CHAPTER 6

Law and Social Change

Chapter Outline

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Summary

Key Terms

One of this decade's most heated social debates has concerned same-sex marriage. States throughout the nation passed constitutional amendments that banned same-sex marriages; the state supreme court of Massachusetts ruled in 2004 that its state constitution permitted same-sex marriage; and, taking a middle ground, several states (California, Connecticut, Hawaii, Maine, New Hampshire, New Jersey, and Vermont) enacted legislation that gave civil unions or domestic partnerships between same-sex couples many or all of the legal protections enjoyed by marriages between heterosexual couples. Hundreds of gay couples married in Massachusetts after same-sex marriage became legal there, and many other couples filed for civil union or domestic partnership status in the states that granted this status new rights. The legal developments regarding same-sex marriage and civil unions were themselves a result of attention given to gays and lesbians during the last few decades, much of it resulting from their own efforts to do away with homophobia and antigay discrimination.

This brief summary does not do the same-sex marriage issue justice, but it does indicate the interplay between law and social change. Changes in society can bring about changes in law, broadly defined, and changes in law can bring about changes in society. The relationship between law and social change has been a key dimension of the study of law and society since the rise of

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the Historical School (see Chapter 2) during the nineteenth century. As Chapter 1 emphasized, the idea that society can affect law and that law can affect society is a basic premise of the field of law and society today. As discussed in that chapter, several key assumptions guide theory and research in the field. Two of these were that *major changes in society often bring about changes in the law*, and that *laws and legal decisions may have a potential impact on one or more aspects of society*.

As should be apparent, then, the existence of a two-way or reciprocal relationship between law and social change is a defining component of the law and society canon. Friedman (2004a) likens this reciprocal relationship to the process and aftermath of building a bridge. Suppose there is a community, he says, on the banks of a wide river that is serviced only by a slow ferry. The residents put pressure on their government to build a bridge, and the bridge eventually gets built. Now that traffic easily goes across the bridge everyday, the community begins to change. Some people begin to live on the other side of the river, and more people, whichever side they live on, begin to commute to jobs on the other side. The ferry stops operating, and the bridge becomes so dominant a feature of the residents' existence that it "affects their behavior, their way of thinking, their expectations, their way of life" (p. 16). It becomes difficult for them to even imagine life before the bridge was built. The bridge, Freidman observes, is a metaphor for law and the legal system. The bridge was built because of social forces and social change—in this case citizen pressure on government—and, once built, "it began to exert an influence on behavior and attitudes" (p. 16). Similarly, law may change because of changes and pressures in the larger society, and, once it does change, it then begins to influence behavior and attitudes. Thus, although this chapter discusses the influence of social change on law and that of law on social change separately, the reciprocal relationship suggested by the bridge metaphor should be kept in mind.

Before moving on, it will be useful to introduce some social science jargon with which many readers may already be familiar. In a potentially causal relationship between two variables (e.g., race affects income), the **independent variable** is something that affects or influences a dependent variable, and the **dependent variable** is something that is affected or influenced by an independent variable. In the race and income relationship, race is the independent variable and income is the dependent variable. These two terms are often used in discussing the relationship between law and social change. Thus, when we say that changes in society may bring about changes in law, we are treating social change as the *independent variable* and legal change as the *dependent variable*. On the other hand, when we say that changes in law may bring about changes in society, we are treating legal change as the *independent variable* and social change as the *dependent variable*.

This chapter reviews the large variety of work on law and social change. We start by looking at the impact of changes in society on changes in law and then examine the impact of changes in law on changes in society.

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The final section discusses law and social movements, an emerging subfield within the larger law and social change rubric that is attracting increasing attention from scholars of law and society and of social movements.

THE IMPACT OF SOCIAL CHANGE ON LAW: LAW AS DEPENDENT VARIABLE

Literature on the impact of social change on legal change falls into two broad types based on the scope of the changes involved. The first type is in the tradition of "grand theory" and examines how and why broad social changes produce far-reaching changes in the nature of a legal system, legal reasoning, and other fundamental dimensions of law. The second type has a somewhat more narrow focus, as it examines how and why certain social changes produce new legislation, new court rulings, new legal procedures, or other rather specific aspects of law. We will discuss both types of impact in this section.

Social Change and Fundamental Legal Change

The model for the first type, on the impact of broad social change on fundamental legal change, comes from the Historical School (see Chapter 2). Although the different theorists who made up this school took very different approaches, all were concerned with a basic social science question: how and why did law change as society became more modern (Cotterrell 2004)?

One of the Historical School's figures, English professor Sir Henry Maine (1822–1888), answered this question in his influential book *Ancient Law* (Maine 1864), in which he explored the evolution of law from ancient times to modern (nineteenth century) times. Recall from Chapter 2 that Maine is famous for his view that law changed *from status to contract*. In older societies, relationships were governed by power (or status) based on the relative social standing of the individuals in the relationship. The most extreme of relationships in terms of power differences was slavery. Over time, these traditional power-based relationships were replaced by agreements that were more voluntary and increasingly based on verbal and then written contracts. For Maine, then, a key dimension of modernization involved the rise of contractual relationships based on the voluntary agreement of the individuals in the relationship.

Other members of the Historical School included the three key founders of sociology whose work was briefly introduced in Chapter 2: Durkheim, Weber, and Marx (with collaborator Engels). Because their work on the impact of social change on law is so historically important and is still influential more than a century later, we examine it here in some detail.

Emile Durkheim: The Rise of Restitutive Law. French scholar Emile Durkheim (1858–1917) developed several themes that continue to resonate in social science theory and research today. Our discussion here is limited to the aspects of his work that are relevant for law and social change.

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Like several other scholars of his time, Durkheim sought to understand how modern (i.e., nineteenth-century) societies differed from the traditional societies characteristic of ancient times and still found today in many parts of the world studied by anthropologists. He wrote extensively about the social bonds that characterize both types of societies and spelled out his argument in his influential 1893 book, *The Division of Labor in Society* (Durkheim 1933 [1893]). In small, traditional societies, he wrote, people are very similar to each other in thought and deed, and these societies are said to be *homogeneous*. Social order in these societies arises from this similarity and homogeneity. Durkheim called this type of social order **mechanical solidarity**. Larger, modern societies obviously differ in many ways from their traditional counterparts. For Durkheim, a key difference was that modern societies are more *heterogeneous*, as people are more different from each other in their beliefs, values, and behaviors. Social order is, thus, more difficult to attain and maintain, said Durkheim, but is still possible because people have to depend on each other for the society to work. Durkheim called this type of social order **organic solidarity** and said it arises from the interdependence of roles that is a hallmark of modern society. This interdependence, he said, creates a solidarity that retains much of the bonding and sense of community found in traditional societies.

According to Durkheim, these two types of solidarity in turn affect the type of law a society has. In traditional societies, a deviant or criminal act offends the *collective conscience*, Durkheim's term for a society's belief and value system. Because the collective conscience in traditional societies is so strong (since people have similar thoughts and values), the response to deviance in such societies is especially punitive, as people react emotionally to an act that offends them. The type of law found in these societies, said Durkheim, was repressive, and he coined the term **repressive law** to characterize law in traditional societies. In modern societies, the collective conscience is weaker because people have different beliefs and values. Their response to deviant and criminal acts is thus less punitive and in fact takes the form of restitution, as it involves compensating an injured or aggrieved party for the harm done to them. Durkheim used the term **restitutive law** to characterize law in modern societies.

Durkheim's connection of the type of law found in a society to the nature and extent of social bonds it exhibits, and thus to its level of modernization, was a key insight for early law and society thinking and continues to have historical importance for the study of law and social change. Unfortunately, later scholarship (remember that Durkheim presented his argument in 1893, long before the advent of modern anthropological research) indicated that Durkheim may have misinterpreted the relationship between type of society and type of law. An oft-cited study by Richard Schwartz and James C. Miller (1964) used data on fifty-one societies that had been studied by anthropologists. This data set allowed Schwartz and Miller to determine whether each society had one or more of the following features of relatively

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modern legal systems: counsel, mediation, and police. Of these, police corresponds most closely to what Durkheim meant by repressive law, and mediation corresponds most closely to what he meant by restitutive law.

After determining the pattern of features that characterized each society, Schwartz and Miller noted how modern the societies were in other respects, for example, whether they had a division of labor (role specialization) and/or money. They then determined that police, as a proxy for repressive law, tended to be found only in the most modern societies, the opposite of what Durkheim argued, while mediation, as a proxy for restitutive law, was found in many traditional, premodern societies, again the opposite of what Durkheim argued. This finding led the authors to conclude, "[T]hese findings seem directly contradictory to Durkheim's major thesis. . . . Thus Durkheim's hypothesis seems the reverse of the empirical situation in the range of societies studied here" (p. 166).

Although Schwartz and Miller's study suggested that Durkheim may have reversed the relationship between modernity and type of law, a decade later another scholar challenged their refutation of Durkheim's hypothesis. Upendra Baxi (1974) argued that Schwartz and Miller erred in using the presence of police as a measure of repressive law because the presence of police by definition requires the existence of role specialization. Measured this way, repressive law could *only* be found in modern societies. For this reason, Baxi argued, the earlier two authors unwittingly "virtually insure that their counter-thesis is correct" (p. 647), because in simple societies that have no role specialization, police could hardly be expected to be found. Although Baxi did not mention it, his argument suggests that the use of a different measure of repressive law, such as whipping or other physical punishment, would have constituted a more appropriate test of Durkheim's hypothesis.

Although Baxi made a valid point, most scholars do think that Durkheim misinterpreted the modernity and law relationship. Although the old Tarzan movies and any number of other films and books have depicted traditional societies as savage in the way Durkheim envisioned, many traditional societies studied by anthropologists in fact rely on restitution to settle disputes and deal with their members who violate social norms (see Chapter 4). By the same token, many modern societies are very punitive in their approach to law. Although physical punishment is no longer used to bring criminals to justice, their incarceration is obviously much more punitive than restitutive, and the death penalty is still used in the United States. Although Durkheim may have misconstrued the law-modernization relationship, his thesis remains valuable for stimulating scholarship on law on social change and more generally on the idea that law reflects a society's beliefs, values, and social structure.

Max Weber: The Rise of Rational Law. Like Durkheim, German scholar Max Weber (1864–1920) developed many themes that continue to influence sociological theory and research. Our discussion focuses on the aspects of his work relevant for an understanding of law and social change.

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Weber (1978 [1921]) recognized that as societies become more modern and complex, their procedures for accomplishing tasks rely less on traditional customs and beliefs and more on rational (which is to say rule-guided, logical, and impersonal) methods of decision making in which the means have a reasonable connection to the ends and vice versa. The development of rational thinking, he said, allowed complex societies to accomplish their tasks in the most efficient way possible. For Weber, then, the key hallmark of modern society is the development of **rationality**.

Weber used the concept of rationality to understand how societies changed legally as they became more modern and complex. One major change involves the type of power characteristic of a society. In many traditional societies, he wrote, the major type of power is **traditional authority**. As its name implies, traditional authority is power that is rooted in traditional, or long-standing, beliefs and practices of a society. It exists and is assigned to particular individuals because of that society's customs and traditions. Individuals enjoy traditional authority for at least one of two reasons. The first is inheritance, as certain individuals are granted traditional authority because they are the children or other relatives of people who already exercise traditional authority. The second reason individuals enjoy traditional authority is more religious: their societies believe they are anointed by God or the gods, depending on the society's religious beliefs, to lead their society. Traditional authority is most common in preindustrial societies, in which tradition and custom are so important, but it continues to exist in some modern monarchies where a king or queen enjoys power because he or she comes from a royal family.

