eleventh edition

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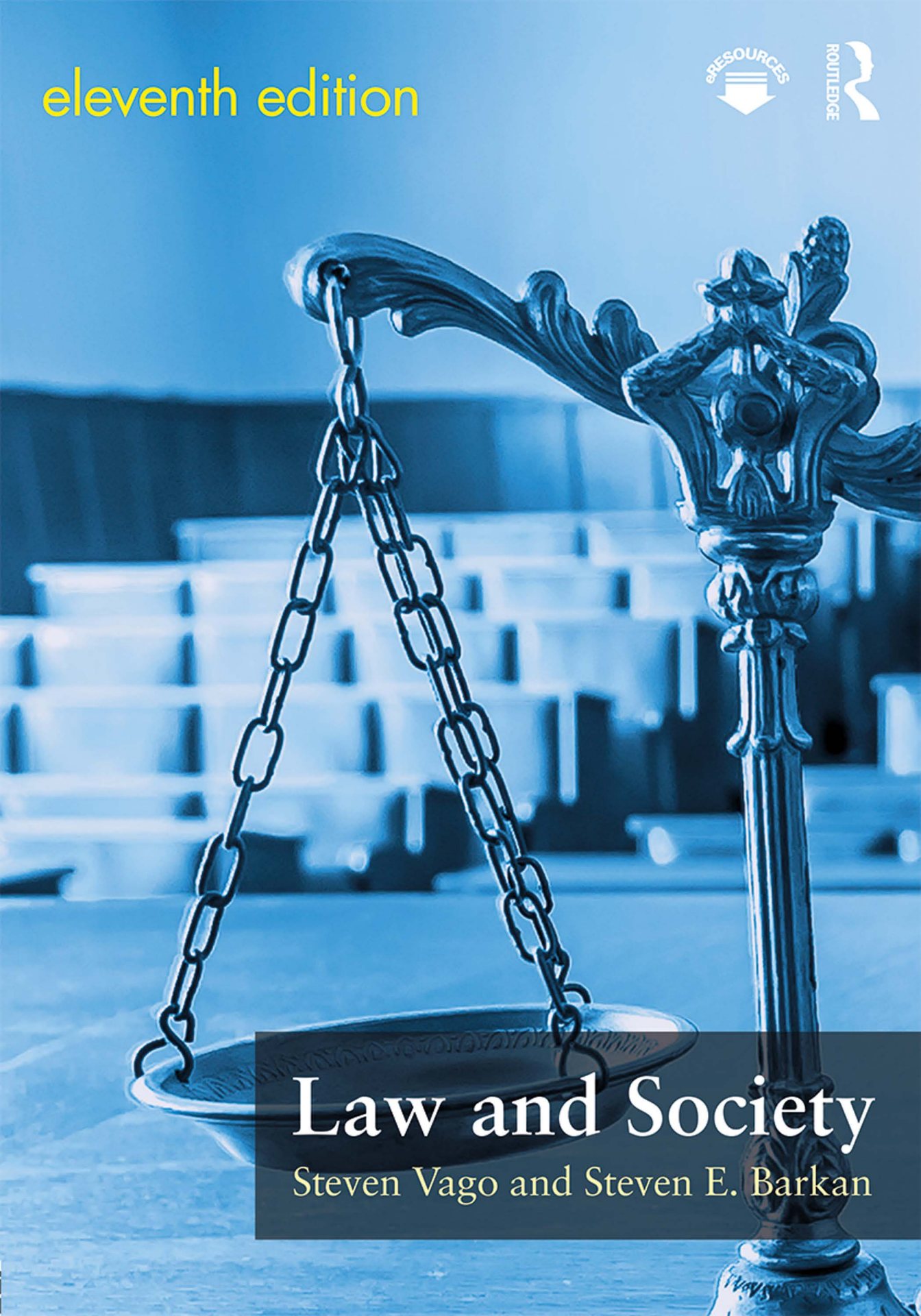

Law and Society

Steven Vago and Steven E. Barkan

Law and Society

In the 11th edition of *Law and Society*, Steven E. Barkan preserves Dr. Vago's voice while making this classic text more accessible for today's students. Each chapter now includes an outline, learning objectives, key terms, and chapter summaries. A new epilogue chapter examines law and inequality in the United States as it moves into the third decade of this century. The 11th edition reflects new developments in law and society literature as well as recent real-life events with legal relevance for the United States and other nations. *Law and Society* is for one-semester undergraduate courses in Law and Society, Sociology of Law, Introduction to Law, and a variety of criminal justice courses offered in departments of Sociology, Criminal Justice, and Political Science.

Steven Vago earned two Ph.D.s: one in Sociology and one in Anthropology at Washington University in St. Louis. During graduate school, he was an integral part of the creation of an alcohol treatment program at Malcolm Bliss Hospital in St. Louis. Steven became part of the Department of Sociology at St. Louis University after finishing his graduate studies and was a full professor there by the age of 37. Thereafter, he chaired the Department of Sociology several times, teaching at St. Louis University for over 30 years. During the 1970s, Steven was asked by the United Nations to work for its member agency UNESCO and worked in Paris for several years in their Office of Population and Demography. At the end of his teaching career in 2001, Steven retired to Bellingham, Washington, with his wife. Vago passed away in 2010, at the age of 73.

Steven E. Barkan is Professor of Sociology at the University of Maine, where he has taught since 1979. His teaching and research interests include criminology, sociology of law, and social movements. He is a past president of the Society for the Study of Social Problems (SSSP) and has served as chair of its Law and Society Division and as a Council member of the Sociology of Law Section of the American Sociological Association. His articles have appeared in the *American Sociological Review*, *Journal for the Scientific Study of Religion*, *Journal of Crime and Justice*, *Journal of Research in Crime and Delinquency*, *Justice Quarterly*, and other journals. He is the author of *Criminology: A Sociological Understanding, 7/e* (Pearson 2018) and several forthcoming texts, including *Race, Crime, and Criminal Justice in America* with Oxford University Press.

Professor Barkan welcomes comments from students and faculty about these books. They may email him at barkan@maine.edu or send regular mail to: Department of Sociology, 5728 Fernald Hall, University of Maine, Orono, ME 04469–5728.

At a time in our lives when a true understanding of the intersection of law and society really matters, this text offers a thoughtful explanation of just that. Both law and society are complex perspectives and the authors provide an organized, clear, and concise understanding of these complexities. This text is used in a graduate level course on the topic and students respond well to the balanced writing encouraging meaningful debate and discussion.

Susan V. Koski, *LP.D., Associate Professor, Department of Criminology & Criminal Justice, Central Connecticut State University*

I highly recommend Vago and Barkan's new book as it provides a solid foundation for understanding the reciprocal nature of law and society. As a practicing attorney for four decades and a professor teaching Law and Society at the upper undergraduate level, I can affirm that Vago and Barkan's 11th edition is the gold standard of Law and Society textbooks.

Michael Bateman, *Part-Time Lecturer, Rutgers University, Attorney-at-Law*

Law and Society

ELEVENTH EDITION

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DETAILED CONTENTS

PREFACE

I am both honored and humbled to become the co-author of this eminent law and society text by the late Steven Vago. I have taught law and society regularly since I began my academic career, and Professor Vago's text was one of the first textbooks I used in my classes. Its longevity attests to its quality and impact, as thousands of undergraduate students, graduate students, and instructors during the past few decades have learned much about law and society by reading the pages Professor Vago wrote.

In preparing the eleventh edition for a new generation of readers, I viewed my task as preserving Professor Vago's voice while making the text more accessible for today's students. Accordingly, I removed material that was not central to the overall presentation and added a chapter outline, learning objectives, and boldfaced terms and a list of key terms to every chapter. To aid comprehension, I also adapted the chapter summaries into a series of numbered points. In addition to these changes, I updated content and references to reflect recent developments in the law and society literature and, as well, recent real-life events with legal relevance for the United States and other nations. I also added a brief epilogue chapter that examines law and inequality in the United States as it moves into the third decade of this century.

My sincere thanks go to Nancy Roberts for her confidence that I was the right author to prepare this new edition, and to Samantha Barbaro and Athena Bryan for their help and patience as I did prepare it. I would also like to thank the many instructors who reviewed the tenth edition and provided very helpful comments that surely improved the text. Their names are Rudolph Alexander, Michael Bateman, Paul Dueren, Ellis Godard, Kimberly Hutson, Susan Koski, Mahgoub Mahmoud, Mary McKenzie, Demetrius Semien, Abigaile VanHorn, and DeeAnn Wenk.

As always in my textbooks, my heartfelt thanks go to Barbara Tennent, David Barkan, and Joel Barkan for everything they do, and to my late parents, Morry and Sylvia Barkan, for everything they did to help make me who I am.

I also owe a considerable debt to Steven Vago for writing this text that taught me so much about law and society when I was beginning my academic career. I hope and trust that Professor Vago would have been pleased with this new edition, and I am delighted that his book will now be available to future classes and readers.

Steven E. Barkan
Department of Sociology, University of Maine

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CHAPTER 1
INTRODUCTION: MAKING SENSE OF LAW AND SOCIETY

CHAPTER OUTLINE

LEARNING OBJECTIVES

- Explain why the study of law and society grew rapidly in the United States after the end of World War II
- Summarize the differences between substantive law and procedural law and between public law and private law
- Describe the major differences between common law and civil law systems
- Explain the ways in which law may be dysfunctional
- List the major differences between the consensus perspective and the conflict perspective

As we approach the third decade of the twenty-first century, law increasingly permeates all forms of social behavior and affects society in many other ways. In subtle and, at times, not so subtle ways, law governs our entire existence and our every action. Law determines registration at birth and the distribution of possessions at death; it regulates marriage, divorce, pet ownership, hanging laundry outdoors to dry, and the conduct of professors and

students in the classroom; it governs family and workplace relationships; and it regulates such different things as motor vehicle's speed limits and the length of school attendance. Laws control what we eat and many aspects of the restaurants and fast-food places in which we eat and what we can see in movie theaters or on television. Laws dictate the manufacture of the clothing we wear and even where we are allowed to wear certain clothing. Laws protect ownership and define the boundaries of private and public property. Laws regulate business, raise revenue, and provide for redress when agreements are broken. Laws protect the prevailing legal and political systems by defining power relationships, thus establishing who is superordinate and who is subordinate in any given situation. Laws maintain the *status quo* and provide the impetus for change. Finally, laws, in particular criminal laws, not only protect private and public interests but also preserve order. There is no end to the ways in which the law has a momentous effect upon our lives.

The principal mission of this book is to serve as a text in undergraduate courses on law and society. The large number of national and cross-cultural references cited also makes the text a valuable and indispensable source for graduate students engaging in research on the sociology of law, instructors who may be teaching this subject for the first time, and anyone else wanting to gain greater insight and understanding of the intricacies of law and society. Because the book is intended primarily for the undergraduate student, it features an eclectic approach to the often-controversial subject matter without embracing or advocating a particular position, ideology, or theoretical stance. To have done so would have been too limiting for a text, because important contributions would have been excluded or would have been considered out of context. Thus, the book does not propound a single thesis or position; instead, it exposes the reader to the dominant theoretical perspectives and sociological methods used to explain the interplay between law and society in the social-science literature. Should any reader care to follow up on a theoretical perspective or practical concern, the chapter topics, references, and suggested readings will prove very helpful.

OVERVIEW OF THE STUDY OF LAW AND SOCIETY

All through history, every human society has had mechanisms for the declaration, alteration, administration, and enforcement of the rules and definitions of relationships by which people live (Glenn, 2010). Not all societies, however, feature a formal legal system (courts, judges, lawyers, and law enforcement agencies) to the same degree (Grillo et al., 2009). For example, in today's poor, agricultural nations, the formal systems of property rights taken for granted in industrial nations simply do not exist. In poor nations, most people cannot identify who owns what, addresses cannot be verified, and the rules that govern property vary from neighborhood to neighborhood or even from street to street (de Soto, 2001). The notion of holding title to property is limited primarily to a handful of elites whose assets are identified in the formal documents and legal structures common in industrial nations.

Moreover, today's agricultural societies rely mostly on custom as the source of legal rules and resolve disputes through conciliation or mediation by village elders, or by some other moral or divine authority. As for law as we know it, such societies need little of it.

Traditional societies are more homogeneous than modern industrial ones. Social relations are more direct and intimate, interests are shared by virtually everyone, and there are fewer things to quarrel about. Because relations are more direct and intimate, nonlegal and often informal mechanisms of social control are generally more effective.

As societies become larger, more complex, and modern, homogeneity gives way to heterogeneity. Common interests decrease in relation to special interests. Face-to-face relations become progressively less important, as do kinship ties. Access to material goods becomes more indirect, with a greater likelihood of unequal allocation, and the struggle for available goods becomes intensified. As a result, the prospects for conflict and dispute within the society increase. The need for explicit regulatory and enforcement mechanisms becomes increasingly apparent. The development of trade and industry requires a system of formal and universal legal rules dealing with business organizations and commercial transactions, subjects that are not normally part of customary or religious law. Such commercial activity also requires guarantees, predictability, continuity, and a more effective method for settling disputes than that of trial by ordeal, trial by combat, or decision by a council of elders. As one legal anthropologist noted, using the male pronouns common in his time, "The paradox . . . is that the more civilized man becomes, the greater is man's need for law, and the more law he creates. Law is but a response to social needs" (Hoebel, 1954:292).

In the powerful words of Oliver Wendell Holmes, Jr. (1963:5), "the law embodies the story of a nation's development through many centuries." Every legal system stands in close relationship to the ideas, aims, and purposes of society. Law reflects the intellectual, social, economic, and political climate of its time. Law is inseparable from the interests, goals, and understandings that deeply shape or compromise social and economic life (Posner, 2007; Sarat and Kearns, 2000). It also reflects the particular ideas, ideals, and ideologies that are part of a distinct "legal culture"—those attributes of behavior and attitudes that make the law of one society different from that of another (Friedman, 2002).

In the academic discipline of sociology, the study of law embraces a number of well-established areas of relevant inquiry. Sociology is concerned with values, interaction patterns, and ideologies that underlie the basic structural arrangements in a society, many of which are embodied in law as substantive rules. Both sociology and law are concerned with norms—rules that prescribe the appropriate behavior for people in a given situation. The study of conflict and conflict resolution are central in both disciplines. Both sociology and law are concerned with the nature of legitimate authority, the definition of relationships, mechanisms of social control, issues of human rights, power arrangements, the relationship between public and private spheres, and formal contractual commitments (Baumgartner, 1999; Griffin, 2009). Both sociologists and lawyers are aware that the behavior of judges, jurors, criminals, litigants, and other consumers of legal products is charged with emotion, distorted by cognitive glitches and failures of will and constrained by altruism, etiquette, or a sense of duty.

Historically, the concern of sociology and other social sciences (anthropology, economics, psychology) with law is not novel. Early American sociologists, after the turn of the twentieth century, emphasized the various facets of the relationship between law and society.

E. Adamson Ross (1922:106) considered law as "the most specialized and highly furnished engine of control employed by society." Lester F. Ward (1906:339), who believed in governmental control and social planning, predicted a day when legislation would endeavor to solve "questions of social improvement, the amelioration of the conditions of all the people, the removal of whatever privations may still remain, and the adoption of means to the positive increase of the social welfare, in short, the organization of human happiness."

The writings of these early sociologists greatly influenced the development of the school of **sociological jurisprudence**, or the study of law and legal philosophy and the use of law to regulate conduct (Lauderdale, 1997). Sociological jurisprudence is based on a comparative study of legal systems, legal doctrines, and legal institutions as social phenomena; it considers law as it actually is—the "law in action" as distinguished from the law as it appears in books (Wacks, 2009). Roscoe Pound, the principal figure in sociological jurisprudence, relied heavily on the findings of early sociologists in asserting that law should be studied as a social institution. For Pound (1941:18), law was a specialized form of social control that exerts pressure on a person "in order to constrain him to do his part in upholding civilized society and to deter him from anti-social conduct, that is, conduct at variance with the postulates of social order."

Interest in law among sociologists grew rapidly after World War II ended in 1945. In the United States, some sociologists became interested in law almost by accident. As they investigated certain problems, such as race relations, they found law to be relevant. Others became radicalized in the mid- and late-1960s, during the period of the Vietnam War, and their work began to emphasize social conflict and the functions of stratification in society. It became imperative for sociologists of the left to dwell on the gap between promise and performance in the legal system. By the same token, those sociologists defending the establishment were eager to show that the law dealt with social conflict in a legitimate fashion. At the same time, sociological interest in law was further enhanced by the infusion of public funds into research evaluating a variety of law-based programs designed to address social problems in the United States (Ross, 1989:37). These developments provided the necessary impetus for the field of law and society, which got its start in the mid-1960s with the formation of the Law and Society Association and the inauguration of its official journal, the *Law & Society Review* (Abel, 1995:9). A large number of professional journals now provide scholarly outlets for the mounting interest in law and society topics; in addition to the *Law & Society Review*, these journals include *Law & Social Inquiry*, *Law and Anthropology*, *Journal of Law and Society*, *Journal of Empirical Legal Studies*, *Indiana Journal of Global Legal Studies*, and *European Law Journal*. Moreover, many colleges and universities now offer an undergraduate major and/or minor, graduate program, and/or joint degree programs in law and society. Some law schools emphasize international relations, with pronounced social-science components (Kuhn and Weidemann, 2010).

As well, many scholars in other nations also specialize in law and society theory and research (Johns, 2010). For example, Scandinavian scholars have explored the social meaning of justice and the public's knowledge of the law and attitudes toward it. Italian scholars have examined judges and the process of judging. Russian social scientists have

considered the transformation of socialist legal systems into more Western, market-oriented ones. German sociologists have studied the legal aspects of immigration and nationalism. International bodies such as the United Nations are also concerned with the legal issues that increasingly arise in today's global community.

Most law and society scholars would probably agree with Eugen Ehrlich's oft-quoted dictum that the "center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself" (Ehrlich, 1975: Foreword). In this regard, sociology has much to offer to the understanding of law and society. As I. D. Willock (1974:7) once commented, "In so far as jurisprudence seeks to give law a location in the whole span of human affairs it is from sociology that it stands to gain most." Sociological knowledge, perspectives, theories, and methods are not only useful but also axiomatic for the understanding and possible improvement of law and the legal system in society.

SOCIAL SCIENTISTS AND LAWYERS

But the study of law by sociologists and other social scientists is somewhat hampered by difficulties of interaction between these scholars and lawyers. Both nationally and internationally, language-based approaches to issues are different in the two professions (Wagner and Cacciaguidi-Fahy, 2008). Edwin M. Schur (1968:8) correctly noted, "In a sense . . . lawyers and sociologists 'don't talk the same language,' and this lack of communication undoubtedly breeds uncertainty in both professions concerning any involvement in the other's domain, much less any cooperative interdisciplinary endeavors." He added, "Sociologists and lawyers are engaged in quite different sorts of enterprises," and noted that "the lawyer's characteristic need to make decisions, here and now, may render him impatient with the sociologist's apparently unlimited willingness to suspend final judgment on the issue" (Schur, 1968:8). The complexity of legal terminology further impedes interaction. There is a special rhetoric of law that has its own vocabulary; terms like *subrogation* and *replivin* and *respondeat superior* and *chattel lien* abound (Garner, 2001; Sarat and Kearns, 1994). Lawyers use an arcane writing style (not that social scientists always write clearly!), at times replete with multiple redundancies such as *made and entered into*; *cease and desist*; *null and void*; *in full force and effect*; and *give, devise, and bequeath*, and they occasionally sue each other over the placement of a comma (Robertson and Grosariol, 2006). Not surprisingly, "between specialized vocabulary and arcane style, the very language of the law defies lay understanding" (Chambliss and Seidman, 1982:119). There is a move under way to combat such legalese, and lawyers and law schools are beginning to learn that good English makes sense (Gest, 1995). The "linguistically challenged profession" (Glaberson, 2001) is further beset by difficulties involving the complexities of legal writing (and the need to translate it into plain English [Garner, 2001]).

Problems of interaction are also brought about and reinforced by the differences in professional cultures (Davis, 1962). Lawyers are advocates; they are concerned with the identification and resolution of the problems of their clients. Sociologists consider all evidence on a proposition and approach a problem with an open mind. Lawyers to a great extent are guided by precedents, and past decisions control current cases. In contrast, sociologists emphasize creativity, theoretical imagination, and research ingenuity.

The pronouncements of law are predominantly prescriptive: They tell people how they should behave and what will happen to them if they do not. In sociology, the emphasis is on description, on understanding the reasons why certain groups of people act in certain ways in specific situations. The law *reacts* to problems most of the time; the issues and conflicts are brought to its attention by clients outside the legal system. In sociology, issues, concerns, and problems are generated within the discipline on the basis of what is considered intellectually challenging, timely, or of interest to the funding agencies.

These differences in professional cultures are, to a great extent, due to the different methods and concepts lawyers, sociologists, and other social scientists use in searching for "truth." Legal thinking, as Vilhelm Aubert (1973:50–53) once explained, is different from scientific thinking for the following reasons:

- Law seems to be more inclined toward the particular than toward the general (for example, what happened in a specific case).
- Law, unlike the physical and social sciences, does not endeavor to establish dramatic connections between means and ends (for example, the impact the verdict has on the defendant's future conduct).
- Truth for the law is normative and nonprobabilistic; either something has happened or it has not. A law is either valid or invalid (for example, did a person break a law or not).
- Law is primarily past and present oriented and is rarely concerned with future events (for example, what happens to the criminal in prison).
- Legal consequences may be valid even if they do not occur; that is, their formal validity does not inevitably depend on compliance (for example, the duty to fulfill a contract; if it is not fulfilled, it does not falsify the law in question).
- A legal decision is an either-or, all-or-nothing process with little room for a compromise solution (for example, litigant either wins or loses a case).

These generalizations, of course, have their limitations. They simply highlight the fact that law is an authoritative and reactive problem-solving system that is geared to specific social needs. Because the emphasis in law is on certainty (or predictability or finality), its consideration often requires the adoption of simplified assumptions about the world. The lawyer generally sees the law as an instrument to be wielded, and he or she is more often preoccupied with the practice and pontification of the law than with its consideration as an object of scholarly inquiry.

Sociologists and other social scientists who study law are sometimes asked, "What are you doing studying law?" Unlike the lawyer, the sociologist needs to justify any research in the legal arena and often envies colleagues in law schools who can carry out such work without having to reiterate its relevance or their own competence. Yet, this need for justification is not an unmixed evil because it serves to remind the sociologist that he or she is not a lawyer but a professional with special interests. Like the lawyer, the sociologist may be concerned with the understanding, the prediction, and perhaps even the development of law. Obviously, the sociologist and the lawyer lack a shared experience—a common quest. At the same time, increasingly, sociologists and lawyers work together on problems of mutual interests (such as research on jury selection, capital punishment, conflict resolution, privacy, same-sex

marriage, immigration, undocumented workers, crime, demographic concerns, consumer problems, and so on) and are beginning to see the reciprocal benefits of such endeavors. Sociologists also recognize that their research has to be adapted to the practical and pecuniary concerns of lawyers if it is to capture their interest. In view of the vocational and bar examination orientation of law schools and the preoccupation of lawyers with pragmatic legal doctrine (and billable events), it is unlikely that research aimed at theory building will attract or retain the attention of most law students and professors (Posner, 1996).

DEFINITIONS OF LAW

The term *law* conjures up a variety of images to the public. For some, law may mean getting a speeding ticket, being barred from buying beer legally if underage, or complaining about the local "pooper-scooper" ordinance. For others, law is paying income tax, taking off shoes and going through a body scanner at the airport, signing a prenuptial agreement, being evicted, or getting fined or going to jail for growing marijuana. For still others, law is concerned with what legislators enact or judges declare. Law means all these and more. Even among scholars, there is no agreement on the term. Some of the classic and contemporary definitions of *law* are introduced here to illustrate the diverse ways of defining it.

The question "What is law?" still haunts legal thought today, and probably more scholarship has gone into defining and explaining the concept of law than into any other concept still in use in sociology and jurisprudence. Comprehensive reviews of the literature by Ronald L. Akers and Richard Hawkins (1975:5–15), Lisa J. McIntyre (1994:10–29), and Robert M. Rich (1977) indicate that there are almost as many definitions of law as there are theorists. E. Adamson Hoebel (1954:18) comments that "to seek a definition of the legal is like the quest for the Holy Grail." He cites Max Radin's warning: "Those of us who have learned humility have given over the attempt to define law."

In our review of the many definitions of law, let us first turn to two great American jurists, Benjamin Nathan Cardozo and Oliver Wendell Holmes, Jr. Cardozo (1924:52) defined law as "a principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged." Holmes (1897:461) declared that "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." For Holmes, judges make the law on the basis of past experience. In both of these definitions, the courts play an important role. These are pragmatic approaches to law as revealed by court-rendered decisions. Implicit in these definitions is the notion of courts being backed by the authoritative force of a political state.

From a sociological perspective, one of the most influential and timeless definitions of law is that of Max Weber. Starting with the idea of an *order* characterized by legitimacy, he suggests: "An order will be called *law* if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a *staff* of people holding themselves especially ready for that purpose" (Weber, 1954:5). Weber argues that law has three basic features that, taken together, distinguish

it from other normative orders, such as custom or convention. First, pressures to comply with the law must come externally in the form of actions or threats of action by others regardless of whether a person wants to obey the law or does so out of habit. Second, these external actions or threats always involve coercion or force. Third, those who instrument the coercive threats are individuals whose official role is to enforce the law. Weber refers to "state" law when the persons who are charged to enforce the law are part of an agency of political authority.

Weber contends that customs and convention can be distinguished from law because they do not entail one or more of these features. Customs are rules of conduct in defined situations that are of relatively long duration and are generally observed without deliberation and "without thinking." Customary rules of conduct are called *usages*, and there is no sense of duty or obligation to follow them. Conventions, by contrast, are rules for conduct, and they involve a sense of duty and obligation. Pressures, which usually include expressions of disapproval, are exerted on individuals who do not conform to conventions. Weber (1954:27) points out that, unlike law, a conventional order "lacks specialized personnel for the instrumentation of coercive power."

Although a number of scholars accept the essentials of Weber's definition of law, they question two important points. First, some contend that Weber places too much emphasis on coercion and ignores other considerations that may induce individuals to obey the law. For example, Philip Selznick (1968, 1969:4–8) argues that the authoritative nature of legal rules brings about a special kind of obligation that is not dependent on the use or threat of coercion or force. Many laws are obeyed because people feel it is their duty to obey. The second point concerns Weber's use of a special staff. Some scholars claim that Weber's definition limits the use of the term *law* in cross-cultural and historical contexts. They argue that the word *staff* implies an organized administrative apparatus that may not exist in certain illiterate societies. E. Adamson Hoebel (1954:28), for instance, proposes a less-restrictive term by referring to individuals possessing "a socially recognized privilege," and Ronald L. Akers (1965:306) suggests a "socially authorized third party." Of course, in modern societies, law provides for a specific administrative apparatus. Still, these suggestions should be kept in mind while studying the historical developments of law or primitive societies.

From a different perspective, Donald Black (1976) contends that law is essentially governmental social control. In this sense, law is "the normative life of a state and its citizens, such as legislation, litigation, and adjudication" (Black, 1976:2). He maintains that several styles of law may be observed in a society, each corresponding to a style of social control. Four styles of social control are represented in law: penal, compensatory, therapeutic, and conciliatory. In the penal style, the deviant is viewed as a violator of a prohibition and an offender is to be subjected to condemnation and punishment (for example, a drug pusher). In the compensatory style, a person is considered to have a contractual obligation and, therefore, owes the victim restitution (for example, a debtor failing to pay the creditor). Both of these styles are accusatory where there is a complainant and a defendant—a winner and a loser. According to the therapeutic style, the deviant's conduct is defined as abnormal; the person needs help, such as treatment by a psychiatrist.

In the conciliatory style, deviant behavior represents one side of a social conflict in need of resolution without consideration as to who is right or who is wrong (for example, marital disputes). These last two styles are remedial, designed to help people in trouble and ameliorate a bad social situation. Elements of two or more of these styles may appear in a particular instance; for example, when a drug addict is convicted of possession and is granted probation contingent upon his or her participation in some kind of therapy program.

These definitions illustrate some of the alternative ways of looking at law. It is the law's specificity in substance, its universality of applicability, and the formality of its enactment and enforcement that set it apart from other devices for social control. Implicit in these definitions of law is the notion that law can be analytically separated from other normative systems in societies with developed political institutions and specialized lawmaking and law-enforcement agencies. The paramount function of law is to regulate and constrain the behavior of individuals in their relationships with one another. Ideally, law is to be used only when other formal and informal methods of social control fail to operate or are inadequate for the job. Finally, law can be distinguished from other forms of social control primarily in that it is a formal system embodying explicit rules of conduct, the planned use of sanctions to ensure compliance with the rules, and a group of authorized officials designated to interpret the rules and apply sanctions to violators. From a sociological perspective, the rules of law are simply a guide for action, and law would remain meaningless without interpretation and enforcement (Benda-Beckman et al., 2009). Moreover, law can be studied as a social process, instrumented by individuals during social interaction. More generally, law consists of the behaviors, situations, and conditions for making, interpreting, and applying legal rules that are backed by the state's legitimate coercive apparatus for enforcement.

TYPES OF LAW

The content of law may be categorized as *substantive* or *procedural*. **Substantive law** consists of rights, duties, and prohibitions administered by courts—which behaviors are to be allowed and which are prohibited (such as prohibition against murder or the sale of narcotics). **Procedural law** refers to rules concerning just how substantive laws are to be administered, enforced, changed, and used by players in the legal system (such as filing charges, selecting a jury, presenting evidence in court, or drawing up a will).

A distinction is also made between *public* law and *private* law. **Public law** is concerned with the structure of government, the duties and powers of officials, and the relationship between the individual and the state. Administrative law, constitutional law, and criminal law are all examples of public law. **Private law** is concerned with both substantive and procedural rules governing relationships between individuals (the law of torts or private injuries, contract, property, will, inheritance, marriage, divorce, adoption, and the like).

Another familiar distinction is between *civil* law and *criminal* law. **Civil law**, as private law, refers to rules and procedures governing the conduct of individuals in their relationships to others. Violations of civil statutes, called **torts**, are private wrongs for which the injured

individual may seek redress in the courts for the harm he or she experienced. In most cases, some form of payment is required from the offender to compensate for the injury he or she has caused. Similarly, one company may be required to pay another a sum of money for failing to fulfill the terms of a business contract. The complainant firm is thus compensated for the loss it may have suffered from the other company's neglect or incompetence. **Criminal law** is concerned with the definition of crime and the prosecution and penal treatment of offenders. Although a criminal act may cause harm to some individual, crimes are regarded as offenses against the state or "the people." A crime is a public wrong rather than an individual or private wrong. It is the state, not the harmed individual, that takes action against the offender. Furthermore, the action taken by the state differs from that taken by the plaintiff in a civil case. For example, if the case involves a tort, or civil injury, compensation equivalent to the harm caused is levied. In the case of crime, some form of punishment is administered, including one or more of the following: a fine, probation, or incarceration. Occasionally, a criminal action may be followed up by a civil suit, such as in a sexual assault case in which the victim may seek financial compensation in addition to criminal sanctions.

A distinction is also made between *civil* law and *common* law. In this context, **civil law** refers to legal systems whose development was greatly influenced by Roman law, a collection of codes compiled in the Corpus Juris Civilis (Code Civil). Civil-law systems are codified systems, and the basic law is found in codes. These are statutes that are enacted by national parliaments. France is an example of a civil-law system. The civil code of France, which first appeared in 1804, is called the Code Napoleon and embodies the civil law of that country. By contrast, **common law** is based not on acts of parliament but rather on case law, which relies on precedents set by judges to decide a case (Bennion, 2009). Thus, it is "judge-made" law as distinguished from legislation or "enacted law."

In the United States, law may be further divided into the following branches: constitutional law, case law, statutory law, executive orders, and administrative law. As noted earlier, **constitutional law** is a branch of public law. It determines the political organization of the state and its powers while also setting certain substantive and procedural limitations on the exercise of governing power. Constitutional law consists of the application of fundamental principles of law based on that document, as interpreted by the U.S. Supreme Court. **Case law** derives from the opinions of judges in cases decided in the appellate courts. **Statutory law** is legislated law—law made by legislatures. **Executive orders** are regulations issued by the executive branch of the government at the federal and state levels. Finally, **administrative law** is a body of law created by administrative agencies in the form of regulations, orders, and decisions. These various categories of laws will be discussed and illustrated later in the text.

MAJOR LEGAL SYSTEMS

In addition to the types of law, there is a large variety of legal systems. The dominant legal systems that exist in various forms throughout the world are the Romano-Germanic (civil) law, common law, socialist law, and Islamic law. The Romano-Germanic civil law systems

predominate in Europe, in most of the former colonies of France, Germany, Italy, Spain, Portugal, and Belgium and in countries that have westernized their legal systems in the nineteenth and twentieth centuries. Common law systems are predominant in English-speaking countries. Islamic systems are found in the Middle East and some other parts of the world to which Islam has spread. Socialist legal systems prevail in the People's Republic of China, Vietnam, Cuba, and North Korea. Remnants of socialist systems are still found in the former Soviet Union and Eastern European countries. We now explain these systems further.

ROMANO–GERMANIC SYSTEM (CIVIL LAW SYSTEM)

The Romano-Germanic, or civil, law refers to legal science that has developed on the basis of Roman *jus civile* or civil law (Plessis, 2010). The foundation of this system is the compilation of rules made in the sixth century A.D. under the Roman emperor Justinian. These rules are contained in the Code of Justinian and have evolved essentially as private law, as a means of regulating private relationships between individuals (Mears, 2004). After the fall of the Roman Empire, the Code of Justinian competed with the customary law of the Germanic tribes that had invaded Europe. The code was reintroduced in law school curricula between A.D. 1100 and A.D. 1200 in northern Europe, then spread to other parts of the continent. Roman law thus coexisted with the local systems throughout Europe up to the seventeenth century. In the nineteenth century, the Napoleonic code and, subsequently, the code of the new German Empire of 1900 and the Swiss code of 1907 are examples of the institutionalization of this legal system.

Codified systems are basic laws that are set out in *codes*. A *code* is simply a body of laws. These statutes are enacted by national parliaments that arrange entire fields of law in an orderly, comprehensive, cumulative, and logical way. Today, most European countries have national codes based on a blend of customary and Roman law that makes the resulting systems members of the Romano-Germanic legal tradition.

COMMON LAW SYSTEM

Common law is characteristic of the English system, which developed after the Norman Conquest in 1066 (Cownie, 2010). The law of England as well as those laws modeled on English law (such as the laws of the United States, Canada, Ireland, and India) resisted codification. Common law is based on case law, which relies on precedents set by judges in deciding a case (Friedman, 2002). Thus, it is "judge-made" law as distinguished from legislation or enacted (statutory) law. The doctrine of *precedent* is strictly a common law practice. The divisions of the common law; its concepts, substance, structure legal culture, and vocabulary; and the methods of the common-law lawyers and judges are very different, as will be demonstrated throughout the book, from those of the Romano-Germanic, or civil, law systems.

SOCIALIST LEGAL SYSTEM

The origins of the socialist legal system can be traced back to the 1917 Bolshevik Revolution, which gave birth to the Union of Soviet Socialist Republics. The objectives of

classical socialist law are threefold. First, law must provide for national security. Ideally, the power of the state must be consolidated and increased to prevent attacks on the socialist state and to assure peaceful coexistence among nations. Second, law has the economic task of developing production and distribution of goods on the basis of socialist principles so that everyone will be provided for "according to his needs." The third goal is that of education: to overcome selfish and antisocial tendencies that were brought about by a heritage of centuries of poor economic organization.

The source of socialist law is legislation, which is an expression of popular will as perceived and interpreted by the Communist party. The role of the court is simply to apply the law, not to create or interpret it. Even today, for example, judges in China are not required to have any legal training, and few do. Most hold their positions because they have close connections with local governments, which are eager for quick convictions (Muhlhahn, 2009).

Socialist law rejects the idea of separation of powers. The central notion of socialist law is the concept of ownership. Private ownership of goods has been renamed "personal ownership," which cannot be used as a means of producing income. It must be used only for the satisfaction of personal needs. Nations with socialist law also have socialist ownership, of which there are two versions: collective and state. A typical example of collective ownership is the *kolkhoz*, or collective farm, which is based on nationalized land. State ownership prevails in the industrial sector in the form of installations, equipment, buildings, raw materials, and products. Although socialist law has faded in the former nations of the Soviet Union, versions of it still exist in China, Cuba, North Korea, and Vietnam.

The collapse of communism in the Soviet Union and the former Eastern-bloc countries in 1989 had immediate implications for the socialist legal system in those nations (Hesli, 2007). Almost overnight, the former Soviet nations had to reconceive basic notions of property, environmental protection, authority, legitimacy, and power and even of the very idea of law (Agyeman and Ogneva-Himmelberg, 2009). They are still experimenting with workable alternatives to the socialist rule of law in their attempts to create a climate for a system of laws compatible with democratic forms of market economies and civil liberties (Hesli, 2007).

Although the problems involved in the transition vary from country to country according to unique historical and political circumstances, all these states face common concerns, such as establishment of a new political ideology, creation of new legal rights, the imposition of sanctions on former elites, and new forms of legitimization (Feuer, 2010). Among the practical problems have been the creation of new property rights; the attainment of consensus in lawmaking; the formulation and instrumentation of new laws on such matters as privatization; joint ventures; restitution for and rehabilitation of victims of the overturned regime; revision of criminal law; the rise of nationalistic, antiforeign, and anti-Semitic sentiments; and multiparty electoral behavior (Oleinik, 2003). There is also a whole slate of legal issues previously denied public attention by socialist law, such as prostitution, drug abuse, unemployment, and economic shortages. There are, finally, concerns with the development of new law school curricula, selection of personnel, and replacement or resocialization of former members of the Communist party still occupying positions of power.

Perhaps the biggest task facing the new lawmakers in the former Soviet nations is the creation of a legal climate aimed at stimulating foreign investments. Westerners need to be assured about the safety of their investments, which requires the creation of a legal infrastructure based on democratic principles. New laws are still needed on repatriation of profits, property rights, privatization, and the movement of goods.

But the greatest challenge confronting the post-Communist regimes is crime management (Hesli, 2007; Oleinik, 2003). In Russia and in its former satellites, the Soviet criminal code has not been significantly altered, even though it is better suited to catch political dissidents than to inspire respect for law and order. The laws were aimed at defending the totalitarian state, not the individual. Presidential decrees and legislative acts have expanded the boundaries of life—from the right to buy and sell property to the freedom to set up banks and private corporations—but the notoriously inefficient courts have no legal basis for interpreting these decrees, much less enforcing them. Consequently, the police cannot formally tackle organized criminal activity, because under present law, only individuals can be held criminally culpable. Not surprisingly, the number of organized criminal groups in Russia more than quadrupled during the last decade of the twentieth century (Oleinik, 2003).

Almost every small business across Russia pays protection money to some gang. Some authors even raise questions such as "Is Sicily the future of Russia?" (Varese, 2001). Vast fortunes in raw materials—from gold to petroleum—are smuggled out through the porous borders in the Baltics by organized groups who have bribed their way past government officials, and ministries and municipal governments peddle property and favors. Official corruption is rampant, and along with that, tax instability, licensing confusion, and disregard for intellectual property rights serve as disincentives to the kind of private Western investment Russia needs to create jobs and a functioning market economy (Eicher, 2009).

ISLAMIC LEGAL SYSTEM

Islamic law, unlike the previously discussed systems, is not an independent branch of knowledge (Ende and Steinbach, 2010). Law is integral to Islamic religion, which defines the character of the social order of the faithful who create laws in the name of Allah, or God (Ghanim, 2010; Hallaq, 2009). *Islam* means "submission" or "surrender" and implies that individuals should submit to the will of God. Islamic religion states what Muslims must believe and includes the *Shari'a* ("the way to follow"), which specifies the rules for believers based on divine command and revelation. Unlike other systems of law based on judicial decisions, precedents, and legislation, Islamic law is derived from four principal sources (Shaham, 2010).

The principal source of Islamic law is the *Koran*, the word of God as given to the Prophet. The second source is the *Sunna*, which are the sayings, acts, and allowances of the Prophet as recorded by reliable sources in the Tradition (*Hadith*). The third is *judicial consensus*; like precedent in common law, it is based on historical consensus of qualified legal scholars, and it limits the discretion of the individual judge. *Analogical reasoning* is the fourth primary source of Islamic law. It is used in circumstances not

provided for in the Koran or in other sources. For example, some judges inflict the penalty of stoning for the crime of sodomy, contending that sodomy is similar to the crimes of adultery, out-of-wedlock sex, and drinking alcohol and thus should be punished by the same penalty the Koran indicates for adultery (*Economist*, 2010:48). In the same vein, a female would get half the compensation a male would receive for being the victim of the same crime, because a male is entitled to an inheritance twice that of a female. In addition to these principal sources, various supplementary sources, such as custom, judge's preference, and the requirements of public interest, are generally followed (Nielsen and Christoffersen, 2010).

Shari'a legal precepts can be categorized into five acts: commanded, recommended, reprobated, forbidden, and left legally indifferent. Islamic law mandates rules of behavior in the areas of social conduct, family relations, inheritance, and religious rituals, and defines punishments for heinous crimes including adultery, false accusation of adultery, intoxication, theft, and robbery. For example, in the case of adultery, the proof of the offense requires four witnesses or confession. If a married person is found guilty, he or she is stoned to death. Stones are first thrown by witnesses, then by the judge, followed by the rest of the community. The punishment for an unmarried person is 100 lashes (Lippman et al., 1988).

For theft, the penalty of hand amputation is often used. From time to time, the classic retribution of the notion "eye for an eye" is invoked in a literary sense. For example, a judge in Bahawalpur, a city in the eastern Pakistani province of Punjab, once ruled that a man convicted of attacking and blinding his fiancée with acid be blinded with acid himself. (*Seattle Times*, 2003:A8).

Even grooming can be a man's undoing. In Afghanistan, an adult male is obliged not only to grow a beard but also to leave the hairy underbrush unmolested by scissors. Patrols from the General Department for the Preservation of Virtue and Prevention of Vice, revived as the Vice and Virtues Ministry, were rather tough in the past on trimmed beards in Kabul and used to snatch violators from the bazaars and took them to a former maximum security prison for 10 days of religious instruction (Bearak, 1998). In Iran, "decency crackdowns" have occurred amid new rules governing men's appearance and periodic police raids on barber shops and stores that sell neckties—seen as vestiges of the decadent West. As is well known, women also have to dress traditionally. For example, in May 2007, in a 1-week period, some 16,000 Iranian women and about 500 men were cautioned about their appearance, and police were hunting streets and parks for immodestly dressed women and wildly coiffed men (Higgins, 2007).

It is important to remember that the sanctions attached to the violation of Islamic law are religious rather than civil. Commercial dealings, for example, between Muslims and Westerners are covered by governmental rules comparable to administrative law in the United States. The fundamental principle of Islam is that of an essentially theocratic society, and Islamic law can be understood only in the context of some minimum knowledge of Islamic religion and civilization. Thus, care should be exercised in discussing or analyzing components of Islamic law out of context and in isolation.

PRINCIPAL FUNCTIONS OF LAW

Why do we need law, and what does it do for society? More specifically, what functions does law perform? As with the definition of law, there is no agreement among scholars of law and society on the precise functions, nor is there consensus on their relative weight and importance. A variety of functions are highlighted in the literature depending on the conditions under which law operates at a particular time and place. The recurrent focal themes include social control, dispute settlement, and social change. We shall now consider them briefly. These functions of the law will be examined in detail in the chapters dealing with social control, conflict resolution, and social change.

SOCIAL CONTROL

In a small, traditional, and homogeneous society, behavioral conformity is ensured by the fact that socializing experiences are very much the same for all members. Social norms tend to be consistent with each other, there is consensus about them, and they are strongly supported by tradition. Social control in such a society is primarily dependent upon self-sanctioning. Even on those occasions when external sanctions are required, they seldom involve formal punishment. Deviants are mostly subjected to informal mechanisms of social control, such as gossip, ridicule, or humiliation. Although they exist, banishment, or forms of corporal punishment are rare in modern societies (Gram, 2006).

Even in a complex, heterogeneous society like the United States, social control rests largely on the internalization of shared norms. Most individuals behave in socially acceptable ways, and as in simpler societies, fear of disapproval from family, friends, and neighbors is usually adequate to keep potential deviants in check (Matza, 2010). Nevertheless, the great diversity of the population; the absence of similar values, attitudes, and standards of conduct; and the competitive struggles between groups with different interests all necessitate formal mechanisms of social control. Formal social control is characterized by "(1) explicit rules of conduct, (2) planned use of sanctions to support the rules, and (3) designated officials to interpret and enforce the rules, and often to make them" (Davis, 1962:43).

Modern societies manifest many methods of social control, both formal and informal. Law is considered the key form of formal social control as it specifies rules for behavior and also the sanctions for misbehavior (Friedman, 1977). Of course, as we shall see, law does not have a monopoly on formal mechanisms of social control. Other types of formal mechanisms (such as firing, promotion, demotion, relocation, compensation manipulation, and so forth) are found in industry, academe, government, business, and various private groups (Selznick, 1969).

DISPUTE SETTLEMENT

Every society has disputes, and law provides an important means for settling disputes. As legal anthropologist Karl N. Llewellyn (1960:2) famously wrote a half-century ago,

> What, then, is this law business about? It is about the fact that our society is honeycombed with disputes. Disputes actual and potential, disputes to be settled and disputes to be prevented; both appealing to law, both making up the business of law . . . . This doing of something about disputes, this doing of it reasonably, is the business of law.

By settling disputes through an authoritative allocation of legal rights and obligations, the law provides an alternative to other methods of dispute resolution. Increasingly, people in all walks of life let the courts settle matters that were once resolved by informal and nonlegal mechanisms, such as negotiation, mediation, or forcible self-help measures. It should be noted, however, that law deals only with disagreements that have been translated into legal disputes. A legal resolution of conflict does not necessarily result in a reduction of tension or antagonism between the aggrieved parties. For example, in a case of employment discrimination on the basis of race, the court may focus on one incident in what is a complex and often not very clear-cut series of problems. It results in a resolution of a specific legal dispute, but not in the amelioration of the broader issues that have produced that conflict.

SOCIAL CHANGE

Another function of law in modern society is social change, also called *social engineering*. This function refers to purposive, planned, and directed social change initiated, guided, and supported by the law. As Roscoe Pound (1959:98–99) put it,

> For the purpose of understanding the law of today, I am content to think of law as a social institution to satisfy social wants—the claims and demands involved in the existence of civilized society—by giving effect to as much as we need with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society. For present purposes I am content to see in legal history the record of a continually wider recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence—in short, a continually more efficacious social engineering.

In considering the function of social change, a major issue concerns the degree to which law can bring about social change. Chapter 7 examines this function further with some important examples from the last several decades.

DYSFUNCTIONS OF LAW

Although law is an essential institution of social life, it possesses, like most institutions, certain dysfunctions that may evolve into serious operational difficulties if they are not seriously considered (Clark, 2007). These dysfunctions stem in part from the law's conservative tendencies, the rigidity inherent in its formal structure, the restrictive aspects connected with its control functions, and the fact that certain kinds of discriminations are inherent in the law itself.

The eminent social scientist Hans Morgenthau (1993:418) suggests that "a given status quo is stabilized and perpetuated in a legal system" and that the courts, being the chief instruments of a legal system, "must act as agents of the status quo." By establishing a social policy of a particular time and place in constitutional and statutory precepts, or by making the precedents of the past binding, the law exhibits a tendency toward conservatism.

Related to these conservative tendencies of the law is a type of rigidity inherent in its normative framework. Because legal rules are couched in general, abstract, and universal terms, they sometimes operate as straitjackets in particular situations. An illustration of this is the failure of law to consider certain extenuating circumstances for a particular illegal act; for example, stealing because one is hungry or stealing for profit. This "straitjacketing" is a second dysfunction of law.

A third dysfunction stems from the restrictive aspects of normative control. Norms are shared convictions about the patterns of behavior that are appropriate or inappropriate for the members of a group. Norms serve to combat and forestall anomie (a state of normlessness) and social disorganization. Law can overstep its bounds, and regulation can turn into overregulation, in which situation control may become transformed into repression. For example, in nineteenth-century America, public administration was sometimes hampered by an over-restrictive use of the law, which tended to paralyze needed discretionary exercises in governmental power (Pound, 1914).

Donald Black's (1989) contention that certain kinds of discrimination are inherent in law itself can be construed as a fourth dysfunction. Rules, in principle, may apply to everyone, but legal authority falls unevenly across social place. Yes, everyone accused of a crime is entitled to a lawyer, but the rich can afford far better legal representation than the poor. In other respects, the law may be biased against the poor, people of color, and other groups (Gabbidon and Greene, 2016). The fourth dysfunction of law, in short, concerns social inequality.

Undoubtedly, the list of dysfunctions of law is incomplete. We could also include a variety of procedural inefficiencies, administrative delays, and archaic legal terminologies. At times, justice is denied and innocent people are convicted (Zalman et al., 2008). One can also talk about laws being out-of-date, inequitable criminal sentencing, lack of clarity of some laws resulting in loopholes and diverse interpretations, and the dominating use of law by one class against another.

PARADIGMS OF SOCIETY

Deliberations by sociologists on law in society often occur in the context of one of two ideal and classic conceptions of society: the *consensus* and the *conflict* perspectives. The former describes society as a functionally integrated, relatively stable system held together by a basic consensus of values. Social order is considered as more or less permanent, and individuals can best achieve their interests through cooperation. Social conflict is viewed as the needless struggle among individuals and groups who have not yet attained sufficient understanding of their common interests and basic interdependence. This

perspective stresses the cohesion, solidarity, integration, cooperation, and stability of society, which is seen as united by a shared culture and by agreement on its fundamental norms and values.

In contrast, the conflict perspective considers society as consisting of individuals and groups characterized by conflict and dissension and held together by coercion. Order is temporary and unstable because every individual and group strives to maximize its own interests in a world of limited resources and goods. Social conflict is considered as intrinsic to the interaction between individuals and groups. In this perspective, the maintenance of power requires inducement and coercion, and law is an instrument of repression, perpetuating the interests of the powerful at the cost of alternative interests, norms, and values. Let us examine in some detail the role of law in these two perspectives.

THE CONSENSUS PERSPECTIVE

The consensus perspective considers law as a neutral framework for maintaining societal integration. In this view, society is composed of diverse groups whose interests often conflict with one another but are in basic harmony. Interest groups are essential for the well-being of society, and that reconciliation among the conflicting interests of these diverse groups is also essential to secure and maintain social order. As Roscoe Pound (1943:39) noted, law is thus

> an attempt to satisfy, to reconcile, to harmonize, to adjust these overlapping and often conflicting claims and demands, either through securing them directly and immediately, or through securing certain individual interests, or through delimitations or compromises of individual interests, so as to give effect to the greatest total of interests or to the interests that weigh most in our civilization, with the least sacrifice of the scheme of the interests as a whole.

In Pound's view, law in a heterogeneous and pluralistic society, such as the United States, is thus best understood as an effort at social compromise with an emphasis on social order and harmony. Pound argues that the historical development of law demonstrates a growing recognition and satisfaction of human wants, claims, and desires through law. Over time, law has concerned itself with an ever-wider spectrum of human interests and has come to provide for the common good and the satisfaction of social wants (Pound, 1959). Pound argued that the purpose of law is to maintain and to ensure the values and needs essential to social order. This happens not by law's imposing one group's will on others, but by law's reconciling and mediating the diverse and conflicting interests of individuals and groups within society. In brief, the purpose of law is to control interests and to maintain harmony and social integration.

In general, proponents of the consensus perspective maintain that law exists to maintain order and stability. Law is a body of rules enacted by representatives of the people in the interests of the people. Law is essentially a neutral agent that dispenses rewards and punishments without bias in favor of or against any social group or interest group. (Chambliss, 1976).

THE CONFLICT PERSPECTIVE

In marked contrast to the consensus perspective, the conflict view considers law as a "weapon in social conflict" (Turk, 1978) and an instrument of oppression "employed by the ruling classes for their own benefit" (Chambliss and Seidman, 1982:36). According to Richard Quinney (1970:35),

> Society is characterized by diversity, conflict, coercion, and change, rather than by consensus and stability... . [L]aw is a *result* of the operation of interests, rather than an instrument that functions outside of particular interests. Though law may control interests, it is in the first place *created* by interests of specific persons and groups; it is seldom the product of the whole society. Law is made by men, representing special interests, who have the power to translate their interests into public policy. Unlike the pluralistic conception of politics, law does not represent a compromise of the diverse interests in society, but supports some interests at the expense of others.

Proponents of the conflict perspective believe that law is a tool by which the ruling class exercises its control. Law both protects the property of those in power and serves to repress political threats to the position of the elite. Quinney (1975:285) writes that, whereas the state, contrary to conventional wisdom, is the instrument of the ruling class, "law is the state's coercive weapon, which maintains the social and economic order," and supports some interests at the expense of others, even when those interests are that of the majority.

Advocates of this position overstate their case. Not all laws are created and operated for the benefit of the powerful ruling groups in society. Laws prohibiting murder, robbery, arson, incest, and assault benefit all members of society, regardless of their economic position. It is too broad an assumption that powerful groups dictate the content of law and its enforcement for the protection of their own interests. As we shall see in Chapter 4, all kinds of groups are involved in lawmaking, although the powerful groups do have a substantial voice in the lawmaking process.

This critique notwithstanding, much evidence supports aspects of the conflict perspective. For example, the power of economic and commercial interests to influence legislation is illustrated by William J. Chambliss in his study of vagrancy statutes. He notes that the development of vagrancy laws paralleled the need of landowners for cheap labor during the period in England when the system of serfdom was collapsing. The first of these statutes, which came into existence in 1349, threatened criminal punishment for those who were able-bodied and yet unemployed—a condition that existed when peasants were in the process of moving from the land into the cities. The vagrancy law served "to force laborers (whether personally free or unfree) to accept employment at a low wage in order to insure the landowner an adequate supply of labor at a price he could afford to pay" (Chambliss, 1964:69). Subsequently, vagrancy statutes were modified to protect the commercial and industrial interests and to ensure safe commercial transportation.

In the late nineteenth and early twentieth centuries in the United States, vagrancy laws were used again to serve the interests of the wealthy. Agricultural states during harvest time enforced vagrancy laws to push the poor into farm work. In periods of economic depression, similar laws were used to keep the unemployed from entering the state (Chambliss and Seidman, 1982:182). This is just one illustration to show how law came to reflect the particular interests of those who have power and influence in society. Chapter 4 returns to the role of interest groups dealing with decision-making processes in the context of lawmaking.

THE ROLE OF THE SOCIAL SCIENTIST

As with the approaches to the study of law and society, different opinions also characterize the question of what role sociologists and other social scientists should play in the understanding of law and society (van Heugten and Gibbs, 2015). These different opinions reflect debates over the "proper" role that social scientists should play in understanding social issues more generally. Many social scientists consider their role primarily to synthesize material and to describe and explain sociolegal phenomena objectively (Sherwin, 2006). These social scientists are concerned with the understanding of social life and social processes, and they go about their research in an alleged value-neutral and empirical fashion. They accept as scientific only those theoretical statements whose truth can be proven empirically.

Others social scientists, however, are more critical in their orientation and do not seek merely to describe and explain social events. They assert their right as social scientists also to criticize, and they believe that the task of sociology and other social sciences is to account for human suffering. They aim at demystifying the world and to show people what constrains them and what their routes to freedom are. Their criticisms are prompted by their belief that the human condition and the social order have become unbearable. These critics believe that they have a responsibility not only to identify the factors that have precipitated a deleterious condition but also to provide, through theoretical and empirical efforts, ways of rectifying or redressing this condition.

In the context of law and society studies, illustrations of such attempts by scholars and journalists over the past few decades include: Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2012); Jerold S. Auerbach's *Unequal Justice* (1976); Mary Ann Glendon's *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* (1994); Elizabeth Hinton's *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America* (2016); Charles J. Ogletree, Jr., and Austin Sarat's, *When Law Fails: Making Sense of Miscarriages of Justice* (2009); Richard Quinney's *Critique of Legal Order* (2002); Gerry Spence's *With Justice for None* (1989); Ann Strick's *Injustice for All* (1977); and Martin Yant's *Presumed Guilty: When Innocent People Are Wrongly Convicted* (1991).

The debate over the proper role of the social scientist complicates the role of sociologists and other social scientists who study law. Based on one's values, ideologies, and conception of sociology, and a plethora of other considerations, one may prefer to be a detached observer of social life, a critic of the social order, or an active agent of change. These

roles, fortunately, are not mutually exclusive. Depending on the nature of the issue under consideration, the degree of commitment to and involvement in that issue, one may freely select among these alternatives. As an intellectual enterprise, sociology is flexible enough to accommodate these diverse positions. In a sense, they contribute to a greater understanding of the complicated interplay between law and society.

SUMMARY

1. The social scientific study of law incorporates values, ideologies, social institutions, norms, power relations, and social processes. Since World War II, there has been a growing interest in law among sociologists and other social scientists both in the United States and abroad. Some of the examples of the study of law and society include the effectiveness of law, the impact of law on society, methods of dispute resolution, and research on judicial, legislative, and administrative processes.
2. Academic debate over a proper definition of law has long preoccupied scholars in jurisprudence and in the social sciences. Many scholars would agree that law is a form of social control with explicit sanctions for noncompliance, and it consists of the behaviors, situations, and conditions for creating, interpreting, and applying legal rules.
3. The content of law may be considered as substantive or procedural. Distinctions are also made between public law and private law, civil law and criminal law, case law and statutory law.
4. The principal legal systems in the world today are the Romano-Germanic (civil) law, common law, socialist law, and Islamic law.
5. Law performs a multitude of functions in society. The major functions include social control, dispute settlement, and social change. But law also possesses certain dysfunctions as a result of its conservative tendencies, the rigidity inherent in its formal structure, the restrictive aspects connected with its social control functions, and the fact that certain kinds of discriminations are inherent in the law itself.
6. Sociological analyses of law and society are generally based on two ideal views of society—consensus and conflict perspectives. The former considers society as a functionally integrated, relatively stable system held together by basic consensus of values. The latter conceives of society as consisting of groups characterized by conflict and dissension on values and held together by some members who coerce others.
7. In addition to divergences in the way of studying law and society, controversies also beset the proper role social scientists should play in the study of law and society. The major controversy concerns whether they should try to understand, describe, and empirically analyze social phenomena in a value-free context, or, instead, to criticize malfunctioning components of, and processes in, a social system.

KEY TERMS

Administrative law the body of law created by administrative agencies in the form of regulations, orders, and decisions

Case law in common law systems, the body of law that derives from the opinions of judges in cases decided in the appellate courts

Civil law (1) the rules and procedures intended to govern the conduct of individuals in their relationships with others; (2) legal systems whose development was greatly influenced by Roman law

Common law the type of law, based to a large degree on case law, that characterizes the legal systems of England and its former colonies

Constitutional law the branch of public law that determines the political organization of the state and its powers while also setting certain substantive and procedural limitations on the exercise of governing power

Criminal law the body of law that involves the definition of crime and the prosecution and penal treatment of offenders

Executive orders regulations issued by the executive branch of the government at the federal and state levels

Private law the body of law that concerns the substantive and procedural rules governing relationships between individuals

Procedural law the body of law that governs how substantive laws are to be administered, enforced, changed, and used by players in the legal system

Public law the body of law that concerns the structure of government, the duties and powers of officials, and the relationship between the individual and the state

Sociological jurisprudence the study of law and legal philosophy and the use of law to regulate conduct

Statutory law law made by legislatures at the various levels of government

Substantive law the body of law that consists of rights, duties, and prohibitions administered by courts—which behaviors are to be allowed and which are prohibited

Torts private wrongs for which the injured individual may seek redress in the courts for the harm he or she experienced

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Kitty Calavita, *Invitation to Law and Society: An Introduction to the Study of Real Law*, 2nd ed. Chicago, IL: University of Chicago Press, 2016. A brief introduction to the basics of the field and a starting point for additional readings.

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Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises*. Chicago, IL: University of Chicago Press, 2001. Just to show that it can be done.

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2

CHAPTER 2
THEORETICAL PERSPECTIVES

CHAPTER OUTLINE

LEARNING OBJECTIVES

- Explain the nature of law in traditional societies
- Identify the features of law in modern legal systems
- Describe the major assumptions of Émile Durkheim and Max Weber
- List the criticisms of the functionalist approach
- Summarize the beliefs of critical legal studies, feminist legal theory, and critical race theory

This chapter examines the evolution of legal systems and reviews the major classical and contemporary theories of law and society. At the outset, it should be recognized that there is no single, widely and commonly accepted, comprehensive theory of law and society (or, as a matter of fact, of anything else in the social sciences). The field is enormously complex and polemical, and individual explanations have thus far failed to capture fully this complexity and diversity. For this reason, it is important to appreciate the major theories because, taken together, they offer a fuller understanding of law and society than any one theory can offer by itself.

Our examination of these theories will provide readers with some conception of the development and content of the theories and how they relate to one another. Although the discussion will show the complex and multifaceted nature of the relationship between law and society, it will also serve as a means of differentiating, organizing, and understanding a great mass of material. Thus, although the concern is to suggest the magnitude and diversity of the field, an attempt is also made to lend order to that magnitude and diversity.

A cautionary note is in order with regard to the procedures followed in this chapter for grouping various theories. It will become clear that many theories of law and society tend to overlap. For example, a theory placed under the heading of "The European Pioneers" may contain similar elements to those embodied in "Classical Sociological Theorists." This overlap illustrates the difficulty in coming up with a "perfect" classification of theories, but the classification we present should still point to similarities among theories presented under a particular heading.

As with general sociological theories, there are many ways of categorizing the more specific law and society theories. They may be considered from the disciplinary perspectives of jurisprudence, philosophy of law, sociology of law, and anthropology of law. They can also be listed under the headings of sociology of civil law, sociology of criminal law, sociological jurisprudence, and anthropology of law; grouped by various theoretical trends, such as natural law, historical and analytical jurisprudence, utilitarianism, positivism, and legal realism; listed under emerging trends such as global law; or classified under various perspectives such as Marxian, Weberian, and Durkheimian (Treviño, 2007, 2008). Any attempt to categorize theories under particular labels is certainly open to question. The present effort should not be an exception. The categories used here simply provide some semblance of order for the principal theoretical approaches to law and society. Finally, space considerations prevent a discussion of every theorist and theory. Readers who wish to gain further knowledge about classical or modern theoretical concerns may consult the suggested readings section listed at the end of this chapter. Because many law and society theories try to explain how contemporary law differs from traditional law, we begin our discussion with the evolution of legal systems before turning to the theories themselves.

EVOLUTION OF LEGAL SYSTEMS

Formal codified law emerges when a society becomes so large and complex that regulatory mechanisms and methods of dispute settlement can no longer depend on informal customs and social, religious, or moral sanctions (Zifcak, 2005). Formal and institutionalized regulatory mechanisms come into being when other control devices are no longer effective. As a society becomes larger and more complex, so, too, does its legal system.

Historically, legal development and industrialization, urbanization, modernization, and, most recently, globalization are closely intertwined (Grossi, 2010). In a small, isolated, and homogeneous society with little division of labor and a high degree of solidarity, informal sanctions are sufficient to keep most behavior in line with the norms. An ideal example is

the community on Tristan da Cunha, an isolated island in the middle of the South Atlantic Ocean. A few hundred people live there, growing potatoes and catching fish. When social scientists visited the island in the 1930s, they were amazed to see how *law abiding* these people were, even though they had nothing resembling law as we know it. There was no serious crime on the island that anyone could recall, no police, courts, jails, or judges. There was no need for such controls. People in the community relied on informal mechanisms of social control such as shaming and open disapproval, which can be effective and severe in their own way. Such forms of control work in small, homogeneous, face-to-face communities (Friedman, 1998, 2002).

But, in a modern, heterogeneous, and complex society with a high division of labor, formal norms and sanctions are necessary to control behavior so that society can continue to function in an orderly and predictable fashion. The presence of some kind of law and a legal system as we know it today is essential to the maintenance of social order (Kritzer, 2002). Although modernization in a sense forces the development of law in this manner, the specifics of how this happens vary from society to society as a result of unique conditions, such as geographical location, historical events, conquest, and prevailing political and social forces.

Thus, it is not surprising that Pound (1959:366), among others, finds it "convenient to think of . . . stages of legal development in systems which have come to maturity." The law and society literature suggests that the more complex the society, the more differentiated the legal system (Schwartz and Miller, 1975). Underlying this proposition is the notion that legal development reflects demands from society's economic, political, educational, and religious institutions. Based on the complexity and magnitude of the interplay among these institutions and between these institutions and the law, several types of legal systems may be identified in the course of societal development. There is practically no limit to the variability of legal systems, and many scholars have developed typologies to capture this diversity (e.g. Diamond, 1971; Mundy, 2002; Pottage and Mundy, 2004). These typologies seldom correspond fully to the real world, but they are essential in an analytical discussion dealing with the types of legal systems. Drawing on these typologies, we discuss legal evolution with respect to three types of legal systems: traditional legal systems, transitional legal systems, and modern legal systems. The term "primitive" was once used to label traditional legal systems so that they were called *primitive legal systems* (Rouland, 1994), but because "primitive" has negative connotations, we will follow contemporary standards in calling these traditional systems rather than primitive systems.

TRADITIONAL LEGAL SYSTEMS

Traditional legal systems are typically found in hunting and gathering and simple agrarian societies. Laws in these societies are not written or codified; instead, they are permeated by customs, tradition, religious dogmas, and values. In effect, the laws of traditional societies are simply their unwritten norms. The functions of law in traditional societies are essentially the same as those in more advanced societies (Rouland, 1994). As such, law in traditional societies helps to coordinate interaction, settle disputes, deter or sanction deviance, and regularize social interaction.

In traditional societies, there are no well-developed political subsystems, and the polity is composed of kin leaders, councils of elders or chiefs, and various religious leaders. Legislatures as we know them do not formally exist in traditional societies. In such societies, judges and political leaders (elders and the like) are one and the same, and chiefs or elders can enact both substantive and procedural laws. Because there are no written laws, a traditional society's leader(s) can strike, rescind, or change old laws more easily than the modern legislator; if such action appears reasonable, little resistance is offered. Removing old laws from the books in modern societies is rarely that easy.

Many traditional societies have the equivalent of modern courts, which in traditional societies are temporarily assembled and then dissolved as disputes arise and are settled. Although they are provisional, traditional courts comprise at least two clearly differentiated roles: that of the judges, who hear evidence and make decisions in accordance with laws, and that of litigants, who have to abide by the judges' decision. Occasionally, a third role can be identified in such courts, that of a representative *lawyer* who pleads the case for a litigant. As the legal system develops, these roles become more clearly differentiated. In traditional societies, however, these three procedures are sufficient to maintain a high degree of societal integration and coordination.

TRANSITIONAL LEGAL SYSTEMS

Transitional legal systems are found in advanced agrarian and early industrial societies, in which the economic, educational, and political subsystems are increasingly differentiated from kinship relationships. As a result of this increased complexity, the legal subsystem also becomes more complex and extensive, as evidenced by a clear-cut differentiation in basic legal elements—laws, courts, enforcement agencies, and legislative structures. In the transitional stage, most of the features of the modern legal system are present, but not to the same degree. Law becomes more differentiated from tradition, customs, and religious dogma. The distinction between public law and private law (see Chapter 1) becomes more pronounced, and criminal law also becomes distinguishable from torts. There is, similarly, a clearer differentiation between procedural and substantive laws (Friedman, 1975).

The increased differentiation of laws is reflected in the increased complexity of the courts. Accompanying this differentiation is the emergence of at least five distinct types of statuses: judge, representative or lawyer, litigant, court officials and administrators, and jurors. The roles of judges and lawyers become institutionalized, requiring specialized training. In transitional legal systems, written records of court proceedings become more common, contributing to the emergence of a variety of administrative roles, which, in turn, leads to the initial bureaucratization of the court.

With the development of clearly differentiated, stable, and autonomous courts, legal development in transitional societies further accelerates for at least two reasons (Turner, 1972). First, laws enacted by the growing legislative body of the polity can be applied systematically to specific circumstances by professionals and experts. Second, where political legislation of laws is absent, an established court can enact laws that incorporate the society prior decisions when disputes had developed. Because these new laws thus

presumably reflect a consensus of how these disputes should have been decided, the laws are thought to be especially appropriate for the society in which they are enacted.

Initially, new courts in transitional societies are localized and characterized by local norms and values. In time, the need for a more uniform legal system leads to a more codified system of laws that apply to courts regardless of their particular location.

Traditional legal systems also see the emergence of explicit police roles and also of legislative structures. This results in what political scientists call a *separation of powers*, or a clear differentiation of legislative statuses from judicial (courts) and enforcement (police) statuses. One effect of this development is that legislating new laws or abolishing old ones is no longer a matter of a simple decree from a society's leader.

MODERN LEGAL SYSTEMS

In **modern legal systems**, we find all the legal components of transitional systems, but in greater and more elaborate arrangements. As Turner (1972:225) notes, "Laws in modern legal systems are extensive networks of local and national statutes, private and public codes, crimes and torts, common and civil laws, and procedural and substantive rules." A distinctive feature of modern legal systems is the rise and proliferation of administrative law (see Chapter 1). Another aspect is the increasing number of statutory laws compared to what is typical of transitional societies. Legislation becomes a more acceptable method of adjusting law to social conditions. There are also clear hierarchies of laws, ranging from constitutional codes that govern a whole society to regional and local codes that have more limited application geographically.

Courts in modern legal systems have an important role in mediating and mitigating conflict, disputes, deviance, and problems. The roles of lawyers and judges become highly professionalized, with licensing requirements and formal sanctions. The various administrative statuses—clerks, bailiffs, and public prosecutors—specialize, proliferate, and become heavily bureaucratized. The jurisdictions of courts are specified with clearly delineated appeal procedures. Especially in common law nations, cases unresolved in lower courts can be argued in higher courts that have the power to reverse lower court decisions.

In modern legal systems, laws are enforced and court decisions are carried out by clearly differentiated and organized police forces, which are organized at the local, state, and federal levels. Each force possesses its own internal organization, which becomes increasingly bureaucratized at the higher levels. In addition to police forces, regulatory agencies (such as the U.S. Food and Drug Administration, the Federal Trade Commission, or the Federal Aviation Administration) regularly enforce and oversee compliance with laws. Administrative agencies, as will be discussed in Chapters 4 and 5, also make and interpret laws in the context of their own mandates.

Inherent in modern legal systems is the notion of *modern* law. Marc Galanter (1977) in a classic and influential article, "The Modernization of Law," listed several features that characterize the legal systems of modern societies. One feature is that rules "are uniform and

unvarying in their application" (1977:1047): The same rules and regulations are applicable to everyone. Modern law is also *transactional*, with rights and duties stemming from transactions between parties on a roughly equal footing. In another feature, modern legal norms are *universalistic*; that is, their application is predictable, uniform, and impersonal. Further, the system, to be uniform and predictable, operates on the basis of written rules and has a regular chain of command. The system is *rational* in the Weberian sense, and "rules are valued for their instrumental utility in producing consciously chosen ends, rather than for their formal qualities" (1977:1048). Such a system is run by full-time professionals (judges and attorneys) whose "qualifications come from mastery of the techniques of the legal system itself, not from possession of special gifts or talents or from eminence in some other area of life" (1977:1048). The legal system is also *amenable*: It can be changed if necessary. Law in modern societies is also *political*: It is inexorably tied to the state, which has a monopoly on law. Finally, legislative, judicial, and executive functions are clearly separated in modern law.

Thus far, we have identified some of the dynamics involved in the development of modern legal systems. Let us now consider some of the theories accounting for those developments.

THEORIES OF LAW AND SOCIETY

The preceding section dealt with general types of legal systems as they correspond to various stages of modernization and social development. The present section addresses two questions emerging from the previous discussion: Why did changes in the legal system take place? And what factors contributed to legal development from a historical perspective? In attempting to answer these questions, we can distinguish two general issues. The first issue concerns legal development in any society, while the second issue concerns forces that produce or inhibit change in the legal system.

Theorists of law and society have long been preoccupied with efforts to describe the broad historical course of legal development and to analyze the factors that influence legal systems. The investigation of legal development has traditionally been the concern of scholars in a variety of fields. We make no attempt here to provide a comprehensive and systematic review of principal theories and schools but do consider several prominent theorists.

Among the theorists to be presented, there is more or less general agreement that societal and legal complexities are interrelated. Beyond that, there is little consensus. The particular theorists differ as to detail and interpretation of the general relationship between legal change and social change. We hope that the following sample of theorists from various disciplines, historical periods, and countries will provide a better understanding of the diverse issues involved in the investigation of the multifaceted relations between law and other major institutions of society.

THE EUROPEAN PIONEERS

Early European theorists considered law as an absolute and autonomous entity, unrelated to the structure and function of the society in which it existed (Feinberg and Coleman,

2008). The idea of **natural law** forms the basis for understanding (Donnelly, 2007) and can be traced back to ancient Greece. Aristotle maintained that natural law has a universal validity and is based on reason that is free from all passion (Daston and Stolleis, 2010). St. Thomas Aquinas argued that natural law is part of human nature, and through natural law, human beings participate as rational beings in the eternal laws of God.

The idea of natural law is based on the assumption that the nature of human beings can be known through reason, and that this knowledge can provide the basis for the social and legal ordering of human existence (Belliotti, 1992). Natural law is considered superior to enacted law. An appeal to higher principles of justice is always permissible from the decrees of a lawmaker. When enacted law does not coincide with the principles of natural law, it is considered unjust.

Under the influence of natural law, many European scholars believed that law in any given society reflected a universally valid set of legal principles based on the idea that through reason, the nature of humanity can be ascertained (Daston and Stolleis, 2010). This knowledge could then become the basis for the social and legal order of human existence. From the middle of the nineteenth century, however, the idea of natural law was largely displaced by historical and evolutionary interpretations of law, which considered the legal and the moral to constitute two quite separate realms. These interpretations sought to explain the law by reference to certain evolutionary forces that pushed the law forward along a predetermined path. Many theorists sought to discourage philosophical speculation about the nature and purposes of law and concentrated on the development and analysis of positive law laid down and enforced by the state. The most notable among these scholars include Baron de Montesquieu in France, Herbert Spencer, and Sir Henry Sumner Maine in England. I shall now consider their theories in some detail.

Baron de Montesquieu (1689–1755) Charles-Louis de Secondat, Baron de Montesquieu was born near Bordeaux, France, to a wealthy family. He inherited a seat in the parliament of Bordeaux and was active in politics most of his life. Well educated by his family, he was a most influential writer against the absolutism of the French monarchy (Carrithers, 2010).

Montesquieu challenged the underlying assumptions of natural law by presenting a radically different conceptualization of law and society. He considered law integral to a particular people's culture. The central thesis of his *The Spirit of Laws* (1886) was that laws are the result of a number of factors in society, such as customs, physical environment, and antecedents, and that laws can be understood only in the context of particular societies. He further posited that laws are relative and that there are no *good* or *bad* laws in the abstract. Each law, Montesquieu maintains, must be considered in relation to its background, its antecedents, and its surroundings. If a law fits well into this framework, it is a good law; if it does not, it is bad.

