ELEVENTH EDITION

INTRODUCTION TO LAW AND THE LEGAL SYSTEM

Frank August Schubert

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To the memories of the late Elizabeth Josephine Neal
and Ethel L. Neal.
F. A. S.

Brief Contents

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Preface

Welcome to the eleventh edition of *Introduction to Law and the Legal System*! The first edition was published 38 years ago.

Suited for undergraduate or graduate programs, this text is a survey of the American legal system and can be used in a variety of courses such as Survey of Law, Introduction to Law and the Legal System, Law and Society, Legal Environment and Business, and Legal Process. This text could be an integral part of business, criminal justice, political science, interdisciplinary, paralegal, or other similar courses in an institution of higher learning.

From its first edition to the present, the goal has been to provide readers with a general understanding of American substantive and procedural law. The premise is that this kind of knowledge is basic to a well-rounded education. Because this book is used in a wide variety of academic settings and disciplines, it is expected that instructors will select topics and cases that are appropriate to the course and students. The length and complexity of cases varies from case to case because it is difficult to reduce a fifty-page opinion to three or four pages and still include all the fodder for class discussion. While it is true that many topics included in the text are fundamental to the typical law school's curriculum, this is not a textbook for law students. This book explains in a few pages fundamental principles that law students study for an entire semester. Law students study law so that they can become practitioners. Undergraduate students—and graduate students in fields other than law—study law in order to obtain a basic understanding of law. This presentation's strength is that it provides readers with a brief peek at what are inherently complex concepts without getting students in over their heads.

Because this is an undergraduate- and graduate-level text, it also tries to show readers connections between law and topics typically covered in more detail in undergraduate or graduate courses taught in history, philosophy, political science, sociology–anthropology, and business departments. Thus, the text includes some legal and cultural history, jurisprudence, ethics, and similar topics in the hope that

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students will get a taste of the bigger picture and perhaps enroll in a corresponding course. Showing these connections helps to promote a better understanding of the role law plays in a complex modern society. From this understanding, students can decide for themselves whether lawmaking institutions—the legislative, judicial, and administrative agencies—are adequately addressing our society's problems.

By reading cases and studying statutes in this text, students will learn to exercise their own powers of reasoning. Because the cases are continuously updated in every edition, students read about real-world problems and study appellate court discussions about how the problems should be resolved. This promotes class discussions about the relative strengths and weaknesses of the competing arguments made by the parties.

New to the Eleventh Edition

The eleventh edition has been updated with 34 new cases including many recent, controversial cases such as the 2012 U.S. Supreme Court case, *National Federation of Independent Business v. Sebelius,* related to whether Congress had the constitutional authority to establish an individual mandate within the Patient Protection and Affordable Care Act (ACA, popularly known as "Obamacare"); the 2013 U.S. Supreme Court case *United States v. Windsor,* concerning the Defense of Marriage Act's constitutionality; and the 2013 U.S. Supreme Court case *Hollingsworth v. Perry,* in which the court ruled on whether California was violating the Fourteenth Amendment rights of same-sex couples by restricting marriage to heterosexual couples.

Comments from reviewers and users have been carefully considered as decisions were made with respect to the replacement or retention of particular cases. As always, the goal has been to select cases that are interesting, teachable, and controversial, and that illustrate the theory being discussed in the corresponding chapter section. Some of the retained cases are classics and have proven to be useful for many years. *Katko v. Briney*, *Strunk v. Strunk*, and *Campbell Soup Company v. Wentz*, for example, have appeared in all eleven editions. Other older cases have been included because they better illustrate the legal principle being addressed in the text than did the removed case.

Some instructors will be pleased to find the return of a long-standing favorite case, *E. I. DuPont de Nemours & Co., Inc. v. Christopher,* which now appears in an appendix after having been removed from the tenth edition. Other favorites that have been "retired" from the textbook can be found on the textbook's website, along with additional cases, statutes, and materials that could not be included in the textbook because of space limitations. This website will be updated periodically with new and relevant cases, and often will include concurring and dissenting opinions that would be too lengthy to be included in the textbook. Additionally, students will find open access to learning objectives, tutorial quizzes, chapter glossaries, flash cards, and crossword puzzles, all correlated by chapter, as well as additional cases on the website. Instructors also have access to the Instructor's Manual which includes chapter objectives, court cases, and

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answers to chapter questions. The test bank available to instructors has been updated with a large array of well-crafted true-false, multiple choice, and essay questions, along with their answers and page references.

Teaching and Learning Aids

The text includes a glossary that was substantially expanded in the ninth edition. Please note that it focuses on terms as they are used in the text and is not intended to be as comprehensive as a legal dictionary. The Constitution of the United States is also reprinted for easy reference.