An important aspect of traditional authority is that it is granted to individuals regardless of their qualifications. They do not need any special skills to receive and wield their authority, as their claim to it is based solely on their bloodline or divine designation. An individual granted traditional authority can be intelligent or dull, fair or arbitrary, and exciting or boring, but the individual receives the authority just the same because of custom and tradition. As not all individuals granted traditional authority are particularly well qualified to use it, societies governed by traditional authority sometimes find that individuals bestowed it are not always the best leaders.

If traditional authority derives from custom and tradition, **rational-legal authority**, **a** second type of power, derives from law and is based on a belief in the legitimacy of a society's laws and rules and in the right of leaders to acting under these rules to make decisions and set policy. It is a hallmark of modern democracies, in which power is given to people elected by voters and the rules for wielding that power are usually set forth in a constitution, charter, or other written document. Whereas traditional authority resides in an individual because of inheritance or divine designation, rational-legal authority resides in the office that an individual fills, not in the individual per se. Thus, the authority of the president of the United States resides in the office of the Presidency, not in the individual who happens to

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be president. When that individual leaves office, authority transfers to the next president. This transfer is usually smooth and stable, and one of the marvels of democracy is that officeholders are replaced in elections without revolutions having to be necessary. Even if we did not voted for the person who wins the Presidency, we accept that person's authority as our president after the electoral transition occurs.

Rational-legal authority even helps ensure an orderly transfer of power in a time of crisis. When John F. Kennedy was assassinated in 1963, Vice President Lyndon Johnson was immediately sworn in as the next president. When Richard Nixon resigned his office in disgrace in 1974 because of his involvement in the Watergate scandal, Vice President Gerald Ford (who himself had become Vice President after Spiro Agnew resigned because of financial corruption) became president. Because the U.S. Constitution provided for the transfer of power when the Presidency was vacant and because U.S. leaders and members of the public accept the authority of the Constitution on such matters, the transfer of power in 1963 and 1974 was relatively smooth and orderly.

A third type of power discussed by Weber is **charismatic authority**, which stems from an individual's extraordinary personal qualities and from that individual's hold over followers because of these qualities. Such charismatic individuals may exercise authority over a whole society or only over a specific group within a larger society. They can exercise authority for good and for bad, as this brief list of charismatic leaders indicates: Joan of Arc, Adolf Hitler, Mahatma Gandhi, Martin Luther King, Jr., Jesus Christ, Prophet Muhammad, and Buddha. Each of these individuals had extraordinary personal qualities that led their followers to admire them and to follow their orders or requests for action. Weber emphasized that charismatic authority is often less stable than either traditional authority or rational-legal authority. The reason for this is simple: Once a charismatic leader dies, the leader's authority dies as well. Although the leader's example may continue to inspire people, it is difficult for another leader to come along and command people's devotion as intensely. After the deaths of Joan of Arc and the other charismatic leaders just named, no one came close to replacing them in the hearts and minds of their followers.

Charismatic authority can reside in a person who came to a position of leadership because of traditional or rational-legal authority. Over the centuries, several kings and queens of England and other European nations were charismatic individuals as well (while some were far from charismatic). A few U.S. Presidents—Washington, Lincoln, both Roosevelts, Kennedy, Reagan, and, despite his affair with an intern, Bill Clinton—also were charismatic, and much of their popularity stemmed from various personal qualities that attracted the public and sometimes even the press. Ronald Reagan, for example, was often called the "Teflon President," because he was so loved by much of the public that accusations of ineptitude or malfeasance simply rubbed off him (Lanoue 1988).

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Weber's emphasis on the rise of rationality and more specifically on the development of rational-legal authority in modern society was a major contribution to the understanding of law and society. Weber, in fact, used the development of law to illustrate the development of rationality. He wrote that legal procedures can be either *rational* or *irrational*, with the former characterizing modern societies and the latter characterizing traditional societies. Rational legal procedures involve the use of logic and reason to reach legal decisions and achieve other goals, while irrational legal procedures are based on magic or faith in the supernatural, including religion. In another distinction, legal procedures can also be *formal* or *substantive*. Formal in this context means that legal decisions are based on established rules, regardless of whether the outcome of a decision is fair or unfair. Substantive means that a legal decision takes account of the circumstances of individual cases in order to help ensure a fair outcome.

Weber said that law has become both more rational and more formal over time. Thus, most modern legal systems are characterized by formal rationality: Legal decisions are based on logic and do not consider whether their outcomes are fair or unfair, only whether the outcome makes sense in view of the facts and other circumstances of a case. This type of law, of course, creates the tension (see Chapter 1) that sometimes occurs between logical decision-making and justice and fairness. As the case in Chapter 1 involving misdiagnosis of brain cancer made clear, some decisions make absolute sense in view of the law governing a case and the facts involved in a case but at the same time yield outcomes that many of us would consider unjust, unfair, or at least unfortunate.

Karl Marx and Friedrich Engels: Law as Domination. Karl Marx (1818–1883) was a founder of sociology, but he was also a towering figure in the history of social and political thought. He and his frequent collaborator Friedrich Engels (1820–1895) left a body of written work that has influenced the course of history and also the development of sociology, political science, economics, and other disciplines.

In understanding the modernization of society, Marx and Engels' chief concern was the rise of capitalism as societies' economies evolved from ones that were based on agriculture to ones that were based on industry. According to Marx and Engels, every capitalist society is divided into two classes based on the ownership of the **means of production**—tools, factories, and the like. In a capitalist society, the **bourgeoisie** or ruling class owns the means of production, while the **proletariat** or working class, the other class, does not own the means of production and instead is oppressed and exploited by the bourgeoisie. This difference creates an automatic conflict of interests between the two groups. Simply put, the bourgeoisie is interested in maintaining its position at the top of society, while the proletariat's interest lies in rising up from the bottom and overthrowing the bourgeoisie to create an egalitarian society. As many readers may know, Marx and Engels

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thought that the effort of the bourgeoisie to maintain its top position involved the oppression of the working class.

How did law fit into Marx and Engels' thinking? Although law was not one of their chief concerns, they thought it aided the ruling class's oppression of the working class in two ways (Cain and Hunt 1979; Collins 1982). First, law helps preserve private property. Although this might mean that law benefits anyone, including the working class, who owns private property, in reality the ruling class owns almost all private property, and, in this way, the law benefits this class much more than the working class. Second, law provides legal rights for all and thus creates a façade of justice that obscures working-class oppression and helps the working-class to feel good about their society when in fact they should be angry about their oppression. In this way, law contributes to *false consciousness* that prevents the working class from realizing its revolutionary potential. Marx and Engels predicted that the working class would eventually revolt and create a true communist society in which everyone was equal and where the state, including the law, would eventually not be needed.

Related to Marx and Engels' views about law were their views about crime, which their various books and articles viewed in at least three ways. Sometimes they depicted crime as a natural and logical reaction of the working class to the squalid conditions in which they lived under capitalism. Thus Engels (1993 [1845]:48) wrote, "The worker is poor; life has nothing to offer him; he is deprived of virtually all pleasures. . . . What reason has the worker for not stealing? . . . Distress due to poverty gives the worker only the choice of starving slowly, killing himself quickly, or taking what he needs where he finds it—in plain English—stealing." In other writings, however, Marx and Engels depicted crime as political rebellion by the working class. In this regard, Engels (1993 [1845]:49) once wrote, "Acts of violence committed by the working classes against the bourgeoisie and their henchmen are merely frank and undisguised retaliation for the thefts and treacheries perpetrated by the middle classes against the workers." Although Engels likened crime to rebellion, he thought that it was unlikely to succeed as rebellion because it is only an individual act and because it leads to arrest and incarceration.

The third way in which Marx and Engels viewed crime by the poor was much more negative, as they sometimes called criminals the *lumpenproletariat*, by which they meant "the social scum, the positively rotting mass" of street criminals (Marx and Engels 1962 [1848]:44). Elsewhere Engels (1926:23) also called the lumpenproletariat "an absolutely venal, and absolutely brazen crew." It should be obvious from their language that Marx and Engels viewed the lumpenproletariat very negatively, partly because they thought it lacked the class consciousness that was needed for a working-class revolution.

As noted above, Marx and Engels devoted much less attention to law than to other aspects of capitalism that help oppress the working class.

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However, as Chapter 2 indicated, contemporary scholars have drawn on Marx and Engels' views about law and capitalism to develop a general Marxian perspective on law and society.

Roberto Mangabeira Unger: The Development of Legal Order. Long after the work of the theorists identified with the Historical School, other scholars have studied law and social change at the broad level in the grand theory tradition. A notable effort was Roberto Mangabeira Unger's (1976) *Law in Modern Society*. Unger first distinguished several types of law—customary law, bureaucratic law, and legal order—and then sought to explain the historical conditions that helped lead to the latter two types. *Customary law* consists of shared patterns of interaction and "mutual expectations that ought to be satisfied" (p. 49) and is the type of law most often found in small, traditional societies studied by anthropologists (see Chapter 2). *Bureaucratic law* consists of "explicit rules established and enforced by an identifiable government" (p. 50). A precondition for such law, then, is the existence of a state, or a society ruled by a central person of power and his or her staff; as such, states and bureaucratic law (e.g., ancient Rome) represent the next stage of political and legal development after traditional societies and customary law. Unger notes that both customary law and sacred law served historically to limit the scope and influence of bureaucratic law.

Legal order, the third and most modern type, is law that is autonomous from the state and general (or applicable to everyone) regardless of any individual's power, wealth, or personal connections. Autonomy and generality are, of course, the ideal of the rule of law (see Chapter 3) characteristic of Western democracies. Unger notes that legal order emerged in postfeudal Europe and that two preconditions made this emergence possible. One was *group pluralism*, or the existence of many social and political groups that compete with each other for power, with no one group consistently dominant. These groups need legal order, as defined by Unger, to ensure that no one group becomes dominant and that all groups play by the same rules, so to speak. In postfeudal Europe, the rise of the merchant class led to a struggle among three groups for power: the monarchy, the aristocracy (wealthy landowners), and the merchants. The latter two groups wanted a legal order to limit the monarchy's power, and the legal order that resulted gave all three groups some protection while also limiting their potential to achieve dominance. In effect, the emergence of a legal order was a compromise to help group pluralism continue without any one group succeeding.

The second precondition for the emergence of legal order was a *reliance on a higher divine or universal law* "as a standard by which to justify and to criticize the positive law of the state" (p. 66). This meant that a precondition for the emergence of legal order was a belief in natural law (see Chapter 3). This belief, and the conclusion among postfeudal Europeans that their emerging legal order was in accordance with the precepts of natural law, helped to legitimize and thus strengthen their new legal order. Unger adds

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that group pluralism and a belief in higher law were both necessary preconditions for the new legal order that emerged; either precondition by itself would not have been sufficient to produce this new, historically monumental belief in the rule of law.

Unger adds that law continued to change as Western democracies became *postliberal societies* and as their governments became so-called welfare states by intervening more than they did previously to redistribute economic resources and to regulate private transactions to ensure fairness and to prevent various social harms. Thus, the state has become more proactive in using the law to help disadvantaged groups in society, as law in Western democracies has become more concerned with substantive justice (see Chapter 3) and with policy considerations. These trends, he argues, had an important consequences for law: "They repeatedly undermine the relative generality and autonomy that distinguish the legal order from other types of law, and in the course of so doing they help discredit the political ideals represented by the rule of law" (p. 197). Ironically, then, according to Unger, the use of law by Western democracies to help disadvantaged groups has helped to undermine the rule of law for which these democracies are so renowned.