But Montesquieu's fame rests above all on his political theory of the separation of powers. According to this theory, a constitution is composed of three different types of legal powers, legislative, executive, and judicial, with each of these powers vested in a different body or person. The role of the legislature is to enact new laws; of the executive, to enforce

and administer the laws as well as to determine policy within the framework of those laws; and of the judiciary, simply to interpret the laws established by the legislative power. This classification influenced the form of constitution subsequently adopted by the newly created United States of America after the Declaration of Independence (Bodenheimer, 1974) and also influenced constitutional thinkers in other countries as well throughout the late eighteenth and nineteenth centuries.

Leopold Pospisil (1971:138), in his analysis of Montesquieu's contributions, aptly remarked, "With his ideas of the relativity of law in space as well as in time, and with his emphasis on specificity and empiricism, he can be regarded as the founder of the modern sociology of law in general and of the field of legal dynamics in particular."

Herbert Spencer (1820–1903) A British philosopher and sociologist, Herbert Spencer was a major figure in the intellectual life of the Victorian era. He was born in Derby, England, and was a product of an undisciplined and largely informal education, strongly influenced by his family's antiestablishment and anticlerical views, which are reflected in his writings.

Contrary to the doctrines of natural law, Spencer provided the philosophical underpinnings for the theory of unregulated competition in the economic sphere. Strongly influenced by Charles Darwin, Spencer drew a picture of the evolution of civilization and law in which natural selection and the survival of the fittest are the primary determining factors. Evolution for Spencer consisted of growing differentiation, individuation, and increasing division of labor. He identified two main stages in the development of civilizations: a traditional or military form of society, with war, compulsion, and status as regulatory mechanisms, and a higher or industrial form of society, with peace, freedom, and a contract as the controlling devices.

Spencer was convinced that, in the second stage, human progress will be marked by a continual increase in individual liberty and a corresponding decrease in governmental activities. Government, he believed, would gradually confine its field of action to the enforcement of contracts and the protection of personal safety. He strongly opposed public education, public hospitals, public communications, and any governmental programs designed to alleviate the plight of the economically weaker groups in society. He was convinced that social legislation of this type was an unwarranted interference with the laws of natural selection (Spencer, 1899).

Spencer's ideas on law influenced a number of early sociologists in the United States (McCann, 2004). For example, William Graham Sumner advocated a position essentially similar to that of Spencer. He, too, saw the function of the state limited to that of an overseer who guards the safety of private property and sees to it that the peace is not breached. He favored a regime of contract in which social relations are regulated primarily by mutual agreements, not by government-imposed legal norms. Sumner also argued that law should promote maximum freedom of individual action. Like Spencer, he considered attempts to achieve a greater social and economic equality among men ill-advised and unnatural:

> Let it be understood that we cannot go outside of this alternative: liberty, inequality, survival of the fittest; not liberty, equality, survival of the unfittest. The former carries society forward and favors all its best members; the latter carries society downward and favors all its worst members.
>
> (Sumner, 1940:25)

Sir Henry Sumner Maine (1822–1888) The founder and principal proponent of the English historical school of law, Sir Henry Sumner Maine was born in Scotland and died in Cannes, France. He was educated at Cambridge, and after various teaching positions in England and administrative appointments in India, he returned to Cambridge where he was elected master of Trinity Hall and ended his career as professor of international law. He was among the first theorists to argue that law and legal institutions must be studied historically if they are to be understood. Different societies, he said, exhibit similar patterns of legal evolution.

One of Maine's general laws of legal evolution is set forth in his classical treatise, *Ancient Law*:

> The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil laws take account... . Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals.
>
> (Maine, 1861:170)

Thus, Maine arrives at his often-quoted dictum that "the movement of the progressive societies has hitherto been a movement from Status to Contract" (Maine, 1861:170). Status is a fixed condition in which an individual is without will and without opportunity. Ascribed status (based on one's position at birth) prevails, and legal relations depend on birth or caste. With the progress of civilization, this condition gradually gives way to a social system based on contract. Maine argues that a progressive civilization is manifested by the emergence of the independent, free, and self-determining individual, based on achieved status, as the primary unit of social life. He suggests that the emphasis on individual achievement and voluntary contractual relations set the conditions for a more mature legal system that uses legislation to bring society and law into harmony. In essence, his argument is that, in modern societies, legal relations are not conditioned by one's birth but depend on voluntary agreements.

CLASSICAL SOCIOLOGICAL THEORISTS

Early sociologists recognized the essential relationship between legal institutions and the social order. This section explores the influential theoretical explanations of law and society of Karl Marx, Max Weber, and Émile Durkheim.

Karl Marx (1818–1883) Karl Heinrich Marx was born into a comfortable middle-class family in Trier, Germany. He studied law and literature at the universities of Bonn and Berlin before moving to Paris and subsequently to England where he did most of his writing, much of it in collaboration with his financial mentor, Friedrich Engels. He died on March 14, 1883, in London.

Of all the social theorists, few are as important, brilliant, or original as Karl Marx. Part philosopher, part economist, part sociologist, and part historian, Marx combined political partisanship with deep scholarship. Marx is perhaps the most influential social and political theorist of the last three centuries (Allan and Daynes, 2017). His writings, and the subsequent ideology of Marxism, may have inspired more social change than any other force in the modern world, in both developed and developing societies (King and Szelényi, 2004).

Marx postulated that every society, whatever its stage of historical development, rests on an economic foundation. He calls this the "mode of production" of commodities, which has two elements. The first is the physical or technological arrangement of economic activity. The second is "the social relations of production," or the indispensable human attachments that people must form with one another when engaged in economic activity. In his words, "The sum total of these relations of production constitutes the economic structure of society—the real foundation, on which rise legal and political superstructures and to which correspond definite forms of social consciousness" (Marx, 1959:43). Further, changes in the mode of production produce change in the way in which groups are attached to production technology. This economic determinism is reflected in Marx's theory of law.

Marx's theory of law, which has greatly influenced social and jurisprudential thinking throughout the world, may be summarized in three principal assumptions: (1) law is a product of evolving economic forces; (2) law is a tool used by a ruling class to maintain its power over the lower classes; and (3) in the communist society of the future, law as an instrument of social control will "wither away" and finally disappear.

The idea that law is a reflection of economic conditions is integral to the doctrine of *dialectical materialism*. According to this doctrine, the political, social, religious, and cultural order of any given epoch is determined by the existing system of production and forms a "superstructure" on top of this economic basis. Law, for Marx, is part of this superstructure, whose forms, content, and conceptual apparatus constitute responses to economic developments. This view maintains that law is nothing more than a function of the economy but without any independent existence (Easton, 2009).

In societies with pronounced class distinctions, the ruling class owns and controls the means of production. Marx's theory of law characterizes law as a form of class rule and dominance (Collins, 1996). While addressing the bourgeoisie of his day in his *Communist Manifesto*, Marx and Engels (1955:47) wrote, "Your 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."

Finally, Marx suggested that, after the revolution, when class conflict is resolved and the institution of private property is replaced by a communist regime, law and the state, hitherto the main engines of despotism and oppression, will "wither away." There will be no need for coercion because everyone's needs will be fulfilled and universal harmony will prevail. According to this view, there will be no need for law in the future—a future that will be the final stage of humanity's evolution because stateless and lawless communism shall exist forever.

Max Weber (1864–1920) Max Weber was born near Erfurt in Central Germany into a middle-class professional family and studied at Heidelberg and Berlin, earned a Ph.D., and became a professor of economics. He traveled to the United States and, among other cities, visited St. Louis during the 1904 World's Fair. After his return to Germany, he devoted his life to writing and teaching. Max Weber played a crucial role in the development of sociology. His significance is not merely historical; he remains an ever-present force in contemporary sociology. Today, he occupies a central position among law and society theorists and remains among the most influential social thinkers since the 1800s (Allan and Daynes, 2017).

Weber's (1954) typology of legal systems rests on two fundamental distinctions. First, legal procedures are rational or irrational. *Rational procedures* involve the use of logic and scientific methods to attain specific objectives (see also Berg and Meadwell, 2004). *Irrational procedures* rely on ethical or mystical considerations, such as magic or faith in the supernatural. Second, legal procedures can proceed, rationally or irrationally, with respect to formal or substantive law. *Formal law* refers to making decisions on the basis of established rules, regardless of the notion of fairness. *Substantive law* takes the circumstances of individual cases into consideration along with the prevailing notion of justice. These two distinctions create four ideal types, which are seldom, if ever, attained in their pure form in specific societies. These four ideal types are:

1. **Substantive irrationality**. This exists when a case is decided on some unique religious, ethical, emotional, or political basis instead of by general rules. An example of this would be when a religious judge makes a decision without any recourse to explicit rules or legal principles.
2. **Formal irrationality**. This involves rules based on supernatural forces. It is irrational because no one tries to understand or clarify why it works and formal because strict adherence is required to the procedures. The Ten Commandments, for example, were enacted in a formally irrational way: Moses, claiming direct revelation, presented the tablets and announced, "This is the Law." Other examples include the use of ordeals and oaths.
3. **Substantive rationality**. This is based on the application of rules from nonlegal sources such as religion, ideology, and science. It is rational because rules are derived from specific and accepted sources and substantive because there is a concern for justness of outcomes in individual cases. The efforts of Ayatollah Khomeini in Iran to make decisions on the basis of the Koran would be an example of substantive rationality.
4. **Formal rationality**. This involves the use of consistent, logical rules independent of moral, religious, or other normative criteria that are applied equally to all cases. An

example of this is modern American or Western law. In general, Weber argued that modern law is rational, whereas traditional law was much less rational in that it did not follow logic and general rules.

While referring to both formal and substantive rationality, Weber discussed three types of administration of justice: (1) *Kahdi* justice, (2) empirical justice, and (3) rational justice. *Kahdi* justice is dispensed by the judge of the Islamic *Shari'a* Court (see Chapter 1) and is based on religious precepts and often lacking in procedural rules. Empirical justice, the deciding of cases by referring to analogies and by relying on and interpreting precedents, is more rational than *Kahdi* justice, but short of complete rationality. Rational justice is based on bureaucratic principles and is *universalistic*, with the same rules applying to everyone. Rational justice is further based on adherence to the observable concrete features of the facts of a case.

In general, Weber's theory of law reflected his fundamental understanding that modern society differs from its past in many ways by being more *rational*, in that decisions are expected to be based on logical reasoning based on the facts and circumstances of a particular situation. Weber pointed out that the acceptance of the law as a rational science is based on certain fundamental and fairly logical postulates, such as that the law is a "gapless" system of legal principles and that every concrete judicial decision involves the application of an abstract legal proposition to a concrete situation. There is little doubt that Weber's idea of rationality captured a crucial feature of modern legal systems. It is rather ironic that soon after Max Weber's death in 1920, rational law in Germany eventually was replaced by a faith in the intuition of a horrific charismatic leader—Adolph Hitler.

Émile Durkheim (1858–1917) Émile Durkheim was born in Epinal, France, and following several generations of rabbis, he was destined for the rabbinate. Part of his early education was spent in a rabbinical school. But soon after his arrival in Paris, he broke with Judaism. He attended the prestigious *École Normale Supérieure* and taught at the Faculty of Letters at Bordeaux and was subsequently appointed professor and chair of sociology and education at the Sorbonne. He was the founder of *L'Année sociologique*, the first social science journal in France, and the author of several very important treaties in sociology (Allan and Daynes, 2017).

Émile Durkheim (1964) outlined his thesis on law in society in his influential work, *The Division of Labor in Society*. While tracing the development of social order through social and economic institutions, Durkheim set forth a theory of legal development with the idea that law is a measure of the type of solidarity in a society. Durkheim maintained that there are two types of solidarity: mechanical and organic. **Mechanical solidarity** prevails in relatively simple and homogeneous societies where unity is ensured by close interpersonal ties and similarity of habits, ideas, and attitudes. **Organic solidarity** characterizes modern societies that are heterogeneous and differentiated by a complex division of labor. The grounds for solidarity are the interdependence of widely different persons and groups performing a variety of functions.

Corresponding to these two forms of solidarity are two types of law: repressive and restitutive. Mechanical solidarity is associated with **repressive law**. In a homogeneous, undifferentiated society, a criminal act offends the collective conscience, and punishment is meant to protect and preserve social solidarity. Punishment is a mechanical reaction. The wrongdoer is punished as an example to the community that deviance will not be tolerated. There is no concern with the rehabilitation of the offender.

In contemporary heterogeneous societies, repressive law tends to give way to **restitutive law** with an emphasis on compensation. Punishment involves restitution for harm done to the victim. Crimes are considered acts that offend others and not the collective conscience of the community. Punishment is evaluated in terms of what is beneficial for the offender and is used for rehabilitation. (This general understanding of the goals of punishment now provides the philosophical underpinning of the contemporary restorative justice approach in criminal justice [O'Mahoney and Doak, 2017]).

Stated concisely, Durkheim's position is that penal law reflects mechanical solidarity. Modern society is bound together by organic solidarity—interdependence and division of labor flowing out of voluntary acts. Society is complex; its parts are highly specialized. Through contracts, which are the main concern of modern law, people arrange their innumerable, complex relationships. Contracts and contract laws are central to modern society and influence the course of societal development through the regulation of relationships.

Durkheim did not elaborate a general framework or methodology for the sociological analysis of law, his interest in law still "resulted in the school that formed around him developing a considerable interest in the study of law as a social process" (Hunt, 1978:65). His ideas on law also provided an important background for discussions by later theorists concerning the nature of traditional law and the nature of crime. Although he may not have made "a serious contribution to the development of systematic legal sociology" (Gurvitch, 1942:106), he certainly made an important contribution to our understanding of the relationship between law and social solidarity and legal evolution (McIntyre, 1994).

SOCIOLEGAL THEORISTS

The theorists considered in this section argue that law cannot be understood without regard for the realities of social life. Since the beginning of the twentieth century, scholars of jurisprudence and of related disciplines on both sides of the Atlantic have reflected the influence of the social sciences in their analyses of legal development. The more prominent ones who are included in our discussion are Albert Venn Dicey, Justice Oliver Wendell Holmes, Jr., and Edward Adamson Hoebel.

Albert Venn Dicey (1835–1922) Albert Venn Dicey, an English legal scholar, was born in Lutterworth, Northamptonshire. For several generations, his family owned and edited a newspaper, and over time, they became prosperous. Dicey was educated at Oxford, assisted in the founding of law schools in Manchester where he was elected the prestigious

Vinerian Chair, then he accepted a professorship and returned to Oxford where he would spend the rest of his life (Collins, 2000).

Dicey offered what has become a classic theory on the influence of public opinion on social and legal change in his lectures given at Harvard Law School in 1898. He traced the growth of statutory lawmaking and the legal system to the increasing articulateness and power of public opinion as societies modernized. He noted that the process begins with a new idea thought of by someone who was especially original or even a genius, such as the celebrated Adam Smith of economic theory and Charles Darwin of evolutionary theory. Next, supporters adopt the new idea and then promote it to others. As time passes, these "preachers of truth make an impression, either directly upon the general public or upon some person of eminence, say a leading statesman, who stands in a position to impress ordinary people and thus to win the support of the nation" (Dicey, 1905:23). As a result of these efforts, public opinion begins to change. Ideally, legislators should reflect and act upon any new public opinion, but judges (even more than legislators) lag behind public opinion. This is because "they are also guided by professional opinions and ways of thinking which are, to a certain extent, independent of and possibly opposed to the general tone of public opinion" (1905:364).

Dicey is also known for his famous doctrine of "the rule of law." The doctrine has three aspects: First, no one is punishable except for a distinct breach of law, and therefore, the rule of law is not consistent with arbitrary or even wide discretionary authority on the part of the government. Second, the rule of law means total subjection of all classes to the law of the land, as administered by courts. Third, individual rights derive from court precedents rather than from constitutional codes.

From a sociological perspective, Dicey's most crucial contribution to law and society is the recognition of the importance of public opinion in legal development. As Lord Tangley (1965:48) observed, "We are indebted to Professor Dicey for many things—he established for all time the relationship between public opinion and law reform and traced its course through the nineteenth century."

Oliver Wendell Holmes, Jr. (1841–1935) Oliver Wendell Holmes, Jr., was born in Boston, Massachusetts, and was named after his famous father, the writer and physician. After his service in the American Civil War, he entered Harvard Law School and subsequently became a professor there. He was appointed to the U.S. Supreme Court in 1902 where he remained for three decades. He became one of the founders of the "legal realism" school (White, 2006). This school is based on the conception of the judicial process whereby judges are responsible for formulating law, rather than merely finding it in law books. The judge always has to exercise choice when making a decision by deciding which principle will prevail and which party will win. According to the legal realists' position, judges make decisions on the basis of their conceptions of justness before resorting to formal legal precedents. Such precedents can be found or developed to support almost any outcome. The real decisions are based on the judge's notion of justness, conditioned, in part, by values, personal background, predilections, and so forth. They are then rationalized in the written opinion (Holmes, 2004 [1897]).

Holmes stresses the limits that are set to the use of deductive logic in the solution of legal problems. He postulates that the life of law has been experience and not logic and maintains that only judges or lawyers who are acquainted with the historical, social, and economic aspects of the law will be in a position to fulfill their functions properly.

Holmes assigned a large role to historical and social forces in the life of law, while de-emphasizing the ethical and ideal elements. Although he admitted that moral principles are influential in the initial formulation of the rules of law, he identified morality with the taste and value preferences of shifting power groups in society. His basic philosophy was that life is essentially a Darwinian struggle for existence and that the goal of social effort was to "build a race" rather than to strive for the attainment of humanitarian ethical objectives.

Edward Adamson Hoebel (1906–1993) Edward Adamson Hoebel was born in Madison, Wisconsin. He received his A.B. from the University of Wisconsin, M.A. from New York University, and a Ph.D. in anthropology from Columbia University. He was president of the American Ethnological Society and the American Anthropological Association and was Regents' Professor of Anthropology at University of Minnesota for 18 years until his retirement in 1972.

A leading anthropologist of law, Hoebel was influenced by another anthropologist, Karl N. Llewellyn, a brilliant lawyer with social-science skills and interests. The two anthropologists collaborated on an analysis of the "law ways" in traditional Cheyenne society. Their emphasis on the "law-jobs" having both a "pure survival" or "bare bones" aspect for the society and a "questing" or "betterment" value (Llewellyn and Hoebel, 1941:Ch. 3) contributed significantly to the development of a modern functional approach to the legal system. We return to this point in the discussion on the functionalist approach later in this chapter.

Hoebel (1954) presented his views on the development of law in his book *The Law of Traditional Man*. He noted (1954:288) that "there has been no straight line of development in the growth of law" but that certain general understandings of law exist in traditional societies as studied by anthropologists. In general, he considered law and the legal system as properties of a specific community or subgroup of a society and stated, "Without the sense of community there can be no law. Without law there cannot be for long a community" (1954:332).

Hoebel began his description of the trend of law with a discussion of the "lower traditional societies"—the hunters and gatherers, such as the Shoshone Indians and the Andaman Islanders. Almost all relations in such a society are face-to-face and intimate. The demands imposed by culture are relatively few. Ridicule is a potent mechanism of social control. Taboo and the fear of supernatural sanctions control a large area of behavior. Special interests are few, for there is little accumulated wealth. Conflict arises mostly in interpersonal relations. Repetitive abuse of the customs and codes of social relations constitutes a crime, and the offender may be beaten or even killed by the members of the community. Hoebel wrote, "Here we have law in the full connotation of the word—the application, in threat or in fact, of physical coercion by a party having the socially recognized privilege-right of so acting. First the threat—and then, if need be, the act" (1954:300).

Among the more organized hunters, the pastoralists, and the root-gardening peoples, such as the Cheyenne, Comanche, Kiowa, and Indians of the northwest coast of North America, the size of the group and the increased complexity of the culture lead to more diverse interests among the members of society. Conflicts of interest grow, and the need arises for legal mechanisms for settlement and control of the internal clash of interests. Private law emerges and spreads, although much of the internal social control problems are handled on other than a legal basis.

"The real elaboration of law begins with the expansion of the gardening-based tribes," such as the Samoans and the Ashanti, Hoebel (1954:316) wrote. The gardening activity provides an economic foundation for the support of larger populations that can no longer maintain face-to-face relationships. With the formation of more communities, "The pressures to maintain peaceful equilibrium between the numerous closely interacting communities become intensified. The further growth of law and a more effective law is demanded" (1954:316). The attempt to establish the interest of the society as superior to the interests of kinship groups is the prime mover of law in this type of society. Allocation of rights, duties, privileges, powers, and immunities with regard to land becomes important, and "the law of things begins to rival the law of persons" (1954:316).

For Hoebel, the "trend of law" is one of increasing growth and complexity in which the tendency is to shift the privilege right of prosecution and imposition of legal sanctions from the individual and the kinship group to clearly defined public officials representing the society as such. Hoebel maintains that this is how law developed in human societies through the ages, but the laws of particular societies have not followed a single line of development through fixed, predetermined, and universal stages. The development of legal systems in particular societies is characterized by a trend that only in general exhibits the features described here.

CONTEMPORARY LAW AND SOCIETY THEORISTS

Many contemporary theorists have written about law and society. This section examines the work of two of the most notable theorists.

Donald Black Donald Black received his doctorate in sociology in 1968 at the University of Michigan. He held dual appointments in the Department of Sociology and the Law School at Yale and Harvard universities. He joined University of Virginia in 1985 where he is presently university professor of social sciences.

In three influential volumes, *The Behavior of Law*; *Sociological Justice*; and *The Social Structure of Right and Wrong*, Black (1976, 1989, 1998) set forth a theory of law aims to explain variations in law from a cross-national perspective, as well as among individuals within societies. As noted in Chapter 1, he considers law as governmental social control, which makes use of legislation, litigation, and adjudication. He distinguishes between behavior that is controlled by these means and behavior that is subject to other forms of social control, such as etiquette, custom, and bureaucracy.

Black contends that law is a quantitative variable that can be measured by the frequency by which, in a given social setting, statutes are enacted, regulations are issued, complaints are made, offenses are prosecuted, damages are awarded, and punishment is meted out. Consequently, the quantity of law varies from society to society and from one historical period to another in a given society. Different organizations in a society may have more or less law both for themselves and in regard to other groups and organizations.

The direction of law (that is, the differential frequency and success of its application by persons in different social settings) also varies. So is the style of law that, as mentioned earlier in our discussion of Durkheim, may be accusatory (with penal or compensatory consequences) or remedial (with therapeutic or conciliatory consequences).

Next, Black develops a number of propositions that explain the quantity, direction, and style of law in regard to five measurable variables of social life: stratification, morphology, culture, organization, and social control. *Stratification* (inequality of wealth) can be measured in such ways as differences in wealth and rates of social mobility. *Morphology* refers to those aspects of social life that can be measured by social differentiation or the degree of interdependence (for example, the extent of division of labor). *Culture* can be measured by the volume, complexity, and diversity of ideas, and by the degree of conformity to the mainstream of culture. *Organization* can be measured by the degree to which the administration of collective action in political and economic spheres is centralized. Finally, the amount of nonlegal *social control* to which people are subjected is a measure of their respectability, and differences between people indicate normative distance from each other.

On the basis of sociological, historical, and ethnographic data, Black arrives at a number of conclusions. He points out that the quantity of law varies directly with stratification rank, integration, culture, organization, and respectability, and inversely with other forms of social control. Thus, stratified societies have more law than simple ones, wealthy people have more law among themselves than poor people, and the amount of law increases with the growth of governmental centralization.

The relationships between the quantity of law and the variables of differentiation, relational distance, and cultural distance are curvilinear. Law is minimal at either extreme of these variables and accumulates in their middle ranges. For example, law relating to contractual economic transaction is limited in simple societies where everyone engages in the same productive activity and in the business world where manufacturers operate in a symbiotic exchange network.

The style of law varies with its direction: In relation to stratification, law has a penal style in its downward direction, a compensatory or a therapeutic style in its upward direction, and a conciliatory style among people of equal rank. In regard to morphology, law tends to be accusatory among strangers and therapeutic or conciliatory among intimates. Less organized people are more vulnerable to penal law, and more organized people can count on compensatory law.

These patterns of stylistic variation explain, for example, why an offense is more likely to be punished if the rank of the victim is higher than that of the offender, but is more likely to be dealt with by compensation if their ranks are reversed, why accusatory law replaces remedial law in societies undergoing modernization, why members of subcultures are more vulnerable to law enforcement than conventional citizens, and why organizations usually escape punishment for illegal practices against individuals.

Over the years, Black's theory of law has generated considerable critical debate and analysis (Wong, 1998), with some of its propositions not supported very well by empirical testing at the macrosociological level (Lessan and Sheley, 1992). Nonetheless, Black's theory of law has still been influential, and his propositions are likely to be subjected to further testing, criticism, revision, and reformulation. But, as Lawrence W. Sherman (1978:15) presciently noted shortly after the publication of *The Behavior of Law*, "whatever the substance or method, social research on law cannot ignore Black."

Roberto Mangabeira Unger Roberto Mangabeira Unger is currently a professor of law at Harvard University. Long active in Brazilian politics, he took a leave from his position at Harvard from 2007 to 2009 to serve in the Brazilian government as minister of strategic affairs.

In *Law in Modern Society*, Unger (1976) revived the sweeping scope of Max Weber's theorizing on law by placing the development of rational legal systems within a broad historical and comparative framework. Unger locates the study of law within the major questions of social theory in general: the conflicts between individual and social interests, between legitimacy and coercion, and between the state and society. His main thesis is that the development of the rule of law, law that is committed to general and autonomous legal norms, could take place only when competing groups struggle for control of the legal system and when there are universal standards that can justify the law of the state.

Unger's analysis emphasizes a historical perspective to understand modern law and society. He says that society evolved from customary or interactional law (involving informal norms and reciprocal expectations), to bureaucratic or regulatory law (involving explicit rules created by an actual government), and then to the legal order (the modern legal system, which is universalistic and independent of ruling leaders). From an evolutionary perspective, these different types of law turn out to be stages, for they build upon one another—regulatory law upon customary law and the autonomous legal order upon regulatory law. There is much more to Unger's complex theory of law that lies beyond the scope of this book, but suffice it to say that his theory has influenced recent sociolegal thinking and scholarship and promises to do so for the foreseeable future.

CURRENT INTELLECTUAL MOVEMENTS IN LAW AND SOCIETY

As discussed in Chapter 1, sociological deliberations of the role of law in society generally take place in the context of two ideal conceptions of society found in the larger field of sociology: the consensus and conflict perspectives. The functionalist perspective on

the role of law reflects sociology's consensus perspective, while the conflict and Marxist perspective on the role of law reflects sociology's conflict perspective. Most law and society scholars opt for either a version of the functionalist or the conflict and Marxist approach to law and the legal system. We begin this section by examining these views' relevance for understanding law and society.

THE FUNCTIONALIST APPROACH

Functionalism derives from the work of early sociologists, most notably Durkheim, and was the most influential sociological theory before the 1960s. Functionalism views society in the same way that biology views the human body. Just as the body consists of limbs, organs, and other bodily parts, so does society consist of social institutions and other components. Just as the body's many parts each contribute to the health of the body, so do society's components each contribute to the health of society.

The following assumptions summarize the basic tenets of functionalism (Van den Berghe, 1967):

1. Societies must be analyzed "holistically as systems of interrelated parts."
2. Cause-and-effect relations are "multiple and reciprocal."
3. Social systems are in a state of "dynamic equilibrium," such that adjustment to forces affecting the system is made with minimal change within the system.
4. Perfect integration is never attained so that every social system has strains and deviations, but the latter tend to be neutralized through institutionalization.
5. Change is fundamentally a slow adaptive process, rather than a revolutionary shift.
6. Change is the consequence of the adjustment of changes outside the system, growth by differentiation, and internal innovations.
7. The system is integrated through shared values.

In a classic application of functionalism to a legal issue, Émile Durkheim (Durkheim, 1962 [1895]) said that deviance could serve certain social functions in a society. Durkheim had in mind the idea that a society needed deviance to continually reaffirm its boundaries of propriety. He also pointed that without the existence of sinners, a church could not exist. Their very existence provides the opportunity for believers to reaffirm the faith that has been offended by the sinner. Thus, the worst thing that could happen to a church is to completely eliminate sin from the world and completely propagate the faith to society. By analogy, society needs deviance for it to especially appreciate the value of acceptable, "normative" behavior.

Functionalism is also present in legal anthropology. For example, in *The Cheyenne Way*, Karl N. Llewellyn and E. Adamson Hoebel (1941) outlined their law-job theory about society as a whole. For societies to survive, there are certain basic needs that must be met. It is within this context that the wants and desires of individuals, their "divisive urges," assert themselves. The conflicts produced are unavoidable but, at the same time, essential to group survival. "The law-jobs entail such arrangement and adjustment of people's behaviour that the society (or the group) remains a society (or a group) and gets enough energy unleashed

and coordinated to keep on functioning as a society (or as a group)" (1941:291). They consider the law-jobs as universal, applicable, and necessary to all groups and to all societies.

Functionalism is evident in other legal writing as well. For example, in Jerome Frank's (1930) *Law and the Modern Mind*, the entire discussion of the "basic legal myth" and the associated "legal magic" is grounded in an examination of their functional consequences for the legal system. Similarly, Thurman Arnold's (1935) concern with the role of symbolism within legal institutions is consciously functionalist. Felix Cohen (1959) also resorts to functional analysis in his elaboration of "functional jurisprudence." Also, the writing of Lon Fuller (1969) on law morality, Julius Stone's (1966) *Law and the Social Sciences*, Philippe Nonet's (1976) ideas on jurisprudential sociology, and Andras Sajo's (2003) study of the functions of governmental corruption in post-communist transition all illustrate the functionalist approach to the study of law and society.

The functionalist approach has been criticized both for alleged theoretical shortcomings and on ideological grounds. Criticisms included complaints that the whole notion of function is oversimplified. Questions such as "Functional for whom?" are raised, as the interests and needs of different groups in a society are often in conflict: What may be functional for one group may be dysfunctional for another. Other critics say that functional analysis is a static, antihistorical mode of analysis with a bias toward conservatism. As expected, a sizable amount of literature in the field addresses these charges (e.g. Turner and Maryanski, 1995). Despite these criticisms, the functionalist perspective has much to offer for the understanding of law and society.

CONFLICT AND MARXIST APPROACHES

Conflict and Marxist approaches are based on the assumption that social behavior can best be understood in terms of tension and conflict between groups and individuals (Appelrouth and Edles, 2016). Proponents of these approaches suggest that society is an arena in which struggles over scarce commodities take place. Closely intertwined with the idea of conflict in society is Marx's concept of *economic determinism*, discussed earlier in this chapter. Economic organization, especially the ownership of property, determines the organization of the rest of society. The class structure and institutional arrangements, as well as cultural values, beliefs, and religious dogmas, are, ultimately, a reflection of the economic organization of a society.

According to Marx, law and the legal system are designed to regulate and preserve capitalist relations. For Marxists, law is a method of domination and social control used by the ruling classes. Law protects the interests of those in power and serves to maintain distinctions between the dominated and the domineering classes. Consequently, law is seen as a set of rules that arise as a result of the struggle between the ruling class and those who are ruled. The state, which is the organized reflection of the interests of the ruling class, passes laws that serve the interests of this domineering class.

This breakdown of society into two classes—a ruling class that owns the means of production and a subservient class that works for wages—*inevitably* leads to conflict. Once

conflict becomes manifest in the form of riots or rebellions, the state, acting in the interest of the ruling class, will develop laws aimed at controlling acts that threaten the interests of the status quo. As capitalism develops and conflict between social classes becomes more frequent, more acts will be defined as criminal.

A notable proponent of this general view, Richard Quinney (1974), argued that law in capitalist society gives political recognition to powerful social and economic interests. By providing the mechanism for the forceful control of the majority in society, the legal system reflects and serves the needs of the ruling class. In *The Critique of Legal Order*, Quinney (2002:16) argued that as capitalist society is further threatened, criminal law is increasingly used in the attempt to maintain domestic order. The underclass will continue to be the object of criminal law as the dominant class seeks to perpetuate itself. To remove the oppression, and to eliminate the need for further reward, would necessarily mean the end of that class and its capitalist economy.

William Chambliss and Robert Seidman (1982) took a similar approach in their analysis of law. While emphasizing conflicting interests in society, they argued that "the state becomes a weapon of a particular class. Law emanates from the state. Law in a society of classes must therefore represent and advance the interests of one class or the other" (1982:72–73). For them, law is an instrument sought after and employed by powerful interest groups in society. Austin Turk (1978) also sees law as "a weapon in social conflict," an instrument of social order that serves those who are in power. The control of legal order represents the ability to use the state's coercive authority to protect one's interests. The control of the legal process further means the control of the organization of governmental decisions and the workings of the law, which diverts attention from more deeply rooted problems of power distribution and interest maintenance.

In a classic historical application of the conflict approach, Jerome Hall (1952) traced the growth of property and theft laws to the emergence of commerce and industrialization. With the advent of commerce and trade, a new economic class of traders and industrialists emerged, and the need to protect their business interests grew. As a result, new laws were established to protect the interests and economic well-being of the emergent class. These laws included the creation of embezzlement laws and laws governing stolen property and obtaining goods under false pretense. Hall's analysis supports the overall conflict view that notions of crime have their origins less in general ideas about right or wrong than in perceived threats to groups with the power to protect their interests through law.

After Marxist and conflict views became popular during the 1960s and 1970s, critics said they were too simple and neglected the complexity of social interaction (Manning, 1975). Many scholars concede the validity of conflict and interest-group arguments but, at the same time, contend that bold assertions about the "ruling class" conceal more than they reveal. Surely, they say, lawmaking phenomena are more complex than implied in statements that hint at a monolithic ruling class that determines legislative behavior and the creation of rules. Despite this criticism, conflict and Marxist views enter into a number of sociological studies on law and society and have left a lasting impact on the study of law and society.

The collapse of the Soviet Union ended the most extensive attempt to implement Marxism ever, and it is unlikely that another attempt will ever be made to create an economy of any scale that rejects private property, markets, money, financial instruments, prices, money wages, profits, and interest. Thus, the Marxist conception of an economy that would be the negation of capitalism will remain but a dream or a nightmare, depending on one's political and economic inclinations. Although Marxism failed in this regard, the basic ideas of Marxism and related conflict views will no doubt continue to influence scholarly thinking on law and society.

THE CRITICAL LEGAL STUDIES MOVEMENT

The critical legal studies (CLS) movement is a vibrant if controversial addition to the ongoing jurisprudential debate on law, legal education, and the role of lawyers in society (Belliotti, 1992:162–189; Kennedy, 2007; Kramer, 1995; Tushnet, 2008). It comprises some exciting sociolegal scholarship around, with one sociolegal scholar describing it as being "where the action is" (Trubek, 1984). The movement began with a group of junior faculty members and law students at Yale in the late 1960s. In 1977, the group organized itself into the Conference on Critical Legal Studies, which reached several hundred members and held an annual conference for many years.

Greatly influenced by Marxist-inspired European theorists, CLS's roots can be traced back to American legal realism (Tomasic, 1985). Legal realists in the 1920s and 1930s argued against the nineteenth-century belief that the rule of law was supreme. Noting that a good lawyer could argue convincingly either side of a given case, legal realists said there was actually nothing about the law that made any judicial decision inevitable. Rather, they pointed out, the outcome of a case depended largely, if not entirely, on the predilections of the judge who happened to be deciding it. Thus, far from being a science, the realists argued, law was virtually inseparable from politics, economics, and culture. They rejected the idea that law is above politics and economics.

Reflecting this general legal realist understanding, CLS proponents reject the idea that there is anything distinctly legal about legal reasoning. As with any other kind of analysis, legal reasoning, they maintain, cannot operate independently of the personal biases of lawyers or judges, or of the social context in which they are acting (Bankowski and MacLean, 2007). Furthermore, law is so contradictory that it allows the context of a case to determine the outcome. That attribute of law—its inability to cover all situations—is called *indeterminacy* (Trubek, 1984). Because law consists of a variety of contradictions and inconsistencies, judicial decisions cannot be the self-contained models of reasoning as they claim to be. Decisions rest on grounds outside of formal legal doctrine, which are inevitably political.

CLS scholars also reject law as being value-free and above political, economic, and social considerations. Laws only *seem* neutral and independent, even those that reflect the dominant values in society. Moreover, laws legitimize those values that predominate in society. Therefore, laws legitimate the status quo. CLS scholars maintain that law is actually part of the system of power in society rather than a protection against it.

CLS arguments generated a good deal of criticism after the movement began (Schwartz, 1984). The movement was called Marxist, utopian, hostile to rules, and incoherent. Critical legal scholars were accused of favoring violence over bargaining, of advocating the inculcation of leftist values in legal education, of advancing a nihilistic understanding of law, and of teaching cynicism to their students. One critic even said that nihilist law teachers with a proclivity for revolution are likely to train criminals and, they have, therefore "an ethical duty to depart from law school" (Carrington, 1984:227). Although both the CLS movement and criticism of it have faded somewhat during this century, CLS views remind us that law may not be as purely logical and unbiased as traditional legal scholarship assumes.

FEMINIST LEGAL THEORY

Feminist legal theory is another intellectual movement of considerable significance and impact. It is concerned with issues that are central to a broader intellectual and political feminist movement: sex-based equality at the work place, reproductive rights, domestic violence, sexual harassment, sexual preferences, and rape, just to mention a few (Chamallas, 2012; Levit and Verchick, 2016). It draws from the experiences of women and from critical perspectives developed in other disciplines in analyzing the relationship between law and gender (Greenberg et al., 2008; Heinzelman, 2010). Unlike critical legal studies, which started in elite law schools and were inspired predominantly by notions of what may be considered contemporary Marxism, feminist legal theory emerged against the backdrop of mass political movements that arose to confront political backlashes for women (Rhode, 1991). These backlashes included the defeat of the Equal Rights Amendment, setbacks in abortion rights, same-sex marriage obstacles, continued sexual subordination and exploitation in the profession of law, and the general prevalence of sexism in most walks of life.

A dominant tendency in feminist legal theory is to regard men and patriarchy as the major source of women's inequality and other problems (Lorber, 2009; Wing, 2003). Society is viewed as basically patriarchal, organized and dominated by men, and, as a result, not very hospitable to women. Not surprisingly, proponents of the theory consider it one of the most crucial challenges to contemporary law and legal institutions.

There are at least three predominant, although by no means mutually exclusive, themes in feminist legal literature (Moran, 2006). The first deals with women's struggle for equality in a male-dominated legal profession and in the broader society. Feminists challenge legal claims of fairness and the impartiality of law in dealing with women (Grana, 2009). The argument is that law historically helped men maintain their own power and to keep women in their place.

In the second broad theme of feminist legal scholarship, the argument of male bias is extended to include practically every feature of law. The law, according to this theme, is a reflection of a typical male culture, a masculine way of doing things. Law, therefore, is corrupted for women by its inherent masculinity. The task feminists face is to come up with a completely new law for women. Such law should be devoid of norms and characteristics that reinforce male prerogatives and female powerlessness about gender roles and private

intentions. For example, the male legal culture dismisses or trivializes many problems that women face, such as sexual harassment and date rape (Horvath and Brown, 2009).

The third dominant theme challenges the very concepts law invokes to support its contention that it is a just and fair institution. Contrary to professed notions, law is not value-neutral, objective, rational, dispassionate, and consistent. This is because law defines those concepts in a typically masculine way, ignoring or devaluing the qualities associated with the experience of women. Essentially, the problem is that law claims to be neutral in relation to the sexes (and other social categories); yet, the very way it argues for its neutrality is gender-biased. The particular style of maleness can best be illustrated by the concept of "rational person," a mythical legal subject who is coherent, rational, acts on *his* free will, and in ordinary circumstances can be held fully accountable for *his* actions (Naffine, 1990).

Feminists rely on feminist legal methods to advance their arguments (Jarviluoma et al., 2003; Kleinman, 2007). They contend that without understanding feminist methods, law will not be perceived as legitimate or "correct." These methods, although not unique to feminists, seek to reveal features of a legal concern that more traditional approaches tend to ignore or suppress. There are three such basic methods (Bartlett, 1991).

One method asks the *woman question*, which is designed to probe into the gender implications of a social practice or rule. Asking the woman question compensates for law's failure to take into account experiences and values that are more typical of women than of men. Nowadays, feminists ask the woman question in many areas of the law. In the case of rape, they ask why the defense of consent deals with the perspective of the defendant and what he "reasonably" thought the woman wanted rather than the point of view of the woman and what she "reasonably" thought she conveyed to the defendant. The woman question asks why pregnancy is virtually the only medical condition excluded from state employee disability plans, why women cannot be prison guards on the same terms as men, and why conflict between family and work responsibilities is considered a private matter for women to resolve rather than a public concern involving the restructuring of the workplace. Essentially, the woman question shows how the predicament of women reflects the organization of society rather than the inherent characteristics of women.

Another method, *feminist practical reasoning*, deals with features not usually reflected in legal doctrine. The underlying assumption is that women approach the reasoning process differently from men, that women are more sensitive to situation and context, and that they tend to resist universal generalizations and principles. An example is minors' access to abortion. The notion of family autonomy seems to justify the legal requirement that a minor obtain parental consent before abortion. The young woman is immature, and parents are best suited to help her to decide whether or not to terminate her pregnancy. However, the often tragic and wrenching circumstances under which a minor may want to avoid notifying a parent about a pregnancy or abortion demonstrate the practical difficulties of the matter. Often, minors are traumatized by their parents' knowledge of their pregnancy. Women may be compelled to continue their pregnancy and subsequently give up the child for adoption, which is contrary to their intentions. Or they may be subjected to various

forms of parental rejection or manipulation. Feminist practical reasoning challenges the legitimacy of the norms of those who claim to speak on behalf of the community, and they seek to identify perspectives not represented in the dominant monolithic male culture.

A third method, *consciousness-raising*, provides an opportunity to test the validity of legal principles through personal experiences of those who have been affected by those principles. The idea is to explore common experiences and patterns that come about from shared recollection of life events. It enables feminists to draw insights from their own experiences and those of other women and to use these newly formed insights to challenge dominant versions of social reality. In consciousness-raising sessions, women share their experiences publicly as victims of marital rape, pornography, sexual harassment on the job, or other forms of oppression or exclusion based on sexual orientation (Lloyd et al., 2010; Williams, 2004), in an attempt to alter public perception of the meaning to women of practices that the dominant male culture considers harmless or flattering.

Critics of feminist legal theory make at least three arguments. First, not all men benefit equally from legal sexism. In particular, low-income men, men of color, and gay and bisexual men have historically not enjoyed the legal rights and benefits that middle- and upper-class men have enjoyed (Cante, 2010; Keen and Goldberg, 1998). Second, feminist legal theorists have not been consistent regarding whether women should be treated the same as men, or instead women receive special treatment because of basic sex differences (Williams, 1991). Third, in calling attention to rape and sexual assault, sexual harassment, and other problems women face, feminist legal theory has sometimes gone too far in depicting women as utterly helpless and defenseless (Badinter, 2006). Despite these criticisms, feminist legal theory represents an important intellectual movement challenging traditional legal doctrine, and it has paved the way for truly significant victories for women in the legal arena during the past few decades (Chamallas, 2012; Levit and Verchick, 2016).

CRITICAL RACE THEORY

Critical race theory (CRT) is another highly significant movement in law with hundreds of law review articles and dozens of books directly or indirectly devoted to it (e.g. Browne-Marshall, 2013; Delgado and Stefancic, 2013).

Like feminist legal theory, CRT is concerned with questions of discrimination, oppression, difference, equality, and the lack of diversity in the legal profession. Although CRT's intellectual origins go back much further, the inception and formal organization of the movement can be traced to a 1989 workshop on CRT in Madison, Wisconsin (Delgado, 1994). Many of its proponents had been involved with critical legal studies or feminist jurisprudence, and the 1989 conference effectively ratified CRT as an important critique of legal theory. The CRT movement, along with Latino-focused critical legal scholarship or LatCrit (Bender, 2004; Valdes et al., 2002), attempts to rectify the wrongs of racism while acknowledging that racism is an inherent part of modern society. Racism is embedded in the legal and political systems, and proponents recognize that its elimination is impossible. However, they insist that an ongoing struggle to countervail racism must be carried out.

In a way, the word *critical* in "critical race theory" reflects continuity between critical legal studies and critical race studies. Both seek to explore the ways in which law and legal education and the practices of legal institutions work to support and maintain a system of oppressive and inequitable relations. But much more than CLS, CRT highlights the urgency of racial problems and an uncompromising search for real solutions to these problems. The basic premises are that persons of color in the United States are oppressed and that this oppression creates fundamental disadvantages for those who are being oppressed. Because of oppression, people of color perceive the word differently than those who have not had such experience. CRT scholars, many or perhaps most of whom are people of color themselves, can thus bring to legal analyses perspectives that were previously excluded. Through narratives and "story telling," some scholars share their experiences or the experiences of other people of color to make their presence felt in legal scholarship.

Critical race theorists view racism, not only as a matter of individual prejudice and everyday practice, but also as a phenomenon that is deeply embedded in language and perception. Racism is in a ubiquitous and inescapable feature of modern society, and despite official rhetoric to the contrary, race is always present even in the most neutral and innocent terms. Concepts such as *justice*, *truth*, and *reason* are open to questions that reveal their complicity with power. This extraordinary pervasiveness of unconscious racism is often ignored by the legal system.

As with all the intellectual developments we have discussed, CRT has been criticized on several grounds (Ayres, 2003). Critics say that as a matter of formal law, blacks and other people of color are no longer barred from professional jobs. Evolving laws and social norms have opened the door for employment and other social and economic opportunities. How widely this door has opened is, of course, the subject of debate. Another criticism is that CRT articulates its conception of race as a social construction at the macro level, focusing primarily on legal and sociopolitical processes, and has neglected the micro, interpersonal ways in which racial oppression is produced. Yet another criticism is that CRT is essentially a reformist project, not really new and distinguishable from traditional civil rights scholarship on the law. These criticisms notwithstanding, and as we have said regarding the other sociolegal intellectual movements, CRT has nonetheless had a highly significant impact on the field of law and on the understanding of law and society.

SUMMARY

1. In a historical context, legal development, industrialization, urbanization, and modernization are closely intertwined. Thee traditional, transitional, and modern legal systems all reflect this context and are still present in the world's societies.
2. Many of the European pioneers discussed reacted in various ways to the influence of natural law and attempted to account for it from an evolutionary perspective. The classical sociological theorists recognized the essential role of legal institutions in the social order and made important explorations of the interplay between law and society. The sociolegal theorists were guided by social science principles in the development of their diverse perspectives on law and society.

3. Sociologists embracing the functionalist approach attempt to account for law in society within the overall framework of the theory that society consists of interrelated parts that work together to maintain internal balance. Sociologists advocating conflict and Marxist approaches to the study of law in society consider conflict inevitable and ubiquitous in societies, as a result of inescapable competition for scarce resources.
4. Proponents of the critical legal studies movement argue that there is nothing inherently rational, scientific, or neutral about the law—nothing that would dictate the outcome of a particular case. They maintain that law is riddled with contradiction and prejudice and that it is heavily in favor of the wealthy and powerful.
5. Feminist legal theory challenges impartiality of law in dealing with women and argues that law reflects male privilege, power, and culture. Feminists rely on feminist methods that seek to reveal aspects of law that more traditional methods tend to ignore or suppress.
6. Critical race theory argues that the roots of racial inequality still persist in American society, embedded in law, language, perception and structural conditions, and that there must be an uncompromising search for real solutions rather than convenient stopgaps.

KEY TERMS

Formal irrationality Max Weber's term for law based on supernatural forces

Formal rationality Max Weber's term for law based on consistent, logical rules independent of moral, religious, or other normative criteria that are applied equally to all cases

Mechanical solidarity Émile Durkheim's term for the social order in relatively simple and homogeneous societies that results from close interpersonal ties and similarity of habits, ideas, and attitudes

Modern legal systems legal systems marked by the rise and widespread use of administrative, constitutional, and statutory law

Natural law the law of God and human nature that transcends the positive law of any particular nation or society

Organic solidarity Émile Durkheim's term for the social order in modern societies that results from the interdependence of widely different persons and groups performing a variety of functions

Repressive law Émile Durkheim's term for the punishment found in societies characterized by mechanical solidarity

Restitutive law Émile Durkheim's term for the legal response to deviance found in societies characterized by organic solidarity

Substantive irrationality Max Weber's term for law in which cases are decided on some unique religious, ethical, emotional, or political basis instead of by general rules

Substantive rationality Max Weber's term for law based on the application of rules from nonlegal sources such as religion, ideology, and science

Traditional legal systems the informal norms of small, homogenous societies

Transitional legal systems the law found in advanced agrarian and early industrial societies

SUGGESTED READINGS

Bruce A. Arrigo and Dragan Milovanovic (eds.), *Postmodernist and Post-Structuralist Theories of Crime*. Burlington, VT: Ashgate, 2010. A collection of critical approaches by well-known contemporary theorists to law, crime, and the criminal justice system.

Katharine T. Bartlett and Rosanne Kennedy (eds.), *Feminist Legal Theory: Readings in Law and Gender*. Boulder, CO: Westview Press, 1991. A balanced and provocative anthology of early articles on feminist legal theory and methods.

Steven W. Bender, *Greasers and Gringos: Latinos, Law, and the American Imagination*. New York: New York University Press, 2004. An insightful examination of Latino negative stereotypes, their evolution, and possible rectification.

William J. Chambliss and Milton Mankoff (eds.), *Whose Law? What Order? A Conflict Approach to Criminology*. New York: John Wiley, 1976. A good early illustration of the fundamental perspectives of conflict criminologists.

Richard Collier, *Masculinity, Law and the Family*. New York: Routledge, 1995. A controversial and thought-provoking book on the legal ramifications of critical studies of masculinity as a reaction in part to race and feminist legal scholarship.

Hugh Collins, *Marxism and Law*. New York: Oxford University Press, 1996. A clear and thorough treatment of the relationship between Marxian theory and law.

Martha Albertson Fineman, Jack E. Jackson, and Adam P. Romero (eds.), *Feminist and Queer Legal Theory: Intimate Encounters and Uncomfortable Conversations*. Burlington, VT: Ashgate, 2009. This compendium brings together positions in feminist and queer theory to create interdisciplinary dialogues and to explore further the legal, cultural, and social implications of the various theoretical approaches.

Judith G. Greenberg, Martha L. Minow, and Dorothy E. Roberts, *Women and the Law*, 4th ed. New York: Foundation Press, 2008. A detailed overview of concrete legal problems of particular and current concern to women. The problems are grouped into three categories: women and work, women and family, and women and their bodies.

Ian Haney López (ed.), *Race, Law, and Society*. Aldershot, Hants, UK/Burlington, VT: Ashgate, 2007. An edited volume of important articles on race and race-related topics in American and a variety of cross-cultural contexts.

Charles E. Reasons and Robert M. Rich (eds.), *The Sociology of Law: A Conflict Perspective*. Toronto, Canada: Butterworths, 1978. An early compendium designed to present the major paradigms in the sociology of law, with particular emphasis on conflict and Marxist approaches.

Charles Sampford, *The Disorder of Law: A Critique of Legal Theory*. Oxford, UK: Basil Blackwell, 1989. A useful source for additional discussion of a large number of important contemporary theorists from a critical perspective.

Kim Lane Scheppele, "Legal Theory and Social Theory," *Annual Review of Sociology, Annual 1994,* 20:383–407, 1994. A concise and comprehensive review of trends in legal theory.

A. Javier Treviño, *The Sociology of Law: Classical and Contemporary Perspectives*. New Brunswick, NJ: Transaction Publishers, 2008. A review of classical and contemporary perspectives incorporating some original writings by theorists.

Francisco Valdes, Jerome McCristal Culp, and Angela P. Harris (eds.), *Crossroads, Directions, and a New Critical Race Theory*. Philadelphia, PA: Temple University Press,

2002. The majority of the essays in this volume were delivered at the last major CRT conference, which was held at Yale in 1997.

Adrien Katherine Wing (ed.), *Critical Race Feminism: A Reader*. 2nd ed. New York: New York University Press, 2003. An anthology that addresses an ambitious range of subjects, from life in the workplace and motherhood to sexual harassment, domestic violence, and other criminal justice issues.

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3

CHAPTER 3
THE ORGANIZATION OF LAW

CHAPTER OUTLINE

LEARNING OBJECTIVES

- Explain the differences that repeat players enjoy in the courts
- Evaluate the effectiveness of juries in the civil and criminal courts
- Describe the involvement of lobbyists and interest groups in the legislative process
- List examples of how administrative agencies affect Americans' everyday lives
- Explain why there is a thin line between police discretion and discrimination by the police based on race and ethnicity, social class, and other traits

Nowadays, one way or another, more than ever before, law touches all of us. The contact may be pleasant or unpleasant, tangible or intangible, direct or indirect, but law is nonetheless a constant force and presence in our lives. For a sociological understanding of law in society, we need to know about the social organization of law, the types of social arrangements and relations involved in the legal process, and the social characteristics of people who interpret and administer the law. This chapter examines the social organization of legal systems in the framework of the judicial, legislative, administrative, and enforcement agencies that carry out the official (and, at times, the unofficial) business of law.

COURTS

Of the various functions of courts, the most important is to process. By definition, a dispute is a conflict of claims or rights—an assertion of right, claim, or demand on one side, met by contrary claims on the other. When courts hear disputes, they attempt to decide (adjudicate) between or among those who have some disagreement, misunderstanding, or competing claims. Such disputes may arise between individuals, between organizations (private or governmental), or between an individual and an organization. Jones may sue Smith to recover damages caused by a traffic accident; acting under the provisions of a civil rights statute, the federal government may sue a state to force its officials to stop discriminating against blacks in the electoral process; and a state may charge Miller with burglary and bring him to court in a criminal proceeding to answer the charge. When a judge renders the official judgment of the trial court in a civil or a criminal case as to the defendant's guilt or innocence, the process is called **adjudication**.

Unlike legislative and administrative bodies, courts do not place issues on their own agendas. Judges generally do not decide proactively to make rulings about voting rights, racial discrimination, abortion, or any other issue. Rather, courts are passive; they must wait until matters are brought to them for resolution. The passivity of courts places the burden on citizens or organizations to recognize and define their own needs and problems and to determine which require legal judgments. As Donald Black (1973:138) notes, this method of acquiring cases "assumes that each individual will voluntarily and rationally pursue his own interests." The courts are indifferent to those issues or disputes that individuals or organizations fail to notice or wish to ignore. This reactive nature of courts ensures that they consider disputes only after the injuries have taken place or after the problems have developed.

In theory, courts differ from other kinds of dispute-regulation methods in that they are available to all members of society. In principle, everyone who has a dispute for which there is possible legal redress ought to be able to use the courts regardless of ethnic, racial, cultural, or other differences. Unlike dispute-settlement methods that are available only to specific groups in society (for example, college grievance committees or religious tribunals), courts are truly public. As judges make their decisions, they are expected to be impartial and to be governed by legal principles, not by personal preferences or by political pragmatism.

DISPUTE CATEGORIES

To understand what courts do, it is necessary to examine the kinds of disputes they process. Sheldon Goldman and Austin Sarat (1989) outline three categories of disputes that provide the bulk of work of American courts.

The first is called the *private* dispute. This kind of dispute is characterized by the absence of any initial participation by public authorities. For example, when a married couple quarrels, when two businesspersons debate the terms of a contract, and when two automobiles collide, these events are likely to give rise to private disputes. Although they may occur in public places and may involve competing interpretations of law, they

remain private as long as the government is not a party. Because these disputes are in the course of normal social life, they are usually processed without government intervention. Many of these disputes can handled in the general context of ongoing relationships or through bargaining and negotiation. For example, the married couple may seek marriage counseling, the businesspersons may arrive at a compromise through negotiation, and a settlement may be reached for the car accident through an insurance company. Sometimes, though, these nonlegal forms of dispute processing prove insufficient. If so, the disputing parties may ask the courts for legal redress.

The second category of disputes is called the *public-initiated* dispute. It occurs when the government seeks to enforce norms of conduct or to punish individuals who breach such norms. An illustration of the public-initiated dispute is the ordinary criminal case in which the state, or some official acting on its behalf, seeks to use the courts to determine whether a particular breach of law has occurred and whether sanctions should be applied. Public-initiated dispute is unique because it involves the law of the entire community. In the case of criminal law violation, dispute processing in a democracy occurs in a public forum, the court, assuming an arrest had occurred and a prosecutor proceeds with the charges. However, because many crimes occur that do not come to the attention of the police, these offenses do not result in arrest or prosecution. Moreover, most crimes that come to the attention of the police still do not yield an arrest (Barkan, 2018). For these reasons, most crimes do not end up being public-initiated disputes that reach the courts.

The third kind of dispute is the *public defendant* dispute. In this type, the government participates as a defendant. Such disputes involve challenges to the authority of some government agency or questions about the propriety of some government action that may be initiated by an individual or by an organization. In such cases, the courts are called upon to review the action of other branches of government. These disputes involve claims that the government has not abided by its own rules or followed procedures that it has prescribed. For instance, parents of children in racially segregated public schools might claim that school officials violated the U.S. Constitution's guarantee of equal protection of the laws. In general, such disputes come to court only after aggrieved parties have failed to remedy their grievances either through the political process or through procedures provided by the offending government agency.

These three types of disputes—private, public-initiated, and public defendant—represent, for the most part, the workload of American courts. It should be noted that, contrary to widespread beliefs, courts generally process rather than resolve disputes. A court decision is seldom the last word in a dispute. For example, after a divorce decree, the estranged couple may continue to argue, not about settlements, but about visiting rights or proper supervision of children (Sarat and Felstiner, 1995). Similarly, in many cities, court-ordered desegregation and busing a few decades ago did not resolve the issue of where children should go to school, not to mention the more enduring and underlying racial issues. Thus, it should be remembered that, whether the disputes involve only two individuals who bring the case to court or whether cases have broader ramifications, court decisions are seldom the final word in a dispute. Let us now consider the structure of courts where decisions are rendered.

THE ORGANIZATION OF COURTS

The American court system consists of both state and federal courts (see Figure 3.1). The federal government has its own court system, and each of the 50 states also has its own court system. No two state court systems are alike; indeed, the differences both in the functions and in the labels given to American courts are many and bewildering, and no generalization is absolutely reliable for all states. Court systems have rarely been the product of long-range planning. Nearly all represent a series of patchwork accommodations to changing needs (Spohn and Hemmens, 2012).

Although the organization and the structure of state court systems vary widely, in most states there are (1) trial courts (commonly called *district courts*), where most civil and criminal cases are originally heard, often before a jury; (2) intermediate *courts of appeals*, which primarily review cases decided at the trial court level; and (3) a court of last resort (commonly called a *state supreme court*), whose primary function is to review cases decided by the lower appeals courts.

Most of the nation's legal business is settled in state courts under the provision of state law. However, state court decisions that involve a "federal question"—that is, decisions that present a question involving the Constitution (such as free speech) or federal laws (such as racial or sexual discrimination)—may be appealed to the U.S. federal courts or to the Supreme Court (Pfander, 2009).

The federal district courts carry most of the workload of the federal courts. At least one court of this type exists in every state, although some of the larger states are subdivided into several districts. There are 94 district courts and some 650 district court judges. A single judge usually presides over trials in the district courts. Although the right to a jury trial is a hallowed American legal principle, jury trials in criminal cases in the federal courts are actually quite rare: In 2015, only about 2% of 81,000 federal criminal defendants were convicted in jury trials (Weiser, 2016).

In the hierarchy of the federal judiciary, the several courts of appeals are immediately above the district courts. The nation is divided into 12 geographically defined jurisdictions, called "circuits," and one nationwide specialized jurisdiction. There is a court of appeals with a panel of three judges in each circuit. The chief function of these courts is to review decisions made by the district courts within their jurisdictions. They are also empowered to review the decisions of federal regulatory agencies, such as the Federal Trade Commission.

Thus, the typical court case begins in a trial court in the state or federal court system. Most cases go no further than the trial court. For example, the criminal defendant is convicted (by a trial or by a guilty plea) and sentenced by the trial court, and the case ends. The personal injury suit ends in a judgment by a trial court (or an out-of-court settlement by the parties while the court suit is pending), and the disputants leave the court system.

Some litigants, however, who are not fully satisfied with the decision of a trial court may, by right, file an appeal. An appeal may take one of two forms: a trial *de novo* (a new trial) or a more limited review of specific aspects of a trial proceeding. For example, a criminal

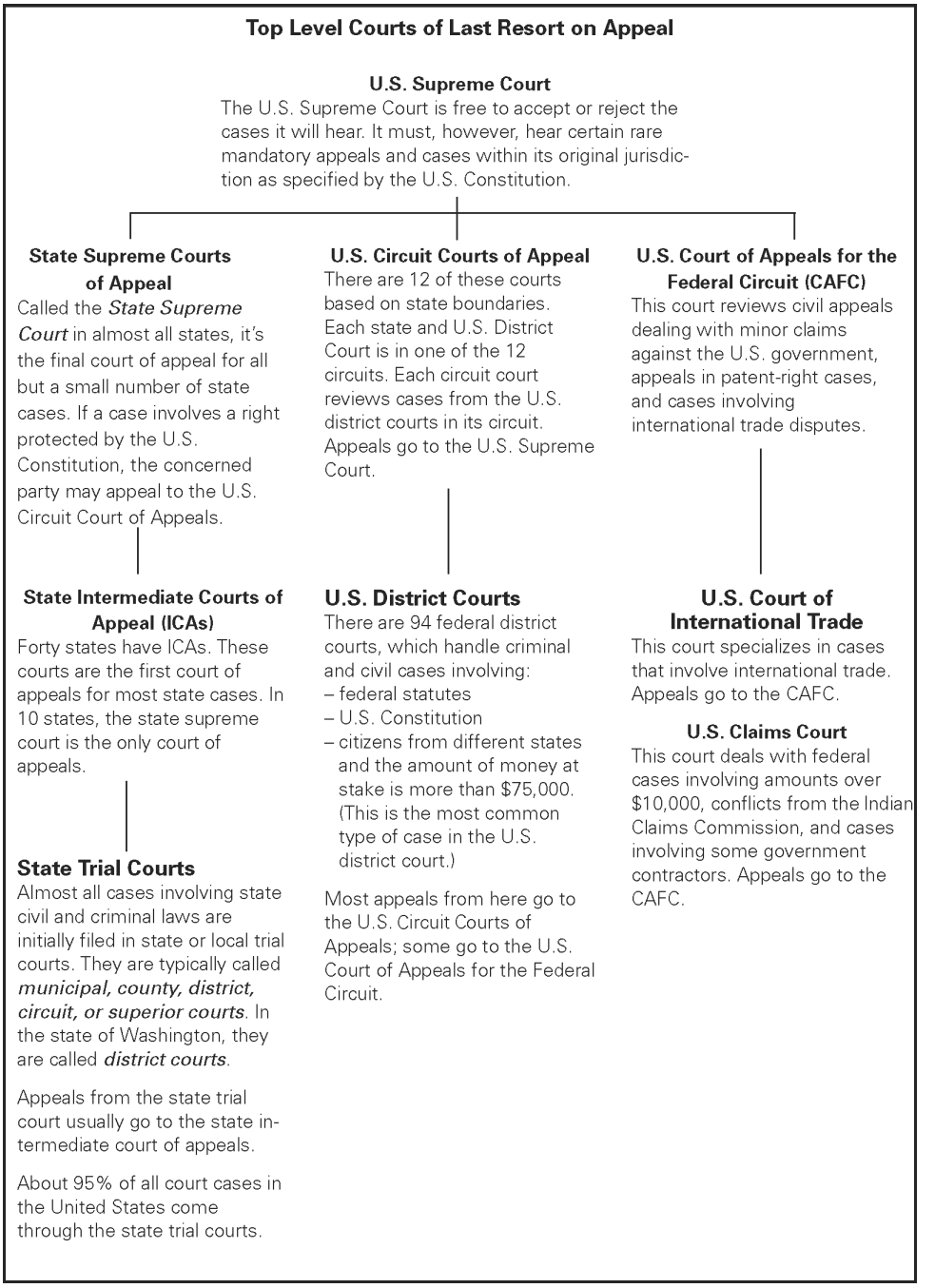

Figure 3.1 American Court Systems Flowchart

defendant who believes that a conviction was based on errors by the trial judge (such as the admission of evidence that should have been excluded) may seek a new trial. In other instances, a litigant may seek a review of certain aspects of the trial based on procedural grounds. Most states have only one appellate court, usually known as the state supreme

court. This court hears appeals from all trial court decisions, criminal and civil, except those of minor courts. State supreme courts render the final decision for all cases involving state law. The U.S. Supreme Court renders the final verdict on all matters involving federal law or the federal Constitution.

In the lower court, the losing party bears the burden of appealing. In a criminal case, the prosecutor is prohibited from appealing an acquittal. The sole function of appellate courts is to correct errors committed in law by the trial courts. As disputes move from the trial to the appellate level, they are typically transformed. They become almost exclusively disputes about law or about procedures; issues of law or questions concerning the way the trial was conducted are argued in appellate courts. Usually, the facts produced by the trial proceedings are not disputed at the appellate level. Time allotted for oral arguments before appellate courts is limited. Disputes are conducted primarily through briefs, motions, and memoranda. In a sense, disputes in appellate courts are a "lawyers' game." In trial courts, decisions are rendered by a single judge or shared by a judge and jury. In appellate courts, the decision-making process involves only judges. Some appellate courts have only a single judge, although most have several judges. Disputing in appellate courts is far removed in time and substance from the events that gave rise to the original disagreement. The original parties, their dispute, and its specific resolution become less important than the legal context into which they are placed.

PARTICIPANTS IN COURT PROCESSES

In the United States, courts, as dispute-processing institutions, comprise four distinct groups of participants—litigants, lawyers, judges, and juries. (In other countries, such as the Netherlands, there is also lay participation in court processes, which theoretically could constitute a fifth group [Malsch, 2010].) These participants, in turn, bring to the judicial process diverse interests, values, and perspectives that influence the ways in which disputes are processed.

Litigants Because the primary function of courts is to process disputes, the most obvious participants are the disputants. This group includes individuals, organizations, and government officials who are trying to settle disagreements and to regulate their own behavior and the behavior of others. Clearly, not all individuals, groups, or organizations can resort or are willing to resort to courts in their attempts to settle disputes. Questions of cost, efficiency, availability, the fulfillment of the legal requirements of a suit, and the nature of the dispute affect the potential users of courts differently. Consequently, two distinct types of litigants emerge.

In an oft-cited classic study, Marc Galanter (1974) designated the two types of litigants as "one-shotters" and "repeat players." These two types are distinguished by the relative frequency with which they resort to court services. As their name suggests, one-shotters use the courts rarely or at most occasionally. Examples of one-shotters include an author suing a publisher for breach of contract and a professor filing charges against her university for alleged sexual discrimination in promotion. And, as their name suggests, repeat players engage in many similar litigations over a period of time. Whereas one-shotters are usually individuals, repeat players are organizations, such as finance companies, moving companies,

the Internal Revenue Service (IRS), or insurance companies. Their investment and interest in any one particular case are moderately small. Because of their high frequency of participation in litigation, repeat players are more concerned with the ways a decision may affect the disposition of similar cases in the future than with the outcome of a single case (Ross, 1980). Repeat players can also invest greater resources in litigation than one-shotters, and their frequent appearances in court enable them to develop expertise. Such expertise is reflected in the way in which they select cases for litigation and in the acumen with which they proceed in the courts.

By contrast, one-shotters, who have only a one-time interest in litigation, are generally more concerned with the substantive result of their case than the way in which the outcome may in the future affect the disposition of other cases. For example, the author in the preceding example is more concerned with winning the case against the publisher than with setting a precedent for similar cases. As a repeat player, an organization like the IRS, on the other hand, is more interested in maintaining specific rules (such as those governing charitable deductions or computers) than with winning one particular case. Organizations, in general, participate in litigation as plaintiffs, and individuals participate as defendants. Both governmental and nongovernmental organizations have greater access to resources, and they are the most frequent initiators of court cases to process disputes between themselves and private individuals with whom they are dealing.

Lawyers Law is a technical game, and the players have to be highly trained in its complex rules and elusive categories. Without the assistance of attorneys, most individuals would be unable to activate the courts on their own behalf. Disputants generally need to retain the services of lawyers to receive advice about legal rules and how those rules apply to specific issues in dispute. By being familiar with both court operations and legal rules, lawyers are instrumental in determining whether a particular dispute warrants judicial intervention. Lawyers in effect play the role of gatekeepers for the judiciary (Hughes, 1995).

Lawyers are repeat players in the adjudication process. However, only a small proportion of lawyers are involved in actual litigation. Instead, most are concerned with specific nontrial activities, such as writing wills or carrying out routine transactions. As will be discussed in Chapter 8, some trial attorneys specialize in particular areas of the law (such as divorce law or criminal law), and others represent only particular kinds of clients (such as corporations or universities) or limit themselves to particular clients within specified areas of law (such as taxes).

Jonathan Casper (1972) distinguished several types of trial lawyers by the manner in which they perceive their clientele. He argued that a small number of attorneys view themselves mainly as representatives of public interests. These attorneys are concerned, for example, with consumer interests or with the protection of the environment. For them, individual cases are simply vehicles for achieving broad public objectives that generally necessitate major changes in the law. They prefer to take only cases they believe involve significant issues.

The second type of lawyer represents particular interests or organizations. For example, some companies have their in-house lawyers whose principal role is to represent members of the organization.

The third type of lawyer, typically criminal defense lawyers, is most often involved in actual court work. These lawyers are legal specialists who most closely approximate the public's preconception of lawyers. Although the role of defense lawyers is most often couched in the general term of "defending a client," defense lawyers perform a number of specific roles. These include the roles of advocate, intermediary, and counselor (Cohn, 1976). In the primary role of *advocate*, defense lawyers take all possible steps within legal and ethical bounds to achieve a victory for the client, while protecting the rights of the client at each step of the criminal justice process. Often, this can best be accomplished by acting as an *intermediary* between the client and the law, working through negotiation and compromise to secure the best possible benefits from the system. The third role is that of *counselor.* It is the responsibility of defense to give advice to the client as to what to expect and what appears to be in the client's best interest.

Although most people would agree that defense attorneys should perform the foregoing functions, critics say they often fail to do so. In an influential critique, Abraham S. Blumberg (1979:242) said that defense attorneys are more concerned with collecting their fees than with achieving justice for their clients. He wrote,

> The real key to understanding the role of defense counsel in a criminal case is the fixing and collection of his fee. It is a problem which influences to a significant degree the criminal court process itself, not just the relationship of the lawyer and his client. In essence, a lawyer–client "confidence game" is played.

He further contended that defense lawyers manipulate their clients and stage-manage cases to offer at least the appearance of services. He also called the criminal lawyer a "double agent" because the main concern of a criminal lawyer is to maintain good relations with members of the court organization. The defense lawyer may give the impression of being an impartial professional who will do everything possible for the client; however, in reality, he or she is dependent on the goodwill of the prosecutor and the court.

Returning to Casper's typology, the fourth type of trial lawyer perceives a lawyer's role primarily as serving individuals who retain him or her as opposed to government-appointed attorneys. They are interested only in the case in which they are involved, and they will do everything within legal and ethical limits to ensure favorable outcomes for their clients. In their view, they serve a case, not a cause.

Judges Although many officials work in and around courtrooms, none has the prestige of the judge, who is responsible for the administration of the court and its reputation for honesty and impartiality and the occasional controversial decisions. The courtroom is designed so that attention is focused on the judge, who sits on a pedestal above everyone else. Any visitor to a courtroom will notice that the visitors' gallery never rises above the judge and that those who work in the courtroom are not allowed to sit or stand at the judge's level. The judge is the only official in the courtroom who wears special attire—a robe. When judges enter the courtroom, everyone rises, and all attention is directed at the judge, who is addressed as "Your Honor." The judge alone interprets the rules that govern

the proceedings, and judges see themselves as autonomous decision makers and the "boss" of everyone else in the courtroom (Jacob, 1997; Spohn, 2009).

In addition to the basic adjudication functions and the control of the flow of litigation in the courtroom, judges are also responsible for administering their own court. This entails a variety of "housekeeping" tasks, such as appointing clerical assistants, drawing up a budget, and making certain that the physical facilities are adequate for the court's operation. The judge is also instrumental in pretrial conferences and, by law, has a great deal of discretionary power (such as jury instruction on admission of evidence), which has important implications on the consideration and outcome of cases (Hemmens et al., 2017). Because of this prestigious role, the judge also performs a variety of nonjudicial functions, such as appointing officials to public agencies (for example, to the board of education, as district attorneys in some states, and, at times, to lucrative patronage positions).

Judges generally come from the middle or upper classes and have a history of party identification, nomination, and appointment, if not activism (Carp et al., 2013). Federal court judges are nominated by the president and confirmed by a majority vote in the U.S. Senate. These federal judges hold office for life, subject to removal only by impeachment or by conviction of a major crime. State and local judges are chosen by a variety of methods: Some are elected, some are appointed, and some are chosen by a method that combines election and appointment. In the combined election and appointment system, judges are appointed by an executive (such as a governor), and after completing a term in office, they must secure voter support to serve further terms. This type of system also has a selection procedure in which the executive's choice for a judgeship is screened through a commission or limited to nominees made by a commission. When elected, a majority of judges at the state level serve for a limited period, such as a 6-year term. Nowadays, running for judgeship can be an expensive proposition; judicial campaigns in many states now include large war chests, consultants, and attack advertising (Streb, 2009). Some candidates for state supreme courts spend more than $1 million for campaigns.

Almost all judges are lawyers in the United States, but only a small fraction of lawyers ever become judges (Badinter and Breyer, 2004). By contrast, in civil law countries, such as France and Italy, judges are civil servants and have different training and experience from practicing lawyers. Those who aspire to become a judge take a competitive examination after law school. The ones who pass will become judges with a career of their own. Previous practice of law is not required, and it is unlikely that these individuals will ever practice law.

These judges' roles and functions also differ from their American counterparts of the adversarial system. Unlike in common law countries, judges rely on the inquisitorial method (Parisi, 2004). In France, for example, the main figures at a trial are the investigating magistrate and the presiding judge. The magistrate is responsible for the investigation and sends investigative materials to the trial's presiding judge, who interrogates the defendant and the witnesses. This interrogation resembles more of a conversation than a cross-examination (Loh, 1984). In general, judges in civil law countries are much more active than in the United States: They play a greater role in building and deciding a case,

they put the evidence together, and they go far beyond the "refereeing" role characteristic of common law judges.

Juries An ancient Welsh king, Morgan of GlaMorgan, established trial by jury in A.D. 725, and the origins of the American jury system can be traced back to civil and criminal inquiries conducted under old Anglo-Saxon law in England (Abramson, 2000). The original concept of the jury was most likely imported into England after the Norman Conquest. The Normans started the practice of placing a group of local people under oath to tell the truth. Early jurors acted as sources of information on local affairs, and they gradually came to be used as adjudicators in both civil and criminal cases.

Before the twelfth century, criminal and civil disputes were resolved by various types of ordeals. For example, an accused person would be bound by rope and dropped into a body of water. If the person floated, it was a sign of guilt; if he or she sank, it was a sign of innocence. There was also ordeal by fire—carrying heated stones or iron, and if the subsequent burn did not get infected in three days, the accused was declared innocent—and ordeal of the morsel that did or did not choke the accused.

