

Oxford University Press, Inc., publishes works that further Oxford University's objective of excellence in research, scholarship, and education.

Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto

With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam

Copyright © 2008 by Oxford University Press, Inc.

Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016
<http://www.oup.com>

Oxford is a registered trademark of Oxford University Press

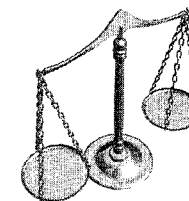
All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior permission of Oxford University Press.

Library of Congress Cataloging-in-Publication Data

Walsh, Anthony, 1941–
Law, justice, and society: a sociolegal introduction / Anthony Walsh,
Craig Hemmens. p. cm.
Includes bibliographical references and index.
ISBN 978-0-19-533408-1 (acid-free paper)
1. Law—United States. 2. Sociological jurisprudence.
3. Justice, Administration of—United States. I. Hemmens, Craig. II. Title.
KF386.W325 2008
340'.115—dc22 2007009404

Printing number: 9 8 7 6 5 4 3 2 1

Printed in the United States of America
on acid-free paper



LAW, JUSTICE, AND SOCIETY

A SOCIOLEGAL INTRODUCTION

Anthony Walsh

Boise State University

Craig Hemmens

Boise State University

New York Oxford
OXFORD UNIVERSITY PRESS
2008



CHAPTER 1

LAW: ITS FUNCTION AND PURPOSE

The bomb blast sent Jawad Sabah flying from his seat in Ali's tea shop in Baghdad. Jawad went there daily to seek the solace of Sunni Muslim relatives and friends following the brutal gang rape and murder of his wife, Abeer, by a marauding Shiite militia gang six months earlier. He picked himself up dusty but uninjured, saw the flame-engulfed bus, and wailed soulfully at the futility and wickedness of the world around him. The police arrived 15 minutes later and just stood around smoking and waiting for their next call to do nothing.

Jawad wasn't thrilled with life under the brutal dictatorship of Saddam Hussein, but at least Baghdad was relatively safe and he could drink his tea undisturbed. He remembered the jubilation felt after the Americans overthrew Hussein in 2003 and his brutal police force melted from the scene. He also remember the foreboding as looting and vengeance killings began to openly occur; three years later Iraq seems to be plunging ever deeper into chaos. In June 2005 Baghdad had 880 violent deaths *excluding* people killed by car bombs and suicide attacks (McGirk 2005). This translates into a homicide rate 30 times higher than New York City's. What law remains in Baghdad is imposed by the "infidel" Americans or by ineffectual and openly corrupt Iraqi police officers, neither of which can expect to be considered legitimate by those whose behavior they are charged with regulating.

America's attempt to impose democracy on a country whose values, norms, and customs are at odds with it has been an abject failure. If Iraq is to become a viable state again it must provide its people with security, stability, and personal safety; these are the things that law is supposed to provide. The Iraqi Constitution (a constitution is the bedrock of any country's law) is reasonably democratic for that area of the world, but as with all law it is just a set of lifeless statements on paper without the will of human actors to give it life. For the law to be more than words on paper it needs the respect, and even the awe, of all individuals affected by its constraints and obligations. It requires assurances that police and judicial processes will be open to scrutiny and will provide equal protections for all citizens. Without such things government loses its credibility, the economy languishes, organized crime flourishes, vigilantism emerges, and innocent people like Jawad are victimized. This chapter explores the cultural underpinnings of law, the functions of law,

and how ancient philosophers and early sociologists have viewed it, and also introduces the idea of natural law.

INTRODUCTION

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

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

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

Law justly promulgated and justly applied is the bedrock of individual liberty and social progress. Former legal counsel for the British government, Phillip Allott (2001, 19) augments Lincoln's awe of the law when he wrote: "In the making of the human world, nothing has been more important than what we call *law*. Law is the intermediary between human power and human ideas. Law transforms our national power into social power, transforms our self-interest into social interest, and transforms social interest into self-interest." Allott is saying that law is a mechanism by which diverse individual and community interests become as close to being the same thing as possible. Law has been a study of endless fascination and the subject of endless debate for generations of philosophers and social scientists—let us join them.

WHAT IS LAW?

What is this thing called law of which Allott is so enamored? The question is a very simple one with a variety of complex answers. The question usually leads to other

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

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

THE SIX PRIMARY CHARACTERISTICS OF CULTURE AND THEIR RELATIONSHIP TO LAW

Culture is the totality of learned socially transmitted behaviors, ideas, values, customs, artifacts, and technology of groups of people living in a common society (Schaefer and Lamm 2001). It is the transmission of all sorts of information from generation to generation by nongenetic means. All cultures possess six primary elements: beliefs, values, norms, symbols, technology, and language. These elements represent critical information that maintains and transmits culture across the generations. Without a general consensus about the nature of a shared culture in terms of the six primary elements, the socialization process would be a difficult task indeed. All of these elements are related to one another and, most centrally for our purposes, to the law. Let us take these elements one by one and see how they are related to the law.