Social Change and Specific Legal Developments

The field of legal history is very fertile, and many studies exist of the social forces and developments that led to specific changes in legislation and in other various aspects of law and the legal system (the second type of impact of social change on law distinguished earlier) in the United States, Great Britain, and elsewhere. We obviously do not have room here to discuss all these studies, but a closer look at a few of them will help to indicate how social change has affected law in various eras. We begin with two examples from British history and then turn to some examples from U.S. history.

The Law of Vagrancy. An interesting legal issue today concerns the treatment of the homeless or other people who are vagrants or beggars. Some jurisdictions have been fairly proactive in arresting homeless people for vagrancy or other similar crimes, while others have adopted a "live and let live" policy that allows the homeless to live in the streets while offering them various social services. Critics of arrest policies say they violate the civil liberties of the homeless if they are breaking no other laws and tie up police and other legal resources unnecessarily. On the other hand, proponents say these policies make the streets safer and help downtown communities and business to thrive. New York City is one of the municipalities that has been following a proactive arrest policy, much to the dismay of homeless advocates. In 2002, one of the city's police officers refused to arrest a homeless man sleeping in a garage. The officer was suspended without pay for a month and was eventually put on probation for one year (The New York Times 2004). At the time of his suspension, a homeless man near the garage defended the officer: "He's a

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good guy—he's got a heart. He knows it's not a crime to be homeless, and the NYPD should be ashamed of itself" (Getlin 2002:A18).

In fact, it was not a crime to be vagrant early in the common law, but a law of vagrancy eventually was enacted in response to certain social changes. As recounted by sociologist William J. Chambliss (1964), the key decade in the history of the law of vagrancy was the 1340s. Before this time, people in England could beg or loiter without fear of arrest and legal punishment. In 1348, however, the bubonic plague devastated England, with about half the population eventually dying. The aristocracy (rich landowners) of England suddenly had a scarcity of labor, with far too workers remaining to work on their land. This meant that the landowners would have to compete for the relatively few workers who remained and, because of simple supply and demand considerations, they would have to raise the wages they offered.

To avoid doing so, they decided to increase the supply of labor by forcing people to work who previously did not work. They did this by inducing Parliament to enact the nation's first vagrancy law in 1349. This law made it a crime to beg, and it also made it a crime to move from one place to another to find better employment. The first provision meant that more people would have to work, and the second meant that they could not easily look for a job with better wages. Both provisions served to keep wages lower than they would have been otherwise. Chambliss (1964:68) writes that the new vagrancy law was "designed for one express purpose: to force laborers . . . 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." According to Chambliss's analysis, then, a terrible social change, the plague, led to the law of vagrancy that, though greatly changed since, still arouses controversy almost seven centuries later.

The Law of Theft. Suppose you bought a plasma TV from a store and arranged to have it delivered. If for some reason the driver of the delivery truck decided to keep the TV, you would certainly not be surprised if the driver were arrested for theft, and you might find it difficult to imagine that this act would not be illegal. Yet, in the early history of common law, this type of theft—the taking and possessing of an item by someone delivering it to the person who had purchased it—was *not* considered a crime punishable by law. As recounted by Jerome Hall (1952), the origins of the body of law that made this action a crime reflected the needs of an emerging mercantile (trade) economy, the forerunner of capitalism.

By the middle of fifteenth century, writes Hall, mercantilism was growing rapidly in England and much of the rest of Europe, whose economies before this time, of course, had been feudal and agricultural. (Recall Unger's discussion, discussed above, of the growth of mercantilism for the development of legal order.) At the heart of mercantilism is a transaction involving the selling of goods, often made by a third party, to a purchaser. Often purchasers will transport the goods home themselves (as you might with

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a plasma TV you had bought), but obviously sometimes the seller will have the goods delivered to the purchaser. During the early fifteenth century, this was routinely done by a *carrier*, the name given to the person, usually someone who was poor, who would drive a horse-drawn cart that carried the goods. During the time the carrier was transporting the goods, legal doctrine held they were technically in the carrier's possession. As such, if the carrier decided to keep the goods, no crime was committed, as it was thought that the carrier owned the goods while they were under the carrier's control. Fearing the loss of their job or violent reprisals by the seller or the purchaser, most carriers did not keep the goods for themselves even if doing so would not have been illegal. However, enough carriers did abscond with the goods that this type of behavior had become a significant problem for the growing mercantile class by the middle of the fifteenth century. However, it was not a problem for most poor people, who could not afford to buy and sell goods and who in some cases were the carriers absconding with the goods.

Perhaps not surprisingly, the issue reached the courts. In 1473, the landmark *Carrier's Case* established new and very consequential legal doctrine by declaring that it was now a crime for anyone transporting goods to keep the goods. According to Hall, this ruling protected the mercantile class's interests and reflected their growing power in English society and the lack of power among the poor. In effect, Hall wrote, the establishment of this new legal doctrine reflected the needs and influence of incipient capitalism. More generally, in this manner economic changes in society produced an important change in legal doctrine.

The Rise of Workers' Compensation. Workers who suffer an injury in their workplace or become ill because of workplace conditions are entitled to workers' compensation. This is a system financed by business contributions in which workers' medical expenses are ideally taken care of without the workers having to threaten to go to court. Workers are entitled to such compensation even if the injury they suffer stems from their own carelessness. For example, a construction worker who accidentally breaks a finger while using a hammer is entitled to workers' compensation even if the worker caused her or his own injury. Most readers probably favor workers' compensation in theory, and several have probably used it themselves or at least know friends or relatives who have used it. Workers' compensation is certainly so familiar that it almost seems as American as apple pie. Yet, workers' compensation has existed for only about a century, and before the late 1800s workers could not expect to have employers pay their medical expenses for injuries and illnesses suffered in the workplace. In fact, many Americans back then might have thought it illogical for employers to have to do so. The change in attitudes about this issue and the actual development of workers' compensation represent an interesting example of the impact of social change, in this case the advent of the Industrial Revolution, on a specific legal development.

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As recounted by law and society scholars Lawrence M. Friedman and Jack Ladinsky (1967) in an oft-cited article, "Social Change and the Law of Industrial Accidents," existing tort law at the beginning of the nineteenth century (and just before the dawn of the Industrial Revolution) allowed individuals to sue other individuals who injured them through such behaviors as assault, trespass, or slander. In addition, according to a legal doctrine called the *law of agency*, an individual was also allowed to sue an employer if the individual was harmed by the behavior of one of the employer's agents (employees): An innkeeper's employee might rob a guest; a pub's employee might allow meat to spoil and make diners ill. Even though the employer in such cases had not injured the individual in question, the employer was still held legally responsible for the malfeasance or negligence of the employee. As a practical matter, for the injured individual to recover any costs, it made much more sense for the claimant to be allowed to sue the employer than the employee, who typically would be fairly poor and in no position to pay medical expenses or other damages to the claimant.

The beginning of the Industrial Revolution some years later resulted in many more workplace injuries because industrial work (e.g., in factories and mines and on railroads) was much more hazardous than agricultural work. Existing tort law and the law of agency could have been logically adapted to apply to these injuries such that workers would have been allowed to sue their employers, but this did not happen initially. A key development here was the establishment of the **fellow-servant rule** in an 1837 English case, *Priestly v. Fowler*. In that case, Fowler, a butcher, had instructed one of his employees, Priestly, to deliver some goods that another employee (or servant) had loaded onto a cart. Because the cart was in fact overloaded, it collapsed on the way, and the accident broke Priestly's leg. Undoubtedly realizing that Fowler was in a much better position to pay damages than the servant who had overloaded the cart, Priestly sued Fowler rather than the servant. Rejecting his claim, the court's ruling in the case established the fellow-servant rule, which held that an employer was not responsible for injuries to an employee that were caused by the actions of another employee. An employee could sue the employer only if employer had personally caused the injuries. Yet, because the employer was hardly ever physically present in factories and mines and on railroads, the employer could never be held legally responsible for any injuries that did occur. Friedman and Ladinsky (1967:53) note the implications of this new legal doctrine:

> In work accidents, then, legal fault would be ascribed to fellow employees, if anyone. But fellow employees were men without wealth or insurance. The fellow-servant rule was an instrument capable of relieving employers from almost all the legal consequences of industrial injuries. Moreover, the doctrine left an injured worker without any effective recourse but an empty action against his co-worker.

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Five years after *Priestly v. Fowler*, the Massachusetts state supreme court rendered another influential decision in *Farwell v. Boston & Worcester Railroad Corporation* in 1842. In this case, a switchman's negligence caused a train engineered by Farwell to run aground; Farwell lost a hand because of the accident. Probably again recognizing it made more financial sense for him to sue the railroad company rather than the switchman, Farwell filed a suit for damages. The court ruled against him on the following grounds. Because some occupations are especially dangerous, employers have to promise more pay to induce potential employees to take on these occupations. In effect, then, the free market has already compensated these employees for doing this dangerous work, and the employer thus owes them no further compensation if, in fact, they are injured on the job. Workers know they are taking on the risks of their jobs for greater pay and do not deserve to be compensated if their jobs do in fact become risky.

The legal reasoning of both *Priestly v. Fowler* and *Farwell v. Boston & Worcester Railroad Corporation* was adopted throughout the United States, and, by the middle of the nineteenth century, American legal doctrine did not allow workers to sue employers for injuries caused by the negligence of other workers. This situation eventually changed for several reasons. One reason was the sheer number of industrial accidents that began to occur after the Civil War as industrialization continued apace and workplaces became more dangerous for more and more workers. By 1900, about 35,000 workers were dying every year from workplace injuries and another 2 million were suffering workplace injuries. A second reason was the start of the *contingency fee system*, in which attorneys take on lawsuits and do not receive any payment unless their plaintiff wins the case. This allowed injured workers or their families to sue without incurring legal expenses, and many did win their lawsuits despite existing legal doctrine. Their victories encouraged other injured workers to sue as well. As Friedman and Ladinsky (p. 61) observe, "Whether for reasons of sympathy with individual plaintiffs, or with the working class in general, courts and juries often circumvented the formal dictates of the doctrines of the common law." A third reason was labor unrest. Beginning in the 1870s, workers protested, went on strikes, and engaged in other agitation, and labor history is filled with many accounts of labor violence and strife during this period (Lens 1973; Taft and Ross 1990). One source of workers' dissatisfaction was their dangerous workplaces and the lack of compensation for the injuries they incurred.

All these factors eventually weakened the fellow-servant rule, and new legislation began to give injured workers greater rights to sue their employers. Some states, for example, established the *vice-principal doctrine* by giving workers the right to sue an employer when the workers were injured by the negligence of someone (the vice-principal) acting in a supervisory capacity for the employer, since this supervisor was no longer a mere fellow servant. Some states also gave workers the right to sue employers for injuries incurred because of unsafe workplaces and unsafe tools.

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These legal developments, along with the rising number of injury lawsuits and growing labor unrest, led the business community to begin to favor a system of relatively automatic compensation that would not involve litigation and in which negligence would not have to be proven. Such a system, businesses thought, would save money by avoiding expensive litigation and the threat of large damages by juries, and it would also help quell labor unrest. In 1910, the president of the National Association of Manufacturers appointed a committee to study this type of system. Wisconsin passed the first workers' compensation law in 1911, and most states had a similar law by 1920. In 1948, Mississippi became the last continental state to adopt a workers' compensation system.

Changes in Family Law. The family is one of our most important institutions and has undergone great change throughout history. Changes in the family in turn have produced changes in law regarding the family, or *family law*. A brief sketch of some of these changes during the nineteenth century and during the past few decades will illustrate this important aspect of law and social change in the United States.

