CHAPTER ONE Introduction

Everyone has some idea what lawyers do. And most people have at least heard of criminologists. But who knows what "law and society" is? A lawyer friend of mine, a really smart guy, asks me regularly, "What exactly do you people *do*?" Once when I was at the annual meeting of the Law and Society Association, my taxi driver was making the usual idle conversation and inquired what I was in town for. I told him I was attending the Law and Society Association's annual meeting. His interest suddenly aroused, he turned to face me and asked with some urgency, "I've been wondering, when *is* the best time to plant a lawn?"

I write this as an invitation to a field that should be a household word but obviously isn't. Peter Berger's (1963) *Invitation to Sociology* is one of my favorite books, and I have shamelessly copycatted it for my title and for the concept of this book. Like Berger, I want to offer an open invitation to those who do not know this territory, by mapping out its main boundary lines and contours and explaining some of its local customs and ways of thinking. This mapping and explaining is more difficult in law and society than in some other academic territories, because its boundaries are not well marked and because it encourages immigration, drawing in people from many other realms. The population includes sociologists, historians, political scientists, anthropologists, psychologists, economists, lawyers, and criminologists, among others. Like the pluralistic legal cultures we sometimes study, our diversity is both a challenge and enriching.

First, a disclaimer. This is not meant to be a comprehensive overview or textbook introduction to law and society. I am bound to antagonize some of my colleagues in this selective sketch of the field, as I speak in the language I know best—sociology—and inevitably favor some approaches and just as inevitably neglect others. In addition to

mostly "speaking" sociology, my primary language is English. This means that besides slighting much that is of interest in political science, economics, and other fields, I include here only a tiny fraction of the excellent works written in languages other than English. I cannot possibly do justice to the whole rich terrain of our field in this small volume, and I do not intend it to be an overview of law and society's many theories and methodologies. Instead, I hope that this book's limitation will be its strength, as an accessible and concise presentation of a way of thinking about law. It is meant for undergraduate students and their professors, but it is also written for my lawyer friend who can't figure us out, for my taxi driver, and even for an occasional colleague, because it is always entertaining to see others attempt to describe what we do.

In the pages that follow, I will try to construct a picture of (some of) our ways of thinking by presenting a few of law and society's overarching themes, arranged roughly as chapters. There is some slippage and overlap among the chapters, and the divisions should not be taken too seriously. What I am after here is a composite picture, a gestalt of a way of thinking, not a comprehensive inventory. I am treating this as a conversation—albeit a one-sided one—and will keep you, the reader, in my mind's eye at all times. Partly in the interests of accessibility and a free-flowing conversation, I have sacrificed theoretical inclusiveness and instead provide many concrete examples and anecdotes from everyday life.

Peter Berger (1963, 1) started his *Invitation to Sociology* by lamenting that there are plenty of jokes about psychologists but none about sociologists—not because there is nothing funny about them but because sociology is not part of the "popular imagination." Well, law and society faces a double difficulty. When people don't confuse us with experts in the care and maintenance of grass, they are likely to think we are practicing lawyers, which is—judging from the number of lawyer jokes in circulation—the world's funniest profession. Complicating matters, some of us are *in fact* lawyers, but not the funny kind.

The law and society mentality is broader than the specific themes I introduce here. And some of these themes are mutually contradictory and represent conflicting visions of the field. But, just as all creatures are greater than the sum of their parts, there is a law and society perspective that transcends its sometimes self-contradictory

themes. One way to get at this perspective is to contrast it to how people ordinarily think about law. I do not want to oversimplify here because people have many different views of law. As we will see later, the same people think of law differently according to whether they are getting a parking ticket, suing a neighbor, negotiating a divorce, or being sworn in as a witness to a crime. But most people tend to hold up some idealized version of law as the general principle, and individual experiences that deviate from that version are thought of as, well, deviations. Law in the abstract somehow manages to remain above the fray, while concrete, everyday experiences with law—either our own or those of others we might hear about—are local perversions chalked up to human fallibilities and foibles. This view of law was brought home to me powerfully the other day on my commute to work. A bumper sticker on a pickup truck read, "Obey gravity. It's the law." I cannot be sure, but I think the point was to underscore the inevitability and black-and-white nature of law, in a sarcastic jab at moral relativists. Like gravity, law is Law.

Even when we are cynical about the law, this cynicism seems not to tarnish the abstract ideal of "The Real Law"—the magisterial, unperverted, gravity-like sort. Consider jury service. If you have ever served in a jury pool or on a jury, you might have been aghast at the shortcomings of some of your peers who might, in your view, be less than intellectually equipped to wrestle with the complex issues being presented (and they no doubt were at the same time scrutinizing you). But, if you are like me, it is hard not to feel a certain awe for the majesty of the process and the aura it projects. The Law—with a capital L—in this idealized version resides in a realm beyond the failings of its human participants and survives all manner of contaminating experiences.

Law and society turns this conventional view on its head. "Real law" is law as it is lived in society, and the abstract ideal is itself a human artifact. Many interesting questions follow. How does real law actually operate? How are law and everyday life intertwined? Where does law as abstraction come from, and what purposes does it serve? What can we learn from the disparity between abstract law and real law? And, why is the idealized version of law so resilient even in the face of extensive contrary experience?

Law and society also turns on its head the jurisprudential view of law usually associated with jurists and often taught in law school.

This view approaches law as a more or less coherent set of principles and rules that relate to each other according to a particular logic or dynamic. The object of study in jurisprudence is this internal logic and the rules and principles that circulate within it. According to this approach, law comprises a self-contained system that, with some notable exceptions, works like a syllogism, with abstract principles and legal precedents combined with the concrete facts of the issue at hand leading deductively to legal outcomes. While this model has been updated recently to allow for the intervention of practical considerations in judicial decision making and some concessions to social context, this lawyerly view of law still dominates law school training and jurisprudential thought. That's why U.S. Supreme Court Chief Justice John Roberts (2005, A10) could say at his Senate confirmation hearing in 2005: "Judges are like umpires. Umpires don't make the rules, they apply them. . . . If I am confirmed . . . I will fully and fairly analyze the legal arguments that are presented." Despite the famous quote long ago by one of America's most noted jurists, Oliver Wendell Holmes (1881, 1), that "the life of the law has not been logic: it has been experience," the view of law as a closed system of rules and principles that fit together logically has proven just as resilient in many legal circles as the layperson's idealization.

So, jurisprudence is mostly devoted to examining what takes place inside the box of legal logic. Law and society takes exactly the opposite approach—it examines the influence on law of forces *outside* the box. If the issue is free speech rights in the United States, jurisprudence might catalog judicial decisions pertaining to the First Amendment and trace the logical relationship between these precedents and some present case. Instead, a law and society scholar might probe the historical origins of the American notion of free speech and expose the political (i.e., extralegal, "outside the box") nature of First Amendment judicial decision making. David Kairys (1998), for example, shows us that the common assumption that a free speech right emerged full blown from the First Amendment is a myth; that the right we associate with the First Amendment today was the product of political activism in the first part of the twentieth century, especially by labor unions; that since then it has been alternately expanded and retrenched according to political pressure and ideological climate; and, last but by no means least, that Americans' myths about the origins and scope

of our free speech right have powerful impacts on our assumptions about the exceptional quality of American democracy. So, judicial decision making on issues of free speech—in fact, the very concept of free speech—is the product of social and political context. And our entrenched mythical abstractions about free speech, while factually inaccurate, have profound sociopolitical effects. The broader law and society point here is that law, far from a closed system of logic, is tightly interconnected with society.

But we can go farther. Because not only are law and society interconnected; they are not really separate entities at all. From the law and society perspective, law is everywhere, not just in Supreme Court pronouncements or congressional statutes. Every aspect of our lives is permeated with law, from the moment we rise in the morning from our certified mattresses (mine newly purchased, under a ten-year warranty, and certified by the U.S. Consumer Product Safety Commission, the U.S. Fire Administration, and the Sleep Products Safety Council, and accompanied by stern warnings not to remove the label "under penalty of law"); to our fair-trade coffee and NAFTA (North American Free Trade Agreement) grapefruit; to our ride to school in the car-pool lane on state-regulated highways; to our copyrighted textbooks, and so on, for the rest of the day. But, in the form of legal consciousness, law is also found in less obvious places like the mental reasoning we engage in when we are pondering what to do about our neighbor's noisy dog. Law so infuses daily life, is so much part of the mundane machinery that makes social life possible, that "law" and "society" are almost redundant. Far from magisterial or above-the-fray, law is marked by all the frailties and hubris of humankind.

I just finished reading a book on the imperfect nature of medical science. Surgeon and essayist Dr. Atul Gawande introduces his provocative volume with a personal anecdote that I quote at some length because it is both powerful and pertinent to our study of law. He writes (2002, 3–5):

> I was once on trauma duty when a young man about twenty years old was rolled in, shot in the buttock. His pulse, blood pressure, and breathing were all normal. . . . I found the entrance wound in his right cheek, a neat, red, half-inch hole. I could find no exit wound. No other injuries were evident. . . . [But] when I

threaded a urinary catheter into him, bright red blood flowed from his bladder . . . The conclusion was obvious. The blood meant that the bullet had gone inside him, through his rectum and his bladder . . . Major blood vessels, his kidney, other sections of bowel may have been hit as well. He needed surgery, I said, and we had to go now. He saw the look in my eyes, the nurses already packing him up to move, and he nodded . . . putting himself in our hands . . .

In the operating room, the anesthesiologist put him under. We made a fast, deep slash down the middle of his abdomen, from his rib cage to his pubis. We grabbed retractors and pulled him open. And what we found inside was . . . nothing. No blood. No hole in the bladder. No hole in the rectum. No bullet. We peeked under the drapes at the urine coming out of the catheter. It was normal now, clear yellow. It didn't have even a tinge of blood anymore. . . . All of this was odd, to say the least. After almost an hour more of fruitless searching, however, there seemed nothing to do for him but sew him up. A couple days later we got yet another abdominal X ray. This one revealed a bullet lodged inside the right upper quadrant of his abdomen. We had no explanation for any of this—how a half-inch-long lead bullet had gotten from his buttock to his upper belly without injuring anything, why it hadn't appeared on the previous X rays, or where the blood we had seen had come from. Having already done more harm than the bullet had, however, we finally left it and the young man alone. . . . Except for our gash, he turned out fine.

Medicine is, I have found, a strange and in many ways disturbing business. The stakes are high, the liberties taken tremendous. We drug people, put needles and tubes into them, manipulate their chemistry, biology, and physics, lay them unconscious and open their bodies up to the world. We do so out of an abiding confidence in our know-how as a profession. What you find when you get in close, however—close enough to see the furrowed brows, the doubts and missteps, the failures as well as the successes—is how messy, uncertain, and also surprising medicine turns out to be.

The thing that still startles me is how fundamentally human an endeavor it is. Usually, when we think about medicine and its remarkable abilities, what comes to mind is the science and all it has given us to fight sickness and misery: the tests, the machines, the drugs, the procedures. And without question, these are at the center

> of virtually everything medicine achieves. But we rarely see how it all actually works. You have a cough that won't go away—and then? It's not science you call upon but a doctor. A doctor with good days and bad days. A doctor with a weird laugh and a bad haircut. A doctor with three other patients to see and, inevitably, gaps in what he knows and skills he's still trying to learn.