1. Beliefs

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

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

Laws are often enacted to support our most deeply held beliefs, and as beliefs change over time so do the laws that support them. When the established doctrine of the Roman Catholic Church was that the earth was the center of the universe and that the sun revolved around it, astronomers who held contrary beliefs were labeled heretics and were in danger of severe punishment or even death if they made their beliefs public (one of the reasons why beliefs traveled slowly back then). Similarly, when the United States Constitution defined a black person, for legal purpose, as three fifths of a person and slavery was constitutionally permissible, laws were made to protect the "property rights" of slave owners. Now that we have ceased to believe in prescientific astronomical notions or in slavery, laws regarding heresy or property rights over human beings no longer exist in Western societies. Laws against heresy, however, continue to exist in many Islamic societies, and there are remnants of legally sanctioned slavery still existing in some African countries. The point is that if enough people believe something is real, the consequences are often real regardless of the empirical validity of the belief. Witches do not exist (at least not in the stereotypical broom-flying, spell-casting, potion-making sense), but this empirical truth was of no comfort to the thousands of women legally burned over the centuries because people believed witches did exist.

2. Values

Values refer to normative standards shared by the culture about what is good and bad, correct and incorrect, moral and immoral, normal and deviant. Values

are more general and abstract than specific beliefs, although values themselves differ in their generality and specificity. American values are based on transplanted and modified Western European values. Examples of broad and general "core" values in all Western societies include the Golden Rule, justice, equality, liberty, and the sanctity of life. Even though everyone may define these core values as good, people of different ideological persuasions may have quite different images in their heads when they talk about them. Examples of more specific values include achievement and success, individualism, progress, self-reliance, and hard work. Shared values are an important binding force in culture, and a set of values for the individual to live by is also viewed as important for binding the disparate parts of our personalities into a coherent self-concept (Walsh 2006).

3. Norms

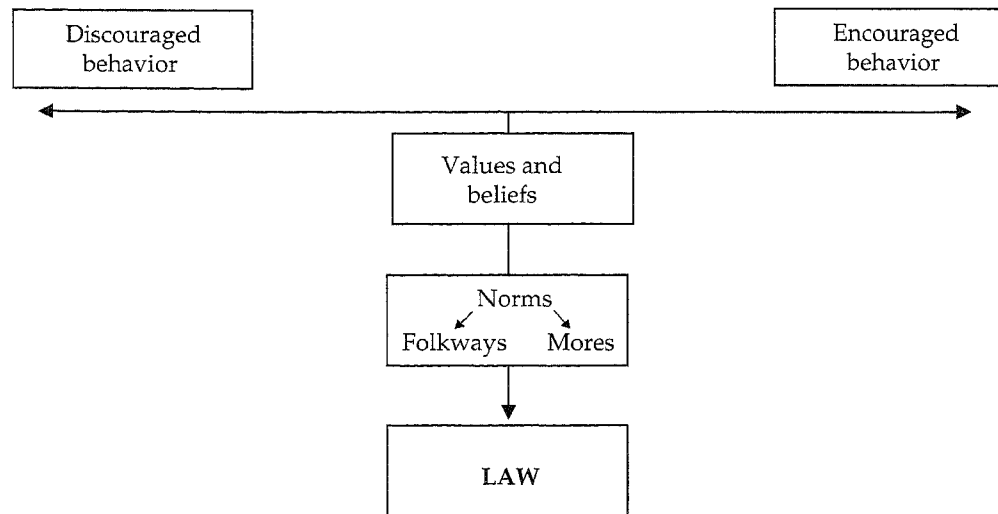
There are other rules governing appropriate conduct that are more specific than values known as norms. A **norm** is the action component of a value or a belief, patterning social behavior in ways consistent with those values and beliefs. Some norms have serious moral connotations and are known as *mores*.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

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

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

Legal theorists differentiate between laws that arise from the norms and customs of a given culture, which is known as **positive law**, with a hypothesized universal set of moral standards known as **natural law**. Legal positivism is a theory of law that explains law by examining its cultural context and views law as socially constructed. Legal positivists study the cultural sources of law as it is without passing moral judgments; natural law adherents philosophize about

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



the law as it *ought* to be. Believers in natural law view it as standing above and placing limits on what is permissible in positive law, whereas positivists draw a distinction between law and morality. It is not that positivists divorce law from morality. Law and morality are always intertwined to some extent, but positivists aver that it is not necessarily so, and that law is law if it has the appropriate authority behind it even if it offends moral sensibilities. Positivists insist that all law is morally relative, and must be judged according to the cultural context in which it was made. That is, there are no “good” or “bad” laws judgeable as such outside of their cultural context. The essential feature of law for most positivists is its coerciveness or authoritative power to command compliance with it, not its moral quality (Leiter, 2001). Legal positivists may well agree that law should be moral, but that we should study law as we find it rather than as we would like it to be.