The early British settlers brought the jury system with them when they came to colonial America. One of the important symbols during the struggle for independence, the jury system is prominently referred to in three of the first ten amendments to the Constitution. Although the Constitution provides the right to a jury trial for both criminal and civil cases, juries render verdicts in fewer than 10% of all cases in the state trial courts (Hemmens et al., 2017). Even so, juries are essential to the operation of American courts, because the prosecution and defense in criminal cases and plaintiff and defendant in civil cases always have to consider the repercussions if a jury ends up hearing the case.

Juries are used predominantly in common law countries, although less so than even in the United States (Hans, 2006). It is estimated that 80% of all jury trials worldwide take place in the United States (Hans and Vidmar, 1986). According to federal judge Richard A. Posner (1995), the American commitment to the jury system reflects the legacy of American distrust of officials, which has its roots in colonial times, and to a lesser extent to the political power of trial lawyers.

Jury trials, as well as trials heard only before a judge, involve two basic types of issues—issues of law and issues of fact. **Issues of law** emerge as participants in the case seek to identify and interpret norms that will legitimize their behavior. In a sense, a trial is a contest of interpretation and legal reasoning (Bankowski and MacLean, 2007). The judge has the authority to determine which interpretations of law are proper and acceptable, but a trial is more than a question of legal reasoning. It also provides the opportunity for a reconstruction, description, and interpretation of events (that is, **issues of fact**). The purpose of a trial is to answer the question of who did what to whom and whether such conduct is legal. The function of the jury is to listen to and decide among competing and conflicting interpretations of events. The jury acts as a referee in an adversary contest dealing with the presentation of differing versions of the same event. By a crude division of labor, the jury is the authority on facts; the judge is the authority on law. But judges

also control the jury, and the common law provides several mechanisms by which judges can and often do intervene to prevent juries from overreaching, including the discretion to exclude prejudicial evidence, the power to split trials into separate phases so that liability can be decided before jurors hear of the terrible pain suffered by the plaintiffs, the prerogative to instruct the jury in the law, the use of special verdicts to ensure that factual determinations are rational, the power to reduce jury awards, and the ability to order new trials when a jury reaches an absurd result (Umphrey, 2009).

The Voir Dire One of the most important functions of a trial lawyer is jury selection (Hemmens et al., 2017). Some attorneys contend that by the time the jury has been chosen, the case has in effect been decided. During the process of jury selection called the **voir dire** (literally, "to see, to tell"), prospective jurors are questioned first, by the judge and then often by the attorneys representing defense and prosecution. The purpose of the voir dire is threefold (Jonakait, 2003). First, it is used to obtain information to assist in the selection of jurors and to ferret out any juror bias. Second, it enables the attorneys to develop rapport with potential jury members. Finally, there is an attempt by both sides to try to change the attitudes, values, and perspectives of jurors (Klein, 1984). If a juror admits to a racial, a religious, a political, or some other bias that would influence his or her decision, the lawyers whose client would be harmed can ask the judge to excuse the juror for cause.

The hypothesis that the composition of the jury is crucial for a trial's outcome is reflected in the process of jury selection. Lawyers rely on their private judgments about how jurors are likely to be biased, and by using their peremptory challenges, they eliminate those who worry them most. Decisions to exclude or include a juror are based on a variety of considerations, including reactions to the juror's looks and manner (Hoffman, 2004). Body language also influences the selection process (Dimitrius and Mazzarella, 1998). For example, sweating is considered a sign of a potential juror's dishonesty, while crossed limbs (arms, legs, or ankles) and a stiff, rigid posture are viewed as signs of anger and volatility. Even television-viewing habits enter into the selection equation. For example, when the *CSI-Crime Scene Investigation* and *Law and Order* shows were popular during the last decade, potential jurors in criminal cases were closely questioned about their television-watching habits because of the possible impact their viewing could have had on cases without forensic data (Deutsch, 2006). Supporting lawyers' concern over this impact, some research evidence finds that jurors do, in fact, expect forensic evidence to be available in a criminal case, even though many cases lack such data (Durnal, 2010).

For centuries, folklore, intuition, and unsystematic past experience provided the basis for jury selection (Jonakait, 2003). Scientific jury selection enabled this process to move to a more sophisticated and predictable level (Hans, 1992). Since the early 1970s, however, lawyers have made increasing use of social sciences and social scientists in jury selection (Lieberman and Krauss, 2010).

Scientific Jury Selection In essence, scientific jury selection consists of three steps. First, a random sample is drawn from the population, and the demographic profile of this sample is compared with that of the prospective jurors (Pope, 1989). If the potential jurors were randomly selected, the profile should match. If there is substantial over- or

underrepresentation of particular characteristics (ethnic groups, age, occupation, and so forth), the jury pool can be challenged. Second, after it is established that the prospective jurors represent the population at large, the demographic, personal, and attitudinal characteristics considered to be favorable to one's own side are then assessed to determine the ideal juror for one's side. Third, after establishing the psychological and demographic profile of this ideal juror, the social scientist can make recommendations for selection of individual jurors (Loh, 1984).

An expansion of the technique is the use of a *shadow jury*. The pioneering work with shadow juries took place during the antitrust case brought by California Computer Products of Anaheim against IBM. The IBM attorneys hired Litigation Sciences, a consulting firm, to help in IBM's defense. The researchers recruited six people with backgrounds and attitudes similar to the real jury. The six shadow jurors sat in the courtroom each day during the course of the trial, and each evening, they telephoned the researchers to report on their impressions of the day's proceedings. Because the plaintiffs presented their case first, the researchers learned how shadow jurors reacted to the arguments and what issues they considered important. Although the judge ruled in favor of IBM after the plaintiff presented its side, IBM attorneys would have used the knowledge gained from the shadow jury in presenting their side of the case (Hans and Vidmar, 1986).

In addition to using shadow juries, some attorneys practice their arguments in front of simulated juries, with social scientists making suggestions about their persuasiveness (Decaro and Matheo, 2004). In an often-cited case, the law firm representing MCI Communications in an antitrust suit against AT&T hired consultants to develop a profile of potentially favorable jurors. The consultants arranged mock juries made up of such people, in front of whom the MCI attorneys practiced their arguments. The researchers also videotaped MCI's witnesses and then advised them on how their testimony could be presented more succinctly and persuasively. MCI won the case and was awarded $600 million (Hunt, 1982).

Scientific jury selection is not without controversy. Lawyers, when they are being candid, admit that their goal is not fairness but the selection of biases that benefit them. In the words of an attorney, "I don't want an impartial jury. I want one that's going to find in my client's favor" (Hunt, 1982:85). But, critics of the method contend that it tends to undermine the American adversarial system of justice, because the techniques for surveying the community and assessing juror values during the voir dire are clearly designed to achieve juror partiality (Lieberman and Krauss, 2010). Moreover, because scientific jury selection is very expensive, it is an advantage only to rich defendants in criminal cases and the richer side in civil suits. The ability of the adversary system to guarantee a fair and impartial jury and trial is obviously tested when the adversaries possess unequal resources (Vidmar and Hans 2007).

Other Issues Concerning the Jury In addition to problems of jury selection, there are other important issues concerning juries (Brooks, 2009; Prentice and Koehler, 2003). The first is whether juries do, in fact, decide cases according to the facts or, instead, allow nonlegal matters to affect their decisions. A classic study by Harry Kalven and Hans

Zeisel (1966) concluded that juries can be trusted to take their role seriously. Kalven and Zeisel examined the percentage of cases in which the judges and juries involved in the same case agreed as to the appropriate verdict. The researchers found a high degree of agreement between judge and jury—approximately 75%. When juries did reach a different verdict, judges told the researchers that their jury's verdict was still reasonable in view of the evidence. Other research supports Kalven and Zeisel's early conclusion that juries competently decide cases, with data from hundreds of jury trials and jury simulations supporting this conclusion (Hans and Vidmar, 1986). Another issue deals with the question of representativeness of the jury. Potential jurors are typically drawn from voter registration lists or driver's license records. Studies show, however, that these sources are not necessarily representative of the various ethnic, social, and economic groups in the community (Forman, 2004; Israel, 1998), as the urban poor, for example, are less likely to vote or to have driver's licenses. Therefore, fewer are located and called for jury duty. People with jobs or family responsibilities are also often able to "get out" of jury duty. As a result, jury panels are more likely to be composed of people who have the time (such as retired persons) or can (or want to) take time off from their places of employment.

THE FLOW OF LITIGATION

Several characteristics of the flow of litigation are significant. The processes by which cases are decided differ widely according to the type of dispute, the participants involved, and the stage of the judicial process at which the dispute is settled. In many instances, civil and criminal cases are quite different, and we review them separately.

CRIMINAL CASES

A high degree of discretion characterizes every phase of a criminal prosecution (Hemmens et al., 2017). The process begins with an alleged crime and the arrest of the suspect. At this point, the police may or may not exercise the option of arresting the lawbreaker. Once an arrest is made, however, the next step is to file charges against the prisoner and to set the amount of bail. Again, at this stage, judges can exercise a great deal of discretion in setting the amount of bail, which frequently results in many defendants having to wait in prison for trial. The poor are very much at a disadvantage in this respect. In New York City, for example, an early study showed that 25% of those arrested could not come up with the $25 (about $180 in today's dollars) that would have enabled them to be set free on bail before trial (President's Commission on Law Enforcement and Administration of Justice, 1967:131).

Plea Bargaining Following bail, the next step depends on the prosecutor, the defendant, and, at times, the judge. Although a date is set for a trial during the arraignment or preliminary hearing, very few cases nationwide ever go to trial. Prosecutors often have to dismiss the charges because the evidence might have been strong enough to support an arrest, but not strong enough to prove guilt beyond a reasonable doubt. Of the remaining cases, most are resolved through plea bargaining instead of a trial (Hemmens et al., 2017). In these cases, the prosecutor promises a reduced sentence in return for the defendant pleading guilty to a

lesser crime. In doing so, the prosecutor in effect acts as a de facto judge and makes most of the decisions regarding the disposition of a case (Scheck et al., 2003).

Plea bargaining is not limited to criminal cases. A version of it can be found even in traffic courts (Cunningham, 2009). For example, an investigation in the metropolitan St. Louis area discovered that accused speeders retain attorneys (who specialize in traffic cases) to get the charges "adjusted" to nonmoving offenses such as having a loud muffler or a burned-out headlight—offenses that do not result in point penalties for driving records (Osborne, 1992). Prosecutors, who want to clear the traffic docket, prefer plea bargaining, lawyers make money by charging about $250 to negotiate a city ticket, and the accused speeders are not faced with the loss of their driving privileges. There is a silent understanding among the plea bargain participants that, if an offender paid the lawyer, "that's punishment enough." Poor people and those who insist on pleading not guilty on their own are the ones who are likely to have their licenses suspended.

Plea bargaining is quite controversial (Feeley, 1979; Lynch and Evans, 2004). Critics say that it lets some criminals obtain "cheap" convictions (that is, ones in which they do not pay for the real crimes they committed), that it leads some defendants to plead guilty when they in fact are not guilty, that it is moving criminal justice into an administrative process rather than an adversarial one, and that it is generating cynicism about criminal justice among the public. On the other hand, other observers say that plea bargaining is necessary to save time, money, and energy in the legal system. From the prosecutor's standpoint, it at least ensures that a defendant receives some legal punishment, while from the defendant's standpoint, it reduces the sentence they might otherwise have received (Hemmens et al., 2017).

Sentencing The final step in most criminal cases is sentencing defendants who have been convicted. In this regard, most jurisdictions permit the exercise of considerable discretion by the judge in many types of cases while giving them less discretion in other types of cases, for example, serious felonies with mandatory minimum sentences.

Thus, judges do have some choice between different sentencing options for most crimes, and they tend to exercise it. Generally, the judge's decision is influenced by the recommendations by the prosecutor and by probation officers. Other factors that might influence a judge's decision include the race, sex, age, and socioeconomic and criminal background of the defendant and the type of lawyer involved (for example, privately retained or court appointed). The decision to plea bargain is also a factor.

When the United States instituted its "get-tough approach" during the 1970s to deal with crime, many states adopted mandatory sentencing laws to fight high crime rates. These laws require a minimum amount of incarceration upon conviction and were designed for specific offenses such as rape, murder, drug trafficking, and dangerous weapons violations. Studies show that mandatory minimums have dramatically increased the number of offenders in prison, and the prison terms are longer. But other than keeping offenders off the streets for a longer time, mandatory sentencing provisions do not act as general deterrence and have had little, if any, measurable impact on crime rates (Walker, 2015). Other law and order initiatives such as "three-strikes" laws mandating life without parole for repeaters of certain violent or

drug-related crimes, fared no better. They, too, have failed to combat crime and recidivism and ignore questions of rehabilitation and reform (Walker, 2015).

CIVIL CASES

In civil cases, a dispute reaches the court when the plaintiff's attorney files it. Just as plea bargaining is common in criminal cases, bargaining often leads to negotiated settlements in civil cases. Pretrial conferences provide a venue for this negotiation. At times, the judge may even suggest a particular amount that seems reasonable, based on the judge's experience with similar cases. If a satisfactory settlement cannot be reached, the case goes to trial, but relatively few cases end up in trial. In some types of cases, such as automobile accidents, the plaintiffs generally prefer a jury trial in anticipation of a larger settlement.

At times, disputes are settled before civil cases go to trial, and, in such instances, the trial is used to legitimize the outcome. This is particularly true in divorce suits. In such cases, the two estranged spouses reach a separation agreement, and then at least one of the spouses takes action in court to formalize and legitimize the agreement.

It has often been said that juries in civil cases are "out of control," handing out unnecessarily large punitive damages against corporations for minor issues suffered by a defendant. This view led to a movement for *tort reform* during the past three decades, with several states specifying relatively low maximum amounts for punitive damages (Studdert et al., 2006). However, research on civil cases finds that judges award punitive damages as often as juries and generally in about the same proportion, suggesting that juries may be far less arbitrary, irresponsible, and incompetent than many people believe (Cohen, 2005; Eisenberg et al., 2006).

LEGISLATURES

THE FUNCTIONS OF LEGISLATURES

A **legislature** is defined as a collection of individuals who are elected as members of the formal parliamentary bodies prescribed by national and state constitutions. The functions of the legislature, at both the federal and the state levels, are numerous. Of course, the hallmark of legislative bodies is their lawmaking function, and Chapter 4 examines this function is carried out. Yet, lawmaking takes up only a portion of the legislature's time. Legislative bodies are also engaged in conflict management and integrative functions.

Conflict Management Functions Even though conflict management is part of both the administrative and the judicial subsystems, the legislature may be distinguished by the extent to which compromise, as a mode of conflict management, is institutionalized in the system.

The conflict management functions of legislative bodies can be seen in the context of their deliberative, decisional, and adjudicative activities (Jewell and Patterson, 1986). Frequently, legislative bodies deliberate without arriving at a decision or taking action. However, the deliberation process itself and the rules under which it occurs contribute to the

reconciliation of divergent interests. In addition to formal debates, deliberation is carried on in the hearing rooms, in the offices of legislators, or in the lobbies or cloakrooms surrounding the chambers. At times, these informal deliberations are more important for they provide an opportunity to incorporate a variety of viewpoints and interests.

Legislative bodies also routinely undertake some adjudicative tasks (Melling, 1994). For example, the work of some legislative committees has been adjudicative, as when hearings before investigating committees have been, in effect, trials during the course of which sanctions have been applied. A celebrated and classic example of the application of sanctions by the Senate for the violation of its norms occurred in the 1950s and involved Senator Joseph McCarthy of Wisconsin, who has been called "America's most hated Senator" (Herman, 2000). As chairperson of the Permanent Subcommittee on Investigations of the Committee on Government Operations, McCarthy charged that Communists had infiltrated important positions in the U.S. Government. In December 1954, the Senate voted to censure McCarthy for his conduct—not for indiscriminately accusing people of being Communists and abusing the investigatory powers of Congress, but for attacking the integrity of the Senate itself.

Integrative Functions Legislative bodies contribute to the integration of the polity by providing support for the judicial and executive and administrative systems. They provide this support through authorization, legitimization, and representation (Jewell and Patterson, 1986). A characteristic of any constitution is the specific delegation of authority to different components of government. In the United States, the legislative branch is given various kinds of authority over the executive branch. The legislative branch is also the source of power in most instances of administrative agencies. Perhaps the most important of these is the budgetary process through which legislative bodies authorize a particular agency or body to collect taxes and disburse funds. Legislative bodies also authorize the courts to establish jurisdiction, to create their organizational machinery, and to qualify their members. Moreover, legislatures oversee bureaucratic activities and attempt to balance them against prevailing special interests in a community.

The integrative functions of legislatures occur in part because legislative actions lend legitimacy to governmental policies and procedures. This dynamic occurs because the public generally deems legislative decisions and actions to be legitimate. For example, when Congress gives the IRS permission to collect more taxes, its exercise of authority is legitimized in the process, and the IRS has the right (meaning legitimate authority) as well as the power to collect more taxes. Even though many people do not like paying taxes, the fact that Congress determines tax rates and other tax code provisions helps to secure the public's compliance with paying the taxes they owe.

THE ORGANIZATION OF LEGISLATURES

Because of their similarities in organizational patterns, we consider the federal and state legislative bodies together in the following discussion. Congress consists of two separate bodies—the Senate and the House of Representatives. These two bodies differ in several respects and are eager to protect their privileges and power. The House members are

apportioned among the states on the basis of population. After each decennial census, the apportionment of representatives among the states normally changes: States with the fastest-growing populations gain representation, and those with little or no population growth or with declining populations lose representation. By contrast, each state is entitled to two senators regardless of any population changes. Unlike the situation in the House, where members come up for election every 2 years, Senate terms are staggered. Only one-third of the Senate is up for election every 2 years, which ensures a greater continuity of both formal and informal organizational arrangements.

Herbert Asher (1973) pointed out that a set of informal norms influences behavior in both the Senate and the House: (1) Newcomers to the legislative body serve a period of apprenticeship in which they accept their assignments, do their homework, and stay in the background while learning their jobs; (2) members become specialists in the work of the committees to which they are assigned; (3) members avoid personal attacks on each other; (4) members are willing to reciprocate by compromising and trading votes (supporting each other's proposals) when possible; and (5) legislators do nothing that will reflect adversely upon the integrity of the legislative body and Congress as a whole. The same informal norms and rules operate in state legislatures.

Avoidance of personal disputes, restriction of full participation in the legislative process to senior members, and the norm of reciprocity all function ideally to minimize conflict within legislative bodies. The emphasis on specialization provides Congress with the opportunity to deal with the increasingly complex issues it must consider, though specialization may also create some organizational problems. In general, House members are more likely than senators to specialize in the work of the committees on which they serve. Senators, on the other hand, are more apt to draw the attention of the media and have presidential ambitions. This is due, in part, to the length of time they are elected to serve. The norm of protecting the integrity of the legislative body may, and often has, led to controversy between the Senate and the House, and between Congress as a whole and the president.

PARTICIPANTS IN THE LEGISLATIVE PROCESS

The legislative process encompasses a variety of participants (Jillson, 2016). Three sets of participants who are particularly relevant to legislative activity—legislators, executives, and lobbyists. We discuss these three sets of participants separately.

Legislators The United States has almost 7,400 legislators at the federal and state levels. Who are these legislators? Do they represent a cross-section of the population? What sociodemographic groups are overrepresented or underrepresented in the legislature? Social scientists have carried out a number of investigations on the social origins and occupational backgrounds of legislators and other political decision makers. This body of research yields several generalizations about the individuals who serve as legislators (Kurtz, 2015).

Not too many decades ago, almost all legislators were white, male, and Protestant. This combination of backgrounds is still common today among legislators, as legislators who are white, male, and Protestant are more common than is true for the national population. But

more women and more people of color now populate the nation's legislatures than was true in years past, even though people from these backgrounds remain underrepresented in the nation's legislatures. For example, only 4% of state legislators in 1971 were women, whereas about 25% of state legislators in this decade are women (Kurtz, 2015). Although this represents a six-fold increase, this proportion still represents a notable underrepresentation of women, who, as is well-known, comprise about 50% of the population.

Similarly, African Americans comprised only 2% of all state legislators in 1971, whereas today they comprise 9%. Although this represents more than a four-fold increase, it means that African Americans, who comprise about 13%–14% of the national population, are still underrepresented among state legislators. Similarly, Latinos were virtually unknown among state legislators in the 1970s, but today comprise about 5% of state legislators. However, this figure is less than one-third of their 17% share of the national population (Kurtz, 2015).

Legislators are also unrepresentative of the national population in another way: They tend to be much more educated than the national population. Whereas most federal and state legislators have at least a 4-year college degree (bachelor's degree), only about one-third of adults nationwide (25 and older) have at least a bachelor's degree. Even more striking, two-thirds of Congress and 40% of state legislators have an advanced (graduate or professional) degree, compared to only 12% of the national population ages 25 and older who have an advanced degree (Kurtz, 2015; National Center for Education Statistics, 2016).

An interesting change from the 1970s concerns the occupational backgrounds of state legislators. In the 1970s, lawyers were more common among state legislators than is true today, when only 14% of state legislators are attorneys. By contrast, the leading occupation today of state legislators is in business, with 30% of legislators coming from business backgrounds. Perhaps not surprisingly, more than 15% of state legislators in the farm states of the Midwest come from agricultural backgrounds (Kurtz, 2015).

From the preceding discussion, it is evident that no legislature comes close to representing a cross-section of the population it serves. The political system inevitably has built-in biases and numerous devices for the containment of minority-group aspirations for office and for the advancement of dominant segments of the population. Some groups win often; others lose often.

The Executive The president and the governors carry out several functions in the legislative process (Jillson, 2016):

- They serve as a source of ideas for the programs that legislative bodies consider.
- They function as catalytic agents.
- They apply the law.

Although the degree to which governors initiate ideas for legislative programs varies among the states, in most instances executive recommendations are the principal items on the legislators' agenda. At the federal level, legislative recommendations emerge from individual cabinet departments or from federal agencies and are sent to the president far

in advance of presentation to Congress. The presidential initiative is a permanent and ubiquitous feature of the legislative process at the federal level (Jones, 2009).

The president and the governors also function as catalytic agents in the legislative process. They not only offer programs but also strive to achieve support for legislation, both directly within legislative bodies and indirectly through interest groups, party leaders, and other political activists. They are also greatly concerned with the manipulation of public opinion (Brooker and Schaefer, 2006).

The application of law constitutes a third executive contribution to the legislative process. The legislative process seldom ends when the executive has signed a bill into law. In many instances, the enactment of a law is not the most important step in making public policy. Much legislation is phrased in general terms to apply to a diversity of concrete situations. Law is interpreted and given new dimensions as it is applied under the direction of the executive.

Lobbyists and Interest Groups Organizations and groups that attempt to influence political decisions that might have an impact on their members or their goals are called *interest groups* (Holyoke, 2014). Whom do interest groups represent? At the most general level, the interest-group system in the United States has a distinct bias favoring and promoting upper-class and predominantly business interests. Interest groups are usually regarded as self-serving—with some justification (Rozell et al., 2006). The very word "interest" suggests that the ends sought will primarily benefit only a segment of society such as, for example, prison management companies pushing for tougher sentencing—to fill beds in private prisons (Selman and Leighton, 2010). Still, many interest groups are not in it for profit, as many nonprofit interest groups exist and lobby Congress and state legislatures. These groups advocate for the environment, children's rights, consumer rights, LGBTQ rights, animal rights, and many other causes. Other interest groups and lobbyists represent foreign governments, small or medium-sized political groups, public and private universities, and various charitable organizations.

The legislative bodies are the natural habitat of political interest groups. These interest groups enter the legislative process through their lobbying activities. Lobbyists are individuals who are paid to try to influence the passage or defeat of a legislation. Lobbying is considered a professional undertaking, and full-time experienced lobbyists are considered essential by most interest groups (Hrebenar and Morgan, 2010). Several thousand interest groups operate in Washington, DC, and they spent more than $6 billion in 2015 and 2016 to lobby Congress, federal agencies, and the White House (Center for Responsive Politics, 2016). Meanwhile, several thousand political action committees (PACs)—groups that are not affiliated directly with a candidate or a political party—contributed almost $2 billion from 2010 through 2016 to the election campaigns of members of Congress.

For better or worse, lobbyists play a variety of roles in the legislative process. As contact persons for the interest groups they represent, lobbyists devote their time and energy to walking the legislative halls, visiting legislators, establishing relationships with administrative assistants and others of the legislator's staff, cultivating key legislators on a friendship basis, and developing contacts on the staffs of critical legislative committees. As campaign

organizers, lobbyists gather popular support for his or her organization's legislative program. As an informant, the lobbyist conveys information to legislators without necessarily advocating a particular position. Finally, as watchdogs, lobbyists scrutinize legislative calendars and watch legislative activities carefully. This way, they can be alert to developments in the legislative bodies that might affect their interest groups (Levine, 2009).

Many lobbyists are former members of Congress or former government employees who occupied a key position when they were employed. Lobbying groups are willing to pay dearly for the services of an experienced ex-senator or House member, particularly a former chair or senior member of a top committee. For this payment, these groups obtain access to the inner sanctum of government. In Washington especially, ex-lawmakers have privileges that set them apart from other lobbyists—including access to the House and Senate chambers and members' private dining rooms, gymnasiums, and swimming pools. But there are some restrictions. A former senator who is a registered lobbyist must wait a year before visiting the Senate for the purpose of influencing former colleagues. The House has no such rule but forbids former member to enter the chamber if they have an interest in an issue that is being debated. Supplementing their own personal efforts, lobbyists often have public relations firms stir up grassroots sentiment. This results in a stream of phone calls, emails, and letters to the offices of legislators.

Lobbyists often give small personal presents, free samples of company products such as perfume, and free meals at expensive restaurants to create a receptive climate for their efforts.

At times, however, a "discreet contribution" may turn out to be outright bribery. A notorious example of this kind of crime was the Federal Bureau of Investigation's (FBI) sting operation known as ABSCAM. FBI agents posed as representatives of an alleged Arab sheik who wanted some Washington favors. Eight officials were persuaded to sponsor special bills or use their influence in the government in return for cash or other rewards. One senator was given stock certificates in a bogus titanium mine for his assistance in obtaining government contracts. Another representative was videotaped stuffing $20,000 in his pocket. Those involved in ABSCAM were convicted of various crimes and given fines and prison terms (Coleman, 2006).

ADMINISTRATIVE AGENCIES

Administrative agencies are authorities of the government other than the executive, legislative, and judicial branches, created for the purpose of administering particular legislation. They are sometimes called commissions, bureaus, boards, authorities, offices, departments, administrations, and divisions (Box, 2005). They may be created by legislative acts, by executive orders authorized by statutes, or by constitutional provisions. The powers and functions of an agency are generally contained in the legislation that created it (Breyer and Stewart, 2006).

In the last century, administrative agencies grew rapidly in the United States, and so did the activities in which they engaged and the power that they exercised (Box, 2009). Today,

numerous local, state, and federal administrative agencies have a tremendous impact on American lives. They are often called "the fourth branch of government" and number at least 60 at the federal level and many dozens in each state (Feldman, 2016). Administrative and regulatory agencies directly or indirectly affect the average person much more than the judicial process does, as the following hypothetical scenario suggests (Seib, 1995).

Two spouses or partners wake up to the chiming of a smartphone that is charging. A utility company, which is regulated by the Federal Energy Regulatory Commission and by state utility agencies, provides the electricity to charge the phone. The couple open a weather app to get the weather report, which is probably generated by the National Weather Service, part of the U.S. Department of Commerce. When they brush their teeth, they use a product (toothpaste) made by companies regulated by the U.S. Food and Drug Administration (FDA). When they eat their cereal, they consume a product subject to the regulations of the U.S. Department of Agriculture (USDA). When they get in their car to go to work, they find their seat belts, air bags, and many other safety devices mandated by the National Highway Traffic Safety Administration, as well as antipollution equipment mandated by the U.S. Environmental Protection Agency (EPA). We could go on with this scenario, but notice that this couple's day has just begun, and already many administrative agencies have affected their lives. Depending on their jobs, at work they will continue to be affected by other agencies, such as the National Labor Relations Board (NLRB), the Occupational Safety & Health Administration (OSHA), and the Interstate Commerce Commission (ICC). Whether or not we realize it, administrative agencies affect all our lives in countless ways.

THE ORGANIZATION OF ADMINISTRATIVE AGENCIES

At the federal level, all the agencies derive their power from Congress, which created them under its constitutional authority to regulate interstate commerce. Congress long ago—after the Civil War—began delegating this authority when it became clear that the job was too complex and technical to be handled entirely by legislation in the amount of time available and with the limited expertise of the lawmakers. As economic activity became more complex as the nation became more industrialized, legislative bodies were unable or unwilling to prescribe detailed guidelines for regulation. Traditional agencies of government could no longer regulate big businesses (Friedman, 2005). Agencies were established and given considerable discretion in determining the applicability of often vaguely written legislation to specific situations such as mass transport and communication. These agencies were expected to provide certain advantages over the courts in the instrumentation of public policy. These advantages included speed, informality, flexibility, expertise in technical areas, and continuous surveillance of an industry or an economic problem.

There is substantial variation in the responsibilities, functions, and operations of the various agencies. Some, such as the EPA and the FTC, are concerned with only a few activities of a large number of firms, while others, such as the ICC, oversee a great many matters involving a relatively small number of firms (in this case, transportation). Many agencies in the first category have the official mission of protecting the interests of the general public in regard to health, safety, and activities in the marketplace. Most of the agencies in the

second category are expected not only to perform public protection functions but also to safeguard and promote the health of specific occupations, industries, or segments of the economy subject to their jurisdiction.

Both conservatives and liberals criticize administrative agencies (Box, 2005). Conservatives say that administrative agencies represent the worse of "big government" by threatening the civil liberties of businesspeople and the proper functioning of the economic system. Liberals say that administrative agencies fail to exert sufficient control over the harmful practices of large corporations.

THE ADMINISTRATIVE PROCESS

Administrative agencies exercise certain powers as they perform their important function in modern society. The processes that exhibit these powers are investigation, rulemaking, and adjudication.

Investigation Almost all administrative agencies have the authority to investigate. Without information, administrative agencies would not able to regulate industry, protect the environment, prosecute fraud, collect taxes, and attempt to reduce the consequences of identity theft or issue grants. Most administrative actions are conditioned by the information obtained through the agency's prior investigation. As regulation has expanded and intensified, the agency's quest for facts has gained momentum. Some agencies are created primarily to perform the fact-finding or investigative function. The authority to investigate helps distinguish agencies from courts. This authority is usually exercised to perform properly another primary function, that of rulemaking.

Congress has traditionally given federal agencies broad investigative powers. In turn, agencies may use several methods to gather information. These methods include requiring reports from regulated businesses and conducting inspections. If these resources prove inadequate, the agency may seek further information by calling in witnesses or documents for examination, or by conducting searches.

Rulemaking Rulemaking is the single-most important function performed by government agencies (Kerwin, 2003). It defines the mission of the agency and essentially involves the formulation of a policy or an interpretation that the agency will apply in the future to all persons engaged in the regulated activity. As quasi-legislative bodies, administrative agencies issue three types of rules—procedural, interpretive, and legislative. *Procedural* rules identify an agency's organization, describe its methods of operation, and list the requirements of its practice for rulemaking and adjudicative hearings. *Interpretive* rules guide both agency staff and regulated parties as to how the agency will interpret its statutory mandate. These rules range from informally developed policy statements announced through press releases to authoritative rulings binding upon the agency and are issued usually after a notice and hearing. *Legislative* rules are, in effect, administrative statutes. In issuing a legislative rule, the agency exercises lawmaking power delegated to it by the legislature.

Adjudication Administrative agencies, of all kinds and at all levels, must settle disputes or mediate among conflicting claims. Adjudication is the administrative equivalent of a judicial trial. It applies policy to a set of past actions and results in an order against (or in favor of) the named party.

Much of this adjudication is handled informally through the voluntary settlement of cases at lower levels in an agency. At these levels, agencies dispose of disputes relatively quickly and inexpensively, and they take an immense burden off the courts. But this practice is not without criticism (Feldman, 2016). Many individuals—in particular, lawyers pleading cases before the agencies—have expressed concern over the extent of judicial power vested in agencies. They complain that administrators violate due process of law by holding private and informal sessions, by failing to give interested parties an adequate hearing, and by basing their decisions on insufficient evidence.

These complaints stem, in part, from the institutional differences between agency and court trials. Agency hearings, unlike court hearings, tend to produce evidence of general conditions, as distinguished from the facts relating specifically to the respondent. This distinction is due to one of the original justifications for administrative agencies—the development of policy. Another difference is that, in an administrative hearing, a case is tried by a trial examiner and never by a jury. As a result, the rules of evidence applied in jury trials, presided over by a judge, are frequently inapplicable in an administrative trial. The trial examiner decides both the facts and the law to be applied. Finally, the courts accept whatever cases the disputants present. As a result, their familiarity with the subject matter is accidental. By contrast, agencies usually select and prosecute their cases. Trial examiners and agency chiefs either are experts or at least have a substantial familiarity with the subject matter, because their jurisdictions tend to be restricted. Courts do exercise some judicial review of agency procedures and decision making but do not ordinarily take on the role of determining agency rules and regulations. For example, courts will not set tariffs, allocate airline routes, or control the development of satellite communications (Breyer and Stewart, 2006).

LAW ENFORCEMENT AGENCIES

Most people, even the law abiding, have ambiguous feelings toward the police. Police are a salvation when it comes to protecting life, limb, and property, but their efforts are possibly less welcome when we are stopped for a traffic violation or for alleged suspicious activity while walking down the street. Few would argue, however, that modern societies could comfortably exist without police.

The principal functions of the police are law enforcement, maintenance of order, and community service (Dempsey and Forst, 2016). Like other components of the American legal system, the origins of the American police can be traced to early English history (Novak, 1989). In the ninth century, Alfred the Great started paying private citizens for arresting offenders. The population was broken down into units of ten families or "tithings," and each person was responsible for watching over the others. Subsequently,

the unit was expanded tenfold to the "hundred," and one person, designated as the constable, was in charge of maintaining order. In time, the hundred was increased to include the countrywide "shire," under the control of an appointed "shire-reeve," who later on became known as the "sheriff." Sir Robert Peel created the first citywide police force in London in 1829. Officers in this new police force were uniformed, organized along military lines, and called "Bobbies" after their founder. The American colonists adopted the English system of law enforcement, and the first metropolitan police force was created in Philadelphia in 1833 (Loh, 1984). In 2013, local police departments, sheriff's offices, and state law enforcement employed almost 725,000 full-time sworn officers and 321,000 civilians, and another 84,000 part-time sworn officers and civilians. Adding up these numbers, the total number of all these individuals exceeded one million (Reaves, 2015).

In the United States, there is no unified system of law enforcement. As Thomas F. Adams (2007:69) observes,

> A police system—if one were to exist in the United States—would be a rank ordering of all the local police agencies in sequence, according to their relative importance; then higher up the scale would be placed the many state agencies, and finally a rank ordering up through all of the federal agencies to a single head or committee. Such a system does not exist in the United States.

In addition to local police, sheriff's offices, and state law enforcement, law enforcement is found in other aspects of our society. Some federal agencies also have law enforcement powers, such as the FBI, United States Secret Service, Drug Enforcement Administration, United States Postal Inspection Service, IRS, U.S. Customs and Border Protection, U.S. Immigration and Customs Enforcement, and Alcohol and Tobacco Tax and Trade Bureau of the U.S. Department of Treasury. In addition, the federal government maintains the U.S. Marshals Service as a law enforcement agency. Marshals serve a 4-year term, and their duties are to preserve order in the courtrooms, handle subpoenas and summonses, seize goods, transport prisoners, and serve as a disbursing officer (Souryal, 1995).

Private-sector security and investigation personnel also may be considered part of the nation's overall law enforcement (Nemeth, 2010; Steden, 2008). Certain private sectors of U.S. business require the services of private police patrols and investigation agencies. Businesses, industries, residential complexes, and other sectors hire their own employees for this purpose and/or use private agencies, such as Pinkerton's Incorporated. These personnel perform several tasks depending on the need for their employer: They may guard property, apprehend thieves, investigate offenses, and/or detect fraud and embezzlement.

Finally, and as many readers already know, most colleges and universities have a campus police department or security force that, depending on the size of the campus, may employ dozens of officers. Many of these officers are armed. For all intents and purposes, they are the equivalent of local police employed by municipalities. We now turn to municipal police, who comprise the bulk of the nation's law enforcement personnel.

THE ORGANIZATION OF LAW ENFORCEMENT AGENCIES

Municipal police and other law enforcement agencies are structured along the lines of complex bureaucratic organizations (see Figure 3.2) and feature formal division of labor. In addition to their bureaucratic characteristics, law enforcement agencies are structured like quasi-military institutions, which gives these agencies their special character. As Egon Bittner (1970:53) once commented on the military and law enforcement,

> Both institutions are instruments of force and for both institutions the occasions for using force are unpredictably distributed. Thus, the personnel in each must be kept in a highly disciplined state of alert preparedness. The formalism that characterizes military organization, the insistence on rules and regulations, on spit and polish, on obedience to superiors, and so on, constitute a permanent rehearsal for "the real thing."

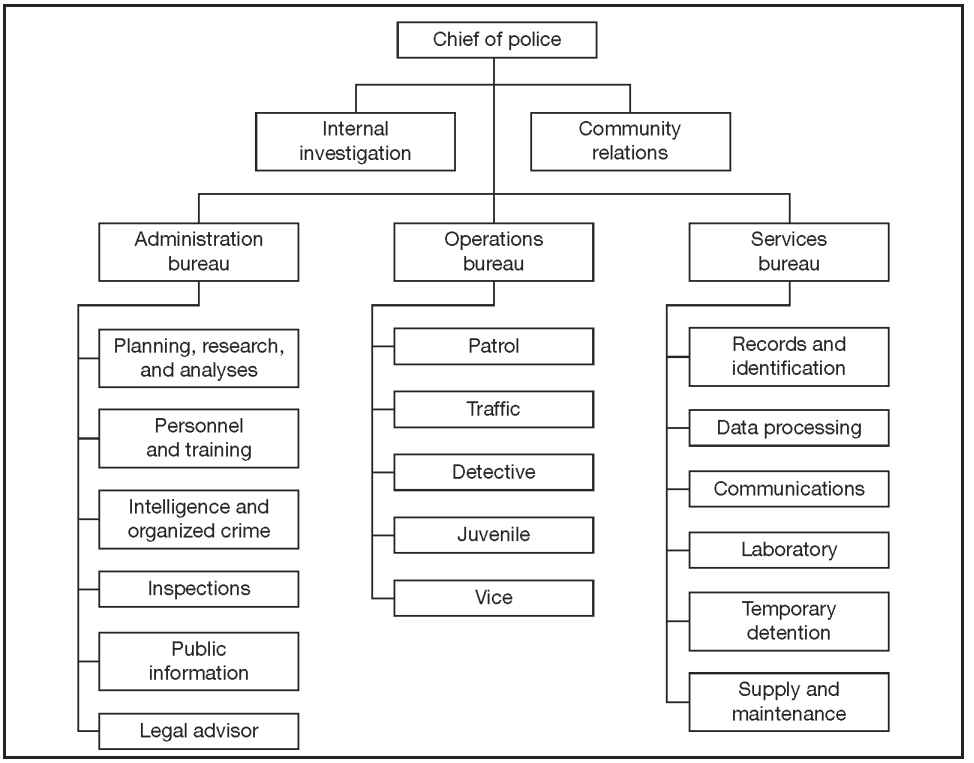

Figure 3.2 One Form of a Well-Organized Municipal Police Department

The municipal police system of law enforcement is built on a subordinating chain of command (Dempsey and Forst, 2016). Although all units of a particular department may be related to a central command, the overall chain of command is divided into units so that different precincts or squads are immediately responsible to a localized authority. The functional divisions of police departments follow the kinds of activities they handle, such

as traffic patrol, investigative work, undercover work (for example, in vice and narcotics), crowd control, and uniformed patrol.

Police departments do not require special education. Most officers entering the force have no more than a high school education, although lately some college education without any specialized training has become the norm. Police training is pragmatic, not intellectual or theoretical, and usually takes place in a police academy. Most officers come from lower-middle-class or working-class backgrounds. For many, becoming a police officer is an opportunity for upward social mobility. Women are slowly making inroads into law enforcement, and in 2013, they comprised about 12% of all full-time, sworn officers in local police departments (Reaves, 2015).

Among police officers, there is a high degree of cohesion and solidarity, much more so than in other occupational groups. Because of the nature of their job, police officers tend to be suspicious of civilians and skeptical toward outsiders. These traits in turn mean that police tend to exhibit an authoritarian character (Reaves, 2015). Their subculture includes a code of silence if an officer is corrupt or brutal, and fellow officers rarely incriminate each other.

Contrary to popular image, police officers, with the exception of detectives, spend only about 20% of their time in criminal investigations (Brown, 1988). The primary activities of police instead consist of routine patrol and maintaining order—such duties as attending to domestic disturbances, handling drunks, assisting motorists, controlling traffic, escorting dignitaries, and processing juveniles.

In an influential study, James Q. Wilson (1968) identified three styles of police work—the watchman style, the legalistic style, and the service style. Although elements of all three can be found in any law enforcement agency, different agencies tend to emphasize one style more than the others and, as a result, practice different law enforcement policies.

The *watchman* style emphasizes the responsibility for maintaining public order, as contrasted with traditional law enforcement. The police officer in such an agency is viewed as a peace officer, ignoring or handling informally many violations of the law and paying much greater attention to local variations in the demand for law enforcement and maintenance of order. The role of peace officer is characterized by a great amount of discretion, because peacekeeping is poorly structured by law or by agency regulation. Underenforcement, corruption, and low arrest rates characterize watchman-style departments.

The *legalistic* style is the opposite of the watchman style. Agencies characterized by this style tend to treat all situations, even commonplace problems of maintaining order, as if they were serious infractions of the law. Members of such agencies issue a high rate of traffic tickets, arrest a high proportion of juvenile offenders, and crack down on illicit enterprises. They tend to focus on some groups, especially juveniles, blacks, and migrants, rather than on others they consider "respectable." Although this style of law enforcement is

characterized by technical efficiency and high arrest rates, it also results in inequality in law enforcement, with complaints of harassment and police brutality by groups who are most often subjected to police scrutiny.

The *service* style combines law enforcement and maintenance of order. An emphasis is placed on community relations, the police on patrol work out of specialized units, and command is decentralized. This style differs from the watchman style in that the police respond to all groups and apply informal sanctions in the case of minor offenses. It differs from the legalistic style in that fewer arrests are made for minor infractions, and the police are more responsive to public sentiments and desires. In this sense, the service style is less arbitrary than the watchman style and more attuned to the practical considerations of public service than the legalistic style. There is little corruption, and complaints against police in service-style departments tend to be low. The emphasis is on problem-solving policing, in which attention is focused on the problems that lie behind incidents, rather than on the incidents only. This style aims at reducing alienation and distrust between police and people of color and between police and the poor.

POLICE DISCRETION

As with the courts, a significant feature of law enforcement is the discretionary power officials can exercise in specific situations. The exercise of discretion is integral to the daily routine of police officers in a large variety of activities ranging from routine traffic stops to responding to domestic violence calls. Albert J. Reiss Jr. and David J. Bordua (1967) pointed out that police discretion stems in large part from the general organization of modern police work. As a largely reactive force, primarily dependent on citizen mobilization, the police officer functions in criminal law much like a private attorney functions in civil law—determining when the victim's complaint warrants formal action and encouraging private settlement of disputes whenever possible. Many decisions by police officers do not lend themselves easily to either command or review. As a result, police exercise a considerable amount of discretionary power, and police agencies differ greatly in such things as their volume of arrests, parking tickets, and pedestrian stops.

Because of their discretionary power, "the police are among our most important policy-making administrative agencies. One may wonder whether any other agencies—federal, state, or local—make so much policy that so directly and vitally affects so many people" (Davis, 1975a:263). The police need to make policy with regard to nearly all their activities, such as deciding what types of private disputes to mediate and how to do it, breaking up sidewalk gatherings, helping drunks, deciding what to do with runaways, breaking up fights and matrimonial disputes, entering and searching premises, controlling juveniles, and managing race relations.

The police exercise their discretion in both reactive and proactive policing. *Reactive* police work is a response to citizen mobilization via a 911 call or other means. If a citizen does call 911, the police dispatcher who answers the call begins to exercise discretion. The dispatcher interviews the caller to identify the nature and location of

the reported problem, and decides whether to dispatch a patrol car. An early study of telephone calls to three police departments found that 20% to 40% of the calls are handled without dispatching a car (Bercal, 1970). If the dispatcher decides to send a patrol car, then the nature of the assignment (for example, burglary or robbery) and which car to assign must be determined. When a car is dispatched, the officer may informally turn down the assignment, or may procrastinate on the way, or even lie about having investigated the call (Rubinstein, 1973). If the officer follows up on the call, he or she often has to decide whether a crime has been committed. Albert J. Reiss Jr. (1971:73) found that, in Chicago, whereas citizens considered 58% of their complaints as criminal matters, officers responding to those dispatches officially processed only 17% as criminal matters.

Proactive police work is undertaken on the initiative of the police themselves without citizen mobilization. The activities of traffic and tactical divisions are primarily proactive policing, as are the various nondispatched activities of detectives and vice divisions. In proactive policing, discretionary power is exercised in the context of whether or not to stop a suspicious pedestrian or automobile for investigation or to engage in various types of crime prevention measures (Braga et al., 2015).

In both reactive and proactive policing, the use of discretion can take a number of forms—investigation, confrontation, disposition, and decisions about the use of force. To some degree, police officials have the option of investigating some acts and not others. The police, for example, may elect to ignore or to actively pursue a citizen's complaint. In some cases, the police arrest a suspect, and in others—even though the act and circumstances may be similar—the individual is released. And the police mistreat some people while handling others with respect. All along the line, the police make many types of decisions.

Because the police exercise so much discretion, they may also end up discriminating for and against certain people based on the latter's race and ethnicity, sex, age, behavior, and other characteristics. A growing amount of evidence finds that police do single out young, African American and Latino men for traffic and pedestrian stops and other actions, as a recent federal investigation of Baltimore police demonstrated (Stolberg, 2016). In earlier research, Nathan Goldman (1963) found that 65% of arrested black youths were referred to the juvenile court, compared to only 34% of arrested white youths apprehended. Similarly, Donald J. Black and Albert J. Reiss Jr. (1970) found that 21% of black youths, but only 8% of white youths, encountered by the police were arrested.

Despite the discrimination resulting from police discretion, police discretion must remain a fundamental characteristic of police work. As Davis (1975b:140) argued,

> Police discretion is absolutely essential. It cannot be eliminated. Any effort to eliminate it would be ridiculous. Discretion is the essence of police work, both in law enforcement and in service activities. Police work without discretion would be something like a human torso without legs, arms, or head.

To say this is not meant to excuse any discrimination practiced by the police. Rather, it is meant to underscore the problem of reducing discrimination by the police.

SUMMARY

1. Court cases generally begin with a dispute. Private-initiated, public-initiated, and public defendant disputes constitute, for the most part, the workload of American courts. When disputes move from the trial to the appellate level, they are typically transformed and become almost exclusively disputes about law or about procedures.
2. Courts are composed of four distinct groups of participants—litigants, lawyers, judges, and juries. Litigants can be distinguished by the relative frequency with which they resort to court services. There are two types—the "one-shotters" and the "repeat players."
3. Judges are the most prestigious participants in court processes. They adjudicate cases, control the flow of litigation in their courtrooms, and administer their courts. Judges' personal backgrounds and values affect their decisions, which in turn are bases for their recruitment to a position on a higher court.
4. Juries are used exclusively in trial courts. The principal issues surrounding the participation of jurors in the processing of disputes are their effectiveness on checking the power of judges; the use of the scientific method in jury selection, the degree of their representativeness of the community; and their competence.
5. Although the principal function of legislative bodies is lawmaking, they also engage in conflict management and integrative functions. White males are still substantially overrepresented among legislators. For better or worse, lobbyists play diverse, key roles in the legislative process.
6. Administrative agencies, often called the fourth branch of government, reach into virtually every corner of American life. Administrative rules affect the food we eat, the cars we drive, the fuel we use, the clothes we wear, the houses we live in, and even the air we breathe. Administrative agencies have powers of investigation, rulemaking, and adjudication.
7. The police are expected and empowered to enforce the law. In the United States, there is no unified system of law enforcement. An important characteristic of law enforcement is the strongly bureaucratic and militaristic organization of the police. Law enforcement features a high amount of discretion. This basic fact of policing creates a thin line between discretion and discrimination as the police enforce the law.

KEY TERMS

Adjudication the official judgment of the trial court in a civil or a criminal case as to the defendant's guilt or innocence

Administrative agencies authorities of the government other than the executive, legislative, and judicial branches, created for the purpose of administering particular legislation; sometimes called commissions, bureaus, boards, authorities, offices, departments, administrations, and divisions

Issues of fact matters concerning the reconstruction, description, and interpretation of events that are considered by a judge and/or jury during a trial

Issues of law matters concerning which interpretations of law are proper and acceptable, as decided by a judge during a trial

Legislature a collection of individuals who are elected as members of the formal parliamentary bodies prescribed by national and state constitutions

Voir dire the questioning of jurors during the process of jury selection

SUGGESTED READINGS

Don J. Lofgren, *Dangerous Premises: An Insider's View of OSHA Enforcement*. Ithaca, NY: Cornell University, 1989. A discerning and revealing narrative of the author's experience as an OSHA investigator, written in nontechnical language.

Jerome H. Skolnick, *Justice without Trial: Law Enforcement in Democratic Society*. New York: Macmillan, 1994. A highly influential account, first published in 1966, of the tension policing creates in a democracy.

Malcolm K. Sparrow, *Handcuffed: What Holds Policing Back, and the Keys to Reform Hardcover*. Washington, DC: Brookings Institution Press, 2016. A provocative critique of policing today, along with proposals for improved policing.

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4

CHAPTER 4
LAWMAKING

CHAPTER OUTLINE

LEARNING OBJECTIVES

- Summarize the moral entrepreneur theory of lawmaking
- List the differences between legislative lawmaking and judicial lawmaking
- Explain the differences between administrative rulemaking and administrative adjudication
- Describe the three types of judicial lawmaking
- Summarize any two sources of impetus for law

Legislative, administrative, and judicial bodies grind out tens of thousands of new laws annually at the local, state, and federal levels. Each law is unique. Each law has a distinct set of precipitating factors, special history, and raison d'être. Still, some generalizations are possible about how laws are formed, the sociological factors that play a role in lawmaking, and the social forces that provide an impetus for making or altering laws. This chapter focuses on the more important sociological theories of lawmaking; the ways in which legislatures, administrative agencies, and courts make laws; the roles of vested interests, public opinion, and social science in the decision-making process; and the sources of impetus for laws.

PERSPECTIVES ON LAWMAKING

The creation and instrumentation of laws are routine and ongoing processes, and theoretical perspectives regarding the many facets of lawmaking abound in the sociolegal literature (Chambliss and Zatz, 1993; Hagan, 1980; Lange, 2009; Monahan and Walker, 2010; Parisi, 2008; Zander, 2005). Students of lawmaking have used a number of them in attempts to explain how laws are created or defeated. We will consider briefly four such theories to illustrate the diversity of perspectives: the rationalistic model, the functional view, conflict theory, and a "moral entrepreneur" thesis.

THE RATIONALISTIC MODEL

The **rationalistic model** proposes that laws (in particular, criminal laws) are created as rational means of protecting the members of society from social harm. In this perspective, crimes are considered socially injurious. This is a popular theory of lawmaking, but also one that is lacking (Goode, 2016). A major problem with the theory is that lawmakers and powerful interest groups define what activities may be harmful to the public welfare. Value judgments, preferences, and other considerations enter into the process of their definition (for example, why are certain types of behaviors, like prostitution or gambling—which will be discussed in Chapter 5—labeled as criminal?).

THE FUNCTIONALIST VIEW

The **functionalist view** of lawmaking, as formulated by Paul Bohannan (1973), is concerned mainly with how laws emerge. Bohannan argued that laws are a special kind of "reinstitutionalized custom." Customs are norms or rules about the ways in which people must behave if social institutions are to perform their functions and society is to endure. Lawmaking is the restatement of some customs (for example, those dealing with economic transactions and contractual relations, property rights in marriage, or deviant behavior) so that legal institutions can enforce them.

This functionalist view suggests that failure in other institutional norms encourages the reinstitutionalization of the norms by the legal institution. From the functionalist perspective, laws are passed because they represent the voice of the people. Laws are essentially a crystallization of custom, of the existing normative order. Although there are

conflicts in society, they are relatively marginal, and they do not involve basic values. In this view, conflict and competition between groups in a society actually serve to contribute to its cohesion and solidarity.

THE CONFLICT PERSPECTIVE

The **conflict perspective** cites value dissensus, unequal access to economic goods, and the resulting structural cleavages of a society as the basic determinant of laws. Specifically, the origin of law reflects the needs of society's elite class (see Chapter 2). These elites, it is suggested, use social-control mechanisms such as laws to perpetuate their own advantageous positions in society. In the event of conflict over the prescription of a norm, conflict theorists would argue that the interest group(s) more closely tied to the interests of the elite group would probably win the conflict. For example, William J. Chambliss (1964), as shown in Chapter 1, claims that the groups in England having the most power to create the vagrancy laws centuries ago were those representing the dominant economic interests at the time. A more recent example would be how corporate interests helped influence legal responses to the turbulence of financial markets in 2009 (Halliday and Carruthers, 2009).

MORAL ENTREPRENEUR THEORY

The **moral entrepreneur theory** attributes the precipitation of law and other key events to the "presence of an enterprising individual or group. Their activities can properly be called moral enterprise, for what they are enterprising about is the creation of a new fragment of the moral constitution of society, its code of right and wrong" (Becker, 1963:146).

Howard S. Becker's (1963) study of the development of criminal law to control marijuana use splendidly illustrates the role of moral entrepreneurs in lawmaking. Becker noted that the federal Marijuana Tax Act of 1937 had its forerunners in earlier criminal statutes such as the Volstead Act (alcohol) and the Harrison Narcotics Tax Act (opium and derivatives). The Narcotics Bureau of the Treasury Department (now the U.S. Drug Enforcement Administration of the U.S. Department of Justice) was unconcerned with marijuana in its earlier years. It argued, instead, that the regulation of opiates was the real problem. However, shortly before 1937, the Narcotics Bureau redefined marijuana use as a serious problem. This agency thus acted in the role of moral entrepreneur, in that it attempted to create a new definition of marijuana use as a social danger. For example, the bureau provided information to the mass media on the dangers of marijuana, including "atrocity stories" that detailed gruesome features of marijuana smoking. Finally, in 1937, the Marijuana Tax Act was passed, ostensibly as a taxation measure but with the real purpose of preventing persons from smoking marijuana. But it had another little-known component to it. The campaign against marijuana was also colored by the fact that Harry Anslinger, the first drug czar, was appointed by Andrew Mellon, his wife's uncle. Mellon, the Treasury secretary, was banker to DuPont, and the sales of hemp threatened that firm's efforts to build a market for synthetic fibers. Spreading scare stories about marijuana was a way to give hemp a bad name.

Birth control provides another example of the role of moral entrepreneurs in lawmaking. In a fascinating book, *Devices and Desires: A History of Contraceptives in America*, Andrea Tone (2001) points out that it was not until the mid-1800s that contraceptive technology jumped beyond methods in use for centuries, such as making condoms out of animal intestines. After Charles Goodyear invented the vulcanization of rubber in 1839, rubber manufacturers began supplying not just condoms but douching syringes and "womb veils" (or diaphragms and cervical caps) and what amounted to IUDs (intrauterine devices). By the 1870s, pharmacies were advertising and selling chemical suppositories, vaginal sponges, and medicated tampons. The easy availability of birth control devices alarmed Anthony Comstock, a onetime salesman in New York City who believed that they assisted the vice trade by divorcing sex from marriage and childbearing. In 1873, joined by like-minded allies, he successfully lobbied for Congressional passage of a bill that branded contraception obscene and prohibited its distribution across state lines or through the mails. Subsequently, versions of the Comstock law were enacted in 24 states.

In addition to seeking real gains through lawmaking, moral entrepreneurs also seek symbolic victories. This symbolic victory has two dimensions. First, the passing of a law may also symbolize the supremacy of the groups that support it. Second, the creation of a law signifies that the illegal behavior of the group(s) allegedly engaging in it is disreputable. Where groups differ significantly in prestige and status, or where two groups are competing for status, each sees the law as a stamp of legitimacy. They will seek to use it to affirm the respectability of their own way of life. According to Gusfield (1967:178),

> The fact of affirmation through acts of law and government, expresses the public worth of one set of norms, or one subculture vis-à-vis those of others. It demonstrates which cultures have legitimacy and public domination, and which do not. Accordingly, it enhances the social status of groups carrying the affirmed culture and degrades groups carrying that which is condemned as deviant.

A FINAL WORD ON THEORIES OF LAWMAKING

Scholars continue to debate the relative merits of the four theories of lawmaking just outlined. None of these theories can account by itself for the creation of all laws. Assessment of these merits depends on one's theoretical perspective. Conflict theorists would certainly argue that "the paradigm that is most compatible with the facts is one that recognizes the critical role played by social conflict in the generation of . . . law" (Chambliss, 1976:67). Others, in a similar vein, would argue for the explanatory power of their respective theoretical stances. Because the legislative, administrative, and judicial bodies make a large number of laws each day, it is always possible to select a few examples that illustrate almost any conceivable theoretical position. At best, the theories we have discussed explain in part how laws are made. Probably all these theories are at least partially correct, but it is doubtful that any single theory fully explains the creation of law, although one or another may account for the formation of any particular law or kind of law. With these considerations in mind, let us now turn to an examination of the processes of legislative, administrative, and judicial lawmaking.

LEGISLATION

The most important and most visible legal task of legislative bodies is to make law (Loewenberg et al., 2002). The term **legislation** describes the deliberate creation of legal precepts by a body of government that gives articulate expression to such legal precepts in a formalized legal document. As such, legislation differs from normative pronouncements made by the courts. The verbal expression of a legal rule or principle by a judge does not have the same degree of finality as the authoritative formulation of a legal proposition by a legislative body. Furthermore, although both adjudication and legislation involve the deliberate creation of laws by a body of government, the judiciary is not a body set up primarily for the purpose of lawmaking. As Chapter 2 explained, the judiciary's main function is to decide disputes under a preexisting law, and the law-creating function of the judges should be considered incidental to their primary function of adjudication.

There are several other differences that should be kept in mind between legislative and judicial lawmaking. Judge-made law stems from the decision of actual controversies. It provides no rules in advance for the decision of cases but waits for disputes to be brought before the court for decision. Legislators, by contrast, formulate rules in anticipation of cases. A judicial decision invokes a justification for applying a particular rule, whereas a statute usually does not contain an argumentative or justificatory statement; it simply states that this is forbidden, this is required, and this is authorized.

In general, legislators have much more freedom to make significant changes and innovations in the law than do the courts. Legislators are also more responsive to public and private pressures than judges. Whereas judges deal with particular cases, legislators consider general problem areas with whole classes of related situations. At times, the attention of legislative bodies is drawn to a problem by a particular incident, but the law it eventually passes is designed for general applicability. For example, when Congress passed the Federal Kidnapping Act of 1932, the kidnapping and death of the Lindbergh baby were fresh in the legislators' minds, but the law that was enacted was designed to deal with a whole class of such possible occurrences. Thus, it may be concluded that legislators are solely responsible for formulating broad new rules and for creating and revising the institutions necessary to put those laws into effect.

LEGISLATION AND SOCIAL ISSUES

Legislative lawmaking often represents a response to a particular problem, one acute enough to intrude on the well-being of a large number of individuals and their organizations or on the well-being of the government itself or conspicuous enough to attract the attention of at least some legislators. But, legislation can also be generated, among other ways, by apprehension, social unrest, conflict, environmental deterioration, and technological innovation (Lazarus, 2004).

In one example of these dynamics, federal pure food and drug laws resulted from disclosure of the practices of food and drug manufacturers and processors (Friedman and Macaulay,

1977). In more recent examples, internal security laws several decades ago grew out of apprehension over the activities of American communists; manpower retraining and area redevelopment legislation providing for more rigorous control over the testing of drugs was passed in the wake of disclosures of the effects of thalidomide, a drug that caused numerous babies to be born malformed; and legislation to establish a system of communication satellites was passed shortly after the successful experiment with Telstar. The list of legislation passed in response to the emergence of new problems or to the successful dramatization of old ones could be extended infinitely.

But neither legislators' recognition of a social problem nor their recognition of a group's particular claims for action is certain to lead to legislation. The probability of some form of legislative response increases when (1) powerful interest groups mobilize their members to seek legislative action; (2) the unorganized public becomes intensely concerned with an issue, as in the controversy over thalidomide, or conversely, is indifferent to the particular measures advocated by an interest group; and (3) there is no pressure to maintain the status quo or opposition to the proposed legislation.

PRE-LAWMAKING ACTIVITIES

Typically, a series of pre-lawmaking stages of activity precedes the introduction of a legislative plan (Price, 1972). The first stage is the instigation and publicizing of a particular problem (such as nuclear waste disposal). Typical instigators are the mass media (such as special TV programs like 60 Minutes or a series of articles or editorials in major newspapers or news magazines), a representative who highlights an issue through investigative hearings, or an author (as we shall see later in this chapter) who documents and dramatizes a social problem.

The second stage is *information gathering*. This stage involves collecting data on the nature, magnitude, and consequences of a problem; the alternative schemes for solving the problem and their costs, benefits, and inherent difficulties; the likely political impact of each scheme; and the feasibility of various compromises. The third stage is *formulation*, or devising and advocating a specific legislative remedy for the problem. The fourth stage is *interests-aggregation*, or obtaining support for the proposed measure from other lawmakers through trade-offs and compromises (that is, if you support my proposal, I will support yours); the championing of one interest group over others; or mediating among conflicting groups.

The next stage is *mobilization*, the exertion of pressures, persuasion, or control on behalf of a measure by one who is able, often by virtue of his or her institutional position, to take effective and relatively direct action to secure enactment. Whether an issue goes beyond the first three stages usually depends on the support it receives from individuals, groups, or governmental units that possess authority and legitimacy in the policy area, and on the support that the proponents of a proposal are able to muster from key figures in the legislature. Finally, the last stage is *modification*, the marginal alteration of a proposal, sometimes strengthening it and sometimes granting certain concessions to its opponents to facilitate its introduction.

These six stages do not simply represent the components the legislative process must necessarily include. They also illustrate the norms that govern the legislative process (for example, the airing of an issue and the attempt to accommodate diverse interests). They further illustrate the thoroughly political character of the legislative lawmaking process.

ADMINISTRATIVE LAWMAKING

Administrative agencies engage in lawmaking through rulemaking and through the adjudication of cases and controversies arising under their jurisdiction. They pursue both civil remedies and criminal sanctions to promote compliance with regulatory and administrative laws (Feldman, 2016). Administrative lawmaking plays an increasingly important role in modern society, and its consequences are felt in all walks of life, as Chapter 3 emphasized. This section further discusses the fundamental processes involved in administrative lawmaking.

ADMINISTRATIVE RULEMAKING

Administrative rulemaking is the single most important function carried out by a government agency. While the president and Congress provide a general framework for the government's tasks, administrative rulemaking provides the specifics that define the law and delineate how administrative agencies implement their responsibilities. Through rulemaking, a particular administrative agency legislates a policy. Under the requirements of the Federal Administrative Procedure Act, general notice of proposed rulemaking must be published in the Federal Register (the daily compendium of new, revised, and proposed rules). The notice must specify the location of the proceedings, the legal authority under which the rules are being proposed, and the substance of the proposed rules. After such a notice is given, interested parties are to be provided with the opportunity to participate in the rulemaking proceedings through the presentation of written data. At the discretion of the agency, oral presentation may be made. Unless the statutes governing the agency's operation require a notice or a hearing, notice of rulemaking can be withheld if the agency considers it to be impractical, unnecessary, or contrary to the public interest.

The flexibility of agencies in rulemaking procedures is much greater than in administrative adjudication. Formal hearings are not held unless required by statute. Administrators are free to consult informally with interested parties and are not bound by the more rigid requirements of adjudicative hearings. The number of parties that may participate is also potentially far greater than in adjudicative proceedings, where only those directly affected by an administrative order have standing (that is, are directly involved in litigation).

The bulk of the immense code of federal regulations consists of the substantive rules of administrative agencies. The Internal Revenue Code, for example, is part of this compendium of regulations, which consists of a seemingly endless number of rules interpreting Congressional statutes. At this point, it should be noted that administrative agencies issue a variety of pronouncements less formal and binding than their "legislative" regulations, which are designed to clarify the laws they are administering (Beermann,

2006). Some of these pronouncements represent "interpretative regulations." For example, the Internal Revenue Service regularly issues interpretations of the Internal Revenue Code, such as under what circumstances a college professor may claim a home office as a business expense. Moreover, in response to inquiries, agencies sometimes issue advisory rulings, which interpret the law with reference to particular types of situations. In addition, some agencies also publish instructions, guides, explanatory pamphlets, and other explanatory materials.

Some examples will illustrate the kinds of lawmaking that administrative agencies create through rulemaking:

- The U.S. Food and Drug Administration determines policies governing the labeling, availability, shelf life, and safety of drugs.
- The U.S. Department of Transportation issues rules on what airlines should do about schedule changes; flight cancellations; long delays; and compensation for missed flights, lost luggage, getting bumped from flights, and many other matters.
- The U.S. Department of Commerce issues rules on banking practices and countless other aspects of interstate commerce.

ADMINISTRATIVE ADJUDICATION

The second way in which administrative agencies create rules is through their adjudicative powers, given to them by congressional grants of authority. Adjudication is the administrative equivalent of a judicial trial. Administrative orders have retroactive effect, as contrasted with the prospective effect of rulemaking. In rulemaking, the agency is notifying in advance those under its jurisdiction of what the law is. When an agency opens proceedings with the intention of issuing an adjudicative order, it must eventually interpret existing policy or define new policy to apply to the case at hand. The parties involved do not know how the policy is going to be applied until after the order is issued, giving the agency decision retroactive effect. Adjudicative lawmaking tends to produce inconsistencies because cases are decided on an individual basis. The rule of stare decisis (requiring precedent to be followed, which will be discussed in the context of judicial lawmaking) need not prevail (Feldman, 2016), and the high turnover of top-level administrators often results in a lack of continuity.

Because many agencies have both the power to issue regulations and the power to adjudicate cases, they can choose between the two methods of lawmaking. When an agency believes that the time has come to formulate a policy decision in an official text, it can draft and issue a regulation. But when an agency prefers to wait until the contours of a problem become clearer, it can continue to deal with the problem on a case-by-case basis, formulating a series of decisional rules couched in terms that ensure continuing flexibility. Furthermore, an agency, unlike a court, does not have to wait passively for cases to be brought before it. Its enforcement officials can go out looking for cases that will raise the issues its adjudicating officials want to rule on. And because the agency can decide for itself what enforcement proceedings to initiate, it can choose cases that present the issues in such a way that the court will be likely to uphold the agency's ruling if an appeal is taken.

JUDICIAL LAWMAKING

Judicial lawmaking has steadily grown in the United States in recent decades (McCloskey, 2016). Legislators and administrators are often willing to let judges take the heat for controversial actions, such as allowing or disallowing abortion or ordering busing to desegregate schools. Similarly, it is often politically expedient to allow courts to handle such sensitive jobs as reapportioning legislatures, regulating employment practices, supervising land use and development or urban planning, and managing school systems. Judges also seem more willing than in the past to think that the courts should address various social issues. As a result of all these currents, the judiciary in recent years has assumed a powerful role in our society. As Henry J. Abraham (1996:21) once exclaimed: "It is simply a fact of life that in the United States all social and political issues sooner or later seem to become judicial!"

During the past few decades, courts altered laws requiring a period of instate residence as a condition of eligibility for welfare; laid down elaborate standards for food handling, hospital operations, inmate employment, and education; and ordered some prisons closed. Courts have established comprehensive programs of care and treatment for the mentally ill who are confined in hospitals. They have ordered the equalization of school expenditures on teachers' salaries, decided that bilingual education must be provided for Mexican American children, ruled for and ruled against same-sex marriage, and eliminated the requirement of a high-school diploma for a firefighter's job. Courts have enjoined the construction of roads and bridges on environmental grounds and suspended and then reinstituted performance requirements for automobile tires and air bags.

In some now classic, broad-ranging and often-cited examples such as *Brown v. Board of Education* (347 U.S. 483 [1954]), the judiciary set a precedent in establishing new policies in interracial relations with its decisions forbidding official segregation in public schools with dramatic long-ranging consequences (Gold, 2005). The judiciary also established a new set of laws for processing criminal cases, requiring among other matters that:

- indigents be given attorneys at public expense in all but minor cases (*Gideon v. Wainwright*, 372 U.S. 355 [1963]);
- defendants must be warned that whatever they say to the police may be used against them and that they will be permitted attorneys during police interrogation if they request them (*Miranda v. Arizona*, 384 U.S. 436 [1966]);
- juveniles must be given some of the same rights as adult offenders in hearings that may lead to their imprisonment (In *re Gault*, 387 U.S. 1 [1967]).

Judicial activism is not without criticism (Dow, 2009; Lindquist and Cross, 2009). There are questions about the policy-making role of judges in the American system of governments. The role of judges is to apply the law, and the policy-making activities carried out by the U.S. Supreme Court in interpreting the Constitution in view of social changes are considered an impermissible expansion of the powers granted to the judicial branch. The increase in judicial activism, it is argued, created a legislative body that is not accountable to the American people. Challenging these critics, proponents of judicial

activism say it is needed to address serious social problems that the executive and legislative branches of government too often ignore or even create through their own rulemaking and other actions.

This controversy aside, three types of judicial lawmaking occur: lawmaking by precedents, lawmaking by interpretation of statutes, and lawmaking by interpretation of constitutions. We now examine these three types separately.

LAWMAKING BY PRECEDENTS

To quickly review material from Chapter 2, judicial decisions in the United States and other common law nations such as England typically build on the precedents established by past decisions, known as the doctrine of stare decisis ("stand by what has been decided"). By contrast, civil law nations such as France and Germany have a codified legal system where the basic law is stated in codes. These are statutes enacted by the national parliament, which arranges whole fields of law (family law, housing law, and so forth) in an orderly, logical, and comprehensive way. Judges in these nations follow the basic principles of law found in acts of parliament. In common law nations, judges base their decisions on case law, a body of opinion developed by judges over time in the course of deciding particular cases. The doctrine of precedent, the notion that judges are bound by what has already been decided, is a fundamental common law doctrine (Friedman, 2002).

In the common law system, following precedents is often much easier and less time-consuming than working out all over again solutions to problems that have already been faced. Precedent enables judges to draw on the reasoning of judges from earlier generations and helps to minimize arbitrariness in judicial decision making. Moreover, precedent enables individuals (with the assistance of attorneys) to plan their conduct in the expectation that past decisions will be honored in the future. Although certainty, predictability, and continuity are not the only objectives of law, they are certainly important ones. Many disputes are avoided, and others are settled without litigation simply because individuals are familiar with how the courts will likely respond to certain types of behavior (Geel, 2009).

Despite the importance of precedent, judges do make decisions that overturn prior decisions. A judge may also be confronted with a case for which there is simply no precedent. For example, consider a problem that judges faced a century ago when airplanes began flying over farmland and agitating farm animals. Farmers sued for damages. Because airplanes were new, existing law did not at all cover this situation, and courts thus looked to analogies in existing law that could reasonably be extended to this new situation (Hamilton and Spiro, 2015). As this example suggests, judges sometimes make law in instances without being guided by precedent, and they do so via the selection of appropriate analogies.

LAWMAKING BY INTERPRETATION OF STATUTES

In interpreting statutes, judges help to determine the effects of legislative decisions. In most statutory cases, the courts have no trouble determining how to apply the statute, because the relevant law and evidence are very clear or fairly clear.

In some cases, however, the intent of a legislature is ambiguous. Some statutes contain unintentional errors and ambiguities because of bad drafting of the law. Other statutes are unclear because those who pushed them through the legislature sought to avoid opposition by being vague or silent on potentially controversial matters. An important reason for the lack of clarity in many instances is that the proponents have not been able to foresee and provide for all possible future situations. This provides the courts with an opportunity to engage in lawmaking. For example, antitrust statutes permit much judicial lawmaking, because Congress has set up only the most general guidelines. Exactly what constitutes a restraint of trade or monopoly practice are questions that courts must therefore determine. In doing so, they not only make law but also set explicit policy to guide other parties, such as businesses and government agencies, that are not directly involved in a case.

On rare occasions, judges find that all their efforts to discover the legislative intent of a statute are in vain. It is simply not clear how the statute applies to the case before them. In those cases, the judges must do just what they do when faced with a case for which no precedents exist: They must perform a creative act of lawmaking. This may well be exactly what the legislature, unwilling to prescribe details for an unknown future, counted on them to do. It is left to the judges to infer a purpose that is applicable to a particular case from what they know of the legislature's broader purposes and of the shared purposes and aims of the community.

THE INTERPRETATION OF CONSTITUTIONS

Courts in the United States are regularly called upon to interpret the U.S. Constitution and state constitutions (Baum, 2016). These cases often involve controversial statutes and controversial executive actions. Dozens of cases could be cited here, but one of the most famous involved President Harry S. Truman and the steel industry. In 1952, Truman wished to avert a threatened strike by workers in the steel industry. To do so, he ordered federal officials to seize and operate the nation's steel mills. The steel companies mounted a legal challenge to his power to do so under Article II of the Constitution, which deals with the powers and duties of the president. The case reached the U.S. Supreme Court, which, by a 6-3 vote, ruled in June 1952 that Truman did not have the power to seize the mills (Marcus, 1994).

Opportunities to interpret constitutional provisions arise more often in federal than in state courts, because the national Constitution is considered more ambiguous in many of its key provisions (McCloskey, 2016). State constitutions, by contrast, tend to be more detailed documents, leaving less room for judicial interpretation.

As this discussion has implied, judicial lawmaking usually concerns the actions of government agencies rather than those of private individuals. However, some public issues are rarely decided in courts. Foreign affairs (because they are considered political and not judicial issues) are generally beyond the scope of court action. For example, and exhibiting what one law professor called "a strange silence" (Schoen, 1994), the Supreme Court refused to rule on the Vietnam War's constitutionality when asked to do so by opponents of the war. Moreover, courts are seldom involved in matters such as the appropriation of funds or the levying of taxes.

INFLUENCES ON LAWMAKING

Lawmaking is a response to many social forces. The forces that influence lawmaking cannot always be precisely determined, measured, or evaluated. At times, several forces operate simultaneously. We have room in this section to consider a limited number of influences on lawmaking: interest groups, public opinion, and the social sciences.

INTEREST GROUPS

The interest-group thesis contends that laws are created because of the special interests of certain groups in the population (Mahood, 2000). Examples of interest-group influence in lawmaking and policy-making abound (Gioacchino et al., 2004; Rozell et al., 2006). Today's laws governing the use of alcohol, regulations concerning sexual conduct, abortion bills, pure food and drug legislation, antitrust laws, and all automobile safety standards, and the like are ultimately originated in interest-group activity. Even alterations in existing statutes are not immune from influence by those who see some threat or advantage in the proposed changes. Often, interest groups also act as a communication network for social movements, facilitating the dissemination of their ideas in a manner that helps to legitimize movements, exert public pressure for legal change, attract some politicians to the movements' objectives, and effect policy change (McCann, 2006).

