resulting from these acts of civil disobedience.[20] In many states, it is against the law to engage in certain sexual activities, such as fornication and adultery. "Fornication" is voluntary sexual intercourse between two unmarried persons, while "adultery" is voluntary sexual intercourse between a married person and someone other than his or her lawful spouse. Indeed, at the present time, it is illegal in three states for straight couples to live together without being married.[21] That these laws are seldom obeyed or enforced is a secret to no one. Although most Americans still approve of forbidding sexual practices and acts that they find personally distasteful, few have much enthusiasm for putting police officers in every bedroom or for strictly enforcing laws that touch on very personal issues.

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Concluding Thoughts on the United States and the Rule of Law

So, are Americans a law-abiding people or not? Is respect for the law only superficial and the belief that everyone ought to obey the law mere cant? The truth, it would appear, is that Americans do honestly have great respect for the law and that their abhorrence of lawbreakers is genuine. But it is also fair to say that mixed with this tradition and orientation is a long-standing belief that sometimes people are called to respond to values higher than the ordinary law and thereby to engage in illegal behavior. However, one person's command to disobey the law and follow the dictates of conscience will appear to another as mere foolishness. Furthermore, Americans have a hefty, pragmatic tradition vis-à-vis the law. Laws that drive citizens to the wall economically (such as farm foreclosures during the 1930s) and laws that are seen to needlessly impinge on personal matters (such as Prohibition and laws prohibiting couples from living together without being married) are just not taken as seriously as those that forbid bank robbery and first-degree murder.

A Litigious Society

Like the law, judges are viewed ambivalently by Americans. In general, judges are held in inordinately high esteem, and most Americans would be proud if a son or daughter achieved this position. Yet, Americans can be quick to condemn judges whose rulings go against deeply held values or whose decisions are not in the best interests of their pocketbooks.[22] Whether this is hypocrisy or merely the complex and ambivalent nature of humankind is perhaps in the eye of the beholder.

The raw statistics reveal that Americans readily look to the courts to redress their grievances. The quarter of a million suits that are filed in the federal courts each year are dwarfed by the sixteen million suits filed in the courts of the fifty states and the District of Columbia. That works out to one new lawsuit for every twenty adults in America.[23] Although some of these suits deal with relatively minor matters, at least three-fourths deal with substantive legal issues. The financial cost of these lawsuits is staggering: the annual bill for such litigation is an estimated $239 billion (at least half of which represents legal fees and expenses).[24] Furthermore, the proportion of lawyers in the United States is comparatively quite large, 1,352,027 according to the American Bar Association—more per capita than any other country.[25] As one contemporary expert has noted:

> Ours is a law-drenched age. Because we are constantly inventing new and better ways of bumping into one another, we seek an orderly means of dulling the blows and repairing the damage. Of all the known methods of redressing grievances and settling disputes—pitched

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battle, rioting, dueling, mediating, flipping a coin, suing—only the latter has steadily won the day in these United States.

Though litigation has not routed all other forms of fight, it is gaining public favor as the legitimate and most effective means of seeking and winning one's just deserts.

The impulse to sue is so widespread that "litigation has become the nation's secular religion," and a growing array of procedural rules and substantive provisions is daily gaining its adherents.[26]

It is useful to see Americans' love affair with lawsuits in some type of comparative perspective. Cross-national comparisons reveal that while the United States is a litigious society, citizens in many other industrialized nations are even more litigious. For example, in the United States, for every 1,000 people, some 74.5 lawsuits are filed. However, in Germany the number is 123.2; in Sweden it is 111.2; in Israel it is 96.8; and in Austria it is 95.9. So, contrary to much popular belief, America is not the most litigious nation in the world.[27]

This virtual explosion of primarily civil litigation in the United States has led the courts to consider cases that in years past were settled privately between citizens or were issues that often went unresolved. Some cases deal with momentous subjects, such as the right of the states to curtail abortion and efforts by the Environmental Protection Agency to enjoin polluters of the environment. But many suits are surprisingly audacious or trivial:

[Americans] sue doctors over misfortunes that no doctor could prevent. They sue their school officials for disciplining their children for cheating. They sue their local governments when they slip and fall on the sidewalk, get hit by drunken drivers, get struck by lightning on city golf courses—and even when they get attacked by a goose in a park (that one brought the injured plaintiff $10,000). They sue their ministers for failing to prevent suicides. They sue their Little League coaches for not putting their children on the all-star team. They sue their wardens when they get hurt playing basketball in prison. They sue when their injuries are severe but self-inflicted, and when their hurts are trivial and when they have not suffered at all.[28]

While such suits are frivolous, they still require the time and efforts of the jurists who must at least consider their merits in the 17,000 courthouses throughout the United States.