Nineteenth-Century Changes. Several important changes in family law occurred during the nineteenth century because of the growing numbers of the middle class and their ownership of land and other property with some value. As Friedman (2004b:20) observes,

> The United States was, in a sense, the first middle-class country. . . . The United States was the first country in which ordinary people owned some capital: a farm, a plot of land, a house. Questions of title, inheritance, and mortgage do not enter the lives of people who have nothing and own nothing—serfs, tenant farmers, and the like. Once people have property, once they own something, they become consumers of the products of the legal system. Now family law becomes significant for them. A man is dead; he owned an eighty-acre farm. Is this woman his widow? Are these children legitimate heirs?"

As Friedman indicates, the fact that so many Americans, compared to people in other nations, owned property meant that it was important for them to have "clear legal lines of ownership" (Friedman 2004b:32). This in turn created pressures to develop three new (as of the nineteenth century) concepts in family law: common-law marriage, legal adoption, and judicial recognition of divorce. We examine each of these briefly.

Common-law marriage. Before the eighteenth century, a betrothed couple in England or the American colonies who wished full legal recognition of their marriage was required to have notice of the marriage announced publicly by church officials (a practice called the *banns*) and then to have the

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marriage performed in a church ceremony with witnesses to the marriage. Despite these requirements, many couples could not afford the cost of the wedding ceremony, were not members of a church, lived in rural areas where no clergy were present, or else were estranged from their parents and ran off together. All such couples then lived together as husband and wife (the modern term would be cohabitation) and were widely regarded by their communities as a married couple. These *informal* marriages (also called *clandestine* or *irregular marriages*) received some legal recognition but did not enjoy full inheritance and property rights (Grossberg 1985).

England tightened the law in 1753 with the enactment of the Marriage Act, which prohibited informal marriage by requiring parental consent, banns announced in a church for three consecutive Sundays, and religious ceremonies; Quakers and Jews were exempted from these requirements (Friedman 2004b). Although the Marriage Act did not apply to the American colonies, the colonies generally adopted its standards but also allowed licenses from magistrates to substitute for banns. Despite these requirements, informal marriages continued to occur during the colonial period and into the nineteenth century for the same reasons they had occurred before England's Marriage Act. The legal status of these marriages in the new nation was unclear, as they enjoyed only some of the legal rights as "official" marriages and, in particular, did not enjoy full inheritance and property rights. Given the decentralized government of the colonies and then the new nation, the legal status of informal marriage also varied from one jurisdiction to another.

As the nineteenth century progressed, however, informal marriage in the United States began to achieve full legal recognition, thanks to court rulings and new legislation, as *common-law marriage* (Friedman 2004b). Here the leading case was *Fenton v. Reed* (4 Johns. 52) in 1809, in which the New York Supreme Court granted full legal recognition to the informal marriage of the defendant, Elizabeth Reed, who had sought such recognition so that she could become the beneficiary of her husband's Revolutionary War pension. The court declared that no formal wedding ceremony was required for the couple to be considered as having legally married. Although a significant court ruling in Massachusetts a year later rejected the idea of common-law marriage, the concept eventually was adopted in most of the states.

Part of the reason for the new legal recognition of common-law marriages was the traditional American affinity for individual freedom and privacy and distaste for state authority (Grossberg 1985). Another major reason was the need to establish clear lines of ownership of property in a growing middle-class society: "[T]he common law marriage was hardly a historical accident. . . . Money, land, and inheritance: these were the points at issue. The common law marriage was a device for settling claims to property. It protected 'wives' of informal unions and their children when the marriage ended with the death of one party, usually the 'husband.' That was its major function" (Friedman 2004b:20). Other functions included protecting the

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reputations of common-law wives, since sex outside marriage was considered extremely immoral for women, and preventing children from being labeled as bastards.

Judicial recognition of divorce. The need to establish clear property rights also led to the judicial recognition of divorce. During the colonial period, legal divorce was rare; in effect, a couple could get a divorce only if their colony's governing assembly passed legislation that granted the divorce. A similar situation characterized England during this period, as divorce could be obtained only by an act of Parliament, a fact that effectively limited divorce to the aristocracy and other wealthy individuals. As the nineteenth century began, American couples in many states similarly could get divorced only if their state legislature passed an act to grant the divorce. As the century progressed, however, Americans began to demand faster and less expensive divorces because more of them had begun to own a farm, a house, or other property. If a marriage dissolved, they needed legal recognition of this dissolution to make clear the lines of property ownership.

Responding to this pressure, many states (following the examples of Massachusetts and Pennsylvania in the mid-1780s) began to pass laws that permitted judicial divorces, in which a spouse would sue for divorce on one or more of several grounds recognized by the new laws. Common grounds included adultery, cruelty, and desertion. Officially, this meant that divorce would still be difficult to obtain in the majority of marriages that had dissolved for none of these reasons, but, in practice, couples wishing divorce often pretended that one of these grounds existed in order to win a divorce. In some cases, a husband would register at a hotel and remove most of his clothing. A woman (not his wife) would then arrive and remove most of her clothing. Then a photographer would arrive and take a photo of them sitting on the bed that would later be used in court to prove adultery. The woman would then collect a small payment from the husband for participating in the charade, get dressed, and depart (Friedman 2004a).

By the mid-twentieth century, several states had liberalized their divorced laws by allowing couples to obtain a divorce on more lenient grounds such as incompatibility or by granting divorce if couples were no longer living together. No-fault divorce was a significant development that arose during the 1970s in response to growing pressure for faster and less expensive divorce and dissatisfaction by many judges and attorneys with the subterfuge that had been used to obtain divorce (Friedman 2004b; Jacob 1988). To obtain a no-fault divorce, one of the spouses merely had to attest that she or he wanted to end the marriage. California passed the nation's first no-fault law in 1970, with most other states following suit.

Legal adoption of children. Legal adoption of children was a practice found in ancient Rome, where it was used to ensure that a family without its own children would be able to continue its name, and it was also a practice found in civil law nations centuries later. Before the nineteenth century,

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however, legal adoption was a concept unknown in the English common law, which gave blood relationships primacy in property rights (Grossberg 1985). This was true in Great Britain as well as in the American colonies and then the new states. Many American children, of course, were raised by adults who were not their natural parents. Some children became apprentices and for all intents and purposes were raised by adults who were not their natural parents. More often, children would lose their parents because of death or abandonment. Death of a parent was a frequent event, as many women died during childbirth during the nineteenth century, and many parents died from disease or accidents. For all these reasons, orphans abounded and would then be cared for by relatives or other individuals (or by orphanages). However, none of the children raised by new parents had legal rights to inherit property from them.

The beginnings of legal adoption are found in laws enacted by state legislatures during the first half of the nineteenth century that named a specific child as the heir of a specific parent. Some of these children were relatives, and some had been born to the parent out of wedlock. A Kentucky law in 1845 allowed one Nancy Lowry to "adopt . . . her step son, Robert W. Lowry, Jr. . . . as her own child, who, in all respects, shall stand in the same legal relation to her as if she were his mother in fact." The law further stipulated that Robert was her heir "as if he were her own personal issue, born in lawful wedlock" (quoted in Friedman 2004b:99). Other states enacted legislation that authorized local courts to give legal status to children taken in by adults who were not their birth parents. Massachusetts enacted the first actual adoption law in 1851 that stipulated a process to be followed. This model soon spread to most other states, and by the end of the nineteenth century, adoption law was widespread (Grossberg 1985). Once again the ownership of property by increasing numbers of the middle class was a key social force, as it created pressures to give children of non-birth parents legal status to allow them to inherit.

Recent Developments. During the last few decades, other changes in family law have occurred because of several types of social and technological change, including developments in reproductive technology, the increase in cohabitation (persons living together without being married), and, as indicated earlier, because of the focus of gay and lesbian advocate groups on same-sex relationships. As these changes all have occurred, the law has had to respond to complex issues.

For example, as scientists developed techniques such as *in vitro* fertilization, in which a sperm and an egg are combined in a laboratory and the resulting embryo implanted in a woman's uterus, family law has struggled to adapt. Before this technology was developed, a large dimension of family law quite naturally concerned custody of children after divorce. Almost overnight, the rights of the embryos and their ownership in case of divorce became significant legal and moral issues. Couples often create several

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embryos in the hope that one or more will successfully implant and yield a birth. However, sometimes a divorce occurs while one or more of the embryos remain frozen. Should conventional custody provisions for (already born) children apply to frozen embryos? In the area of custody law, should frozen embryos be treated exactly like children? If a woman gives birth to an implanted embryo conceived with an anonymous donor's sperm, does that donor have any parental rights? Courts have had to deal with these issues for several years now, and the body of law in this area is still evolving. The use of birth surrogates and anonymous egg or sperm donors who later decide that they have an interest in their child complicates the legal and ethical questions already at stake.

The title of a report on changes in family law from reproductive technology aptly summarizes this development: "Modern Life Stretching Family Law: US Courts Grapple with Nontraditional Custody Issues" (Paulson 2004). A law professor cited in the report explained how courts are responding to these issues: "Courts are more willing now to try and think creatively about the issues of parenthood and family because [nontraditional arrangements] are a much more common thing. Family law cases, which for a long time were regarded as not very interesting from a theoretical point of view, are becoming much more complex" (quoted in Paulson 2004:1).

The report described several cases involving embryo/birth custody. In one Pennsylvania case, after four triplets from an implanted embryo were born, four individuals claimed custody as the babies' parents: the egg donor, the surrogate mother who carried the embryo, and the couple (which included the sperm donor) who paid the surrogate to do so. In a preliminary ruling, a judge awarded primary custody to the surrogate mother, but an appellate court later awarded custody to the biological father (Ayad 2006). In a California case, a woman was supposed to be implanted with an embryo conceived with anonymously donated sperm, but instead was implanted with an embryo conceived with a client's sperm and meant for the client's wife. The error was discovered after the woman's son was born, and the sperm donor and his wife claimed custody. A judge decided that she was the legal mother and that the sperm donor was the father. The woman won a suit against the fertility clinic for $1 million.

There have also been several cases involving the disposition of frozen embryos after a couple gets divorced. In a Tennessee case that is often cited, a couple had produced seven embryos that were frozen for later possible implantation. The couple had no legal document to outline what would happen with the embryos if the couple divorced. During their divorce, both spouses claimed custody of the embryos; the mother wanted to save them for later possible use, and the father claimed ownership so that he would not have to become an unwilling biological father. The trial court said that the embryos were "human beings existing as embryos" and awarded custody to the mother so that one or more of them could yield a birth. An appellate court reversed this ruling and gave custody to the father, who, the court said,

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had a constitutional right not to become a father against his will. The Tennessee Supreme Court affirmed this decision (*Davis v. Davis*, 842 S.W.2d 588 [Tenn. 1992]). In a Massachusetts case, a couple created four embryos in 1991 but then divorced in 1995. Each spouse claimed custody of the embryos. Citing the Tennessee decision, a trial court ruled for the father. In 2000, the Massachusetts Supreme Judicial Court affirmed that ruling in a unanimous verdict, stating that no individual should be forced to become a parent against her or his wishes (Goldberg 2000).

Cases involving same-sex couples or cohabiting heterosexuals have led courts in several states to adopt the concept of *de facto parenthood*, which goes beyond biological parenthood to consider a couple's original intent regarding birth and parenting, and the concept of *psychological parenthood*, which takes into account the bonds adults have to their child even if they are not the child's biological parent. A series of California Supreme Court cases decided in August 2005 illustrates the issues that the law has needed to address in the absence of legal recognition of same-sex marriage (Egelko 2005). All the cases involved lesbian partners with one or more children who later ended their relationships. In one case, a woman donated an egg to her lesbian partner, who later had twin girls. They raised their daughters together for six years but then separated. When the birth mother moved with the twins to Massachusetts, her former partner had no claim to custody or visitation because she had signed a standard hospital form for anonymous donors that waived any parental rights. She filed suit in California to regain these rights. The California Supreme Court ruled in favor of the plaintiff by declaring that both women were the twins' legal parents and thus had the same rights and obligations enjoyed by and required of heterosexual parents.