4. Symbols

Anthropologists and sociologists often refer to nonmaterial culture as symbolic culture. Although the totality of symbolic culture includes nonphysical things such as gestures, language, values, and norms, we concentrate here on physical and tangible **symbols** that are identified with something else less tangible. Symbols are concrete physical signs that “stand for” and signify abstractions that range from the mundane and specific (the little man or woman painted on the restroom door) to those that are suffused with meaning and can evoke the deepest of feelings such as a nation’s flag. While the figures on the restroom doors point to something useful, they not capture our emotion. A flag, while less useful

in a day-to-day sense, expresses all that it means to be a part of the nation signified by that piece of cloth. A symbol such as a flag may transcend many cultures so that persons living in different cultures may understand the symbol within their own cultural context. Think of the different emotional responses evoked in Washington, Paris, and Teheran by seeing a mob burning the American flag. The American flag is recognized as a symbol representative of the American nation in each of those cities, although this recognition has vastly different emotional meanings to their citizens.

Symbols are of vast importance to the law, which is, after all, a rather abstract and intangible notion itself. Think of the symbolic meanings involved in being inside an imposing courtroom, viewing robed (and in some countries, bewigged) judges sitting on elevated stages flanked by flags and uniformed law officers. Think of the “sacred” text of the nation’s constitution, the pomp, the ritualism, the old-fashioned terminology sometimes used (“Hear ye!”), the formal oaths sworn, all of which symbolically support the notion that the law is of great importance and above any individual. The law must “stand for something” (which is what *symbol* means) that is agreeable to at least the majority of society’s members if it is to be considered legitimate. The symbolism surrounding the law helps those who observe it to “feel” its majesty and awesome power, and thus helps to legitimize and sustain it.

5. Technology

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

Different stages of technology affect the law in at least three ways (Vago 1991). First, it supplies technical inventions and refinements (e.g., fingerprinting, DNA testing, polygraphy, computerized data banks, and closed-circuit TV cameras) that change ways in which criminal investigations are made and the law is applied. Second, technological advances in the media (the ability to televise congressional hearings and courtroom dramas, videotape of police officers beating suspects) may change the intellectual climate in which the legal process is executed. Third, new technology presents the law with new conditions with which it must wrestle. For example, how will the law deal with technology-driven issues such as surrogate motherhood, surgical and chemical “cures” for criminals, pornography and fraud on the Internet, human cloning, and the possible uses and misuses of individual genetic profiles?

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

Because these and a host of other potential hazards are manufactured and internal rather than natural and external, we have evolved a **risk society**, meaning a society "increasingly preoccupied with the future (and also with safety), which generates the notion of risk" (Giddens 1999, 3). This does not mean that there are more risks today than in the past, although arguably there are, but rather we are more aware that we can do something about them. *Risk* is thus conceptually different from *danger* or *hazard* in the sense that it is bound up with human control and "particularly with the idea of controlling the future" (Giddens 1999, 3). Automobiles are not going to stop pouring excessive carbon dioxide into the air unless the law mandates lower emission levels; the ozone layer will get bigger and global warming will increase unless law mandates control of chlorofluorocarbon and puts a stop to deforestation. But since these things occur cross-nationally, there is little that the legal system of a single country can do except tend to the problems in its own backyard. The point is that whether problems/risks/hazards are addressed by local, national, or international law, its role is just as are science and technology, has an increasingly central in our lives, which generate the need for new laws.

6. Language

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

Language is created abstractly and can be added to or modified according to the needs of each culture. Words mean what they mean because culture defines

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

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

Law, then, is integral to all aspects of culture. Since the dawn of civilization there has been some form of rules and sanctions designed to ensure socially desirable conduct and thereby bring order to a culture, to define authority and its limits, and to clarify the responsibilities, duties, and obligations members owe to one another. Given the great importance of law, it is not surprising that philosophers, historians, sociologists, and scholars from many other disciplines have debated the nature and function of law for centuries. The ideas of some of these men are discussed in the following sections. We limit ourselves to what these scholars had to say about topics that have the greatest bearing on the content of other chapters in this book, and to a brief discussion of one of the earliest and most famous legal codes.

THE CODE OF HAMMURABI

The first legal codes showed that there were well-advanced societies that exhibited signs of mature civilizations many centuries ago. The Code of Hammurabi (Hammurabi was a King of Babylonia who lived from 2123 to 2081 BCE) was long acknowledged as the oldest known written code of law. We now know, however, that other documents of this type existed in the area of the Middle East called Mesopotamia, but no other was so broad in its scope. The code was discovered inscribed on a round stele pillar, seven feet four inches high. On the top of the pillar was Shamash, the Sun god, handing the legal code to Hammurabi. On the back and front of the lower portion of the obelisk was the legal code of King Hammurabi. It was not law in the sense that law is understood today; that is, a set of abstract principles applicable to all. Rather, it is a set of judgments originally pronounced to solve particular cases (Bottero 1973). Nor was it an attempt to cover all possible situations as modern codes are, and as far as we know it was never copied and distributed to those officials charged with the day-to-day administration of Hammurabi's vast kingdom (Sinha 1990). Nevertheless, the