Despite this plethora of less than monumental lawsuits, the judicial system appears to be fighting those who attempt to use the courts to advance frivolous causes. Rule 11 of the Federal Rules of Civil Procedure forbids the filing of worthless petitions, and this was made stronger in 1983, when US trial judges were given the authority to impose sanctions for the filing of frivolous suits. (Critics of the rule have charged that it has had a chilling effect on civil rights

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suits, but law school studies have largely refuted that claim.)[29] In 1991, the US Supreme Court handed down two key decisions that reaffirmed the imposition of large fines on those filing specious lawsuits—sending a strong message to the legal community that violations of Rule 11 will be taken seriously.[30] More recently, in May 2018, the Supreme Court handed down a very important ruling that held that companies can require its employees to settle employment disputes through *individual arbitration* rather than filing class actions in federal court.[31] This decision affects as many as twenty-five million workers.[32]

Furthermore, the individual states are also electing to combat those who inundate their legal tribunals with worthless petitions.[33] The American Tort Reform Association now has a nationwide network of state-based liability reform coalitions backed by 135,000 grassroots supporters, and it claims "an unparalleled track record of legislative success."[34] But as with many things in the judiciary, the matter of human judgment is all important: what is frivolous to one person might be deadly serious to another.

Although a burst of litigation has been evident in the United States during the past several decades, Americans have always been litigious people. As early as 1835, the highly perceptive French observer Alexis de Tocqueville noted that "there is hardly a **political question** in the United States which does not sooner or later turn into a judicial one."[35] As one contemporary scholar has said, "To express amazement at American litigiousness is akin to professing astonishment at learning that the roots of most Americans lie in other lands. We have been a litigious nation as we have been an immigrant one. Indeed, the two are related."[36] This scholar goes on to argue that US history was made by diverse groups who wanted to live according to their own customs but found themselves drawn haphazardly into a larger political community. As these groups bumped into one another and the edges became frayed, disputes resulted. But given a strong common law legal tradition, such disputes were channeled, for the most part, into the courtroom rather than onto the battlefield. Many reasons can be cited as to why Americans have been and continue to be highly litigious, and it is beyond the scope of this chapter to examine them all systematically. Suffice it to say that in the United States, the courthouse has been and is the anvil on which a significant portion of personal, societal, and political problems are hammered out.

Although America is a litigious society, this trend may be part of a worldwide phenomenon. Even countries that historically made little use of public law courts are seeing increasing use of these tribunals as their citizens gradually deem it appropriate and useful to bring grievances before the courts, which in earlier times would have been borne in silence or at least viewed as unsuitable for a judicial tribunal. A case in point is China, which is now seeing lawsuits on an issue that a decade ago would have been considered unthinkable: parents suing the government for the death of their children, which resulted from shoddy workmanship on a collapsed schoolhouse. This stemmed from the horrendous earthquake that occurred in western China on May 12, 2008. The quake left 88,000 people dead or missing, including up to 10,000 schoolchildren,

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as some 7,000 classrooms and dormitories collapsed across the quake zone. (The government conceded that in the rush to build schools during the Chinese economic boom, poor workmanship or faulty planning might have contributed to the school's collapse during the quake.) In the past, to bring a lawsuit against the Chinese government in such an instance would have been unheard of at best and an act of treason at worst. But on December 1, 2008, the parents whose children died in the collapse of Primary School No. 2 in the town of Fuxin, sued the town government, the education department of the nearby city of Mianzhu, the school principal, and the company that built the school. The parents demanded compensation equivalent to $19,000 per child.[37] But alas, this attempt to use the Chinese courts in this novel way died aborning (at least this time). For on December 23, 2008, US National Public Radio announced in a news broadcast, "A court in southwest China has rejected a lawsuit brought by the parents of schoolchildren who died in the May 12 earthquake in Sichuan province."[38] Still, it was clear to all observers that this was truly a novel phenomenon in modern-day China, and the final chapter in this overall legal upheaval is yet to be written. Additional evidence that a changing, modernizing China is becoming a more litigious society is seen in the number of lawyers per capita. In 2013, China had almost a quarter of a million lawyers, a whopping average annual growth rate of 9.1 percent, and there are now about 20,000 law firms in the country, up 6 percent annually on average. As the All-China Lawyers Association said in a recent report: "The ratio of lawyers per 10,000 people is an important indicator of development in the legal industry."[39] A more recent study concluded:

> One thing's for sure in China: Courts of law are increasingly stepping out of the shadows to play a more prominent role regulating Chinese society by settling disputes, with landmark cases aimed at enforcing environmental law, checking the abuse of governmental power and just figuring out how to split up property in messy divorce cases. And more of what they do is on public record, making big areas of law more transparent. Instead of lodging a petition with the government, says Beijing lawyer Wei Shilin, the Chinese are increasingly taking their complaints to a judge, and the courts are often asked to weigh in on the complicated issues thrown up by the rapid changes in this society.[40]

These facts suggest that modern life and the increasing use of law courts may go hand in glove.[41] Because America's judicial caseload is so enormous and far-ranging, the courts must be examined to understand fully how the nation is governed and how its resources are allocated. Given the significance of courts in formulating and implementing public policy in the United States, it is important to know who the judges are, what their values are, and what powers and prerogatives they possess. And it is essential to study how decisions are made and how they are implemented if the judicial game is to be understood.