The court's decision was issued the same day as two other decisions involving reproductive technology in which the court similarly granted legal parenthood status to same-sex partners. In one of these two cases, a lesbian couple had separated, and the plaintiff had asked the court to order her former partner to pay child support for the plaintiff's biological children. In declaring that same-sex parents had the same legal obligations as heterosexual parents, the court's decision ordered the defendant to pay the requested child support. In the other case, two lesbian partners had signed a pre-birth agreement affirming that both would be parents of the child that one of them was bearing. After the partners separated when the child was almost two years old, the birth mother refused to let her former partner visit the child or share custody. The court's ruling granted the former partner these rights.

Although courts in other states had also granted visitation and other parental rights to same-sex couples with children who later ended their relationships, the California Supreme Court's rulings went further in granting same-sex parents all the rights and responsibilities of heterosexual parents, including custody, inheritance, and insurance coverage. A spokesperson for the California State Attorney General's office applauded the rulings: "These rulings recognize that these children have the same rights as the children of

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opposite-sex couples in maintaining ties to the people who helped raise them and presumably love them. The rulings also properly recognize the diverse nature of family relationships in today's world" (Egelko 2005:A1). Echoing a similar point, the legal director of the National Center for Lesbian Rights observed, "Same-sex couples are now able to procreate and have children, and the law has to catch up with that reality" (Paulson and Wood 2005:1).

Technological Changes and the Law. Reproductive technology, of course, is not the only technology that has changed during the past few decades. Personal computers, cell phones, DVD players, and other devices were unknown three decades ago, just as the motor vehicle was unknown just over a century ago. All these innovations and discoveries have led to various changes in the law because technological changes create new situations and problems that demand legal attention.

The invention of the automobile illustrates this dynamic. As automobiles became more common at the beginning of the twentieth century, many new traffic laws were necessary to govern the many aspects involved in their use, including, of course, obeying speed limits, using turn signals, and stopping at stop signs and traffic lights. New regulations were necessary to govern the manufacture of this new type of machine, the issuing of drivers' licenses, and the width of roads. Many laws have since been passed to enhance motor vehicle safety, including the requirements that all vehicles must contain seat belts, air bags, and a rear brake light separate from the taillights. The advent of the automobile also led perforce to automobile accidents, personal injuries, and deaths; this development led in turn to an increased number of personal injury lawsuits and played no small role in the development of the automobile insurance industry with its own set of regulations.

Before the automobile was invented, the invention of the railroad had a similar impact on the law. In particular, railroad accidents significantly influenced the development of tort law, most of which involves personal injury, during that period. As Friedman (1984:144) explains, "Indeed, the law of torts was insignificant before the railroad age of the nineteenth century—and no wonder. This branch of law deals above all with the wrenching, grinding effects of machines on human bodies. It belongs to the world of factories, railroads, and mines—in other words, the world of the Industrial Revolution. Basically, then, the railroad created the law of torts." In this regard, recall *Farwell v. Boston & Worcester Railroad Corporation*, the 1842 case discussed earlier that helped establish the fellow-servant rule in the United States that effectively denied injured workers financial compensation.

The railroad thus had an enormous impact on tort law, but it also (like the automobile later) necessarily led states and municipalities to pass new legislation and regulations to guide the bourgeoning railroad industry. Trains were dangerous instruments, and the railroad industry was rife with financial corruption. Various state railroad commissions were implemented to regulate the railroad industry, but these ultimately proved ineffective

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when confronted with the great wealth and power of the major railroad corporations. As a result, the federal government was forced to intervene with the establishment of the Interstate Commerce Commission in 1887. The legislation that created the commission imposed certain controls on the railroad industry, but did not go as far as railroad critics wished (Friedman 1984).

The advent of the personal computer during the 1980s revolutionized modern society in many ways, but, for our purposes, it also led to many legal changes. As just one example, before the computer era and the Internet, traditional copyright law could not imagine someone being able to make a copy of a copyrighted song or album and then making it instantly available to tens or hundreds of thousands of people worldwide for their free use. Copyright laws in the United States and other nations needed to be changed to encompass and ban such behaviors. For this reason, 160 nations met in 1996 to discuss revisions to their copyright laws, which at that time, according to a news report, were "under technological siege" (Lewis 1996:A1). Since then, the U.S. Supreme Court and other appellate courts have considered many cases dealing with file sharing and other possible copyright infringement, and the music industry succeeded in winning legislation that prohibits the uploading of copyrighted music to shared Web sites for free downloading. As another example, before the computer era, *hacking*, or breaking into Web sites or private computer files, was obviously a behavior that did not yet exist. When it began, existing criminal law did not cover this new type of crime, and new laws had to be written. Another new behavior was *cyberstalking*, or the use of computers (through e-mail and hacking) to stalk someone, often out of sexual interest. State governments and finally the federal government had to pass anti-cyberstalking laws to ban and punish this new type of crime in the computer era. Perhaps not surprisingly, "stalkers still roam on the Internet," according to the headline of a recent news report (Zeller 2006), and cyberstalking continues to be a problem.

THE IMPACT OF LAW ON SOCIAL CHANGE: LAW AS INDEPENDENT VARIABLE

About a generation ago, law was hailed as an effective vehicle for social change. The U.S. Supreme Court's 1954 decision in *Brown v. Board of Education* declared school racial segregation unconstitutional and helped usher in the Southern civil rights movement that changed the nation. In 1964 and 1965, the U.S. Congress passed the Civil Rights Act and Voting Rights Act, respectively. Among other provisions, the Civil Rights Act banned discrimination in employment and public facilities on the basis of race, gender, religion, and national origin, while the Voting Rights Act abolished literacy tests that parts of the South had used to prevent African Americans from voting. Again and again, the U.S. Supreme Court ruled in favor of the civil rights movement in cases that arose from arrests of civil rights demonstrators and from other events in the South. These and other legal actions on behalf of

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civil rights and civil liberties spurred many idealistic young people to apply to law school and indicated that law could be used to ameliorate many long-standing social problems and to benefit disadvantaged social groups. Reflecting this view, new social movements since that time, including the women's movement, the environmental movement, and the gay and lesbian movement, that arose during the 1970s all tried with considerable success to mobilize the law to help achieve their goals. In all these ways, law was seen, and is still seen by many, as a potent tool to improve society.

This view of law as a vehicle for social change may be overly optimistic, however. Although *Brown v. Board of Education* aroused a nation, school segregation remained entrenched in many parts of the South for more than a decade. Racial discrimination continued for years after passage of the 1964 Civil Rights Act. Most states do not yet have laws that fully protect gays and lesbians from discrimination, and the environment continues to be endangered despite noble and persistent efforts, many of them involving litigation, by environmental advocacy groups.

This brief overview raises two important related questions: (1) How effective is law (or to be more precise, a change in the law) as a vehicle for social change? and (2) Under what conditions is law (or legal change) more or less effective in achieving social change? There is no easy answer to the first question: although much evidence suggests that law can be a very effective vehicle for social change, other evidence indicates that law is a rather ineffective tool for social change. A fair if indecisive conclusion is that law is a somewhat effective vehicle for social change whose effectiveness varies according to certain conditions. A major goal of this section is to elucidate these conditions and, more generally, the factors that promote or impede the impact of law on social change.

Aspects of the Law → Social Change Relationship

Before proceeding further, we need to distinguish certain aspects of the legal change → social change relationship.

Sources of Legal Change. Legal change can involve new legislation, a new court ruling, a new executive order, new administrative law, or changes in legal procedure. Whatever form it has, legal change emanates from several sources. Two major initiators of legal change may be distinguished. First, some legal changes are initiated primarily by a social reform group or larger social movement, as when the NAACP Legal Defense and Education Fund initiated the case that ended with the *1954 Brown v. Board of Education decision* (Klarman 2007). This type of legal change is the subject of recent scholarly attention, and we examine it in a separate section below. Second, some legal changes are initiated primarily by legislators or other government officials themselves, although in practice they are usually responding at least in part to the concerns of certain interest groups including political lobbyists.

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The social change desired varies from one situation to another, but in general involves changes in people's behavior or attitudes or changes in social policy or the structure and functioning of social institutions such as the family.

Direct and Indirect Impact of Law. In another distinction, the impact of law on social change, and more specifically on behavior to simplify the discussion, may be either direct or indirect (Dror 1969; Handler 1978; Scheingold 1974). *Direct* social change occurs when legal change (e.g., new legislation or a court ruling) itself affects behavior. Changes in behavior happen for some of the reasons underlying people's obedience to law more generally (Tyler 2006) (see Chapter 2), with the particular reason depending on the law and behavior in question: (1) fear of legal sanctions that vary from law/behavior to the next but may include a fine, arrest, or loss of business among other sanctions; (2) a felt obligation to obey the new law simply because it is law (recall here Weber's concept of legitimate authority); (3) peer pressure or other informal legal sanctions. When scholars try to determine how effectively law changes behavior, they are often trying to determine the direct impact of law for any of these reasons.

Law may also have an *indirect* impact on social change. This can occur in either of two ways. First, a change in law may first affect a social institution, and the resulting changes in this social institution may then bring about changes in behavior or attitudes (Dror 1969). Suppose, for example, same-sex marriage one day becomes a legal option in the majority of the states thanks to new legislation, state constitutional amendments, or court rulings. If, as would almost certainly happen (and as has happened in Massachusetts, the only state to permit same-sex marriage), more same-sex couples then get legally married, the increase in such marriages would be a direct effect of this legal change. If the growing familiarity of same-sex marriage then increases public acceptance of such marriage, this latter change would be an indirect effect of the initial legal change.

Attitude change of this sort occurs for certain social psychological reasons. One reason involves the important concept of *cognitive dissonance* (Festinger 1957; Hyman and Sheatsley 1964). When people hold beliefs incompatible with their situation, they experience discomfort, or dissonance, that prompts them to change their beliefs in order to reduce their dissonance. Legal change may thus lead to attitude change through cognitive dissonance. To take an example from William K. Muir, Jr.'s (1967) study of attitude change after the U.S. Supreme Court banned prayer in the public schools in its 1963 *School District of Abington Township v.Schempp* decision, some educators who favored school prayer experienced cognitive dissonance after *Schempp*, especially because they considered themselves patriotic and respected the Supreme Court. To reduce their dissonance, these educators changed their beliefs and agreed with the Court that prayer did not belong in the public schools.

In addition to its effects through changes in a social institution, law may have an indirect impact in a second way: a legal change may give a disadvantaged group a sense of legal entitlement by suggesting that its

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claims and grievances are entitled to legal redress and thus a new hope that social change is possible. Both these perceptions in turn may spur the group into political action that aims to achieve beneficial social changes. We return to this process below in our discussion of law and social movements.

With the distinction between the direct and indirect effects of law on social change in mind, we now turn to certain problems and issues that may limit the impact of law on social change. These limitations pertain more to law's direct impact on social change than to its indirect impact.

The Limits of Law as a Social Change Vehicle

Attempts to use the law as an instrument of social change often encounter legal, political, and social obstacles; the particular obstacles depend to some degree on the nature of the social change desired. Although we focus here on obstacles facing government-initiated attempts to use the law for social change, we will examine the obstacles facing social reform group-initiated attempts in the section below on law and social movements.