The nature of the interaction between interest groups and lawmakers varies based on the branch of the government. Judges, although they are not immune to interest-group pressures, are generally not lobbied in the same way as legislators or administrators. To reach the courts, a lawyer must be hired, formal proceedings must be followed, and grievances must be expressed in legal terminology. Minorities and the poor find the courts attractive because they are more readily available. To influence legislators, a group must be economically powerful or able to mobilize a large number of voters, but the courts require no such prerequisites. If a group has enough money to hire an attorney or can find an attorney to act *pro bono* (for public good, which usually means no fees or low fees), it can seek court action to further its interests. Further, interest groups may also turn to courts because they assume that the judicial branch may be more sympathetic to their objectives than the other two branches (McCann, 2006). For these reasons, groups representing people of color, such as the NAACP, have used the courts to secure various civil rights.

Interest groups' techniques to influence courts are different from those used to influence legislative or administrative bodies. As political scientist Herbert Jacob (1984:151) observed,

> The principal techniques are: to bring conflicts to a court's attention by initiating test cases, to bring added information to the courts through amicus curiae (friend of the court) briefs, and to communicate with judges indirectly by placing information favorable to the group's cause in legal and general periodicals.

By instituting test cases, interest groups provide judges with opportunities to make social policy. These groups often submit legal briefs that communicate relevant social science

research findings to a particular case. By providing information through amicus curiae briefs, interest groups expand the confines of the judicial process and build coalitions with other groups (McGuire, 1994). Another technique is to publish decisions in legal periodicals. Judges generally read these journals to keep abreast of legal scholarship and sometimes even cite them as authority for their ruling. Publication in these journals gets one's views before the courts and before the attentive public.

Interactions between interest groups and legislative and administrative lawmakers are more overtly political in nature. As Chapter 3 noted, many interest groups maintain Washington and state capital offices staffed with people who keep track of developments in the legislative and administrative branches and attempt to influence their activities. Some groups pay for the services of law firms in dealing with legislators or administrators. These firms provide expertise in such areas as antitrust and tax regulations and use their personal contacts with important lawmakers on behalf of their clients.

Several specific conditions enhance the potential influence of interest groups on lawmakers (Ripley, 1988). In many instances, there may not be two competing groups on an issue. When only one point of view is presented, the group is likely to get much of what it wants. For example, when banking and other money-lending interests, such as pawnshops, push for a higher ceiling for usury laws in a state, they are more likely to succeed if there is no organized opposition. Similarly, if the groups on one side of a controversy are unified and coordinated on the principal issues they want to push (or if they can minimize their disagreements), they will enhance their chances of success. If certain key members of legislative bodies (such as a subcommittee chairperson) believe in the interest group's position, the probability of success is also greatly enhanced.

The visibility of an issue is another consideration in influencing lawmakers. When the issue is not too visible or when interest groups seek single distinct amendments to bills (such as to alter soybean export quotas in addition to others proposed by farming interests), as contrasted with large legislative packages, the chances for success increase. Conversely, as the visibility of issues increases and public attention grows (such as draft registration or wage and price controls), the influence of interest groups tends to diminish. In addition, interest groups are likely to have greater influence on issues that coincide with the interests of the groups they purport to represent. For example, the AFL-CIO may be very influential in matters concerning working conditions, but it is likely to receive less attention from lawmakers when it advocates higher tariffs for imported goods or when it attempts to guide foreign policy. Finally, interest groups are likely to have greater influence on amendments than on entire pieces of legislation. This is because amendments are generally technical and less understood by the public.

Other considerations also matter for the effectiveness of interest groups in lawmaking:

- Financial resources determine an interest group's ability to support lawsuits, lobbying, public relations, and other activities (Abramson, 1998).
- Interest groups that support the status quo have an advantage over groups trying to bring change, because whereas the latter must overcome several obstacles in the

lawmaking process, the former may frustrate change at any of several points in the process.

- An interest group's influence depends heavily on its status as perceived by lawmakers. An interest group is particularly influential in situations where a lawmaker shares the same group affiliation (for example, when farm groups talk to legislators who are farmers), where the group is considered important to the legislator's constituency, and where the group is recognized as a legitimate and reliable source of information.
- A group's competence to influence lawmaking is enhanced by its ability to bring about social or economic disruptions. Threats of disorder, disruption, and mass violence have been, at times, effective bargaining weapons of relatively powerless groups (Shaw et al., 2010). Similarly, the threat of a decline in the supply of such necessities as food, medical services, and energy has been used to influence lawmakers. The ability of an interest group to create a crisis, whether a social disorder, an economic slowdown, or the reduction of supply of a needed product or service, gives it considerable clout in the lawmaking process.

PUBLIC OPINION

In the traditional societies studied by anthropologists, public opinion and law are fairly indistinguishable (see Chapter 2). In these societies, one comes to know intimately the law of one's tribe, which in effect consists solely of the customs and informal norms that guide the behavior of all members of the society. As a society becomes larger, more complex, and heterogeneous, there is a less direct correspondence between public opinion and the law. Because there are so many laws today and because these laws are often so complex, the average citizen cannot begin to know, let alone tinker with, the law that could affect one's life. Some legal and political issues, of course, do capture public attention. This fact raises the question of the degree to which public opinion can influence lawmaking regarding these issues.

A related question concerns which people we have in mind when we try to understand the impact of *public* opinion on lawmaking. The *people* may mean a numerical majority, an influential elite, blacks, women, the poor, the middle class, the young, the aged, migrant workers, students, college professors, and so forth. Popular views may be similar throughout all segments of the population, but on many important issues, opinions will differ (Norrander and Wilcox, 2009).

A more meaningful way of looking at the influence of public opinion on lawmaking would be to consider the diverse opinions of many "publics" (that is, segments of society) bearing on specific concerns such as sentencing offenders for particular crimes (Walker and Hough, 1988). These opinions operate through a multitude of channels, such as the media, political parties, and the various types of interest groups. As we try to assess which segments of society are able to have their "public" opinion affect lawmaking, the law and lawmaking literature highlights the significance of wealth, power, and influence. Simply put, the "public" opinion of some groups and individuals matters more for lawmaking than the "public" opinion of other groups and individuals. As Lawrence M. Friedman (1975:163) once observed,

> The "public opinion" that affects the law is like the economic power which makes the market. This is so in two essential regards: Some people, but only some, take enough interest in any particular commodity to make their weight felt; second, there are some people who have more power and wealth than others. At one end of the spectrum stand such figures as the president of the United States and General Motors; at the other, migrant laborers, babies, and prisoners at San Quentin.

The differential influence of public opinion on lawmaking processes is a well-known phenomenon among social scientists but also among lawmakers. Lawmakers are aware that some people are more equal than others because of money, talent, or choice. As Friedman (1975:164) again observed of lawmakers, in this case regarding health care reform,

> They know that 100 wealthy, powerful constituents passionately opposed to socialized medicine, outweigh thousands of poor, weak constituents, mildly in favor of it. Most people do not shout, threaten, or write letters. They remain quiet and obscure, unless a head count reveals they are there. This is the "silent majority"; paradoxically, this group matters only when it breaks its silence—when it mobilizes or is mobilized by others.

Lawmakers also know that most people have no clear opinions on most issues with which judicial, administrative, and legislative bodies must deal. This means that lawmakers have a wide latitude within which to operate. Thus, for example, when legislators claim to be representing the opinion of their districts, they are, on most issues, representing the opinion of only a minority of the constituents (for example, developers versus residents of a community). This is because most residents simply do not know or care enough about the issue at hand and therefore do not communicate their views on it.

Despite these considerations, public opinion exerts influence on the lawmaking process (Carp et al., 2017). Dennis S. Ippolito and colleagues (1976) identified three types of public opinion-related influences that press lawmakers into formulating certain decisions. These three types are direct, group, and indirect influences.

Direct influences refer to constituent pressures that offer rewards or sanctions to lawmakers. Constituents may vote for lawmakers who enact legislation the constituents favor, and vote against lawmakers who fail to enact such legislation or who enact legislation the constituents oppose. The same dynamic holds true for financial contributions to election campaigns. But this kind of influence is not confined to legislators. Members of the judiciary are also pressured by citizens to make certain decisions and not to make other decisions on various social and political issues.

Group influences stem from efforts of organized interest groups representing a specific constituency. Political parties, citizen action groups, and other interest groups continually influence the lawmaking process. In this context, public opinion becomes organized around a specific issue or an immediate objective (for example, pros and cons of gun control or abortion). Through the process of organizing, interests are made specific, and public-opinion backing is sought in the attempt to gain an advantage in pressing for change or redress through the legal machinery.

Finally, *indirect influences* occur in lawmaking when legislators act in accordance with constituent preferences because they either share such preferences or believe such preferences should prevail over their own judgment. Legislators may wish to win potential votes through their lawmaking activities, but this type of influence highlights the possibility that lawmakers may simply agree with the views of their constituents or see value in their constituents' views even if they do not entirely share these views.

Public opinion polls seek to determine the aggregate view people hold in a community on current important issues. Many well-established commercial firms conduct these polls by following standard and complex polling procedures. Among the most respected of such polls are the Gallup, Harris, Yankelovich, and Sindlinger, Opinion Research Corporation, Roper, and Cambridge Reports polls. They often work jointly with major TV networks such as CBS, CNN, and NBC or newspapers and magazines such as the *New York Times*, *Washington Post*, and *Time*. In addition, there are a variety of smaller, specialized public and private and university polling organizations. A typical sample size for national polls is around 1,500 randomly chosen respondents, but some national polls include as few as 400 respondents. According to statistical theory, there is a 95% probability with a sample of 1,500 that the results obtained are no more than 3 percentage points off the figure that would be obtained if every adult in the country were interviewed.

Research going back several decades demonstrates that opinion polls do influence lawmaking (Lipset, 1976). On a variety of domestic issues, for example, public opinion has led lawmakers to enact programs that might have otherwise been delayed for months or years. Legislation concerning minimum wages, social security, and medical programs are examples of issues on which public opinion has preceded and prompted legislative action. However, in other instances, such as civil liberties and civil rights, public opinion has either lagged behind government policy or tended to support measures that are repressive of constitutional rights. For example, since the mid-1950s, the Supreme Court has played a leading role in interpreting and formulating policies on civil rights that were more progressive than the views reflected in public-opinion polls (Simon, 1974). It should be noted, however, that whether the U.S. Supreme Court does or should reflect majority public opinion has been a recurring controversy in American legal thought (Baum, 2010).

Generally, the use of polls in lawmaking is encouraged. For example, Irving Crespi (1979) suggests that lawmakers could be more effective if they learned to draw upon the full fruits of survey research. Direct evidence—unfiltered by the interpretations of special interests or lobby groups—of the wants, needs, aspirations, and concerns of the general public needs to be accounted for in lawmaking activities. In lawmaking processes, Crespi argues that first there should be an attempt to determine the views of both the general public and that segment of the public that would be directly affected by a particular law. Then that public opinion should be made part of the formative stages of the lawmaking process, and not simply a force to be coped with after the fact. As Crespi (1979:18) asserts, "The difference between treating public attitudes and opinions as a relatively minor variable instead of an influence that should be authoritative is ultimately the difference between technocratic and democratic government."

LAWMAKING AND SOCIAL SCIENCE

Lawmakers have long been aware of the contribution that social scientists can make to the lawmaking process. For example, the so-called Brandeis Brief of 1908, defending the constitutionality of limited working hours for women, is considered an early landmark for the use of social science in lawmaking (Zeisel, 1962). The ideas of the economist John R. Commons (1934) influenced the way most states in the United States deal with compensation for industrial accidents and unemployment. In the historic U.S. Supreme Court decision of *Brown v. Board of Education of Topeka* (347 U.S. 483 [1954]), the Court drew upon a spectrum of the social sciences—ranging from discrete psychological experiments to broad-ranging economic and social inquiry—in reversing an earlier ruling that had established the separate-but-equal standards in racial matters. Relying on this research, the Court ruled that racial segregation in elementary schools is psychologically harmful. In a famous footnote in its decision, the Court cited a number of social science studies summarizing evidence showing that segregation retards black children's educational development. In an era increasingly dominated by scientific and technical specialists, it is not surprising that lawmakers may rely on various kinds of research evidence, especially social science evidence (Costanzo et al., 2007).

Efforts to bring social science to bear on lawmaking processes involve the use of quantitative and qualitative social science data and the reliance on the social scientist as an expert witness in specific legal cases. Social science data may be collected and analyzed for academic purposes and later used by one or more sides of a dispute as it was, for example, in *Brown v. Board of Education* (Gold, 2005). Social science research may also be conducted at the specific request of a party in a dispute. In such instances, the materials may address facts in the case or initiate an intervention in a lawmaking process (for example, the disparate effects of wage garnishment on blacks). Social science research is also undertaken without such a specific request if a social scientist anticipates that the results of the research will influence lawmakers' decisions (Berk and Oppenheim, 1979).

In addition to conducting research, social scientists can also participate in the lawmaking process as expert witnesses who testify typically for one of the litigants or appear before a legislative body. The demand for such service is evidenced by the various directories of expert witnesses and a growing body of literature on the intricacies of testifying in court or in front of legislative bodies (Brodsky, 2013). At times, social scientists are asked to directly assist either the court or the legislator in the preparation of background documents pertinent to a particular issue or to serve on presidential commissions intended for policy recommendations.

Although social science influences what lawmakers do, the role of social scientists in lawmaking is also controversial. Consider, for example, the controversy that broke out in the late 1960s over reinterpretations of the Equal Educational Opportunity Report, commonly known as the Coleman Report after its principal author, James S. Coleman (1966, 1967). In the late 1960s, Coleman's data on pupil achievement influenced several important court decisions calling for school busing. With the use of extensive busing to achieve "racial balance" in public schools, social science findings about the effects of

integration on black children have been hotly debated (Howard, 1979). In reviewing the studies on busing, David J. Armor (1972) questioned the assumption that school integration enhances blacks' educational achievement, aspirations, self-esteem, and opportunities for higher education. He contends that it is possible that desegregation actually retards race relations. Other scholars, such as Thomas F. Pettigrew and Robert L. Green (1976), accused Armor of presenting a distorted and incomplete review of a politically charged topic.

The late Daniel Patrick Moynihan (1979), an eminent social scientist and a member of the U.S. Senate from 1977 to 2001, proposed two general reasons why social scientists have been criticized for their involvement in lawmaking processes. First, he pointed out that social science is basically concerned with the prediction of future events, whereas the purpose of the law is to order them. Noted Moynihan (1979:16), "But where social science seeks to establish a fixity of *relationships* such that the consequences of behavior can be known in advance—or, rather, narrowed to a manageable range of possibilities—law seeks to dictate future performance on the basis of past *agreements*." For example, it is the function of the law to order alimony payments; it is the function of social science to attempt to estimate the likelihood of their being paid and of their effect on work behavior and remarriage in male and female parties, or similar probabilities. The second reason Moynihan (1979:19) suggested was that "social science is rarely dispassionate, and social scientists are frequently caught up in the politics which their work necessarily involves." Social scientists are, to a great extent, involved with problem solving, and the identification of a "problem" usually entails a political statement that implies a solution. Moynihan (1979:19) stated, "Social scientists are never more revealing of themselves than when challenging the objectivity of one another's work. In some fields almost *any* study is assumed to have a more-or-less-discoverable political purpose." Furthermore, there is a distinct social and political bias among social scientists. As a result, social sciences attract many people who are more interested in shaping the future than in preserving the past. Moynihan feels that this orientation coupled with politically liberal tendencies and the limited explanatory power of social sciences results in a weakening of influence on lawmakers. Because social scientists often themselves dispute the meaning of research findings, it is not surprising that lawmakers are, at times, skeptical about social science and social scientists.

SOURCES OF IMPETUS FOR LAW

An impetus is a fundamental prerequisite for setting the mechanism of lawmaking in motion. Demands for new laws or changes in existing ones come from a variety of sources. Key sources of impetus for law creation detached scholarly diagnosis, nonacademic writing, protest activities and social movements, public-interest groups, and the mass media.

DETACHED SCHOLARLY DIAGNOSIS

The impetus for law may come from a detached scholarly undertaking. From time to time, academicians may consider a given practice or condition as detrimental in the context of existing values and norms. They may communicate their diagnoses to their colleagues or

to the general public through either scholarly or popular forums. In some cases, they may even carry the perceived injustice to the legislature in search of legal redress. An example of how an academic scholar can provide an impetus for law involves an early study by one of your authors, Steven Vago (1968), on **wage garnishment**, which is a legal process that enables a creditor upon a debtor's default to seize the debtor's wages from the employer before the debtor is paid.

This study investigated the impact of wage garnishment on low-income families. The findings indicated that existing wage garnishment laws at that time in Missouri were more counterproductive than functional as a collection device. Employers fired about 20% of the debtors after receiving the first garnishment suit. Such an action was detrimental not only to the debtors, but also to their families, creditors, employers, and society at large.

The negative consequences of garnishment (for example, increased family conflict and increased criminality) led Vago (1968) to propose a simple procedure to provide debtors whose wages were subject to garnishment with legal safeguards so that they could not be fired or forced into bankruptcy. At the same time, he also outlined ways to enable creditors to maintain an effective collection method.

Vago's data and recommendations provided the basis for House Bill 279, which was introduced in the 75th General Assembly of the State of Missouri. Under the proposed bill, the service of the writ would be made upon the defendant only, and the employer of the defendant would not be involved in the litigation process. Upon entry of the judgment, the court may order the debtor to make payments to the clerk of the court, which would be disbursed in turn by the clerk. In settling the amount of these payments, the court would take into consideration the circumstances of the defendant, including his or her income and other obligations or considerations bearing on the issue. If the debtor fails to obey the order of the court, then, and only then, could the creditor summon the employer as a garnishee. The primary intention of the bill was to prohibit employers from discharging employees upon the receipt of the first garnishment suit, thus saving thousands of jobs for low-income individuals annually in Missouri.

Today, wage garnishment is regulated nationally (Bryant, 2004). This is the result of the Consumer Credit Protection Act (PL 90-32), passed in 1968. The act protects consumers from being driven into bankruptcy by excessive garnishment of wages by limiting the amount of wages subject to garnishment to 25% of the employee's weekly disposable income. It also forbids the firing of an employee because of wage garnishment. Despite these protections, garnishment still plays a role in the some 1.6 million personal bankruptcies filed annually (Murray and Daugherty, 2010).

Other university professors have conducted research that provided an impetus for lawmaking. For example, publications by David Caplovitz, such as *The Poor Pay More* (1963) and *Consumers in Trouble: A Study of Debtors in Default* (1974), resulted in proposals for much-needed reform of consumer credit laws. And research since the 1970s by feminist scholars on rape and sexual assault and domestic violence led to new awareness of these crimes and led to a series of reforms throughout the United States

on how the legal system interacted with victims of these crimes and dealt with their offenders (Belknap, 2015). The list could go on ad infinitum, but it is clear that detached scholarly diagnoses can, indeed, stimulate lawmaking. The source of impetus, however, is not limited to ivory towers. It can have other origins, as the following sections will demonstrate.

NONACADEMIC WRITING

Through their writings, many nonacademics succeed in calling public attention to a particular problem or social condition. There is a long list of those whose literary efforts stimulated changes in the law. For our purposes, it will suffice to call attention to some such distinguished ventures.

Around the turn of the twentieth century, there was a fair amount of concern in the United States about the quality of food products. In particular, numerous scandals had arisen over the quality of meat products. It was alleged that during the Spanish-American War, American soldiers were forced to eat cans of "embalmed beef." A number of horrible practices of manufacturers were revealed in the mass media, but a federal food and drug law had still not passed when, in 1906, Upton Sinclair published *The Jungle*, a novel about life in Chicago, centering on the stockyards.

The first half of the book provided a vivid description of conditions in the Chicago meatpacking plants. To illustrate:

> Tubercular pork was sold for human consumption. Old sausage, rejected in Europe and shipped back "mouldy and white," would be "dosed with borax and glycerin, and dumped into the hoppers, and made over again for home consumption." Meat was stored in rooms where "water from leaky roofs would drip over it, and thousands of rats would race about on it." The packers would put out poisoned bread to kill the rats; then the rats would die, and "rats, bread and meat would go into the hoppers together." Most horrifying of all was the description of the men in the "cooking rooms." They "worked in tankrooms full of steam," in some of which there were "open vats near the level of the floor." Sometimes they fell into the vats "and when they were fished out, there was never enough of them left to be worth exhibiting—sometimes they would be overlooked for days, till all but the bones of them had gone out to the world as Durham's Pure Leaf Lard."
>
> (Quoted by Friedman and Macaulay, 1977:611–612)

Sinclair's book created an immediate furor. A copy was sent to President Theodore Roosevelt, who appointed two investigators whose report confirmed Sinclair's findings. It is hard to say to what extent Sinclair's book provided an impetus for the passage of the Pure Food and Drug Act and the Meat Inspection Act in 1906, but it is indisputable that it played an important role in it.

Rachel Carson's (1962) classic book, *Silent Spring*, had a similar impact by bringing the dangers of pesticides to public attention. Other books that have called attention to

environmental dangers include Richard Falk's *This Endangered Planet* (1971), Fairfield Osborn's *Our Plundered Planet* (1948), and *Moment in the Sun* by R. Reinow and L. T. Reinow (1967).

Even a short list of influential authors would be incomplete without a reference to Ralph Nader. He was an unknown young lawyer at the time he published his book, *Unsafe at Any Speed* (1965), which alerted the public to the automobile industry's unconcern for safety in the design and construction of American cars. This book is a model of the kind of muckraking journalism that, at times, initiates the rise of public concern over a given issue. As a result of his book, and General Motors' reaction to it, Nader became front-page news, and his charges took on new weight. More than anyone else, he has contributed to and provided the impetus for the passing of a substantial number of auto safety provisions. Since 1966, Nader

> has been responsible almost entirely through his efforts for the passage of seven major consumer-related laws—the National Traffic and Motor Vehicle Safety Act (1966), Natural Gas Pipeline Safety Act (1968), Wholesale Meat Act (1967), Radiation Control Act (1968), Wholesale Poultry Products Act (1967), Coal Mine Health and Safety Act (1969), and the Occupational Health and Safety Act (1970).
>
> (Buckhorn, 1972)

PROTEST ACTIVITIES AND SOCIAL MOVEMENTS

Protest activities involve demonstrations, sit-ins, strikes, boycotts, and more recently various forms of electronic civil disobedience or "hacktivism" both in the United States and abroad (Whyte, 2011) that dramatically emphasize, often with the help of news and social media, a group's grievances or objectives (Staggenborg, 2016). Often, such strategies, along with rioting or other use of mass violence, have been considered tools of those who are unable or unwilling to engage in the more conventional lawmaking or who regard it useless (Meyer, 2015). A celebrated act of protest, and one with which most readers are familiar, involved Rosa Parks. On December 1, 1955, Parks sat down in the back of a city bus in Montgomery, Alabama, then refused to relinquish her seat to a white man when the "white" section of the bus became overcrowded. Her action launched the famous black boycott of Montgomery buses that created a new era in the civil rights struggle and provided considerable impetus for civil rights legislation.

It should be noted at the outset that "the relationship among law, protest, and social change is neither unidirectional nor symmetrical—nor always predictable. One major function of protest may be to secure changes in the law as a means of inducing change in social conditions. Another may be to bring about change directly without the intervention of the law. Still a third may be to bring about legal change which ratifies or legitimizes social change accomplished by other means. These functions are not mutually exclusive" (Grossman and Grossman, 1971:357). But the impact of protest activities on law creation is clearly evident, for "the law in general, and the [U.S. Supreme] Court in particular, lacks a self-starter or capacity for initiating change on its own" (Grossman and Grossman, 1971:358).

People of color, feminist activists, poverty organizations, antiwar groups, environmental activists, and opponents of nuclear power and nuclear weapons have been among those who have employed protest techniques in recent years in attempts to create laws in favor of their objectives (McCann, 2006). Much of this activity is designed to generate favorable media coverage and, through this, the support of organizations and persons important in the eyes of lawmakers.

To what extent protest activities provide an impetus for lawmaking is difficult to say (McCann, 2006). But,

> few major social movements or great changes have occurred without the unrest and disorder which, if one approves is called protest or civil disobedience, and if one disapproves, it is called breaking the law, violence, or worse. Violence in particular is as much a part of enforcing the law as it is of seeking changes in the law.
>
> (Grossman and Grossman, 1971:358)

Most protest activities represent the efforts of social movements to change existing conditions. Over the years, there have been many examples of social movements that have culminated in proposals for or the actual creation of new laws and social policies (Lipschutz, 2006; McCann, 2006; Snow et al., 2004; Tilly and Tarrow, 2007). By definition, a **social movement** is a type of collective behavior whereby a group of individuals organizes to promote certain changes or alterations in certain types of behavior or procedures. The movement usually has specified stated objectives, a hierarchical organizational structure, and a change-oriented ideology. The movement consciously and purposefully articulates the changes it desires through political, educational, or legal channels.

A classic example is the movement to legalize abortion (Staggenborg, 2016). People had for some time regarded illegal abortion as dangerous, but efforts to legalize abortion (and thus end the death or serious injury of women) were unsuccessful. Then, a combination of women's rights and medical groups began to demand the legalization of abortion. Medical spokespersons argued that abortion is rightfully a medical decision to be made by a physician and his or her patient. Feminist activists argued that a woman has an unassailable right over her own body and ought to be able to choose whether to terminate a pregnancy.

These initial efforts succeeded to an extent, as several states during the 1960s began to repeal or greatly liberalize laws against abortion. Within this climate of opinion, the Supreme Court completed the process in 1973 by declaring in *Roe v. Wade* that state laws against abortion unconstitutional except in the case of the last 3 months of pregnancy. This landmark is still the law of the land, although a 1989 Supreme Court decision sharply restricted the availability of public funds for abortion. Still, *Roe v. Wade* remains a classic and routinely cited example of a social movement's impact on the law.

PUBLIC-INTEREST GROUPS

Lawmakers are very aware that private interests are much better represented than public interests in the lawmaking process (Maloney et al., 1994). Hundreds of organizations and

individuals in Washington and in state capitals represent one or more private interests on a full- or part-time basis. They range from extremely well-financed organizations, such as the American Petroleum Institute, involved in worldwide affairs and supported by thousands of engineers, lawyers, and public relations experts, to small, single-issue groups, such as the Sportsman's Paradise Homeowners Association. Some, such as oil companies, regulate refinery output to maintain prices, and they lobby government representatives for favorable tax policies. Others, such as the Shipbuilders Union and the National Maritime Union, win direct and indirect subsidies from Congress in the guise of national defense requirements. Power utilities are legal monopolies whose rate structures are decided by utility commissions that are, in turn, the focus of tremendous pressures to allow expansion and higher rates for the benefit of managers and investors.

By contrast, the number of groups that represent public interests is quite small. Among the most notable among these are Common Cause, the Sierra Club, public interest research groups (PIRGs), and the American Civil Liberties Union (ACLU). These and other groups have been instrumental in the initiation of a series of changes in the law designed to benefit the public.

Common Cause, founded in 1970, has more than 475,000 members and supporters. According to its website (www.commoncause.org), Common Cause works to "create open, honest, and accountable government that serves the public interest; promote equal rights, opportunity, and representation for all; and empower all people to make their voices heard in the political process." Over the decades, it helped win 18-year-olds the right to vote, achieve public financing of election campaigns, and achieve procedures to reduce ethical misconduct in the U.S. House of Representatives.

The Sierra Club was founded in 1892 by conservationist John Muir, after whom the Muir Woods National Monument in northern California is named. The Sierra Club now has 2.4 million members and supporters. Spurred by the belief that the world faces an environmental disaster unless immediate and successful efforts are made to halt the deterioration of the environment, Sierra Club members "are no longer the outdoor recreationists of yesterday, but rather today's environmental politicos, in the vanguard of society's newest social movement," two authors wrote several decades ago (Faich and Gale, 1971:282). During the last several decades, the Sierra Club and other environmental organizations have provided the impetus for a series of environmental protection laws. These laws include the Air Quality Act of 1967, the Clean Air Act of 1970, and the Clean Water Act of 1972, along with the formation of a number of new federal agencies both to monitor compliance with the numerous existing pollution and environmental protection laws and to help establish new policies.

Modeled after Ralph Nader's Center for Study of Responsive Law, but independent of it, are the various PIRGs that are found in 47 states and that include thousands of college students at dozens of campuses that have PIRG chapters. All the nationwide PIRGs fall under the umbrella of U.S. PIRG. At the national, state, and local levels, a small professional staff of lawyers, scientists, and organizers aids the PIRGs, which have achieved some significant legal and other changes. For example, from the late-1990s to late-2000s, the

Missouri Public Interest Research Group (MoPIRG), drafted a new consumer code to protect poor people in St. Louis and distributed a handbook on tenants' rights in Missouri. MoPIRG also participated in a study of the Educational Testing Service and worked with St. Louis unions to secure better enforcement of occupational safety and health laws. PIRGs throughout the nation continue to point out deficiencies in the political and economic systems and to propose legal solutions for their improvement through research, public information, and law reform.

Impetus for law may also come from the various quasi-public specialized interest groups. They may represent certain economic interests, such as consumer groups, organized labor, or the National Welfare Rights organization. Or they may represent certain occupational interests, such as the American Medical Association, which not only exercises considerable control over the practice of medicine in this country, but also actively takes stands, raises money, and lobbies in favor of specific positions on such issues as abortion, euthanasia, drugs, and alcohol. The same can be said for the American Association of University Professors (though not on the same issues). Still other groups represent what may be called moral interests, such as temperance, various types of antidrug concerns, and antiprostitution and antipornography concerns. The important point to remember is that many types of organizations with many different concerns have agitated for changes in the law and provided the needed impetus for it.

For a group to effectively provide an impetus for lawmaking, it will ideally have access to lawmakers. But access to lawmakers depends, at least in part, on the socioeconomic status of the group. Groups with the most financial resources, the most prestigious membership, and the best organization are likely to have the greatest access to legislators. It takes a substantial amount of money to maintain lobbyists in Washington and throughout the state capitals. Moreover, lawmakers, on the local as well as the higher levels, may be more sympathetic to groups that represent interests of the middle and upper classes than to groups representing poor people, welfare recipients, and the like. Generally, groups with "mainstream" views, seeking only small changes in the status quo, may be given more sympathetic hearing than those advocating large-scale radical changes.

THE MASS MEDIA

The mass media function in part as an interest group. Each component of the mass media is a business, and like other businesses, each component has a direct interest in various areas of public policy. For example, the media have aimed to secure certain legislation, such as freedom of information and open meeting laws to facilitate their access to news sources, as well as legislation or court decisions that allow them to protect the confidentiality of news sources. Associations like the National Association of Broadcasters are regularly concerned with the activities of the Federal Communications Commission, which controls their licensing of television and radio stations (Graber, 2009).

The mass media also function as conduits for other parties who aim to shape policy. For example, lobbying groups may purchase media advertising in an effort to align public opinion behind their causes. Through the media, these groups may reach the ear of

legislators and administrators by publicizing problems and proposals about which these lawmakers might not otherwise hear or, in some instances, about which they might not want to hear.

The news media often generate widespread awareness and concern about events and condition. A class example involves the Watergate scandal that brought down the Nixon Administration four decades ago. Without dogged investigations by the media, the scandal probably would have remained buried. Many of the most scandalous aspects of the Watergate scandal involved the improper solicitation and use of campaign funds. Outraged segments of public opinion demanded the prevention of future "Watergates." The legislative response to this outcry was the passage of a bill in April 1974 that would drastically alter the way in which presidential and congressional campaigns are funded. This brief history provides just one example of a situation in which, as a result of investigative reporting, the mass media provided a direct impetus for legislation. Another example involved the Iran–Contra scandal of the 1980s, in which funds from secret U.S. arms sales to Iran were diverted to a Nicaraguan right-wing rebel group called the Contras. The Contras used the money to buy weapons to strengthen their effort to topple Nicaragua's government, which was controlled by the leftist Sandinista Party (*St. Louis Post-Dispatch*, 1987). Congress reacted to this scandal by enacting the Intelligence Authorization Act of 1989, which prohibited any U.S. agency from providing assistance to the Nicaraguan paramilitary operations (Barron and Lederman, 2008).

Because public opinion is an important precursor of change, the mass media can set the stage by making undesirable conditions visible to a sizable segment of the public with unparalleled rapidity. Through the exposure of perceived injustices, the mass media play a crucial role in the formation of public opinion. Ralph Turner and Lewis M. Killian (1987) discuss six processes considered essential in understanding how this role plays out. First, the mass media *authenticate* the factual nature of events, which is decisive in the formation of public opinion. Second, the mass media *validate* opinions, sentiments, and preferences: It is reassuring to hear one's views confirmed by a well-known commentator. A third effect of the mass media is to *legitimize* certain behaviors and viewpoints considered to be taboo. Issues that were discussed only in private can now be expressed publicly, because they have already been discussed on television or elsewhere in the mass media. Fourth, the mass media often *symbolize* the diffuse anxieties, preferences, discontents, and prejudices that individuals experience. By giving an acceptable identification for these perplexing feelings, the mass media often aid their translation into specific opinions and actions. Fifth, the mass media *focus* the preferences, discontents, and sentiments of the public into lines of action. Finally, the mass media *classify into hierarchies* persons, objects, activities, and issues. As a result of the amount of consideration, preferential programming, and placement of items, they indicate relative importance and prestige.

In addition to investigative reporting and the shaping of public opinion, the mass media can pressure or challenge lawmakers into taking action on an issue or into changing their stand on a question. Influential newspapers such as the *New York Times* and the *Washington Post* can make or break legislators by the use of editorial pages. Endorsement by a major newspaper can help a candidate's chances of being elected. Conversely, opposition to a

candidate on the editorial page can harm these chances. Legislators are quite aware of the power of the press, and as a result, take editorial views seriously.

Finally, an indirect way by which the mass media can furnish an impetus for lawmaking is through the provision of a forum for citizens' concerns. For example, the "letters to the editor" page in newspapers is a traditional outlet for publicizing undesirable conditions, while comments to articles on news websites provide the modern equivalent. These letters and comments can accomplish several objectives. First, they can alert the community that an issue is before a lawmaking body; second, they can persuade readers to take a position; third, they can make clear that there are responsible and articulate people in the community who are concerned with the issue; and fourth, they can enlist the active support of others. Similarly, many radio and television stations have local talk shows and public-affairs programs that can be used to air grievances and to seek redress.

SUMMARY

1. Theoretical perspectives on lawmaking include the rationalistic model, the functional view, conflict theory, and the "moral entrepreneur" thesis. None of these theories can account for the creation of all laws, but they at partly explain how laws are made.
2. The three general types of lawmaking processes include legislative, administrative, and judicial processes. Legislative lawmaking basically consists of finding compromises to ideas advanced for legislation by the executive, administrative agencies, interest groups, and various party agencies and spokespersons. Administrative lawmaking consists of rulemaking and adjudication. Judicial lawmaking is an accelerating trend in the United States and occurs by precedent, by interpretation of statutes, and by Constitutional interpretation.
3. Interest groups, public opinion, and social science all exert an influence on the lawmaking process. Interest groups influence judicial lawmaking by initiating test cases, by providing additional information to the courts through amicus curiae briefs, and by communicating indirectly with judges by placing information in legal and general periodicals. Interactions between interest groups and legislative and administrative lawmakers are more overtly political in nature. Social scientists have also contributed to lawmaking either directly in the form of expert testimony or indirectly through the use of research findings.

KEY TERMS

Conflict perspective a theory of lawmaking that cites value dissensus, unequal access to economic goods, and the resulting structural cleavages of a society as the basic determinant of laws

Functionalist view a theory of lawmaking that assumes that laws reflect customs and are passed because they represent the voice of the people

Legislation the deliberate creation of legal precepts by a body of government that gives articulate expression to such legal precepts in a formalized legal document

Moral entrepreneur theory a theory of lawmaking that attributes the precipitation of law and other key events to the efforts of enterprising individuals or groups

Rationalistic model a theory of lawmaking that proposes that laws, particularly criminal laws are created as rational means of protecting the members of society from social harm

Social movement a type of collective behavior whereby a group of individuals organizes to promote certain changes or alterations in certain types of behavior or procedures

Wage garnishment a legal process that enables a creditor upon a debtor's default to seize the debtor's wages from the employer before the debtor is paid.

SUGGESTED READINGS

Debbie Cenziper and Jim Obergefell, *Love Wins: The Lovers and Lawyers Who Fought the Landmark Case for Marriage Equality*. New York: William Morrow, 2016. A fine, moving account of the key players in the 2015 U.S. Supreme Court decision that made same-sex marriage legal throughout the United States.

Richard A. Harris and Sidney M. Milkis, *The Politics of Regulatory Change: A Tale of Two Agencies*. New York: Oxford University Press, 1989. A fascinating and timeless account of how regulatory policies are made and unmade.

Kamala Kempadoo and Jo Doezema, *Global Sex Workers: Rights, Resistance, and Redefinition*. New York: Routledge, 1998. An early account that includes discussion of the impact of legal regulation of prostitutes and other sex workers.

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5

CHAPTER 5
LAW AND SOCIAL CONTROL

CHAPTER OUTLINE

LEARNING OBJECTIVES

- Explain the difference between informal social control and formal social control
- Summarize the arguments for and against the death penalty
- List the problems associated with the legal war against certain drugs
- Explain why the legal control of white-collar crime is ineffective
- Describe why the threat of publicity is a form of administrative social control

Since the beginning of the discipline of sociology in the nineteenth century, a great deal has been written on various facets of social control, and the topic continues to occupy a central position in the sociological and law and society literatures. (Chriss, 2013; Moore and Recker, 2016). **Social control** refers to the methods used by members of a society to maintain order and to promote predictability of behavior. There are many different forms of social control, and law is only one of them. The emphasis in this chapter is on social control through laws that are activated when other forms of control mechanisms are ineffective or unavailable. This chapter examines the processes of informal and formal

social control, the use of criminal sanctions, the effectiveness of the death penalty, and civil commitment to regulate behavior. Part of this chapter is concerned with crimes without victims (drug addiction, prostitution, and gambling), white-collar crime, and the control of dissent. The chapter concludes with a consideration of administrative law as an instrument of control in the context of licensing, inspection, and the threat of publicity.

There are two basic processes of social control—the internalization of group norms and control through external pressures (Clinard and Meier, 2016). In the first instance, social control is the consequence of **socialization**, the process of learning the rules of behavior for a given social group. Individuals develop self-control by being taught early what is appropriate, expected, or desirable in specific situations. People acquire a motivation to conform to the norms, regardless of external pressures. People conform to norms because they have been socialized since childhood to believe that they should conform, regardless of and independent of any anticipated reactions of other persons.

Mechanisms of social control through external pressures include both negative and positive sanctions. **Negative sanctions** are penalties imposed on those who violate norms. **Positive sanctions**, such as a promotion, a bonus, and encouragement, are intended to reward conformity. These positive and negative sanctions are forms of social control. Some types of social control are formal or official, and others are informal or unofficial in character. Typical reactions to deviance and rule breaking may generate both informal and formal sanctions. Although there is a considerable amount of overlap between informal and formal mechanisms of social control, we will discuss them separately for analytical purposes.

INFORMAL SOCIAL CONTROL

Methods of informal social control are best exemplified by **folkways** (established norms of common practices such as those that specify modes of dress, etiquette, and language use) and **mores** (societal norms associated with intense feelings of right or wrong and definite rules of conduct that are simply not to be violated—for example, incest). These informal controls consist of "techniques whereby individuals who know each other on a personal basis accord praise to those who comply with their expectations and show displeasure to those who do not" (Shibutani, 1961:426). These techniques may be observed in expressions of opinion and specific behaviors, such as ridicule, gossip, praise, reprimands, criticisms, ostracism, and verbal rationalizations. Gossip, or the fear of gossip, is one of the more effective devices members of a society can use to have individuals conform to norms. Unlike formal social controls, these informal controls are not exercised through official group mechanisms, and there are no specially designated persons in charge of enforcement.

Informal mechanisms of social control tend to be more effective in groups and societies where relations are face-to-face and intimate and where the division of labor is relatively simple. For example, Émile Durkheim argued that in simple societies, such as tribal villages or small towns, legal norms more closely accord with social norms than in larger and more complex societies. Moral disapproval of deviance is nearly unanimous in such communities (Shilling and Mellor, 1998). In simple societies, laws are often

unwritten, necessitating the direct teaching of social norms to children. Socialization in such simple societies does not present children with contradictory norms that create confusion or inner conflict. Intense face-to-face interaction in such societies produces a moral consensus that is well known to all members; it also brings deviant acts to everyone's attention quickly.

There is substantial evidence in the sociological literature to support the contention that informal social control is stronger in smaller, traditional, more homogeneous communities than in larger, more modern, heterogeneous communities (Hanawalt, 1998). In a classic study of deviance in the seventeenth-century Massachusetts Bay Colony, Kai T. Erikson (1966:169–170) found that the small size and the cultural homogeneity of the community helped control behavior, because everyone in the community pressured potential deviants to conform to dominant norms, neighbors watched out for acts of deviance, and these acts met with moral censure.

Informal social controls in modern societies operate more effectively in smaller communities where people know each other and regularly interact. In such communities, law enforcement agents can probably expect better cooperation. As the President's Commission on Law Enforcement and Administration of Justice (1967a:6) pointed out in the male-oriented nouns and pronouns commonly used at the time of its writing:

> A man who lives in the country or in a small town is likely to be conspicuous, under surveillance by his community so to speak, and therefore under its control. A city man is often almost invisible, socially isolated from his neighborhood and therefore incapable of being controlled by it. He has more opportunities for crime.

An example of this dynamic is found in Sarah L. Boggs's (1971) early study of formal and informal social controls in central cities, suburbs, and small towns in Missouri. Boggs found that residents of large cities were more apt than suburban or small-town residents to feel that crime was likely to occur in their community. City residents were also more likely to think that their neighbors would not report a burglary that they observed. Most people in all areas felt that their own neighborhood was safe, but fewer felt that way in the cities. When they were asked *what* it was that made their neighborhood safe, 83% of those in rural areas and small towns said that it was informal controls; 70% in suburbs and 68% of those in the cities attributed safety to informal controls. When they said that their neighborhood was kept safe by informal social controls, the people meant that they felt secure because of the character of the community and its residents—"good, decent, law-abiding, middle-class citizens" (Boggs, 1971:323). Safety in a neighborhood was also attributed to the social network in the community that might lead to bystander intervention in a crime. Respondents who lived in suburbs and large cities were more likely than those who lived in rural areas and small towns to attribute safety to such formal control agents as the police (Boggs, 1971:324). Boggs concluded that people in cities were most inclined to expect crime but least likely to feel that they could rely on their neighbors rather than the police to protect their community. As a result, they were more likely to take precautions, such as purchasing weapons or a watchdog, than their counterparts who lived in suburbs, small towns, and rural areas.

Similar conclusions about the role of informal social-control mechanisms come from studies of developing nations. For example, in comparing a low crime-rate community and a high-crime-rate community in Kampala, Uganda, Marshall B. Clinard and Daniel J. Abbott (1973) found that the community with less crime showed greater social solidarity, more social interaction among neighbors, more participation in local organizations, less geographical mobility, and more stability in family relationships. There was also greater cultural homogeneity and more emphasis on tribal and kinship ties in the low-crime community. The stronger primary group ties among residents of the low-crime community made it more difficult for strangers in the community to escape public notice. This and other studies (e.g. Garofalo and McLeod, 1989) show that informal social control will be most effective in a community (thus making legal or formal controls less necessary) if the community features intense social interaction on an intimate face-to-face basis, a normative consensus, and surveillance of community members' behavior.

A troubling example of informal social control comes from China and involves some 1 million neighborhood committees composed of more than 6 million older citizens, virtually all of them women. The primary task of these committees to seek out and resolve squabbles among neighbors. They report everything they see to higher-ups, investigate disturbances, routinely stop strangers, and pry into couples' plans for having children. This technique of community-based surveillance is modeled after the one introduced in the former Soviet Union in the 1920s, which was based on the principle of denouncement. People were encouraged and rewarded to report on friends and relatives who were suspected of engaging in activities contrary to the interests of the government. Various versions of this technique were subsequently used in Nazi Germany and other totalitarian regimes.

FORMAL SOCIAL CONTROL

Although there is no clear-cut dividing line, formal social control usually characterizes more complex societies with a greater division of labor, heterogeneity of population, and subgroups with competing values and different sets of mores and ideologies. Formal controls arise when informal controls alone are insufficient to maintain conformity to certain norms. Formal controls involve the explicit establishment of procedures (laws, regulations, codes, decrees) and take two general forms: (1) social controls instituted by the state and authorized to use force and (2) social controls imposed by agencies other than the state, such as business and labor groups, religious organizations, and colleges and universities.

As these two general forms suggest, formal social controls originate in and are implemented and enforced by society's various social institutions. Many of these are nonpolitical institutions, which may resort to a variety of penalties and rewards to ensure compliance (Vaughan, 1998). For example, an organization may fire an employee; a church may withhold religious services at a wedding or a burial, or even excommunicate a member; and a league owner may fine or suspend a professional athlete for infractions of rules. These same organizations may also use formal rewards to ensure conformity. An

organization may promote someone for excellent job performance or provide a bonus to someone who makes an outstanding contribution. Houses of worship may commend a member for exemplary service, and a sports team may provide a well-paid, long-term contract to an athlete who shows much promise.

Turning to the political institution of the state, its primary form of social control involves the law. Social control through the law seldom involves the use of positive sanctions or rewards. A person who obeys the law and meets its requirements seldom receives rewards or commendations. Instead, social control through the law ordinarily involves the use or threat of punishment to regulate the behavior of citizens. The next two sections focus on law as a means of formal social control.

CRIMINAL SANCTIONS

The social control of criminal behavior exemplifies the most highly structured formal system (the criminal justice system) used by society. In the United States, the criminal justice system affects millions of people. The number of Americans under correctional supervision (in prison or jail or under probation or parole) exceeds 6.7 million (2014 data) and includes more than 2.2 million inmates in federal and state prisons and local jails (Kaeble et al., 2016). The 6.7 million figure under correctional supervision represents almost 3% of adult Americans. The U.S. criminal justice system costs more than $265 billion annually, and the United States has a much higher incarceration rate than any other democracy.

The size of the U.S. correctional population reflects the large number of laws that prohibit many behaviors and the "get tough" approach to crime the United States has followed during the past several decades (Enns, 2016). The laws enacted by legislators and modified by court decisions define criminal and delinquent behavior and specify the sanctions imposed for violations. Over time, there has been an increasing reliance on law to regulate the activities and, thus, the lives of people. As the law has proliferated to incorporate more types of behavior, many changes in penalties for certain crimes have also occurred. These increases inevitably result in more social control and in further changes in the control methods. As more behaviors are defined as criminal, more acts become the interest of the police, the courts, and the prison system.

The term **legalization** is used to describe the process by which norms are moved from the social to the legal level. Not all social norms become laws; in fact, only certain norms are translated into legal norms. Why is it that the violation of only certain norms results in violations of the criminal code? In an influential formulation, Austin Turk (1972) wrote that several social forces are involved in the creation of legal norms: (1) moral indignation, (2) a high value on order, (3) response to threat, and (4) political tactics.

As discussed in Chapter 4, laws may be created by the actions of moral entrepreneurs who become outraged over some practice they regard as reprehensible. Others prefer order and insist on provisions to regulate life and to make society as orderly as possible. They promulgate laws to ensure order and uniformity, as in the case of traffic regulation. Some

people react to real or imaginary threats and advocate legal-control measures. For instance, some people may assume that the availability of pornographic material not only is morally wrong but also directly contributes to the increase of sex crimes. The final source of legalization of norms is political, where criminal laws are created in the interest of powerful groups in society. This source is identified with the conflict perspective that previous chapters have discussed.

Legalization of social norms also entails the incorporation of specific punishments for specific kinds of criminal law violators. Rusche and Kirchheimer (2003:5) note, "Every system of production tends to discover punishments which correspond to its productive relationships." Michel Foucault (1977) tells us that, before the industrial revolution, life was considered cheap and individuals had neither the utility nor the commercial value that is conferred on them in an industrial economy. Under those circumstances, punishment was severe and often unrelated to the nature of the crime (for example, death for stealing a chicken). When more and more factories appeared, the value of individual lives, even criminal ones, began to be stressed. Beginning in the last years of the eighteenth century and the early years of the nineteenth century, efforts were made to connect the nature of a given punishment to the nature of the crime.

Fitting the punishment to the crime is a difficult and at times controversial and politically sensitive task (Brooks, 2010; Tonry, 2010). The definition of crime and the penalty for it and the components of the culture of control vary over time and from one society to another (Cusac, 2009; Garland, 2001). For example, in rural areas in the People's Republic of China, it is not uncommon to burn down the houses or to confiscate the property of those who violate birth control laws. In the words of a villager, "If you have more than one child, they will come and rip the engine out of your boat or destroy your house on the land" (Tyler, 1995:6). By contrast, in a democracy, the power to define crime and punishment theoretically rests with the citizenry and is largely delegated to elected representatives. Legislative statutes are often broad and subject to various interpretations. As Chapter 3 demonstrated, legislative enactments allow judges, prosecutors, and juries considerable flexibility and discretion in assessing guilt and imposing punishment.

But what does it mean to punish an individual who violates a criminal law? Edwin H. Sutherland and Donald R. Cressey (1974:298) provide the following definition of the ingredients of punishment as a form of social control:

> Two essential ideas are contained in the concept of punishment as an instrument of public justice. (a) It is inflicted by the group in its corporate capacity upon one who is regarded as a member of the same group... . (b) Punishment involves pain or suffering produced by design and justified by some value that the suffering is assumed to have.

Goals of Punishment Punishment of lawbreakers has several purposes (Neubauer and Fradella, 2017). A primary goal is to achieve the goal of *retribution* or *social retaliation* against the offender. This means punishment of the offender for the crime that has been committed and, to an extent, punishment that (in principle) matches the impact of the

crime upon its victim. The state is expected to be the agent of vengeance on behalf of the victim.

During the past few decades, some municipalities and courts have instituted judicially created public humiliations as alternatives to incarceration and to satisfy a "retributive impulse" (Karp, 1998:277). These efforts are called "shaming penalties" and in that regard remind us of the use of the stocks by seventeenth-century Puritans. For example, the names of men who solicit prostitutes have sometimes been identified in local papers or radio shows; in the late 1990s, Kansas City, Missouri, started "John TV," in which the names, mugshots, birth dates, and hometowns of men arrested for trying to buy sex, and women arrested trying to sell it, were broadcast on the municipal cable channel. In other locations, drunk drivers carry signs on their cars announcing their problem and urging other drivers to report their erratic driving to the police; convicted shoplifters must take out advertisements in local papers running their photographs and stating their crimes; and people convicted of child molestation must put signs in their yards announcing their transgression (Belluck, 1998; *Economist*, 2006; Hoffman, 1997).

A second goal of legal punishment is *incapacitation* via incarceration, which prevents offenders from misbehaving during the time they are being punished. Furthermore, punishment is supposed to have a *deterrent* effect, both on the lawbreaker and on potential deviants. *Individual* or *specific deterrence* may be achieved by intimidation of the person, frightening her or him from committing further deviance, or it may be effected through reformation, in that the lawbreaker changes her or his deviant behavior. *General deterrence* results from the warning offered to potential criminals by the example of punishment directed at a specific wrongdoer. It aims to discourage others from criminal behavior by making an example of the offender being punished.

The idea of deterrence is predicated on the assumption that individuals weigh the costs and rewards associated with alternative actions and select behaviors that maximize gains and minimize cost. Thus, crime takes place when law breaking is perceived as either more profitable (rewarding) or less costly (painful) than conventional activities. The effectiveness of deterrence reflects the operation of three variables: (1) the severity of the punishment for an offense, (2) the certainty that it would be applied, and (3) the speed with which it would be applied (Friedland, 1989). Research generally supports the view that certainty of punishment is more important than severity for achieving deterrence, but there is little research data as yet on the swiftness of punishment (Nagin et al., 2015).

However, sociologists have long recognized that punishment may deter only some crimes and some offenders. William J. Chambliss (1975) made a very useful distinction between crimes that are instrumental acts and those that are expressive. *Instrumental* offenses include burglary, tax evasion, motor vehicle theft, identity theft, and other illegal activities directed toward some material end. Examples of *expressive* acts are murder, assault, and sex offenses, where the behavior is an end in itself. Chambliss hypothesizes that the deterrent impact of severe and certain punishment may be greater on instrumental crimes because they generally involve some planning and weighing of risks. Expressive crimes, by contrast,

are often impulsive and emotional acts. Perpetrators of such crimes are unlikely to be concerned with the future consequences of their actions.

Chambliss further contended that an important distinction can be made between individuals who have a relatively high commitment to crime as a way of life and those with a relatively low commitment. The former would include individuals who engage in crime on a professional or regular basis. They often receive group support for their activities, and crime for them is an important aspect of their way of life (such as prostitutes or participants in organized crime). For them, the likelihood of punishment is a constant feature of their life, something they have learned to live with, and the threat of punishment may be offset by the supportive role played by their peers. On the other hand, a tax evader, an embezzler, or an occasional shoplifter does not view this behavior as criminal and receives little, if any, group support for these acts. Fear of punishment may well be a deterrent for such low-commitment persons, particularly if they have already experienced punishment (for example, a tax evader who has been audited and then subjected to legal sanctions).

On the basis of these two types of distinctions—instrumental and expressive acts, and high- and low-commitment offenders—Chambliss contends that the greatest deterrent effect of punishment will be in situations that involve low-commitment individuals who engage in instrumental crimes. Deterrence is least likely in cases involving high-commitment persons who engage in expressive crimes. The role of deterrence remains questionable in situations that involve low-commitment individuals who commit expressive crimes (such as murder), which can be illustrated by the arguments used for or against the death penalty.

DISCORD OVER THE DEATH PENALTY

The death penalty is the most severe form of punishment and also probably the most controversial and emotional issue in the study of legal punishment of deterrence. Historically, property offenses rather than violent crimes accounted for the majority of executions (Ferguson, 2010). In the eighteenth century, England allowed the death penalty for more than 200 offenses, including poaching and smuggling. Executions were performed in public and were a popular spectacle. The standard methods of execution were hanging, beheading, disemboweling, and quartering. Although the colonies inherited capital punishment from England, by the middle of the nineteenth century, the United States imposed the death sentence primarily for murder and, to a lesser extent, rape.

In the 1972 decision *Furman v. Georgia*, the U.S. Supreme Court declared capital punishment unconstitutional as then practiced. The Court held that the discretionary application of the death penalty to only a small fraction of those eligible to be executed was capricious and arbitrary and hence unconstitutional. However, a number of states responded to the Court ruling by making the death penalty mandatory for certain offenses, such as multiple killings; killing in connection with a robbery, rape, kidnapping, or hostage situation; murder for hire; killing a police officer or prison guard; and treason. Some of these revised statutes were held to be constitutional by the Supreme Court in 1976 when it voted 7–2 in *Gregg v. Georgia* to reinstate the death penalty.

Executions resumed during the following years and reached a peak of 98 executions in 1999. They have declined since then, with only 39 people executed in 2013. The number of inmates on death row has also declined: At year's end 2013, 2,979 U.S. inmates were on death row, compared to a peak of 3,601 inmates in 2000 (Snell, 2014).

There is a mounting national debate over whether lethal injection is a cruel and unusual punishment because of recent medical information showing a risk of great pain if poorly trained personnel mishandle the anesthetic that is supposed to render inmates unconscious (Henderson, 2006). At the same time, medical groups warn physicians on aiding executions, and a mandate from the American Board of Anesthesiology that "we are healers, not executioners" could result in the loss of certification of those who participate in lethal injection (Stein, 2010). In another controversy, research shows that other things being equal, killers of white people are more likely to receive death sentences than killers of African Americans (Bohm, 2015).

Arguments for the Death Penalty The arguments for the death penalty are mostly anecdotal but, at times, can become visceral (Peppers and Anderson, 2009). Proponents of the death penalty contend that it:

- is a deterrent to others and that it protects society;
- constitutes retribution for society and the victim's family and serves to protect police officers and prison guards; and
- removes the possibility that the offenders will repeat the act.

Regarding deterrence, little empirical evidence supports the use of the death penalty as a deterrent. The early work of Isaac Ehrlich did find a deterrent effect. Using econometric modeling techniques to construct a "supply-and-demand" theory of murder, Ehrlich (1975) argued that the death penalty prevents more murders than do prison sentences. He speculated that because of the 3,411 executions carried out from 1933 to 1967, enough murderers were discouraged so that some 27,000 victims' lives were saved.

As might be expected, his conclusions drew immediate criticism, with an assortment of concerns raised. Among others critiques, Ehrlich did not compare the effectiveness of capital punishment with that of life imprisonment. When data from 1965 to 1969 are omitted, the relationship between murder rates and executions was not statistically significant (Loh, 1984). While considering the increases in homicides in the 1960s, he failed to account for the possible influences of rising racial tensions, the Vietnam War, and increased ownership of handguns. Moreover, for deterrence to be effective, murderers need to take into consideration the probable costs of their action. Emotions and passions at play can make such a cost–benefit analysis unlikely. Recalling Chambliss's work, most murderers are low-commitment individuals, often under the influence of drugs or alcohol, who are unlikely to assess rationally the consequences of their action. For them, the death penalty remains a highly questionable deterrent.

Arguments against the Death Penalty Aside from ethical and moral considerations, there are many arguments against the death penalty (Bohm, 2015). A first argument is, as the

critiques of Ehrlich's work asserted, that the death penalty does not deter homicide. For serial killers, capital punishment is not a deterrent (Kelleher and Kelleher, 1998). Moreover, states with capital punishment do not tend to have lower homicide rates than states without capital punishment. A study of different types of police killings for 1976–1989 involving 1,204 officers found no evidence that police are afforded an added measure of protection against death by capital punishment (Bailey and Peterson, 1994). Studies in Canada, England, and other countries also find nothing to suggest that the death penalty is a more effective deterrent than long prison sentences. Although a cause-and effect relationship cannot be inferred between capital punishment and murder rates, Lawrence M. Friedman (1998:214) speculated that capital punishment might work efficiently in some societies "which use it quickly, mercilessly, and frequently. It cannot work well in the United States, where it is bound to be rare, slow, and controversial."

Opponents of the death penalty argue that prison terms without parole would deter as many potential murderers as capital punishment, even if this deterrent effect might still be very small because most murders are emotional and spontaneous. Trials of capital cases are also more costly and time-consuming than trials for other cases, and maintenance costs for inmates in death row are higher than for inmates in the rest of the prison. An exhaustive system of judicial review is required in capital cases. Today, no death-row inmate will be executed until the inmate's case has been brought to the attention of the state's highest court, a federal district court of appeals, and the U.S. Supreme Court. All these conditions mean that a capital case actually costs much more than a non-capital murder case over both the short term and long term. On average around the United States, a capital case costs between $1 million and $2 million more than a non-capital case would have (Dieter, 2013).

There is also the possibility that an innocent person will be executed. One study showed that some 139 innocent people were sentenced to death between 1900 and 1985 in the United States. Of those, 29 were actually executed (Haines, 1992). Other research shows that 1 innocent person has been convicted for every 20 executions carried out since the turn of the century (*St. Louis Post-Dispatch*, 1985:6B). In their 1992 book, *In Spite of Innocence*, the authors (Radelet et al., 1992) reviewed more than 400 cases in which innocent people were convicted of capital crimes in the United States. Since the 1970s, more than 150 death row inmates have been released from prison after evidence emerged that cast serious doubt on their guilt (Death Penalty Information Center, 2016). Reasons for their wrongful convictions include mistaken eyewitness testimony, the false testimony of informants and "incentivized witnesses," incompetent lawyers, defective or fraudulent scientific evidence, prosecutorial and police misconduct, and false confessions.

The death penalty is also more likely to affect the poor people of color more than affluent whites (Bohm, 2015). This has to do in part with the quality of legal help available to homicide defendants. Those with court-appointed lawyers are more likely to be sentenced to death than those represented by private attorneys. Court-appointed lawyers in most states are not required to stay on a homicide case after a conviction. Issues for appeal are likely to be raised by different court-appointed attorneys, if at all, for the poor. In a study carried out in Texas in 2000, it was found that people represented by court-appointed

lawyers were 28% more likely to be convicted than those who hired their own lawyers. If convicted, they were 44% more likely to be sentenced to death (*New York Times*, 2001a).

Beyond all these concerns, there is even some evidence that capital punishment actually encourages homicide in certain circumstances. The threat of death penalty raises the stakes of getting caught, and anyone who is subject to death penalty has little to lose by killing again and again, which may be the case with serial killers (Holmes and Holmes, 2010). Criminals who already face death for a previous crime are more likely to kill in order to avoid being captured or to silence possible witnesses. For these reasons, the death penalty has actually been called "the enemy of law enforcement" (Morgenthau, 1995).

CIVIL COMMITMENT

The formal control of deviant behavior is not limited to criminal sanctions. There is another form of social control in the form of a civil commitment to a mental institution (Forst, 1978). Statutes governing civil commitment exist in every state in America, although with some variations in the criteria for involuntary hospitalization (Boyd-Caine, 2009).

Civil commitment is a noncriminal process that commits disabled or otherwise dependent individuals, without their consent, to an institution for care, treatment, or custody, rather than for punishment. It is based on two legal principles: (1) the right and responsibility of the state to assume guardianship over individuals suffering from some disability and (2) police power within constitutional limitations to take the necessary steps to protect society. Procedurally, civil commitment is different from criminal commitment. In civil commitment, certain procedural safeguards are not available, such as a right to a trial by jury, which involves confronting witnesses against the defendant, and to avoid testifying against oneself. Moreover, the formal moral condemnation of the community is not an issue in civil commitment. Forst (1978:3) notes,

> This situation may arise if the behavior is intentional but not morally blameworthy, as in a civil suit for damages, or if the behavior would have been morally blameworthy, but because of mental impairment, criminal culpability is either mitigated or negated. In the latter instance, the civil issue is not the person's behavior but his status.

In this view, a heroin addict, a mental defective, or a sex offender is not held morally responsible for these actions. The general consensus is that the individual deserves treatment, not punishment, even though the treatment may entail the deprivation of the individual's liberty in a mental institution without due process.

In the United States, about 1 in 12 people will spend some part of his or her life in a mental institution. On any given day of the year, nearly half a million Americans are in confinement in mental wards; in fact, nearly half of all hospital beds in the United States are occupied by people suffering from mental disorders. But civil commitment for mental illness and incompetence is only one of the many types of civil commitments used to control deviant behavior (Levine, 2009). Other types are the incarceration of juveniles in

training schools or detention homes; the commitment of chronic alcoholics and alcohol-related offenders; the commitment of drug addicts; and the institutionalization, through the civil law, of sex offenders and those who are considered "dangerous" to either themselves or the community as initially perceived by family members or the authorities (Dallaire et al., 2000). Martin L. Forst (1978:7) contends that the various types of civil commitments "constitute one of the primary forms of social control through law in American society." He further notes that this form of social control is more extensive than the social control exercised by the traditional criminal commitment.

The use of civil commitment as a form of social control is not limited to adults (Baughman, 2015). Difficult, disruptive, disobedient adolescents—the ones who may have been sent to military schools or juvenile detention centers—are sometimes placed in mental hospitals. Some of these adolescents are seriously disturbed, but others are simply rebellious teenagers fighting with their parents over anything—from the music they enjoy to the romantic partners they choose. Regardless of the reason, they are often held behind locked doors, virtually without civil rights. In the name of therapy, they are subjected to a strict regimen of rewards and punishments. These teenagers are often diagnosed with common behavioral problems, such as "conduct disorder," "oppositional defiant disorder," and the popular "adolescent adjustment reaction." These terms sound impressive, but they cover a variety of teenage activities: running away, aggression, persistent opposition to parental values and rules, and engaging in "excessive" sexual activity (usually as defined by the parent). Not surprisingly, many adolescents are committed to mental hospitals not because they are troubled but because they are troubling to someone else (Darnton, 1989).

In the legal arena, the causes of criminal behavior and the responsibility for such behavior lie within the individual. But in a legal system that posits individual causation, complications arise in attempts to control individuals who are threatening yet have broken no law (Peay, 2005). One way to control such individuals is to define their conduct as a mental disorder. Greenaway and Brickey (1978:139) state, "This definition has the combined effect of imputing irrationality to the behavior and providing for the control of the individual through ostensibly benign, but coercive psychiatric intervention." Thus, it is not surprising to find that many state mental hospitals include people who have committed trivial misdemeanors or who have not been convicted of any crime at all, but have been sent there for "observation." The police and courts may refer individuals whose behavior appears odd for psychiatric examination, and if they are found to be "insane," they can be confined in a mental hospital against their will for long periods, in some cases for life (Levine, 2009).

There are diverse explanations for the increased use of civil commitment as a mechanism of social control. As Forst (1978:9–10) once observed,

> There are those (the positive criminologists) who view the increase as a beneficial shift from the traditional emphasis on punishing people to rehabilitating them. Another explanation for the increased use of civil commitments (the divestment of the criminal law) is that the civil commitment serves as a substitute for, or a supplement to, the criminal law in order to socially control undesirable forms of behavior.

The use of civil commitment is not without criticisms (Baughman, 2015). Some critics advocate the abolition of all civil commitment laws because the constitutional rights of the individuals subjected to them are violated, despite the number of laws designed to protect the rights of the mentally ill. Others oppose it because it allows people to avoid the punishment they deserve. Although the issue remains controversial, the use of civil commitment as a form of social control will certainly continue.

CRIMES WITHOUT VICTIMS

The United States invests enormous resources to control **victimless crimes**, in which harm occurs primarily to the participating individuals themselves. In 2015, there were about 10.8 million arrests recorded in the latest Federal Bureau of Investigation (FBI) Uniform Crime Report. Many of these arrests involved crimes without (unwilling) victims. For example, about 42,000 arrests were made for prostitution; 670,000 for drunkenness and violation of liquor laws (not including driving under the influence of alcohol); 1.5 million for drug abuse violations; and 4,800 for gambling (Federal Bureau of Investigation, 2016).

The criminalization of some acts that have no unwilling victims reflects the view that individuals should be deterred from engaging in acts deemed morally repugnant and/or socially or individually harmful. Many of those arrested for victimless crimes are never prosecuted: Arrest and overnight lockup are used simply as a means of exerting social control over prostitutes and intoxicated persons without going through the bothersome lengths of creating a convincing prosecution case. For example, habitual drunks may build up formidable "criminal" records by being repeatedly arrested, even though they may never have harmed anyone except, possibly, themselves. One study found that two-thirds of repeatedly arrested alcoholics had been charged only for public intoxication, vagrancy, and other related offenses (Landsman, 1973).

There is an extensive victimless crime literature dealing with drug addiction, prostitution, gambling, abortion, homosexuality, suicide, alcoholism, certain sexual behaviors, pornography, and such lewd "offenses" as women going topless on public beaches or breast-feeding in public. To use a legal term, these are crimes *mala prohibita* (that is, behaviors made criminal by statute but without consensus as to whether these acts are criminal in and of themselves). They are acts against public interest or morality and appear in criminal codes as crimes against public decency, order, or justice. Crimes like rape or murder are *mala in se* (that is, evils in themselves with public agreement on the dangers they pose).

Victimless crimes are distinguished from other crimes by three additional factors: (1) the element of consensual transaction or exchange, (2) the lack of apparent direct harm to others, and (3) the difficulty in enforcing the laws against them as a result of low visibility and the absence of complainants. In other words, victimless crimes are plaintiffless crimes—that is, those involved are willing participants who, as a rule, do not complain to the police that a crime has been committed. Although many people do not consider these activities "criminal," the police and the courts continue to apply laws against such groups

as drug users, prostitutes, gamblers, homosexuals, and pornography distributors—laws that large sections of the community do not recognize as legitimate and simply refuse to obey. This situation is further compounded (and muddied) by technological breakthroughs in the computer and Internet age. Is there a line between "fake" pornography, where digital simulations are used to create images, and "real" pornography with "live" subjects? The two are virtually indistinguishable from each other, and the criminalization of foul figments of cyber technology that does not involve human subjects raises some interesting First Amendment questions (Liptak, 2001).

The formal controls exerted on victimless crimes are expensive and generally ineffective. Still, they serve certain functions. Robert M. Rich (1978:28) noted that persons who are labeled as criminals serve as an example to community members. When the laws are enforced against lower-class and minority-group members, it allows the ones in power (middle- and upper-class people) to feel that the law is serving a useful purpose because it preserves and reinforces the myth that low-status individuals account for most of the deviance in society. Finally, the control of victimless crimes, in the forms of arrests and convictions, strengthens the notion in the community that the police and the criminal justice system are doing a good job in protecting community moral standards. Let us now consider law as a means of social control for certain victimless crimes such as drug use, prostitution, and gambling.

DRUG USE

Although there have been several major periods of antidrug sentiments, crusades, and drug scares, the nonmedical use of drugs like opium and heroin became illegal only about a century ago (Goode, 2015). Before 1914, there had been only sporadic attempts to regulate the use of drugs. Although some states attempted to control drug use by passing laws to provide for civil commitment to institutions for drug addicts and outlawing the use of particular narcotic substances, it was not until the passage by Congress of the Harrison Narcotics Tax Act in 1914 that any systematic attempt was made to regulate drug use in the United States and other substances that people may put in their bodies for which they were not legally intended (Smith and Deazley, 2010; Szasz, 2003).

This legislation was the first attempt to deal comprehensively with the narcotics and dangerous drugs known at that time. It was essentially a tax measure or, more aptly, a series of prohibitive taxes. Drug use was restricted to medical purposes and research by licensed individuals and facilities. But in the act's interpretation, in court rulings in specific cases, and in supplementary laws, criminal sanctions were provided for the unauthorized possession, sale, or transfer of narcotics. Marijuana became illegal throughout the nation beginning in the 1930s, and the legal war against drugs intensified during the 1980s and 1990s when cocaine and crack became popular. This legal war involved increased and mandatory prison sentences for the sale and possession of many controlled substances, such as heroin, cocaine, and crack (Inciardi and McElrath, 2015). With increasing frequency, drug testing has become the norm in many workplaces, and potential employees are required to undergo drug testing (Tunnell, 2004). The nation's prisons, which in 1980 housed fewer than 30,000 drug offenders, now harbor about 300,000 drug offenders

(Carson, 2015); in 2015, more than 1.2 million people were arrested for drug offenses, including more than 570,000 for possessing marijuana (Smith, 2016).

Despite these numbers, almost half (49%) of Americans 12 and older (equal to 130 million persons) have ever used an illicit drug, and Americans spend more than $100 billion every year on illegal drugs (Office of National Drug Control Policy, 2014; Substance Abuse and Mental Health Services Administration, 2015). More than 116 million Americans have ever used marijuana, and an estimated 24 million Americans are regular users of marijuana. Some 40 million Americans say they have used cocaine or crack, and almost 3 million report being current users.

The illegal drug industry is extremely profitable, and this profitability makes it hard to stop this industry. At every level, the industry's pricing reflects by the level of risk of enforcement: the risk of seizure and jail, and the uncertainty that arises because traffickers cannot rely on the law to enforce drug transaction agreements. The vast gap between the cost of production and the price paid in the end by drug users plays a key role in the failure of drug policies. The producers (usually farmers in low-income nations) see a very modest return; the real profit is embedded mainly in the distribution chain, which is very hard to control effectively (Marez, 2004).

At all levels of government, the United States spends more than $50 billion annually on criminal justice expenses arising from the legal war against drugs (Drug Policy Alliance, 2015); it spends much less on drug treatment, rehabilitation, education, and prevention programs. With more than 2 million Americans now behind bars and many of them occasional or habitual users of powerful drugs like cocaine and heroin, rehabilitation programs offer a potent weapon for decreasing addiction, crime, and the spiraling cost of incarceration. Yet only a fraction of inmates—about 2%—undergo serious drug rehabilitation. It has been shown that every $1 invested in drug treatment saves $7 in future costs of crime and incarceration (Treaster, 1995). In this regard, Michael Massing (1998) notes that that the hard-core users of heroin and cocaine are disproportionately poor, unemployed, and members of minority groups. Although hard-core users are only one-fifth of total users, they consume three-fourths of the cocaine and heroin used in America. If local authorities could provide appropriate treatment to anyone in this population who wanted it, Massing maintains, the drug problem would diminish, as would the crime and illness associated with it.

Marijuana In the United States as well as in other countries, marijuana has reached a kind of a low-profile status, and it is no longer a symbol of rebellion or creativity (Sandberg and Pedersen, 2009). Unlike most other illegal drugs, 60% of the marijuana consumed in the United States is produced domestically. Marijuana is the largest cash crop in the United States, more valuable than corn and wheat combined. With marijuana now legal in several states, legal marijuana has been called the "fastest-growing industry" in the nation that may grow to almost $11 billion annually by 2019 (Ferner, 2015).

As noted earlier, more than 570,000 persons were arrested in 2015 on marijuana charges. This number far exceeds the total number of arrestees, almost 506,000, for all violent

crimes combined, including murder, rape, robbery, and aggravated assault. Convicted marijuana offenders are denied federal financial student aid, welfare, and food stamps and may be removed from public housing. In some cases, those convicted are automatically stripped of their driving privileges, even if the offense is not driving related. The cost to the taxpayer of enforcing marijuana prohibition amounts to billions of dollars annually.

The harsh nature of punishments for marijuana offenses is even more disturbing if one considers the racial bias of the War on Drugs. Although African Americans and whites use marijuana at roughly equal rates, African Americans are almost four times more likely than whites to be arrested on marijuana charges (American Civil Liberties Union, 2013). Questions of racial and ethnic bias affect the integrity of investigations, arrests, and prosecutorial discretion in the legal war against marijuana (Rice and White, 2010).

The Failure of the Legal War against Drugs We have already indicated several times that the legal war against drugs has cost billions of dollars over the years without any noticeable impact on the actual use of illegal drugs. In addition to this fundamental problem, the war against drugs has had other negative consequences that recall those that occurred after the United States banned alcohol manufacture and use almost a century ago. These consequences include:

- the formation of elaborate illegal organizations for the supply of illicit drugs;
- many users turning to other criminal activities to support their habit;
- police corruption, as police may take bribes to ignore drug trafficking or even sell illegal drugs that have been confiscated; and
- because drug use is a victimless crime, the lack of complainant makes enforcement difficult, resulting in the use by police of entrapment and illegal search and seizure tactics.

In addition to these problems, the potential exists for conflict and recrimination in the control of the flow of illegal drugs. The principal drug-consuming nations are affluent and industrialized; the principal drug-producing countries are poor and basically agricultural (Paoli et al., 2009). Cocaine and heroin traffic in the western hemisphere is a particularly serious example of how this conflict of interests plays out. Consuming and producing countries vehemently accuse and blame each other and, depending on which side they are on, advocate either demand-side or supply-side solutions—controlling the demand of users in the United States for cocaine, as opposed to controlling the supply from South America. The concerns of the United States are fairly unambiguous. Cocaine imports have greatly increased during the past few decades, distribution patterns became more sophisticated, and cocaine and crack continue to be popular drugs. The position of producing nations is also clear-cut. These nations' elites think that antidrug campaigns impose significant burdens and create formidable challenges, including the fostering of violence between powerful drug traffickers and law enforcement personnel (Paoli et al., 2009).