A Supreme Court intern told a colleague of mine (Brigham 1987, 4) that once he had been "behind the scenes" at the Court, he "could never teach constitutional law with a 'straight face' again. This insider argued that the reality of the Chief Justice wearing his slippers inside the Court demystified the Constitution." A little like Dr. Gawande who routinely sees the weird laughs and bad haircuts of the real doctors who put flesh and blood on the abstraction of "medicine," this budding law and society scholar had peered behind the curtains and seen The Wizard of Law at the controls in his slippers.

At some level, law and medicine are fundamentally different. After all, medicine *has* provided us with "ways to fight sickness and misery." To cite just one example, over the last four decades enormous strides have been made in curing cancer; many of those afflicted with the disease now live healthy lives where they once would have died of it. In contrast, we have arguably made little progress in fighting crime and are no closer to a cure for the injustices of the legal system than we were four decades ago. Medicine—its theory and its practice—is affected and shaped by sociocultural forces and human fallibility, but at its core it is oriented toward physiological realities. Instead, law is a social construction through and through. This means that its limitations are the mirror image of society itself and are not only—or even mainly—about missing knowledge or skills not yet learned.

In other ways though, Dr. Gawande's depiction of medicine applies to law as well. Both law and medicine enjoy almost mythic status. Like the confidence that doctors have in their own know-how and that patients bestow on them as they allow themselves to be drugged, intubated, and sliced open, law too benefits from and demands complete authority. The policeman who stops me for speeding will find that I am as compliant and submissive as a patient awaiting surgery. And there is an eerie, graphic similarity between the patient strapped to

a gurney for an operation meant to save her life and the death row prisoner in the execution chamber ready for his lethal injection. In both cases, we tend to put blind faith in the fundamental legitimacy of the enterprise.

The aura of infallibility and authority that surrounds both medicine and law seems to survive compelling evidence to the contrary and even blistering critique. There are probably no two professions that can elicit more passionate attacks than that of lawyer and doctor. At your next social gathering, tell a story about some incompetent doctor, miscarriage of justice, or greedy lawyer, and you are bound to hear a chorus of amens, followed by more stories. But the myths and auras of law and medicine mysteriously endure. And, for all the horror stories we share with each other, we rarely examine in any systematic way what those stories add up to, what their common elements are, or why they persist. The field of law and society is exciting precisely because it does this and more, probing "how it all actually works."

Here is a brief preview of what follows. The next chapter provides a glimpse of research about the links between the kinds of law in a society and the social, economic, and cultural contours of that society. There is disagreement among scholars about what those links consist of and how definitive they are. But the broader, formative idea in law and society scholarship is that law—far from an autonomous entity residing somewhere above the fray of society—coincides with the shape of society and is part and parcel of its fray. Chapter 3 takes up the related idea that law is not just shaped to the everyday life of a society, but permeates it, even at times and in places where it may not at first glance appear to be. As we'll see, the probing law and society scholar turns up law in some unlikely places, such as in our speech patterns and, even more unlikely, in a squirrel stuck in a chimney in small-town Nebraska. Chapter 4 describes research that documents one important aspect of this interpenetration of law and society, having to do with race. Providing a brief synopsis of what is called Critical Race Theory, this chapter traces the kaleidoscopic color of law across many venues, from early pseudo-scientific theories of immigrant inferiority to contemporary criminal justice profiling. After that, chapter 5 turns to a discussion of legal pluralism, which focuses on the fact that in any given social location there are almost always multiple legal systems operating simultaneously. Sometimes they nest comfortably

inside each other like those Russian dolls of decreasing size that stack neatly together; sometimes, they are an awkward fit; and, in a few rare cases cracks are exposed between the layers so that some groups and institutions fall out of accountability altogether. In chapter 6, I engage a favorite theme of mine, and a canonical concern for law and society scholarship: the gap between the law-on-the-books and the law-in-action. Noting that the law as it is written and advertised to the public is often quite different from the way it looks in practice, law and society scholars have long had an interest in studying that gap. It is not only a powerful lens for understanding the various dimensions and stages of *law;* like a broken promise, it reveals a lot too about the institutions or other social entities that made the promise and cannot or will not deliver on it. The final substantive chapter wrestles with the question of law's role in social change. There we will encounter scholarship that interrogates the limits of law to advance real change, as well as works that highlight law's progressive potential. Returning to the theme of chapter 2 that societies get the types of legal forms and laws that they "deserve" (and vice versa), we will see the challenges of trying to upend entrenched social arrangements using the lever of law.

Peter Berger (1963, 19) wrote that if you are the kind of person who likes to look behind closed doors and, by implication, cannot resist snooping into your friend's personal effects while house-sitting, then you have the right aptitude for sociology. People who are drawn to law and society might also be curious about their friends' hidden lives and what they might find by snooping around their houses. But our curiosity is aroused even further by questions like why snooping is considered wrong in the first place, and what unwritten code it violates in our society and why. And if snooping in a friend's house might reveal some dicey secrets about her personal life, snooping around a society's written and unwritten laws to expose the secrets behind their public mythology reaps rewards that are in equal measure subversive and thrilling.

CHAPTER TWO Types of Society, Types of Law

Two middle-aged friends of mine are deeply in love and want to get married. But there is one issue that has caused tears and recriminations, and that is the dreaded prenuptial contract. Their love is blinding in its intensity, but now they have to imagine what happens in case they get divorced; they feel their love in their very souls and in the chemistry between them, but now they must enter into a business contract. Their intellect tells them a prenup is a reasonable thing to do. The angst it produces underscores the tension between romance and the ultimately more seductive reason.

The prenup and the stress it is causing my friends reminds me of Max Weber's (1954) theory that in modern capitalist societies, rationality permeates all realms of human activity, displacing tradition, religion, emotion, and other such forces as a primary motivator for human behavior. It's the clash between romance and rationality that makes the prenup so stressful. Suffice it to say, my friends are going ahead with the prenup.

For Weber, as reason and calculation increasingly motivate all human activity with the advent of modern society, law too becomes more rational. What he meant by this is that modern law is driven by logic and human calculation, rather than by irrational forces like oracles, tradition, or emotion. In the process of rationalization, law also becomes more functionally insulated from other institutions, such as religion or politics, and is therefore more "autonomous."

None of this is a coincidence. Instead, for Weber (1958), rationalization emerged with Calvinism—specifically, the Calvinist principle of predestination. Imagine for a moment that you are a Calvinist who believes you are predestined by God from before birth to be a chosen one or to be damned for eternity. If chosen, you will spend your life on earth blessed and live an afterlife at the hand of God; if not, you will

have a miserable life and, worse, a miserable Eternity. In Weber's view, this late sixteenth and early seventeenth-century Calvinist idea of predestination produced an intolerable level of anxiety. In part to alleviate the anxiety, Calvinists searched for signs of being chosen. In looking for signs, they produced the very signs of the chosen life—hard work and the accumulation of wealth—they were looking for. This hard work, accumulation of wealth, and frugal lifestyle that were taken as signs (presumably subliminally, since God kept his decisions to himself) were compatible with the emergence of capitalism, and all of the above were accompanied and facilitated by a calculating, reasoning mentality. So, there is an "elective affinity," to use Weber's term, between Calvinism, capitalism, and rationality. As rationality became the organizing principle of modern society, law too was rationalized. The broader point is that, for Weber, the nature of law and the nature of society evolve in tandem through elective affinity.

The idea that different types of society produce, or at least coincide with, different types of law is a foundational element of the law and society framework but is at odds with commonly held notions of law's transcendence. Modern Western views of law as transcendent can be traced back to Plato and Aristotle and then to St. Thomas Aquinas, who, despite their considerable differences and the fourteen centuries separating Aquinas from the Greek philosophers, all argued that law ideally reflects some universal morality, some divine natural order. Hence, the concept of "natural law," and, as on the bumper sticker I mentioned a few pages ago, law's kinship with other natural phenomena like gravity. Aristotle wrote in *Politics,* "He who bids the law rule may be deemed to bid God and reason" (2000, 140). For both Aristotle and Plato, since law is ideally the tangible expression of morality arrived at through reason, the whole ensemble is God-given, universal, and natural. Obedience to just law is the highest virtue and is indispensable to a just social order. St. Thomas Aquinas also believed that law—to the extent that it *is* law and not simply an unjust command—is a creation of God. Later surfacing in John Locke's influential ideas about inalienable human rights, the natural law approach is hard-pressed to explain the enormous variation in legal systems historically and cross-culturally—unless we're willing to take the convenient but dubious position that the Western legal system is natural and all others are arbitrary cultural constructions.

While the a priori, natural appearance of law may be central to its legitimacy, sociolegal scholars have long theorized that legal systems are no less social (that is, human) products than the economic systems they are often linked to. Evolutionary social theorists such as Henry Maine, Emile Durkheim, Karl Marx, and Max Weber posited that legal systems develop in concert with socioeconomic systems, changing form and becoming more complex over time. According to this thinking, the modern Western legal system represents the current stage in a linear evolution and corresponds precisely to the social and economic forms that emerged with it.

Henry Maine (1861/2008), writing a generation before Weber, had the idea that legal systems go through definitive stages, from status to contract. He reasoned that the primary unit of social organization in ancient societies was the clan or extended family, while in modern societies the individual is the primary unit. In the feudal period when landed gentry ruled the countryside of England and serfs toiled on the gentry's land, both statuses (gentry and serf) were inherited. In this social system, people saw themselves as, and were treated as, members of a social class and parts of a family, but rarely as separate, independent individuals. As the social order evolved, the free association of individuals and free agreements among them became primary, with the family relegated to a supporting role.

Coinciding with this development in social organization, law shifted away from dealing with people as members of specific clans and with particular *statuses* to dealing with individuals with certain rights, obligations, and *contracts.* In fact, Maine thought this was the defining quality of modern ("progressive") civilization. In *Ancient Law* (1861/ 2008, 86; emphasis in original), he wrote, "We may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*." Maine was short on empirical data, and at least one sociolegal scholar has dismissed him as an "armchair scholar" who was "factually wrong" (Sutton 2001, 30).

Not the least of Maine's problems was a kind of naive optimism about modern law, stripped of any status biases, such as those based on race, class, or gender. I just read in the newspaper that in central Florida they arrest (mostly African American) children as young as six years old for disruptive behavior in the classroom, handcuffing them, and booking them for a felony. In Texas, a black fourteen-year-old

girl received a prison sentence of up to seven years for shoving a hall monitor at her high school (Herbert 2007a, A19; 2007b, A29). Another article reports that a black seventeen-year-old boy in Georgia was sentenced to ten years in prison for consensual oral sex with a fifteen-year-old girl at a New Year's Eve party (Goodman 2007, A12). But a front-page story in the same newspaper reveals that employers who subject their workers to unsafe conditions resulting in accident and injury are not being prosecuted (Labaton 2007, A1). Discrepancies like these, repeated many times over, have led most contemporary sociolegal scholars to conclude that status—or something like it—still matters.

But Maine had his fans. Emile Durkheim (1893/1964) borrowed some of his ideas when, writing in France at the turn of the twentieth century, he argued that homogeneous societies of the past, which were based on "mechanical solidarity," had evolved into more complex, heterogeneous societies bound together by "organic solidarity." Durkheim maintained that in premodern societies like tribal groups of hunter-gatherers, where solidarity was based on the fundamental similarity in people's daily material lives, consensus over moral values was strong and deep. For Durkheim, this strong moral consensus reflects the fact that values are rooted in material conditions, and where people's material conditions are similar their values are likely to be shared as well. He called this deep well of shared values the "collective conscience" (or, the "conscience collective," in the French original).