A major problem that limits the impact of law arises from the fact that many of the legal changes initiated by government aim to change people's behavior: to reduce drunk driving, to reduce illegal file sharing on the Internet, to eliminate polygamy (to use an example discussed just below), and so forth. Some of these efforts involve behavior to which people are strongly committed for cultural, moral, financial, or other strongly held reasons. As the previous chapter discussed for certain types of crime, such behavior is often resistant to change by new legislation or court rulings. This problem is exacerbated when the behavior in question tends to occur in private rather than in public, as it can then be very difficult to detect. Of course, many practices are both private and strongly held, and these are precisely the kinds of behaviors that may be resistant to legal change.

An oft-cited example here is polygamy among the Mormons in Utah in the nineteenth century (Gordon 2002). According to Mormon religious beliefs, it was appropriate and even expected for men to have several wives. Most of the rest of the nation considered polygamy immoral, and the resulting conflict took on important legal dimensions in 1862, when Congress enacted the Morrill Act that made polygamy a federal crime. Polygamy continued, however, as many Mormons simply disobeyed the new law. Several years later, a Mormon who was arrested and convicted for violating the Morrill Act took his case to the U.S. Supreme Court (*Reynolds v. United States*, 98 U.S. 145 [1878]) and argued that his conviction violated his First Amendment rights to freedom of religion. The Court upheld his conviction, the Morrill Act remained the law of the land, and Congress passed a series of measures designed to strengthen its anti-polygamy effort. Yet even after these developments, polygamy persisted until the Mormon church officially abandoned it in 1890. Even after it did so, however, some Mormons continued to practice polygamy for many more years.

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Another problem in using the law to achieve social change involves the consistency of the response by legal and political authorities to a legal change. For a new law to have an impact on behavior, police, judges, and other legal and political authorities need to apply the law consistently. If police fail to make arrests under the new law or judges fail to sentence people as the new law dictates, the impact of the law will be diluted. A primary reason for the failure of criminal justice authorities to apply a new criminal law stems from the system capacity considerations discussed in the previous chapter. They realize that a greater number of arrests and/or longer prison terms will overload the criminal justice system to its detriment and, in the long run, endanger public safety. In less common reasons, some legal authorities may fail to apply a new law because they simply disagree with its substance or because they think compliance will divert their time and attention from more important matters. Whatever the reasons, the problem of inconsistent application is yet another obstacle that limits the impact of certain legal changes.

Examples of this problem abound. One is drunk driving, which, as Walker (2006) observes, involves a behavior committed by people who, as representative of the general public, should fear all the consequences (including publicity and family members' reactions) of arrest and harsh sentences and thus change their behavior if new legislation cracks down on drunk driving through mandatory sentencing and other measures. However, new legislation of this type often does not accomplish its intended impact for a variety of reasons (Ross 1992; Walker 2006). Sometimes short-term reductions in traffic accidents do result from such new legislation, but over time these reductions dissipate as accidents return to their previous levels. Drivers may drink less or otherwise not drink and drive in the wake of new legislation, and police may initially increase their stops and arrests of drunk drivers. Within a relatively short time, however, things get back to normal. People rightly recognize that their chances of being stopped for any one incident of drunk driving are very low, and begin to drink and drive the way they did before the new legislation. In another problem, police do not like traffic stops for many reasons, including the dangers they pose to police and the time they take away from crime-control activity, and thus eventually shy away from aggressive patrolling of drunk driving after publicity surrounding the new drunk driving crackdown has faded. Even if drunk drivers end up in court, plea bargaining and other decisions by prosecutors and judges in the interests of system capacity help drunk drivers avoid the harsh mandatory sentencing that is often part of new legislation aimed at drunk driving. Thus, although many reasons may explain the relatively limited impact of drunk driving legislation, the inconsistent application of such legislation by police, prosecutors, and judges is one important reason.

Another example of inconsistent response by legal authorities involves the "three strikes" laws passed in the 1990s that mandated life imprisonment or very long prison terms for someone convicted of a second or third felony.

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Although these laws have not reduced serious crime for the reasons outlined in the previous chapter's discussion of the problems with deterrence, the lack of consistent application is another reason that minimizes any conceivable effect they could have had. Although many states enacted "three strikes" laws, Walker (2006:60) observes that outside of California "prosecutors in most states were simply not using the law." Instead, they used the possibility of a three-strikes prosecution to persuade defendants and their attorneys to agree to a guilty plea. Moreover, in California, prosecutors in Los Angeles used the law quite often, but their counterparts in San Francisco used it only rarely. As this example illustrates, legal officials may adapt to legal changes in ways legislators and other parties responsible for the legal changes did not intend. Legislation that dramatically increases the potential penalty for a crime may force attorneys and judges to devise ways of getting around the law to avoid various system capacity and related problems. This situation reflects an important dynamic: "An increase in the severity of the penalty will result in less frequent application of that penalty" (Walker 2006:62). This dynamic helps explain why the impact of certain legal changes will not achieve their intended impact.

Problems in Assessing Legal Impact

It is often difficult to accurately assess the actual impact that legal change may have. Several reasons account for this difficulty.

First, legal impact may occur in the short term but not persist beyond an initial phase. The public, organizations, or other targets of legal change may initially comply and behave in the way a new law intends, but over time they may revert to their previous behavior. Legal authorities may initially actively enforce a new law but later slacken their enforcement. Drunk driving legislation provides a telling illustration of these problems.

Second, even if legal change achieves its intended impact, in the long run it may have negative unintended effects, as the example of 1960s Congressional legislation and the South's voting tendencies indicates. Although, as noted earlier, the 1965 Voting Rights Act increased voting levels among Southern African Americans, it had an unintended indirect effect that no doubt dismayed the Democratic-controlled Congress, which passed the voting legislation, and President Lyndon Johnson, who signed it. The Voting Rights Act was so unpopular in the South, a strong Democratic region, that many white Southerners began to switch their allegiance to the Republican Party (Abramsky, 2007). This process accelerated under Presidents Nixon and Reagan until most Southern states finally became "red" states, or Republican strongholds at the federal level.

Third, if behavior or attitudes change after some legal change, it is sometimes difficult to know why these changes occurred and, more specifically, whether these changes stemmed from the legal change. For example, say a state legislature passes a law that raises the financial and other legal

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penalties for speeding. Six months later, a study is published that finds that traffic tickets for speeding are down and that (through camera surveillance) fewer cars are in fact speeding. Although this study does suggest that the law worked as intended, it is possible that other factors were at work. Suppose gasoline had become more expensive around the time of the new law; if so, drivers might have decided to drive more slowly in order to save gas and money. If the six-month study period included a harsh winter, it is possible that car speeds lowered because road conditions were hazardous. Studies of legal impact also often lack adequate control groups that would permit them methodologically to rule out these kinds of nonlegal factors. Thus, in our traffic example, if speeding apparently reduced in the state that passed the new law, it would be helpful to study any possible speeding changes in adjoining states. If speeding in these states also declined in the absence of any new speeding legislation, this would suggest that some other factor prompted the speeding reductions in the state that did have the new legislation.

The example of zero-tolerance policing in the 1990s provides a real-life example of the need for control groups in studying legal impact. Such policing involves frequent arrests for minor offenses such as loitering and disorderly conduct; the expectation is that some of the people arrested will have committed (and be likely to commit) more serious offenses, and this very visible policy of arrest will deter other persons from committing crime. After New York City initiated zero-tolerance policing in the 1990s, its crime rate plummeted, and the New York mayor and police commissioner received national credit for their city's crime rate decline. However, crime declined in several other cities, including Boston, Dallas, Los Angeles, San Antonio, and San Diego, that did not institute zero-tolerance policing, and New York's crime rate had actually begun to decline *before* it began zero-tolerance policing. These developments all suggest that New York City's policy might not deserve the credit it received (Karmen 2001).

A fourth and related problem regarding accurate assessment of legal impact concerns the actual reasons for any behavior changes that do occur. Recall that people have many reasons for obeying the law: fear of punishment, belief in the legitimacy of law, habit, peer pressure, and self-interest. Thus, although a legal change may affect behavior, it is sometimes difficult to determine exactly why the behavior did alter because of the legal change. An example of a stop sign illustrates this problem (Kidder 1983). Suppose a stop sign is installed at an intersection that earlier had only a blinking yellow light that most drivers largely ignored. The stop sign does seem to work: Drivers at least slow down in the typical "rolling stop" before proceeding through the intersection, and some drivers stop completely. What we cannot easily determine is exactly why they are slowing down or stopping because of this "legal change." Do they fear that a hidden police car will suddenly appear and result in a traffic citation? Do they stop (or slow down) because they feel obliged to obey the law? Do they stop simply because they are accustomed to stopping at stop signs? Is there someone in the car with them

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who would react negatively if the driver did not stop, as research suggests (Feest 1968)? Are they stopping primarily because they are concerned about a possible collision if they do not stop? As all these possibilities suggest, people may obey a new law for a variety of reasons, and even if the law does have its intended impact, we may not be able to determine the exact reasons for the impact.

A final problem concerns the intent of the legal change whose impact is being assessed. In order to know whether a legal change has its intended impact, it is obviously necessary to first know what specific impact was intended. However, the intended impact that might be inferred by the public or by researchers may not, in fact, be the impact that the initiators of the legal change actually intended. Kidder (1983) observes, for example, that lawmakers who put up stop signs seemingly want to reduce traffic accidents. However, it is possible that their real intent, or at least part of their intent, is to increase municipal revenue from the many new traffic fines that people who run the new stop signs will now have to pay. In a less cynical possibility, Kidder (1983:140) also observes that many new laws or court rulings are compromises stemming from political struggles and thus have not just one intent but "many intents." Thus, a researcher who wants to study the impact of a new law or court ruling may not know which intended impact to study.

Conditions That Maximize the Potential Impact of Legal Change

The many problems, obstacles, and issues discussed in the preceding sections indicate why the impact of law varies from one situation to another and also why this impact may be lower than the initiators of a legal change may prefer. In a classic article, William M. Evan (1965) emphasized that the impact of law is likely to be highest under certain conditions that are not always possible to achieve. We present each of these conditions with some explanation.

1. ***The source of the law should be perceived as authoritative and prestigious.*** Evan distinguishes four sources of lawmaking: administrative, executive, judicial, and legislative. Because the average citizen probably perceives the legislature to be the proper source of lawmaking and thus the most authoritative and prestigious of all four sources, laws from legislatures are apt to have more impact than laws from the other three sources. The impact of executive orders would be the next highest, followed in turn by administrative decisions and finally by judicial decisions. All things equal, Evan added, legislative laws are especially desirable when the intended social change is likely to encounter great resistance. For this reason, he hypothesized that Southern school desegregation might have occurred more quickly if it had been ordered by Congress (which, of course, was not about to do so) than by the Supreme Court in the *Brown* decision.