In short, there is little prospect of effective control of drugs through the criminal law in the United States, or any other nation (Scherrer, 2010). Some even argue that the War on Drugs has corrupted the institutions of the nation and that no law enforcement agency

has escaped the effects of the profit that drives the drug trade and the racial bias that drives its criminalization (Marez, 2004). The various punitive approaches—attacking drug production abroad, interdiction (seizing drugs in transit), and domestic law enforcement (arresting and incarcerating sellers and buyers)—have failed (Smith, 2016).

There are two controversial alternatives, however. The first is a consideration of drug addiction and drug use more as a medical than a legal problem with an emphasis on comprehensive treatment, as is done, to some extent, in Great Britain and the Scandinavian countries (Drug Policy Alliance, 2010).

The second is the legalization or decriminalization of drugs. As the influential *Economist* (2001) has argued, drugs are dangerous, but so is the illegality that surrounds them. Because an illegal drug is illegal, it cannot be regulated. Governments cannot insist on minimum quality standards for cocaine or warn asthma sufferers to avoid Ecstasy or demand that illegal drug distributors take responsibility for how their products are sold. With alcohol and tobacco, such restrictions are possible; with illegal drugs, these restrictions are not possible. If these drugs were legal, their sale would be controlled, taxed, and supervised; educational campaigns would proclaim their dangers. Through legalization, drugs would poison fewer customers, kill fewer dealers and bystanders, bribe fewer enforcement people, and raise more public revenue. Initially, there may be more users and more addicts.

The recommendation of the *Economist* (2001:16) was simply "to set it free." This article contended that governments allow their citizens to engage in a variety of self-destructive things: to go bungee-jumping, to ride motorcycles and jet skis, to carry loaded guns, to drink alcohol, to play with explosives (fireworks), to have unsafe sex, to overeat, and to smoke cigarettes. Some of these activities are far more dangerous or harmful than taking drugs. The article concluded that trade in drugs may be immoral or irresponsible, but it should no longer be illegal. The same theme highlighted Jacob Sullum's (2003) book, *Saying Yes: In Defense of Drug Use*, which outlined the injustice of punishing people for their politically incorrect choice of intoxicants and argued that government agencies, antidrug activists, and a naïve national media have exaggerated the public's fear of the harmful effects of recreational drugs.

PROSTITUTION

If there is one area in the criminal law that arouses the most anxiety concerning public morals, it is sexual conduct (Scoular and Sanders, 2010). The range of sexual conduct covered by the law is so extensive that the law makes potential criminals of most teenagers and adults—especially with the increased availability and variety of cybersex (Neumann, 2010).

A traditional justification for such legal complete control of sexual behavior is to protect the institution of the family. A number of state laws control acts that, according to many people, would otherwise endanger the chastity of women before marriage, such as the variety of laws on incest, adultery, and prostitution (Quinney, 1975). In addition, a complex set of federal and state laws controls the advertising, sale, distribution, and availability

of contraceptives; the performance of abortion; voluntary sterilization; and artificial insemination. Because of the complexity and extensiveness of legal controls on sexual conduct and related matters, this section will be limited to a discussion of the legal control of female prostitution. In the United States, estimates of women who make some or all of their living as prostitutes range from half a million (Clinard and Meier, 2016) to a million (Aday, 1990).

It is now recognized that laws throughout the world against prostitution discriminate against women (Matthews, 2008; Munro and della Giusta, 2008). Many women's groups in America and abroad maintain that a woman should have the right to engage in sexual relations for pay if she so desires (Weitzer, 2011). However, law enforcement authorities do not share that position, and there is still a tendency to regard only the women as offenders and not the men who are almost always their clients.

State laws vary on prostitution (Meier and Geis, 2006). In many states, solicitation is considered a misdemeanor punished by a fine or a jail sentence of up to 1 year. Frequent arrests, however, may result in a charge of felony. There are three broad categories of arrests for prostitutes: (1) for accosting and soliciting; (2) on a charge of "common prostitution," which can be subsumed under disorderly conduct or vagrancy; and (3) detention under health regulations (La Fave, 1965:457–463). Law enforcement of prostitution is sporadic, and much of the control is limited to half-hearted efforts at containing prostitution.

There is a fair amount of discretion involved in the control of prostitutes. At times, there is practically no enforcement; at other times, police conduct special campaigns directed at streetwalkers in certain neighborhoods. In general, most of the police control of prostitutes is aimed at the individual practitioners and streetwalkers (Canter et al., 2009). High-class call girls are relatively immune to legal control. So are those who use the Internet to make appointments and to screen clients.

Laws against prostitution are attempts to control private moral behavior through punitive social control measures. However, Great Britain's important Wolfenden Report (1963) from several decades ago noted that prostitution has prevailed for many centuries and cannot be really controlled by criminal law. As long as there is both a demand for the services of prostitutes and women who choose this form of livelihood, said this report (Wolfenden Report, 1963:132), "no amount of legislation directed towards its abolition will abolish it."

One day, perhaps, community leaders and law enforcement officials will agree with this statement and will recognize that legal efforts to control prostitution are futile in a free society (Wright, 2009). Some nations have already reached this recognition. For example, prostitution is legal (with some restrictions) in Canada. Similarly, in many European countries, prostitutes ply their trade legally, pay taxes, receive health and retirement benefits, and take regularly scheduled vacations (Weitzer, 2011). The decriminalization of prostitution in the United States would allow police agencies, who already mostly disregard much prostitution, to deal with more important matters, and it would probably help lower the number of sex crimes. Opponents of decriminalization argue for continued or increased legal control of prostitution for several reasons: (1) they believe prostitution

is inherently immoral; (2) they believe prostitution leads to other crimes, such as drug addiction, blackmail, and assault; and (3) they believe prostitution objectifies and victimizes the women who engage in prostitution.

GAMBLING

Most Americans gamble. More than 80% of Americans have gambled at least once in their lifetimes, and 60% have gambled in the past year (National Council on Problem Gambling, 2014). Casino gambling is legal in many parts of the country, and state lotteries throughout the nation add billions of dollars every year to state revenues. Legalized gambling is a major American growth industry.

Although legal gambling is very common, illegal gambling has far from disappeared. In the victimless-crime literature, illegal gambling, just like drug use and prostitution, is considered a consensual transaction and a plaintiffless crime (Wolfe and Owens, 2009). The players are willing participants who generally do not notify the police that a crime has been committed. The police must therefore initiate any enforcement activity; if and when they do so, they in effect act as the complainant on behalf of the community. By contrast, enforcement activity for other crimes, such as burglaries or muggings, usually occurs in response to citizens' (victims and witnesses) complaints.

Historically, the prohibition and regulation of gambling in the United States was originally the function of the individual states, not the federal government. Federal involvement with gambling began in the late nineteenth century, when Congress put an end to the operation of corrupt lotteries by denying them mailing privileges and the ability to transact business across state lines. The next significant federal action dealing with gambling occurred in 1949, when Congress enacted legislation to eliminate the gambling ships that had been operating off the coast of California. Other actions dealt with the interstate transportation and transmission of wagering information and gambling paraphernalia. The Organized Crime Control Act of 1970 further extended jurisdiction over interstate gambling and made it a federal offense to operate certain illegal gambling businesses (Pierce and Miller, 2004). Congress also has affected gambling activities through the exercise of its taxing powers by levying excise and occupational taxes on gambling operations, and a stamp tax on gambling devices, and by subjecting gambling winnings to the federal income tax (Commission on the Review of the National Policy Toward Gambling, 1976).

Local police departments have the primary responsibility for gambling enforcement, although the role of state-level agencies is growing. The Commission on the Review of the National Policy Toward Gambling (1976:44–46) identified a number of control techniques used by law enforcement agencies. The commission noted that the most frequent source of gambling arrests is the direct observation of illegal gambling activity. Such arrests are primarily "nonserious," involving individual street players or low-level employees of gambling organizations. Arrests at higher levels—for example, large bookmakers or numbers offices—are rarely, if ever, made in this manner. They require investigation leading to a probable cause for search and arrest warrants. The use of informants in gambling control is widespread. Most police departments rely on this technique, as well as on

undercover investigators who can often accumulate evidence against individuals and on operations by placing bets.

In recent years, the use of electronic surveillance, authorized by Congress in 1968 under Title III of the Omnibus Crime Control and Safe Streets Act, became particularly widespread in the control of illegal gambling (Norris and Wilson, 2007). Electronic surveillance is best suited for the use of gambling investigation because of the dependence of gambling operations on telephones (smartphones and landlines). One of the devices that is used is the pen register, which records phone numbers dialed from a particular phone. By attaching a pen register to the telephone line of a gambling location, police can often identify additional locations and individuals involved in illegal gambling operations. Although these and other efforts to control illegal gambling continue, arrests for gambling have declined dramatically in recent decades, with only 4,825 in 2015 compared to 123,000 in 1960 (Federal Bureau of Investigation, 2016).

The decline in gambling arrests is not easy to explain but probably reflects recognition that so much gambling is now legal that it makes little sense to arrest people for illegal gambling. In any event, the criminal law historically has been ineffective in controlling and preventing people from engaging in illegal gambling. The parties involved in illegal gambling do not complain about it, and a typical gambling transaction is easily, rapidly, and privately consummated. Aside from the difficulties of detection, the criminal sanction for illegal gambling exerts little deterrent force. Generally, the penalties for those who are convicted tend to be light. Public opinion does not consider gambling as particularly wrongful, a sentiment both affected by and reflected in the lenience with which gambling offenders are treated.

Historically, illegal gambling has been a major source of revenue to organized crime (Wolfe and Owens, 2009), and gambling laws were seen as necessary to combat organized crime (Sheley, 1985). In most urban areas, bookmakers associated with crime syndicates specialize in bets on horseracing, professional football and basketball, boxing, hockey, and baseball. Increasingly, they are also involved in college football and basketball. Syndicates also run "numbers games," which involve placing a bet on the possible occurrence of certain numbers, such as the last three digits of the U.S. Treasury balance. A complicated hierarchical organization is required to distribute the forms and to collect and pay off bets. Organized-crime syndicates employ "writers," "runners," or "sellers," terms to indicate the persons who accept numbers bets directly from bettors. Bets collected by them are given to a "pickup man," who forwards them to the next level in the hierarchy, the "bank." In larger operations, bets may be carried from the pickup man to another intermediary, the controller (Pierce and Miller, 2004).

We noted earlier that the war against illegal drugs historically has generated police corruption, with police taking bribes to look the other way. The same problem is true of laws against gambling. Few police officers are willing to accept bribes from murderers, burglars, or other criminals whose acts are blatantly harmful and have identifiable victims. However, many police officers tend to feel that gambling is not particularly serious and that, in any case, it is impossible to eradicate. Hence, organized crime is often readily

able to buy police protection for its activities. The 1972 Knapp Commission found corruption in the New York Police Department to be "at its most sophisticated among plainclothesmen assigned to enforce gambling laws" (Commission on the Review of the National Policy Toward Gambling, 1976:40). Participation in organized payoffs—a "pad"—netted individual New York plainclothes officers $300 to $1,500 a month. In return for protection, gambling establishments paid as much as $3,500 a month. Similarly, it was found that in Philadelphia, police throughout the city accept protection money from gamblers. It should be noted, however, that police corruption exists not only in gambling enforcement but in other areas as well (Punch, 2009). Investigations have also uncovered misconduct related to the enforcement of narcotics, prostitution, liquor establishments, construction-site regulations, and traffic (Chambliss, 1978). These forms of police corruption are largely an urban problem and not limited to the United States (Klockars et al., 2004).

One response to the difficulty and wastefulness in trying to enforce laws against gambling is to remove completely the criminal label. As the Knapp Commission recommended, "The criminal law against gambling should be repealed. To the extent that the legislature deems that some control over gambling is appropriate, such regulation should be by civil rather than criminal process. The police should in any event be relieved from any responsibility for the enforcement of gambling laws or regulations" (Wynn and Goldman, 1974:67). Although, as we noted earlier, arrests for illegal gambling have dropped dramatically, the question of the decriminalization of gambling remains a controversial issue. One of the concerns fueling this controversy is the estimate that several million Americans are problem or pathological gamblers (National Council on Problem Gambling, 2014).

Young people may be at special risk for gambling problems. For those under 21, estimates go as high as 15% with serious gambling problems. According to a study by the International Centre for Youth Gambling at McGill University, more than half of Canadian adolescents are recreational gamblers, 10 to 15 per cent are at risk of developing a severe problem, and 4% to 6% are considered pathological gamblers. The McGill study also found young Canadians aged 18 to 24 are two to four times more likely to develop a problem with gambling than the general adult population (Schmidt, 2003).

WHITE-COLLAR CRIME

Both at home and abroad, white-collar crimes are essentially crimes of privilege (Benson and Simpson, 2015; Payne, 2017), often termed "crimes of the suite" rather than "crimes of the street." The term **white-collar crime** was coined by Edwin H. Sutherland (1949:9) and first used in an address to the American Sociological Society in 1939. He criticized theories of crime emphasizing poverty and introduced class and power dimensions. "White-collar crime," he proposed, "may be defined approximately as a crime committed by a person of respectability and high status in the course of his occupation." He documented the existence of this form of crime with a study of the careers of 70 large, reputable corporations, which together had amassed 980 violations of the criminal law, or an average of 14 convictions

apiece. Behind the offenses of false advertising, unfair labor practices, restraint of trade, price-fixing agreements, stock manipulation, copyright infringement, and outright swindles were perfectly respectable middle- and upper-middle-class executives.

Gilbert Geis (1978:279; 1994) argued that "white-collar crimes constitute a more serious threat to the well-being and integrity of our society than more traditional kinds of crime" and that workplace injuries, unnecessary surgeries, and illegal pollution consign far more people to the cemeteries than the offenses of traditional criminals. Moreover, as the President's Commission on Law Enforcement and Administration of Justice (1967b:104) concluded, "White-collar crime affects the whole moral climate of our society. Derelictions by corporations and their managers who usually occupy leadership positions in their communities, establish an example which tends to erode the moral base of the law."

The full extent of white-collar crime is difficult to assess. Many illegal corporate activities go undetected, and many wealthy individuals are able to evade taxes for years without being found out. One of the more recent examples is Bernard "Bernie" Madoff who developed a sophisticated network of contacts across Jewish charities, synagogues, universities, and country clubs and managed to steal billions of dollars over a period of several years (LeBor, 2010).

White-collar crimes as "suite crimes" are generally considered less serious than the "street crimes" crimes of low-income people, and there is often strong pressure on the police and the courts not to prosecute at all in these cases—to take account of the offenders' "standing in the community" and to settle the matter out of court. For example, a bank that finds its safe burglarized at night will immediately summon the police, but it may be more circumspect if it finds that one of its executives has embezzled a sum of money. To avoid unwelcome publicity, the bank may simply allow the offender to resign after making an arrangement for him or her to pay back whatever possible.

The concept of white-collar crime generally incorporates both *occupational* and *corporate* crimes (Coleman, 2006). Individuals commit **occupational crime** for personal gain in connection with their occupations. For example, physicians may give out illegal prescriptions for narcotics, make fraudulent reports for Medicare payments, and give false testimony in accident cases. Lawyers may engage in some illegalities, such as securing false testimony from witnesses, misappropriating funds in receivership, and being involved in various forms of ambulance chasing to collect fraudulent damage claims arising from accidents. Meanwhile, **corporate crimes** are illegal activities that are committed in the furtherance of business operations but that are not the central purpose of the corporation.

A convenient distinction between occupational and corporate crimes may be in the context of immediate and direct benefit to the perpetrator. In occupational crimes, generally the benefit is for the individual who commits a particular illegal activity. In corporate crime, the benefit is usually for the corporation. For example, a corporate executive bribes a public official to secure favors for the executive's corporation. In this instance, the benefit would be for the corporation and not directly for the individual. The remainder of this section focuses on corporate crime.

EXTENT AND COST OF CORPORATE CRIME

In the United States, corporate crime did not exist before the late nineteenth century (Croall, 2010). The reason for this is simply that there were no laws against dangerous or unethical corporate practices. Before the late nineteenth century, corporations were free to sell unsafe products, to keep workers in unsafe conditions, to pollute the atmosphere, to engage in monopolistic practices, to overcharge customers, and to make outrageously false advertising claims for their products. By the end of the nineteenth century and the beginning of the twentieth century, increasingly laws were passed that attempted to regulate some of the more flagrant business practices that prevailed at the time. Examples are the Sherman Antitrust Act (1890) and the Pure Food and Drug Act (1906). Since that time, a vast array of laws has been passed to regulate the various facets of potentially harmful corporate activities.

The extensive nature of corporate crime is unquestioned today, as revealed by many government investigations and much news media coverage (Payne, 2017). An early study of the 582 largest publicly owned corporations in the United States found that over 60% had at least one enforcement action completed against them in 1975 and 1976 (U.S. Department of Justice, 1979). The number of actions initiated against these corporations for illegal activities (such as price-fixing, foreign payoffs, illegal political contributions, and manufacture of unsafe foods and drugs) average 4.2 actions per corporation.

Corporate crime continues apace and costs consumers up to some $231 billion annually (*Economist*, 2009), including more than $65 billion lost to price-fixing (Simon, 2008). These figures are much higher than the estimated annual loss, $16 billion to $18 billion, from conventional property crime (burglary, larceny, motor vehicle theft) (Federal Bureau of Investigation, 2016).

Undoubtedly, corporate crimes impose an enormous financial burden on society. In addition, it has been estimated that, each year, 200,000 to 500,000 workers are needlessly exposed to toxic agents such as radioactive materials and poisonous chemicals because of corporate failure to obey safety laws. Nearly half of all deaths among asbestos insulation workers are directly caused by exposure to that substance (Coleman, 2006). Many of the 2.5 million temporary and 250,000 permanent worker disabilities from industrial accidents each year stem from violations of accepted safety standards (Geis, 1978). Corporate crimes cause injuries to people on a larger scale than so-called street crimes. Far more people are killed annually through corporate criminal activities than by the 15,000 or so individual criminal homicides.

LEGAL CONTROL OF CORPORATE CRIME

A variety of regulatory agencies regulate corporate behavior and thus corporate crime. The control of corporate activities may be prospective, as in licensing, when control is exercised before illegal acts occur; processual, as in inspection where control is continuous; and retrospective, as when a lawsuit is brought for damages after illegal acts have occurred. A later section of this chapter discusses these types of controls further. In addition, if a business concern defies the law, the government may institute, under civil law, an injunction to "cease and desist" from further violations. If further violations occur, contempt of

court proceedings may be instituted. Fines and various forms of assessments are also used in attempts to control deleterious corporate activities, as, for example, in cases of levying fines on water and air polluters. At times, the government can also exercise control through its buying power by rewarding firms that comply and withdrawing from or not granting governmental contracts to those who do not.

However, as Christopher D. Stone (1978:244–245) once pointed out, "Whether we are threatening the corporation with private civil actions, criminal prosecutions, or the new hybrid 'civil penalties,' we aim to control the corporation through threats to its profits." Although corporations are subjected to federal sentencing guidelines, corporate offenders are rarely criminally prosecuted and even more rarely imprisoned. A large proportion of these offenders are handled through administrative and civil sanctions, and the penalty is monetary. Because large corporations can easily afford to pay fines amounting to hundreds of millions of dollars or more, the penalty imposed for violating the law in effect amounts to little more than a reasonable licensing fee for engaging in illegal activity. Essentially, it is worthwhile for a large corporation to violate the laws regulating business.

Controlling corporations through the law becomes, as Stone (1978:250) has put it, a "misplaced faith on negative reinforcement." Although there are now sophisticated detection and record-keeping technologies, forensic accountants, and other legal specialists, the law constitutes only one of the threats that the corporation faces in dealing with the outside world. Often, paying a fine is just considered part of doing business.

Further, the government's response to corporate violations cannot be compared to its response to ordinary crime. Generally, penalties imposed on corporations are quite lenient, particularly in view of the gravity of the offenses committed, as compared with the penalties imposed on conventional criminals. Few members of corporate management ever go to prison, even if convicted; generally, they are placed on probation or requested to carry some kind of community service. If they go to prison, it is almost always for a very short time period. For example, a study found that, of 56 federally convicted executives, almost two-thirds received probation, 29% were incarcerated, and the remainder had their sentences suspended. The average prison sentence for all those convicted for white-collar crimes averaged just 2.8 days (U.S. Department of Justice, 1979). Gilbert Geis (1978, 1994) once pointed out that it is ironic that the penalties for corporate crime are minimal even though they are given to the very persons who might be the most affected by them. In other words, if corporate offenders are potentially the most deterred (because they simply dread the thought of imprisonment), an increase in punishment and the intensity of enforcement might result in the greatest benefit to society. As it stands now, however, the penalties for corporate crime remain far less than the harm caused.

SOCIAL CONTROL OF DISSENT

A frequent governmental activity is the control of dissent (Lovell, 2009; Sarat, 2005). Political trials, surveillance, and suppression of information and free speech are common in many authoritarian countries (Sunstein, 2003; Hier and Greenberg, 2010). Some

examples are: In Islamic countries, fundamentalists regularly ban books. The most blatant case is that of the writer Salman Rushdie, who was being threatened with death because of his book, *The Satanic Verses*. Ayatollah Ruhollah Khomeini called it blasphemy against Islam and in 1989 offered a million-dollar reward for the writer's execution (*St. Louis Post-Dispatch*, 1998). In Islamic countries, the press is state controlled, and dissidents, at best, are jailed. In African and Asian countries, journalistic loyalty to the ruling dictatorship is demanded, and the abuse of psychiatry to intimidate and torture dissidents in the former Soviet Union was well documented and loudly deplored by the West. In Canada, from the 1950s to the late 1990s, state agents spied on, harassed, and interrogated gays and lesbians, who were considered threats to society and enemies of the state. National security was used as an excuse for regulation of same-sex behavior (Kinsman and Gentile, 2010).

China is another nation that suppresses democratic dissent (Diamant et al., 2005). Just a decade ago, the government there imprisoned many democratic activists in psychiatric hospitals, where they were drugged, physically restrained, isolated, and/or given electric shocks (*New York Times*, 2001b). This action was taken under the guise of a Chinese law that includes "political harm to society" as legally dangerous mentally ill behavior. Law enforcement agents are instructed to take into psychiatric custody "political maniacs," defined as people who make antigovernment speeches, write reactionary letters, or otherwise express opinions in public on important domestic and international affairs contrary to the official government position.

Although the United States is a democracy, it still legally punishes dissent. The U.S. has a history of welcoming dissent in the abstract, but it also has a history of controlling and punishing it (Boykoff, 2012). For example, David Wise (1978:399–400) pointed out that the Central Intelligence Agency (CIA), although prohibited by law from doing so, has engaged in domestic operations to monitor and control the activities of Americans. For 20 years, the CIA opened 215,000 first-class letters, screened 28 million letters, and photographed the outside of 2.7 million letters. During the Nixon era, in Operation Chaos, the CIA followed antiwar activists, infiltrated various antiwar groups, undertook illegal break-ins and wiretaps, indexed 300,000 names in its "Hydra" computer, and compiled separate files on 7,200 Americans.

From 1955 to 1975, the Federal Bureau of Investigation (FBI) investigated 740,000 "subversive" targets—including the renowned sociologist Talcott Parsons of Harvard University's Social Relations Department (Diamond, 1992) and Senator John Kerry, the 2004 Democratic presidential nominee (Glionna, 2004). The FBI has also engaged in illegal break-ins, installed taps on telephones, falsified the credit ratings of some individuals on the subversive list, obtained their tax returns, staged arrests by local police on narcotic pretexts, made anonymous phone calls to friends or family members of some targets telling them of immoral or radical conduct, provided distorted information to civil rights and antiwar organizations in an attempt to create dissension and disruption within the group, and tried to disrupt marriages of suspected dissidents by sending anonymous letters to spouses or newspaper gossip columnists (*Newsweek*, 1979).

The congressional investigations that followed the Watergate scandal of the 1970s showed that one harassing tactic of the Nixon administration directed at its "enemies" was to subject them to frequent tax audits. The Internal Revenue Service (IRS), under pressure by the Nixon administration, established a secret section that eventually became known as the Special Services Staff (SSS). Operating under what was called "red seal" security, and situated in the basement of IRS headquarters in Washington, the SSS acted like a clandestine intelligence unit, in close liaison with the FBI, and compiled files on 8,585 persons and 2,873 organizations (Wise, 1978). The SSS was "given responsibility for investigating and collecting intelligence on 'ideological, militant, subversive, radical and similar type organizations' and individuals (and) . . . 'non-violent' groups and individuals, including draft-card burners, peace demonstrators and persons who 'organize and attend rock festivals which attract youth and narcotics'" (Wise, 1978:327). The IRS, like the FBI, became an instrument for social control, making its own judgments about what political views and cultural preferences were acceptable.

The Army Intelligence unit and the highly secret National Security Agency (NSA) have also been actively involved in the surveillance of dissenters (Wise, 1978). The NSA for years was reading and listening in on international communications. In the 1960s, for example, Western Union, Winston International, and ITT Corporation made copies of international cables available to the NSA in "Operation Shamrock." Later, when some of the communications companies switched to storing their cables on magnetic tape, the NSA transported the tapes daily to its headquarters in Maryland for copying and then back to New York the same day. When these round trips became too burdensome, the CIA, in the guise of a television tape-processing company, provided the NSA with office space to copy the tapes in New York.

As these examples indicate, the U.S. government has at times created a system of institutionalized social control of dissent by closely watching the activities of people who threaten it (Moynihan, 1998). Obviously, the government has to exert some control over its citizens, but in exerting control, care needs to be exercised to protect individuals' rights as guaranteed by the Constitution. There is a thin line between governmental control of dissent and the creation of a police state.

This thin line manifested itself during the last decade, when it was revealed that the NSA had collected data from the phone records of millions of Americans, beginning in 2004 and ending in 2015, after Congressional legislation banned this practice. This surveillance was authorized under the Patriot Act by President George W. Bush and widely condemned when it became known in 2013 (Nakashima, 2015).

Perhaps it is time to start thinking about some effective controls and checks to be devised and imposed upon the users of modern technology so that they do not overstep the boundaries as has happened during and since the Nixon era. If not, as many social commentators suggest, privacy may just become extinct (Kerr, 2004), civil rights may be sacrificed for security (Welsh and Farrington, 2009), and there will be additional breakdowns of traditional boundaries between public and private space resulting in substantial reduction of autonomy and privacy (Suk, 2009).

ADMINISTRATIVE LAW AND SOCIAL CONTROL

A popular misconception about the law is that it consists almost entirely of criminal law, with its apparatus of crime, police, prosecutors, judges, juries, sentences, and prisons. Another misconception is that all law can be divided into criminal law and civil law. However, and as we have seen in earlier chapters, the resources of legal systems are far richer and more extensive than either of these views implies. This section discusses how distinctive legal ways can be used to control what Robert S. Summers and George G. Howard (1972:199) call "private primary activity." They use this concept to describe various pursuits, such as production and marketing of electricity and natural gas; provision and operation of rail, air, and other transport facilities; food processing and distribution; construction of buildings, bridges, and other public facilities; and radio and television broadcasting. But these activities are not confined to large-scale affairs such as electrical production and provision of air transport. The list can also include such activities as the provision of medical services by physicians, ownership and operation of motor vehicles by ordinary citizens, construction of residences by local carpenters, and the sale and purchase of stocks and bonds by private individuals. Private primary activities not only are positively desirable in and of themselves, but also are essential for the functioning of modern societies. These activities generate legal needs that are met through administrative control mechanisms (Warren, 2010).

Today, all kinds of services are needed, such as those provided by physicians, transport facilities, and electric companies. But an incompetent physician might kill rather than cure a patient. An unqualified airline pilot might crash, killing everyone on board. A food processing company might poison half a community. In addition to incompetence or carelessness, deliberate abuses are also possible. An individual may lose her or his entire savings through fraudulent stock operations. A utility company might abuse its monopoly position and charge exorbitant rates. An owner of a nuclear waste disposal facility may want to cut corners, thus exposing the public to harmful radiation.

Private primary activities, Summers and Howard (1972) noted, can cause avoidable harm. At the same time, such activities normally have great potential for good. Airplanes can be made safe, and stock and consumer frauds by fly-by-night operators can be reduced. Legal control of these activities is then justified on two grounds—the prevention of harm and the promotion of good. For example, in the case of radio and television broadcasting, laws can be concerned with both the control of obscenity and the problem of balanced programming, such as covering public affairs in addition to entertainment and sports. Control is exerted on private primary activity through administrative laws, which take the form of licensing, inspection, and the threat of publicity.

LICENSING

The power of administrative law goes beyond the punishment of those who fail to comply. Requiring and granting licenses to perform certain activities is a classic control device. With so many groups being licensed in one state or another, licensing as a form of social control affects a substantial portion of the labor force. Nowadays, a license may be required

to engage in an occupation, to operate a business, to serve specific customers or areas, or to manufacture certain products (Tashbook, 2004). Physicians and lawyers must obtain specific training and then demonstrate some competence before they can qualify for licenses to practice. Here, licensing is used to enforce basic qualifying standards. Airplane companies just cannot fly any route they wish, and broadcasters are not free to pick a frequency at will. Underlying all regulatory licensing is a denial of a right to engage in the contemplated activity except with a license.

The control of professions and certain activities through licensing is justified as protection for the public against inferior, fraudulent, or dangerous services and products. But, under this rubric, control has been extended to occupations that, at the most, only minimally affect public health and safety. In some states, licenses are required for cosmetologists, auctioneers, weather-control practitioners, taxidermists, junkyard operators, and weather-vane installers. To be a manicurist in the state of Washington, one must take 600 hours of training and pass both a written exam and a skill demonstration, and to cut hair, one needs 1,000 hours of training and two tests. Movie projectionists need a license in Massachusetts; college math teachers in Florida; and drywall installers along with paperhangers, upholsterers, and fence erectors in California (*Forbes*, 2004). Hawaii licenses tattoo artists; and New Hampshire, lightning-rod salespeople.

In addition to requiring a license to practice these occupations, control is exerted through the revocation or suspension of the license. For example, under administrative law, the state may withdraw the right to practice from a lawyer, a physician, or a beautician, and it may suspend a bar or restaurant owner from doing business a few days, a year, or even permanently. A study by Roger L. Goldman and Steven Puro (2001) on the police points out that a very common approach to addressing misconduct in police departments is the revocation of the offending officer's license or state certificate, which is obtained after the completion of a state-mandated training. They note that revocation of license is more effective than termination, which does not really prevent an officer to obtain employment in another department. Most states have adopted this little-known way of handling police misconduct.

Local, state, and federal administrative controls through licensing are widely used mechanisms of social control. Administrative laws generally specify the conditions under which a license is required, the requirements that must be met by applicants, the duties imposed upon the licensees, the agency authorized to issue such licenses, the procedures in revoking licenses and the grounds that constitute cause for revocation, and the penalties for violations.

INSPECTION

Administrative law grants broad investigatory and inspection powers to regulatory agencies (Pagnattaro et al., 2016). Periodic inspection is a way of monitoring ongoing activities under the jurisdiction of a particular agency. Such inspections determine whether cars and trains can move, planes can fly, agricultural products can meet quality standards, newspapers can obtain second-class mailing privileges, and so forth. Similar procedures are used to

prevent the distribution of unsafe foods and drugs, to prohibit the entry of diseased plants and animals into the country, or to suspend the license of a pilot pending a disciplinary hearing.

In a variety of industries and businesses, government inspectors operate on the premises. For example, when a U.S. Food and Drug Administration (FDA) inspector finds botulism in soup, the manufacturer will withdraw the product from grocers' and manufacturers' shelves and destroy all cans—because of the unstated but understood FDA threat to prosecute through the U.S. Department of Justice (Gellhorn and Levin, 1997).

Inspections constitute a primary tool of administrative supervision and control. For instance, the inspectors for the Federal Reserve Board and the Federal Deposit Insurance Corporation visit banks to examine bank records. A housing official may inspect buildings to determine compliance with building codes. In some instances, inspection takes place occasionally, such as when ensuring compliance with building codes. In other instances, inspection is continuous, as in food inspection. Both forms of inspection, sporadic and continuous, also exert pressure for self-regulation and contribute to the maintenance of internal controls specified by the law. At times, these inspections may also lead to proposals for corrective legislation governing regulatory standards.

THREAT OF PUBLICITY

In small communities where people tend to know each other, publicizing the acts of wrongdoers may significantly change their behavior. Such a system of social control normally would not work for individual deviance in a large urban industrial society. However, negative publicity may well influence large companies selling widely known brand-name products. For example, the publicity surrounding the secret internal documents of the Ford Motor Company on defective and recalled Pintos, which showed that needed structural fuel tank improvements at the cost of about $11 per car and which could have prevented 180 fiery deaths a year, resulted in a significant drop in market share for the company (Fisse and Braithwaite, 1993). As another example, Volkswagen sales dropped precipitously after it became known in 2015 that the auto company had cheated on diesel emissions testing (Noskova, 2016).

Perhaps the most potent tool in any administrator's hands is the power to publicize (Gellhorn and Levin, 1997). A publicity release detailing the character of a suspected offense and the offender involved can inflict immediate damage. For instance, just before Thanksgiving in 1959, the U.S. secretary of Health, Education, and Welfare virtually destroyed the entire cranberry market by announcing at a press conference that a cancer-producing agent had contaminated some cranberries. The effectiveness and power of publicity as a control mechanism were again confirmed by the announcement that botulism in a can of soup had killed a man. The publicity led to the bankruptcy of Bon Vivant Soup Company (Gellhorn and Levin, 1997). In some cases, however, firms that have a monopoly on their products, such as local gas and electric companies, are not likely to be hurt by adverse publicity.

SUMMARY

1. Law is a mechanism of formal social control that comes into play when other forms of social control are weak, ineffective, or unavailable.
2. Mechanisms of social control through external pressures may be formal and informal, and include both negative and positive sanctions. Informal social controls tend to be effective when there is intense social interaction on an intimate face-to-face basis, normative consensus, and surveillance of the behavior of members of the community. Formal social controls are characteristic of more complex societies with a greater division of labor and different sets of mores, values, and ideologies; these social controls arise when informal controls are insufficient to maintain conformity to certain norms.
3. The social control of criminal and delinquent behavior represents the most highly structured formal system used by society to attempt to control deviant behavior. The goals of legal punishment include retribution or social retaliation, incapacitation, and both specific and general deterrence.
4. Legal punishment is more likely to have a deterrent effect in situations that involve low-commitment individuals who engage in instrumental crimes.
5. Formal control of deviant behavior is not limited to criminal sanctions. The use of civil commitment as a mechanism of legal control is rather common and involves few or no procedural safeguards available for defendants, who include alcoholics, drug addicts, sex offenders, and troublesome teenagers.
6. The United States invests enormous resources in controlling victimless crimes. The legal control of victimless crimes, such as drug addiction, prostitution, and gambling, tends to be generally expensive, and ineffective and often leads to the corruption of law enforcement agents.
7. White-collar crimes constitute a greater threat to the welfare of society than more traditional kinds of crime. In general, laws dealing with corporate crime are ineffective, and the sanctions are insufficient to act as effective deterrents. Corporations tend to consider law violation and the resulting fine as part of their regular business expenses.
8. Many governments use the law and other means to control dissent. In both the recent and more distant past, the U.S. government has relied on the operations of various intelligence agencies to create a system of institutionalized social control of dissent.
9. Control through administrative law is exercised in the context of licensing, inspection, and the use of publicity as a threat.

KEY TERMS

Corporate crime illegal activity that is committed in the furtherance of business operations of a corporation but that is not the central purpose of the corporation

Folkways established norms of common practices such as those that specify modes of dress, etiquette, and language use

Legalization the process by which norms are moved from the social to the legal level

Mores societal norms associated with intense feelings of right or wrong and definite rules of conduct that are simply not to be violated

Negative sanctions penalties imposed on those who violate norms

Occupational crime crime committed by individuals for personal gain in connection with their occupations

Positive sanctions actions, such as a promotion, a bonus, and encouragement, that are intended to reward conformity

Social control the methods used by members of a society to maintain order and to promote predictability of behavior

Socialization the process of learning the rules of behavior for a given social group

Victimless crimes crimes involving willing participants and for which any harm occurs primarily to the participating individuals themselves

White-collar crime crime committed by persons of respectability and high status in the course of their occupation

SUGGESTED READINGS

Phillip Bean, *Legalizing Drugs: Debates and Dilemmas*. Bristol, UK: Policy Press, 2010. The war on drugs continues along with new legislations and debates about them. This book provides a balanced account of this moral, legal, and political minefield.

Lawrence M. Friedman. *Impact: How Law Affects Behavior*. Cambridge, MA: Harvard University Press, 2016. A highly insightful book by a leading law and society scholar on the conditions under which law most strongly affects behavior.

Jack P. Gibbs (ed.), *Social Control: Views from the Social Sciences*. Beverly Hills, CA: Sage Publications, 1982. A compilation of classic papers from influential scholars in several fields regarding the notion of social control. Several conceptual, theoretical, and empirical issues are identified and discussed.

Allan V. Horwitz, *Creating Mental Illness*. Chicago, IL: University of Chicago Press, 2002. A series of case studies on the social control of mental illness.

Michael Tonry, *Sentencing Fragments: Penal Reform in America, 1975–2025*. New York: Oxford University Press, 2016. A critique of U.S. criminal sentencing policy that also presents important proposals for reforming this policy.

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CHAPTER 6
LAW AND DISPUTE RESOLUTION

CHAPTER OUTLINE

LEARNING OBJECTIVES

- Outline the stages of the disputing process
- Explain why some disputants may wish to practice lumping it or avoidance
- Explain why adjudication may threaten enduring relationships
- Define what is meant by justiciability and standing
- Describe the advantages that repeat players enjoy in adjudication

A core function of law is the orderly resolution of disputes. The purpose of this chapter is to examine the questions of why, how, and under what circumstances laws are used in disagreements between individuals, between individuals and organizations, and between organizations.

A NOTE ON TERMINOLOGY

The sociological and legal literature uses many different terms to describe the role of law in disputes. Terms such as conflict resolution, conflict regulation, conflict management, dispute processing (Chase, 2007), dispute settlement (O'Connell, 2003), and dispute resolution (Coltri, 2010) are used more or less interchangeably.

Some scholars contend that disputes are processed rather than settled and that conflicts are managed or regulated rather than resolved (Abel, 1973; Menkel-Meadow, 2003). In these scholars' view, third-party intervention, whether through legal or nonlegal means, represents only the settlement of the public component of the dispute or conflict, rather than the alleviation of the underlying forces or tensions that created the conflict. Reflecting this view, Richard L. Abel (1973:228) chided sociolegal scholars who "have tended to write as though 'settlement' must be the ultimate outcome of disputes, 'resolution' the inevitable fate of conflicts." He added that many disputes generate other disputes.

Other authors point out that the disputing process consists of several stages. According to Laura Nader and Harry F. Todd (1978:14–15), three distinct stages exist: (1) the grievance or preconflict stage, (2) the conflict stage, and (3) the dispute stage. The *grievance* or *preconflict* stage refers to situations that an individual or a group perceives to be unjust and considers grounds for resentment or complaint. The situation may be real or imaginary, depending on the aggrieved parties' perception. If this grievance is not resolved, it enters into the *conflict* stage, in which the aggrieved party confronts the offending party and communicates its resentment or feelings of injustice to the offending party. If the grievance is not resolved at this stage, it enters into the final, dispute stage, which is when the conflict is made public.

The legal approach to dispute resolution entails the transition from a dyad of the conflicting parties to the triad, "where an intermediary who stands outside the original conflict has been added to the dyad" (Aubert, 1963:26). The three stages discussed by Nader and Todd are not always clear-cut or sequential. A person may file a lawsuit without ever confronting the offender, or one party may quit or concede at any stage in the disagreement.

Although sociolegal scholars continue to debate which terms involving dispute resolution make the most sense to use, this chapter will, for the sake of simplicity, use terms such as *conflict resolution*, *dispute settlement*, and *dispute processing* interchangeably. At the same time, it is worth reiterating that the law at best resolves only the legal components of conflicts and disputes, rather than ameliorating the underlying causes of these disputes. Any legal resolution of conflict does not necessarily reduce the antagonism between the aggrieved parties. In this regard, sociolegal work on divorce as a legal resolution of marital conflict clearly shows that divorce does not necessarily reduce the spousal tensions that lead to divorce (Sarat and Felstiner, 1995).

METHODS OF DISPUTE RESOLUTION

Disputes appear in every society, and a wide variety of methods are used to manage these disputes (see, for example, Chase, 2007; Coltri, 2010). Most societies use fairly similar methods; the differences among them consist in the preference given to one method over others. Cultural factors and the availability of institutions for settling disputes usually determine such preferences.

Two main forms of resolving legal disputes are used throughout the world. In Henry W. Ehrmann's (1976:82) apt description,

> Either the parties to a conflict determine the outcome themselves by negotiations, which does not preclude that a third party acting as a mediator might assist them in their negotiations. Or, the conflict is adjudicated, which means that a third, and ideally impartial, party decides which of the disputants has the superior claim.

Anthropologist Simon Roberts (1979:57–59) noted that, in some societies, direct interpersonal violence constitutes an approved method of dispute settlement. This violence may be a way of retaliation for violence already suffered, or, instead, a reaction to some other form of perceived wrong. In earlier eras, physical violence was sometimes channeled into a restricted and conventionalized form, such as dueling. Another historic form of physical violence in response to grievances has been feuding (Gulliver, 1979). **Feuding** is a state of recurring hostilities between families or groups, instigated by a desire to avenge an offense (insult, injury, death, or deprivation of some sort) against a member of the group. The unique feature of a feud is that responsibility to avenge is carried by all members of the group. The killing of any member of the offender's group is viewed as appropriate revenge, because the group as a whole is considered responsible. At times, a feud can turn into a full-scale battle when, in addition to the families, whole communities are drawn into a dispute. This happened from time to time in the famous feud triggered by a romantic interlude between a Hatfield of Virginia and a McCoy of Kentucky. The feud broke out in 1882 and lasted for several years (Alther, 2012).

Disagreements are sometimes channeled into rituals (Rosati, 2009; Stewart and Strathern, 2010). For example, among the Inuit of North America, parties to a dispute may confront each other before the assembled community and voice their contentions through songs and dances improvised for the occasion. In the form of a song, the accuser states all the abuse he or she can think of; the accused then responds in kind. A number of such exchanges may follow until the contestants are exhausted, and a winner emerges through public acclaim for the greater singing skill (Hoebel, 1967).

In some societies, shaming is used as a form of public reprimand in the disapproval of disputing behavior. Ridicule directed at those guilty of antisocial conduct is also used to reduce conflict. At times, the singing of rude and deflating songs to, or about, a troublesome individual is also reported as a means of achieving a similar end. Ridicule, reproach, or public exposure may also take the form of a "public harangue," in which a person's wrongdoings are embarrassingly exposed by being shouted out to the community at large (Roberts, 1979:62).

In attempts to resolve disputes, parties in the traditional societies studied by anthropologists may choose to resort to supernatural agencies. The notion that supernatural beings may intervene to punish wrongdoers is rather widespread among these societies. This notion is often accompanied by the belief that harm may be inflicted by witches or through the practice of sorcery. In some societies, witchcraft and sorcery are seen as a possible cause of death and of almost any form of illness or material misfortune. Jane Fishburne Collier (1973:113–120), for example, identified a variety of witchcraft beliefs among the Zinacantecos in Mexico. They include witches who send sickness, ask that sickness be sent, perform specific actions (such as causing the victim to rot away), control weather, talk to

saints, or cause sickness by an evil eye. Consequently, in such societies the procedures for identifying witches or sorcerers responsible for particular incidences or misfortunes assume great importance in the handling of conflict (Roberts, 1979:64).

Of course, not all disputes are handled by violence, rituals, shaming, ostracism, or resorting to supernatural agencies (Chase, 2007). Most societies have access to a number of alternative methods of dispute resolution. These alternatives differ in several ways, including whether participation is voluntary, presence or absence of a third party, criteria used for third-party intervention, type of outcome and how it may be enforced, and whether the procedures employed are formal or informal (Administrative Conference of the United States, 1987:12-13). Before considering them, let us look at two other popular ways of coping with disputes: "lumping it" and avoidance.

LUMPING IT AND AVOIDANCE

Lumping it refers simply to inaction, to not making a claim or a complaint. Marc Galanter (1974:124-125) once wrote, "This is done all the time by 'claimants' who lack information or access or who knowingly decide gain is too low, cost too high (including psychic cost of litigating where such activity is repugnant)." In "lumping it," the issue or the difficulty that gave rise to the disagreement is simply ignored, and the relationship with the offending party continues. For example, a college professor may not want to press a particular claim (say, for a higher salary) against the administration and continues to work for the university. Carol J. Greenhouse (1989) described a different form of lumping it in her study of Baptists in a southern town. Greenhouse found that the Baptists she studied considered disputing a profoundly unchristian act because the Bible states that Jesus is the judge of all people. The implication was that to partake in a dispute is to stand as judge over another person, representing lack of faith and a preemption of Jesus's power. For these reasons, her subjects tended to shy away from disputes.

Avoidance refers to limiting the relationship with other disputants sufficiently so that the dispute no longer remains salient (Felstiner, 1974:70). Albert O. Hirschman (1970) called this kind of behavior "exit," which entails withdrawing from a situation or terminating or curtailing a relationship. For example, a consumer may go to a different store rather than complain about a rude employee or high prices. Avoidance entails a limitation or a break in the relationship between disputants, whereas "lumping it" refers to the lack of resolution of a conflict, grievance, or dispute for the reason that one of the parties prefers to ignore the issue in dispute. Decisions to practice lumping behavior or avoidance arise from feelings of relative powerlessness or from concern over the possible social, economic, or psychological costs involved in seeking a solution. Avoidance is not always an alternative, especially in situations when the relationship must continue—for example, with certain companies that have monopolies, such as gas or electric companies, or with the Social Security Administration or the U.S. Department of Health & Human Services.

In sum, avoidance involves the reduction of social interaction or its termination, whereas lumping behavior entails the ignoring of the issue in dispute while continuing the

relationship. Either method allows the dispute to continue, with the aggrieved party not achieving any reduction in the grievance itself.

PRIMARY RESOLUTION PROCESSES

The primary dispute resolution processes can be depicted on a continuum ranging from negotiation to adjudication. In negotiation, participation is voluntary, and disputants arrange settlements for themselves. Next on the continuum is mediation, in which a third party facilitates a resolution and otherwise assists the parties in reaching a voluntary agreement (Bush and Folger, 2005). At the other end of the continuum is adjudication (both judicial and administrative), in which parties are compelled to participate, the case is decided by a judge, the parties are represented by counsel, the procedures are formal, and the outcomes are enforceable by law. Just before adjudication on the continuum is arbitration, which is more informal and in which the decision may or may not be binding. Negotiation, mediation, and arbitration are the main components of what is referred to as "alternative dispute resolution" (ADR) in legal parlance (Partridge, 2009). The ADR movement is spreading to other parts of the world. For example, legal scholars and political officials in France promote ADR as a means of relieving the burden of the courts; of rendering dispute resolutions faster, simpler, and cheaper; and of "de-dramatizing" disputes to render their resolutions more satisfactory to the parties (Gaillard, 2000). We now consider these processes and some of their variants in some detail.

Negotiation **Negotiation** occurs when disputants seek to resolve their disagreements themselves without the help of any third parties. Negotiation is a two-party arrangement in which disputants try to persuade one another, establish a common ground for discussion, and feel their way by a process of give-and-take toward a settlement. It involves the use of debate and bargaining (Lewicki et al., 2011). A basic requirement for successful negotiation is the desire of both parties to settle a dispute without escalation and without resorting to neutral third parties. Vilhelm Aubert (1969:284) states, "The advantage of negotiated solutions is that they need not leave any marks on the normative order of society. Since the solution does not become a precedent for later solutions to similar conflicts, the adversaries need not fear the general consequences of the settlement." In industrial societies, such as the United States, lumping behavior, avoidance, and negotiation are the most frequent responses to dispute situations.

Mediation **Mediation** is a common dispute resolution method that involves a neutral and noncoercive third party, the *mediator*, between the disputants (McCorkle and Reese, 2010). Unlike litigation, where a judge imposes the ultimate decision, a mediator does not make the final decision. Rather, the terms of settlement are worked out solely by and between the disputants, but with the assistance of the mediator. Mediation can be an effective way of resolving a variety of disputes if both parties are interested in a reasonable settlement of their disagreement, and it often produces a more equitable outcome than other methods (Fitzpatrick, 1994). Mediation begins with the agreement to undertake mediation, it is nonadversarial, and its basic tenet is cooperation rather than competition.

The role of the mediator in the dispute is that of a guide, a facilitator, and a catalyst. The disputants may choose a mediator, or someone in authority may appoint a mediator. Depending on the society and situation, a mediator may be selected because the person has status, position, respect, power, money, or the alleged power to invoke sanctions on behalf of a deity or some other superhuman force. A mediator may have none of these traits but may simply be a designated agent of an organization set up to handle specific disputes. Bringing disputes to a mediator may be the choice of both parties, or of one but not the other party to a conflict, or it may be the result of private norms or expectations of a group that normally dictate disputes to be settled as much as possible within the group.

Mediation essentially consists of influencing the parties to come to a compromise agreement by appealing to their own interests. Mediators may use a variety of techniques to accomplish this objective. As Torstein Eckhoff (1978:36) once observed, mediators

> may work on the parties' ideas of what serves them best . . . in such a way that [the parties come to] consider the common interests as more essential than they did previously, or their competing interests as less essential... . [Mediators] may also look for possibilities of resolution which the parties themselves have not discovered and try to convince them that both will be well served by his suggestion. The very fact that a suggestion is proposed by an impartial third party may also, in certain cases, be sufficient for the parties to accept it.

Ideally, both parties should have confidence in the mediator, be willing to cooperate, listen to her or his advice, and consider the mediator as impartial. A mediator may also use warnings, promises, or flattery in attempts to reconcile differences between the parties. Eckhoff (1978:36) pointed out when mediation is most likely to succeed:

> The conditions for mediation are best in cases where both parties are interested in having the conflict resolved. The stronger the common interest is, the greater reason they have for bringing the conflict before a third party, and the more motivated they will be for cooperating actively with him in finding a solution, and for adjusting their demands in such a way that a solution can be reached.

Mediation has become rather popular in the United States. Hundreds of nonprofit dispute resolution centers emphasizing mediation operate across the nation. One of these centers may be found in Austin, Texas. The center, aptly named the Dispute Resolution Center, features mediation services and mediation training for individuals, business, and other entities in the greater Austin area (www.austindrc.org). It has a paid staff and about a hundred volunteer mediators; about one-fifth of these volunteers are attorneys. This and the many other dispute resolution centers around the nation handle family, housing, and other disputes.

Although there is variation among centers in the types of cases they handle, almost all tend to concentrate on disputes between persons with an ongoing relationship. Participation in mediation is voluntary. The majority of disputants are referred to the centers by

judges, police, prosecutors, and court clerks. Mediators include lawyers, law students, undergraduates, and laypeople, all of whom receive training in mediation techniques.

There are many advantages of such dispute resolution centers (DRCs). A major advantage is that their services cost much less (and are sometimes free) than hiring an attorney and proceeding to a civil court. Compared to the civil courts, DRCs often can resolve disputes more effectively because participants are able to explore the underlying problems contributing to the dispute without legal formalities, time limits, and lawyers acting as intermediaries in the discussion. The reliance on informal alternatives also frees the courts to attend to more serious cases (Wright and Galaway, 1989) and may help defendants in nonviolent offenses avoid a prison sentence (Zernova, 2008).

Arbitration **Arbitration** is another way of involving a third party in a dispute. Unlike mediation, in which a third party assists the disputants to reach their own solution, arbitration requires a final and binding decision to be made for the disputants by a third party. Disputants agree beforehand both to the intervention of a neutral third party and to the finality of her or his decision. Unlike in courts, the proceedings in arbitration can remain private and participants can opt for simplicity and informality. Arbitration tends to reduce the cost of dispute resolution because of the lack of opportunity to appeal the arbitrator's decision and especially when attorneys are not hired. Arbitration is also faster than adjudication because participants can proceed as soon as they are ready rather than waiting for a trial date to be set.

Nowadays, almost all collective bargaining contracts contain a provision for final and binding arbitration in the event of a labor-management dispute. When such disputes occur, they may be brought before arbitrators, whose decisions are binding by mutual consent of the disputants and ultimately enforceable by private sanctions and by the courts. Arbitration clauses also appear in business contracts and even in executive employment letters. Many private organizations, professional groups, and trade associations have their own formal arbitration machinery for the settlement of disputes among members.

Although arbitration has its advantages, it may also protect businesses from being sued for unfair practices. For example, people who sign up for bank accounts and credit cards often have to agree to have any disputes submitted for private arbitration. This practice prevents customers from suing a bank corporation, and it also prevents class action lawsuits if the corporation is suspected of defrauding customers. Customers may find it difficult to find an attorney to represent them during arbitration since any financial compensation will be likely much smaller than in a lawsuit. In another problem, arbitration is a private process, whereas a lawsuit is a public event. A recent news report said that this private nature of arbitration "helps to conceal corporate misconduct from the public and regulators because the related documents and hearings are not made public" (Reuters, 2016:B5).

Adjudication **Adjudication** is a public and formal method of conflict resolution that involves the use of the courts. Courts have the authority to intervene in disputes whether or not the parties desire it, to render a decision that has one party win and the other party lose, and to enforce compliance with that decision. In adjudication, the emphasis is on

the legal rights and duties of disputants, rather than on compromises or on the mutual satisfaction of the parties. Courts can deal only with disagreements, grievances, or conflicts that have been transformed into legal disputes. For example, in a divorce case, the court may focus on one incident in what is a complex and often not very clear-cut series of problems. It results in a resolution of a legal dispute but not necessarily of the broader issues that have produced that conflict.

Three general aspects of adjudication are important to note. First, although courts occasionally seek compromise and flexibility, generally the verdict of the court has an either/or character: The decision is based upon a single definite conception of what has actually taken place and upon a single interpretation of legal norms. When a conflict culminates in litigation, one of the parties must be prepared for a total loss. Second, because of the use of precedents, there is a fair amount of predictability in how similar cases will be settled by courts. Third, because the courts are dealing only with the legal issues, they do not take into consideration the possibility that the applicable legal facts and norms may have been influenced by different social conditions and that, in many instances, courts are treating only the symptoms rather than the underlying causes of a problem.

HYBRID RESOLUTION PROCESSES

Because the intervention of a third party—a person, a government agency, or other institutions—can often facilitate dispute resolution among conflicting parties, several "hybrid" dispute-resolution processes have arisen in recent decades in addition to the primary processes just described. The term "hybrid" is used because these processes incorporate features of the primary processes. The main hybrid processes include rent-a-judge, med-arb, and minitrial (Goldberg et al., 2012).

The *rent-a-judge* process is basically a form of arbitration. In this process, the disputants, in an attempt to avoid the use of a regular court, select a retired judge to hear and decide a pending case as an arbitrator would. The same procedure is used as in court, and the decision of the retired judge is legally binding. Unlike in arbitration, the retired judge's decision can be appealed for errors of law or on the ground that the judgment was against evidence, though such appeals are rare.

Another hybrid process is *med-arb*, in which the issues that were not solved by mediation are submitted to arbitration, with the same person serving first as mediator and then as arbitrator. Med-arb has been used often in contract negotiation disputes between public employers and their unionized employees. A third hybrid process is the *minitrial*, which has been repeatedly utilized in a number of big inter-corporate disputes. In this method, attorneys for each disputant are given a short time (not more than a day) in which to present the basic elements of their case to senior executives of both parties. After the presentation, the senior executives try to negotiate a settlement of the case, usually with the aid of a neutral advisor. If there is no settlement, the advisor gives the parties an opinion of the likely outcome if the dispute were litigated. This dose of reality at times helps to break the deadlock.

DISPUTE RESOLUTION IN REVIEW

This section has distinguished a number of procedures used for settling disputes. Some are public, some private. Some are official, some unofficial. Some are formal, some informal. These procedures overlap, and each has its limitations and advantages. They are related in different ways to outcomes and consequences. A number of procedures may also be used for the settlement of a single dispute. Table 6.1 summarizes the salient features of the more widely used procedures.

Table 6.1 Partial List of Characteristics of the Major Primary and Hybrid Dispute-Resolution Processes

Negotiation	Mediation	Arbitration	Adjudication	Rent-a-Judge	Minitrial
Voluntary	Voluntary	Voluntary, unless contractual or court-ordered	Nonvoluntary	Voluntary	Voluntary
Nonbinding	Nonbinding	Binding, usually no appeal	Binding, subject to appeal	Binding, but subject to appeal, and possibly, review by trial court	Nonbinding
No third-party facilitator	Party-selected facilitator	Party-selected third-party decision-maker	Imposed third-party neutral decision-maker	Party-selected third-party decision-maker, usually a former judge or lawyer	Third-party neutral adviser
Informal and unstructured	Informal and unstructured	Procedurally less formal than adjudication	Highly procedural; formalized and structured by predetermined, rigid rules	Flexible as to timing, place, and procedures	Less formal than adjudication and arbitration
Presentation of proofs, usually indirect or nonexistent	Presentation of proofs less important than attitudes of each party	Opportunity for each party to present proofs supporting decision in its favor	Opportunity for each party to present proofs supporting decisions in its favor	Opportunity for each party to present proofs supporting decisions in its favor	Opportunity and responsibility for each party to present proofs supporting decisions in its favor

Continued

Table 6.1 Continued

Negotiation	Mediation	Arbitration	Adjudication	Rent-a-Judge	Minitrial
Mutually acceptable agreement	Mutually acceptable agreement sought	Compromise result possible	Win/lose out come	Win/lose outcome (judgment of court)	Mutually acceptable agreement sought
Agreement usually included in contract or release sought	Agreement usually embodied in contract or release	Reason for result not usually required	Expectation of reasoned statement	Findings of fact and conclusion of law possible but not required	Agreement usually embodied in contract or release
Emphasis on disputants' relationship	Emphasis on disputants' relationship	Consistency and predictability balanced against concerns for disputants' relationship	Process emphasizes attaining substantive consistency and predictability results	Adherence to norms, laws, and precedent	Emphasis on sound, cost-effective, and fair resolution satisfactory to both parties
Highly private process	Private process	Private process unless judicial enforcement sought	Public process; lack of privacy of submissions	Private process, unless judicial enforcement sought	Highly private process

Obviously, no one procedure is applicable to every kind of problem. Several considerations shape the selection of a particular method. One is the relationship between the disputants. For example, is there an ongoing relationship between the disputants, such as business partners, or is the dispute the result of a single encounter, such as an automobile accident? When an ongoing relationship is involved, it is more productive for the parties to work out their difficulties through negotiation or mediation, if necessary. An advantage of mediation is that it encourages the restructuring of the underlying relationship so as to eliminate the source of conflict rather than dealing only with the manifestation of conflict.

Another consideration is the nature of the dispute. If a precedent is required, such as in civil rights cases, litigation in the form of class action may be appropriate. The amount at stake in a dispute also plays a role in deciding on the type of dispute-resolution procedure. Small, simple cases might end up in small-claims courts, whereas more complex issues might require court-ordered arbitration, such as in contract negotiation disputes between public employers and unions. Speed and cost are other relevant factors. For example, arbitration may be speedier and less costly than a court trial.

Finally, consideration must be given also to the power relationship between the parties. When one party in a dispute has much less bargaining strength than the other, as in the

case of a pollution victim faced by a powerful corporation, an adjudicatory forum in which legal principle, not power, should determine the outcome may be desirable. The remainder of this considers why some disputants turn to legal mechanisms of conflict resolution, under what circumstances they choose the law rather than some other procedures, and the limitations of the law in resolving conflicts.

DEMANDS FOR COURT SERVICES IN DISPUTE RESOLUTION

Americans take many issues and troubles to courts (Haltom and McCann, 2004). Lawsuits and other legal actions are much more common in the United States than in other nations. On a related note, the United States has some 1.3 million attorneys, with a rate of about 1 lawyer for every 300 citizens, which is one of the highest rates in the world. Although the United States has only about 4.5% of the world's population, it accounts for more than two-thirds of all the world's lawyers. Along with a very high rate of attorneys, the United States also has a high rate of litigation. The annual number of civil lawsuits today is much, much higher than a few decades ago, as is the monetary cost of this litigation.

Several reasons explain the increase in civil litigation over time. Americans today tend to accept that being sued is the price of freedom, and they seem more fascinated by litigation than people in any other society. In a sense, litigation is a form of entertainment, and a favorite indoor activity is to see due process take its course on television as evidenced by the enormous onslaught and popularity of law-related programming (Zobel, 1994). Some scholars argue that lawsuits are good for America (Bogus, 2001). For instance, product liability litigation has saved countless lives, brought critical information to light (along with product labels that warn us about almost everything that could be potentially harmful), forced manufacturers to make products safer, and driven off the market unreasonably dangerous products when regulatory agencies or Congress lacked the political will to do so (Koenig and Rustad, 2004).

Another reason for the rise in civil litigation is the increase in the number of lawyers since the 1960s (Nelson, 2009). Basically, the more lawyers there are, the greater is the quantity of litigation. The increase in the number of lawyers increases competition among lawyers and reduces a variety of costs, such as the cost of retaining an attorney and lower contingency fees. This lower cost to the litigant increases the demand for lawyers.

An additional explanation for the increase in the number of cases reaching the courts may be that although the number of litigants has not increased, the relatively few individuals or organizations (that is, repeat players) who typically use courts to settle disputes have in recent years simply found more occasion to do so. This resulted in a kind of assembly-line litigation aided by all-but-automated computerized litigation packets that are now available for products ranging from handguns to tires (France, 2001).

The increase in litigation is also related to the increase in the range and variety of legally actionable or resolvable problems:

> As the scope of law expands, as more legal rights and remedies are created, the amount of litigation increases as a result of the new opportunities for court action. As new rights are created, litigation may be necessary to clarify the way in which those rights will be defined and understood by the courts. Furthermore, the creation of new rights may direct the attention of organized interest groups to the judiciary. Interest groups may come to perceive litigation as a viable strategy for stimulating group mobilization to achieve the group's political goals.
>
> (Goldman and Sarat, 1978:41)

Sheldon Goldman and Austin Sarat (1978:41–43) identify three generic factors that may explain litigation. The first they call *social development*. Societal variation in the frequency of litigation is a function of changes in the level of complexity, differentiation, and skill of the society in which courts operate. Social development and changes in the structure of society bring about increased reliance on courts to process disputes. In less-developed societies, which feature stable and enduring contacts among individuals, disputes are easier to resolve informally. Consequently, courts play a less important role in disputes. In more complex societies, relationships are typically more transitory, and disputes often occur between strangers. Furthermore, in developed societies, there is no longer a single dominant ethos or a set of customs. Under these circumstances, informal dispute processing is impractical.

The second generic factor that explains why disputes are translated into demands for court services is subjective cost–benefit calculations on the part of disputants. For some disputants, the decision to use courts is a relatively objective, well-thought-out decision, because they weigh what they may lose against the possible benefits of doing nothing or of using different methods of conflict resolution. For others, however, resorting to courts may be an act "that has value because of its cathartic effect, even though it may not produce tangible, material benefits" (Goldman and Sarat, 1978:42). In such a situation, vindictiveness, spite, or the desire for a "moral victory" outweighs the lack of material rewards from litigation.

The third generic factor in litigation is the creation of more legally actionable rights and remedies by legislatures and courts. Goldman and Sarat state, "The greater the reach and scope of the legal system, the higher its litigation rate will be" (1978:42). To some extent, the expanded use of courts is attributable to the expansion of rights and remedies stemming from Supreme Court decisions. The growing scope of law increases litigation by expanding the jurisdiction of the courts. The creation of new rights is likely to stimulate litigation designed to vindicate or protect those rights.

For example, prisoners' lawsuits increased after a 1964 Supreme Court decision let prisoners sue state correctional officials when conditions of confinement failed to meet constitutional standards. The Court had in mind complaints involving excessive force, inadequate medical treatment, and freedom of religious expression. This decision spawned

many prisoners' lawsuits regarding these and less serious matters (Cox, 2009). As another example, the 1973 Supreme Court decision in *Roe v. Wade* invalidating statutes prohibiting abortions led litigation concerning such issues as whether the federal government had to pay for abortion through Medicaid, whether hospitals receiving federal funds had to make facilities for abortions available, whether parents must consent to a minor's abortion, and whether a husband can veto his wife's decision to terminate a pregnancy (Lempert, 1978:97–98).

VARIATION IN LITIGATION RATES

Ligation rates may vary over time and space. Regarding time, a common view in the law and society literature is that increased societal complexity and heterogeneity have increased litigation rates. However, some authors contend that social development of this nature does not necessarily lead to higher rates of litigation, at least for the span of time since the nineteenth century. For example, Lawrence M. Friedman (2005) argues that there is no evidence that nineteenth-century America witnessed proportionately less interpersonal litigation than mid-twentieth-century America, despite more cohesive kin and residential systems in the earlier period. Similarly, over time in Spain, the litigation rate "has remained remarkably constant and at a relatively low rate . . . the process of economic change does not seem to have affected the rate of litigation" (Jose Toharia, quoted by Grossman and Sarat, 1975:59). Vilhelm Aubert (1969) reached a similar conclusion in his study of Norway's legal system. He noted that the demand in Norway for dispute resolution during the previous hundred years had remained stable or even decreased, despite vast social changes and great economic progress during this period.

In a study of the civil load of two trial courts in California between 1890 and 1970, Lawrence M. Friedman and Robert V. Percival (1976) sampled civil case files of the superior courts in two counties. They found that litigation during the latter period was not higher than the former period 80 years earlier. In fact, the litigation rate in the latter year was somewhat lower. They attempt to explain this decline by suggesting that uncertainty—a prime breeder of litigation—has declined in the law and that rules are more settled now than in 1890. The routine administrative function has replaced the dispute-settlement functions in these courts. In reanalyzing Friedman and Percival's data, however, Richard Lempert (1978:133) came to the opposite conclusion: Although "the mix of judicial business has changed over the years" and there is

> little reason to believe that courts today are functionally less important as dispute settlers than they were in 1890 . . . overall, I do not believe that we can conclude from the Friedman and Percival data that the dispute settlement function of courts . . . has diminished over time.

Although the evidence of increased litigation since the nineteenth century is inconsistent, there is clear evidence that litigation rates vary over space, that is, from one society to another and even from one area to another area within the same society. Among industrial societies, Japan has often been identified as a nation with a low litigation rate (Tanase,

1995). In an often-quoted article, "Dispute Resolution in Japan," Takeyoshi Kawashima (1969) discussed specific social attitudes toward disputes that are reflected in the Japanese judicial process. Traditionally, the Japanese prefer to resolve disputes informally rather than take them to court. This aversion to litigation exists for two reasons. First, the Japanese culture emphasizes harmonious relationships, and litigation can disrupt relationships. When disputes do arise, the Japanese culture leads many people either to apologize for a perceived wrongdoing or to forgive someone for doing something wrong. Second, the Japanese culture also emphasizes authority and hierarchy. Subordinate persons and groups are supposed to defer to more dominant persons and groups. This means that subordinate parties simply "lump it" (to recall our earlier term) when they feel they are wronged.

PREREQUISITES FOR THE USE OF COURTS IN DISPUTE RESOLUTION

Courts provide a forum for the settlement of a variety of private and public disputes. The courts are considered a neutral and impartial place for dispute processing. Individuals and organizations that want to use the courts for dispute processing must meet certain legal requirements. At the minimum, plaintiffs must be able to demonstrate justiciability and standing (Hessick, 2015).

Justiciability means that the conflict is in fact a legal issue for which potential court involvement is appropriate. In the United States, most disputes are justiciable in one court or another, although the jurisdiction of particular courts varies. For example, federal courts are not permitted to grant divorces or adoptions or to probate wills. Various state courts exist for these and most other cases excluded from the federal judiciary. The potential litigant must turn the grievance into a legal dispute and must determine, with or without the aid of an attorney, whether the complaint is justiciable. Essentially, justiciability refers to real and substantial controversy that is appropriate for judicial determination, as differentiated from disputes or differences of a hypothetical or an abstract character.

Standing is a more severe limitation to litigation than justiciability. The theory behind standing is that individuals should be able to bring lawsuits only if their personal legal rights have been violated. For example, a taxpayer may not sue the government to prevent the expenditure of funds for an objectionable purpose because the ordinary taxpayer's stake in the expenditure is minimal. Someone who disapproves what the CIA is doing is supposed to take it up with Congress, not with the courts. Similarly, parents cannot sue for their grown daughter or son to be divorced: Such proceedings must be initiated by one of the spouses to the marriage.

Justiciability and standing are not the only limitations to the use of courts in disputes. There is also the old legal axiom *de minimis non curat lex*: The law will not concern itself with trifles. Trivial matters may not be litigated. For example, a court may refuse to hear a suit involving a very small sum of money. Moreover, although untold numbers of disputes arise over which the courts have clear jurisdiction and someone has standing to sue, a potential plaintiff may simply decide not to sue. If the plaintiff does threaten to sue, the

potential defendant may then prefer to settle out of court. Economic resources for both plaintiffs and defendants are important in their decision to become involved in courtroom action. In general, plaintiffs are unlikely to use the courts unless they have sufficient funds to hire an attorney and bear the costs of litigation. The parties on either side of a dispute must also be able to afford the costs of delay, which occur when disputes are submitted to the courts. For example, automobile accident cases involving large sums of money do not reach the court dockets for several years in many large American cities. In the interim, the plaintiff has expenses. Often the cost of waiting must be calculated against the benefits of a quick settlement for only part of the claim. Obviously, for many people, economic resources play an important role in the use of court services and may be decisive in out-of-court settlements.

Socioeconomic status is also related to the use of the judiciary in disputes. People and groups that cannot afford a lawyer and the necessary court fees are less likely to litigate than those who have sufficient funds. Moreover, social status is related to the kind of court services that are used. In general, the poor are more likely to be defendants and recipients of court-ordered sanctions. Middle-class litigants are less likely to be subjected to court sanctions and more likely to benefit from the use of court services in their own behalf from the legitimization of their private agreements or from out-of-court negotiations.

INDIVIDUALS AND ORGANIZATIONS AS DISPUTANTS

As noted in Chapter 3, the use of courts varies also by the types of litigants. Marc Galanter (1974) advanced a highly influential typology of litigants by the frequency of the use of courts. Those who have only occasional recourse to the courts are called **one-shotters**, and those who are engaged in many similar litigations over time are designated as **repeat players**. Examples of one-shotters include spouses in a divorce case and auto-injury claimants, while examples of repeat players include insurance and finance companies. Based on this typology, Galanter proposed a taxonomy of four types of litigation by the configuration of parties:

- One-shotter versus one-shotter
- Repeat player versus one-shotter
- One-shotter versus repeat player
- Repeat player versus repeat player

Divorces are common illustrations of cases involving disputes between one-shotters. Disputes between one-shotters are "often between parties who have some intimate tie with one another, fighting over some unsharable good, often with overtones of 'spite' and 'irrationality'" (Galanter, 1974:108). Neighbors may also end up in court over property disputes and other problems.

The second type of scenario, involving repeat players suing one-shotters, is exemplified by suits initiated by finance companies against debtors, landlords against tenants, and

the Internal Revenue Service (IRS) against taxpayers. These and other examples of repeat players versus one-shotters account for much litigation every year. For repeat players, the use of law in this manner is a regular business activity. When they win their case, as usually happens, they in effect are borrowing the government's power for their private purposes. Repeat players may use that power to achieve many objectives, such as to collect debts, oust tenants, or prohibit some harmful activity. Thus, a landlord or bank holding an unpaid mortgage may, for example, call on a sheriff to oust a tenant, to reclaim some property, to sell property belonging to a defendant, or to seize the defendant's wages or property.

The third type of scenario involves one-shotters suing repeat players. Examples of this situation include tenants versus landlords and injury victims versus insurance companies. Outside of the personal injury area, litigation in this combination is not routine. It usually represents the attempt of some one-shotters to invoke outside help to create and use leverage against an organization with which the individual has a dispute.

The fourth type of litigation involves repeat players suing repeat players. Examples of this type include litigation between union and management and regulatory agencies and the companies they regulate. Given the large size of the organizations that are repeat players and the huge sums of money often at stake, this form of litigation is often very expensive and very time-consuming.

With these types of litigation in the background, we now further discuss certain types of conflicts between individuals, between individuals and organizations, and between organizations where one of the disputants resorts to the judiciary in an attempt to resolve the conflict.

DISPUTES BETWEEN INDIVIDUALS

Even though most controversies between individuals never come to the attention of courts, the handling of interpersonal differences is a traditional function of courts. Most individual disputes involve one-shotters. The manner in which these individuals' dispute is handled is likely to have a marked effect on their attitudes toward the government.

Individual disputes often deal with the distribution of economic resources and a variety of noneconomic problems. Economic disputes include various claims associated with contests over wills, trusts, and estates, landlord–tenant controversies, and disputes over property, land titles, and sales. Noneconomic conflicts include allegations of slander and libel, custody cases, divorce proceedings, insanity commitments, and malpractice suits.

Judges often attempt to encourage disputants to settle their differences by negotiating and reaching an agreement, as this process is much less costly and time-consuming than litigation and also less likely to generate harsh feelings. The success of such attempts depends to a great extent on the skills of the judge and on the nature of the disputes. If the parties are unable or unwilling to resolve their disputes outside of court, legal action proceeds and adjudication occurs.

In the adjudication of individual disputes, one party wins and the other loses. Robert B. Seidman (1978:213–214) observed that, in situations in which parties want to cooperate after the dispute, both must leave the legally settled cases without too great a sense of grievance. If, however, there are opportunities for avoidance (that is, parties need not live or work together), then the disputants may continue their antagonism. As noted earlier, the win/lose outcomes typical of litigation threaten enduring relations between the parties. Therefore, disputants who wish to maintain an ongoing relationship will generally engage in compromise settlements.

The structure of social relationships thus plays a role in the decision as to whether to take a dispute to court in the first place. When continuing relations are important to the individuals involved in the dispute, they are generally more predisposed to resolve their differences through nonlegal means. In a classic paper, Stewart Macaulay (1969) described the avoidance of the law as a way of building and maintaining good business relations. Businesspeople prefer not to use contracts in their dealings with other businesspeople. Macaulay (1969:200) said: "Disputes are frequently settled without reference to the contract or potential or actual legal sanctions. There is a hesitancy to speak of legal rights or to threaten to sue in these negotiations."

Although a desire for continuing relationships may deter many disputants from litigating, litigation may nonetheless result if the stakes are high and if hostility between the parties builds. Nader and Todd point out: "It is not enough to state that because litigants wish to continue their relation they will seek negotiated or mediated settlement with compromise outcomes" (1978:17). For example, a family may be torn apart by disputes over inheritance, leading one or more siblings to sue the others for what they consider to be their fair share of the inheritance.

A very wide range of economic and noneconomic disputes between individuals end up in court, with many of these disputes over trivial matters, at least to outsiders. For example, a New Jersey couple whose home caught fire after a Pop-Tart was left unattended in the toaster sued Kellogg's and Black & Decker for damages (*Time*, 2001:15). People have sued school officials for disciplining their children, and they have sued local governments after they slip and fall on sidewalks, get struck by lightning on city golf courses, and even when they get attacked by a goose in a park (*Newsweek*, 2003:43–51). An administrative-law judge in Washington, DC, once sued a dry cleaner for $65 million for losing his pants (Takruri, 2007). In more serious disputes, a client may sue her or his attorney for legal malpractice, and a patient may sue a physician for medical malpractice. As these examples suggest, the list of disputes that may reach the courts is almost endless.