When a strong collective conscience is violated—as it is when someone commits a crime—people react with shock and outrage at the almost unthinkable offense. That is why, according to Durkheim, ancient societies had passionate "repressive law," by which he meant they emphasized punishment for punishment's sake. Don't get the wrong idea from the sound of this word "repressive." Durkheim used the term analytically, not normatively or judgmentally. He believed that repressive sanctions served the important function of shoring up the collective conscience and reestablishing the boundaries of acceptable behavior. A public hanging, for example, has the potential to bond upstanding citizens together in their outrage and in the social quality of the occasion, and to spell out once again the unacceptability of the offense.

Durkheim theorized that in modern societies with a lot of division

of labor and occupational diversity, it is our *differences* that bring us together. The division of labor makes us literally dependent on each other for survival. I, for one, can do research, teach, write, and sometimes cook a good meal, but without other people to plant and harvest crops—not to speak of slaughtering animals—and to manufacture and periodically service my car, produce the garb that passes for fashion in my circles, and otherwise do almost everything required for my material sustenance, life as I know it would fall apart. And so it is for you and most likely everyone you know. In this context, said Durkheim, the nature of law shifts from repressive to "restitutive." Since it is important to restore the balance in complex, interdependent societies, when an offense is committed the emphasis in restitutive law is on quickly returning things to the way they were before the status quo was disrupted. And, because the collective conscience is not so strong (given our diversity and differences in our material existence), the response to an offense is not one of moral outrage or passion of the type that drive repressive sanctions.

Suppose I do not pay my income taxes. If I'm caught, the penalty is I have to pay. I might have to pay some interest, but only in extreme cases would I be sent to prison or otherwise punished. Partly because it's so important to restore harmony in this interdependent society and partly because our diversity has diminished the collective conscience, sanctions are less passionate and do not come from a deep moral anger. This is not to say that the collective conscience has completely dissipated. Instead, according to Durkheim, there is a moral value placed on fulfilling our obligations to each other and performing our social roles (as in tax law, family law, or commercial law), since our very survival depends on reciprocity. Once again, for Durkheim our values follow our material conditions and survival needs.

When Durkheim said, "Every society is a moral society" (1964, 228), he did not mean that every society is morally good. Instead, he was saying that every society—if it *is* a society and not just a collection of individuals—is bound together by moral values. This is so, he said, even in modern societies based on organic solidarity. Consider the case of "Octomom." As this book goes to press, Nadya Suleman, the woman who gave birth to octuplets on January 26, 2009, is being skewered in the court of public opinion. Fifty discussion groups formed on Facebook.com in one week alone, with headers like "What

Nadya Suleman Did Was Totally Wrong." Suleman's former publicist, who quit after receiving death threats, is quoted on one site, "In terms of reaction to her, I would say not in my experience have I ever seen anything like it. And I would add that I was involved in public relations for Three Mile Island after the [1979 nuclear power plant reactor meltdown]."

The response to this octuplet phenomenon changed dramatically over the course of the first few days. When the births were initially reported, people were fascinated with the rare event and Suleman was "The Miracle Mom." But, once it was known that she had six other small children and was single, unemployed, and received food stamps, the miracle woman quickly became a mercenary out to rob already-strapped taxpayers. One of the most watched YouTube videos featured the "Octo-Mom Song," where a popular parody singer played Suleman giving birth, with a doctor wearing a baseball glove catching babies as they flew out, and the sounds of a cash register in the background. The Suleman case probably made people angry for a variety of reasons, and not everyone was equally obsessed with her single-mom, welfare status. But one thing is sure. Even in this otherwise fragmented, diverse society where a Durkheimian consensus seems elusive, the Octomom episode galvanized us in agreement that "What Nadya Suleman Did Was Totally Wrong." As Durkheim would have predicted (although he might have been surprised by the passion and intensity of the response), our organic society is still capable of moral union. Also predictably, calls have gone out to impose legal sanctions on Suleman's fertility doctor and to establish a regulatory regime to prevent the birth of any more "Franken-babies," as one faith-based show mercilessly called the octuplets.

Admittedly, this kind of consensus is relatively rare these days. Consider the debate that has raged around Proposition 8 in California. This proposition was passed by California voters in November 2008, changing the state's constitution to prohibit same-sex marriage. The validity of the proposition was immediately appealed by opponents on the grounds that it would substantially revise the constitution and not just amend it, and therefore required legislative action and a two-thirds majority vote. But, in May, 2009, the California Supreme Court upheld the contentious proposition, effectively banning gay marriage in the state. This issue continues to stir powerful passions on both

sides and reveals the depth of the chasm that has opened up in the so-called culture wars. Episodes like this—and the very concept of culture wars—offer counterpoints to the Octomom scandal and the perhaps superficial moral cohesion driving it.

Durkheim's concepts of mechanical and organic solidarity and repressive and restitutive law, and his emphasis on the functions of law in providing social equilibrium, are ingenious and have inspired important theoretical elaborations over the decades. But, in at least one respect, Durkheim got his facts wrong. Anthropological evidence suggests that premodern societies used primarily *restitutive* law and more complex modern societies emphasize *repressive* sanctions, not vice versa. This makes a certain sense from the point of view of Durkheim's own theory, since the collective conscience is weaker in modern societies and the need for repressive sanctions to help reinforce it is greater. This is no small matter for Durkheim's legacy. It would be like having the genius to invent the concept of gravity, but then theorizing that the gravitational force is *away* from the earth rather than toward it.

Despite Maine's dearth of data and Durkheim's fatal sequencing problem, they were on to something: The form of law roughly coincides with the form of society. You could say that the legal order and the social order are fashioned from the same cloth. For Weber, the main thread of the modern cloth was rationalization; for Maine, it was contract; and, for Durkheim, it was organic solidarity and division of labor.

For many other law and society scholars, economics are paramount. Macaulay, Friedman, and Stookey (1995, 7) have said that "sooner or later, [legal systems'] shape gets bent in the direction of their society. . . . *Medieval law looked, smelled, and acted medieval.*" Following the same logic, capitalist law looks, smells, and acts capitalist. Civil law provides the legal infrastructure for manufacturing, the execution of contracts, investments, and financial transactions of all kinds. And it codifies social relations grounded in the capitalist economic structure, such as those based on individual rights and the nuclear family as opposed to caste and kinship networks. In criminal law, it coins new legal concepts like theft and larceny that protect private property; and it bestows capitalist coercion—specifically, the coercion associated with the capitalist workplace—with the mantle of normalcy.

Jeffrey Reiman (1984, 135–36) discusses this normalization of coercion in explaining why things like workplace hazards and air pollution are not criminalized in the same way street crime is. He says that "the current division between criminal and noncriminal is built into [the capitalist] structure" and in that sense is "'read off' the face of capitalism." Under capitalism, the vast majority of people are required to work for an employer and have little say about their working conditions, since the workplace is owned by others. Drawing from Karl Marx, Reiman argues there is coercion involved here—most people either work in the capitalist workplace or starve. This arrangement is rarely recognized as coercive but is seen instead as contractual, and the dangerous conditions a worker may be subject to are not recognized as violence but rather as risks the worker assumes as part of her contract. Reiman (p. 139) uses an analogy to clarify: "Imagine . . . a society where there were only a few sources of oxygen owned by a small number of people and that others in the society had to work for the oxygen-owners in order to get a chance to breathe. Even if no overt force were used in arranging the 'labor-for-breath' exchanges, it would be quite clear that the workers were slaves to the oxygen-owners." Just so, he says, capitalist labor contracts are coercive and labor conditions not freely chosen. But capitalist law does not treat unsafe working conditions as violent crimes because our understanding of the concepts of "violence" and "crime" are, as Reiman put it, "'read off' the face of capitalism."

Law not only follows the contours of society and its economic base; it is implicated in shaping those contours. Michael Tigar and Madeline Levy, in their 1977 book, *Law and the Rise of Capitalism*, show that the economics-law symmetry is no coincidence. They argue that feudal law was transformed into capitalist law in England and France during the period from 1100 to 1800, through strategic alliances between the new commercial bourgeoisie, monarchs who benefitted from tax revenues on the budding commerce, and lawyers who for a price provided both the technical expertise and the philosophical justification for legal change. The legal ideology of free contract advanced by lawyers in this alliance was central because it supplied a normative justification for the dismantling of the hereditary bonds and forced servitude of feudal relations. In this rendition, in contrast to Maine who they cite with some derision, the principles of private property

and free contract did not emerge spontaneously out of the new social form. Instead, as a new class began to gain economic power through long-distance trade they used that economic power to advance legal principles that accelerated the socioeconomic transformation and further elevated their position. Once entrenched, capitalist law—with its principles of private property, free contract, and individual rights—came to be seen as part of the natural order of things.

This pattern repeats itself today as we witness the contemporary equivalent of those early alliances among merchants, monarchs, and lawyers. For example, the unfettered finance capitalism that became the dominant global economic form in the late twentieth century (and that, as I write this, has crashed spectacularly to earth) flourished on the support it received from political leaders of all stripes, and the lobbyists and lawyers that secured a favorable legal and regulatory climate. Beginning in the 1980s, the banking industry—or, more precisely, its lobbyists, finance experts, and legal professionals—mobilized a deregulation movement that paved the way for new investment options. They were wildly successful, in 1999 getting a repeal of the 1933 Banking Act that had been passed at the height of the Great Depression and that had restricted the risks banks could take with other people's money. One of the new investment instruments to flourish in this environment was the so-called credit derivative. It is too complicated to go into how it works here, but its importance to the ballooning finance economy can be grasped by a single figure: By the early 2000s, credit derivatives had become a $58 *trillion* market worldwide. The larger point is that the elite in the prevailing economic form—or in an emerging one—can use their considerable resources to advance their position and bolster the dominance of that economic form through legal interventions facilitated by alliances with political leaders, lawyers, and a stable of experts. The result over time is a convergence between the legal form and the economic form.

William Chambliss's (1964) analysis of the invention of vagrancy as a legal concept is consistent with this materialist approach. Chambliss shows us that the first vagrancy law, passed in feudal England in 1349, was designed to deal with a scarcity of workers and skyrocketing wages. After the bubonic plague had killed off half the English population in 1348 and caused a spike in wages, the vagrancy law made it illegal to refuse work, put a ceiling on wages, and outlawed the giving

of alms (which were thought to allow the lower classes to shirk work). The fact that the ban on alms was a direct violation of the principle of Christian charity prevalent at the time, at least at the level of lip service, underscores the power of economic imperatives to trump other considerations.

Georg Rusche and Otto Kirchheimer (1939) provide another historical study of this convergence of law and economics. They focused less on the individual agents of change and more on the structural congruence between law and the nature of the economy it is embedded in. Rusche and Kirchheimer noticed that human societies across time and place have punished their members for violations of law in all sorts of ways. It is hard to conjure up a form of punishment that hasn't been used at some point. Branding, mutilation, humiliation, exile, dismemberment, beheading, fines, forced labor, indentured servitude, imprisonment, electrocution, whipping—it's all there in the historical record. But they noticed there is a pattern and that in any given historical period one or two forms of punishment predominate. During the reign of Henry VIII in early sixteenth-century England, death by hanging was so prevalent it was used against seventy-two thousand petty thieves. In seventeenth- and eighteenth-century England, public whippings were a favored punishment. In the United States today, punishment is less public, with millions of convicts warehoused in prisons, a form of punishment virtually unheard of before the nineteenth century.