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2. ***The rationale for the new law should emphasize its continuity and compatibility with existing institutionalized values.*** Emphasizing that a new law conforms to the values embodied in, say, the Declaration of Independence or the Constitution should help ensure obedience to it.
3. ***Publicity surrounding a new law should emphasize that similar laws have proven helpful elsewhere with few or no adverse effects.*** This again helps overcome potential resistance. To take a contemporary example, advocacy groups urging legalization of same-sex marriage might point to the experience of Massachusetts after its highest court granted legal status to same-sex marriage in 2004: no evidence has shown that this ruling weakened the institution of heterosexual marriage or otherwise had any negative practical impact.
4. ***A new law should mandate that any changes it requires should occur quickly rather than slowly.*** Evan feels that the requirement of fairly swift compliance would help ensure compliance with a new law by minimizing the opportunity for organized resistance to the law to build. In this regard, one possible reason for the successful resistance to *Brown v. Board of Education* is that the decision allowed Southern communities to proceed "with all deliberate speed," a phrase that gave these communities time to plan and implement their successful resistance to the decision.
5. ***Legal authorities must apply and enforce a new law consistently and without hypocrisy or corruption.*** We have already discussed this problem earlier. In discussing this condition, Evan noted the corruption of police during the Prohibition era that helped ensure that Prohibition would fail.
6. ***Positive as well as negative sanctions should be used to help ensure compliance with a new law.*** Negative sanctions—punishment—may prove effective, but they can also cause resentment and other problems that undermine compliance with a new law. A large body of research from the field of social psychology finds that positive sanctions—rewards—are often more effective than negative sanctions in affecting behavior. Most new laws threaten legal sanctions and do not promise any reward for compliance. Evan speculated that school desegregation might have occurred sooner in the South if the federal government had granted funds for teachers' salaries and school construction and even tax rebates to communities that desegregated their schools.
7. ***Effective protection and resources should be provided for the rights of individuals who would suffer if other people violate or evade the new law.*** Sometimes, as happened in the South after *Brown*, people have to go to court to win rulings designed to force compliance with a new law. Evans believed that these efforts are more likely both to occur and to succeed if government agencies or private organizations provide the necessary funds and legal resources needed for these efforts.

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Taken together, then, these seven conditions theoretically help ensure that a new law will achieve its maximum impact. In practice, it is often difficult for all of these conditions to exist for any new law. As noted earlier, the Congress was not about to order school desegregation in the South in 1954 when the Supreme Court rendered its *Brown* verdict. The fact that the order for school desegregation came from the Supreme Court rather than from the Congress, a more authoritative source of lawmaking, helped maximize Southern resistance to school integration.

LAW AND SOCIAL MOVEMENTS

Social movements are a familiar part of the landscape in the United States and other nations. Although many definitions of social movements exist, they may be regarded as sustained, collective efforts by individuals and groups lacking political power and influence to achieve social, economic, political, and/or cultural change (Meyer 2007). To achieve such change, social movements use a variety of strategies and tactics including civil disobedience, marches, rallies, and other types of protest. Although social movements are, perhaps, most known for protest, they often also use the law to help advance their aims. More specifically, they file lawsuits to change or end a government or business practice or policy, to alter the structure or functioning of a social institution like the family and so forth. Their use of the law for this purpose is called *social movement litigation* or, more popularly, **legal mobilization** (Zemans 1983). Earlier parts of this chapter briefly discussed examples of legal mobilization by the Southern civil rights movement and other movements of the last several decades.

At the same time, law is also used *against* social movements in what may be called the *legal control of movements* or, more popularly, **legal repression**. Law enforcement agents may infiltrate or conduct other kinds of surveillance on movement groups and individuals, and police may arrest, and district attorneys may prosecute activists who engage in illegal acts of protest. Sometimes, activists are arrested or otherwise legally harassed even if they have not broken the law. As we shall see, the Southern civil rights movement was again a focus for such legal repression.

In all these ways, law often plays a vital role in the struggle between social movements and their opponents, and the interaction between law and social movements forms a key dimension of the law and social change nexus (Marshall 2005a). Accordingly, this section reviews important issues and findings from the law and social movement literature. Reflecting common usage, we will use the terms *social movements* and *social reform groups* interchangeably.

Use of Law by Social Movements

A basic issue in the study of legal mobilization is whether it provides social movements an effective tool for achieving their objectives. Scholars disagree regarding the impact of legal mobilization in this regard. Some think that

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law is a potentially very effective tool for helping social movements (Eskirdge 2001), while some think that law is ineffective and even counterproductive for movements (Brown-Nagin 2005), with one scholar famously asserting that the courts offer social movements only a "hollow hope" for achieving change (Rosenberg 1991). Still other scholars take a middle ground—one that is becoming more popular—in concluding that legal mobilization is sometimes effective and sometimes ineffective, depending on the particular change sought and other conditions. As a leading scholar in this area, Michael McCann (2006:35) concluded,

> Legal mobilization tactics do not inherently empower or disempower citizens. Legal institutions and norms tend to be Janus-faced, at once securing the status quo of hierarchical power while sometimes providing limited opportunities for episodic challenges to and transformations in the reigning order. . . . How law matters depends on the complex, often changing dynamics of the context in which struggles occur.

Legal mobilization has proven to be a fairly effective strategy for several social movements and social change efforts during the past few decades. The *Brown v. Board of Education* decision was a significant legal victory for the early civil rights movement, even if many Southern communities resisted school desegregation for more than a decade. The environmental movement has also achieved significant legal victories (Coglianese 2001). The equal employment opportunity movement succeeded in winning federal legislation and court rulings that banned employment discrimination based on gender, national origin, race, and religion. This general prohibition, along with subsequent victories in lawsuits brought later against businesses allegedly violating EEO laws, is often cited as illustrating the potency of legal mobilization (Burstein 1994). Litigation has also been an effective tactic for the animal rights movement, whose lawsuits have helped win it publicity, influenced public opinion, and pressured alleged animal abusers to change their practices to avoid the economic cost of dealing with the lawsuits and the practical cost of possibly losing them (Silverstein 1996).

The Limits of Legal Mobilization. Despite victories such as these, many scholars, as noted above, question the effectiveness of legal mobilization for social movements. Several concerns underlie their skepticism.

First, the courts and other law-generating branches of government are often unsympathetic to the claims of social reform groups and the larger social movements to which many such groups belong. This lack of sympathy makes it difficult for social reform groups to win legal victories. In the 1970s, for example, groups opposed to nuclear power plants brought several lawsuits to halt construction of various plants, but judges routinely refused to

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grant the legal relief sought by the antinuclear groups (Gyorgy 1979). And although the U.S. Supreme Court eventually came to the aid of the Southern civil rights movement, most state courts and lower federal courts were hostile to the legal claims of the movement (Barkan 1985).

Second, social reform groups typically lack the financial and legal resources and acumen typically enjoyed by the corporations, government agencies, and other established interests that are often the targets of legal mobilization. Although law theoretically offers them a level playing field to present their grievances, this disparity again makes it difficult for social reform groups to win legal victories. This problem is compounded by the fact that litigation is both time-consuming and very expensive. These twin problems aggravate the resource disparity just mentioned and again limit the potential of legal mobilization.

Third, certain rules of judicial procedure and legal doctrine may also pose various obstacles (Handler 1978). Social reform groups need legal *standing* (see Chapter 2) to initiate a lawsuit. The early environmental movement often encountered standing issues in its attempts to win litigation to reduce pollution, save endangered species, or achieve other environmental victories (Large 1972). Courts must also have proper *jurisdiction* to hear an issue; not every issue is justiciable at all, and some issues are justiciable only by certain courts (for example, state versus federal). During the Vietnam War, various groups brought lawsuits to have the war ruled unconstitutional, but courts routinely either refused to hear these suits or else ruled against the plaintiffs on the grounds that the war was a *political question* and thus not one that courts should consider (Ely 1993).

Fourth, even if movements win court rulings and other legal changes, the targets of these changes often vigorously resist these changes. Thus, legal victories by a social movement may be a victory in name only and not actually prompt much change in social policy or institutional behavior. This problem is especially acute when the movement's legal victory involves a court ruling, as courts lack effective enforcement powers. An oft-cited example of this difficulty again comes from the civil rights era, when Southern governments effectively resisted *Brown v. Board of Education* and other federal court rulings through a variety of legal stratagems. As one scholar observed,

> It is ironic that the white South was extremely successful in minimizing the impact of the desegregation decisions of the federal courts without arousing the indignation of the rest of the nation. . . . [African Americans came to realize] that although they had won a new statement of principle they had not won the power to cause this principle to be implemented (Killian 1968:70).

Fifth, litigation strategies by social movements may ironically impede their goals by channeling activists' energy into legalistic pursuits that seek only minor changes and turning their attention away from various types of

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protest that may prove more effective in the long run (Marshall 2005a). The contemporary environmental movement has been criticized in this regard for pursuing an overly legalistic strategy with narrow goals at the expense of a more transformative strategy relying more heavily on the grassroots organizing and protest tactics that proved effective a generation ago (Coglianese 2001). The histories of the labor and gay and lesbian movements also provide examples of legalistic strategies pursued at the possible expense of protest and other political action that may have proven more effective (Anderson 2005; Forbath 1991).

A final problem involving legal mobilization recalls the structuralist Marxist argument outlined in Chapter 2. Even if social movements win court rulings or new legislation, the impact of these victories may be primarily symbolic if, as often happens, they yield only minor improvements to serious, intractable problems (Sarat and Grossman 1975). These minor improvements may nonetheless appease social reform groups and their constituents and help legitimate the power structure and the *status quo*. In this manner, legal victories of social reform groups may be Pyrrhic victories that in the long run help preserve social inequities in power, wealth, and other resources.

An influential study reflecting many scholars' skepticism about the effectiveness of legal mobilization was Joel Handler's (1978) examination of litigation by the civil rights, consumer, environmental, and welfare movements of the 1960s and 1970s. Finding that their legal mobilization produced only limited success at best, Handler (1978:209) concluded,

> In sum, social-reform groups find it difficult to obtain tangible results directly from law-reform activity. It can be accomplished, and numerous cases have been discussed where such results have been obtained, but, on the whole, special circumstances are needed. . . . Social-reform groups seek out the courts because they are weak and have lost in the political process, and there is only so much that courts can do by way of direct, tangible benefits.

Indirect Benefits of Legal Mobilization. Although scholars thus disagree on the extent to which legal mobilization can achieve significant legal victories with far-reaching tangible results, they generally do agree that legal mobilization may provide social movements and social reform groups with significant *indirect* benefits (McCann 2006; Scheingold 1974). Perhaps the most important indirect benefit was noted earlier: even if legal mobilization does not produce significant tangible results in and of itself, it may still give aggrieved groups a sense of legal entitlement by suggesting that their claims and grievances are in fact their legal rights. This sense may in turn give them new hope for social and political change and spur members of these groups to work for such change. As Friedman (1975:234) puts it: "Vindication of rights feeds on its own success. Success in one claim encourages and reinforces more claims and gives others a model and hope of success."

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A widely cited example is once again the 1954 *Brown v. Board of Education* decision. As already mentioned, *Brown* did not quickly end Southern school segregation: Southern schools so resisted the decision through legal and political machinations that only 7 percent of African American children in the South were attending desegregated schools by 1961. At the same time, however, *Brown* galvanized African Americans in the South, among whom its effect was said to be "electric" (Lomax 1962:74). It gave them new hope for change by suggesting the federal government would now pay attention to the evils of segregation and is widely credited with helping to spur the massive civil rights protests that captured national attention in the ensuing decade (Morris 1984). Other civil rights litigation efforts had a similar mobilizing effect on movement activism in the South (Polletta 2000).

A more recent example of litigation acting as a catalyst for political action involves the movement for gender pay equity. In a study of this movement, Michael McCann (1994) found that the pay increases won by the movement were relatively modest. More important for the women workers he interviewed was the increased sense of political empowerment the women gained from the legal victories that won them their modest pay increases. They gained a new sense of their rights as workers and a new sense of their discrimination as women workers. Their increased rights consciousness in turn spurred them to become more active in their labor unions and to seek reform in areas beyond pay equity, including better working conditions and maternity leave.