When any dispute does end up in court, a judge takes control of the case (Soeharno, 2016). Judges are supposed to decide disputes by reference to the facts of who did what to whom, and by identifying, interpreting, and applying appropriate legal norms. As they do so, they are required to remain impartial and objective regarding the parties to the dispute, the exact nature of the dispute, and the outcome of the dispute.

However, even if courts appear impartial in their procedures, however, they may still produce biased results if the laws that they apply favor one type of litigant (Goldman and

Sarat, 1978). The type of attorney that disputants are able to retain may also influence the outcomes of court decisions. Availability of resources to disputants directly affects the quality of legal talent they can hire. In particular, access to a skillful attorney increases the likelihood of a favorable court decision.

DISPUTES BETWEEN INDIVIDUALS AND ORGANIZATIONS

This section discusses disputes between individuals and organizations. The first part of the section considers individuals as plaintiffs and organizations as defendants, while the second part will deal with legal disputes initiated by organizations against individuals. We will use the term organization to cover a broad range of social groups that have been deliberately and consciously constructed to achieve certain specific goals—hospitals, credit agencies, universities, General Motors, regulatory agencies, the American Medical Association, public-interest law firms, and so forth.

Disputes between individuals and organizations may take place over a variety of issues, many of which may be included in four general categories:

1. disputes over property and money (economic disputes);
2. claims for damages and restitution;
3. issues of civil rights; and
4. disputes concerning organizational actions, procedures and policy.

Examples of economic disputes include the following types of actions: claims for damages and restitution; suits for unpaid rent; eviction; claims for unpaid loans and installment purchases; foreclosures and repossessions; and suits on contracts and insurance policies.

Claims for damages and restitution most often involve automobile accidents and lawsuits against insurance companies (Zernova, 2008). However, other forms of injury—for example, airplane accidents, faulty appliances, and medical malpractices—also give rise to claims. Damage suits may also be initiated to compensate for losses sustained from the failure to honor a contract or to perform a service properly. Slander and libel actions also fall within this category (Shuy, 2010). Although money may change hands as a result of these actions, the actions themselves seek compensation for alleged improper behavior and its consequences.

Civil rights disputes include claims of discrimination by race, sex, national origin, or other protected backgrounds in matters of employment, hiring, promotion, retention, pay, housing, and admission policies. Other issues that may lead to civil rights disputes include discriminatory practices such as the exclusion of handicapped people and setting arbitrary age or educational limits (McCrudden, 2004).

The final category of disputes includes challenges to a variety of actions, procedures, and policies of organizations. Decisions of zoning boards or tax assessors may be challenged as a violation of statutes or administrative procedures. Plaintiffs may seek

a reversal of particular decisions, or a voiding of statutes or injunctions prohibiting the continued application of particular policies. In organizations that distribute benefits, such as food stamps, aid to the disabled, and Medicaid, there are disputes about the appropriate form of benefits, conflicting and inconsistent eligibility rules on employment and training incentives, and disputes about how administrators should deal with beneficiaries. In business organizations, disputes over policies governing warranties, replacement of defective products, or unethical collection practices also come to courts.

Usually, organizations are plaintiffs in the first category of disputes just listed, and defendants are plaintiffs in the remaining three categories. In general, as Marc Galanter (1975) concludes, organizations are more successful than individuals as both plaintiffs and defendants. Moreover, organizations enjoy greater legal success against individual antagonists than they do against other organizations. Meanwhile, individuals fare less well in legal actions against organizations than against other individuals.

Much evidence supports Galanter's conclusion. In an oft-cited example of the legal victories organizations routinely gain against individuals, David Caplovitz (1974:222) found that legal actions against debtors in his sample of 1,331 cases, drawn from 4 cities, resulted in creditor victories in all but 3% of the cases.

Although organizations have a greater chance of winning and a higher frequency of initiating lawsuits, individuals still sometimes sue organizations (Hellman, 2004). For example, consumers may sue companies for injuries suffered from defective products, and workers may sue companies for health problems caused by hazardous workplace conditions. When individuals launch such lawsuits, organizations have a considerable advantage in court owing to their wealth and legal resources. Despite the supposed impartiality of the courts, David normally has little chance of defeating Goliath in a courtroom. Instead, the legal arena is more like the Roman Coliseum where the lions almost always win (McIntosh and Cates, 2010).

The remainder of this section considers disputes initiated by individuals and organizations separately. For the former, we will illustrate the use of law as a method of dispute resolution in academia, and for the latter, we will discuss the use of courts as collection agencies in the field of consumer credit.

Law as a Method of Dispute Resolution in Academia As we move further into the twenty-first century, law remains a potent force in institutions of higher learning in the United States (Alexander and Alexander, 2017); it is also becoming more pronounced at all other levels of education (Imber et al., 2014). Along with producing lawyers, our nation's colleges and universities are increasingly producing work for lawyers (Gajda, 2010). Many disputes that develop on campuses in America are resolved outside the halls of academia. Students, faculty members, academic administrators, and their institutions have become litigants in growing numbers during the past few decades. For example, students have sued their institutions after being raped or sexually assaulted and after being sexually harassed (Mervosh, 2017). Less seriously, students have also sued their institutions over grades they did not like.

Faculty members have also sued their own institutions. The grounds for these lawsuits include denial of tenure and/or promotion, and allegedly unfair firings or other disciplinary actions after charges of plagiarism or sexual harassment. Faculty have also taken legal action alleging infringement on academic freedom and unfair labor practices by their administration (Nelson, 2010).

Because litigation involving colleges and universities involve several different types of parties, it is helpful to discuss campus lawsuits further in the context of three combinations of these parties' relationships with each other: (1) faculty–administration; (2) student–faculty; and (3) student–administration.

Faculty–Administration Relationship **The faculty–administration** relationship in higher education features an increasingly complex web of legal principles and authorities. The essence of this relationship is contract law, but "that core is encircled by expanding layers of labor relations law, employment discrimination law, and, in public institutions, constitutional law and public employment statutes and regulations" (Kaplin and Lee, 2006:159). The growth in the number and variety of laws and regulations governing faculty–administration relations provides a fertile ground for grievances and coincides with an increase in the number of lawsuits stemming from that relationship.

Many legal disputes center on the meaning and interpretation of the faculty–institution contract. Depending on the institution, a contract may vary from a basic notice of appointment to a complex collective bargaining agreement negotiated under federal or state labor laws. In some instances, the formal document does not encompass all the terms of the contract, and other terms are included through "incorporation by reference"—that is, by referring to other documents, such as the faculty handbook, or even to past custom and usage at an institution. In the context of contract interpretation, legal disputes arise most often in the context of contract termination and due notice for such termination.

Many lawsuits instituted by faculty members against university administrations have focused on faculty–personnel decisions, such as appointment, retention, promotion, and tenure policies; monetary matters affecting women and people of color; and sex discrimination. As a result of civil rights legislation, hiring procedures must follow clearly established affirmative action guidelines. Many traditional practices of departments and universities are being questioned, such as the use of "the old boy network" and other selection processes not in compliance with these guidelines. Similarly, termination procedures must also follow specific guidelines and deadlines, and in recent years, faculty members have increasingly resorted to lawsuits on the grounds of procedural matters.

Student–Faculty Relationship Other potentially conflict-laden situations in academia arise from *student–faculty* relations. Students are increasingly considering themselves buyers of education, treating education like other consumer items and expecting a proper return for their educational dollars (Johnson, 2003). Because students are purchasers of education, they expect "delivery" of a product. In this context, the question of academic malpractice becomes important. Academic malpractice is generally considered to be improper, injurious, or negligent instruction, and/or action that has a "negative effect" on the

student's academic standing, professional licensing, or employment (Vago, 1979:39). Many examples of possible academic malpractice exist. A faculty member may be charged with malpractice by a student who perceives a particular course as "worthless," or by a student who contends that he or she did not obtain any "relevant" information or that for some reason a course did not fit into the student's general educational outlook, requirement, or area of concentration. In such instances, individual professors are charged, and the object of the lawsuit is usually the recovery of tuition money, and occasionally an intent to seek punitive damages, because the legal doctrine of *respondeat superior* (that is, the sins of the employee are imputed to the employer) is usually invoked (Vago, 1979).

Disputes resulting from a failure of a student to pass an exam in a course may also culminate in attempts to involve the courts. In such a situation, a student may question the expertise and competency of professors to evaluate examinations, or a department may be accused of following improper procedures during examinations. Questions of expertise and competency usually arise in the area of alleged academic overspecialization. For example, instructors sometimes teach a course that is outside their area of expertise. If so, are they qualified to evaluate an exam in this course? Issues of improper procedures often arise in the context of due process involving the department's or the university's failure to list specific guidelines for examination procedures, or to live up to those guidelines, or to provide clearly written guidelines and appeal procedures.

However, judges are ordinarily restricted from overturning strictly academic decisions made by faculty members about a student's academic career. According to a 1985 Supreme Court ruling, "When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment," and courts are not "suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members" (Palmer, 1985:33).

A student's failure to pass a professional examination (for example, to become an attorney or a physician) is another ground for lawsuits. Here the charge is usually that a given department failed to properly prepare the student to successfully take an external examination, such as a bar examination, and thus provided a "defective product." In a well-publicized case some years ago, a court ruled against a graduate of the Southern University Law School who claimed the university was responsible for his failure to pass—on three occasions—the state bar examination. The court held that it was against Louisiana law to sue a state agency and that the university is such an agency; the court also noted that a properly drafted contract suit may have stated a "remediable" course of action (Vago, 1979:41).

Student–Administration Relationship **Student–administration** relations provide a third area for potential conflict in academia. Students have increasingly brought legal challenges regarding such things as suspension and dismissal procedures, the rights of students to organize, alleged censorship activities over student publications, and sex.

Although institutions of higher learning have the right to dismiss, suspend, or otherwise sanction students for misconduct or academic deficiency, the exercise of this right must

observe a body of procedural requirements. Under the due process clause, students are entitled to a hearing and notice before disciplinary action is taken. In general, several court rulings indicate a judicial trend toward increased protection of student rights, in both public and private institutions, in suspension and dismissal cases (Alexander and Alexander, 2017).

Student–administration disputes sometimes raise First Amendment rights. Under the First Amendment, students have a legal right to organize and use appropriate campus facilities. In some instances, however, postsecondary institutions retain the authority to revoke or withhold recognition of student groups and to regulate the organizational use of campus facilities. When a mutually acceptable and satisfactory balance between the organization's rights and the institution's authority cannot be attained, the organizing students may turn to the courts to settle their dispute with the administration, as has been the case, for example, with various gay rights organizations at religious institutions.

First Amendment principles also apply to student publications. The chief concern here is censorship and administrative control over publications. Sometimes campus newspapers publish op-eds or other material that, for better or worse, offends the administration, many students, or other parties. In some situations, campus administrations have attempted to shut down a newspaper or otherwise to control its content.

Student lawsuits against university administrations on the basis of alleged sex discrimination, particularly in athletics, also occur. Although these lawsuits reflect the increasing cultural acceptance of women's participation in intercollegiate athletics, they were made possible in the first place by the Title IX federal statute that prohibits sex discrimination in education (Brake, 2010). Title IX lawsuits have concerned such issues as funding disparities in men's and women's athletics; the use of university sports facilities and locker rooms; scheduling games and practice time; the provision of equipment and supplies; travel and per diem allowances; publicity; and the provision of coaches, housing, and dining facilities.

The growing use of lawsuits as a method of conflict resolution in academia has had important implications for contemporary higher education. The economic cost of these lawsuits can be considerable. In addition, colleges and universities have had to hire more on-staff lawyers to advise administrators, faculty, and other parties regarding liability issues. They have also needed to develop and maintain more effective ways of handling disputes that respect the principles of fairness and due process. Because there is certainly no evidence that the various disputes that occur at almost every institution of higher education will ever disappear, law and litigation will continue to be important features of the halls of academia.

THE COURTS AS COLLECTION AGENCIES

Disputes involving organizations as plaintiff and individuals as defendants are most often triggered by disagreements over property and money. Such disputes occur in the creditor–debtor relationship, where the creditor is usually an organization such as a collection,

finance and loan company, car dealership, department store, or hospital. In these situations, there is a gross power disparity between the debtor and the organization. To use our earlier terms, the organization is typically a repeat player when it comes to the law, while the debtor is a one-shotter. This means that the organization has much more legal knowledge and resources than the debtor and can use these advantages to win any legal action it brings against the debtor (Goldberg et al., 2012).

Robert A. Kagan once commented, "If the extension of credit is the lifeblood of a dynamic commercial society, the forcible collection of unpaid debts is its backbone" (1984:324). When debtors default on their contractual obligation to make payments, the standard legal remedy is for the creditor to sue in civil court. The purpose is to establish the legality of the debt and its amount. Of course, creditors "hope to collect the debt by invoking the power of the court, but even if they do not collect, a judgment against the debtor is still of value for income tax purposes. Bad debts are worth 50 cents in deductions on every tax dollar" (Caplovitz, 1974:191).

A creditor who is successful in court obtains a judgment against the debtor. Once obtained, there are a variety of legal remedies available for collecting the judgment, including garnishment, liens, and the forced sale of the debtor's property. To define some terms, a **garnishment** is a court order directing someone who owes money to the debtor; a **lien** establishes a creditor's claim on property (such as a house or a car); while a **forced sale**, such as foreclosure, involves seizure and sale of the debtor's property at an auction, with the proceeds then turned over to the creditor to satisfy the judgment.

Lenders will continue to hold debtors responsible for the difference between what they were able to recover through forced sale of a property and the actual amount owed on it. For example, if a car is repossessed, the lender will try to sell the car, and because cars lose their value over time, the sale price the lender achieves will be substantially less than what the debtor paid—or even owe. With lenders having no motivation to seek the best price, the car is most likely to be sold in an auction to used car dealers, and the debtor will owe the remainder. So, if someone still owes $10,000 on a car and the lender sells the car for $3,000, the debtor will still owe $7,000 on the car that he or she no longer owns. If the lender cannot collect, the debt will likely be assigned to a collection agency with extra fees, charges, threats and hounding, and a likely scarred credit report.

Before going to court, a creditor may resort to a number of social pressures and sanctions of varying severity, ranging from impersonal routine "reminders" and dunning letters or telephone or email appeals to pressure the debtor to pay any money owed (Hobbs, 2011). Creditors sometimes resort to unusual extrajudicial methods of collection. For example, a London firm once used a rather unconventional method of extracting money from debtors—smell: "Smelly Tramps, Ltd. is just what it sounds: a motley crew of ragged, foul-smelling tramps, who specialize in dunning particularly evasive debtors. The tramps are really otherwise respectable chaps, dressed in disgusting clothes and treated with a special stomach churning chemical" (*Economist*, 1979:104). Their technique was simply to sit around the victim's office or home until he or she signs a check. A cable company in New York once used another unusual dunning technique to persuade customers to pay their

bills. Instead of cutting off service completely, the company filled each of its 77 channels with C-SPAN's programming. Collection of overdue balances improved dramatically after this change occurred (*U.S. News & World Report*, 1995).

When such dunning efforts fail and creditors have exhausted nonlitigation alternatives, they are likely to sue. A characteristic of most civil suits for debt is that the plaintiff usually wins by default. A major reason for this outcome is that most defendants do not retain an attorney. In fact, many of them are not present when their cases are heard. Their absence is treated as an admission of the validity of the claim, and a default judgment is entered against them. An early study found that such judgments are rendered in over 90% of consumer cases (Caplovitz, 1974).

Several circumstances explain why defendants fail to respond to a summons and to appear in court. Some recognize the validity of the creditor's claim and see no point in attempting to contest it or cannot afford an attorney to do so (Hobbs, 2011). Others may simply find it impossible to leave work (with consequent loss of pay), travel to court, and spend most of the day waiting for their cases to be called. The fact that most courts are open from 9 A.M. to 5 P.M., hours when most debtors are at work, further contributes to default judgments. At times, the wording of a summons is so complicated and unclear that many debtors simply cannot grasp what is at stake or that they must appear if they are to avoid a default judgment. Others simply do not know that they are being sued. Instead of properly serving the summons, process servers in some areas (because of the inability to locate debtors or the fear of going into certain neighborhoods) destroy it and claim it has been served. Although accurate statistics on the frequency of such "sewer service" do not exist, it is evidently commonplace in many cities (Caplovitz, 1974). These individuals learn about suits against them the hard way—when a garnishment or eviction notice is served.

Although we have focused on suits for debts, there are a number of other important types of actions initiated by organizations against individuals. For example, real estate companies regularly initiate legal action in the form of evictions against unknown thousands of tenants, while the IRS files suits against individuals (and at times organizations) for back taxes or for tax evasion. In all such suits, plaintiffs can usually expect to win for the reasons we have outlined. In the legal arena, Goliath organizations usually beat David individuals.

DISPUTES BETWEEN ORGANIZATIONS

The final category of legal disputes we will consider involves one organization suing another organization. Examples of such interorganizational conflict include disputes between a university and the community over matters of zoning, land use, and tax-exempt status; disputes between a corporation and the federal government concerning compliance with federal regulations, such as occupational safety, pollution, and civil rights; or disputes between two corporations over such matters as copyright infringement or possible theft of business secrets.

As these examples indicate, disputes between organizations cover a wide spectrum of participants and controversies. Corporate executives may take their disagreements to court

over contract interpretation, trademarks, or alleged patent infringements. The federal government is involved as a plaintiff in suits to acquire land needed for federal projects (highways, dams, parks, buildings) that it is unable to purchase through negotiation; it is also involved as a plaintiff in actions to force private companies to comply with contracts with federal agencies, and in suits brought under the antitrust statutes. Disputes between the government and private firms arise over matters of licensing and regulation, labor relations, and governmental contracts. Local governments are often the defendants in cases involving zoning and land use, location of public housing projects, and tax reassessment.

In recent decades, complex public-policy disputes and regulatory disputes stemming from the government's regulation of the economic and social systems have become more pronounced. The regulation of economic activities has become pervasive, and it involves important decisions about the distribution of goods and services.

Social-policy disputes develop when the government pursues broad national objectives that may involve many interests and groups, such as racial equality and economic opportunity, environmental protection, income security, and public health and safety. Examples of agencies with such objectives are the Occupational Safety and Health Administration, the Equal Employment Opportunity Commission, and the Environmental Protection Agency. In fact, large-scale social welfare programs—cash transfers, food stamps, housing, health, and education—have often generated complex public-policy disputes (Mink and Solinger, 2004).

Regulatory disputes frequently involve difficult technical questions (Morriss et al., 2009), whereas social-policy disputes raise difficult political and value questions. In both types of disputes, information about important variables is often incomplete or inaccurate, effects of alternative choices are hard to ascertain, and often there are no easy answers to cost–benefit questions or to questions of trade-offs among various interests. The various regulatory agencies discussed in Chapter 3, in addition to major policy issues, also process large numbers of routine disputes. For example, the Civil Aeronautics Board (CAB), in addition to allocating airline routes (large complex disputes), in any given year will also handle thousands of passenger and shipper complaints, tariff applications, and referrals. The U.S. Securities and Exchange Commission (SEC), in addition to a number of formal hearings annually, also rules on thousands of registration statements.

In many instances, the formal quasi-adjudicative procedures used by regulatory agencies are ill-suited to resolving large and complex disputes. Delays in settling disputes are frequent, and the situation is further compounded by the fact that some agencies traditionally engaged in economic regulations are now being asked to consider environmental claims as well. The regulatory process, in a sense, encourages conflict, rather than acting to reconcile opposing interests. When agencies grant licenses, set rates, or determine the safety of drugs, they often allow the parties to the proceedings to have a full adversary hearing with impartial decision-makers, formal records, and rights of cross-examination and appeal. This leads the parties to approach the agency as if they were in a lawsuit.

Public-Interest Law Firms in Environmental Disputes Since the mid-1960s, many law firms have practiced *public-interest law* by working for a cleaner environment; for the

rights and needs of the poor, women, LGBTQ people, immigrants, and people of color; for consumer rights; and for other similar causes. This type of work is called **cause lawyering** (Scheingold and Sarat, 2004), which is generally oriented toward causes and interests of groups, classes, or organizations, rather than individuals (Handler, 1976). Although public-interest law firms engage in activities such as lobbying, reporting, public relations, and counseling, litigation is by far their most important activity. A recent example of such litigation was a series of legal actions brought against the January 2017 executive order of President Donald Trump that banned Syrian refugees and people from several primarily Muslim nations from entering the United States (Kranish and Barnes, 2017).

In the area of education, public-interest law firms have handled cases on such matters as school financing, the legal rights of students and parents, bilingual education, and special education. In the area of employment, they have handled cases involving possible discrimination in hiring and promotion based on race, gender, or other legally protected social backgrounds. In the area of consumer products, firms have handled cases involving product quality, product safety, and guarantee and warranty practices.

Another key area for public-interest law is the environment. Private groups such as the Environmental Defense Fund, the National Resource Defense Council, and the Sierra Club have used the courts to pursue better environmental quality. These efforts sometimes involve novel legal strategies (Bodansky, 2010; Stone, 2010). Environmental lawyers and organizations have been active in a variety of domains. They have challenged dams and other water resources projects, raised questions about nuclear power plants, attacked the pricing policies of electric utilities, stopped the use of dangerous pesticides, and sought to improve enforcement of such major environmental statutes as the National Environmental Policy Act, the Clear Air Act, and the Federal Water Pollution Control Act (Weibust, 2010).

Environmental disputes typically fall into two broad categories: (1) enforcement and (2) permitting cases. *Enforcement* disputes come about when a public-interest group raises questions about a party's compliance with certain state or federal law setting specific environmental standards, such as air or water quality. *Permitting* cases involve disputes over the planned construction of new facilities, such as a dam or an airport.

Environmental disputes differ from more traditional disputes in several ways: Irreversible ecological damages may be involved; at least one party to the dispute may claim to represent broader public interest, including the interests of inanimate objects, wildlife, and unborn generations; and the implementation of a court decision may pose special problems (what will happen to the community if the major employer is forced to close a factory responsible for water pollution) (Goldberg et al., 2012).

Environmental litigation differs in at least one other respect. Unlike litigation involving racial discrimination in schools, housing, or employment, environmental litigation does not usually represent the interests of oppressed groups like the poor, women, and people of color. Instead, environmental litigation represents the interests of people more generally.

Over the years, environmental litigation has become more frequent in the United States as well as in other advanced industrialized nations (Baier, 2016). This growth reflects the significant increase in public awareness that our modern civilization causes substantial and possibly irreparable damage to the natural environment. Consequently, this awareness and the failure of many corporations to act as good stewards of the environment has led to a proliferation of regulatory laws aimed at protecting the natural environment.

SUMMARY

1. A major function of law is to help settle disputes. Terms such as conflict resolution and dispute settlement all refer to this important function of law. Although law may help settle disputes, it does not deal with the underlying causes of conflict and does not reduce tension or antagonism between the aggrieved parties.
2. Nonlegal methods of dispute resolution include violence, rituals, shaming and ostracism, supernatural agencies, "lumping it," avoidance, negotiation, mediation, and arbitration. In the United States and other industrialized countries, lumping behavior, avoidance, and negotiation are frequent responses to dispute situations.
3. Adjudication is a public and formal method of dispute resolution and is best exemplified by courts. Court decisions have an either/or character, and the adversary nature of court proceedings can aggravate the antagonism between the parties in a case.
4. As a result of social developments, the increased availability of legal mechanisms for conflict resolution, and the creation of legally actionable rights and remedies, there is a growing demand for court services in dispute resolution. However, some authors challenge the notion that the dispute-processing function of the courts has increased in recent years as a result of social and economic changes.
5. To qualify for the use of court services, at the minimum plaintiffs must be able to demonstrate justiciability and standing. Because of these standards, not all disputes and other issues are eligible for legal action.
6. Those who have only occasional recourse to the courts are called one-shotters, and those who are engaged in much similar litigation over time are designated repeat players.
7. Individuals tend to be one-shotters, while organizations tend to be repeat players. Repeat players ordinarily have several advantages in any of the legal disputes with which they become involved.
8. Many types of litigation occur in campus settings. These types generally fall into three relationship contexts: faculty–administration, student–faculty, and student–administration.
9. When nonlegal methods of collection fail, creditors are likely to enlist the courts in the collection process. Of the legal devices available for collecting the judgments, garnishment of wages is used most frequently. A characteristic of most civil suits for debts is that the plaintiff usually wins by default.
10. Disputes between organizations cover a wide spectrum of participants and controversies. Public-interest law firms have been involved in many interorganizational disputes. A focus of much public-interest law during the past few decades has been the environment, with several national organizations using litigation to improve many aspects of the environment.

KEY TERMS

Adjudication a public and formal method of conflict resolution that involves the use of the courts

Arbitration a method of conflict resolution in which disputants agree beforehand to the intervention of a neutral third party and to the finality of this party's decision

Avoidance the sufficient limiting of a relationship with other disputants so that the dispute no longer remains salient

Feuding a state of recurring hostilities between families or groups, instigated by a desire to avenge an offense (insult, injury, death, or deprivation of some sort) against a member of the group

Justiciability the idea that a conflict is in fact a legal issue for which potential court involvement is appropriate

Lumping it inaction in reaction to a dispute

Mediation a common dispute resolution method that involves a neutral and noncoercive third party

Negotiation a two-party arrangement in which disputants try to persuade one another, establish a common ground for discussion, and feel their way by a process of give-and-take toward a settlement

One-shotters litigants who have only occasional recourse to the courts

Repeat players litigants who are engaged in many similar litigations over time

Standing that idea that individuals should be able to bring lawsuits only if their personal legal rights have been violated

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7

CHAPTER 7
LAW AND SOCIAL CHANGE

CHAPTER OUTLINE

LEARNING OBJECTIVES

- Explain what is meant by the reciprocal relationship between law and social change
- Distinguish between the direct and indirect effects of law on social change
- Describe an example of the limited efficacy of law in achieving social change
- Define rational-legal authority
- Explain why law can often possess binding force for social change
- Describe any three factors that reduce the ability of law to produce social change

For quite some time now, law and society theorists have examined the relationship between legal and social change in the context of development of legal institutions (Anleu, 2009). These theorists, some of whom were discussed in Chapter 2, viewed law as both an independent and a dependent variable in society and emphasized the interdependence of the law with other social systems. In light of the theoretical concerns raised earlier in the book, this chapter will further examine the interplay between law and social change. The

law will again be considered as both a dependent and an independent variable—that is, as both an effect and a cause of social change. The chapter will also analyze the advantages and the limitations of the law as an instrument of social change and will discuss a series of social, psychological, cultural, and economic factors that have an influence on the efficacy of law as an agent of change.

The initial step in understanding the relationship between law and social change is conceptual. What is social change? The term *change*, in everyday usage, is often used loosely to refer to something that exists that did not exist previously, or to the demise or absence of something that formerly existed. But not all change is social change. Many changes in life are small enough to be dismissed as trivial, although at times they may add up to something more substantial and consequential. In its most concrete sense, social change means that large numbers of people are engaging in group activities and relationships that are different from those in which they or their parents engaged in previously. Society is a complex network of patterns of relationships in which all the members participate in varying degrees. These relationships change and behavior changes at the same time. Individuals face new situations to which they must respond. These situations reflect factors such as new technologies; new ways of making a living, changes in place of residence; and innovations, new ideas, and new social values. Thus, **social change** means modifications in the way people work, rear a family, educate their children, govern themselves, and seek ultimate meaning in life. It also refers to a restructuring of the basic ways people in a society relate to each other with regard to government, economics, education, religion, family life, recreation, language, and other activities (Vago, 2004).

Social change is a product of a multitude of factors and, in many cases, the interrelationships among them. In addition to law and legal cultures, there are many other mechanisms of change, such as technology, ideology, competition, conflict, political and economic factors, and structural strains (McMichael, 2017). All the mechanisms are related in many ways. One should be very careful not to assign undue weight to any one of these "causes" in isolation. Admittedly, it is always tempting and convenient to single out one "prime mover"—one factor, one cause, or one explanation—and use it for a number of situations. This is also the case with legal change: It is extremely difficult, perhaps impossible, to set forth a simple cause-and-effect relationship in the creation of new laws, administrative rulings, or judicial decisions. Although there are exceptions, as will be alluded to in this chapter, one should be somewhat skeptical and cautious concerning one-factor causal explanations in general and in particular about such explanations for large-scale social changes.

RECIPROCITY BETWEEN LAW AND SOCIAL CHANGE

The subject of whether law can and should lead, or whether it should never do more than cautiously follow changes in society, remains controversial. The conflicting approaches more than two centuries ago of the British social reformer Jeremy Bentham and the German legal scholar Friedrich Karl von Savigny provided the contrasting classical

paradigms for this long-standing debate. At the beginning of industrialization and urbanization in Europe, Bentham expected legal reforms to respond quickly to new social needs and to restructure society. He freely gave advice to the leaders of the French Revolution, since he believed that countries at a similar stage of economic development needed similar remedies for their common problems. In fact, it was Bentham's philosophy, and that of his disciples, that turned the British parliament—and similar institutions in other countries—into active legislative instruments to help achieve various social reforms.

Writing at about the same period, Savigny condemned the sweeping legal reforms brought about by the French Revolution that were threatening to invade Western Europe. He believed that only fully developed popular customs could form the basis of legal change. Since customs grow out of the habits and beliefs of specific people, rather than expressing those of an abstract humanity, legal changes are codifications of customs, and they can only be national, never universal.

Well over two centuries later, the relationship between law and social change remains controversial. The basic debate concerns whether law merely reflects public sentiment and behavior or instead can be used to shape public sentiment and behavior. As Vilhelm Aubert once explained,

> According to the first view, law is determined by the sense of justice and the moral sentiments of the population, and legislation can achieve results only by staying relatively close to prevailing social norms. According to the second view, law, and especially legislation, is a vehicle through which a programmed social evolution can be brought about.
>
> (Aubert, 1969:69)

At one extreme, then, is the view that law is a dependent variable, determined and shaped by current mores and opinions of society. According to this position, legal changes would be impossible unless preceded by social change; law reform could do nothing except codify custom. This is clearly not so, and ignores the fact that throughout history, legal institutions have been found to "have a definite role, rather poorly understood, as instruments that set off, monitor, or otherwise regulate the fact or pace of social change" (Friedman, 1969:29).

The other extreme envisions the law as an instrument for social engineering. This was the view of many jurists in the former Soviet Union, which "made extensive use of legislation to guide society [and to] establish and develop social economic forms. [It also] used legislation to create and improve the institutions of socialist democracy, to establish firm law and order, safeguard the social system and state security, and build socialism" (Gureyev and Sedugin, 1977:12).

These general views still represent the two extremes of a continuum representing the relationship between law and social change. The problem of the interplay between law and social change is obviously not a simple one. Essentially, the question is not, "Does law change society, or does social change alter law?" Both contentions are likely to be correct.

Instead, it is more appropriate to ask under what specific circumstances law can achieve social change, at what level, and to what extent. Similarly, the conditions under which social change alters law need to be specified.

In general, in a highly urbanized and industrialized society like the United States, law does play a large part in social change, and vice versa, at least much more so than is the case in traditional societies. There are several ways of illustrating this **reciprocal relationship** (Nagel, 1975). For example, in the domain of family relations, urbanization, with its small apartments and crowded conditions, has lessened the desirability (and the feasibility) of three-generation families in a single household. This social change helped to establish certain social welfare legislation laws that in turn helped generate changes in the labor force and in social institutions for the aged. As another example, technological changes have caused the relation of personal-property owners to other individuals to become more impersonal and more likely to lead to injury. As a result, there have been alterations in the legal definition of fault, which in turn has changed the American insurance system

Although there is an obvious and empirically demonstrable reciprocal relationship between law and social change, with social change influencing law and law also influencing social change, for analytical purposes we will briefly consider these two relationships separately. To this end, the next section examines the conditions under which social change induces legal change, while the following section discusses law as an instrument of social change.

SOCIAL CHANGES AS CAUSES OF LEGAL CHANGES

In a broad historical framework, social change has been slow enough to make custom the principal source of law. Law could respond to social change over decades or even centuries (Edgeworth, 2003). Even during the early stages of the Industrial Revolution, changes induced by the invention of the steam engine or the advent of electricity were gradual enough to make legal responses valid for a generation. As time went by, however, social change became more rapid, forcing the law to respond more quickly. As Alvin Toffler (1970:11) famously observed, "Change sweeps through the highly industrialized countries with waves of ever accelerating speed and unprecedented impact." In a sense, people in modern society are caught in a maelstrom of social change, living through a series of contrary and interacting revolutions in demography, urbanization, bureaucratization, industrialization, science, transportation, agriculture, communication, biomedical research, education, and civil rights. During the past many decades, each of these revolutions has brought spectacular changes in a string of tumultuous consequences and transformed people's values, attitudes, behavior, and institutions.

Many sociologists and legal scholars assert that technology is one of the great moving forces for change in law (Volti, 2010). In just one example, the shifting forms of technological literacy (ranging from the invention of writing through the mass production of legal texts brought about by the printing press to the use of computers and the Internet) have shaped law, the practice of law today, and the training of lawyers (Tiersma, 2010). There is also

consensus in the literature that technology generally changes exponentially while social, legal, and economic systems change incrementally (for example, the laws have not kept pace with the rapid changes brought about by the digital revolution [Downes, 2009]).

Technology influences law in at least three ways:

> The most obvious . . . is technology's contribution to the refinement of legal technique by providing instruments to be used in applying law (e.g., fingerprinting or the use of a lie detector). A second, no less significant, is technology's effect on the process of formulating and applying law as a result of the changes technology fosters in the social and intellectual climate in which the legal process is executed (e.g., televised hearings). Finally, technology affects the substance of law by presenting new problems and new conditions with which law must deal.
>
> (Stover, quoted by Miller, 1979:14)

Technology moves so quickly that we can barely keep up, and our legal system moves so slowly that it can't keep up with itself. Illustrations from the past century of technological changes leading to legal changes abound. The advent of the automobile and air travel brought along new regulations. The automobile, for example, has been responsible for an immense amount of law: traffic rules, rules about drunken driving, rules about auto safety, drivers' license laws, rules about pollution control, registration, and so on. Just as technology has given a big boost to the retail industry, it has also transformed retail crime. Using sophisticated tactics such as bar-code forgeries and fraudulent gift cards, criminals steal large amounts, and many high-tech thieves belong to organized crime rings resulting in the formation of organized retail crime task forces among other control measures (Zimmerman, 2006). As another example, the Internet has led to a new form of bullying, cyberbullying, in which bullies use Twitter, Facebook, or other social media means to intimidate, harass, embarrass, and offend others. Through these means, bullies can engage in a variety of activities without ever having to face their victims and often without consequences (Algar, 2017).

Another impact of technological changes on law concerns various developments in crime detection over the years, including fingerprinting, DNA use, and electronic surveillance. These developments prompted many changes in the law, such as the kinds of evidence admissible in court (Carr, 2009). Although personal computers have existed for many readers' lifetimes, they are certainly still a relatively recent development. Their development combined with the advent of the Internet to enable **cybercrime**, the unleashing of viruses, worms, and other rogue programs onto victims' computers to disrupt them or steal information. Virtually overnight, this type of technological change created a new type of crime, identify theft, and the law had to respond accordingly (Grabosky, 2016).

In addition to technological changes, shifts in community values and attitudes may also prompt changes in law. To cite several examples drawn from the past half-century, people may come to think that poverty is bad and that laws should be created to reduce it in some way. People may come, as happened in the United States during the past

half-century, to condemn the use of law to further racial discrimination in voting, housing, employment, education, and the like and may support changes that forbid the use of law for this purpose. People may come to think that businesspeople should not be free to put just any kind of foodstuff on the market without proper governmental inspection, or fly any plane without having to meet governmental safety standards, or show anything on television that they wish. So laws may be enacted as appropriate and regulatory bodies may be brought into being as necessary. And people may come to think that the practice of abortion is not evil, or that the practice of contraception is desirable, or that divorce and remarriage are not immoral Hence, laws governing these practices may undergo repeal or revision.

Alterations in social conditions, technology, knowledge, values, and attitudes, then, may induce legal change. In such instances, the law is reactive and follows social change. It should be noted, however, that changes in law are one of many responses to social change. But the legal response in some respects is important, because it represents the authority of the state and its sanctioning power. A new law in response to a new social or technological problem may help to alleviate the problem, but it may also aggravate that problem. Often, the legal response to social change, which inevitably comes after a time lag, induces new social changes. For example, the legalization of same-sex marriage has increased the number of legal divorces, since some same-sex couples who were previously not permitted to marry are now getting divorced (Vasileff, 2015).

LAW AS AN INSTRUMENT OF SOCIAL CHANGE

There are abundant historical and cross-cultural illustrations in which the new laws have been used deliberately to induce broad social changes in society (Jimenez, 2010). Since Roman times, great ages of social change and mobility almost always involved great use of law and of litigation. There are several illustrations of the idea that law, far from being simply a reflection of social reality, is a powerful means of accomplishing reality—that is, of fashioning it or making it. In one of history's most important examples, the former Soviet Union used new laws to make fundamental changes in society (Dror, 1968). In Spain, during the 1930s, law was used to reform agrarian labor and employment relations (Collier, 1989). More recently, the attempts by Nazi Germany and later on by Eastern European countries to make wholesale social changes through the use of laws—such as nationalization of industry, land reform and introduction of collective farms, provision of free education and health care, and elimination of social inequities—illustrate of the effectiveness of law to induce change, even if some of the changes were on the wrong side of history (Eorsi and Harmathy, 1971). In China, when the Communist party came to power in 1949, virtually all vices that are ubiquitous in Western countries—prostitution, gambling, pornography, drug trafficking, and usury—were eliminated by government decree along with business operations that were dependent on profits from such activities (Muhlhahn, 2009). China also managed to moderate through law its population growth and as a result devote more of its resources to economic development and modernization (Diamant et al., 2005).

Acknowledgment of the role of law as an instrument of social change is becoming more pronounced in contemporary society. As Wolfgang Friedmann (1972:513) once noted, "The law—through legislative or administrative responses to new social conditions and ideas, as well as through judicial re-interpretations of constitutions, statutes or precedents—increasingly not only articulates but sets the course for major social changes" (1972:513). Thus, "attempted social change, through law, is a basic trait of the modern world" (Friedman, 1975:277). Reflecting this fact, many sociolegal scholars consider law as a desirable, necessary, and often effective means of inducing social change.

In present-day societies, the role of law in social change is of more than theoretical interest. In many areas of social life, such as education, race relations, housing, transportation, energy utilization, the protection of the environment, labor movement, immigration, crime prevention, and alleviation of poverty, law and litigation are important instruments of change (Milkman et al., 2010). In the United States, the law has been used as a principal mechanism for improving the political and social position of African Americans. Since the 1960s, the courts and Congress have dismantled a racial caste system embedded in the law and in practice for generations. The old order was swept away by legislation, including the Civil Rights Act of 1964 and the Voting Rights Act of 1965, as well as by the commitment of billions of dollars to social welfare programs.

In a relatively short time, these policies produced notable effects. For example, the immediate results of the Voting Rights Act of 1965 were dramatic, particularly in states that had successfully resisted earlier attempts to end voting discrimination. The percentage of potential black voters registered in Alabama increased from 23% to 52% between 1964 and 1967. By 1969, it had gone up to 61%. In Mississippi, this figure increased from 7% in 1964 to 60% in 1967, and then to 67% by 1969. Between the 1964 and 1968 presidential elections, overall black registration in the South increased by nearly a million voters. About 75% of the increase came in the six states that were fully covered by the Voting Rights Act—Alabama, Georgia, Louisiana, Mississippi, North Carolina, and South Carolina. This effectively doubled the number of registered blacks in those states (Logan and Winston, 1971:27).

The 1965 law, through its impact on black registration and voting, also had profound consequences for black political power. In 1965, there were some 70 elected black officials in the South. By 1969, their number had risen to 400. In 1981, there were approximately 2,500 elected black officials in 11 southern states, including a black mayor in Atlanta (Scher and Button, 1984:45).

Similarly, in the former Soviet Union, the law was a principal instrument in transforming society after World War II from a bourgeois to a socialist one. Legal enactments initiated and legitimized rearrangements in property and power relations, transformed basic social institutions such as education and health care, and opened up new avenues of social mobility for large segments of the population. Legislation guided the reorganization of agricultural production from private ownership to collective farms, the creation of new towns, and the development of a socialist mode of economic production, distribution, and

consumption. These changes, in turn, affected values, beliefs, socialization patterns, and the structure of social relationships.

INDIRECT AND DIRECT EFFECTS OF LAW ON SOCIAL CHANGE

There are several ways of considering the role of law in social change. In an influential article "Law and Social Change," Yehezkel Dror (1968) distinguished between the indirect and direct aspects of law in social change. Dror (1968:673) contended that "law plays an important indirect role in social change by shaping various social institutions, which in turn have a direct impact on society." He used the illustration of the compulsory education system, which performed an important indirect role in regard to change. Mandatory school attendance upgraded the quality of the labor force, which, in turn, played a direct role in social change by contributing to an increased rate of industrialization and modernization. Dror argues that law exerts an indirect influence on social change in general by influencing the possibilities of change in various social institutions. For example, the existence of a patent law protecting the rights of inventors encourages inventions and furthers change in the technological institutions, which, in turn, may bring about other types of social change. As another example, the existence of a patent law protecting the rights of inventors encourages inventions and furthers change in the technological institutions, which, in turn, may again lead to other types of social change.

Dror also emphasized that law interacts in many cases directly with basic social institutions, constituting a direct relationship between law and social change. For example, laws prohibiting racial discrimination in education have a direct influence on social change by enabling previously excluded groups to attend schools of their choice. He warned, however, that "the distinction is not an absolute but a relative one: In some cases, the emphasis is more on the direct and less on the indirect impact of social change, while in other cases the opposite is true" (Dror, 1968:674).

For all modern societies, Dror (1968:676) continued, every collection of statutes and delegated legislation is "full of illustrations of the direct use of law as a device for directed social change." A good example of social change directly induced by law was the enactment of Prohibition in the United States to shape social behavior. (It was also one of the more conspicuous failures, showing that there are limits to the ability of law to achieve social change, as we will discuss later.) Other illustrations of comparable magnitude include the abolition of slavery in the United States and the passage of the 1964 Civil Rights Act.

ADDITIONAL CONSIDERATIONS REGARDING LAW'S EFFECT ON SOCIAL CHANGE

Another way of considering the role of law in social change is in the context of Leon H. Mayhew's (1971) notion of the possibility of either redefining the normative order or creating new procedural opportunities within the legal apparatus. He designates the former possibility as an "extension of formal rights," illustrated by the 1963 ruling of the U.S. Supreme Court that defendants accused of serious crimes have the right to legal

representation. And he termed the latter possibility the "extension of formal facilities," illustrated by the establishment of a system of public defenders who provide the required legal representation. The extension of formal rights and formal facilities in this manner had important implications for the criminal justice system in the form of greater protection of individual rights, at least in theory.

Lawrence M. Friedman (2005) presented a rather different perspective on law in social change. He describes two types of change through law: "planning" and "disruption." Planning "refers to architectural construction of new forms of social order and social interaction. Disruption refers to the blocking or amelioration of existing social forms and relations" (Friedman, 2005:25). Planning through law is an omnipresent feature of the modern world. Although it is most pronounced in socialist countries (for example, 5-year plans of social and economic development), all nations are committed to planning to a greater or lesser extent. Both planning and disruption operate within the existing legal system and can yield "positive" or "negative" social change, depending on one's perspective.

Although revolution is the most distinct and obvious form of disruption, "judicial review is frequently disruptive," said Friedman (1975:277). He continued,

> American courts have smashed programs and institutions from the Missouri Compromise to the Alaska pipeline. Activist reformers have played a sensational role in American life in the last decade. Ralph Nader is the most well-known example. . . . He stimulates use of legal process as a lever of social change. Much of his work is technically disruptive; it focuses on litigation and injunctions, on stopping government dead in its tracks, when it fails to meet his ethical and policies standards. Legal disruption can . . . include lawsuits; particularly after Brown v. Board of Education, reformers have frequently gone to court to upset many old and established arrangements.
>
> (Friedman, 1975:277)

As these examples remind us, social change through litigation has been an important feature of the American landscape. Whether the change produced by such action is considered "destructive" or "constructive," the fact remains that law can be a highly effective device for producing social change. For example, when the California Supreme Court overturned the legal basis for the system of financing schools in the state, Friedman (1973:27) succinctly observed: "Many a *coup d'Etat* in small countries have achieved less social change than this quiet *coup d'Etat* in the courts."

Friedman observed that social change through litigation is found more often in the United States than in many other nations. This is because creative disruption of the judicial type presupposes a number of conditions that rarely coincide and are apparently not present in other countries to the same degree. These conditions include an activist legal profession, financial resources, activist judges, a genuine social movement, and what he describes as "the strongest condition"—that is, in the United States, "elites—the power holders—must accept the results of disruptive litigation, like it or not" (Friedman, 1975:278). Clearly, no

socialist or authoritarian country will tolerate anything like the American form of judicial review. Their legal structures are not designed to accommodate these patterns.

THE EFFICACY OF LAW AS AN INSTRUMENT OF SOCIAL CHANGE

As an instrument of social change, law entails two related processes: (1) the institutionalization of patterns of behavior and (2) the internalization of patterns of behavior. Institutionalization of a pattern of behavior refers to the establishment of a norm with provisions for its enforcement (such as desegregation of public schools), while internalization of a pattern of behavior means the incorporation of the value or values implicit in a law (for example, the belief that integrated public schools are "good"). William M. Evan (1965:287) noted, "Law . . . can affect behavior directly only through the process of institutionalization; if, however, the institutionalization process is successful, it, in turn, facilitates the internalization of attitudes or beliefs."

Often law is an effective mechanism in the promotion or reinforcement of social change. However, the extent to which law can provide an effective impetus for social change varies according to the conditions present in a particular situation. In a very influential formulation, Evan (1965:288–291) suggested that a new law is likely to be successful to induce change if it meets the following seven conditions:

1. The law must emanate from an authoritative and prestigious source;
2. The law must introduce its rationale in terms that are understandable and compatible with existing values;
3. The advocates of the change should make reference to other communities or countries with which the population identifies and where the law is already in effect;
4. The enforcement of the law must be aimed at making the change in a relatively short time;
5. Those enforcing the law must themselves be very much committed to the change intended by the law;
6. The instrumentation of the law should include positive as well as negative sanctions; and
7. The enforcement of the law should be reasonable, not only in the sanctions used but also in the protection of the rights of those who stand to lose by violation of the law.

Other factors also affect the efficacy of law as a mechanism of social change. One factor is the amount of information available about a given piece of legislation, decision, or ruling. When there is insufficient transmission of information about these matters, the law will not produce its intended effect. Ignorance of the law is not considered an excuse for disobedience, but ignorance obviously limits the law's effectiveness. In the same vein, law's effectiveness will be limited if rules are not stated precisely, and not only because people are uncertain about what the rules mean. Vague rules permit multiple perceptions and interpretations. (What does the expression "all deliberate speed," used by the Supreme Court in its *Brown v. Board of Education* school

desegregation decision, mean?) Consequently, the language of the law should be free of ambiguity, and care should be exercised to prevent multiple interpretations and loopholes (Carter and Burke, 2005).

Legal regulations and the required behavior of people to whom the law is addressed must also be clearly known, and the sanctions for noncompliance need to be precisely enunciated. The effectiveness of the law is directly related to the extent and nature of perception of officially and clearly stated and sanctioned rules. Perceptions of rules, in turn, vary with their sources. Rules are more likely to be accepted if they reflect a notion of fairness and justice that is prevalent in society and when their source is considered legitimate (Jacob, 1995).

The responsiveness of enforcement agencies to a law also has an impact on its effectiveness (Kerley, 2005). Law enforcement agents not only communicate rules, but also show that the rules are taken seriously and that punishment for their violation is likely. But for a law to be enforceable, the behavior to be changed must be observable. For example, it is more difficult to enforce a law against the private use of illegal drugs than a law against racial discrimination in public housing. Moreover, law enforcement agents need to be fully committed to enforcing a new law. One reason for the failure of Prohibition was the unwillingness of law enforcement agents to enforce the law. Selective enforcement of a law also hinders its effectiveness: The more that high-status individuals are arrested and punished, the greater the likelihood that a particular law will achieve its intended objective (Zimring and Hawkins, 1975). Laws regularly and uniformly enforced across social class and social group lines tend to be perceived as more binding than they would have been if they were seldom and selectively enforced, because enforcement establishes behavioral norms, and in time, as E. Adamson Hoebel (1954:15) put it, "The *norm* takes on the quality of the *normative.* What the most do, others should do."

As a strategy of social change, law has certain unique advantages and limitations as compared with other agents of change. Although these advantages and limitations go hand in hand and represent the opposite sides of the same coin, for analytical purposes, we will examine them separately.

ADVANTAGES OF LAW IN CREATING SOCIAL CHANGE

Social change is a complex, multifaceted phenomenon brought about by a host of social forces. At times, change is slow and uneven and can be brought about by different factors to differing degrees. Change in society may be initiated by a number of means. Of these, the most drastic is revolution, aimed at fundamental changes in the power relation of classes within society. Others include rebellion, riot, *coup d'etat*, various forms of violent protest movements, sit-ins, boycotts, strikes, demonstrations, social movements, education, mass media, technological innovations, ideology, and various forms of planned but nonlegal social-change efforts dealing with various behaviors and practices at different levels in society.

Compared with this list of change-inducing forces, the law has certain advantages. Change efforts through law tend to be more focused and specific. Change through law is a deliberate, rational, and conscious effort to alter a specific behavior or practice. The intentions of legal norms are clearly stated, with a concomitant outline of the means of instrumentation and enforcement and sanction provisions. Essentially, change through law aims at improving behaviors and practices in precisely defined social situations, as identified by the proponents of a particular change. The advantages of law as an instrument of social change reflect the fact that law in society is seen as legitimate, more or less rational, authoritative, institutionalized, generally not disruptive, and backed by mechanisms of enforcement and sanctions.

LEGITIMATE AUTHORITY

A key advantage of law as an instrument of social change is the general feeling in society that legal commands or prohibitions ought to be observed even by those critical of the law in question. To a great extent, this feeling of obligation depends on respect for **legitimate authority** (Ewick and Silbey, 2003).

Max Weber (1947) authored the classic treatment of legitimate authority. Obedience to commands by a society's leaders can rest on a variety of considerations, from simple habituation to a purely rational calculation of advantage. But there is always at least some voluntary submission based on an interest in obedience. In extreme cases, this interest in obedience can be seen in the tendency for people to commit illegal acts when so ordered by authority (and for others to excuse such acts as not subject to ordinary morality). Examples of this include the defense used at the Nuremberg trials, at the Watergate hearings, and at the court-martial of Lt. William Calley for the My Lai massacre during the Vietnam War (Kelman and Hamilton, 1989). Obedience to authority can be based on custom, emotional ties, or purely material interests. Because these factors may still be relatively unstable, another important element helps to produce more stable obedience. This factor is the belief in legitimate authority, also known as *legitimacy*.

Weber outlined three types of legitimate authority—traditional, charismatic, and rational-legal. **Traditional authority** bases its claims to legitimacy on an established belief in the sanctity of traditions and the legitimacy of the status of those exercising authority. The obligation of obedience is not a matter of acceptance of the legality of an impersonal order but, rather, a matter of personal loyalty. The "rule of elders" in many of the societies studied by anthropologists illustrates traditional authority.

Charismatic authority bases its claim to legitimacy on devotion to the specific and unusual sanctity, heroism, or exemplary character of an individual and the normative patterns that are revealed or ordained. Charismatic leaders are obeyed by virtue of personal trust in their exemplary qualities. Illustrations of individuals with charismatic authority include Moses, Christ, Mohammed, and Gandhi.

Rational-legal authority bases its claims to legitimacy on a belief in the legality of normative rules and in the right of those elevated to authority to issue commands under

such rules. In such authority, obedience is owed to a legally established impersonal order. The individuals who exercise authority of office are shown obedience only by virtue of the formal legality of their commands, and only within the scope of authority of their office. For example, most Americans these days have a low opinion of Congress. Despite this view, most Americans doubtless still believe that the rules outlined in Congressional legislation should not be disobeyed, because these rules come from a branch of government with legitimate authority.

Theory and research show that legitimate authority can wield considerable influence over both actions and attitudes (Tyler et al., 1988). It can be the result of both the coercive power involved in law, but also an individual's internalized values regarding legitimate authority. There is a tendency on the part of individuals to assume that the law has the right to regulate behavior and insist on conformity to the law. To an extent, obedience to the law stems from respect for the underlying process. As Lawrence Friedman (1975:114) has perceptively noted,

> People obey the law, 'because it is the law.' This means they have general respect for procedures and for the system. They feel, for some reason, that they should obey, if Congress passes a law, if a judge makes a decision, if the city council passes an ordinance. If they were forced to explain why, they might refer to some concept of democracy, or the rule of law, or some other popular theory sustaining the political system.

In short, law helps to define the "correct" way of behaving in our daily lives. This effect is ingrained and is present even without the sanctions that are part of the enforcement machinery. In fact, most people in most situations tend to comply with the law without consciously assessing the possibility of legal sanctions or punishment. To the extent they obey the law simply because it is the law, and not because they fear punishment, obedience will be more stable. The legal definitions of proper conduct become subsumed to a large extent in individual attitudes toward everyday life and become part of internalized values.

THE BINDING FORCE OF LAW

Law is binding for many reasons (Honore, 1987). A primary reason is that most people in society simply consider law as something that should be obeyed. The awareness and consciousness of law by most people serve as the foundation for law's existence. People generally submit their behavior to its regulations, although they may have many different reasons for doing so. Some may believe that in obeying the law, they obey the higher authority of the law: God, nature, or the will of the people (Negley, 1965). Other people obey the law because they generally have an inner desire of people to obey; this desire reflects the belief that a particular law is fair and just because it is applied equally, a feeling of trust in the effectiveness and legitimacy of the government, and a sense of civic-mindedness. Some people may obey the law merely to avoid legal punishment. In general, though, most people follow the law simply because they feel that, as Tyler (2006) succinctly puts it, it is the "right thing to do."

Even when laws violate accepted morality, they are often obeyed. In the name of obedience to the law, thousands of people aided and abetted the extermination of more than 6 million Jews in Nazi Germany during the Holocaust. Readers may be familiar with psychologist Stanley Milgram (1975), who contends that the essence of obedience is that individuals come to see themselves as instruments for carrying out someone else's wishes, and they therefore no longer view themselves as responsible for their actions. In many instances, the acceptance of authority results in obedience. In his famous electric shock experiments, Milgram showed that people from a wide range of backgrounds will do morally objectionable things to other people if they are told to do so by a clearly designated authority. His "learning" experiments found that about two-thirds of his laboratory subjects willingly behaved in a manner they believed was painful or harmful to others. Even though "victims" cried out in pain, feigned heart attacks, and literally begged for the experiment to be terminated, most subjects continued to obey authority and deliver what they believed to be high levels of electric shock (Milgram, 1975). The study, in addition to showing that under certain conditions many people will violate their own moral norms and inflict pain on other human beings, underlines the notion that many people willingly submit to authority and, by extension, the law.

An additional reason for the binding force of the law may be that people prefer order and predictability of behavior over disorder and unpredictability. Individuals are creatures of habit because a habitual way of life requires less personal effort than any other type of life and fosters a sense of security. Obedience to the law performs these same functions. It also pays to follow the law—it saves effort and risk, a motivation sufficient to produce obedience. Obedience to the law is also related to the socialization process. People in general are brought up to obey the law. The legal way of life becomes the habitual way of life. From an early age, a child increasingly gains insight into the meaning of parental expectation, orders, and regulations and becomes socialized. This process repeats itself in school and in the larger society. As a result of all these processes, any need for external discipline is replaced to a large extent by mere self-discipline.

SANCTIONS

Although many people obey laws because they feel obliged to do so, the possible sanctions for violating laws also matter. As Hoebel (1954:26) eloquently states, "The law has teeth, teeth that can bite if need be, although they need not necessarily be bared." The sanctions recognized and used by legal systems are usually diverse. In primitive societies, sanctions may take the form of cruel punishments or social ostracism. In modern legal systems, the administration of sanctions is, as a general rule, entrusted to the organs of political government. These sanctions may include punishment by fine or imprisonment; the imposition of damage awards; the ordering by a court of specific actions at the threat of a penalty; and, rarely, the impeachment and removal of a public officer for dereliction of duty. As Hans Kelsen (1967:35) once noted, the sanctions characteristic of modern legal systems go beyond the exercise of merely psychological pressure, and authorize the performance of disadvantageous coercive acts, namely, "the forcible deprivation of life, freedom, economics and other values as a consequence of certain conditions."

Robert B. Seidman (1978:100) pointed out that "laws more or less consistent with the existing social order need not rely upon the threat of legal sanction to induce behavior." However, not all laws are consistent with the existing social order, and an advantage of the law as an agent of social change is that actual or perceived risk and the severity of sanctions may deter potential violation of the law. Even the threat of sanctions can deter people from disobedience. Sanctions may also work because they may induce a moralistic attitude toward compliance (Schwartz and Orleans, 1970).

The types of possible sanctions vary with the purposes and goals of a law or legal policy. An essential distinction is whether the main purpose of a law is to prevent individuals from doing things that others in society oppose as being harmful or immoral, or whether the purpose of the law is to create new types of relationships or policies involving groups or individuals (Grossman and Grossman, 1971). The distinction is not always perfect. The former purpose, preventing harmful or immoral behaviors, usually involves negative sanctions (punishment), while the latter purpose may involve both positive sanctions (rewards) and negative sanctions (Friedland, 1989). Rewards, such as federal contracts or subsidies, are frequently part of regulatory statutes attempting to change established patterns of economic behavior and have been used widely as an incentive for compliance with desegregation laws. Those who violate such laws not only lose prospective rewards but also may be liable for fines or criminal penalties. Grossman and Grossman (1971:70) point out: "Laws or statutes which seek positive societal changes of major proportion must rely as much on education and persuasion as on negative sanctions. For the carrot and stick approach to be successful, the latter must be visible and occasionally used".

The circumstances are different where the changes sought through the law are the reduction or the elimination of deviant behaviors. In such instances, the law does not provide rewards or incentives to dissuade individuals from committing such acts—only the possibility, if not the certainty, of detection and punishment. In such instances, the emphasis is on deterrence and punishment, and the aim is to eliminate or reduce a particular behavior considered harmful.

LIMITATIONS OF LAW IN CREATING SOCIAL CHANGE

Although law offers many advantages as an instrument of social change, it also has certain limitations. Awareness of these limitations helps to understand more fully the role of the law in social change. At the same time, these limitations need to be taken into account for the use of the law to bring about change.

We now live in a period when many people distrust government and when people disagree on fundamental social and moral issues. In such a period, it seems naïve to suggest that the law is an expression of the will of the people. For the great majority of individuals, the law originates externally to them and is imposed upon them in a manner that can be considered coercive. In reality, very few individuals actually participate in the formation of new laws and legislation. Consequently, one of the limitations of the

law as an instrument of social change is that elites tend to determine which laws are promulgated and which alternatives are rejected. As they do so, moreover, they take into account how this process may advance their own interests. Other limitations regarding law as an instrument of social change include the idea that laws cannot easily produce social change unless they conform to prevailing morality and values. We now consider several such limitations.

ELITES AND CONFLICTING INTERESTS

We begin with conflicting interests between groups with and without power in society. Access to scarce resources and highly cherished objects is limited in every society. In the struggle to achieve them, some individuals and groups win; others lose. More than a century ago, Max Weber had already recognized, as did Karl Marx before him, that many laws are created to serve special economic interests. Individuals with the control of ownership of material goods are generally favored by laws since "economic interests are among the strongest factors influencing the creation of law" (Weber, 1968:334). Weber further recognized that other special interests, in addition to the economic ones, influence the formation of law. These other interests include maintaining one's prestige, power, and other advantages that are not, strictly speaking, economic in nature.

Two important insights are contained in Weber's points. The first point is that conflict of interest provides the framework in which laws are framed and change is created. Consequently, social stratification in a society determines to a large extent the role laws will play in bringing about change. This dynamic arises out of the selectiveness and preferences exercised by those (typically social elites) who promulgate those changes.

The second point concerns the significance of the use of power to back up those changes. Studies of the legislative, judicial, and administrative processes in a society could lead very quickly to a discovery of not only who wields the power in society but also what interests are significant and influential in that group. Thus, the law as an instrument of a change can be viewed in the context of the organization of power and the processes by which interests are established in everyday social life; the resulting changes might very well be evaluated in those terms.

In a sense, it is obvious that the powerful make and administer the laws in society. If anything gets done, it is because somebody had the power to do it. At the same time, those who are powerful and influential tend to use the law to protect their advantageous position in society. Many legislative enactments, administrative rulings, and judicial decisions reflect the power configurations in society. Some groups and associations are more powerful than others, and by virtue of being at the center of power, they are better able to reinforce their interests than those at the periphery. Furthermore, many people are often apathetic about or unaware of an issue, but even when they are concerned, they are frequently unable to organize and thus successfully impose their preference on the legislature.

At the same time, those who are considered coerced or oppressed by a system of laws imposed upon them by a ruling minority often seem unaware of their coercion or oppression. Indeed, they are frequently among the strongest partisans of the existing legal system. It may be argued that they have been "indoctrinated" by the ruling establishment, which uses its power to confuse them as to their true interests. But this requires that we distinguish between what people define as their interests and what their "true interests" are, a distinction that is the subject of much intellectual debate.

It is debatable whether the existence of conflicting interests could really be construed as pointing to a serious limitation of the law as an instrument of change. The points raised concerning the power of certain interest groups are valid, but the actual mechanics of change through the law would in any case preclude inclusion of large segments of the population. Large-scale participation of the citizenry in legal change, even in a democratic society, is seldom feasible. But lack of participation does not necessarily mean lack of representation. In the United States and most parts of Europe, people do have access (although of varying rates) to lawmakers and to the legal apparatus, and their aspirations for change through the law are often realized.

LAW AS ONLY ONE OF MANY POLICY INSTRUMENTS

Yehezkel Dror (1970:554) discussed another additional limitation of law as an instrument of social change. He contended that

> law by itself is only one component of a large set of policy instruments and usually cannot and is not used by itself. Therefore, focusing exclusive attention on law as a tool of directed social change is a case of tunnel vision, which lacks the minimum perspective necessary for making sense from the observed phenomena.

Thus, according to Dror, law is but one of many policy instruments that must be used in combination to produce some social change. Any change achieved by law will be more limited in the absence of other policies aimed at achieving the intended change.

However, the law is still often used as an instrument of change outside of the context of a broader policy-making framework. This is typically the situation in reform-oriented litigation, where the object is to alter a particular institutionalized practice. For example, the 1973 Supreme Court decision to overrule state abortion statutes was not carried out within a larger policy context, and yet it provided many women access to legal abortions that they did not have previously.

Although some reform litigation can have considerable impact, legislative and administrative reforms dealing with large social issues should ideally take place within a broader social policy-making framework (Dean, 2012). Such an approach would greatly enhance the efficacy of the law as an instrument of change. To this end, Dror (1970) advocated the establishment of interdisciplinary teams of lawyers, social scientists, and policy analysts to engage in relevant studies and prepare policy recommendations.

MORALITY AND VALUES

The sociological literature recognizes that the ability of the law to produce social change depends on many circumstances. One of these factors concerns the prevailing morality and values in society (Sterba, 2004).

Patrick Devlin (1965) argued that a society owes its existence less to its institutions than to the shared morality that binds it together. Although his thesis is only partly true, morality and values affect the efficacy of the law in social change. Obviously, society could not exist without accepting certain basic values, principles, and standards. On certain issues, such as violence, truth, individual liberty, and human dignity, a shared morality is essential. However, not all our values are essential. Values about property, for example, are not necessarily essential, as many societies do not share the common U.S. value placed on private ownership. A society could own all property in common without ceasing to be a society.

In general, when the law is used as an instrument of social change, it needs the support of society. If a new law conflicts too much with prevailing values and morality, it will be that much less effective in producing change. As Edwin Schur (1968:132) once wrote, "A good illustration of the systematic ineffectiveness of unsupported law is provided by the utter failure of legislation designed to enforce private morality." Thus, a rather clear limitation of the law in social change appears when it tries to deal with what may be called moral issues in society. Laws prohibiting adultery, for example, have existed for centuries, but adultery remains common in the United States and elsewhere. Laws prohibiting drug use, same-sex relations, or prostitution have similarly been ineffective (Meier and Geis, 2006; Nussbaum, 2010). The well-known failure of the prohibition of alcohol through constitutional amendment a century ago is another example of the limitations of using law to change public morality (McGirr, 2016). All these examples illustrate that "behavior that is perceived of as satisfying important drives is more difficult to extinguish than behavior that satisfies less compelling drives" (Zimring and Hawkins, 1975:332).

The link between law and morality in the making and unmaking of law raises two questions: (1) What needs to be done in considering a change in the law when moral opinion is divided? (2) How can the line be drawn between that part of morality or immorality which needs legal enforcement and that which the law ought to leave alone (Raz, 2009)? In response to these questions, Morris Ginsberg (1965) suggests law should respect privacy and thus should deal primarily with externally observable acts. He contends that these are "principles of demarcation arising from the limitations inherent in the machinery of the law" (Ginsberg, 1965:238). As this discussion indicates, laws are generally more likely to produce changes in what may be called *external behavior*, and for this and other reasons many scholars think that the law should not try to control private consensual behavior (Meier and Geis, 2006).

Although it is difficult for law to change prevailing values and morality, several studies do suggest that such change is possible. For example, early studies on the effects of desegregation before the 1960s in situations such as "armed forces units, housing projects, and employment situations indicate that change required by law has lessened prejudice"

(Greenberg, 1959:26). Although these laws aimed to change the behavior of whites, they also sometimes changed the attitudes of whites (Harris, 1977).

RESISTANCE TO CHANGE

Several forces beyond the factors just described also may limit law's impact on social change. In the modern world, resistance to change is often much more likely than acceptance of change. Members of a society can always find a justification for active resistance to change. They may resist change because it conflicts with their traditional values and beliefs, or they may think that a particular change may simply cost too much money. Sometimes people resist change because it interferes with their habits or makes them feel frightened or threatened. Although the law has certain advantages over other agents of change, for a greater appreciation of the role of law in change, it is helpful to identify some general conditions of resistance that have a bearing on the law. The awareness of these conditions is a major, but often overlooked, prerequisite for a more efficient use of law as a method of social engineering.

The sociological literature recognizes a variety of forces that directly or indirectly may affect law's ability to create change. This section outlines these forces. As may be expected, there is a substantial amount of overlap among them.

SOCIAL FACTORS

Several social factors are potential barriers to change. They include vested interests, social class, ideological resistance, and organized opposition.

Vested Interests **Vested interests** refer to personal stakes in maintaining or changing a social policy or other arrangement to enhance one's wealth, power, prestige, or other attributes. Because many and perhaps all individuals and groups have vested interests, these parties may resist a particular new policy or other change if they fear they will lose power, prestige, or wealth. There are many different types of vested interests for which the status quo is profitable or preferable. For example, students attending state universities have a vested interest in tax-supported higher education; college administrators have a vested interest in obtaining endowments; and faculty have a vested interest in obtaining research money (Stein, 2004). Divorce lawyers have a vested interest that leads them to oppose efforts that may make it easier for spouses to divorce without the need for legal services. Physicians have a vested interest that leads some of them to oppose efforts to reduce their payments from Medicare or private insurance. Residents in a community often develop vested interests in their neighborhood. They often organize to resist zoning changes, interstate highways, the construction of correctional facilities, or the busing of their children. In fact, nearly everyone has some vested interests—from the rich with tax-exempt bonds to the poor with food stamps.

The acceptance of almost any change through law will harm the vested interests of some individuals or groups in society. To the degree that those whose interests are threatened

consciously recognize this threat, they will oppose the change. To cite a distressing historical example, Soviet efforts in the early 1920s in central Asia to induce Muslim women to assert their independence from male domination was perceived by men as threatening to their interests. The men reacted by forming counterrevolutionary bands and murdering some of the women who obeyed the new laws (Massell, 1973).

Social Class Rigid class and caste patterns in general tend to hinder the acceptance of change. In highly stratified societies, people are expected to obey and take orders from those in superior positions based on wealth, power, and/or prestige. The upper strata jealously guard their prerogatives of the upper strata and often resent and resist attempts by lower socioeconomic groups to infringe upon these prerogatives. In most cases, for the upper classes, there is a tendency to cherish the old ways of doing things and to adhere to the status quo, precisely because they do very well under the status quo.

In the United States, working-class people tend to agree more readily that legal intervention is necessary to rectify certain deleterious social conditions, such as guaranteeing employment opportunities (Beeghley, 2007). By contrast, upper-class people are more likely to oppose government intervention in this regard. The larger idea is that social class may affect the degree to which individuals and groups will oppose the change intended by a new law.

Ideological Resistance Resistance to change through law on ideological grounds is quite prevalent. A good example of this is the opposition of the Catholic Church to legislation and court decisions dealing with the removal of some of the restrictions on birth control and abortion. Specifically, in 1982, a French pharmaceutical company announced that it had developed a pill that would end pregnancy if taken within 7 weeks of conception. Advocates of reproductive freedom hailed the news, because the pill, known as RU-486, meant that abortions could be induced soon after conception in a doctor's office, without surgery. By the early 1990s, RU-486 was available in France, Britain, and Sweden. But protests by abortion opponents helped block the drug's introduction into the United States by threatening to boycott the products of any drug company that sold it. In the face of such efforts, virtually no American company was willing to supply RU-486 in commercial quantities. After the U.S. Food and Drug Administration finally approved the drug in the fall of 2000, one pharmaceutical company did distribute RU-486 in the United States (Tone, 2001, 2009).

Organized Opposition Occasionally, widespread individual resistance to change may become mobilized into organized opposition, which can assume formal organizational structure (for example, the National Rifle Association opposing gun control or AARP opposing changes in Social Security benefits). Resistance to change may also be channeled through a social movement, political action committees, or lobbyists. Much organized resistance to change results from efforts of groups that oppose extending rights and liberties to historically subordinate groups. For example, members of the Ku Klux Klan and the John Birch Society oppose efforts to improve racial and ethnic equality. These and similar organizations have resisted change that was under way, and although most of them have fought a losing battle, their delaying effects have often been considerable.

PSYCHOLOGICAL FACTORS

Several psychological factors also may impede change generally and therefore weaken the ability of law to produce social change. These factors include habit, motivation, ignorance, selective perception, and moral development.

Habit From a psychological perspective, habit is a barrier to change. Once a habit is established, its operation often becomes satisfying to the individual. People become accustomed to behaving in a certain manner, and they feel comfortable with it. Once a particular form of behavior becomes routinized and habitual, it will resist change. Meyer F. Nimkoff (1957) suggested that the customs of a society are *collective habits*; for this reason, custom is slow to change when challenged by new ideas and practices. To cite just one example, attempts to introduce the metric system in the United States have largely failed. Americans are accustomed to miles and feel uncomfortable with kilometers; they prefer a quart of something to a liter of something. When the law is used as an instrument of social change to alter established customs, it is likely that the compliance with the law will require an active reorientation of the values and behaviors of a significant part of the target population (Zimring and Hawkins, 1975).

Motivation Motivational forces also condition the acceptance of change through law (Ginsberg and Fiene, 2004). Some motivations are culture-bound, in the sense that their presence or absence is characteristic of a particular culture. For instance, religious beliefs in some cultures offer motivations to certain kinds of change, whereas in other cultures these motivations center on the preservation of the status quo. Other kinds of motivations tend to be universal, or nearly universal, in that they cut across societies and cultures. Examples of these motivations include the desire for prestige or for economic gain and the wish to comply with friendship obligations.

Ignorance Ignorance is another psychological factor associated with resistance to change. At times, ignorance goes hand in hand with fear of the new. In regard to legal change, ignorance can underlie racial prejudice and may thus be a factor in noncompliance with laws designed to reduce discriminatory practices. For example, employers may hold racial biases grounded in ignorance and thus hesitate to hire people of color (Beeghley, 2007).

Selective Perception People's perceptions of the intent and potential impact of new law (legislation, court rulings, etc.) are selective and vary with socioeconomic, cultural, and demographic variables. The unique pattern of people's needs, attitudes, habits, and values derived through socialization determines what they will selectively attend to, what they will selectively interpret, and what they will selectively act upon. People in general will be more receptive to new ideas if they are related to their interests, consistent with their attitudes, congruent with their beliefs, and supportive of their values (Baker, 2005). Differing perceptions of the purpose of a law may hinder change. For example, in India the law provides for widespread distribution of family-planning information and supplies. But many Indian villagers reject the use of contraception because they perceive the law's intent is to stop birth completely. In the United States, the early attempts to fluoridate city water

supplies met with perceptions that a "communist conspiracy" was behind these efforts, and as a result, they were resisted in many communities.

The way a law is written also affects perception. The *Brown v. Board of Education* decision is again a good illustration. Calling for desegregation "with all deliberate speed," as this decision did, was too vague to produce meaningful change. "Ambiguity always lends itself to individualized perceptions" (Rodgers and Bullock, 1972:199), and individuals will interpret and perceive the meaning of the law in a way they consider most advantageous in the context of social changes, economic trends, and integration into the larger community locally, nationally, and internationally (Engel and Engel, 2011).

Moral Development To a great extent, obedience to the law stems from a sense of moral obligation, which is the product of socialization. Only relatively recently, however, has there been some awareness of moral codes that are not necessarily linked to conventional external standards of right and wrong behavior but represent internally consistent principles by which people govern their lives.

Lawrence Kohlberg (1964, 1967) identified six stages of moral development. The first stage is described as an "obedience and punishment" orientation. This stage involves a "deference to superior power or prestige" and an orientation toward avoiding trouble. The second stage, "instrumental relativism," includes naïve notions of reciprocity. With this orientation, people will attempt to satisfy their own needs by simple negotiation with others or by a primitive form of equalitarianism. He calls these two stages "premoral." The third stage, "personal concordance," is an orientation based on approval and pleasing others that involves conformity to perceived majority beliefs. Such people adhere to what they consider to be prevailing norms. Stage four is the "law and order" stage. People with such orientations are committed to "doing their duty" and being respectful to those in authority. Stages three and four combine to form a *conventional moral orientation*.

Stages five and six indicate the internalized-principle orientation. Kohlberg calls stage five the "social contract" stage; it involves a legalistic orientation. Commitments are viewed in contractual terms, and people at this stage will avoid efforts to break implicit or explicit agreements. The final and highest stage of moral development is "individual principles." This emphasizes conscience, mutual trust, and respect as the guiding principles of behavior.

If the development theory proposed by Kohlberg is correct, the law is more or less limited depending on the stage of moral development of individual members of a society. In this context, David J. Danelski (1974:14–15) suggested that both qualitative and quantitative considerations are important. We would need to know the modal stage of the moral development of elites, of "average" citizens, and of deprived groups. If most members of a society were at the first and second stages, institutional enforcement would be essential to maintain order and security. Law would be least limited in a society in which most people were at the third and fourth stages of development. Law at the last two stages is probably more limited than at stages three and four, "but it might be otherwise if it is perceived as democratically agreed upon and consistent with individual principles of conscience. If it is

not, it is likely to be more limited" (Danelski, 1974:15). The limits of law, in other words, appear to be curvilinear with respect to moral development.