So, Rusche and Kirchheimer asked, what drives the pattern? Their answer was that the form of punishment depends on the type of economic production system (for example, whether it is feudal, slave, mercantilist, or capitalist), the population size relative to the need for labor, and the type of labor required. The lords on feudal estates were unlikely to impose the death penalty, since executing a serf would have meant destroying one's own assets. Instead, corporal punishment was used, with the henchman taking care not to cause permanent injury. During the heady mercantilist period of colonial expansion, English convicts were put to use through indentured servitude in the colonies, galley slavery, the military, and—in those days of labor shortages and an embryonic factory system—"houses of correction." The latter were based on the convenient premise that criminals could be morally "corrected" through hard factory labor. The advent of the Industrial

Revolution in England brought increased mechanization and, with it, increased unemployment. The surplus population was crowded into prisons, but instead of the prison labor of the late mercantilist period—irrelevant at a time of mass unemployment and plentiful labor reserves—the treadmill and other forms of prison torture were invented to ensure that going to prison was not a tempting alternative to the homeless and starving masses on the streets.

In the realm of theory as in most human endeavors, nothing is new under the sun. Rusche and Kirchheimer, Chambliss, and Tigar and Levy were following in the dialectical-materialist tradition of Karl Marx. According to Marx (1906), the way production and the creation of wealth are organized in a society shapes most other aspects of that society, including law. Further, in all economic forms, those who own the wealth and those who work to produce it are locked in a conflict of interest, the playing out of which produces social conflict and change. That mattress I woke up on this morning, with all its tags and dire warnings of legal liability, was no doubt produced in a privately owned factory by workers toiling at some bare minimum wage and sold by the owners of the factory for a profit. In its simplest form, this is the logic of industrial capitalist production. The production and economic relations in feudal societies instead are organized around agriculture and large landholdings and function according to their own distinct logics with their own specific consequences for social relations, conflict, and law. In each economic form, according to this argument, laws are tailored to the needs of the prevailing production system—ensuring an adequate supply of workers, setting up the ground rules, providing the infrastructure, and handling the inevitable social disorder and conflict.

FRENCH PHILOSOPHER and social theorist Michel Foucault had a different take on all this. A "post-structuralist," Foucault was convinced that economic structure does not inexorably determine power relations or the exact form of law and social control. Instead, he argued, power is decentralized, dispersed, and fragmented, constituted as it is of actual social practice and the discourse (or talk) that is a key element of practice. Power is not an entity that is imposed top-down as in Marxist structuralism, but an emergent relation emanating from

local social practices and the discourses that permeate them. Law and legal systems from this perspective shift with changes in discourse and "knowledge" (what we think to be true at any given time), which are embedded in specific social contexts.

In *Discipline and Punish: The Birth of the Prison* (1977), Foucault traces the shift from the gory public executions and torture of convicted criminals in eighteenth-century France to the use of regimented and largely bloodless prisons less than a century later. For Foucault, this shift coincides with and is emblematic of the emergence of modernity, with its emphasis on predictability, rationality, the dispersion of "power/knowledge" throughout society, and the internalization of discipline by society's members. Foucault coins the term "panopticism" in this context. The Panopticon was a circular prison designed by Jeremy Bentham in 1787 that was never actually built but that provided a loose model for some modern prisons. The Panopticon design would allow prison authorities to keep inmates under constant observation. Foucault used it as a metaphor for modern society with its ever-widening capacity for scrutiny of the individual. What matters in the Panopticon is not that prisoners actually *be* under surveillance at all times, which would consume unnecessary resources; rather, it is the *potential* of being watched at any given moment—and prisoners' uncertainty about when that potential is being realized—that produces conformity. According to Foucault, the intense surveillance of modern society in the long run produces an internalization of discipline that reduces the need for external restraints.

The creation of advanced technology that facilitates surveillance by individuals has opened up a debate among parents about the appropriate use of these seductive devises for the monitoring of their children. Drug testing, global positioning systems for the car, and other such gadgets potentially let parents keep an ever-watchful eye on their children. A recent opinion article in the *New York Times* (Coben 2008, 14), entitled "The Undercover Parent," points out that computer spyware can help parents monitor who their children are chatting with and what Web sites they access. The author writes that it may be sufficient for parents to warn their children that they have installed the spyware, for the children to self-regulate (at least on that computer). He concludes, "Do you tell your children that the spyware is on the computer? I side with yes, but it might be enough to show

them this article, have a discussion about your concerns and let them know the possibility is there." We can see parallels here to Foucault's prison: As middle-class parents eschew corporal punishment, they increasingly employ disciplinary surveillance, including the intimidating uncertainty associated with it.

Unlike Rusche and Kirchheimer's structural and materialist analysis of punishment systems, Foucauldian post-structuralism highlights the microprocesses of power and the discourses and knowledges that comprise them. Economic structure is not unimportant for Foucault, who frequently cites Marx, but his post-structuralism incorporates the contingent and unpredictable in the messy world of social interaction and knowledge construction.

In *The Culture of Control* (2001), David Garland takes from Foucault this idea that punishment and social control policies are organically linked to sociocultural forces in ways that can be explained after the fact but that are often unpredictable. Garland notes the abrupt rise in punitive responses to crime in the United States and England over the last thirty years, including among other things massive increases in incarceration and a rejection of rehabilitation. He (2001, 3) wonders why we made this sudden turn to punitiveness that seems "oddly archaic and downright anti-modern," and that veers away from the "'rationalization'" that Weber argued characterizes modern society since it does not seem important whether or not the tough policies actually *work.*

In a far-ranging analysis, Garland argues that rising crime rates in the 1960s, suburbanization, the fragmentation of families, increased economic uncertainties, and the dismantling of welfare protections have produced a "late modernity" that is fraught with chronic insecurities. These social, economic, and demographic shifts, and their accompanying anxieties, reverberate in formal and informal systems of control that are meant first and foremost to contain danger. With safety resonating as a strong cultural value in what are perceived to be unusually dangerous times, and with rehabilitative policies debunked as weak-willed, state after state has passed get-tough policies. In this context, more people are sent to prison, sentences are longer, and furloughs are curtailed or eliminated. Garland (2001, 178) says, "The prison is used today as a kind of reservation, a quarantine zone in

which purportedly dangerous individuals are segregated in the name of public safety."

In this day of Internet blogs and chat rooms, we can hear the individual voices of this punitive impulse, its connection to anxieties about safety, and support for long prison terms and the death penalty. One blogger asked his discussion group what they thought of the Federal Death Penalty Abolition Act introduced in 2007. The responses varied, but the visceral anger of the majority who opposed the abolition was palpable. One virtually shouted into his keyboard, "Why should we waste taxpayer dollars supporting this garbage in prison for the rest of their lives, or worse yet, release them back into society where they can do someone else harm?" Another response included echoes of Garland's "quarantine" theme: "The only way I would agree to ending the death penalty is if every criminal convicted of a capital crime was moved to a remote island and left to fight for his or her life."

The online *Orange County Register* has a crime blog that once featured a "Stupid Criminals" column. It told the true story of a man who was suspected of murdering his girlfriend and was overheard on a police microphone discussing a cover-up with his father. In an earlier lead-in story it was learned that the girlfriend was pregnant at the time, had other children, and had used fraud to enter people's homes. Many bloggers ridiculed the man's "stupid gene" for speaking to his father about the crime inside a police car. Others simply wanted him "to fry." Another blasted the accused for what he had done and then for how "hateful and mean" he made her feel. The punitive impulse was not confined to the accused. Several found the victim equally repugnant: "Why was she homeless looking for kind Irvine [Orange County] strangers to take advantage of???" These are real-life expressions of Garland's "cultural field," permeated as it is with safety anxieties, economic uncertainties, taxpayer hostility, and anger toward those who embody society's myriad "blights." In this sociocultural landscape, it's not just criminals but sometimes their victims too who make people feel "hateful and mean."

A few law and society scholars have found the "mirror paradigm" in which law and society reflect each other as altogether too tidy and have tried to unsettle it. Brian Tamanaha (2001) points to the transplantation of U.S. law in Micronesia to make his point that sometimes

the form of law can be completely out of sync with social organization, values, and customs. "To cite a few examples," he says (p. xi), in the islands of Yap "they had a thriving caste system, yet the [imported] law prohibited discrimination; their culture was consensual in orientation, but the law was based upon the adversarial model; their understanding of criminal offences required a response by the community itself . . . , but the state insisted that it had a monopoly on the application of force." Tamanaha makes an eloquent case against the mirror view of law and society, but for now at least the reigning paradigm has not been dislodged.

SO FAR, I have talked about law without defining it. Defining law is surprisingly tricky business. Most people probably assume that when we speak of law we are referring to a set of written rules governing the conduct of society's members, which are propagated, interpreted, and enforced by agents of the state or local authorities. One problem with this definition is that it is culturally biased, fitting modern Western societies best. In fact, if this is our operative definition, then many societies have no law at all.

When anthropologist Bronislaw Malinowski studied the Trobiand Islanders off the New Guinea coast in the early 1920s, he found a preliterate society without formal law (1982; originally published 1926). This is not to say there was no social control or rules governing social conduct. It's just that they were not written down, and they were not enacted and implemented by state officials (there were none). Instead, the Islanders had informal rules for behavior, including specific rights and obligations for all members of society and sanctions for infringement. These rules were every bit as binding as formal law is in modern Western societies.

A familiar example from the United States might help underscore the potency of such informal rules, even in a society with a codified legal system. I went to a restaurant recently with European houseguests who were visiting the United States for the first time. As is customary in some circles, our guests wanted to treat us to a restaurant meal. When the bill arrived, I could see they were pleasantly surprised it was not more expensive. But their faces fell when we told them about tipping customs in the United States and that we were expected to leave

at least a 15 percent tip for the waitstaff. They were so dismayed by this unexpected requirement that they asked if it was a law. Their dismay turned to shock when we explained it is not a written law but that it may as well be, given how strongly normative it is and how strictly obeyed. In fact, other guests from Italy had once been chased down on their way out of a restaurant after failing to leave a tip. It strikes me that this tipping norm—which for all intents and purposes is a "law"—is a lot like some of the Micronesian obligations and sanctions that Malinowski wrote about, none of which are codified.

The absence of formal legal structures is not unique to preliterate societies; while admittedly rare, communities with and without formal law may sit side by side. Richard Schwartz (1954) did a study of social control in two Israeli communities, a moshav (a cooperative) and a kvutza (a socialist settlement). The first was based on private property and the family as the primary social unit, while the latter adhered to egalitarianism and collectivist principles, sharing all meals and property and raising their children communally. Schwartz found that in the kvutza, where interaction was intense and face-to-face and where communal principles were passionately adhered to, public opinion was more than enough to keep people in line, and there was no need for formal legal institutions. In this tight-knit community where even showers were public gatherings, people were highly attuned to informal controls, with tone of voice, gestures, gossip, and other tools of social disapproval performing the role of law. Instead, in the moshav, where work, meals, and presumably showers were private affairs, people were less concerned with their neighbors' opinions of them. One moshav member, speaking of the referral to the justice system of a group of boys who had stolen some melons, explained to Schwartz that if all the community did was "scold" them, "they [would] laugh at you" (quoted on p. 490). Schwartz distinguished between law and informal controls and concluded that law only emerges in communities where informal controls are weak and that once formal legal institutions are established the power of informal controls atrophies even further, to the point of being laughable.