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SUMMARY

In this chapter, we looked briefly at law in the United States—the wells from which it springs, its basic types, and its functions in society. We also examined the ambivalent attitude Americans have about the rule of law; this is a nation born in an illegal revolution, yet it is proud of its respect for law and order. Finally, we noted that Americans' contentiousness as a people has been channeled largely through the legal and court systems. Consequently, the high priests of the judicial temples, the judges, play a significant role in Americans' personal lives and in their evolution as a society and political entity.

FURTHER THOUGHT AND DISCUSSION QUESTIONS

1. In the introduction to this chapter, we discussed the case of Shelley Luther who believed that her right to run an honest, legitimate business concern was fundamentally protected by the Constitution of the United States. On the other hand, the Texas governor believed (at least until political pressures made him back down) that the "police powers" of the State gave him the right to provide for the health, welfare, and safety of Texas citizens by ordering those businesses to remain closed until the COVID pandemic abated. Which side was right? Is there an inherent conflict between what citizens often want to do and what the government contends that they ought not do? How should such conflicts be resolved in a democracy: by popular vote, by the courts, by legislative action, by decisions of elected executive officials?
2. In the United States today, almost seven million adults—about 3 percent of the population—are either incarcerated or on probation or parole. Is this a sign of the inherent lawlessness of the American people, or is it evidence that the United States is a nation that believes in strict law enforcement?
3. Americans are known internationally for their high numbers filing lawsuits, but many other nations, particularly the developing countries, are beginning to close the gap. Is this a sign of progress or regression on their part?
4. How many US citizens would be willing to break the law and risk imprisonment if their economic survival depended on it? If they believed the law were illegal and unjustified? If they felt the law violated a higher moral or religious belief? If they felt the law unfairly violated their individual liberties?

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SUGGESTED RESOURCES

Calvi, James V., and Susan Coleman. *American Law and Legal Systems*, 8th ed. Boca Raton, FL: Taylor & Francis, 2017. A systematic discussion of all the major types of law in the United States.

Hall, Kermit L., and Karsten Peter. *The Magic Mirror: Law in American History*. New York, NY: Oxford University Press, 2008. A discussion of the historical interactions of law with events in the social and political realms.

Howard, Philip K. *Life Without Lawyers: Restoring Responsibility in America*. New York, NY: W. W. Norton, 2009. This legal reformer argues that we are being choked to death by lawyers and with too much law. His critique is directed mainly toward the realms of health care, education, and the plaintiffs' bar.

Irons, Peter. *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court*. New York, NY: Penguin, 1990. Examines sixteen case studies of strong-minded individuals who fought their legal battles all the way to the Supreme Court.

May, Larry, and Jeff Brown. *Philosophy of Law: Classic and Contemporary Readings*. West Sussex, UK: Wiley-Blackwell, 2010. A wide selection of readings about various philosophies of law, punishment, liberty, legal reasoning, and so on.

Sarat, Austin, and Patricia Ewick, ed. *Studies in Law, Politics, and Society*, Vol # 23. Bingley, UK: Emerald Books, 2012. A collection of readings on diverse topics such as the purpose of law, the dilemmas inherent in social organization, and the discretionary aspects of the judicial system.

Vago, Steven. *Law and Society*, 11th ed. New York, NY: Routeledge, 2018. A good summary of law and society issues in the United States, with an excellent comparative perspective on these issues.

NOTES

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3. Ibid.
4. Fourteenth Amendment to the United States Constitution, Section 1.
5. Stephen D. Ford. *The American Legal System: Its Dynamics and Limits* (St. Paul, MN: West, 1974), 13. Our elaborations on this definition of law are borrowed from Chapter 1 of Ford's text.

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8. Gregg Easterbrook, *It’s Better Than It Looks* (New York, NY: Public Affairs, 2018), 93.

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11. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

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13. Andrew Romano, “Jailbreak!” *Newsweek*, April 23 and 30, 2012, 22.

14. Theodore Reed Fehrenbach, *Lone Star: A History of Texas and the Texans* (New York, NY: American Legacy Press, 1968), 336.

15. Martin Luther King Jr., “Letter from Birmingham Jail, April 16, 1963.” The full text of the letter may be found in *Why We Can’t Wait* (New York, NY: Harper & Row, 1963).

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21. “Cohabitation in the United States,” http://enwikipedia.org/wiki/Cohabitation_ in_the_United States (accessed March 17, 2015).

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27. “Global Litigation Rates: The U.S. Is Not the Leader,” *doeLegal Journal*, March 29, 2011, http://doelegal.blogspot.com/2011/03/global-litigation-rates-us-is-not.html (accessed April 9, 2012).

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29. Stephen Wermiel, “High Court Agrees to Hear Case on Segregation at State Colleges,” *Wall Street Journal,* April 16, 1991.

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40. The evidence suggests that this litigious trend is also being experienced in Europe. For example, see Charles Fleming, "Europe Learns Litigious Ways: Union's Tactic Spotlights Trend toward U.S.-Style Lawsuits," *Wall Street Journal*, February 24, 2004.
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