CULTURAL FACTORS

When long-established practices or behaviors are threatened, resistance to change is usually strong, often on the basis of traditional beliefs and values. The status quo is protected, and change is resisted. For example, the Mormons, on the basis of traditional religious beliefs, opposed laws threatening their polygamous marriages. Similarly, in India, where malnutrition is a problem of considerable magnitude, millions of cows sacred to Hindus not only are exempt from being slaughtered for food but also are allowed to roam through villages and farm lands, often causing extensive damage to crops. Eating beef runs counter to long-held religious beliefs, and as a result, it is unlikely that the raising of cattle for food will be acceptable in India. Other cultural factors also act often as obstacles to change. They include fatalism, ethnocentrism, notions of incompatibility, and superstition.

Fatalism Famed anthropologist Margaret Mead (1953:201) once stated, using the male-dominated language of her time,

> In many parts of the world we find cultures adhering to the belief that man has no causal effect upon his future or the future of the land; God, not man, can improve man's lot . . . . It is difficult to persuade such people to use fertilizers, or to save the best seed for planting, since man is responsible only for the performance, and the divine for the success of the act.

Basically, fatalism entails a feeling of a lack of mastery over nature. People believe they had no control over their lives and that God or evil spirits cause everything that happens to them. Such a fatalistic outlook results in resistance to change, for change is seen as human-initiated rather than having a divine origin.

Ethnocentrism Some groups in society consider themselves "superior," possessing the only "right" way of thinking about the world and of coping with the environment. Feelings of superiority about one's group are likely to make people unreceptive to the ideas and methods used in other groups. As a result, ethnocentrism often constitutes a bulwark against change. For example, such feelings of superiority by whites have hindered integration efforts in housing, employment, and education, among many other areas, in the context of race relations (Schaefer, 2016).

Incompatibility Resistance to change is often due to the presence in the target group of material and systems that are, or considered to be, irreconcilable with the new proposal. When such incompatibility exists in a culture, change comes about with difficulty. An illustration is a marriage-age law once enacted in Israel in an attempt to induce changes in that nation's immigrant population. The law set 17 as the minimum age for marriage with the exception of pregnancy, and it imposed a criminal sanction on anyone who married a girl below the age of 17 without permission of the district court. By setting the minimum age at 17, the law attempted to impose a rule of behavior that was incompatible with the

customs and habits of some of the sections of the Jewish population of Israel that came from Arab and Asian countries, where marriage was usually contracted at a lower age. The act had only limited effect, and communities that formerly permitted marriage of females at an early age continued to do so (Dror, 1968).

Superstition *Superstition* is defined as an uncritical acceptance of a belief that is not substantiated by facts (Ambrose, 1998). At times, superstitions act as barriers to change. For example, in one situation in Zimbabwe, nutrition-education efforts were hampered because many women would not eat eggs. According to widespread belief in Zimbabwe, eggs cause infertility, make babies bald, and cause women to be promiscuous. Similarly, in the Philippines, it is a widely accepted idea that squash and chicken eaten at the same time produce leprosy. In some places, women are not given milk during late pregnancy because of the belief that it produces a fetus too large for easy delivery, and in other places, a baby may not be given water for several months after birth because water's "cold" quality will upset the infant's heat equilibrium. In some parts of Ghana, children are not given meat or fish because it is believed that they cause intestinal worms (Foster, 1973:103–104). Where such superstitious beliefs prevail, change efforts through law or other agents will meet some resistance.

ECONOMIC FACTORS

Even in affluent societies, limited economic resources constitute a barrier to changes that might otherwise be readily adopted. For instance, in the United States, more people would probably accept the desirability of more effective controls on pollution, more convenient systems of public transportation, and adequate health care for all, if all these changes would cost much less than they would cost. The fact that changes in these areas come very slowly is thus a matter not only of ideology and other factors but also of cost. Cost and limited economic resources in a society do in effect provide a source of resistance to change.

It is a truism that change through law can be expensive. In most instances, the instrumentation of legislation, administrative ruling, or court decision carries a price tag. For example, the economic impact of federal regulations on institutions of higher education has been significant. In the United States, various affirmative action programs carry sanctions providing for cutting off federal funding to institutions that do not comply with antibias laws. Compliance, in turn, results in increased administrative costs for postsecondary institutions, which are resisted in many academic circles and have contributed to the demands for modification of a variety of laws affecting higher education.

In addition to the direct cost of a particular change effort, the way costs and benefits are distributed also affects resistance. For example, when costs and benefits are widely distributed (as in Social Security), there is minimal resistance to programs. The cost to each taxpayer is relatively small; the benefits are so widely distributed "that they are almost like collective goods; beneficiaries will enjoy the benefits, but only make small contributions to their retention or growth" (Handler, 1978:15). Resistance will be forthcoming in situations where benefits are distributed while costs are concentrated. For example, automakers still

resist (although not too successfully) legal attempts to impose more sophisticated pollution-control measures on cars.

Although a particular change through the law may be desirable (such as an effective and comprehensive universal health insurance plan in the United States), limited economic resources often act as barriers to such change efforts. Of the four sources of resistance to change, the economic factors are perhaps the most decisive. Regardless of the desirability of a proposed change, its compatibility with the values and beliefs of the recipients, and many other considerations, it will be resisted if the economic sacrifice is too great. Simply stated, regardless of how much people in a society want something, if they cannot afford it, chances are they will not be able to get it. As George M. Foster (1973:78) suggests, "Cultural, social and psychological barriers and stimulants to change exist in an economic setting . . . [and] economic factors . . . seem to set the absolute limits to change."

SUMMARY

1. Law is both a dependent and an independent variable in social change. The relationship between law and change is still controversial: Some maintain that law is a reactor to social change; others argue that it increasingly is an initiator of change. These two views represent the extremes of a continuum dealing with the relationship between law and social change.
2. More and more, law is being considered an instrument of social change. Today the role of law in change is of more than theoretical interest. In many areas of social life, such as education, race relations, housing, transportation, energy utilization, and the protection of the environment, the law has been relied on as an important instrument of change.
3. As compared with other agents of change, the law has several distinct advantages. These advantages are attributed to the perception that the law in society is legitimate, more or less rational, authoritative, and backed by mechanisms of enforcement and sanctions.
4. The law also has certain limitations in creating social change. It is not always able to resolve conflicting interests, and generally the powerful in society fare better than the less privileged. Moreover, law alone cannot deal effectively with social problems such as drug addiction and corruption in government.
5. Further limitations flow from the inherent clumsiness of the instrument of the rule of law. One cannot easily foresee and take into account the situations to which a rule might apply. The law is further limited by the divergences in values and moral codes, the difficulty in enforcing some laws, the occasional lack of clarity of law, and the questionable diligence in enforcing certain laws.
6. In addition to these limits on the law in social change, a variety of social, psychological, cultural, and economic forces may provide direct or indirect resistance to change efforts.
7. These social factors include vested interests, social class, moral sentiments, and organized opposition. Meanwhile, psychological resistance to change may be triggered by habit, motivation, ignorance, selective perception, and the complexities inherent in moral development.

8. Cultural barriers to change include fatalism, ethnocentrism, notions of incompatibility, and superstition. But economic factors are perhaps the most decisive. Cost and limited economic resources effectively set a limit to change.

KEY TERMS

Charismatic authority leadership whose claim to legitimacy stems from devotion to the specific and unusual sanctity, heroism, or exemplary character of an individual

Cybercrime the use of viruses, worms, and other rogue programs to disrupt victims' computers and/or to steal information from their computers

Legitimate authority the idea that people willingly lend their obedience to their society's leadership because they see it as their obligation to do so

Rational-legal authority the idea that people willingly lend their obedience to their society's leadership authority because they accept the legality of normative rules and accept the right of those elevated to authority to issue commands under these rules

Reciprocal relationship regarding law and social change, the idea that legal changes help create social changes and that social changes also help create legal changes

Traditional authority the idea that people willingly lend their obedience to their society's leadership because they believe in the sanctity of traditions and in the legitimacy of the status of those exercising authority in accordance with these traditions

Vested interests personal stakes in maintaining or changing a social policy or other arrangement to enhance one's wealth, power, prestige, or other attributes

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CHAPTER 8
THE LEGAL PROFESSION

CHAPTER OUTLINE

LEARNING OBJECTIVES

- Outline the emergence of lawyers in England before the end of the eighteenth century
- Explain why lawyers were unpopular in colonial America
- List the changes that Dean Langdell of Harvard Law School made in legal education beginning in 1870
- Describe the four major subgroups of attorneys
- Summarize the advantages and disadvantages of the Socratic method

An appraisal of the legal profession touches on fundamental issues in sociological and sociolegal theory—issues involving power, social control, stratification, socialization, and the social organization of legal work. This chapter examines the character of the legal profession and the social forces shaping it. It begins with a historical background of law, with an emphasis on the professionalization of lawyers and the evolution of the legal profession in America. Next, the chapter focuses on the legal profession today, including the kinds of legal practice and the competition among lawyers for business. The chapter then turns to legal services to the poor and to law schools and legal education. We conclude the chapter with some comments on bar admission, bar associations as interest groups, and professional discipline.

ORIGINS OF THE LEGAL PROFESSION

The origins of the legal profession go back some centuries. Before tracing these origins, it will be helpful to discuss what is meant by the idea of a profession.

UNDERSTANDING PROFESSIONS AND PROFESSIONALIZATION

In the sociological literature, **professionalization** implies the transformation of some nonprofessional occupation into a vocation with the attributes of a profession. A **profession** may be defined as a highly skilled occupation that requires prolonged education and training for entrance into it. Also usually included in the discussion of professions are the ideas of a client–practitioner relationship and a high degree of autonomy in the execution of one's work tasks. Harold L. Wilensky (1964:143) studied occupations that developed into professions and noted that they passed through the following general stages in their professionalization:

1. Became full-time occupations
2. a. Training schools established
   b. University affiliation of training schools
3. a. Local professional associations started
   b. National professional associations evolved
4. State licensing laws
5. Formal codes of ethics established

Magali Sarfatti Larson (1977) emphasized that professions normally try to *control* a market for their expertise. This control involves limiting entry into a profession and, because of the limited numbers allowed into the profession, yields higher incomes and status for those who do enter. Larson viewed professionalization as an attempt to translate one type of scarce resources—special knowledge and skills—into another—social and economic rewards. The attempt by professions to maintain scarcity implies a tendency toward monopoly: monopoly of expertise in the market and monopoly of status in a system of stratification. For Larson, the following elements in the professionalization process are inseparably related:

- differentiation and standardization of professional services;
- formalization of the conditions for entry;
- persuasion of the public that they need services that only professionals can provide; and
- state protection (in the form of licensing) of the professional market against those who lack formal qualifications and against competing professions.

As this analysis suggests, a critical element in professionalization is market control—the successful assertion of unchallenged authority over some area of knowledge and its professional instrumentation (Abel, 2003).

THE EMERGENCE OF ATTORNEYS

The emergence and history of attorneys and the legal profession have long fascinated scholars in history, law, and sociology (Grillo et al., 2009). In preliterate societies, as noted in Chapter 2, custom and law coincided, and these societies had no lawyers as we think of lawyers today. Although some such societies had the equivalent of judicial trials, defendants were not typically represented by a "lawyer." Instead, each individual was her or his own "lawyer," and everyone more or less knew the law, because they knew the society's customs. Although some individuals were probably wiser than others and more skilled in social affairs, these attributes were not considered as legal attributes per se.

As societies became larger and more complex, formal legal systems developed, and so did the legal profession. This profession's origins go back to ancient Rome (Brundage, 2010). Initially, Roman law allowed individuals to argue cases on behalf of others; however, those persons were trained not in law but in rhetoric. They were called orators and were not allowed to take legal fees. Later on, by Cicero's time, there were jurists as well—individuals who were knowledgeable about the law and to whom people went for legal opinions. They were called *juris prudentes*, but these men learned in the law did not yet constitute a profession. Only during the Imperial Period, which began about 27 B.C., did lawyers begin to practice law for a living and schools of law emerge. By this time, the law had become exceedingly complex in Rome, and this complexity made the Roman lawyer indispensable.

By the Middle Ages, the lawyer had three functions—agent, advocate, and jurisconsult (Jeffery, 1962). The word *attorney* originally meant an agent, a person who acts or appears on behalf of someone else. In this role of agent, the lawyer appeared in court to handle legal matters in place of the client. In ancient Athens and Rome, an agent was allowed to appear in the place of another person. In France, however, clients had to appear in court themselves, and in England, they needed special permission from the king to be represented in court by an agent. In France, by 1356, there were 105 *legistes* (men of law) representing clients in court (Jacoby, 1973:14).

The Emergence of Lawyers in England The distinction between an *agent* and an *advocate* appeared when the lawyer went to court with a client to assist the client in presenting the case. In addition to law, the advocate was trained in the art of oratory and persuasion. In England, the function of the agent was taken over by solicitors and attorneys; the advocate

became the barrister (trial lawyer). The function of a lawyer as a jurisconsult was both as a legal advisor and as a writer and teacher. Although contemporary lawyers perform essentially the same functions, the modern legal profession is fundamentally different, as we discuss later.

"The profession of advocate," wrote Michael E. Tigar (2000:157), "in the sense of a regulated group of (law) practitioners with some formal training, emerged in the late 1200s." Both the English and the French sovereigns legislated with respect to the profession, limiting the practice of law to those who had been approved by judicial officers. The profession of full-time specialists in the law and in legal procedures appeared initially as officers of the king's court. The first professional lawyers were judges who trained their successors by apprenticeship. The apprentices took on functions in the courtroom and gradually came to monopolize pleading before the royal judges. In England, training moved out of the courtroom and into the Inns of Court, which were the residences of the judges and practicing attorneys. The attorneys, after several reorganizations of their own ranks, finally became a group known as *barristers*. Members of the Inns became organized and came to monopolize training in the law as well as control of official access to the government. Signs of the professionalization of lawyers began to appear.

In England, the complexity of court procedures required technical pleading with the aid of an attorney, and oral argument eventually required special skills. By the time of Henry III (1216–1272), judges had become professionals, and the courts started to create a body of substantive legal knowledge as well as technical procedures. The king needed individuals to represent his interests in the courts. In the early fourteenth century, he appointed sergeants of the king to take care of his legal business. When not engaged in the king's business, these fabled sergeants-at-law of the Common Pleas Court could serve individuals in the capacity of lawyers.

A crucial event in the beginning of the legal profession was an edict issued in 1292 by Edward I. During this period, legal business had increased enormously; yet, there were no schools of common law, and the universities considered law too vulgar a subject for scholarly investigation. The universities were, at that time, agencies of the church, and the civil law taught there was essentially codified Roman law, the instrument of bureaucratic centralization. Edward's order, which directed Common Pleas to choose certain "attorneys and learners" who alone would be allowed to follow the court and to take part in court business, created a monopoly of the legal profession.

The effect of placing the education of lawyers into the hands of the court cannot be overestimated. It resulted in the relative isolation of English lawyers from Continental, Roman, and ecclesiastical influences. Lawyer taught lawyer, and each learned from the processes of the courts, so that the law had to grow by drawing on its own resources and not by borrowing from others. But the court itself was no place for the training of these attorneys and learners. It did, however, provide aid in the form of an observation post, called the *crib*, in which students could sit and take notes, and from which occasionally they might ask questions during the course of a trial.

The Inns of Court provided for the training of lawyers. A small self-selecting group of barristers gave informal training and monopolized practice before the government courts of London, as well as judgeships in those courts. Barristers evolved into court lawyers (that is, lawyers who represented their clients in court proceedings). Originally, they were called "story-tellers" (Latin *narrators*); they told their client's story in courts, and this is their essential function to this day. The barristers' monopoly of court activities helped create a second group within the legal profession, named the "solicitors" (or "fixers"), who advised clients, prepared cases for trial, and handled matters outside the courtroom (Simpson, 1988:148–156). This group arose to meet the needs of clients, because barristers were too involved as officers of the court to be very responsible to outsiders. The barristers outranked solicitors, both by virtue of their monopoly of access to the court and through their control of training. Originally, solicitors were drawn from the ranks of those who attended the Inns of Court, and later they came to be trained almost entirely by apprenticeships or through schools of their own. At first, in the Inns of Court, lawyers lived together during the terms of court, and for them, the Inns represented law school, a professional organization, and a tightly knit social club, all in one.

Law in English Universities Initially, universities such as Oxford and Cambridge saw little reason to include training in the law as it was practiced in the Inns. They instead taught subjects such as legal history, jurisprudence, and Roman and ecclesiastical law (Kearney, 1970). Because it was upper-class "gentlemen" who primarily attended English universities, legal training at the Inns of Court became the cheapest and the easiest route of social mobility for those who aspired to become gentlemen. Many sons of prosperous yeomen and merchants thus chose legal apprenticeship in an attempt to adopt a lifestyle associated with a gentleman.

The appointment in 1758 of Sir William Blackstone to the Vinerian Chair of Jurisprudence at Cambridge marked the first effort to make English law a university subject. Blackstone thought it would help both would-be lawyers and educated people generally to have a "system of legal education" (as he called it), which would be far broader than the practical legal training offered in the Inns of Court. Blackstone may thus be considered the founder of the modern English system of university education in law (Berman et al., 2004).

The Legal Profession in England By the end of the eighteenth century, law in England had become a full-fledged profession. Members of the profession considered law a full-time occupation, training schools were established, universities began to offer degrees in law, and a professional association evolved in the form of a lawyers' guild. The practice of law required licensing, and formal codes of ethics were established. Knowledge of law and skills of legal procedures became a marketable commodity, and lawyers had a monopoly on them. The practice of law in royal courts was limited to members of the lawyers' guild, which in turn enhanced their political power, their monopoly of expertise in the market, and their monopoly of status in a system of stratification (Frank, 2010). Access to the profession became controlled, and social mobility for those admitted assured. By the end of the eighteenth century, the name "attorney" had been dropped in favor of the term "solicitor," with the formation of the Society of Gentlemen Practicers in the Courts of Law

and Equity, which was their professional society until 1903, when the Law Society came into being.

EVOLUTION OF THE AMERICAN LEGAL PROFESSION

The American legal profession, like the American government, has its roots in English government organization. Colonial America was a transplant of English institutions, but with an emphasis on greater decentralization. The upper class of Southern planters and Northern merchants and planters virtually monopolized the practice of law in the colonial years. In the South, wealthy planters tended to send their sons to the Inns of Court in London for legal training. In the northern colonies, bar associations developed in most of the populous places after 1750, beginning originally as social clubs, but gradually coming to control admission to practice. The colonial legislatures delegated to the courts the power of admission to practice before them. In the late eighteenth century, the local bar associations, in particular in New York and Massachusetts, were in turn delegated responsibility for recommending lawyers for admittance (Hurst, 1950).

Before the Revolution, lawyers were unpopular. Both the Puritans and the planters feared a secular legal profession. The Puritans felt that the Bible was all the "law" they needed (Turner and Kirsch, 2009). The planters opposed lawyers because of the threat they posed to their political power. Lawyers became even more unpopular during the American Revolution than they had been before (Friedman, 2005). Because many lawyers were closely associated with the upper class in background and in interests, it was among this group that the British sympathizers were most concentrated. As a result, a substantial proportion of lawyers immigrated to England during wartime persecutions of Tories. The prevailing custom of the bar to limit practice to a small group of elites also contributed to lawyers' unpopularity, as did their efforts to collect wealthy creditors' claims in the period following the Revolution.

POST-REVOLUTIONARY AMERICA

After the Revolution, the legal profession became somewhat more egalitarian in several ways. First, the distinction between barristers and attorneys—in imitation of the English system—disappeared with democratization of the legal profession. Second, standards of admission to the bar became somewhat loosened. Third, bar associations weakened and even disappeared as their powers waned. Between about 1800 and 1870, local courts granted admission to the bar. In its most extreme form, this meant that admission in one court conferred no right to practice before others, although it was more usual for the right to practice in one court to enable one to practice before any other court in the same state.

During this period, admission to the bar required neither a college education nor a law degree. The bar examination itself was usually oral and administered in a casual fashion. Legal education throughout the nineteenth century was similarly informal. The principal method of education was apprenticeship in a lawyer's office (as was true for Abraham Lincoln), during which the student performed small services, served papers, and copied

legal documents. In his spare time, he (almost all apprentices during this time were men) read what law, history, and general books were available. Students in the offices of leading lawyers were often charged fees for apprenticeship.

The first law schools grew out of specialized law offices offering apprentice programs. They used many of the same techniques as the offices. The earliest such school was founded in Litchfield, Connecticut, in 1784. It proved successful and grew rapidly in size. In time, it gained national reputation and attracted students from all over the country. It offered a 14-month course and taught law by the lecture method.

University law schools started gradually to replace the Litchfield type as the main alternative to office training, but legal training at the university level was still rare (Freeland, 1992). A few university professorships of law were established as far back as 1779 at the College of William & Mary, 1793 at Columbia University, as well as at Harvard University in 1816 and at Yale University in 1824. But attendance was spotty, and the courses given were short and informal, covering the same materials as apprenticeship programs and allowing students to drop in and out as suited their own convenience. Legal standards for passing the course were minimal, and only a single final oral examination was required at some universities. Even at Harvard in the mid-nineteenth century, the standards were very low, and "there were absolutely no examinations to get in, or to proceed, or to get out. All that was required was the lapse of time, two years, and the payment of the fees" (Friedman, 1998:242).

1870 AND BEYOND

After 1870, several changes took place that established stratification within the legal profession and brought university law schools to an important position. A nationally prominent group of lawyers developed, and the bar (or the lawyers' union, although never called by that name) fought vigorously to protect the boundaries of the calling (Friedman, 2005). Simultaneously, university professors of law began to make claims for the scientific status of law. The bar association movement started, and the establishment of new bar associations led to efforts to restrict admission to the bar. In 1878, the American Bar Association (ABA) was formed. After 1878, boards of examiners normally controlled by the local bar associations replaced the state supreme courts as the examining authority. Statewide boards were established and financed themselves out of applicants' fees. The boards were almost invariably controlled by the state bar associations (Stevens, 1971).

Dean Langdell of Harvard Law School Starting in 1870, Harvard began teaching law with the case study method. Instead of using the older system of textbook reading and lectures, the instructor carried on a discussion of assigned cases designed to bring out their general principles. The proponent of the case method, Harvard Law Dean Christopher Columbus Langdell, believed that law was a general science and that its principles could be experimentally induced from the examination of case materials. He rejected the use of textbooks and instead used casebooks as teaching materials; these were collections of reports of actual cases, carefully selected and arranged to illustrate the meaning and development of principles of law. The teacher became a Socratic guide, leading the student to an understanding of concepts and principles hidden as essences among the cases.

Langdell also made it more difficult for students to gain admission. If an applicant did not have a college degree, he (almost all law students at Harvard and other universities were men) had to pass an entrance examination. A student was required to show knowledge of Latin by translating from Virgil or Cicero; on occasion, a skill in French could substitute for Latin. Langdell likewise made it harder for a student to graduate law school. He increased the length of legal education to 2 years in 1871 and then to 3 years in 1876. He also replaced the lax oral examinations for a law degree with a series of written exams with increasingly formal standards. By 1896, Harvard also required a college degree as a prerequisite for admission to law school (Friedman, 2005).

Langdell's changes helped increase the prestige of law and legal training and affirmed that legal science stood apart as an independent entity distinct from politics, legislation, and ordinary people. Langdell provided grounds for certain important claims of the legal profession. Law, he maintained, was a science that demanded rigorous formal training. There was justification, then, for the lawyers' monopoly of practice.

The U.S. Legal Profession into the Early Twentieth Century The increased emphasis on professionalization and monopoly of the practice of law brought about concerted efforts to improve the quality of legal education, to raise admission standards, and to intensify the power of bar associations. Attempts to improve legal education meant, in practice, the adoption of the standards of the leading law schools. The adoption of formal-education requirements for admission to bar exams further strengthened the schools, and by 1940, forty states required 3 years of law school study. At the same time, many states began to require at least 2 years of college education for entrance into law school, and two-thirds of states had this requirement by 1940. By 1950, 3 years of college had become the norm, and by the 1960s, 4 years of college were required. A law student of today would find it hard to believe that until the 1950s, the number of lawyers who had not been in college exceeded the number of those who had been (Stevens, 2001).

The Law School Admission Test (LSAT) was first ready for general use in 1948. The ABA, in 1929, established law school accreditation standards, and the bar-admitting authorities encouraged the ABA's accreditation efforts. Today, graduation from one of the many ABA-approved law schools satisfies the legal-education requirement for admission to the bar (after passing the bar exam) in all jurisdictions in the United States.

GENDER AND RACE IN THE LEGAL PROFESSION

White males have dominated the legal profession throughout its history. Not a single woman was admitted to the American bar before the 1870s, and very few blacks (Friedman, 2005). Reflecting the deep-rooted sexism of American society before the 1970s, women were simply not considered suitable for the practice of law. They were seen as delicate creatures and, just like children, lacked full legal rights. By allowing women to practice law, the traditional order of the family would be upset.

This general view lay at the heart of a notorious opinion of a justice of the U.S. Supreme Court in 1873. This opinion said in part that "the natural and proper timidity and delicacy which

belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the creator" (Stevens, 2001:82). Not until 1878 did federal courts open the door to women attorneys. Law schools began to admit women in 1869, although many schools continued to deny admission to women. In 1872, Charlotte E. Ray became the first woman to graduate from an American law school (Smith, 2000). As of 1880, there were 75 women lawyers and 1,010 by 1900 (Stevens, 2001). By 1984, of the 649,000 lawyers, more than 83,000 were women (Curran, 1986). Today, women comprise about half of all law school students and an increasing percentage of all attorneys.

The legal profession also explicitly discriminated against African Americans and other people of color before the 1960s (Abel, 1986). The ABA and many law schools simply excluded blacks altogether before a half-century ago. In 1965, blacks made up 11% of the population but less than 2% of lawyers and only 1.3% of law students, half of them in all-black law schools. More than a decade later in 1977, only 5% of the country's law students were black (Friedman, 1998, 2002). By the 1990–1991 academic year, this figure had risen slightly, to 5.6%. Today (2013–2014 data), African Americans comprise about 9.3% of law school students, a figure still smaller than their approximate 13% portion of the U.S. population (American Bar Association, 2017).

Law firms before the 1960s were about as discriminatory as law schools. Many excluded Jews, Catholics, blacks, and women. Through the 1950s, most firms were solidly WASP (white Anglo-Saxon Protestant). These discriminatory hiring practices had started to decline by the end of the 1960s, but women and people of color continue to be underrepresented at the nation's largest law firms (Jackson, 2016).

Some lawyers contend that while law schools have aggressively recruited minority students and many law firms have done the same for minority graduates, firms have been more reluctant to promote minority associates to partnership. One reason lawyers fail to offer a partnership is that minority lawyers are less likely to have relationships with important clients or to land a significant amount of business for the firm (Glater, 2001). But some minority lawyers say that they are not given the same opportunities as white lawyers to work with important clients, often because they do not have mentors who ensure that they have access to the best work. Finally, minority lawyers also cite of what they perceive to be a lack of opportunity for advancement within firms, and as a result, they opt for career opportunities in business, consulting firms, government jobs, or corporate legal departments.

There is also continuing evidence of disparate treatment of male and female lawyers in court in demeanor and language (Oliver, 2015). Minority female attorneys claim that they lack support by white women and minority men attorneys, face both race and sex discrimination, and have difficulties establishing networks (Jackson, 2016). Sexual harassment continues to be a problem, with more than half of women attorneys saying they have been sexually harassed as attorneys. There is evidence to suggest that women's integration into the legal profession remains marginal despite their growing proportions in the field; they are still underrepresented in law firm partnerships and move more slowly than men toward these positions.

THE RISE OF THE CORPORATE ATTORNEY

Before the Civil War, much legal business concerned land and commerce. After the Civil War, the most lucrative legal business involved the large corporations, beginning first with railroad companies. During this period, lawyers became closely involved with the major banks and began to sit on boards of directors. By the turn of the century, corporate law firms were edging to the pinnacle of professional aspiration and power (Auerbach, 1976). Lawyers were instrumental in the growth of corporations, devising new forms of charters and helping companies to organize national business, while taking maximum advantage of variable state laws concerning incorporation and taxation. At the turn of the century, the emergence and proliferation of firms specializing in corporation law provided their lawyers with an opportunity to secure personal power and to shape the future of their profession. But only lawyers who possessed what Gerald S. Auerbach (1976:21) calls "considerable social capital" could inhabit the world of the corporate law firm. These individuals were white males from privileged backgrounds.

Through corporate law firms, the large modern-style law firm came into existence. Before the middle of the nineteenth century, law practice was either done by a one-person firm (*solo practitioner*) or carried on in two-person partnerships. After 1850, partnerships dealing with business interests began to specialize internally, with one person handling the court appearances and the other taking care of office details. At the same time, business clients started to solicit opinions from law firms on legal aspects of prospective policies, a practice that gradually led to the establishment of permanent relationships between law firms and corporations. The size of major law firms began to grow. The idea of the "Wall Street law firm," allied with major corporations, originated in the late nineteenth century; the prestige and influence of these firms grew along with that of the corporations whose economic dominance these firms helped make possible.

In addition to changes in the structure and functions of the profession, there have been substantial changes in its numbers. In 1850, there were approximately 24,000 lawyers in the United States. In the next 50 years, after the Civil War and the transformation of the American economy, there were significant changes in supply and demand. The number of lawyers increased to approximately 60,000 by 1880, and to 115,000 by 1900 (Halliday, 1986). Beginning in the 1960s, law became one the fastest-growing professions in the United States. The number of lawyers increased from 285,933 in 1960 to 355,242 in 1970, before reaching 649,000 in 1984 (Curran, 1986). In 2006, there were 1,116,967 attorneys, and today (2015 data), there are about 1.3 million attorneys in the United States (American Bar Association, 2015).

THE LEGAL PROFESSION TODAY

This section sketches various aspects of the legal profession today in the United States. We begin with an age-old problem for lawyers, their negative public image, as any number of lawyer jokes on the Internet will attest.

THE NEGATIVE IMAGE OF LAWYERS

This negative image has probably existed ever since lawyers first existed, because lawyers have never been popular (Friedman, 1998). Plato spoke of lawyers' "small and unrighteous" souls, and Keats said, "I think we may class the lawyer in the natural history of monsters." Thomas More left lawyers out of his Utopia, and Shakespeare made his feelings known in a famous line from Henry VI, Part II: "The first thing we do, let's kill all the lawyers." Reflecting this long-standing image, Americans hold a dim view of lawyers' ethical qualities. A 2016 Gallup Poll asked a national sample of Americans to rate the "honesty and ethical standards" of people in different occupations as very high, high, average, or low. Whereas 84% of respondents gave nurses a very high/high rating and 65% gave medical doctors this rating, only 18% gave lawyers this rating. Ranking even below lawyers were such occupations as insurance and car salespersons and members of Congress (Norman, 2016).

Headlines in professional and popular publications and book titles over the years have been anything but flattering. Some examples over the years are "The Lawyer as Liar" (Uviller, 1994); "Why Lawyers Lie: The Truth Is Not the Highest Priority in a Criminal Trial" (Abrams, 1994); "The Law According to the Chequebook—The Duplicity of Lawyers" (Fotheringham, 1994); "Who Ya Gonna Call? 1–800-Sue Me" (*Newsweek*, 1995); *Beyond All Reason: The Radical Assault on Truth in American Law* (Farber and Sherry, 1997); and *The Case against Lawyers: How Lawyers, Politicians, and Bureaucrats Have Turned the Law into an Instrument of Tyranny, and What We as Citizens Have to Do about It* (Crier, 2002).

Although lawyer-bashing is a venerable tradition, in fairness to lawyers, much of their negative image is exaggerated, and they are probably no less ethical or otherwise dislikeable than members of other professions. Some of the charges are due to guilt by association. They often deal with people in trouble—criminals, politicians, business people, and those seeking a divorce. At times, they articulate strong partisan interests, and it is no surprise that they are the object of strong sentiments. Still, although lawyers play a useful role and are sometimes admired, they are rarely loved. Probably no other legitimate profession has been as subjected to extremes of homage and vilification as lawyers (Bonsignore et al., 1989).

THE EMPLOYMENT OF LAWYERS

There are four principal subgroups in the legal profession: lawyers in private practice, lawyers in government service, lawyers who work for corporations or other private businesses, and the judiciary. In the United States, about three-quarters of lawyers are in private practice, while the remainder work in government, private industry, and many other settings: the judiciary, educational institutions, legal-aid programs, private associations such as unions, and other special-interest organizations. In career patterns, self-image, and sheer numbers, lawyers in private practice constitute the central group of the American legal profession from which other types of practice are branching out. These lawyers generally work as either individual practitioners or members of law firms. The next section will consider the private practice of law in the context of solo and firm practitioners.

Private Practice Contrary to the popular image that is reinforced by television (Rapping, 2004), only a small proportion of lawyers engage in litigation. Instead, they perform many other tasks and roles. One role that private practice lawyers perform is *counseling*. Attorneys spend about one-third of their time advising their clients about the proper course of action in anticipation of the reactions of courts, agencies, or third parties. Another role is *negotiating*, both in criminal and in civil cases. Plea bargaining is an example of negotiation and is widely used in criminal cases; pretrial hearings and conferences in attempts to reach a settlement and avoid a costly trial illustrate the negotiating role of lawyers in civil cases. *Drafting*, the writing and revision of legal documents such as contracts, wills, deeds, and leases, is the "most legal" of a lawyer's role, although the availability of standardized forms for many kinds of legal problems often limits the lawyer to filling in the blanks.

In additional roles, *litigating* is a specialty, and relatively few lawyers engage in actual trial work. Much litigation in the United States is generally uncontested in cases such as debt, divorce, civil commitment, and criminal charges. Some lawyers also engage in *investigating*. In a criminal case, for example, the defense attorney may search for the facts and gather background information in support of the client's plea. Finally, lawyers take part in *researching*—searching, for example, for precedents, adapting legal doctrine to specific cases, and anticipating court or agency rulings in particular situations.

Solo Practitioners In terms of the structure of legal practice, **solo practitioners** and large law firms represent the two extremes of private practice. In between, there are partnerships and small law firms of relatively modest size. Solo practitioners typically received their law degree from the lower ranks of law schools. They are generalists, performing a range of tasks and roles. Many of these attorneys engage in marginal areas of law, such as collections, personal injury cases, rent cases, and evictions. They face competition from other professionals, such as accountants and real estate brokers, who are increasingly handling the tax and real estate work traditionally carried out by solo practitioners.

In general, solo practitioners rank at the bottom of the legal profession in terms of prestige, influence, and income. As Jerome E. Carlin (1962:206) noted long ago in a classic study, these lawyers are "most likely to be found at the margin of (their) profession, enjoying little freedom in choice of clients, type of work, or conditions of practice." In another classic study, Jack Ladinsky (1963) found that solo practitioners tend to come from much less wealthy (parents') backgrounds than lawyers in large firms and also tend to have graduated from nonelite law schools. After graduating from these schools, they find it difficult to obtain a prestigious firm job and thus end up doing the relatively low-paying, low-status work that solo practitioners do.

There are also differences between solo practitioners and large firm attorneys in acceptance of and compliance with ethical norms. Carlin (1966) found that solo practitioners were more likely to violate ethical norms (for example, cheating clients), and recent research echoes this finding (Gunning et al., 2009). A major reason for this finding is that the types of clients and cases (for example, personal injury cases) handled by solo practitioners are more likely to yield opportunities for such violations.

Large Law Firms Unlike solo practitioners, large law firms maintain long-term relationships with their clients, and many are on retainers by large corporations. Large firms offer a variety of specialized services, with departments specializing in a number of fields such as tax law, mergers, antitrust suits, and certain types of government regulations. These firms deal generally with repeat players and provide the best possible information and legal remedies to their clients along with creative and innovative solutions for the clients' problems (Jacob, 1995).

Large firms have a pronounced hierarchical organization structure (Nelson, 1988). Young lawyers are hired as associates. Beginning associates are seen as having limited skills, despite their elite education, and are assigned the task of preparing briefs and engaging in legal research under the supervision of a partner or a senior associate. In 7 or 8 years, they either become junior partners or leave the firm. For a new associate who has a strong desire to move into a partnership position, the competition with cohorts is very strong.

Associates are on a fixed salary, whereas partners' incomes are based on profits. In most firms, law partners earn profits largely on hourly billings of associates: the more associates per partner, the higher the profits. A small committee of a firm's partners usually decides how profits are divided among all the firm's partners; this committee considers such factors as work brought in, hours billed, and seniority. The traditional rule is that associates should produce billings of at least three times that of their salaries. A third of money collected from this minimal expectation pays for the associate's salary, another third pays for overhead, and the remaining third contributes to the firm's profits (Carter, 2015). If the associate earns more than three times her or his salary, the extra amount (after paying for the associate's salary and overhead) again goes to the firm's profits.

These profits can be considerable. To illustrate, let's take a relatively new associate at a very large law firm who is earning $200,000 annually and bills at $400 per hour, the average associate billing rate at very large firms (Strickler, 2014). If an associate works 50 hours per week, the median workweek at large law firms, for 50 weeks a year (with a 2-week vacation), a little arithmetic indicates that the associate's billable hours will amount to $1 million annually. After paying the associate's $200,000 salary and having the same amount go to overhead, the firm's profits amount to about $600,000 per associate. Because dozens of associates work at the very large law firms, this profit per associate quickly amounts to many millions of dollars that the firm's relatively small number of partners divide among themselves.

One of the most complete analyses of large law firms is still Erwin O. Smigel's (1964) *Wall Street Lawyer.* The large law firms he investigated perform a variety of functions. Then and now, they are spokespersons for much of big business in the United States. But they not only represent business; many members of the firms also serve as members of the boards of directors of corporations they represent. These law firms also act as recruiting centers for high-level government service. Members of the firm are appointed to important government positions and seek national political offices. Many of their members are also active in various capacities in national, state, and local governmental agencies. Wall Street

lawyers also participate in civic and philanthropic activities, such as the Metropolitan Opera, various museums, and other cultural and charitable affairs.

The Wall Street law firms Smigel studied were very large, ranging from 50 to several hundred lawyers on the staff. Over 70% of their lawyers attended Harvard, Yale, or Columbia Law School and were top students. As might be expected during the time of his study several decades ago, Smigel found very few black or women attorneys in the Wall Street firms, and he also found relatively few Catholic lawyers.

John P. Heinz and Edward O. Laumann (1994) authored another influential study of lawyer's employment, this time of the Chicago bar. Their study highlighted the dramatic differences between the practice of law in large law firms and the practice of law by solo practitioners or in very small (two- or three-person) firms. They noted that much of the "differentiation within the legal profession is secondary to one fundamental distinction—the distinction between lawyers who represent large organizations (corporations, labor unions, or government) and those who represent individuals. The two kinds of law practice are the two hemispheres of the profession." Most lawyers, they said, "reside exclusively in one hemisphere or the other and seldom, if ever, cross the equator" (Heinz and Laumann, 1994:319).

These two sectors of the profession, Heinz and Laumann noted, are associated with the social origins of lawyers, the schools where they were trained, the types of clients they serve, office environment, frequency and type of litigation, values, and different circles of acquaintance. Large cities, Heinz and Laumann concluded, have two legal professions—one that is recruited from more privileged social origins where lawyers serve wealthy and powerful corporate clients, and the other from less prestigious backgrounds where lawyers serve individuals and small businesses. Thus, "the hierarchy of lawyers suggests a corresponding stratification of law into two systems of justice, separate and unequal" (Heinz and Laumann, 1994:385).

Government Roughly 12% of the members of the bar in the United States are employees of the federal, state, county, and municipal governments, exclusive of the judiciary. Because young lawyers may take positions in government agencies to aid their upward professional mobility, the ranks of government attorneys often include persons who do not come from wealthy backgrounds and who did not attend elite law schools (Spector, 1972). Young lawyers who begin their career working at some level of government gain valuable trial experience, specialized knowledge of regulatory law, and government contacts that eventually might be parlayed into a move to a large law firm or to private industry.

Many lawyers in government work at the federal level for Cabinet departments, such as the Department of Justice and the Department of the Treasury, or for regulatory agencies such as the Interstate Commerce Commission. Other lawyers in government work in the various legal departments of cities and deal with matters such as planning, zoning, and eminent domain issues. Still other government lawyers work as prosecutors or as public defenders. The president appoints federal prosecutors, while state prosecutors are commonly elected by the county in which they work.

Private Corporations and Other Businesses About 12% of lawyers, often called **house counsel**, work for corporations or other private businesses. Large corporations such as General Electric, AT&T, State Farm, and Liberty Mutual have huge legal departments with over 500 lawyers (*Lawyer's Almanac*, 2017).

The growth of corporations, the complexity of business, and the multitude of problems posed by government regulation make it desirable, if not imperative, for some firms to have lawyers and legal departments familiar with the firm's particular problems and conditions. In addition to legal work, lawyers often serve as officers of the company, and may serve on important policy-making committees, perhaps even on the board of directors. Although lawyers in legal departments are members of the bar and are entitled to appear in court, their lack of trial experience means that a firm will usually hire an outside lawyer for litigation and for court appearances.

Judiciary A very small proportion of lawyers are federal, state, county, and municipal court judges. Judges are generally required to be admitted to the bar to practice, but they do not practice while on the bench. There is so little uniformity that it is difficult to generalize further about judges, other than to point out three salient characteristics that relate to the ranks from which judges are drawn, to the method of their selection, and to their tenure.

Judges are drawn from the practicing bar and less frequently from government service or the teaching profession. In the United States, there is no career judiciary such as is found in many other countries, and there is no prescribed route for the young law graduate who aspires to be a judge—no apprenticeship that he or she must serve, no service that he or she must enter (Carp et al., 2010). The outstanding young law school graduates who serve for a year or two as law clerks to distinguished federal or state judges have only the reward of the experience to take with them into practice, not the promise of a judicial career. The legal profession is not entirely unaware of the advantages of a career judiciary, but it is generally thought that they are outweighed by the experience and independence that lawyers bring to the bench from their practice of law. Many of the outstanding judges of the country's highest courts have had no prior judicial experience.

In more than two-thirds of the states, judges are elected, usually by popular vote and occasionally by the legislature (Streb, 2009). In a small group of states, the governor appoints judges, subject to legislative confirmation. This is also the method of selection of federal judges, who are appointed by the president, subject to confirmation by the Senate. The selection of judges is not immune from political influence, pressure, and controversy (Shuman and Champagne, 1997).

Regarding judges' tenure, they commonly serve for a term of years rather than for life. For courts of general jurisdiction, it is typically 4 to 6 years, and for appellate courts, 6 to 8 years. In a few state courts and in the federal courts, the judges sit for life. Whether on the bench for a term of years or for life, a judge may be removed from office only for gross misconduct and only by formal procedures.

REVENUE STREAMS: LAWYERS AND MONEY

In recent years, law firm billing practices have come under close scrutiny (Koppel, 2006). In addition to the amount, there are legal and ethical questions concerning billing practices. Such practices include "using a heavy pen," which means rounding up to the next time unit in measuring fractions of hours worked on a client's case. There is also "late time," adding to the bill extra hours that lawyers did not work. Another questionable practice is the "smell test," a crude way lawyers can tell whether a padded bill will seem exorbitant to the client. Then there are fictitious narratives using such phrases as "review of key documents" and "analyze defense strategy" to describe work never performed. The central character of Jeremy Blachman's (2006:56) novel, Anonymous Lawyer, captures, in a lighter vein, some of these billing practices. In his sardonic words,

> I bill the time I think about these sorts of things. I call it "research." The clients never question it. "Research" is code for surfing the Internet, "drafting" is code for eating in your office, "misc. legal forms" is code for ordering gifts online, and "preparing for meeting" is code for taking a crap. Everyone knows. It's no big deal.

No clear line exists between aggressive billing practices and fraud. Ideally, legal billing should be as simple as paying for a house call by a plumber or electrician. Lawyers, plumbers, and electricians all charge by the hour, and they expect to be reimbursed for expenses incurred. However, this process for lawyers is not as simple as it sounds. Because lawyers may charge hundreds of dollars per hour and incur thousands in expenses, any imprecision can be costly to the client. Large-firm associates, for example, who are expected as many as 2,400 or 2,500 hours per year, often introduce a modest multiplier in the charges. Most lawyers have timers on their phones and round off their phone calls, so that a 1-minute call costs the client a full-time unit of 6 or 15 minutes on the bill. Other lawyers may charge a full hour for an hour of work that includes lunch and a visit to the bathroom (Moses and Schmitt, 1992).

In another example, through a process of legal alchemy known as *double billing*, lawyers can make two into four: Take 2 hours of research spent on client A's legal problem, which turns out to be the same as client B's problem, and charge each client for 2 hours, or 4 hours altogether. Although the ABA condemns double billing, its rulings do not bind lawyers, who are thus free to bill both clients for the same work. In yet another example, associates are even told that any time spent thinking about a client's legal woes, even while eating or jogging, should be billed (Stracher, 2001).

In the United States, legal expenses can be as devastating as medical expenses. To most Americans, legal fees for justice seem almost criminal—about $5,000 for misdemeanors; $4,000 to $12,000 for nontrial felonies; and $25,000 and above for felony trials. Even the simplest traffic violation starts with a $1,000 retainer. Similarly, the legal fees in estate and probate provide the opportunity for large profits from legal work. Few people understand why a lawyer who fills out mostly standard forms for 2 hours at the closing of a $600,000 house deserves 1%, or $6,000, for his or her effort (which is the same for a $100,000 house or for a $10,000,000 house—still 1%). In probate, legal fees are determined usually as a

percentage of the worth of the transaction—in this case, the value of the estate. Typical charges are 7% for the first $7,000 of the estate, 5% for the next $4,000, 4% for the next $10,000, 3% for the next $60,000, and 2.5% for the remainder. Once again, the amount of the fee is not necessarily related to the amount of work expended by lawyers, especially in cases where the value of an estate exceeds several million dollars. Nowadays, it is not unusual to hear of lawyers receiving multimillion-dollar fees, especially in large class-action suits against large corporations.

Lawyers also take cases on a contingency-fee basis (Cotterman, 2016). This is an arrangement whereby a lawyer receives a percentage of any damages collected. This practice is limited to a great extent to the American legal system, and most countries emulate England, which refuses to allow lawyers to work for contingency fees. Such fees in the United States are used primarily in medical malpractice, personal injury, and some product liability and wrongful death cases. If the plaintiff loses, there is no payment required for legal services; if he or she wins, the lawyer takes his or her expenses off the top, then gets a percentage (up to 35%) of the remainder of any money the plaintiff wins in damages.

This contingency system has its merits. It allows individuals who could not otherwise afford it to retain the services of an attorney. It encourages lawyers to screen out weak cases because they share the risk of litigation—if they do not win, they do not collect. At the same time, the contingency-fee arrangement provides a motivation to seek high damages. Lawyers make substantial investments by hiring investigators, expert witnesses, and consultants to augment their chances of winning. Often, they invest a considerable amount of their time in cases that can drag on for years. Not surprisingly, contingency-fee law made more overnight millionaires than just about any legal business one could name. An extensive survey of the richest lawyers in America found that their big fortunes were made predominantly in contingency-fee work, not the corporate law and transaction planning that have always represented the height of lucrative law practice (Olson, 1991a:45).

Lawyers defend the contingency fee as the victim's key to the courthouse. It allows the poor to obtain the same high-caliber legal services as the rich. Many cases require much expense and preparation. If the suit is lost, the lawyer gets nothing; therefore, the one-third contingency fee is most reasonable.

COMPETITION FOR BUSINESS

Some years ago, Arizona lawyers placed an ad for their firm in a local newspaper that violated the model code of professional responsibility formulated in 1969 by the ABA and adopted in Arizona by the state's supreme court. The lawyers were censured for their ad. They appealed the case to the U.S. Supreme Court, which decided in 1977 that state laws and bar associations prohibiting lawyers' advertising were in conflict with the Constitution's guarantee of free speech.

Advertising Historically, bar associations have strongly opposed advertising by lawyers (Cebula, 1998). In the common-law tradition, lawsuits were considered an evil, albeit a

necessary evil (Solovo, 2009). They were thought to increase hostility and resentment among people who could otherwise find an opportunity to cooperate and to settle their pecuniary or personal differences. As a result, lawyers were forbidden to "stir up" litigation. Any attempt to drum up business as ordinary businesspeople did was discouraged. Lawyers were expected to wait passively for clients and to temper any entrepreneurial urge to solicit them (Olson, 1991b:27).

The demise of opposition to advertising that came with the Supreme Court decision just cited began with a simple idea. By the time of this decision, lawsuits had come to be considered an effective way to deter misconduct and to compensate wronged persons. There was also a need to increase the demand for legal services, in part because law schools kept turning out large numbers of newly minted attorneys. Many attorneys and law firms began to view law as a business that required the use of business marketing strategies (Savell, 1994). The Supreme Court decision in effect endorsed this view.

Following this decision, bar associations developed and subsequently refined guidelines to allow lawyers to advertise. Typically, these guidelines allow lawyers to indicate their education, specialties, public offices, teaching positions held, and memberships in professional organizations. They may also indicate other clients represented with those clients' permission, tell what credit arrangements are acceptable, and indicate fees for initial consultations and other services.

The number of lawyers currently advertising has risen sharply in over the years. If you look on the Internet for lawyers in your area or consult the old-fashioned Yellow Pages, you will certainly see no shortage of advertising by lawyers. This is because effective advertising generates approximately $8 in revenue for each advertising dollar (Kennedy, 1994). Young, small-town, small-firm, or solo practitioners who earn relatively low incomes as lawyers are the most likely to advertise. Older, big-city lawyers still shy away from advertising.

These days, there are even manuals and how-to books for lawyers on how to advertise on their own (Randall and Johnson, 2005). A divorce attorney in Chicago, who may have been inspired by one of these, put a large billboard in Chicago in May 2007, getting all the attention it was hoping to attract. The ad showed the barely clothed torsos of a man and a woman with the caption: "Life is short. Get a divorce." The ad overnight became controversial and was removed by order of city officials but not before generating a fair amount of publicity—and business for the divorce attorney (*Newsweek*, 2007).

Of course, members of the legal profession have not unanimously welcomed these changes. Some say that lawyer advertising has contributed to the low public image of attorneys. The profession has traditionally considered unethical the more obvious forms of competition—advertising and soliciting clients. However, because a lack of competition leads to higher fees for clients to pay, advertising helps potential clients to be better able to afford to hire an attorney.

Solicitation After advertising, the next step in competition for business has been *solicitation*. Until 1985, bar associations discouraged lawyers from actively trying to find clients for

potential lawsuits against a corporation, hospital, or other common targets of lawsuits. In 1985, the Supreme Court, in *Zauderer v. Office of Disciplinary Council*, ruled that soliciting clients for injury claims against the company that produced the Dalkon Shield, a dangerous intrauterine device, was permissible. This decision created a precedent for lawyers recruiting litigants against all kinds of institutions and businesses, and lawyers now have the right to send letters to solicit the business of individuals known to have legal problems.

Even in-person solicitation is no longer a taboo. From airplane disasters to mine accidents, the scene is characterized by a "ravenlike descent" of tort lawyers anxious to contact the victims or their relatives. For example, competition for business among lawyers was so intense in the well-known 1989 Exxon Valdez oil spill in Bligh Reef in Alaska's Prince William Sound that it was referred to as "tanker chasing." A commentator vividly captured this scene: "Liability lawyers and prostitutes fresh from nearby Anchorage are said to prowl the dark, smoky bars in search of clients. Townspeople aren't as concerned about the prostitutes as they are about the lawyers" (Olson, 1991b:32). One of the consequences of this well-publicized incident was the creation of a code of conduct for accident scenes by the Association of Trial Lawyers of America.

LEGAL SERVICES FOR THE POOR AND THE NOT SO POOR

More than a third of the U.S. population have at least one legal problem annually, but only one in ten consults an attorney (Shdaimah, 2009). A frequently cited survey carried out for the ABA found that low- and moderate-income families generally do not seek legal help for their problems. Although 41% of the poor and 52% of moderate-income families encountered at least one legal problem in the 1990s, 71% of the poor and 61% of moderate-income families did not turn to attorneys for help with this problem. The legal problems faced by these people were mainly consumer issues and personal finance (Hansen, 1994; Kritzer and Silbey, 2003).

Why do so many people with legal problems not seek legal help? A main reason is that attorneys are expensive, definitely too expensive for many people who might want to hire an attorney. Consequently, under a celebrated 1963 Supreme Court decision, *Gideon v. Wainwright*, indigent defendants in serious criminal cases must be represented, usually by public defenders on the state's payroll or by court-appointed private attorneys. Unfortunately, many of these public defenders and court-appointed attorneys are overworked, and some are plainly incompetent (Hines, 2001). At the same time, a court's practice of appointing private attorneys for defendants is unpopular among these attorneys. It is damaging to their incomes, for they receive only nominal compensation for their services, and it interferes with their regular activities.

The plight of indigent criminal defendants is further complicated in many instances by the absence of some basic legal work that their more affluent counterparts would have. For example, most lawyers appointed to represent the poor do not hire private investigators to look for witnesses or evidence. Most do not get expert witnesses, like psychiatrists or

pathologists, to help challenge the prosecution's case. Most do not take the time to go to the scene of crime, and some do not even make a jail or prison visit to discuss the case with their clients. A study of 137 New York homicide cases completed by court-appointed lawyers in 2000 shows that in 42 of them—nearly one-third—the lawyers did less than a week of preparation, raising questions about their effort and thoroughness. Only 12 spent at least 200 hours—5 weeks or more—investigating and preparing their cases, a sign of "appropriate diligence," according to legal experts (Fritsch and Rohde, 2001:27).

Some lawyers provide legal services *pro bono publico* (for the public good) for indigents (Granfield and Mather, 2009). From time to time, various bar associations have recommended that all lawyers engage in such endeavors. But many attorneys cannot afford to do so, and others, particularly those who work for large firms, are discouraged from doing so. Many large firms are reluctant to take on pro bono criminal-law work, divorce, housing disputes, and consumer problems because their corporate clients would regard such cases as unseemly.

In civil cases, the poor can gain access to lawyers through public or private legal-aid programs. As part of the War on Poverty program in the 1960s, the Office of Economic Opportunity established neighborhood law offices to serve the indigents. In 1974, much of legal-aid work was assumed by the Legal Services Corporation (LSC), which began distributing money to several hundred legal service organizations across the nations. Because LSC-funded attorneys often were fighting local governments and influential businesses, LSC soon became controversial. President Reagan tried in the early 1980s to phase the program out, but Congress balked. As a result of financial cutbacks, the availability and quality of legal services for the poor continues to decline in many states (Angones, 2017); a draft budget by the Trump Administration in early 2017 listed eliminating funding for LSC altogether, ending legal aid for millions of low-income people (McCarthy, 2017).

The work of legal services attorneys is concentrated in five main areas—family, consumer, housing, landlord–tenant, and welfare. To qualify, applicants must have proof of indigence and have a case that falls within the mandate of legal services. This mandate includes family matters like child support, spouse abuse, and divorce; housing; food stamps and other government benefits; consumer issues, and a variety of other matters. However, the work done by legal services does not begin to fill the vast need for their services. Compounding this problem, many low-income people with legal needs do not ask legal aid programs for help for at least one of three reasons: (1) they do not know these programs exist, (2) they do not know they qualify for help from these programs, or (3) they assume they still would not be able to obtain help from a program.

To help provide legal services to indigent clients, bar associations and law schools have established *legal clinics* in many communities across the nation (Davis, 2017). A legal clinic is a high-volume, high-efficiency law setting that caters to low-income people and provides free or low-cost services. Legal clinics build case volume primarily through advertising and publicity. They achieve efficiency by using systematic procedures, by relying heavily on standard forms, and by delegating much of the routine work to law students and/or to

paralegals (nonlawyers trained to handle routine aspects of legal work). These clinics focus on legal problems that are fairly common, such as wills, personal bankruptcy, divorces, and traffic offenses.

LAW SCHOOL

As of February 2017, 204 ABA-approved law schools offered the Juris Doctor (J.D.) degree in the United States; three of these schools were provisionally approved. In addition to the J.D. degree, some law schools offer other types of degrees for people who want to learn about law but who do not wish to practice law. These degrees include:

- The master's degree (LL.M.) usually involves a 1-year program combining coursework and research beyond the J.D.
- The Doctorate of Juridicial Sciences (S.J.D.) is a graduate academic research degree that involves substantial advanced academic publishable work
- The Master's in Comparative Law (M.C.L.) involves advanced work for foreign-educated lawyers.

Beyond these degrees, some law schools also offer joint degrees in conjunction with another college or school, usually within the university housing a particular law school. One example includes a joint Juris Doctor/Master of Public Administration degree. Some popular joint degree programs combine law and medicine, law and psychology, law and health administration, and law and international relations. Joint degrees give students career management flexibility, and students with joint degrees often hope and expect to be more competitive in the legal job market. Many law schools also encourage students to take advantage of study-abroad opportunities and internship programs in other countries and to learn a foreign language.

A BRIEF LOOK AT ENROLLMENT AND ADMISSION

Overall enrollment in U.S. law schools increased from 49,552 in the academic year 1963–1964 to 110,951 in the academic year 2016–2017. Despite this overall increase, law school enrollments have actually decreased from a decade ago, thanks in part to the Great Recession that began in 2008 (Delmore, 2017).

Although still more people apply to law school than can be accepted, about 70% of all applicants are accepted in at least one school. Admission to law school is very competitive. The higher the reputation of a law school, the greater is the competition among students for the number of places. There are annual rankings of law schools by a number of popular magazines, perhaps most notably *U.S. News & World Report*. The status of a law school is related, to an extent, to the placement of its graduates. Graduates of law schools attached to elite colleges and universities (for example, Harvard, Yale, Columbia, and Chicago) are more likely to be employed in large law firms, whereas graduates of less prestigious law schools are more likely to be found in solo practice. The elite Wall Street firms have been most educationally selective in this regard, choosing not

only from Ivy League law schools but also from a group whose backgrounds include attendance at elite prep schools and colleges, as Smigel (1964) observed in his influential study of these firms. Moreover, lawyers graduating from high-status law schools typically do not practice in the lower-status specialties of criminal, family, poverty, and debtor–creditor law.

Admission to law school is determined to a great extent by the combined scores of grade point averages in college and LSAT scores. Virtually all law schools also require that applicants submit the law school data assembly service report, a summary of their college transcript that the Law School Admission Council/Law School Admission Services prepare. The LSAT is a one-half-day standardized test. It consists of several sections of multiple-choice questions designed to measure the ability to read with understanding and insight, the ability to make logical deductions from a set of premises, the ability to evaluate reading, the ability to apply reasoning to rules and facts, and the ability to think analytically.

Despite the LSAT's influence on law school admissions, questions have been raised concerning the extent to which it can predict success in law school. Performance criteria of success in law school have traditionally been, and continue to be, grades obtained in formal course work. Some studies suggest that the LSAT average predicts law school grades rather poorly (Leonard, 1977). Despite these questions, all law schools require it as part of the admission process.

WOMEN AND PEOPLE OF COLOR IN LAW SCHOOL

Over the years, substantial changes have occurred in the composition and characteristics of law students. Women have been dramatically underrepresented in the past both in law schools and in the legal profession. As late as 1970, women made up only 2.8% of the population of lawyers in the United States, and only 8.5% of law school students were women. By 2013, almost 49% of law school students were women.

Historically, people of color, like women, have been extremely underrepresented in the legal profession. In 1970, black lawyers made up slightly over 1% of all lawyers (Leonard, 1977). The various minority-recruitment programs instrumented by most law schools in the late 1960s have increased the enrollment of minority-group students substantially over earlier years. But these groups still do not have representations within the law school populations anywhere near the percentage of the total population. Today (2013 data) African Americans make up only about 7.5% of all law students, even though they comprise about 13% of the general U.S. population. Similarly, Latinos make up about 9.9% of all law students, even they comprise more than 15% of the U.S. population (American Bar Association, 2017).

Women and people of color are also underrepresented among law school faculty. In 1989, law school students around the country demonstrated and successfully exerted pressure on their institutions to hire more women and minority-group members as professors (Leatherman, 1989). These and similar efforts in subsequent years resulted in major changes

in the composition of law school faculties, and now close to half of full-time law school faculty are women and minority-group members.

THE TRAINING AND SOCIALIZATION OF LAW STUDENTS

The purpose of law school is to change people; to turn them into novice lawyers; and to instill "in them a nascent self-concept as a professional, a commitment to the value of the calling, and a claim to that elusive and esoteric style of reasoning called 'thinking like a lawyer'" (Bonsignore et al., 1989:271). Chambliss and Seidman (1971:97) sardonically but correctly note, "The American law school education is a classic example of an education in which the subject matter formally studied is ridiculously simple, but the process of socialization into the profession is very difficult." The study of law is a tedious, although not a challenging, undertaking. After the first year, the workload in law schools tends to be light. The popular conception of law students' life as a mixture of long hours, poring over casebooks, and endless discussions of the contents of those books is more myth than reality after the first year. For many students during their last 2 years in school, law school is a part-time commitment, and by the fifth semester, they have the equivalent of a 2-day workweek and discuss their studies rarely if at all.

The Socratic Method The key to an understanding of the socialization of law students is best found through an examination of their principal method of instruction, the *case method* or, as it is also called, the **Socratic method** (Gee, 2014; Sullivan et al., 2007). As noted earlier, the case method began in 1870 at Harvard, and it has since become the dominant form of instruction in American law schools.

The Socratic method of education involves sharp questioning by a law professor of students regarding the facts and principles contained in judges' opinions in real legal cases. These opinions usually were written by justices of the U.S. Supreme Court or of the several federal appellate courts, but they may also have been authored by state supreme court justices. The Socratic method aims to accomplish two objectives. The first is informational: instruction in the substantive rules of law. The second aim

> is to develop in the student a cognitive restructuring for the style analysis generally called "thinking like a lawyer." In that analysis, a student is trained to account for the factual "details" as well as legal issues determined by the court to be at the core of the dispute which may allow an intelligent prediction of what another court would do with a similar set of facts. The technique is learner centered: students are closely questioned and their responses are often taken to direct the dialogue.
>
> (Bonsignore et al., 1989:275)

This method of learning the law through court decisions, appellate opinions, and attempts to justify those opinions predominates at virtually every law school in the country and has not changed since its introduction in 1870.

The first-year curriculum is rather uniform across all law schools. Nearly all the students who begin their legal education every fall must take what are generally thought of as the

basic subjects—contracts, torts, property law, criminal law, and civil procedure. And for all of them, the effects of that education are considered to be equally predictable and far-reaching. It is during the first year that law students learn to read a case, frame a legal argument, and distinguish between seemingly indistinguishable ideas; then they start absorbing the mysterious language of the law, full of words like "estoppel" and "replevin." It is during the first year that a law student learns "to think like a lawyer," to develop the habits and perspectives that will stay with her or him throughout a legal career (Turow, 1977:60).

The ratio of the number of students to the number of faculty in law schools is generally higher than that in other forms of graduate education. A 20-1 student–faculty ratio is rather common at many law schools, compared with about 6-1 ratio in graduate schools. The law school ratio reflects the assumption that law students, unlike other graduate students, are handled in large classes and that law professors, unlike other academicians, "have no research work to be done" (Manning, 1968:4). Although the emphasis on research is on the increase among law professors, students, especially during the first year, are taught in large classes.

Fortunately, a striking advantage of the Socratic method is its adaptability to large classes. Indeed, the impersonality of the large law school class might well be helpful to the student called upon to perform under attack (via the Socratic method) for the first time in her or his life. As once stated by a law professor at Yale, "After you've taught a subject to a class of a hundred for two or three years, you can anticipate the questions and their timing. When I started, I was told, 'Pick four or five points and keep coming back to them; find the bright students and play them like a piano!' It works" (Mayer, 1967:83–84). This method requires the student to do his or her own work and to prepare regularly for classes. When a professor has a gift for posing hypothetical questions, and invents cases to supplement the real ones, the method can be extremely stimulating, pointing out to a student that the rule, as he or she has stated it, would produce a different result under other circumstances. This method also focuses attention on subtleties and provides a good background for logical reasoning.

Despite the Socratic method's advantages, students have long deplored its failure to encourage creativeness and its lack of intellectual stimulation (Stevens, 1973; Tushnet, 2008). The class atmosphere is considered to be a hostile one, with the hostility directed from the icily distant law professor toward the student who has been put on the spot. This situation can pose a threat to the students' self-esteem, self-respect, and identity, helping to account for the elevated levels of depression and anxiety law students experience (Patrice, 2015).

Defenders of the Socratic method say that it aims to acclimate the students to real-life legal reasoning and to "thinking like a lawyer" (Bankowski and MacLean, 2007; Schauer, 2009). Critics of the Socratic method question that connection and say that "one often gets the feeling that the recitation of 'thinking like a lawyer' has become more a talismanic justification for what is going on than an articulated educational program" (Packer and Ehrlich, 1972:30).

Other Problems in Legal Education Further, many lawyers perceive critical gaps between what they are taught in law school and the skills they need in the workplace. This was

the core conclusion of a study by the Berkman Center for Internet & Society at Harvard University (Koo, 2007), which found that more than 75% of lawyers surveyed said they lacked critical practice skills after completing their law school education. Today's workplace demands skills that the traditional law school curriculum does not cover. For example, most attorneys work in complex teams distributed across multiple offices; nearly 80% of lawyers surveyed belong to one or more work teams, with 19% participating in more than five teams. Yet only 12% of law students report working in groups on class projects. Also, legal educators seriously underuse modern computer technologies and computer simulation and networking, even in those settings, such as clinical legal education, that are the most practice oriented, and neither law schools nor most workplaces provide new attorneys with a structured transition between school and practice.

Essentially, the objective of law school education is to indoctrinate students into the legal profession. Questions that challenge the basis of the system are seldom raised, and law students define the problems presented to them within the framework of the existing system. The socialization of law students tends to make them intellectually independent, but at the same time, it restrains them from looking for radical solutions, "for throughout their law school education they are taught to define problems in the way they have always been defined" (Chambliss and Seidman, 1971:99). During law school, students change their political orientation in a conservative direction (Erlanger and Klegon, 1978). It is therefore unsurprising that

> legal education seems to socialize students toward an entrepreneurial value position in which the law is presumed to be primarily a conflict-resolving mechanism and the lawyer a facilitator of client interests. The experience seems to move students away from the social welfarist value in which the law is seen as a social change mechanism, and the lawyer a facilitator of group or societal interests.
>
> (Kay, 1978:347)

In response to these criticisms, there is a growing emphasis on interdisciplinary work in law schools, and on the joint degrees described earlier. There has also been a growing emphasis on clinical legal education via legal clinics, also discussed earlier (Schrag and Meltsner, 1998). The idea here is to remove law students from classroom situations and place them during their second and third years in real situations, such as criminal defense offices and poverty-related neighborhood legal-aid offices. Many law students deem clinical education more relevant for perceived social needs, and they believe in particular that it will help them provide better legal services for the poor and other unrepresented groups in society. Clinical education lends itself to being a separate activity and is by nature removed from the law school.

However, in view of the prevailing academic ethos that rewards faculty more for publishing than for teaching, some universities look with disdain on innovations that seek to provide courses that are snobbishly referred to as "vocational training." Clinical education is also expensive: It is more economical to deploy senior faculty (who earn well in excess of $300,000 at top schools) to teach 150 students in a large lecture hall than to advise and supervise a handful in a time-consuming clinical program.

BAR ADMISSION

The legal profession has defined the perimeters of the practice of law and carefully controlled entrance into the bar. Recall the lockstep of the profession as it now operates. The process begins after college, when LSAT scores and GPAs largely determine who is accepted into law school. There the refining process continues with study and examinations designed to test the same qualities that were measured on the LSAT. Finally, at the end of law school, there is, for those who wish to practice law, a bar examination, which reviews fitness to practice by testing for the same qualities as did the LSAT and the law school examinations.

In the United States, the possession of a law degree does not automatically entitle someone to practice law. Because a lawyer is technically a court official, he or she must, in addition to legal training, be admitted to the practice of law by a court. Historically, there were no criteria for admission to the bar, and it depended a great deal on the charity or leniency of a local judge. In most instances, to be admitted by one court was sufficient to practice before any court in a state, for each judge respected her or his colleagues' actions in admission proceedings. As a result, the standards of the most lenient judge in a state became the minimum standard for admission (Hurst, 1950).

This lack of stringent standards attracted the attention of the ABA and state bars. Their concern was twofold. First, easy admission into the bar permitted the entry of unqualified and unscrupulous lawyers whose work blemished the reputation of all lawyers. Second, and more selfishly, easy entrance into the legal profession allowed more lawyers to compete for the available legal business and thus reduced the income of lawyers.

The ABA and state bar associations used several means to restrict entry into the legal profession. In particular, they obtained legislation to lengthen the required training before application for admission could be accepted, and they also persuaded state legislatures to require applicants to pass a standardized bar examination.

Bar examinations had their desired impact in reducing admission to the legal profession and increasing the standards of the profession The bar exam is a test administered by state bar organizations, which law school graduates must pass before being licensed to practice law. In some states, there may be other requirements, such as having completed 3 years of legal education. Each state's bar exam is unique but almost all states use a 2-day format incorporating the nationally administered Multistate Bar Exam (MBE), a 6-hour, 200 multiple-choice question examination as a component of their test. State-specific law is often tested on a second day, usually in essay format. In most jurisdictions, the bar exam is offered twice a year, in February and in July. The school's bar passage rate is also part of the ranking and recruitment process, and many guides rank law schools also on the best first-time bar passages rates.

LICENSING

In order to obtain a license to practice law, almost all law school graduates must apply for bar admission through a state board of bar examiners. Most often, this board is an agency of the highest state court in the jurisdiction, but occasionally, the board is connected more closely to the state's bar association. The criteria for eligibility to take the bar examination or to otherwise qualify for bar admission are set by each state, not by the ABA or the Council of the Section of Legal Education and Admissions to the Bar.

The Bar Exam Licensing involves a demonstration of worthiness in two distinct areas. The first is competence. For initial licensure, competence is ordinarily established by showing that the applicant holds an acceptable educational credential (with rare exception, a J.D. degree) from a law school that meets educational standards, and by achieving a passing score on the bar examination.

Boards of bar examiners in most jurisdictions expect to hear from prospective candidates during the final year of law school. Bar examinations are ordinarily offered at the end of February and July, with considerably more applicants taking the summer test because it falls after graduation from law school. Some boards offer or require law student registration at an earlier point in law school. This preliminary processing, where available, permits the board to review character and fitness issues in advance.

Over time, bar examinations have had some unanticipated consequences. Because the content of bar examinations closely resembles that of the law school curriculum, this content strongly inhibits change in educational programs. The extent to which a school introduces innovative programs or markedly deviates in its curriculum from traditional programs places its graduates at a competitive disadvantage in taking a bar examination. Moreover, because law schools are accredited according to, among other criteria, the number of students who pass the bar exam, and are often rated by students according to this standard, legal education has become very much examination-oriented in many states. Subjects included in the examination are required of the students, and courses in those subjects are often molded according to the questions asked on the examinations.

More and more law school graduates, in preparation for the local bar examination, take cram courses and sit through 6 hours of daily lectures for 6 to 12 solid weeks, memorizing endless outlines and gimmicks of local "examinationship"—which will be erased from their minds within months after the examination date. And more and more of them take out "bar exam loans," averaging many thousands of dollars, to pass the fiscal bridge between commencement and the first paycheck and to pay for living expenses and for high expense of a bar review course. There is also a registration fee for the bar exam, which can be several hundred dollars and varies from state to state.

CHARACTER AND MORAL FITNESS

In addition to demonstrating competence via the bar exam, applicants to the bar most also demonstrate appropriate character and moral fitness for the practice of law. In this regard, bar examiners seek background information concerning each applicant that is relevant to the appropriateness of granting a professional credential. Because law is a public profession, and because the degree of harm a lawyer, once licensed, can inflict is substantial, decisions about who should be admitted to practice law are made carefully by bar examining boards.

Applicants for admission to the bar must have "good moral character." But the definition of this standard is weak. Basically, it means that no one who has a serious criminal record can be admitted to the practice of law. In the past, at least, it led to the refusal of a board of examiners to admit someone who has held (or still held) unpopular political views. During the so-called McCarthy Era of the 1950s, which centered on ferreting Communism from American life and politics, the ABA urged that all those who would become lawyers should take a loyalty oath as a condition of practice (Green, 1976). Although the moral standards for legal practice are vague, historically the U.S. Supreme Court often upheld the authority of state courts to refuse admission to individuals whom the state deemed unworthy to practice law.

BAR ASSOCIATIONS AS INTEREST GROUPS

In addition to restricting entry into the profession and seeking to control the activity of their members, bar associations are interest groups actively engaged in the promotion of activities that the bar considers vital to its interests.

Much of the bar's activity concerns the organization and personnel of the courts. Historically, bar associations have often attempted to devise and to promote court reorganization plans. Much of this effort went into the elimination of nonprofessional elements (e.g. individuals without sufficient legal training to be a judge) from the judicial process. The bar has also been active in seeking to influence the actual selection of judges. On the state level, where judges are often elected on a partisan or nonpartisan ballot, the bar association has frequently lobbied for a change in selection procedures that would give the bar a greater voice. The bar also influences the selection of federal judges, and it is now a standard procedure for the U.S. attorney general to seek the ABA's opinion about political nominees when choosing a name for submission by the president to the Senate.

The bar is also active in promoting legislation that will benefit lawyers and the administration of justice. For example, the bar has pushed for legislation against the unauthorized practice of law (UPL), which during the last few decades has included software programs and manuals for creating wills, contracts, or simple divorce papers (*Time*, 1998). The aim here has been to safeguard its monopoly of legal services. Although the bar characterizes UPL legislation as a way of protecting customers from charlatans, the practical effect of this legislation is to protect lawyers from lower-priced competition.

In addition to taking a leading part in shaping certain laws, structuring the legal system, and making recommendations for judicial positions, the national and state bar associations have often turned to politics to promote their professional and economic interests. Over the decades, such efforts have yielded state regulations that limit the number of lawyers and raise the income of those who do practice. Associations of trial lawyers have also sought to influence state and national legislations or regulations that affect their economic interests. For example, trial lawyers opposed no-fault automobile insurance, whereby people in an automobile accident can collect from their own insurance companies without having to hire a lawyer, go to court, and establish liability (Passell, 1998).

Not surprisingly, publishers of self-help legal books and software have been popular for some time (Benjamin, 2001). These legal resources are useful for simple matters such as simple will, no-fault divorces, landlord–tenant disputes, bankruptcies, and other bread and butter issues that previously used to be the exclusive domain of lawyers. They specialize in routine paperwork—the legal equivalent of the common cold. Their books mostly guide people through tasks that lawyers delegate to their secretaries and paralegals, like setting up basic wills. The fee of $150–$400 or more per hour that attorneys usually charge for those services is certainly much higher than the average person's hourly wage. Despite the old maxim that a person who represents her- or himself "has a fool for a client," many people are using online sites, software, and the legal guidebooks to in effect act as their own lawyers.

PROFESSIONAL DISCIPLINE

One of the characteristics of a profession is a code of ethics. A profession involves, among other things, a sense of service and responsibility to the community, and the conduct required of a professional is delineated in a code of ethics for that profession. A lawyer's code of ethics deals with his or her relations with clients, other lawyers, the court, and the public (American Bar Association, 2016).