Not to get too far off the track, but it has come to my notice that even in its more formal state, law may be considered a laughing matter by some. The *New York Times* reported recently that a group of high school boys in Vermont had vandalized the farm home/museum of

the late poet Robert Frost (Barry 2008, A12). Breaking windows and furniture, writing on walls, urinating and vomiting from an excess of beer and other liquor, the boys partied late into the night. When the state police caught up with them, they were arrested and prosecuted for trespassing. The sergeant in charge was struck by the irreverence of one boy who asked if he could post his mug shot on Facebook. Not even formal sanctions were enough to make this American youth take his transgression seriously. What would be even more shocking to members of Schwartz's kvutza is that this young man, far from fearing communal shame, wanted to advertise his transgression to his whole Facebook community.

WE HAVE SEEN that social form and legal form tend to converge, with types of law corresponding to the societies they are embedded in. There is another tradition in law and society that links not just the contours of law but the shape and practices of the legal profession to social, cultural, and economic conditions. Richard Abel and Philip Lewis's three-volume *Lawyers in Society* (1988–89) provides information about legal practice in nineteen different countries and anchors the sometimes dramatic differences to the distinctive socioeconomic forces that the legal profession is part of and contributes to.

These links can be seen too in the shifts in the profession in the last half of the twentieth century. Some of the earliest works in law and society revealed a highly stratified legal profession in the post–World War II period. Jerome Carlin's (1962) study of solo lawyers of the 1950s depicted these lone practitioners as isolated, competitive, and struggling to meet the demands of their mostly individual clients while warding off encroachment by their competitors. At the other end of the status hierarchy, Erwin Smigel (1960) showed us the professional life of *The Wall Street Lawyer* in firms that serviced corporations. Reflecting the status of their clients, Carlin's solo practitioners were more likely to be ethnically diverse and enjoy little occupational security; in contrast, the corporate lawyers described by Smigel were almost all white Anglo-Saxon Protestant—with the exception of the white ethnics who often handled the litigation end of things for corporations—and had much higher incomes and job security.

The highly stratified quality of the legal profession was under-

scored again by Heinz and Laumann (1982) in their landmark, *Chicago Lawyers.* They interviewed 777 lawyers in Chicago and concluded that the profession was bifurcated according to whether one's clients were individuals or institutional entities such as corporations and that professional status was dependent on the prestige of one's clients. The most prestigious corporate law firms were comprised almost exclusively of men who had gone to the top law schools and who were, not coincidentally, white Anglo-Saxon Protestant. Those who had less prestigious solo practices servicing individuals or small businesses usually had gone to regional law schools and were more often Jews or Catholics. This "elitist tendency" of the legal profession (Heinz and Laumann 1982, 83) paralleled exactly, and helped reproduce, the prevailing inequalities of mid-century American society.

As social and economic conditions in the United States shifted in the last decades of the twentieth century, so did the contours and practices of the legal profession. The number of lawyers increased significantly, going from just over 355,000 in 1971 to more than double that in 1995; law firms grew larger with more of them practicing corporate law; and there was a proportionate decrease of solo practioners and small firms (Halliday 1986; Abel 1989; Seron 1996; 2007). More striking was the entrance of previously excluded groups into the profession. During the first half of the twentieth century, the American Bar Association had altogether barred African Americans from membership, and women were denied entry to most law schools. But, by the end of the century, almost half of law students were women, and the proportion of minority law students had risen to 20 percent.

In their sweeping documentation and analysis of these changes, Heinz, Nelson, Sandefur, and Laumann (2005) reveal that the legal profession is really two distinct professions, with those specializing in services to corporate clients a world apart from the mostly solo practitioners and small firms serving individuals with injury claims and divorce proceedings. In fact, the profession is even more stratified than it used to be, with specialization and income inequality greater than ever. While it is true that more women and minorities now practice law, they are rarely partners in large firms and on average have lower incomes (Epstein, Sauté, Oglensky, and Gever 1995; Chambliss 2004; Heinz et al. 2005). The processes that produce this glass ceiling are less explicit than the outright exclusions of the past and often

take the form of sexual harassment and/or stereotyping (Epstein et al. 1995). What remains of the notion that law resides above the fray is put to rest by this extensive body of literature tracking the zigs and zags of the legal profession as its structures and inequalities parallel those of society.

The global economy has triggered changes in legal practice too. In a book about transnational commercial arbitration called *Dealing in Virtue*, Yves Dezalay and Bryant Garth (1996) describe how disputes between international parties in business transactions are handled through a private justice system. Most important for us here, they trace transformations in this arbitration that closely shadow broader economic and political changes. The cadre of elite lawyers who serve on panels of highly paid arbitrators in these business disputes was likened to a "mafia" by one insider. As he put it, "It's a mafia because people appoint one another. You always appoint your friends—people you know" (quoted in Dezalay and Garth 1996, 10). Like the conventional legal profession, this club has diversified somewhat with the times, admitting a handful of women and minorities. More fundamentally, Dezalay and Garth tell a story of institutional change, as U.S. business interests have refashioned an informal means for handling disputes into a more formal, technocratic one with a greater resemblance to U.S. litigation practices. Adopting Weber's model of increasing rationalization in modern society, Dezalay and Garth argue that the charisma and elite credentials of the "grand old men" who traditionally made up this transnational arbitration club continue to provide it with an aura of genteel legitimacy, but that its actual operation has been rendered highly technocratic and rational.

Another study of the institutional and normative structures of the legal profession takes us far afield from these glamorous, globe-trotting arbitrators. In their book on local divorce lawyers in Maine and New Hampshire, Mather, McEwen, and Maiman (2001) introduce the concept of "communities of practice" as a way to think about the links between socioeconomic forces, professional norms, and personal values. They find that the conduct and communication of these lawyers, mediated by personal factors and constrained by economic incentives, reproduce powerful professional norms among these solo and small-firm practitioners.

Two cumulative points emerge from these studies, despite their

many theoretical and methodological differences. The first is that, as Carroll Seron recently told me, "It is in some ways misleading to talk about 'the legal profession,'" given the dramatic professional differences among types of lawyers. The second broad point is that the legal profession(s) and legal practice, like law itself, are both constituted by and in turn help constitute the surrounding social, political, and economic landscape.

AS THIS CHAPTER comes to a close, I return to the question of how to define law. Whether we should make law synonymous with rules for social behavior and mechanisms of control—however informal—as it was for Malinowski, or reserve the word to refer to specialized and formal legal institutions as Schwartz did, is open to debate. The Central Alaskan Yupik language apparently has over a dozen words for "snow," suggesting that when precision is important we can maximize it by using different words (in our case, "law," "norms," "social mores") for variations on a similar phenomenon. But what is gained in precision by limiting what counts as "law" might be lost in analysis if it inhibits us from seeing beyond differences in social control practices to their functional similarities. Snow in all its many forms is cold and wet; the task then is to decipher under what atmospheric conditions one form or the other will fall. Terminological disputes aside, Malinowski and Schwartz show us that the very presence or absence of a formal legal system depends on social context.

So, law in both its particulars and its generalities is contoured to society—a law and society insight that shakes to its very foundations the myth of law as transcendent, natural, or divinely inspired. Who knows, maybe our *faith* in this myth does have its roots in biology or divine intervention—not so far-fetched an idea since this belief in the sanctity of one's own legal system seems to be a constant across societies. But myth it is, and law and society scholarship that highlights the variability of law according to social structure and social relations goes a long way to debunking it.

Oh, and in case you are wondering, we paid the tip.

CHAPTER THREE Law in the Everyday, Everywhere

Law, and its evil twin, crime, permeate the cultural vernacular in the contemporary United States. Arguably, no other institution gets so much press. The economy is relegated to its own section of the newspaper, "Business," for those who want to know about such arcane affairs or whose job it is to know (at least until the latest financial collapse has forced economic news onto the front page). Education is something everyone says they care about, but draws yawns if you go on for too long about it. Politics gets a lot of media attention during election cycles, but even then most people probably don't know or care much about, say, what the Electoral College actually does. And some people are still undecided about which candidate they prefer for president of the United States right up to election day (these are the much-courted "undecideds" who decide election outcomes). But, when it comes to law, people's passions are stirred, and few are undecided about things like the death penalty, Megan's Law, Three Strikes, or the guilt or innocence of O. J. Simpson. The very fact that we call them by their nicknames—"Megan's Law" and "Three Strikes"—suggests an easy familiarity.

No wonder. We are introduced to law over and over again in so many personas, often sexy and usually sensational. When Paris Hilton was sent to jail in June 2007, the media were on high alert for days, keeping us apprised of her status, whether or not DUIs go to jail and for how long, the whereabouts of health care for those in her jail, exactly what the terms of her probation were, and other enticing details. Michael Jackson's 2005 trial on child molestation charges was such a media draw that a reenactment of the day's events was broadcast nightly on Court TV. O. J. Simpson's fame as Heisman Trophy winner and one of football's greatest running backs was dwarfed by

the infamy of his trial for the 1994 murder of his wife, Nicole Brown Simpson, and her friend, Ronald Goldman. His not-guilty verdict in October 1995 was watched on live television by over half the American population. By then, virtually every adult in the United States could tell you the most obscure details about the case and the trial, and we all had become instant pundits, second-guessing the jury decision with the confidence of experts and the passion of a populace aroused. Neither the passion nor attention to detail faded with time. In early 2008, I asked my undergraduate research assistant (who was seven years old during Simpson's murder trial) to read this chapter and give me her feedback. She noted in the margins here, "Don't forget O.J.'s recent armed robbery charges!" Even before his conviction for this latter offense and the wide press it received, she was fully apprised.

The O.J. trial has been called "The Trial of the Century," but every season brings its own galvanizing legal spectacle. It's not just celebrities who get celebrity coverage. Think of Laci Peterson's disappearance in December 2002 and the subsequent arrest and conviction of her husband, Scott Peterson. Even people like myself who do not buy the tabloids or watch much commercial television somehow knew of Scott's fishing trip, Laci's late-term pregnancy, the sensational arrest despite Scott's amateurish efforts to disguise himself, and the risqué audiotapes of Scott and his masseuse-girlfriend. These spectacles draw audiences not just for the material's salacious nature but for its apparent "news" value and for the psychic satisfaction of our moral outrage, even if that outrage seems to be—as in the Simpson case—alternately directed at the alleged perpetrator and at the legal system itself.

Coverage of such cases shares a lot with crime shows on reality TV. *America's Most Wanted*, *Unsolved Mysteries*, *World's Wildest Police Videos*, *COPS*, and *Dog the Bounty Hunter* are so popular they launch spin-offs of the spin-offs. Duane "Dog" Chapman (The Bounty Hunter) has written a best-selling memoir available in airport bookstores where other offerings are paltry. *You Can Run, but You Can't Hide* chronicles Dog's exploits, first as a gang member and drug dealer and later as "the world's most famous bounty hunter." His Web site gushes that Chapman "went from ex-con to American icon." The sensationalism and gritty realism of these shows no doubt provide much of their appeal,

but it seems hard to go wrong when peddling anything relating to law and crime. According to my cable guide, Court TV even has its very own channel where people can watch legal trivia around the clock.

If we include fictional crime and law shows, the genre covers well over half of my television channels. The *Dragnet* and *Perry Mason* of my childhood have given way to a crowded field. *Law and Order* and its many knock-offs, *CSI* (and now *CSI Miami* and *CSI New York*), and a whole crop of shows about the legal profession, are among the most prized products of the entertainment industry. Many—like *The Practice*, *LA Law*, *Boston Legal*, and *Ally McBeal*—achieve immortality as reruns and on DVDs. *CSI* has become such a part of the cultural lexicon that *Time* magazine ran a cover story on "The CSI Effect." In a version of life imitating art, some jury consultants say they deliberately pick jurors who are familiar with the *CSI* series and the kind of forensics it publicizes. The police are reportedly worried that they will have to do extra forensic work just "to placate CSI-educated juries."