In sum, the indirect, catalytic effects of legal mobilization may in the long run prove more consequential for social movements than the direct, tangible effects of legal victories themselves. Legal mobilization may be especially effective in this regard when it can be used as "a course of institutional and symbolic leverage against opponents" (McCann 2006:29). The targets of legal mobilization litigation may fear both the legal expenses of defending themselves against movement lawsuits and the negative publicity that often accompanies such litigation. In this way, legal strategies can complement protest and other political strategies to most effectively advance movement goals.

If legal change inspires a disadvantaged group in this fashion, it is also true that it may inspire entrenched groups to resist any social change that would weaken these groups' power and influence. Thus, legal change may indirectly both promote social change by inspiring aggrieved groups into political action and impede social change by spurring established interests into resisting such efforts. The Southern civil rights movement again illustrates this latter dynamic, as *Brown* not only inspired civil rights protest but also galvanized Southern white resistance to desegregation and helped set the stage for the white power structure's intransigence over the next decade and beyond (Klarman 2007). In another example, although the Supreme Court legalized most abortions in *Roe v. Wade* in 1973, this decision created a backlash that led to a sustained effort to overturn *Roe* or otherwise limit abortion

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rights that continues to this day (Maxwell 2002). The possibility of this indirect effect that helps spur a countermovement is yet another reason underlying the skepticism of some scholars of the value of legal mobilization for social movements.

Use of Law Against Social Movements

Law may sometimes be an effective tool for social movements for the direct and especially indirect reasons just discussed, but it can also be an effective weapon used against social movements by the government and other targets of movement activity. The legal repression or control of social dissent and social movements takes several forms.

First, corporations and other targets have sued social reform groups and other citizen efforts for slander or libel or for otherwise making statements or engaging in actions that may threaten profits or other goals pursued by the plaintiff. These lawsuits have been named *strategic lawsuits against public participation* (SLAPP) (Pring and Canan 1996). Real estate developers have sued groups attempting to stop developments that the groups feel may cause environmental or other problems. After Oprah Winfrey publicly questioned the safety of U.S. beef in regard to "mad cow" disease in the mid-1990s, the cattle industry sued her. Although she won the case, most defendants in SLAPP suits are hardly as wealthy or well-known. SLAPP suits themselves, and even the mere threat of being sued, may thus intimidate citizens into silence and are said by critics to undermine the First Amendment right to of freedom of speech.

Second, police, FBI, and other law enforcement agents may conduct surveillance on members of protest groups or on people associated with other kinds of social change efforts (Marx 1988). For example, police may infiltrate protest groups and pretend to be legitimate members of a group, and they may wiretap the groups' phone calls or conduct other kinds of monitoring. One of the most notorious examples of such surveillance was COINTELPRO, an FBI counterintelligence program that began in the 1940s and lasted until the 1970s. As part of this program, the FBI monitored tens of thousands of U.S. citizens who were exercising their First Amendment rights as part of the civil rights, Vietnam antiwar, and other social movements of that era (Cunningham 2004). Targets of the FBI spying program included Dr. Martin Luther King, Jr., and Beatle John Lennon, but almost all the people monitored were "regular" citizens. The CIA and many other federal, state, and local law enforcement agencies also engaged in similar spying. Although Congress passed legislation in the 1970s that limited surveillance of this type, a decade later the FBI spied on about 2,400 individuals and many organizations opposed to U.S. policy in Central America (Gelbspan 1991). The following decade it was revealed to be monitoring the activities of gay rights groups (Hamilton 1995). After 9/11, the National Security Agency not only began monitoring phone calls received within the

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United States but also phone calls outside the United States. This monitoring was conducted without judicial warrants. Although the White House said the monitoring was a necessary part of the effort to combat terrorism, critics said it violated federal law designed to protect individual privacy (Risen and Lichtblau 2005).

A third form of legal control of social dissent involves the arrest and prosecution of activists (Barkan 2006a). Some protesters are arrested for committing acts of civil disobedience, while others arrested on trumped-up charges as targets of legal harassment. Whatever the reason for their arrest, protesters may be forced to spend large amounts of time, money, and energy defending themselves against criminal charges, and the threat of arrest and prosecution may also help deter other people from joining in protest efforts. Arrests of protesters may also stigmatize them and the movement to which they belong in the eyes of the news media and of the public.

During the Southern civil rights movement, thousands of activists were arrested, many of them for acts of civil disobedience but many also for such innocuous activities as merely walking down the street. In jail, they had to face the taunts and possible violence of white racist guards and inmates. Guilty verdicts were a foregone conclusion as the South experienced "a wholesale perversion of justice, from bottom to top, from police force to supreme court" (A. Lewis 1966:289). Although violence by police and townspeople received national headlines and TV coverage and greatly helped the civil rights movement achieve its goals, cities that relied strictly on mass arrest and incarceration were able to defeat civil rights forces without the negative publicity that accompanied the use of violence against civil rights activists elsewhere in the South (Barkan 1984).

In some movements, however, protesters who are arrested and prosecuted have been able to take advantage of their trials to win publicity for their cause. During the Vietnam War, antiwar defendants in several trials were able to discuss their views about the war and occasionally win acquittals and sympathetic news media coverage (Barkan 1985). During the abolitionist movement that preceded the Civil War, several abolitionists were arrested and prosecuted for helping fugitive slaves escape from the South. Juries in Massachusetts and New York sometimes acquitted these defendants, and the newspaper publicity these acquittals received is thought to have strengthened the abolitionist cause (Mabee 1969). Susan B. Anthony's trial a quarter-century later also won headlines. Anthony, the famous women's rights leader, was arrested in 1872 in New York for voting because, as a woman, she was not permitted to vote. At the end of her trial in Canandaigua, NY, a year later, she delivered a statement before sentencing after the judge ordered the jury to find her guilty: "I shall earnestly and persistently continue to urge all women to the practical recognition of the old revolutionary maxim, 'Resistance to tyranny is obedience to God.'" Her prosecution and eloquent summation received much attention and are thought to have helped the women's suffrage movement (Friedman 1971).

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Summary

1. The relationship between law and social change is a key dimension of the study of law and society. Social change can affect law, and legal change can affect some aspect of society. When scholars study how that changes in society may bring about changes in law, they treat social change as the independent variable and legal change as the dependent variable; when they study how changes in law may bring about changes in society, they treat legal change as the independent variable and social change as the dependent variable.
2. Literature on the impact of social change on legal change falls into two broad types based on the scope of the changes involved. The first examines how and why broad social changes produce far-reaching changes in the nature of a legal system, legal reasoning, and other fundamentally underlying dimensions of law. The second type has a more narrow focus and examines how and why certain social changes produce new legislation, new court rulings, new legal procedures, or other rather specific aspects of law.
3. Emile Durkheim thought that mechanical solidarity and repressive law characterize traditional societies while organic solidarity and restitutive law characterize modern societies. Although Durkheim's views helped reinforce the idea that the type of law a society has depends on certain features of the society itself, later scholarship indicated that Durkheim may have misinterpreted the relationship between type of society and type of law and in particular reversed the relationship that actually exists.
4. Max Weber emphasized rationality as a key feature of modern society and used this concept to understand how societies changed legally as they became more modern and complex. Whereas traditional authority characterizes small, traditional societies, rational-legal authority, based on a belief in the legitimacy of a society's laws in the right of leaders acting under these rules to make decisions, characterizes modern society. Legal decision-making in general becomes more rational, involving the use of logic and reason, as societies become more modern.
5. Karl Marx and Friedrich Engels emphasized that law helps the ruling class preserve its dominance in several ways. First, law helps preserve private property. Second, law provides legal rights for all and thus creates a façade of justice that obscures working-class oppression and helps the working class to feel good about their society. In this way, law contributes to false consciousness that prevents the working class from realizing its revolutionary potential.
6. Roberto Mangabeira Unger, a contemporary scholar, attributed the development of legal order to certain preconditions that characterized postfeudal Europe. One of these features was conflict among the

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bourgeoning merchant class, the aristocracy, and the monarchy. The second precondition was a reliance on a higher divine or universal law as a standard to justify and legitimate state law.

7. Specific legal changes also result from various social changes. As one example, in fourteenth-century England, the massive loss of life from the bubonic plague led to England's first vagrancy law in 1349 that criminalized both begging and moving from one place to another to find better employment. As a second example, in fifteenth-century England, the growth of the merchant economy led persons transporting goods that had been purchased to keep the goods for themselves. This problem in turn led to the Carrier's Case of 1473 that made this type of behavior a crime.
8. Technological changes other than reproductive technology also affect the law. When automobiles became more common about a century ago, new traffic laws and new regulations governing the manufacture of automobiles were necessary. Many laws have since been passed to enhance motor vehicle safety. The invention of the railroad several decades before the automobile also led to many new laws and regulations. The invention and widespread use of the personal computer and the Internet have again led to many legal changes; copyright law especially has had to adapt.
9. The actual impact of law on social change is open to debate. Sometimes, law has been an effective vehicle for social change, but sometimes it has been ineffective. The impact of law may be both direct and indirect. Direct social change occurs when legal change itself affects behavior. Indirect social change can occur in either of two ways. First, a change in law may first affect a social institution, and the resulting changes in this social institution may then bring about changes in behavior or attitudes. Second, a legal change may give a disadvantaged group new hope that social change is possible and spur it into political action.
10. Attempts by the government to use the law to effect social change face several obstacles. These obstacles include (a) public resistance to court orders or other legal changes and (b) inconsistent application and enforcement of a new law by legal authorities.
11. Accurate assessment of the actual impact of legal change is difficult for several reasons. First, legal impact may occur in the short term but not persist beyond an initial phase. Second, legal change may achieve its intended impact but in the long run prove a Pyrhhic victory because it helps shore up existing inequalities. Third, it is sometimes difficult to know why certain social changes occur and, more specifically, whether these changes stemmed from the legal change in question. Fourth, although a legal change may affect behavior, it is sometimes difficult to determine exactly why the behavior did change because of the legal change. Fifth, it is not always clear what specific impact of a legal change was actually intended by the initiators of the legal change.

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12. William M. Evan presented several conditions that maximize the potential impact of legal change. These include (a) The source of the law should be perceived as authoritative and prestigious; (b) The rationale for the new law should emphasize its continuity and compatibility with existing institutionalized values; (c) Publicity surrounding a new law should emphasize that similar laws have proven helpful elsewhere with few or no adverse effects; (d) A new law should mandate that any changes it requires should occur quickly rather than slowly; (e) Legal authorities must apply and enforce a new law consistently and without hypocrisy or corruption; (f) Positive as well as negative sanctions should be used to help ensure compliance with a new law; and (g) Effective protection and resources should be provided for the rights of individuals who would suffer if other people violate or evade the new law.

13. The use of law by social movements is called legal mobilization. Some scholars think that law is an effective tool for helping social movements, while some think that law is ineffective and even counterproductive for social movements.

14. Legal mobilization may provide social movements with significant indirect benefits by giving aggrieved groups a new sense of legal entitlement and a new hope for social change. For these reasons, legal mobilization may spur members of these groups to work for such change.

15. Law has been used as an effective weapon against social movements. Targets of citizen groups have sometimes sued them for slander, libel, and other allegations. Police, FBI, and other law enforcement bodies have conducted surveillance on members of protest groups and other social reform groups. Finally, the arrest and prosecution of activists may tie up their time, money, and energy in legal defense, stigmatize their movement, and deter other people from participating in the movement.

Key Terms

Bourgeoisie
Charismatic authority
Dependent variable
Fellow-servant rule
Independent variable
Legal mobilization
Legal order
Legal repression
Means of production
Mechanical solidarity
Organic solidarity
Proletariat
Rationality
Rational-legal authority
Repressive law
Restitutive law
Traditional authority

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