The legal profession has long been concerned with the ethical forms under which lawyers operate. In 1908, the ABA published its *Canons of Ethics*. In 1969, it was revised and called the *Model Code of Professional Responsibility*. The standards of professional conduct promulgated by the code were adopted by most states. The code covered a variety of important rules from representation of conflicting interests and preservation of clients' confidences to matters of professional etiquette. In 1977, the ABA decided that the code was insufficient in view of the changing nature of the profession and established a commission to come up with a new, more realistic, and more practical set of ethical rules.

In 1983, the ABA adopted the *Model Rules of Professional Conduct and Code of Judicial Conduct* (American Law Institute, 1989). It contains a series of guidelines and rules on matters such as fees, confidentiality of information, certain types of conflict of interest, safekeeping property, UPL, advertising, and reporting professional misconduct. Some of these are from time to time modified at the ABA's annual meetings.

The 2016 edition of the *Model Rules of Professional Conduct* provides an up-to-date resource for information on lawyer ethics. The topics include:

- Client–lawyer relationship. Addressing issues such as competence, fees, confidentiality, conflict of interest, and safekeeping property
- The lawyer as counselor. The lawyer's role as advisor and intermediary
- The lawyer as advocate. On meritorious claims, expediting litigation, fairness and impartiality, trial publicity, the lawyer as witness, special responsibilities of a prosecutor
- Transactions with persons other than clients. Dealing and communicating with third parties and unrepresented persons
- Law firms and associations. Examining the right to practice; responsibilities toward partners, associates, and nonlawyer assistants; restrictions on right to practice
- Public service. Pro bono service and other community activities
- Information about legal services. Advertising and other communications with prospective clients
- Maintaining the integrity of the profession. Disciplinary and misconduct matters, including information on political contributions to obtain legal engagements or appointments by judge.

A serious weakness of the codes and model rules is that they are not always binding on lawyers, because local bar associations are not required to adopt them. The ABA exerts no control over state bars in this process. Furthermore, enforcement is not obligatory. Although the ABA advocates uniform standards in disciplinary procedures, it is unable to instrument uniform adherence.

Disciplinary authorities are supposed to make sure that only honest and competent people are licensed to practice law. In some states, the disciplinary committee operates under the auspices of the state court system. In others, the bar organization runs the disciplinary agency and investigates complaints but any sanctions are imposed by the courts. Although the procedures vary from state to state, the boards investigate complaints about alleged violations of professional rules of conduct.

In general, disciplinary sanctions, such as reprimand, suspension, or disbarment, are imposed only for serious instances of misconduct, such as criminal acts, mishandling of client's property, and flagrant violation of certain rules of professional conduct, such as breach of confidentiality. Of course, unhappy clients can always sue their lawyers, and an indirect form of punishment is the very high cost of attorneys' malpractice insurance (Rhode and Hazard, 2007). Although other rule violations rarely evoke formal disciplinary action, informal discipline may occur in the form of expressed disapproval and questions about one's professional reputation.

Generally, and as noted earlier, the highest ethical standards are found among attorneys who work for large firms and represent corporate clients. Solo practitioners and other attorneys who represent individuals in cases that are characterized as "unsavory," such as personal injury plaintiffs' work, divorce, and criminal defense, tend to have lower ethical standards. As Herbert Jacob (1984:62) once noted, the more contact such attorneys have with lower courts, the less

likely they are to comply with legal ethics: "The culture of lower courts—waiting around, exchanging gossip, litigating petty criminal and civil cases" promotes unethical conduct.

Punishments for violations of legal ethics include a reprimand, a temporary suspension of the license to practice law, or the revocation of the license. In his influential study, Carlin (1966:170) found that only about 2% of the lawyers who violated ethical norms were even processed by the bar's disciplinary machine, and only 0.2% were officially sanctioned. In 1994, the ABA created a nationwide, online database of disbarred and censured lawyers, some 25,000 to start with, to keep track of lawyers who move from state to state (Stevens, 1994). The service is available to disciplinary authorities but not to consumer groups, because in case of the slightest inaccuracy, it could harm a lawyer's reputation and lead to potential lawsuits. Discipline boards and state bar associations welcomed the service. Because each state regulates its own lawyers, discipline is complicated as lawyers become increasingly mobile and register in more than one state. Lawyers who are disciplined in one state can move to another, take the bar examination, and start over without alerting authorities or potential clients of the infractions.

Lawyers have an obligation to report known or suspected ethical violations by other lawyers according to the ethics rules and standards of the governing bodies (Rhode and Hazard, 2007). But most complaints against lawyers are filed by clients or initiated by the bar council. It is rare that lawyers or judges report lawyer or judicial misconduct. They fail to do so for one or more of several reasons:

- They feel that nothing will happen if they do report an ethical violation.
- They do not want to ruin someone's career.
- They fear it would take too much time to testify in a disciplinary proceeding.
- They do not know where to report the misconduct.
- They are afraid of being sued if they do report misconduct.

Despite these reasons, it is unfortunate that more attorneys do not report alleged ethical violations by other attorneys that come to their attention. Their failure to do so harms public trust in the legal profession, and it also harms the general welfare of the clients and other parties with whom ethically corrupt attorneys interact. Because the legal profession, as with other professions, generally polices itself, the ethical violations that occur within its ranks can be reduced only to the extent that attorneys do report these violations, and only to the extent that disciplinary boards sanction the lawyers who commit them.

SUMMARY

1. In all societies, the legal profession has been intimately connected with the rise and development of legal systems. As societies developed and their legal systems became more complex, lawyers as a class of skilled advocates emerged.
2. By the fourteenth and fifteenth centuries, a secular class of lawyers emerged in England. To a large extent, English lawyers received their training in the Inns of Court, at the hands of the legal profession itself, and not in the universities. Blackstone's

appointment to the Vinerian Chair of Jurisprudence in 1758 marked the first effort to make English law a university subject.

3. Legal education in the American colonies was initially modeled after the British system. Many of the early upper-class American lawyers obtained their training in the Inns of Court. In the late eighteenth and early nineteenth centuries, general courses in law were established in many American universities. University law schools developed later in the nineteenth century and became the dominant form of legal education.
4. The legal profession consists of four principal subgroups: lawyers in private practice, in government service, in private employment, and in the judiciary. Lawyers in private practice who are solo practitioners tend to have a lower status in the profession. Employment with the government is often considered a mobility route into a more prestigious practice for young lawyers. Some larger corporations today have legal departments that compare in size and excellence with those of the largest law firms. In the United States, there is no career judiciary, and there is no prescribed route for the young law graduate to become a judge.
5. Law and lawyers are expensive. In criminal cases, the poor are represented either by public defenders or by court-appointed attorneys. In civil cases, the poor can gain access to lawyers through various legal-aid programs, including legal clinics.
6. Today the ABA approves more than 200 law schools. Although women now comprise almost half of law students, African Americans and Latinos are still underrepresented in law school.
7. Law school education still relies heavily on the case or Socratic method, which has remained virtually unchanged since its introduction. The method aims to acclimate the students to "thinking like a lawyer," but it has been criticized for the anxiety it creates among law students.
8. Law schools socialize students toward an entrepreneurial value position and acceptance of the legal system as now constructed. In response to the growing criticism of the socialization process of law students, law schools have begun to emphasize interdisciplinary work and clinical programs.
9. To maintain standards and to control entry into the bar, law school graduates are required to pass a standardized bar examination in the state where they wish to practice. This exam has stifled changes in legal education.
10. Bar associations further restrict admission procedures to those who are morally fit to become lawyers. Applicants for admission to the bar must have "good moral character." Bar associations also act as interest groups in promoting social, economic, and political activities that the bar considers vital to its interests.
11. Although violation of the bar's code of legal ethics may be punished by reprimand, suspension from the bar, or disbarment, only a very small proportion of lawyers who violate the ethical standards are ever subjected to disciplinary action.

KEY TERMS

House counsel lawyers who work for corporations or other private businesses

Market control regarding a profession, the successful assertion of unchallenged authority over some area of knowledge and its instrumentation

Profession a highly skilled occupation that requires prolonged education and training for entrance into it

Professionalization the transformation of a nonprofessional occupation into a vocation with the attributes of a profession

Socratic method sharp questioning by a law professor of students regarding the facts and principles contained in judges' opinions in real legal cases

Solo practitioner an attorney who practices law by herself or himself

SUGGESTED READINGS

Richard L. Abel, *Lawyers in the Dock: Learning from Attorney Disciplinary Proceedings*. New York: Oxford University Press, 2010. A discussion of a series of disciplinary proceedings of attorneys that focuses on the factors leading up to the proceedings and on the proceedings' consequences.

Barbara Babcock, *Fish Raincoats: A Woman Lawyer's Life*. New Orleans, LA: Quid Pro Books, 2016. An autobiography by the first woman professor at Stanford Law School.

Marc Galanter and Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm*. Chicago, IL: University of Chicago Press, 1991. A provocative study of the growth patterns of large corporate law firms.

Robert Granfield, *Making Elite Lawyers: Visions of Law and Beyond*. New York: Routledge, 1992. A fascinating and timeless empirical work on the conservatizing effects of legal education at Harvard on a broad cross section of students.

Linda Hirshman, *Sisters in Law: How Sandra Day O'Connor and Ruth Bader Ginsburg Went to the Supreme Court and Changed the World*. New York: Harper Perennial, 2016. The story of the first two women on the U.S. Supreme Court.

Austin Sarat and William L. F. Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process*. New York: Oxford University Press, 1995. An insightful analysis of the activities of divorce lawyers.

J. Clay Smith, Jr. (ed.), *Rebels in Law: Voices in History of Black Women Lawyers*. Ann Arbor, MI: University of Michigan Press, 2000. A moving compilation of writings by several African American women attorneys that makes clear the challenges they faced as both women and African Americans in law school and in their practice of law.

Scott Turow, *One L: The Turbulent True Story of a First Year at Harvard Law School*. New York: Putnam, 2010. A reprint edition of a classic memoir of the author's first year at Harvard Law School.

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9

CHAPTER 9
RESEARCHING LAW IN SOCIETY

CHAPTER OUTLINE

LEARNING OBJECTIVES

- List problems associated with doing historical research
- Summarize the advantages and disadvantages of experimental methods
- Explain why random samples are important in survey research
- Discuss an example of sociology's research on public policy
- Explain why it is difficult to measure the actual impact of law

Empirical studies provide the background for many of the generalizations and conclusions reached about law and society in the preceding chapters. This chapter discusses how sociologists and other social scientists carry out such studies by describing some of the ways they research law and the methods they use to arrive at their findings. This chapter also demonstrates the significance and applicability of sociological research to the formulation, instrumentation, and evaluation of social policy. The general comments on methodological tools for research on law are not proposed to replace the more detailed technical discussions found in books on the various methods of social research (e.g. Babbie, 2017). They are intended merely to provide an exposure to the strategies used in the study of the interplay between law and society and to highlight the methodological concerns and complexities inherent in such endeavors.

METHODS OF INQUIRY

There are several methods that can be applied in researching law in society, and more than a single method is usually involved in such a study. However, there are four commonly used methods of data collection in sociology: All other approaches are variations and combinations of these four methods. The four methods that will be considered are the historical, observational, experimental, and survey methods.

Of course, actual research is much more complicated than these methods indicate. All research is essentially a process in which choices are made at many stages. There are several methods, and they are combined in various ways in the actual research. Methodological decisions are made on such diverse matters as the kind of research design to be used, the type of research population and sample, the sources of data collection, the techniques of gathering data, and the methods of analyzing the research findings. The differences among the four methods are more a matter of emphasis on a particular strategy to obtain data for a particular research purpose than a clear-cut "either/or" distinction. For example, in the observational method, although the emphasis is on the researcher's ability to observe and record social activities as they occur, the researcher may interview the participants—a technique associated with the survey and experimental methods. Similarly, in the experimental method, the subjects are usually under the observation of the researcher and his or her collaborators. The information gained in such observations also plays a crucial role in the final analysis and interpretation of the data. Furthermore, historical evidence is often used in observational, survey, and experimental studies.

At all stages of social science research, there is interplay between theory and method (Schutt, 2015). In fact, it is often the theory chosen by the researcher that determines which methods will be used in the research. The selection of the method is to a great extent dependent on the type of information desired.

To study a sequence of events and explanations of the meanings of the events by the participants and other observers before, during, and after their occurrence, *observation* (especially *participant observation*) seems to be the best method of data collection. Researchers directly observe and participate in the study system with which they have established a meaningful and durable relationship, as did, for example, Jerome H. Skolnick (1994) in his study of police officers. Although the observer may or may not play an active role in the events, he or she observes them firsthand and can record the events and the participants' experiences as they unfold. No other data-collection method can provide such a detailed description of social events. Thus, observation is best suited for studies intended to understand a particular group and certain social processes within that group. When these events are not available for observation because they occurred in the past, the *historical approach* is the logical choice of method for collecting data.

If a researcher wishes to study norms, rules, and status in a particular group, *intensive interviewing* of "key" persons and informants in or outside the group is the best method of data collection. For example, in a well-known study, Jerome E. Carlin (1966) interviewed approximately 800 lawyers in New York City for his study of legal ethics and their

enforcement. Those who set and enforce norms, rules, and status, because of their position in the group or relations with persons in the group, are the ones who are the most knowledgeable about the information the researcher wishes to obtain. Intensive interviews (especially with open-ended questioning) with these persons allow the researcher to probe for such information.

When an investigator wishes to determine the numbers, the proportions, the ratios, and other quantitative information about the subjects in his or her study, possessing certain characteristics, opinions, beliefs, and other categories of various variables, then the best method of data collection is the *survey*. The survey method relies on a representative sample of the population to which a standardized instrument can be administered.

As a final point, the *experiment* is the best method of data collection when the researcher wants to measure the effect of certain independent variables on some dependent variables. The experimental situation provides control over the responses and the variables, and gives the researcher the opportunity to manipulate the independent variables. In the following pages, I will examine and illustrate these methods in greater detail.

HISTORICAL METHODS

Sociologists generally are accustomed to studying social phenomena at one time—the present. But social phenomena do not appear spontaneously and autonomously. Historical analysis can indicate the possibility that certain consequences can issue from events that are comparable to other events of the past: history as something more than a simple compilation of facts. It can generate an understanding of the processes of social change and document how a myriad factors have helped shape the present.

Historical research carried out by sociologists and other social scientists is a critical investigation of events, developments, and experiences of the past; a careful weighing of evidence of the validity of sources of information on the past; and the interpretation of the evidence. As a substitute for direct data from the people or events being studied, contents from a wide variety of historical documents and materials are used as a method of data collection. These documents and materials include census data; archives of various types; official files such as court records, records of property transactions, and tax records; business ledgers; personal diaries; witness accounts; propaganda literature; and numerous other personal accounts and letters. The researcher uses these data sources to carry out what is generally referred to as **secondary analysis**; that is, the data were not generated or collected for the specific purpose of the study formulated by the researcher. Of course, the usefulness of the historical method depends to a large extent on the accuracy and thoroughness of the documents and materials. With accurate and thorough data, the researcher may be able to gain insights, generate hypotheses, and even test hypotheses.

Official records and public documents have provided the data for sociological analyses attempting to establish long-term legal trends. For example, William J. Chambliss (1964) showed in a classic study how and why vagrancy statutes changed in England according to emerging social interests. The first full-fledged vagrancy law, enacted in 1349,

regulated the giving of alms to able-bodied, unemployed people. After the Black Death (bubonic plague) and the flight of workers from landowners, the law was reformulated to force laborers to accept employment at a low wage. By the sixteenth century, with an increased emphasis on commerce and industry, the vagrancy statutes were revived and strengthened. Eventually, vagrancy laws came to serve, as they do today, the purpose of controlling people and activities regarded as undesirable to the community. Similarly, Jerome Hall (1952) has shown, on the basis of historical records, how changing social conditions and emerging social interests brought about the formulation of trespass laws in fifteenth-century England.

The historical method is also used to test theories. For example, Mary P. Baumgartner (1978) was interested in the relationship between the social status of the defendant and the litigant and the verdicts and sanctions awarded them. She analyzed data based on 389 cases (148 civil and 241 criminal) heard in the colony of New Haven between 1639 and 1665. She found, not unexpectedly, that in both the civil and the criminal cases, individuals who enjoyed high status received more favorable treatment by the court than their lower-status counterparts.

Another example of using historical data to test theories was Lawrence M. Friedman and Robert V. Percival's (1978) survey of the caseloads of two California trial courts at five points between 1890 and 1970. As described in Chapter 6, the authors hypothesized that, over time, trial courts have come to do less work in settling disputes and more work of a routine administrative nature. They concluded that the dispute-settlement function of the trial courts has declined noticeably over time, a conclusion that has since been repeatedly questioned.

In addition to relying on official documents, the historical method may also be based on narrations of personal experiences, generally known as the *life-histories* method. This technique requires that the researcher rely solely on a person's reporting of life experiences relevant to the research interest with minimal commentary. Often, life histories are part of ethnographic reports. In such instances, they are referred to as "memory cases" (Nader and Todd, 1978:7). This method is useful to learn about events such as conflict or dispute that occurred in the past, particularly when there are no written records available.

Despite this advantage, this method also has certain pitfalls. In particular, life histories tend to be tainted by selective recall: Subjects tend to remember events that have impressed them in some way and tend to forget others.

The life-history method still serves several functions. First, it provides insights into a world usually overlooked by the objective methods of data collection. Second, life histories can serve as the basis for making assumptions necessary for more systematic data collection. Third, life histories, because of their details, provide insights into new or different perspectives for research. When an area has been studied extensively and has grown "sterile," life histories may break new grounds for research studies. Finally, they offer an opportunity to view and study the dynamic process of social interactions and events not available with many other kinds of data.

A noteworthy difficulty of historical methods overall lies in the limited accuracy and thoroughness of the documents and materials involved. Because the data are "compiled" by others with no supervision or control by the researcher, the researcher is at the mercy of those who record the information. The recorders use their own definitions of situations; define and select events as important for recording; and introduce subjective perceptions, interpretations, and insights into their recordings. For example, how do the recorders define a dispute? In many instances, a dispute enters officially into the court records when it is adjudicated, and a settlement is imposed after full trial. But as Chapter 6 noted, not all disputes are adjudicated. Many are settled informally in pretrial conferences, or judges may intervene in other less formal ways as well.

Therefore, a researcher must ascertain the reliability and validity of documents. Historical documents should be verified for *internal consistency* (consistency between each portion of the document and other portions) and *external consistency* (consistency with empirical evidence, other documents, or both). Although the historical method provides details of events that are often unmatched by other methods of data collection, it is desirable (when possible, of course) to combine this method with other data-collection methods.

OBSERVATIONAL METHODS

Observational methods can be divided into two types: (1) those using either human observers (participant observers or judges) or mechanical observers (cameras, digital recorders, and the like) and (2) those directly eliciting responses from subjects by questioning by a trained interviewer. Observational methods can be carried out both in laboratory or controlled situations and in field or natural settings.

Participant observation has a long history of use in anthropological research. Indeed, much of our knowledge of prehistoric law comes from anthropologists, such as Bronislaw Malinowski and E. Adamson Hoebel, who lived in traditional societies. Of course, for anthropologists, the opportunity to observe ongoing legal phenomena depends on a combination of circumstances and luck: It means that the anthropologists have to be in the right place at the right time. Anthropological (and sociological) field researchers generally proceed by way of a kind of methodological eclecticism, choosing the method that suits the purpose and present circumstances at any given time. In summary, "Hence, unobtrusive measurement, life history studies, documentary and historical analysis, statistical enumeration, in-depth interviewing, imaginative role-taking, and personal introspection are all important complements of direct observation in the field worker's repertoire" (Williamson et al., 1982:200).

Observational techniques are sometimes used in laboratory or controlled situations. For example, comparatively little empirical research has been performed with actual juries because of the legal requirements of private deliberations. Consequently, social scientists who wish to study jury deliberations have used mock trials, in which "jurors" respond to simulated case materials. The mock trial permits both manipulation of important variables and replication of cases (Hillmer, 2015). Many of the laboratory jury studies deal with the deliberation processes preceding the verdict and how juries reach a verdict under various

conditions (Loh, 1984). One method of analyzing deliberations is to make a video/audio recording of the deliberations and then analyze their content.

Sociologists and other social scientists often use observational methods in relatively natural field settings that involve direct contact with subjects. For example, in attempts to find out and understand how law typically works on a day-to-day basis, sociologists have studied various aspects of the criminal justice system in person. This body of research includes several notable examples:

- a study of the public defender's office by David Sudnow (1965);
- studies of the police by Richard V. Ericson (1989), Maurice Punch (1989), and Jerome H. Skolnick (1994), among others;
- Frank W. Miller's (1969) study of prosecution;
- Donald J. Newman's (1966) study of conviction; and
- Abraham S. Blumberg's (1979) work on the entire criminal justice system.

A central finding of these studies concerns the role of discretion in the application or nonapplication of the law in legal proceedings. At each step in the criminal justice system, from the citizen's decision to lodge a complaint or to define the situation as one in which it is necessary to summon the police, to the judge's decision as to what sentence a convicted person should receive, decisions are made that are not prescribed by statutory law (Westmarland, 2011).

Observational methods have both advantages and limitations. The advantages include the opportunity to record information as the event unfolds or shortly thereafter. Thus, the validity of the recorded information can be high. Often observations are made and information is recorded independently of the observed person's abilities to record events. At times, when verbal or written communication between the researcher and the subjects is difficult—for example, in studying traditional tribes—observation is the only method by which the researcher can obtain information. Finally, the observer need not rely on the willingness of the observed persons to report events.

There are also several limitations of observational research. The method is obviously not applicable to the investigation of large social settings. The context investigated must be small enough to be dealt with exhaustively by one or a few researchers. In the case of fieldwork, there is a great likelihood that the researcher's selective perception and selective memory will bias the results of the study. There is also the problem of selectivity in data collection. In any social situation, there are literally thousands of possible pieces of data. No one researcher can account for every aspect of a situation. The researcher inevitably pulls out only a segment of the data that exist, and the question inevitably arises as to whether the selected data are really representative of the situation. Finally, there is no way to easily assess the reliability and validity of the interpretations made by the researcher. As long as data are collected and presented by one or a few researchers with their own distinctive talents, faults, and idiosyncrasies, suspicion will remain concerning the validity of their rendering of the phenomena studied. Researchers often respond to these criticisms

by suggesting that the cost of imprecision is more than compensated for by the in-depth quality of the data produced.

EXPERIMENTAL METHODS

A very common method for testing causal relations by social scientists, especially psychologists, is the experimental method. An **experiment** may be carried out in a laboratory or a field setting, and it ideally begins with two or more equivalent groups, with an experimental variable introduced into only the experimental group. The researcher measures the phenomenon under study before the introduction of the experimental variable and after, thus getting a measure of the change presumably caused by the variable.

There are two common ways of setting up experimental and control groups. One is the **matched-pair technique**. For each person in the experimental group, another person similar in all important variables (age, religion, education, occupation, or any other variable important to the research) is found and placed in the control group. Another technique is the **random-assignment technique**, in which statistically random assignments of persons to experimental and control groups are made—such as assigning the first person to the experimental group and the next to the control group, and so on.

Experiments in sociology face certain difficulties (Babbie, 2017). An experiment involving thousands of people may be prohibitively expensive, and the cost factor is often the decisive issue whether or not to embark on a project. It may take years to complete such an experiment. Ethical and legal considerations prohibit the use of people in any experiments that may injure them. When people are unwilling to cooperate in an experiment, they cannot be forced to do so. Moreover, when individuals realize that they are experimental subjects, they begin to act differently and the experiment may be spoiled. Almost any kind of experimental or observational study upon people who know they are being studied will give some interesting findings, which may vanish soon after the study is terminated. Experiments with human subjects are most reliable when the subjects do not know the true object of the experiment. But the use of deception in social research poses the ethical question of distinguishing between harmless deception and intellectual dishonesty.

In law and society research, experimental methods have been used to study jury deliberation (Hans, 1992, 2006; Jonakait, 2003; Simon, 1975), the evaluation of objections in the courtroom (Koehler, 1992), allocation of scarce criminal resources (Nagel and Neef, 1977), the impact of increasing or decreasing police patrols on crime (Zimring, 1989), and the determination of the effectiveness of pretrial hearings (Zeisel, 1967). In the last example, a controlled experiment was done to find out whether pretrial hearings were time savers or time wasters. Sociologists developed a design calling for a random assignment of cases by court clerks to one of two procedures: obligatory pretrial hearing in one group of cases and optional pretrial in the control group, where it was held only if one or both of the litigants requested it. The conclusion was that the obligatory pretrial hearing did not save court time; in fact, it wasted it (Zeisel, 1967). Persuaded by the experiment, the state of New Jersey changed its rules and made pretrial hearings optional.

Many experiments, such as those dealing with juror and jury behavior (Diamond, 1997; Jonakait, 2003; Kramer and Kerr, 1989), are conducted in a laboratory situation. The widely publicized National Commission on the Causes and Prevention of Violence (1969), for example, relied heavily on the results of laboratory experiments for its final report. In one group of experiments, young children who were shown acts of violence and then later observed at play committed more acts of violence in their play than children who did not witness acts of violence. In another group of experiments, college students were told that they were participating in a "learning experiment" in which they must apply mild electric shocks at whatever level of intensity they wished to other "learners" if the "learners" made a mistake. The "learning experiment" was interrupted, and some students were shown a violent film while others were shown a nonviolent one. When the "learning experiment" was resumed, the students who saw the violent film used slightly stronger shocks on their "learners" than those who had watched the nonviolent film.

Laboratory experiments, as important as they may be in revealing insights into human behavior, achieve rigorous and controlled observation at the price of unreality. The subjects are isolated from the outside and from their normal environment. The laboratory experiment has been criticized for its unnaturalness and questioned as to its generalizability. By contrast, experimental methods that are used in nonlaboratory settings increase the generalizability of results and lend greater credence to the findings, but concomitantly increase the difficulty of controlling relevant variables.

SURVEY METHODS

Survey research aims for a systematic and comprehensive collection of information about the attitudes, beliefs, and behavior of people. The most common means of data collection are face-to-face interviews, self-administered questionnaires (for example, by mail, in a classroom, or online), telephone interviews. Typically, the questionnaire or the interview schedule is set up so that the same questions are asked of each respondent in the same order with exactly the same wording and the validity of surveys is dependent on the design of the questions asked (Babbie, 2017).

Many surveys put questions to a **random sample** of the population; this population may be at the national, state, or city levels, or it may be the population of a large university. The use of random sampling allows researchers to generalize the results of a survey to the population from which respondents to the survey come.

Survey studies tend to be larger than is typically the case in observational or experimental studies. Usually, data are collected at one time, although a survey approach can be used to study trends in opinion and behavior over time. Because of its ability to cover large areas and many respondents and to generalize to the population, the survey method is the dominant method of data collection in sociology.

Survey methods, like other research methods, have their pitfalls. A potential difficulty involves a survey's *response rate*. To be able to generalize the results of a random survey to a population, it is essential that the sample maintain its representativeness, which may be

affected severely when a large number of respondents fail to participate in the study. In addition to a subject's refusal to participate, other factors affect the response rate. These factors include the inability of the subject to understand the question, the possibility that the subject may have moved or died, and a possible physical or mental disability of the subject.

An illustration of the use of survey methods can be seen in the efforts of the U.S. Department of Justice to gain a more accurate measure of the extent of crime in the United States. For years, both law enforcement agencies and criminologists have had to rely on official records compiled by such agencies as the Federal Bureau of Investigation (FBI) to measure the amount of crime. However, there have been concerns about the accuracy of these reports, and criminologists generally believe that officially recorded crime statistics are a far better indicator of police activity than they are of criminal activity (Barkan, 2018).

For the past several decades, the U.S. Department of Justice has conducted the sophisticated National Crime Victimization Survey (NCVS) in an attempt to supplement official crime records and to overcome some of the problems of accuracy therein (Truman and Morgan, 2016). This survey interviews tens of thousands of Americans annually to determine how many crimes have been committed against them. In addition to determining the volume of crime, the surveys are also used in developing a variety of information on crime characteristics and the effects of crime on the victims—victim injury and medical care, economic losses, time lost from work, victim self-protection, and reporting of crime to the police.

Two advantages of the NCVS help make it superior to self-report studies and the FBI's *Uniform Crime Reports* (Barkan, 2018). First, the NCVS by design seeks out information about crimes rather than waiting for victims to report them as is the case with the *Uniform Crime Reports*. Second, the NCVS relies on a large representative sample of the U.S. population, so that its results can be generalized to the entire population. The NCVS is very expensive, and its respondents might for various reasons overreport or underreport the crimes they have suffered. Still, it has yielded highly useful information since it was established several decades ago.

Researchers have used survey methods in a variety of cross-cultural studies dealing with knowledge and opinion about law and legal issues. Some of these studies reveal interesting findings. For example, a European study once asked residents of Poland, the Netherlands, and Germany whether they thought people should obey the law. They found significant national variations; more Germans (66%) than Poles (45%) or Netherlanders (47%) answered yes to this question (Friedman and Macaulay, 1977:216).

THE IMPACT OF SOCIOLOGY ON SOCIAL POLICY

In every scientific field, there is distinction between pure and applied science. **Pure science** is a search for knowledge, without primary concern for its practical use. **Applied science** is the search for ways of using scientific knowledge to solve practical

problems. For example, a sociologist making a study of the social structure of a slum neighborhood is working as a pure scientist. If this is followed by a study of how to prevent crime in a slum neighborhood, the latter study is applied science. Examples of such applied research include investigations of the impact of neighborhood watch groups and patrols on crime and vandalism rates (Levitz, 2009) and of how certain changes in schools and schooling might reduce delinquency (Gottfredson, 2017).

Fundamentally, sociology is both a pure and an applied science. A substantial amount of sociological work is still generated for academic purposes and executed with disciplinary concerns in mind. The consumers of the knowledge generated are typically sociologists and other social scientists. But sociologists and other social scientists also increasingly wish to generate and disseminate knowledge with potential applied or policy-relevant implications (Belknap, 2015; Treviño and McCormack, 2016). Social science research has long been used to help resolve empirical issues that arise in litigation (Monahan and Walker, 2010), and sociological knowledge and methodology can be useful in the formulation and instrumentation of social policy and in the evaluation of current policies or proposed policy alternatives.

Because theoretical knowledge can and should be translated into practical applications, this section discusses social science knowledge and expertise can have an impact on social policy (Anderson, 2015). **Social policy** generally refers to purposive legal measures that are adopted and pursued by representatives of government who are responsible for dealing with particular social conditions in society. The term *policy-making* refers to the process of identifying alternative courses of action that may be followed and choosing among them (Scott and Shore, 1979:XIV).

CONTRIBUTIONS OF SOCIOLOGY TO POLICY RECOMMENDATIONS

Over the years, there have been many instances in which sociological perspectives, concepts, theories, and methods have aided the development of policy recommendations (Jimenez, 2010; Jordan, 2007). Perhaps the best-known illustrations of this are the various uses made of sociology in presidential commissions. These commissions include the President's Commission on Law Enforcement and Administration of Justice, the U.S. National Commission on the Causes and Prevention of Violence, and the President's Commission on Obscenity and Pornography. Sociologists were active in these commissions, and disciplinary research and knowledge were incorporated in the recommendations.

Sociology played an especially important role in the President's Commission on Law Enforcement and Administration of Justice. Social science concepts, theories, and perspectives were of great utility to the commission in forming final recommendations, and "existing social science theories and data were drawn upon to formulate broad general strategies in the prevention and control of crime" (Ohlin, 1975:108). Sociologists also provided sensitizing concepts and theories that oriented the search for solutions of the crime problem. For example, studies of the correctional system and the operation of law enforcement in the courts raised doubts about the effectiveness of existing criminal justice policies and of rehabilitation and treatment efforts. On the basis of sociological

data, the commission accepted the view that alternative systems of social control should be used in place of the criminal justice system when possible, recommended the possibility of decriminalizing certain offenses against moral or public order, and called for a reconsideration of consensual crimes, or "crimes without victims" (Ohlin, 1975:109).

Sociologists made similar contributions to the work of the National Commission on the Causes and Prevention of Violence. The specific recommendations provided by sociologists were incorporated in the commission's progress report and "marked the high point of social science input to the Commission" (Short, 1975:84). Specific recommendations rested on the ideas that the nature of violence is essentially social as opposed to biological or psychological, that there is a connection between perceived legitimacy of the law and effective legal control of violence, and that the notions of responsibility for violence and of "relative deprivation" often lie in the unresponsiveness of social institutions (Short, 1975:85).

One of the final recommendations of the President's Commission on Obscenity and Pornography resulted directly from sociological and other social science research on the personal, psychological, and social consequences of exposure to explicit sexual materials. The commission recommended that federal, state, and local laws prohibiting the sale, exhibition, and distribution of sexual material to consenting adults be repealed. This recommendation was based upon extensive sociological investigation that provided

> no evidence that exposure to or use of explicit sexual materials plays a significant role in the causation of social or individual harm such as crime, delinquency, sexual and nonsexual deviancy, or severe emotional disturbance—Empirical investigations thus support the opinion of a substantial majority of persons professionally engaged in the treatment of deviancy, delinquency and anti-social behavior, that exposure to sexually explicit material has no harmful causal role in these areas.
>
> (Report of the commission, quoted by Scott and Shore, 1979:17)

A similar conclusion was reached by Berl Kutchinsky (1973) in his ground-breaking study of the effects of liberalizing pornography in Denmark. Kutchinsky found that concurrent with the increasing availability of pornography, there was a significant decrease in the number of sex offenses registered by the police in Copenhagen. He concluded, "The unexpected outcome of this analysis is that the high availability of hard-core pornography in Denmark was most probably the very direct cause of a considerable decrease in at least one type of serious sex offense, namely, child molestation" (Kutchinsky, 1973:179). In a later study, Kutchinsky found a similar decrease in child molestation in Germany, which he attributed to an increased availability there of pornographic material (U.S. Department of Justice, 1986:974).

On the basis of the involvement of sociologists in presidential commissions, Scott and Shore (1979:20–21) conclude that sociology has made a contribution to recommendations for policy in three ways:

> The first is through the use of sociological concepts that are said to provide new or unique perspectives on social conditions—perspectives that are based upon more

> than common sense and that may in fact be inconsistent with basic notions upon which existing policies are based... . Second, prescriptions for policy are sometimes suggested by the findings of sociological research undertaken primarily to advance scientific understanding of society... . The third is the use of sociological methods and techniques of research to obtain information about specific questions central to the deliberations of Commissions.

As this brief discussion should suggest, sociological knowledge can and at times does have an impact on developing recommendations for social policy. "For this reason," as Scott and Shore (1979:23) observe, "sociologists can legitimately claim that their discipline has been and is relevant to the development of policy recommendations." That claim has been validated over the years as evidenced by the demand on sociology and sociologists in policy-making circles.

CONTRIBUTIONS OF SOCIOLOGY TO ENACTED POLICY

Although there is a growing influence of social science in law, measuring the actual impact of social science research remains fairly difficult (Kraft and Furlong, 2015). Impact studies rely predominantly on citations for an indication of whether policy-makers have used such research (Roesch et al., 1991). Counts of social science publications and findings cited in legal decisions could possibly underrepresent the influence of research because policy-makers are reluctant to cite them even when they have influenced their decisions. Because of their training in law, policy-makers prefer legal scholarship and precedent over social science methodology and statistics. Consequently, the extent of impact in some instances remains controversial; in certain cases, sociology is considered to have had a direct impact on enacted policy.

A widely cited illustration of this impact is the social science contribution to the 1954 Supreme Court decision outlawing segregation in public schools. Other examples of impact on social policy are sociological studies that helped reduce delay in the courts, change testimony procedures, change procedures to select judges, and establish the right to counsel for indigent defendants (Walker and Hough, 1988).

A number of other examples may be cited to support the view that sociology has had an impact on enacted policy. They include the involvement of sociologists in programs to combat juvenile delinquency, to lower juvenile recidivism rates, to reduce school dropout rates, and to prevent narcotics addiction. Sociological research on talent loss as a consequence of inadequate educational opportunities for minority groups and persons of low socioeconomic status led to the enactment of remedial measures, such as the establishment of new scholarships and loan resources and the creation of federal programs like Outward Bound, Talent Search, and VISTA. In each instance, sociologists have contributed research and conceptual skills toward the "formulation of programs and policies that were eventually enacted to ameliorate social conditions deemed harmful to society" (Scott and Shore, 1979:24).

In social-policy research, sociologists doing scientific work are often confronted with problems and issues that have a wide impact. To illustrate, a study that had a significant

impact on the lives of many people in the United States is the so-called Coleman Report. In 1964, the federal Civil Rights act authorized the U.S. Department of Education to undertake a survey and to report to the president and Congress on the lack of availability of equal educational opportunities for individuals by reason of race, color, religion, or national origin in public schools in the United States. Subsequently, a social science team led by James S. Coleman, Ernest Q. Campbell, and their associates (1966) conducted a social survey on a huge scale. The survey included 570,000 school pupils, 60,000 teachers, and 4,000 schools. The final report was a 737-page document. One far-reaching policy outcome of the study was the federal government's decision to implement busing for the purpose of achieving integrated schools. Busing proved highly controversial and led to many protests, counter-protests, and even violence.

The preceding illustrations show some of the contributions of sociology to enacted policy. However, a great deal of applied sociological research has no discernible policy implications of any kind. Many of the recommendations are pragmatically useless (that is, too expensive to instrument) or are considered politically unrealistic or implausible by policy-makers. Furthermore, policy questions are fundamentally political and not sociological questions (Kraft and Furlong, 2015). Often, policies are formulated, and *then* relevant research is sought to support, legitimize, and dramatize (or even propagandize) these policies. Thus, it would be erroneous to assume that research generally precedes and determines policy actions. Additionally, some sociologists feel that they should not be directly involved through research in the development and instrumentation of social policy, and this position is epitomized by Daniel P. Moynihan (1969:193), who contends that "the role of social sciences lies not in the formation of social policy but in the measurement of its results." The next section considers evaluation research and impact studies.

EVALUATION RESEARCH AND IMPACT STUDIES

The evaluation of enacted policy is as old as policy itself. Policy-makers always have made judgments regarding the benefits, costs, or effects of particular policies, programs, and projects (Royse and Thyer, 2016). Many of these judgments have been impressionistic, often influenced by ideological, partisan self-interest, or subjective criteria. For example, a tax cut may be considered desirable because it enhances the electoral chances of the evaluator's political party, or unemployment compensation may be deemed "bad" because the evaluator "knows a lot of people" who improperly receive benefits. Undoubtedly, much conflict may result from this sort of evaluation because different evaluators, employing different value criteria, reach different conclusions concerning the merits of the same policy.

Another type of evaluation has centered on the operation of specific policies or programs, such as a juvenile correctional reform, boot camp, various police programs, or specific crime prevention programs. Questions asked may include: Is the program honestly run? What are its financial costs? Who receives benefits (payments or services) and in what amounts? Is there any overlap or duplication with other programs? What is the level of

community reintegration of participants? What is the degree of staff commitment? Were legal standards and procedures followed? This kind of evaluation may provide information about the honesty or efficiency in the conduct of a program, but like the impressionistic kind of evaluation, it will probably yield little if anything in the way of hard information on the societal effects of a program.

Since the late 1960s, a third type of policy evaluation has received increased attention from policy-makers. It is the systematic objective evaluation of programs to measure their societal impact and the extent to which they are achieving stated objectives. In 1967 and 1968, Congress altered some of the central pieces of President Johnson's Great Society legislation so that mandatory evaluation would be included in all programs, such as the Economic Opportunity Act of 1964. The aim was to monitor the progress of programs and to terminate those that did not seem to yield the desired level of results. There were also political benefits to be obtained by emphasizing evaluation. Low-cost experiments on social problems and rigid evaluation requirements could be used to subvert attempts to solve social problems through (expensive) direct social change or action programs.

For many sociologists, evaluation research quickly became a proper use of sociology in policy-related work (Babbie, 2017). An entire field of specialization has developed about methods and procedures for conducting evaluation research. Technically speaking, however, there are no formal methodological differences between evaluation and nonevaluation research. They have in common the same techniques and the same basic steps that must be followed in the research process. The difference lies in the following:

- Evaluation research uses deliberate planned intervention of some independent variable
- The programs assessed by evaluation research assume that some objective or goal is desirable
- Evaluation research attempts to determine the extent to which this desired goal has been reached.

As Edward A. Suchman (1967:15) once put it, "evaluative research asks about the *kind* of change the program views as desirable, the *means* by which this change is to be brought about, and the *signs* according to which such change can be recognized." Thus, the greatest distinction between evaluation and nonevaluation research is one of objectives.

Carol Weiss (1998:6–8) proposed several additional criteria that distinguish evaluation research from other types of research:

1. Evaluation research is generally conducted for a client who intends to use the research as a basis for decision making.
2. The investigator deals with his or her client's questions as to whether the client's program is accomplishing what the client wishes it to accomplish.
3. The objective of evaluation research is to ascertain whether the program goals are being reached.

4. The investigator works in a situation where priority goes to the program as opposed to the evaluation.
5. There is always a possibility of conflicts between the researcher and the program staff because of the divergences of loyalties and objectives.
6. In evaluation research, there is an emphasis on results that are useful for policy decisions.

Social policy evaluation is essentially concerned with attempts to determine the impact of policy on real-life conditions. As a minimum, policy evaluation requires a specification of policy objectives (what we want to accomplish with a given policy), the means of realizing it (programs), and what has been accomplished toward the attainment of the objectives (impacts or outcomes). In measuring objectives, there is a need to determine that not only some change in real life conditions has occurred, such as a reduction in the unemployment rate, but also that it was due to policy actions and not to other factors, such as private economic decisions.

DIMENSIONS OF POLICY IMPACT

Thomas R. Dye (2008) suggests that the impact of a policy has several dimensions, all of which must be taken into account in the course of evaluation. These dimensions include the impact on the social problem at which a policy is directed and on the people involved. Those whom the policy is intended to affect must be clearly defined—that is, the poor, the disadvantaged, schoolchildren, or low-income mothers. The intended effect of the policy must then be determined. If, for example, it is an antipoverty program, is its purpose to raise the income of the poor, to increase the opportunities for employment, or to change their attitudes and behavior? If some combination of such objectives is intended, the evaluation of impact becomes more complicated, because priorities must be assigned to the various intended effects.

At times, as Friedman and Macaulay (1977) note, it is difficult to determine the purpose of a law or a program of regulation. They suggest that the determination of intent is complicated because many individuals with diverse purposes participate in the policy-making. Will consideration be given to the intention or intentions of the persons who drafted the statute or the judge who wrote the opinion creating the rule? To that of the majority of the legislature or court who voted for it? To that of the lobbyists who worked for the bill? To that purpose openly discussed or to the purpose that is implicit but never mentioned? They add that sometimes one can only conclude that a law has multiple and perhaps even conflicting purposes, but this is not to say that one can never be sure of the purpose of a law. However, one must be aware of the complexities of determining "purpose."

It should also be noted that a law may have either intended or unintended consequences or even both. A guaranteed-income program, for example, may improve the income situation of the benefited groups, as intended. But what impact does it also have on their initiative to seek employment? Does it decrease this, as some have contended, or does it mainly improve the health and well-being of low-income families, as others have contended? Similarly, an agricultural price support program intended to improve farmers' incomes, may lead to overproduction of the supported commodities.

The difficulties of measurement of impact are most acute for those areas of conduct where the behavior in question is hard to quantify and where it is hard to tell what the behavior *would* have been without the intervention of the law. The laws against murder illustrate the difficulties here. There is a fairly good idea about the murder rate in most countries, but no information at all exists about the contribution that the *law* makes to this rate. In other words, there is no way of determining how high the murder rate would be if there were, for example, no severe legal penalties.

The extent to which the legal profession is familiar with a new law affects this law's potential impact. For example, the Magnuson-Moss Warranty Act of 1975 was heralded as a major piece of legislation intended to protect the consumers against defective products. Did the new law help consumers with specific complaints about faulty products? Not much, according to research findings. Two years after the passage of the new law, one study concluded that "most lawyers in Wisconsin knew next to nothing about the Magnuson-Moss Warranty Act" and "many had never heard of it" (Macaulay, 1979:118). The fact that many lawyers know little about laws that are intended to protect consumers obviously impairs the effectiveness of such laws. As this example shows, another problem confronting impact research is the assessment of knowledge of a particular law by those who are involved in its interpretation and application.

A given legislation may also have impact on future as well as current conditions. Is a particular policy designed to improve an immediate short-term situation, or is it intended to have effects over a longer time period? For example, was the Head Start program supposed to improve the cognitive abilities of disadvantaged children in the short run, or was it to have an impact on their long-range development and earning capacity? The determination of long-term effects stemming from a policy is much more difficult than the assessment of short-term impacts.

MEASURING LAW'S IMPACT

A rather rich literature of evaluation of actual and proposed programs of law has developed, using criteria derived from economics as its standard. This literature takes certain economic goals as its basic values and assesses legal programs as good or bad depending upon whether they most efficiently or rationally achieve the economic goals or make use of theoretically correct economic means. Of course, it is fairly easy to calculate the dollar costs of a particular policy when it is stated as the actual number of dollars spent on a program, its share of total government expenditures, how efficiently the funds are allocated, and so on. Other economic costs are, however, difficult to measure. For example, it is difficult to discover the expenditures by the private sector for pollution-control devices that are necessitated by air pollution control policy. Moreover, economic standards are hardly applicable to the measurement of social costs of inconvenience, dislocation, and social disruption resulting, for instance, from an urban renewal project. At the same time, it is also difficult to measure the indirect benefits of particular policies for the community. For example, the Social Security program may contribute to social stability as well as the retirement incomes of recipients. The problem of measurement is again apparent.

In addition to the difficulties inherent in the measurement of indirect costs and benefits, other complexities arise because the effects of a particular law may be *symbolic* (intangible) as well as *material* (tangible). Intended symbolic effects capitalize on popular beliefs, attitudes, and aspirations for their effectiveness. For example, taken at face value, the graduated income tax is a symbol of equality and progressiveness in taxation and draws wide support on that basis (Reed and Swain, 1997). In reality, the impact of income tax on many people, particularly the rich, is noticeably reduced by provisions such as those for tax shelters. The result is that effective tax rates for the rich are substantially lower than commonly believed. What is symbolically promised is quite different from what materially results.

These are some of the difficulties that need to be taken into consideration in measuring the impact of a particular law. There are several possible research approaches that can be used for measuring impact. One approach is the study of a group of individuals from the target population after it has been exposed to a program that had been developed to cause change. This approach is referred to as the *one-shot* study. Another possible approach is to study a group of individuals both *before* and *after* exposure to a particular program.

Still another possibility would be the use of some kind of *controlled* experiment. But noted earlier in this chapter, in measuring the impact of law, one serious problem is the absence of control groups. As a result, it is difficult to say with confidence what behavior would have been had a law not been passed or had a different law been passed. Outside of a laboratory setting, it is difficult to apply an experimental treatment to a group that one has matched in all significant respects to another group that does not receive the treatment, so as to control for all possible sources of distortion or error. This difficulty is further accentuated by ethical problems that often arise from such research methods as the random assignment of persons to different legal remedies.

A final consideration of evaluation research involves the use of results. As James S. Coleman (1972:6) stated, "The ultimate product is not a 'contribution to existing knowledge' in the literature, but a social policy modified by the research result." In many instances, however, those who mandate and request evaluation research fail to use the results of that research. These people may feel committed to particular ways of doing things despite evidence that a program is ineffective. This is particularly true in instances where programs were established because of political pressures, such as various efforts in corrections and crime policy. As public interest waned in the later stages of these programs, there was no real pressure to incorporate the results of evaluation studies into the ongoing activities (Vago, 2004).

It is apparent that sociological expertise can be made relevant to social policy. Of course, it is a question of choice whether one would want to pursue primarily disciplinary or a policy-oriented applied sociology, although the two are not mutually exclusive. Sociology undoubtedly has a good potential to play an active, creative, and practical role on the formulation, instrumentation, and evaluation of social policy (Babbie, 2017). At the same time, as sociological knowledge and methods become relevant to and influential on policy, they become part of politics by definition. In such a situation, the contributions of sociology can become a tool for immediate political ends and even propaganda purposes by

justifying and legitimizing a particular position. Ideally, the objective should be to insulate, but not isolate, sociological contributions from the immediate vagaries of day-to-day politics, and to strike some sort of balance between political and sociological considerations, permitting neither to dominate.

SUMMARY

1. Several research methods can be applied in studying law in society, and more than a single method is usually involved in an investigation. The methods of sociological research are the historical, observational, experimental, and survey studies.
2. Historical analysis relies on secondary sources collected for purposes other than the researcher's intentions. Thus, a notable difficulty of the historical method lies in the limited accuracy and thoroughness of the documents and materials involved.
3. Observational methods use either human observers or mechanical devices and procedures to elicit responses directly from the subjects by questioning. Many of the observational techniques are used in laboratory situations as, for example, the studies on jury deliberations. Observational methods are also used by sociologists in field settings, which involve direct contact with subjects and take place in relatively natural social situations.
4. Experimental methods are used to test causal relationships, either in a laboratory or in a field setting. Experiments in sociology face certain difficulties such as ethical, legal, and financial considerations. Although there have been several large-scale experiments dealing with law and a large number of laboratory studies, questions of generalizability of results persist.
5. Survey methods are widely used in sociological research, and they often involve a random sample of the population under study. Survey studies tend to be larger than is typically the case in observational and experimental studies, and data may be collected at one point in time or over time.
6. Sociology, like all sciences, may be either pure or applied. Pure sociology searches for new knowledge, whereas applied sociology tries to apply sociological knowledge to practical problems. Although this distinction is often used in the sociological literature, sociology is both a pure and an applied science.
7. There is an increasing involvement of sociologists in evaluation research and impact studies. The object of evaluation research is to determine how successful a particular change effort is in achieving its goals. Evaluation research allows policy-makers to determine the effectiveness of a program, whether it should be continued or phased out, and what in-course adjustments, if any, are needed to make it more effective.

KEY TERMS

Applied science the search for ways of using scientific knowledge to solve practical problems

Experiment a research design that is normally carried out in a laboratory or a field setting, and that ideally begins with two or more equivalent groups, with an

experimental variable introduced into only the experimental group

Historical research the critical investigation of events, developments, and experiences of the past; a careful weighing of evidence of the validity of sources of information on the past; and the interpretation of the evidence

Matched-pair technique regarding an experiment, for each person in the experimental group, another person similar in all important variables is found and placed in the control group

Observational methods research involving either human observers or mechanical observers that elicits information from subjects through observation and/or interviewing

Pure science a search for knowledge, without primary concern for its practical use

Random assignment regarding an experiment, the random assignment of subjects to experimental and control groups

Random sample a subset of a population for which every unit in the population has an equal chance of being selected

Secondary analysis research involving data that the researcher did not actually generate or collect herself or himself

Social policy purposive legal measures that are adopted and pursued by representatives of government who are responsible for dealing with particular social conditions in society

Survey research the systematic and comprehensive collection of information about the attitudes, beliefs, and behavior of people, as gathered through face-to-face interviews, self-administered questionnaires, and telephone interviews

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10

CHAPTER 10
EPILOGUE: LAW AND INEQUALITY IN A CHANGING AMERICA

CHAPTER OUTLINE

LEARNING OBJECTIVES

- Discuss the role that law played in slavery and the historic treatment of Native Americans
- Describe how the race of the victim in criminal cases matters for sentencing
- Explain why it is difficult to study social class differences in sentencing
- List the ways in which women historically were unequal in the eyes of the law
- Discuss how LGBTQ people still do not enjoy full legal equality

The United States will soon be entering the third decade of the twenty-first century. Since the first settlers came to these shores some 400 years ago, America has been a land filled with inequality based on race and ethnicity, social class, gender, sexual orientation and gender identity, nationality, and religion. Although the relative importance of these factors has changed over the years, Americans remain more or less likely to achieve the American dream and to lead happy, healthy lives because of where they rank on these factors.

This harsh truth is a central message of sociology's emphasis on the **social stratification** found in every contemporary society (Andersen and Collins, 2016). Every society is stratified, meaning that some people enjoy many advantages based where they rank on the factors just listed, while other people suffer from many disadvantages.

The social inequality that has long beset American society has also beset its legal system. Historically, the American legal system has been filled with inequality, and it has also contributed to inequality in the larger society. The overall situation today is notably better than just a half-century ago, thanks to federal and state legislation and a host of rulings by the U.S. Supreme Court and other courts. As we know from earlier chapters of this book, however, how the law plays out often differs from how it is supposed to play out. Despite

the legislation and court rulings just mentioned, inequality continues to characterize the legal system, and the legal system continues to contribute to social inequality. We outline the major dimensions and dynamics of inequality in American law in the pages that follow. The bulk of our discussion focuses on race and ethnicity in view of the amount of research on this topic and its historical and contemporary significance in American life.

RACE AND ETHNICITY

America was founded on two horrific examples of racial inequality that continue to stain the historic record: the slavery of African Americans and what many historians deem the near-genocide of Native Americans (Baptist, 2016; Dunbar-Ortiz, 2015). What is sometimes forgotten in remembering these two historic monstrosities is that American law at the federal, state, and local levels helped them to happen.

Regarding slavery, Article I of the U.S. Constitution allowed slaves to count as three-fifths of a person for electoral purposes. Earlier, the various colonies developed a body of so-called *slave law* that, among other things, regulated the buying and selling of slaves and stipulated that slaves could not own property or even marry (Friedman, 2004). In the South, a key aim of the criminal justice system was to help prevent slaves from escaping and to punish those who did try to escape (Walker, 1998). In 1850, the U.S. Congress passed the Fugitive Slave Act, which made it a federal crime to help slaves escape and to help escaped slaves remain free. Six years later, the U.S. Supreme Court ruled 7-2 in its notorious *Dred Scott* case that slaves and free blacks were not U.S. citizens and thus did not enjoy the legal protections given by the Constitution to citizens. The majority opinion said in part that African Americans have "for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race . . . ; and so far inferior, that they had no rights which the white man was bound to respect" (quoted in Burns, 1998:282). After the Civil War ended slavery, the South adopted the so-called Black Codes, which discriminated against freed slaves in many ways. Reconstruction in 1866 eliminated these codes, but legal racial discrimination and segregation returned to the South after Reconstruction ended in 1877.

Turning to Native Americans, American law provided the foundation for the activities over many decades that took land away from Native Americans and, worse, caused the deaths of untold numbers of their ranks. These efforts reduced the numbers of Native Americans from about 1 million in the early 1600s, when European settlers first arrived to these shores, to less than one-fourth that number by 1900, a fraction of what would have been expected through normal population growth (Venables, 2004). Beginning in the late eighteenth century, government authorities coerced Native Americans to sign legal treaties, in which they gave up their land and agreed to be confined to reservations (Samuels, 2006). The Congressional Removal Act of 1830 enabled the forced relocation of Native Americans from the Southeast to west of the Mississippi River. This relocation took the form of the heartbreaking *Trail of Tears*, as the relocated Native Americans had to walk for hundreds of miles, without thousands dying en route. In 1903, the U.S. Supreme Court ruled in *Lone Wolf v. Hitchcock* that Congress could nullify the land treaties and take land without compensation from Native Americans (Wildenthal, 2002).

These short summaries of African Americans' and Native Americans' histories only begin to illustrate the many ways that American law reinforced their maltreatment and subjugation. But as these summaries demonstrate, these two groups' distressing histories cannot be fully understood without appreciating the role that law played for many decades in the human suffering they experienced.

American history is replete with many legally caused injustices against other racial and ethnic groups. For example, federal legislation in 1882 banned immigration from China, and several states back then banned marriages between Chinese and whites (Friedman, 2004; Lee, 2003). During this era, fear of and hostility toward Chinese immigrants and African Americans fueled laws that banned opium and cocaine (Musto, 1999). Whites irrationally feared that the Chinese were using opium to lure young white children into sexual slavery and that African Americans who used cocaine could acquire super strength and become invulnerable to bullets. During the 1930s, fear by whites that marijuana use would make Mexican Americans rape and murder whites fueled federal legislation that banned marijuana use.

RACE/ETHNICITY AND THE LAW TODAY

History often repeats itself and thus helps us to understand the present and to predict the future. Even so, the past is not always prologue, as social change can and does occur, as Chapter 7 emphasized. Although law has played a fundamental role in establishing and reinforcing racial and ethnic inequality throughout American history, perhaps this role has diminished in recent decades. Perhaps American law has begun to achieve the ideal of **blind justice** promised by the familiar symbol of a blindfolded Lady Justice holding balanced scales. According to this symbol, the law should be impartial, and the chances of achieving justice under law should not depend on someone's race, ethnicity, wealth, or other nonlegal attributes.

What does the social science evidence say about racial and ethnic inequality in the legal system today? The answer here is less clear than it would have been more than a half century ago, for the law has improved in this regard during the past five decades, thanks to much legislation and many court rulings. However, the picture that emerges from the social evidence is still disturbing, because race and ethnicity still matter even if law itself is "officially" now blind when it comes to race and ethnicity. To recall what we stressed earlier in this chapter, the law does not always work the way it is supposed to work. Supporting this harsh reality, there is ample evidence that race and ethnicity still influence many legal outcomes and that these outcomes in turn contribute to racial and ethnic inequality in the larger society.

Indirect and Direct Effects of Race and Ethnicity We have room here to summarize this evidence briefly, with fuller treatments available elsewhere (Johnson et al., 2015; Walker et al., 2018). To begin to summarize this evidence, we must first distinguish between the indirect effects of race and ethnicity on legal outcomes and their direct effects on legal outcomes. By *indirect* effects, we mean that people of color are generally much poorer and otherwise disadvantaged than whites and thus have worse legal outcomes than whites

because of their lower socioeconomic status (SES). By *direct* effects, we mean that it is the race and ethnicity of people of color themselves that leads to their worse legal outcomes, because of bias against them by actors in the legal system.

Regarding indirect effects, low-income people of all racial and ethnic backgrounds are worse off in the legal system because, simply put, they lack money. The next section on social class discusses this dynamic further. Given this evidence, African Americans, Latinos, and Native Americans are indeed unequal within the legal system, regarding both civil cases and criminal cases, because of their lower SES. All things equal, these groups' lower SES renders them at a significant disadvantage in the civil and criminal justice arenas compared to whites facing similar legal issues.

Regarding direct effects, we must first acknowledge that there is actually little research on racial and ethnic bias in the *civil* legal system. However, because racial and ethnic prejudice exists in American society as a whole, it is reasonable to assume that it exists in the civil legal system and that it thus results in worse outcomes for people of color in this branch of the legal system. But much more research is needed on this matter before any firm conclusions can be drawn.

Fortunately, there is much research on the direct effects of race and ethnicity in the criminal justice system: the behavior of police, including the use of excess force and arrest; the various practices of prosecutors; and the sentencing practices of judges. Although this huge body of evidence is more complex than might be assumed, it does point to enduring and significant direct effects of race and ethnicity on legal outcomes at every stage of the criminal justice system. These effects stem from racial and ethnic bias by police, prosecutors, judges, and other criminal justice actors.

Implicit Bias Before discussing this evidence, we must comment on the nature of the bias just mentioned. A half century ago, racial and ethnic bias often took the form of "Jim Crow" racism, with whites holding blatantly racist views regarding African Americans and other people of color as biologically inferior, and with out-and-out racists occupying law enforcement, prosecutorial, and judicial positions in the South but also sometimes in the North (Litwack, 2009). Fortunately, that form of racism has largely faded, although too many Americans still hold such racist views. More to the point, Jim Crow racism has been replaced by what is called *modern* or *symbolic* racism that views African Americans and other people of color as culturally, if not biologically, inferior and blames them for their low SES (Quillian, 2006).

Responding to this change in the nature of racial and ethnic prejudice, social scientists have studied the extent and impact of **implicit bias**, the idea that many people hold unconscious racial and ethnic stereotypes (James et al., 2016; Lum, 2016). To the extent that people of color are at a key disadvantage today in the criminal justice system because of racial and ethnic bias by criminal justice professionals, social scientists think this bias reflects implicit bias rather than a conscious, shamelessly racist attempt of these professionals to oppress people of color (Walker et al., 2018). Some police and other criminal justice professionals, of course, may still be out-and-out racists, but overall the bias that operates in the criminal justice system is much more implicit and unconscious than explicit and conscious.

Evidence of Implicit Bias in the Criminal Justice System Because most evidence of this issue concerns African Americans, most of our discussion here will concern African Americans. That said, growing evidence indicates that Latinos and Native Americans also experience worse outcomes in the criminal justice system because of implicit bias against them. Our summary of the evidence that generally exists for these three groups will focus on decision making during major stages of criminal justice: law enforcement, prosecution, and conviction and sentencing.

Law Enforcement When Americans think about racial issues in criminal justice, the behavior of police probably comes most readily to mind. Are the police more likely to stop, frisk, and/or arrest African Americans and other people of color, whether they are walking, driving, or just standing around? Are the police more likely to use excessive force (*police brutality*) against these individuals? What does the evidence say?

As just noted, the evidence is complex, and not every study finds discrimination by police in all these dimensions of their behavior as they encounter the public. Overall, though, the picture that emerges from this evidence is disturbing, as it strongly suggests that African Americans are more likely, even if they have done nothing wrong, to be stopped for questioning if they are walking, driving, or just standing around, and more likely than whites to be arrested for suspicious behavior (Walker et al., 2018).

As also just noted, we do not have space to discuss all the evidence, but it is revealing to examine the results of a few specific studies. Let's begin with racial profiling of drivers and walkers. Anecdotally, African Americans often say that the police stopped them for no good reason while they were driving or walking, leading observers to sarcastically call these persons' alleged criminal behavior *DWB* (*driving while black*) or *WWB* (*walking while black*), respectively. Social science evidence backs up these drivers' and walkers' claims (Baker, 2010; Lundman and Kowalski, 2009; Rojek et al., 2012). For example, a Maryland study found that African Americans comprised more than three-fourths of all drivers stopped by state troopers on a particular highway, even though they comprised only 17% of the drivers on the highway. In locations such as New Jersey and St. Louis, studies have found state troopers or local police (depending on the study) much more likely to stop African American and Latino drivers than white drivers and also much more likely to search the cars of the drivers of color. In New York City, which for several years had an intensive "stop and frisk" policy of young males who were walking or standing around, studies have found that police were much more likely (i.e. out of proportion to their representation in the general population) to stop African American and Latino males and to frisk them after stopping them (Baker, 2010).

The evidence for racial bias in arrest is probably less clear than that for stopping, questioning, and frisking. Methodological problems make it difficult to study such bias, because social scientists would need to know, for example, how many black and white offenders are breaking the law, and what percentage of these offenders are arrested. But because much crime goes unreported, it is difficult to know how many offenders by race are breaking the law. To counter this problem, some social scientists have accompanied the police during their patrolling and recorded the race of possible suspects and whether the

police arrest these suspects. Some of these observational studies find no racial bias in arrest, but other such studies do find racial bias (Walker et al., 2018). The best conclusion from these studies is probably that racial bias in arrest sometimes occurs, but that it is not nearly as extensive as a half-century ago.

In this regard, a more subtle form of police bias in arrest is possible. What if police tend to arrest white suspects only if the evidence against them is fairly strong, while arresting African American suspects even if the evidence against them is fairly weak? Some older evidence finds this is indeed the case (Hagan and Zatz, 1985; Petersilia, 1983), but newer evidence is needed to determine the extent to which this more subtle form of bias still exists.

Clear evidence exists of racial bias in arrests for one kind of criminal behavior, drug offenses. Although African Americans are not more likely than whites to use illegal drugs, they are arrested for illegal drug possession far beyond their proportion in the U.S. population (Mitchell and Caudy, 2015). To be more precise, African Americans comprise about 13% of the population, but accounted for 27% of all drug arrests in 2015 (Federal Bureau of Investigation, 2016), twice their "fair share" of arrests. The disparity for Latinos is smaller: Although Latinos comprise about 15% of the population, they accounted for 20% of drug arrests in 2015.

These disparities have existed ever since the nation began its legal war on drugs in the 1980s and have contributed to the overrepresentation of people of color in prisons and jails (Alexander, 2012). A former president of the American Society of Criminology warned of this situation in 1993, "What is particularly troublesome," he said, "is the degree to which the impact [of the drug war] has been so disproportionately imposed on nonwhites" (Blumstein, 1993:4–5). He added, "One can be reasonably confident that if a similar assault was affecting the white community, there would be a strong and effective effort to change either the laws or the enforcement priority."

Prosecution Researchers are becoming increasingly interested in the behavior of prosecutors, who must decide, among other things, whether to drop charges against arrested suspects or to continue to prosecute the case, whether to bring more serious or less serious charges against defendants, and whether to insist on incarceration as part of the plea-bargaining process (Pfaff, 2017). Despite this growing interest, research on race/ethnicity and prosecutorial decisions is still fairly scant, making it difficult to draw firm conclusions. Of the research that does exist, some studies do find racial bias in prosecutorial decision making, but other studies do not (Kutateladze et al., 2016). For example, New York prosecutors in marijuana cases are more likely during plea-bargaining discussions to demand incarceration of African American defendants than of white defendants; this difference manifested even after researchers took into account the strength of the evidence and other legal factors (Kutateladze et al., 2016).

Evidence of prosecutorial racial bias is clearer in homicide and rape cases (Myers, 2000). Some studies find that prosecutors in these cases bring more serious charges when the defendant is African American than when the defendant is white. The evidence for racial bias in these cases is even stronger when the race of the *victim* is considered, with

prosecutors bringing more serious charges when the victim is white than when the victim is black. According to one criminologist, this latter evidence raises "the disturbing possibility that some prosecutors define the victimization of whites, especially when African Americans are perpetrators, as more serious criminal events than the comparable victimization of African Americans" (Myers, 2000:451).

Conviction and Sentencing More than one-third of prison inmates are African American, and about one-fifth are Latino. These proportions exceed their representation in the U.S. population. Although this disparity may reflect heavier involvement in criminal behavior to some degree (Baumer, 2013; Spohn, 2015), a large amount of research does find that people of color are more likely than whites to be sentenced to prison for similar offenses and to receive longer prison terms once sentenced (Bales and Piquero, 2012; Franklin, 2015; Walker et al., 2018). This difference appears more often for African American than for Latino defendants, while some studies do not find racial disparities in sentencing. To the extent that racial differences in sentencing exist in the research, they are found more often for the decision by judges to incarcerate a convicted defendant (the "in/out" decision) than for the length of the prison term that judges determine.

Although the overall evidence on race/ethnicity and sentencing is somewhat inconsistent, it is clearer for death penalty cases and for drug cases. African Americans convicted of homicide are somewhat more likely than their white counterparts to be sentenced to death by juries, and this difference becomes stronger when the race of the victim is considered (Bohm, 2015). Echoing the findings for prosecutors in homicide cases, death sentences are more likely when a homicide victim is white than when the victim is black, and especially more likely when the victim is white and the defendant is black. Also echoing research on arrests for drug offenses, sentencing for drug offenses is harsher for African American and Latino defendants than for their white counterparts (Alexander, 2012).

A recent intriguing study uncovered an additional kind of racial bias in sentencing (Chokshi, 2017). This study examined 1,900 cases since 1989 where the defendant was convicted of murder, sexual assault, or drug offenses but later exonerated as evidence came to light pointing to the defendant's innocence. Exonerations stemmed from such reasons as mistaken identification by witnesses or police or prosecutorial misconduct. Of the 1,900 exonerations, 47% involved African American defendants. More to the point, the percentage of exonerated cases for these three crimes involving African American defendants exceeded the percentage of all convictions for these crimes involving African American defendants. As a news report summarized this evidence, "Black defendants convicted of murder or sexual assault are significantly more likely than their white counterparts to be later found innocent of the crimes" (Chokshi, 2017).

SOCIAL CLASS

Poor and low-income people experience many disadvantages in American society from infancy through old age. One significant set of disadvantages occurs in the legal system. Much evidence finds that the poor are much worse off than wealthier people in both the

civil courts and in the criminal courts. This is because they do not have the money to afford a good attorney, or often any attorney, and because they do not have the knowledge base and "social capital" to succeed in the complex worlds of the civil and criminal courts. Although the Constitution requires effective counsel in criminal cases, in practice, this requirement is rather meaningless because the poor do not receive effective counsel, or at least do not receive counsel that is as skilled and effective as the counsel that a wealthy defendant can afford to hire.

In the civil court arena, recall from earlier chapters that litigation can be very expensive, and that "one-shotters" are at a considerable disadvantage because they simply do not know the way of the courts. These twin problems combine to make it very difficult for low-income people to win justice in the civil courts. If they end up in these courts because of actions taken by a finance company or a landlord, they more often than not lose. If they have a legal problem, they cannot afford an attorney to take action on their behalf. Legal-aid societies help in this regard, but their staff is overworked, and they cannot give clients the same time and energy that wealthy clients receive from a private attorney they hire. For all these reasons, the "haves" come out ahead in the civil courts, and the "have-nots" come out behind, to paraphrase the title of Galanter's (1974) classic work that discussed this issue. Several studies from the past few decades find empirical support for Galanter's view that the poor come out behind in the civil courts (Carlin, et al., 1966; Farole, 1999; Songer et al., 1999).

The situation for low-income people in the criminal justice arena is perhaps even worse, if only because their physical freedom may be at stake. Political scientist Herbert Jacob (1978:185) observed long ago that the criminal courts are "fundamentally courts against the poor." This is because almost all the criminal cases these courts handle involve suspects and defendants who are poor or low-income. Wealthy defendants may commit white-collar crime, but they are much less likely to commit the "conventional" violent and property crimes that are the focus of the criminal courts.

Because almost all criminal suspects and defendants are poor or low-income, we do not really have enough wealthy people accused of violent and property crime to determine how disadvantaged poorer suspects and defendants are in the criminal justice system. Still, as Jacob (1978:185–186) also observed, "Those few defendants who are not poor can often escape the worse consequences of their [criminal] involvement." This is partly because, he said, they can afford bail, and they can afford to hire a skilled, private attorney who can devote much time to their case.

Two celebrated cases since Jacob made this observation illustrate his point. After O. J. Simpson, the former football player and movie celebrity, was arrested in 1994 for allegedly brutally murdering his ex-wife and her friend, he was able to afford a highly skilled legal defense team that cost him an estimated $10 million and won him a jury acquittal (Barkan, 1986). A decade later, star basketball player Kobe Bryant was prosecuted for alleged rape; his legal defense probably cost several million dollars and helped him to win his freedom after the alleged victim refused to testify and the prosecutor was forced to drop the charges (Saporito, 2004).

Beyond examples like these, many sociological and journalistic accounts since the 1960s confirm that indigent defendants typically do not enjoy effective counsel or even adequate counsel (Downie, 1972; Fritsch and Rohde, 2001; Strick, 1978; Sudnow, 1965). Criminal cases in the nation's urban courts are often called "factory-line justice" because overworked public defenders or assigned private counsel have so little time to handle any one case.

When we compare the sentencing of white-collar crime defendants, who can commit crime that is more serious than many violent and property crimes, we see ready evidence of social class bias in sentencing. When corporations produce dangerous products or maintain dangerous workplaces, it is very rare that a single corporate executive is ever incarcerated, even though many people may be harmed or even killed by their companies' criminal behavior (Barak, 2017). One widely cited study found that California defendants convicted of grand theft were twice as likely as physicians convicted of Medicaid fraud to go to prison, even though the economic loss from the Medicaid fraud was ten times greater than the cost from the grand theft (Tillman and Pontell, 1992).

GENDER

There was a time when women had no equality in the eyes of the legal system. They could not vote or own property, they could not sign contracts or serve on juries, and they could not even make a will. Employers were legally free to refuse to hire them. Thankfully those days are long gone, thanks to federal legislation and to various rulings by the Supreme Court and other courts. In today's world, women are formally equal in the eyes of the law, and they enjoy many more legal advantages than was true just a few decades ago.

In the juvenile justice and criminal justice arenas, some gender inequality still exists. Adolescent girls are more likely than boys to get into trouble with juvenile authorities for status offenses like sexual activity or running away from home (Chesney-Lind and Sheldon, 2014). In an opposite form of gender inequality, adult women are less likely than adult men convicted of similar crimes to be incarcerated, as judges and prosecutors evidently believe that women are less threatening than men to society and often have childcare responsibilities.

In another area, women who are victims of sexual assault, domestic violence, and other crimes targeting them as women still find that their allegations of criminal violence are taken less seriously than they should be by police, prosecutors, and judges. This is because many criminal justice professionals still believe that women are somehow to blame for the violence they suffer (Alderden and Ullman, 2012; Visher et al., 2008). To the extent these professionals continue to hold this belief and to accept other myths surrounding violence against women, the legal system contributes to women's inequality.

SEXUAL ORIENTATION AND GENDER IDENTITY

Same-sex sexual behavior used to be illegal in many states, and same-sex couples could not legally marry anywhere. Supreme Court rulings have abolished laws against same-sex sexual behavior and given same-sex couples the right to marry in every state and every community. Many Americans celebrated when these rulings occurred, and LGBTQ individuals enjoy many more legal advantages and much more legal equality than was true in just the recent past.

Despite these advances, the LGBTQ community continues to lack full legal equality. In particular, there is no federal law prohibiting employment or housing discrimination against LGBTQ people, and employers, landlords, and property owners are free in the majority of states to practice such discrimination. Because there is also no federal law prohibiting LGBTQ discrimination in public accommodations, restaurant owners, retail store managers, and hotel managers are also free in the majority of states to refuse to serve LGBTQ customers. In the area of the law, the United States still has a long road to travel before the LGBTQ community achieves full legal equality.

SUMMARY

1. As a nation long filled with social inequality, the United States has also long had a legal system marked by inequality.
2. During the colonial period and well into the nineteenth century, American law reinforced slavery and the near-genocide of Native Americans.
3. Inequality in today's legal system based on race and ethnicity is less pronounced than in the past, but such inequality persists and stems largely from implicit bias by legal officials.
4. Poor and low-income people suffer many disadvantages in the legal system, as they do in the larger society. These disadvantages stem from their lack of money and other problems associated with being poor. Unlike the wealthy, they cannot afford to hire skilled attorneys, and they lack other resources held by the wealthy.
5. Women used to be legally unequal in many profound ways but today enjoy formal legal equality. However, the criminal justice system still often does not take seriously the violent victimization of women.
6. Same-sex couples may now legally marry and engage in same-sex relations without fear of arrest. However, in the majority of states, they may still face discrimination in employment, housing, and public accommodations.

KEY TERMS

Blind justice the ideal that law should be impartial, and that the chances of achieving justice under law should not depend on someone's race, ethnicity, wealth, or other nonlegal attributes

Implicit bias the idea that many people hold unconscious racial and ethnic stereotypes

Social stratification inequality in a society based on wealth, power, race and ethnicity, gender, and other attributes

SUGGESTED READINGS

Walter Frank, *Law and the Gay Rights Story: The Long Search for Equal Justice in a Divided Democracy*. New Brunswick, NJ: Rutgers University Press, 2014. An insightful summary of various court cases during the past few decades that helped establish certain gay rights.

Elizabeth Hinton, *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America*. Cambridge, MA: Harvard University Press, 2016. An excellent history of the racial and other factors that helped produce mass incarceration in the United States.

John Pfaff, *Locked In: The True Causes of Mass Incarceration and How to Achieve Real Reform*. New York: Basic Books, 2017. A persuasive analysis of how changes in prosecutorial decision making helped to fill the nation's prisons and jails.

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