Law and Order has broken all records for viewership and spawned the almost irresistibly compelling *Law and Order Special Victims Unit*, known colloquially both on and off the show as "Special Vics." For those few who have not seen it, the show focuses on the detection and arrest of people suspected of sex crimes and on the dramatic dynamics of their prosecution. Interspersed throughout are quasi-factual tidbits about actual statutes and criminal justice procedures, giving it a documentary gloss and leaving viewers—for better or for worse—convinced they have learned something. It helps too that the show advertises itself as based on true stories, which are "ripped from the headlines," to borrow the show's own violent verbiage.

Elayne Rapping (2003) has written of the conservative ideological messages conveyed by these shows—the criminalization of social problems, the overrepresentation of people of color as criminal offenders, and the exaggerated focus on violent crime. In a recent article entitled "Looking beyond Caged Heat: Media Images of Women in Prison," Dawn Cecil (2007) reveals the sensationalized and sexualized image of women prisoners in documentaries, television news, and talk shows. And, in *Distorting the Law*, William Haltom and Michael McCann (2004, 33) expose the many fallacies in the media coverage of "pop torts" like the McDonald's coffee burn case. As Haltom and McCann reveal (pp. 185–95), contrary to sensational reports of a multi-

million dollar windfall for an opportunistic victim in the McDonald's case, the claimant was left with permanent injuries from third-degree burns and a final payment that was not even one-fifth of what the jury had awarded her.

In another kind of law/popular culture analysis, a former president of the Law and Society Association, Austin Sarat (2000), gave his presidential address on the complex meaning of law and images of law in the film *The Sweet Hereafter.* Sarat argued that images of fatherhood and images of law in that film are so intertwined that people's fantasies and anxieties about each are expressed through the other. The film reveals that both fathers and law are associated with dread, abuse, and loss. But Sarat suggests it also shows that these realities "are contingent and variable," with some images of kind and empathetic fathers and of law as it might be and that we "need not remain inert" in determining our reality (p. 42). Despite their different takes, scholars like Rapping, Cecil, Haltom and McCann, and Sarat, all point to the pervasiveness of law in popular culture and to its many reverberations.

But when we talk about law being everywhere, law and society scholars often mean something else. Beyond the hyperactive cop shows, celebrity trials, and reality TV car chases, beyond the myths about American litigiousness and the legal subtexts of films that do not appear to be about law, law is present in our lives in more mundane ways as well. It permeates popular culture to be sure, but just as surely it permeates our everyday, ordinary lives beyond the spotlight of the media or the ritual of the courtroom.

Like Malinowski, many law and society scholars find law even where there are no traces of formal law. Several decades ago Sally Falk Moore wrote about the "semi-autonomous social fields" that are outside the formal legal system, but which "have their own customs and rules and the means of coercing or inducing compliance" (1973: 721). Examples of such social fields are everywhere—from corporations to professional associations to voluntary associations, and to the structured interactive spaces among and between such groups. Moore analyzed the upscale ready-made dress industry in New York City as a "semi-autonomous social field" in which union representatives, contractors, and designers exchange gifts and favors in a way that often circumvents both the formal legal system and union rules. Making the

case that this is indeed a legal order, she said (p. 728), "[T]here are strong pressures to conform to this system of exchange if one wants to stay in this branch of the garment industry. These pressures are central to the question of . . . the relative place of state-enforceable law as opposed to the binding rules and customs generated in this social field." Moore's detailed description of these uncodified legal orders and their penetration into everyday life remains one of the most compelling in the field.

Clearly, law (or something like it) shapes the way we live whether we notice it or not. E. Adamson Hoebel and Karl Llewellyn (1941) emphasized this point long ago in their study of the Cheyenne Indians who once inhabited the Great Plains of North America. Unlike Moore's research, their focus was on formal law; but, like Moore, they highlighted the ubiquity of legal orders and law's often invisible presence. Mixing interviews with historical documents, they pieced together a picture of a traditional system of law organized around two main functions. The first was to set the parameters for ordinary life so people could "go around in more or less clear ways" (p. 20). In this function, law stayed largely behind the scenes, like a theater prompter who is invisible as long as everyone remembers their lines. But, said Hoebel and Llewellyn (p. 20), "trouble cases" inevitably arose—for example, in the form of disputes or egregious violations—and then law made a flamboyant entrance to clean up the "social mess."

As Hoebel and Llewellyn found with the Cheyenne, law in contemporary Western society sets the ground rules and stays in the background, only commanding attention when trouble comes. We nonetheless sense its routine strictures, as, for example, when I am intimidated into leaving the annoying labels on my mattress, or concede to a credit check, or even more routinely when I stop for the red light on my quiet street at midnight with no other cars in sight. The impulse to abide by law's restrictions may vary across time, culture, social class, personality type, and punishment severity (a topic of what are called compliance studies), but even violators usually modify their behavior to minimize detection. It is this everyday nature of law—its ability to influence our most mundane activities and even to determine what those activities *are*—that makes it such a powerful resource for those who would shape the socioeconomic order to their advantage, as we saw in the last chapter.

If law shapes how we live, it also shapes how we talk, and so how we think. At the most basic level, law creates conceptual categories and determines their contents and boundaries. As I write this, there is a heated debate in the United States about whether immigrants take jobs away from citizens. Beyond the specifics of this debate, consider how law shapes the thought process that underlies it. Without immigration law, there is no category of "immigrant" (as there wasn't when European explorers "immigrated" to the shores of what was to become the Americas). The point may seem trivial until we recognize how much a part of natural reality this legal category and others like it seem, and how critical to our very thought process.

Susan Coutin's (1994) analysis of the 1980s sanctuary movement in the United States underscores this power of language and legal categories. She shows that while sanctuary workers resisted the government's definition of which illegal aliens were true "refugees," they continued to use these legal classifications that are so much a part of our linguistic and cognitive repertoire. Sanctuary activists redefined the *contents* of categories and so at one level replaced government's legal authority with that of the community, but at the same time they reinforced the legitimacy of the categories themselves. Even this radical movement that was intent on shaking up legal meaning "both resisted and furthered repression" (Coutin 1994, 299), illustrating once again the cognitive power of legal classifications.

So it is with many of the concepts that are the building blocks of thought. Not just "criminal," "prison," "felony," or "illegal alien," but less combustible words like "contract," "capital," "private property," "mortgage," "welfare," "spouse," and "discrimination" are the creatures of law. Law not only defines their boundaries and content but brings them into existence in the first place. They become routine parts of our vocabulary, but their origins in law—and so their essentially invented nature—remain obscure to us. Even words like "brother-in-law" that noisily declare their legal origins somehow manage to settle in to the natural order of things. By the same token, relationships that lack a name lack a certain cognitive solidity. There is no word in English for me to call the parents of my son's wife. To my son, they are his "in-laws." But there is nothing for me to call them, and so they reside somewhere out there on the hazy fringes of family.

Law and society thinkers who study the concept of race point out

that race and racial categories are not fixed, natural realities but are instead sociolegally constructed. "Critical Race Theory" scholars show that law has historically been a central protagonist in defining racial categories and that the boundaries of these categories have shifted over time to accommodate political realities and conventional wisdoms. For example, the first citizenship law in the United States in 1790 declared that only "free White persons" could become U.S. citizens. So, it was critical to define who was "white" and on what grounds. Over the decades (before the racist exclusion was finally repealed in 1952), the courts came to many conflicting decisions on the subject. As Haney López (1996, 203–8) reports in his book, *White by Law,* the courts have variously declared "Chinese are not White," "Persons half White and half Native American are not White," "Hawaiians are not White," "Burmese are not White," "Japanese are not White," "Mexicans are White," "Native Americans are not White," "Persons half White, one-quarter Japanese, and one-quarter Chinese are not White," "Asian Indians are probably not White," "Syrians are White," "Armenians are White," "Syrians are not White," and "Filipinos are not White." The courts may have had trouble deciding what "white" actually was, but they played a key role in perpetrating the *ideas* of whiteness and nonwhiteness and their assumed basis in natural reality.

Feminist scholars have shown that the content and boundaries of sexual identification are also at least partly legal constructions. Many of these scholars document the role of law historically in defining what it means to be women or men and what their respective characteristics, capabilities, and rights are. Some focus on the historical exclusion of women in the United States from public life and from certain professions, based on women's alleged timidity and irrationality and their capacity for motherhood (Taub and Schneider 1998). Others, like Judith Butler (1990), argue that the dichotomization of sex into male and female is itself a sociolegal creation. Pointing to a continuum of anatomical traits and body types, Butler contends that law and culture impose the male/female duality on that continuum and in the process naturalize it.

At a recent trial in San Francisco, a transgender prisoner brought a lawsuit against the California Department of Corrections and Rehabilitation (CDCR) for deliberate negligence, after being serially raped by her cellmate and others in a men's prison. At the start of the trial,

most of a day was consumed with the prosecution and defense arguing the legal question of whether the inmate should be referred to with the feminine pronouns she preferred or the masculine pronouns that attorneys for the CDCR insisted upon (presumably because the latter was jockeying for an advantage with the jury who might find it harder to imagine a man as a rape victim). Beyond the fact that the very term "transgender" naturalizes the male/female divide that the gender-variant person *trans*gresses, the intense courtroom debate underscored the mutually exclusive nature of the gender categories and the emotional stakes in assigning them.

The ability of law to create social realities that appear natural by inventing many of the concepts and categories we think with, means that it insinuates itself invisibly into our everyday worlds and wields extraordinary power. John Conley and William M. O'Barr (1998), in *Just Words*, reveal the subtle workings of linguistic power in the courtroom where participants who do not use linear logic and masculine forms of speech are effectively silenced and technical legal language defines reality. The "powerless language" of many women and some men "reflects and reinforces their subordinate position in society" (Conley and O'Barr 1998, 66, 65). In the courtroom, their tendency to use "hedge words" such as "kind of" or "sort of," finishing sentences with a lifting up of their voices as if asking a question rather than making a statement, and other such stylistic specifics—learned through years of subordination and its attendant hesitancies—undermines their authority with juries and other courtroom players and reproduces inequalities of power. The fact that this power remains mostly invisible precisely because its products are so taken for granted makes it even more formidable. Whether in the courtroom, on the streets, or in the private space of family, law and the thought processes and power relations it contributes to draw much of their power from their quiet ubiquity.

The Italian social thinker Antonio Gramsci (1971) called this power to shape reality without calling attention to itself "hegemony." Contemporary law and society scholars point out that law is hegemonic because not only does it shape how we live, but it gives the shape of our lives a taken-for-grantedness. The term is usually used for weighty subjects like the power of the ruling class to impose its value system and worldview. It is often brought to bear, for example, to explain

how subordinate people come to accept their subordination or how a society that promises freedom and equality retains legitimacy despite its perpetuation of profound inequalities (Lazarus-Black and Hirsch 1994). To the extent that this subordination and these inequalities are made to appear part of the natural order of things through law and its associated cognitive processes and social structures, they go uncontested and derive further hegemonic power from their lack of contestation.

A similar process applies to the more trivial events of daily life. To give a couple of examples from the realm of traffic flows: I was recently in Ireland and found it almost impossible to drive as they do, on the "wrong" side of the road, and in one instance I ended up in a ditch. Upon my return, I exchanged many stories with other Americans and some Europeans, the common theme of which was twofold—the challenges of this driving experience and the conviction that the Irish drive on the wrong side. There is always a tongue-in-cheek quality to these conversations and accusations, but the extent to which law has ingrained in me which is the *right* side of the road was graphically conveyed by my landing in that ditch. My second example comes from closer to home. If I don't run that red light on my corner at midnight, it is not just because I am afraid a policeman will see me; it is also that deep in my frontal lobe somewhere "red light = stop" has taken up quiet, but no less forceful, residence.

Sociolegal scholar Tom Tyler (1990) asks "Why People Obey the Law" and concludes that it is partly because we think of it as legitimate, fair, or just. The concept of hegemony takes this a step further. Not only do the categories and processes of law seem *just*, they seem *natural*. I consent to that credit check at Sears because it seems like a reasonable, legitimate thing for Sears to do; mostly though, it does not occur to me to question it, much less to ponder the sociolegal construction of the whole concept of credit. Only once have I thought long and hard about the meaning of "credit" in a capitalist society, and that was when my credit card company bizarrely informed me that my credit history was bad precisely because I paid all my bills on time and therefore owed no accumulated interest.

But if law is powerful and hegemonic, it also occasionally provokes people to contest that power and provides a venue for resistance. In fact, it is partly because law is the locus of so much power—both

the formal, blatant kind and the more invisible, hegemonic kind—that people often turn to it as a tool of resistance. The transgender inmate, whose trial underscored the hegemonic quality of gender categories, effectively used the courtroom for a lesson on the ambiguity of those categories. Using law as a form of resistance, she not only sought material relief from the indifference of the CDCR, but she briefly unsettled sexual categories and exposed their arbitrariness as the court argued for the better part of a day over whether she was a "she" or a "he." The judge finally intervened and announced that the plaintiff was to be considered female and should be referred to with the feminine pronoun. Ultimately, she lost the legal case against the CDCR, but a colleague who observed the trial and spoke to her afterward told me that she was beaming even in the face of defeat, gratified not just that she had her day in court but that she had forced people to accept her femaleness, at least linguistically and for the duration of the trial.

James Scott (1985) writes about small acts of everyday resistance among peasants in a Malaysian village, as "weapons of the weak." Others have extended the idea to daily acts of retaliation and sabotage like a waiter spitting in a disrespectful customer's soup or a disgruntled worker surreptitiously dropping a wrench in the assembly line. People who are deprived of the power that comes with material resources or social status harness whatever is at hand to register their discontent, vindicate their lowly position, exact satisfaction for the wrongs done them, or simply rescue their dignity. As that transgender inmate found, the legal arena can sometimes be used for these purposes.

Sometimes law is not just the arena but also the tool. A good example of this can be found in the burgeoning prisons of twenty-first-century America. The unprecedented surge in incarceration in the United States has meant that prisoners are often crammed into quarters built for half as many, sleeping in tents set up in prison yards or triple-bunked in what were once prison gymnasiums. Rehabilitation programs have given way to warehousing, and increased mandatory sentences mean that many more prisoners are serving what amount to life sentences. As people serve out their long terms, the prison population is aging, and decrepit medical facilities are stretched even further beyond their meager capacity. Not long ago, the *Sacramento Bee* (Sillen 2006, E1) ran this description of medical facilities at San Quentin in California:

> To reach one of San Quentin's medical clinics, you must walk past a row of 20 maximum-security cells with inmates confined behind fine crosshatched wire, barely visible. The floor is strewn with trash, puddles of water and worse from the runoff of inmate showers from the tiers above. Soap and hair drip off the guardrails of the walkways, leaving a slippery mess to dance around as you approach the clinic, which is shoehorned into a converted cell. A mildewed shower curtain hangs in front of the clinic's entrance to keep the water from spraying directly into the medical area. . . . Inhumane is the nice term for the conditions. . . . The resulting patient health outcomes tell a gruesome story.

In the midst of the prison surge, the Republican Congress in 1996 passed the Prison Litigation Reform Act, designed to cut down on prisoner lawsuits. Among other things, it required prisoners with grievances to exhaust administrative remedies provided by the states' prison systems before accessing federal court to contest the conditions of their confinement. It was clear from the congressional debate that lawmakers saw internal administrative procedures as a way to reduce prisoner lawsuits, most of which they said were "frivolous."

And it worked. Federal lawsuits filed by prisoners plummeted from forty-two thousand in 1995 to twenty-six thousand in 2000, even as the prison population continued to rise. The inmate grievance systems that are partly responsible for this decline in lawsuits are severely compromised as effective disputing mechanisms. State correctional systems control how the process works and often make it so complicated that few prisoners (or anyone else) can figure it out. Most states require the paperwork to be filled out just so, in strict accordance with all state guidelines no matter how complicated; otherwise, the grievance will be screened out and the inmate deemed not to have exhausted internal remedies. One federal judge has described prison grievance systems as "a series of stalling tactics, and dead-ends without resolution"(*Campbell v. Chaves,* 402 F. Supp. 2nd 1101,1106 n. 3 [D. Arizona 2005]).

In California, an inmate who wants to file a complaint starts the process by describing their grievance on a "602" form and depositing it in a box. Inmates consider the system "a joke." One claims, "I've watched officers take 602s and using a lighter burn them in front of inmates and then deny having done so when asked about it by their

supervisors." Another says he has seen staff throwing away prisoners' grievances before logging them in. And a woman reports that guards come into inmates' cells "and steal your stuff. . . I turned in lots of 602s and they lost or ignored them, I never received any response. What are they going to do anyway? These men control us, it's their system, it's the way it is. We are a number to them, we're not even human." The inmates are right to be cynical about it. The vast majority of these grievances are screened out or denied, and their appeals rejected.

So, why are tens of thousands of these grievances filed every year in California alone? One inmate I asked looked at me as if the answer were obvious and said with a shrug, "It's all we got." I assume he meant that even if their chances of winning are slim, they take a shot at it anyway, like the lottery. But maybe filing a complaint is also about taking charge and telling one's story. In the context of captivity, where one's identity as an autonomous human being is under attack, filing a grievance may be an assertion of one's agency or ability to take action. A prisoner in solitary confinement recently wrote, "Every aspect of our lives is controlled, from when the light comes on in the morning to the little bit of property we're allowed in our cells. The system tries to make us into caged animals but we still retain the right to be persons who are humyn [*sic*]." In this context, prisoners might file grievances as a way to affirm their very humanity.

Some prisoners talk of filing grievances as a way to harass guards and officials, in a rare turning of the tables of who is in charge. Assuming the forms are not simply thrown away, they produce an avalanche of paperwork for guards, wardens, and the entire prison system, as folder after folder of prisoner grievances pile up at the Sacramento Office of Inmate Appeals. I once overheard an inmate in a California prison yard telling another about something a guard had done, and that he was going to retaliate: "I'm gonna 602 his ass!!" The fact that "602"—the administrative number of the grievance form—has become a verb in prison slang and means something you do to an official offers a powerful hint about its use as a weapon of the weak.

The point is, these grievance systems that were seen by Congress as a way to limit the power of prisoners to get to court may actually empower them at some level. Even though it is unlikely to succeed at changing conditions, filing a grievance may be a form of resistance—

an assertion of agency, the catharsis of telling one's story, and the rare opportunity to exact revenge-by-paperwork on one's captors. So, law may contribute to hegemony as Gramsci explained, but it may also be used at the microlevel to fight back, or at least to fight for one's dignity.

Sometimes the victory eked out through resistance is more than symbolic or subjective and extends beyond the microlevel. Richard Abel (1995) writes of the ingenious and powerful use of law by opponents of apartheid in South Africa. As he tells us, law was a potent weapon not only for those who imposed apartheid on black South Africans but for those who resisted it. And its power as a tool of resistance was related directly to its hegemonic power, in the sense that it was the cultural legitimacy of the rule of law in South Africa that enhanced its utility in challenging white elites.

Contributors to the edited volume *Contested States* (Lazarus-Black and Hirsch 1994) explore the uses of law by women in India to resist patriarchal relations (Moore 1994), the role of courts in the politics of slave resistance in the British Caribbean (Lazarus-Black 1994), and women in sixteenth-century Istanbul who stood defiantly at the "gates of justice" and negotiated protection under Islamic law (Seng 1994). In some cases, the impacts were confined to the individual protagonists, and in other cases their ramifications were far-reaching. In all of them though, the previously disempowered obtained concrete changes through the deployment of laws that were otherwise used to subordinate them. Hirsch and Lazarus-Black (1994, 20) sum it up succinctly: "Law is at once hegemonic and oppositional." While law exerts enormous power by seeping into and through daily life, structuring our routines, our language, and our thought, at the same time it offers itself up as one of the sharpest instruments in our tool kits of resistance.

A *New York Times* article (Worth 2008, 8) entitled "Tiny Voices Defy Fate of Girls in Yemen" tells the story of two young girls in Yemen who risked death to escape their violent, forced marriages. The average age of marriage for girls in this conservative Arab country steeped in poverty is twelve or thirteen. Fathers sometimes force their daughters to marry as young as eight years old. The thinking apparently is that early marriage preempts a dishonoring kidnapping by a future husband. It is also understood locally that early marriage makes the wife more

compliant. The local saying goes, "Give me a girl of 8, and I can give you a guarantee" that she will be a good wife.

Recently, two girls rebelled against this custom. The *Times* reporter tells the story of ten-year-old Nujood Ali:

> The issue first arose because of Nujood, a bright-eyed girl barely four feet tall. Her ordeal began in February, when her father took her from Sana, the Yemeni capital, to his home village for the wedding. She was given almost no warning. . . . The trouble started on the first night, when her 30-year old husband . . . took off her clothes as soon as the light was out. She ran crying from the room, but he caught her, brought her back and forced himself on her. Later, he beat her as well. "I hated life with him," she said, staring at the ground in front of her. The wedding came so quickly that no one bothered to tell her how women become pregnant, or what a wife's role is . . . Nujood complained repeatedly to her husband's relatives and later to her own parents after the couple moved back to their house in Sana. . . .On April 2, she said, she walked out of the house by herself and hailed a taxi. It was the first time she had traveled anywhere alone, Nujood recalled, and she was frightened. On arriving at the courthouse, she was told the judge was busy, so she sat on a bench and waited. Suddenly he was standing over her, imposing in his dark robes. . . . [The judge] invited her to spend the night at his family's house, she said, since court sessions were over for the day. . . . When Nujood's case was called the next Sunday, the courtroom was crowded with reporters and photographers, alerted by her lawyer . . . "Do you want a separation, or a permanent divorce?" the judge asked the girl, after hearing her testimony and that of her father and husband. "I want a permanent divorce," she replied, without hesitation.

The judge granted the divorce, and since then her lawyer has been contacted by other girls. As the reporter tells it, "One of them was Arwa, who was married last year at the age of eight. . . . Arwa described how surprised she was when her father arranged her marriage to a 35-year-old man eight months ago. Like Nujood, she did not know the facts of life, she said. The man raped and beat her." After several months, she fled to a hospital and ended up in front of a sympathetic judge who dissolved the marriage. When the reporter asked her what had made her run away, "Arwa gazed up, an intense,

defiant expression in her eyes. 'I thought about it,' she said in a very quiet but firm voice. 'I thought about it.'"

These two girls' actions have triggered a movement against child marriage in Yemen, where many people are outraged at the violence and suffering they speak of. And their resistance will probably reverberate beyond that. Nujood told the *Times* reporter that she plans to be a civil rights lawyer or journalist. Like the Turkish women who went to the "gates of justice" four centuries ago, Nujood and Arwa defied patriarchal customs and used the courts to do so. In the process, they freed themselves and launched a movement.

In *Law and Globalization from Below* (2005), editors Boaventura de Sousa Santos and César Rodríguez-Garavito and their contributing authors look at some of the other resistance movements that have been built like this from the bottom up. They include the struggles of landless peasants, marginalized immigrants, and workers in this period of relentless globalization. Reversing the conventional emphasis on the inexorable sweep of the neoliberal forces of globalization, the book reveals the many ways that those most negatively impacted by globalization fight back, crafting legal strategies and forming advocacy networks. The results are some important local victories and the emergence of a counter-hegemonic "global justice movement" (de Sousa Santos and Rodríguez-Garavito 2005, 3).

One particularly powerful account in the book describes the local, national, and international opposition to development of the Narmada Valley in India (Rajagopal 2005). In this two-decade struggle, a coalition of local and global actors used law and international norms regarding human rights and sustainable development to oppose elites (including the World Bank) who supported the damming of the Narmada River and the flooding of tribal lands and farms. Contesting the displacement the flooding would entail, its impact on local livelihoods, and its environmental effects, the coalition was both strategic and persistent. The outcomes were mixed, with the Indian Supreme Court first ordering the project suspended and later reversing itself, the World Bank withdrawing from the development project, and a World Commission on Dams being established as a venue for policy discussions about the impacts of dam development. Following the second supreme court decision in 1999, displacement continues. Rajagopal argues though that domestic and international norms con-

cerning sustainable development have been advanced by this intense and visible struggle and that the resistance contributes in the long run to counter-hegemonic globalism.

Echoes of Foucault permeate this scholarship on resistance. Remember from chapter 2 that Foucault was interested in the social practices that constitute power relations at the local level. For him, the practice of power assumes at least two adversaries each of whom is capable of action. Just as it is ultimately human beings whose actions and practices *produce* power, they are capable of resisting it. Prisoners in twenty-first-century California, twentieth-century opponents of apartheid in South Africa, eighteenth-century slaves in the British Caribbean, women in the Ottoman Empire, Yemeni child brides, and opponents of dam development in the Narmada Valley, all in their own way exploit law's power to contest their disempowerment.

In one final example of the power of people to carve counter-hegemonic forces from otherwise oppressive contexts, legal anthropologist Laura Nader (1990) describes the "harmony ideology" among the indigenous Zapotec people in Oaxaca, Mexico. Nader tells us that missionaries and colonizers imposed ideas on the Zapotec about the dangers and dysfunctions of conflict and the superior state of harmony. This harmony ideology, with its strong value placed on compromise and cooperation, was eventually incorporated into the local society and legal order. The Zapotec then exploited this "rhetoric of peace" as a shield with which they protected their autonomy from encroachment by the Mexican state. It was in other words "both a product of nearly five hundred years of colonial encounter and a strategy for resisting the state's political and cultural hegemony" (1990, 2). In this example, the instrument of resistance was neither a courtroom nor law per se, but rather an ideology that permeated the sociolegal order—an ideology that was imposed from above and then retrofitted for counter-hegemonic ends.

LAW AND SOCIETY scholars generally argue that beliefs and behavior are ultimately rooted in culture and social structure, which helps explain law's hegemony, but that people also have the capacity to resist, rebel, and at least temporarily subvert that hegemony. The law and society concept of "legal consciousness" ties this conceptual

package together. Patricia Ewick and Susan Silbey (1998) and others who study legal consciousness are interested in people's beliefs about law and how they act on those beliefs. They pay special attention to the tension in legal consciousness between its role in reproducing legal hegemony and the agentive quality entailed in resistance. Mostly though, studies of legal consciousness reveal the amazing capacity of law to roll with the punches, exhibiting a kind of Zen flexibility that strengthens rather than diminishes its power.

People may recognize law as a tool that is wielded over them and may sometimes fashion resistance to that subordinating force, but our experiences with law and our interpretations of those experiences are full of inconsistencies and contradictions. These inconsistencies usually remain under the radar of our awareness, cause us no cognitive dissonance, and if anything contribute to, rather than detract from, law's hegemony. Law's basic legitimacy remains unquestioned, as our legal consciousness seems capable of expanding and transmorphing at a moment's notice. So, according to Ewick and Silbey (1998), the same person may think of law as impartial and objective in one instance, boast of manipulating it in the next, and then complain of its oppression, without posing any real threat either to our cognitive processes or to law's legitimacy.

I was reminded of this chameleon-like quality of legal consciousness recently when I was called to jury duty. At first, I complained that I couldn't spare the time. But, once I got to the courthouse and was seated as a potential juror, I was awed by the majestic ritual. It was not just the judge's robes, the respectful silence, and the bailiff's formal demeanor, but the judge's meticulous explanation of due process and the obvious lengths to which the system goes to ensure adherence to that inspired principle. Now anxious to serve, I soon found myself strategizing over the best way to pass the voir dire process during which those who are deemed potentially biased are excluded from the jury pool. Committed to not telling a lie, yet not wanting to reveal too much of my underdog sympathies, I thought carefully about how I might word my responses to the inquiries. As it turned out, the mental exercise was for naught, as the eerily clairvoyant prosecutor summed up my appearance, asked me nothing, and peremptorily excused me. Leaving the courtroom, I was troubled because I had figured out that

this was a "three-strikes" case, and that the defendant stood to go to prison for life for several small-time robberies committed to support a heroin habit. It struck me that I should have "resisted," at the very least making a statement protesting the Three-Strikes Law in response to the judge's question about whether I could be impartial.

In the space of a few hours, I had alternately seen law as majestic, manipulable, and an oppressive system to be resisted. Probably because I was in law's formal living room —court—I became more than usually conscious of my fickle legal consciousness. But our sense of law, in all its majesty, manipulability, and oppressiveness, is not confined to courtrooms, prisons, or struggles of liberation; more subtle examples can be drawn from daily life, as we dispute with a neighbor, apply for a driver's license, or seek reimbursement from our insurance company. All are part of legal consciousness, welded by social structure, infused with ideology, and—here is the larger point—ubiquitous.

The development of legal consciousness probably starts in early childhood, like just about everything else. Legal historian Harold J. Berman (2006) once said, "A child says 'It's my toy.' That's property law. A child says, 'You promised me.' That's contract law. A child says, 'He hit me first.' That's criminal law. A child says, 'Daddy said I could.' That's constitutional law." Law is not only everywhere, but there is hardly a time in our lives before at least some dim consciousness of law.

So when law and society scholars say that law is everywhere, they mean that it permeates popular culture but also that it is part and parcel of our daily lives and our very consciousness. Neighborhood watch campaigns, the shouted rules of a pickup-basketball game, and the Sears credit check share important aspects of official law and bear an uncanny resemblance to their more formally dressed sister. We sense this functional similarity when we talk about "taking law into our own hands" or when we "lay down the law" to our kids, "read someone the riot act," proclaim that "his word is law around here," or stand at an intersection beside our friend's stalled car and direct traffic—even the shyest of us—with surprising aplomb and authority.

The *New York Times* recently ran a funny article about a small town in Nebraska where the confluence of law and everyday life is especially

apparent (and clearly considered quaint by the urbane editors of the *Times*). It seems that in this prairie town of Chadron, Nebraska, citizens call the police department to report almost any type of activity that is a little out of the ordinary, and the dispatcher provides the local paper with a weekly report of these activities. The reports—from daily life to police, and back again to the weekly paper where people keep abreast of community events—have the ring of a town diary chronicling the everyday: "Caller from the 900 block of Morehead Street reported that someone had taken three garden gnomes from her location sometime during the night. She described them as plastic, 'with chubby cheeks and red hats' "; "Caller from the 200 block of Morehead Street advised a man was in front of their shop yelling and yodeling. Subject was told to stop yodeling until Oktoberfest"; "Caller from the 400 block of Third Street advised that a subject has been calling her and her employees, singing Elvis songs to them"; "Caller from the 200 block of Morehead Street advised that a known subject was raising Cain again"; "Officer on the 1000 block of West Highway 20 found a known male subject in the creek between Taco John's and Bauerkemper's . . . Officers gave subject ride home"; "Caller on the 900 block of Parry Drive advised a squirrel has climbed down her chimney and is now in the fireplace looking at her through the glass door, chirping at her"; and "Caller stated that there is a 9-year-old boy out mowing the yard and feels that it is endangering the child in doing so when the mother is perfectly capable of doing it herself."

Mocking tone aside, the article is a great illustration of the penetration of law and daily life. It reminds us that legal consciousness is not just about prisoners resisting their grotesque conditions or heroic women in the Ottoman Empire standing up to patriarchy. It is just as surely found in Chadron, Nebraska, where citizens call the police to let them know about a squirrel in the fireplace or Elvis on the telephone. Legal consciousness, like law itself, is everywhere.

This concept of the pervasiveness of law and legal consciousness can be misinterpreted in the context of the conventional wisdom that American society is too litigious. Let me set this straight. I do not mean that Americans are quick to sue. For one thing, the idea that law is everywhere is not for the most part about people using the formal levers of law; it is more fundamentally about the profound visible

and invisible presence of law in every realm of life and thought. It is true that some of the examples I have given here—like the prisoners who file grievances and the girls in Yemen who go to court to contest their forced marriages—involve people turning to the formal law as a tool of resistance. The larger point though is that law permeates our lives in myriad ways even when we are not consciously engaged with "the law."

There is another problem with confusing the idea of the pervasiveness of law with the notion that contemporary American society is litigious. And that is that sociolegal scholars long ago put to rest the myth of American litigiousness. Felstiner, Abel, and Sarat (1980–81) point out that while people may be quick to complain, they are unlikely to mobilize law formally. They note the differences between "naming" a problem, "blaming" someone for it, and actually "claiming" compensation in court. While there may be quite a lot of naming and blaming, relatively few people go the extra step of filing a legal claim.

Haltom and McCann (2004) summarize extensive scholarly findings that support this. These findings show that, contrary to the conventional wisdom, the amount of product liability and malpractice litigation in the United States has not significantly increased over the last few decades. They then question what has given rise to the myth that contemporary Americans are quick to sue. Tracing the trajectory of celebrity torts—or torts that are so widely known about that they become household words—they document these torts' tour through the media, the often distorted nature of the story, and the interests these distortions serve. Haltom and McCann build a convincing case that prevailing ideas about American litigiousness are spread by a media eager to appeal to readers with dramatic and oversimplified tales of tort-happy complainants, and by economic elites who are interested in tort reform to immunize themselves from lawsuits.

So we end this chapter where we began. Law permeates our cultural vernacular, introduced to us over and over by a mass media less interested in accurate portrayal than in selling copy. Litigiousness is not the same thing as the pervasiveness of law, but the entrenched *myth* of American litigiousness provides a powerful example of the cultural, ideological, and economic moorings of legal consciousness.

Likewise, the media's relentless and racialized images of violent crime, with which I began this chapter, reflect and fortify powerful interests. Stoking our fears, they facilitate what Jonathan Simon (2007) calls "governing through crime," as social institutions from the family to schools to neighborhoods adopt the policies and metaphors of the war on crime. In the process, the very rationale of governance has shifted from distributive justice to the containment of danger.

In the next chapter, I pick up again on the ubiquity of law, its role in shaping our experiences and perceptions, and the powerful forces these reflect and advance, this time in the contentious arena of race. As we will see, law may be less overtly implicated in constructing race today than it was when the courts struggled to define who was white. But, in small and large ways—many shaped by the kinds of invisible processes I have touched on in this chapter—law is far from color-blind.