All cases have been edited to frame issues for classroom discussion and for length and readability. Most case footnotes have been deleted. Most citations similarly have been omitted, as well as less important portions of majority opinions. Ellipses have been inserted to indicate such omissions. Academic works that were relied upon as sources within each chapter have been acknowledged with endnotes. Case citations are provided occasionally so that interested students can consult the official reports for unedited cases.

Acknowledgments

This revision would not have been possible without the valuable contributions of many people. The following reviewers were instrumental in shaping the eleventh edition:

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I am most pleased and proud that my daughter, Tracy, has again prepared the index for this text. Her excellent assistance has made the eleventh edition both better and more memorable. Finally, I'd like to thank my wife, Barbara. Once again she has adjusted to life with a husband who is deeply involved in the long process of researching and writing another edition of this textbook. Barbara has always encouraged me and shown patience and steadfastness as I have labored away. I could not have completed this work without her constant love and support. This edition is dedicated to the memories of my late mother, Elizabeth Josephine Neal and my maternal grandmother, Ethel L. Neal.

F.A.S.

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1

Introduction

CHAPTER OBJECTIVES

1. *Understand each of five jurisprudential approaches to answering the question, What is law?*
2. *Explain the legal objectives that are common to American public and private law.*
3. *Understand how our nation's legal history and culture have contributed to law and legal institutions as we know them today.*
4. *Develop the ability to read and brief an appellate court opinion.*
5. *Explain in general terms the concepts underlying the Due Process and Equal Protection Clauses.*
6. *Understand the basic differences between civil and criminal law.*
7. *Understand the basic differences between tort and contract law.*

WHAT IS LAW?

The study of legal philosophy is called **jurisprudence.** Many of the world's greatest philosophers have theorized about the nature and meaning of law. Jurisprudential philosophers ask questions like these: What is law? Is bad law still law? Is custom law? Is law what it says in the statute books, or what really happens in practice? Philosophers have debated the essential nature of law for centuries, yet there is no single commonly accepted definition. This chapter begins by summarizing some of the schools of legal philosophy in order to introduce students to different ways of answering this fundamental question: What is law?[1]

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Law as Power

According to this view, the validity of a law does not depend on whether it is socially good or bad. It is apparent, for example, that tyrannies, monarchies, and democracies have produced socially beneficial laws. They have also produced laws that are unjust and "wrongful." What these different forms of government have in common is that each is based on power and that possessing the power to enforce its laws is central to each government's existence. This philosophy can be criticized for ignoring arbitrariness, abuses of power, and tyranny, and for producing bad law.

Natural Law

Natural law philosophers argued that law is that which reflects, or is based on, the built-in sense of right and wrong that exists within every person at birth. This moral barometer, which operates through the functioning of conscience, gives each person the capacity to discover moral truth independently. Some believed this sense was God-given; others believed it was an intrinsic part of human nature.[2] Natural law philosophers argued that moral goodness is conceptually independent of institutional views of goodness or evil. Thus, no government can make a morally evil law good or a morally good law evil. Moral goodness exists prior to institutional lawmaking and sets a moral standard against which positive law should be measured. Thus, even though during apartheid the all-white South African government may have had the power to enact racially discriminatory statutes, such statutes were not truly "law" because they were morally abhorrent. This natural law philosophy was very influential in seventeenth- and eighteenth-century Europe. Revolutionaries who sought to overthrow established monarchies were attracted to natural law because it established a philosophical foundation for political reform.

Natural law thinking has greatly influenced American law as well. American civil rights advocates currently use the same time-tested natural law arguments that were used thirty and forty years ago to oppose racial discrimination. They argue that discriminatory statutes should not be respected as law because they are so blatantly unfair. Constitutional provisions that require government to treat all persons fairly and impartially (the Due Process and Equal Protection Clauses) are other examples.

Our tort system is also a reflection of natural law thinking. It is "right" that people who intend no harm but who carelessly cause injury to other people should have to pay compensation for the damages. Similarly, if two people voluntarily enter into a contract, it is "right" that the parties comply with its terms or pay damages for the breach. (However, our law confers power in our judges to refuse to enforce contractual provisions that are too one-sided.) Finally, it is "right" to punish persons who commit crimes for those acts.

When there is no consensus in society about what is morally right and wrong, natural law loses its effectiveness as a basis for law. Current examples of this problem include issues such as abortion, physician-assisted suicide, and capital punishment.

Historical Jurisprudence

Historical jurisprudence evolved in response to the natural law philosophy. Aristocrats were attracted to this school because it provided a justification for preserving the status quo and the preferential treatment of powerful elites that was deeply rooted in cultural tradition. The historical philosophy of law integrated the notion that law is the will of the sovereign with the idea of the "spirit of the people."[3] That is, law is only valid to the extent that the will of the sovereign is compatible with long-standing social practices, customs, and values. Law, according to this view, could not be arbitrarily imposed by legislators whose legal source was "right" reasoning. Instead, the historical school insisted that only practices that have withstood the test of time could be thought of as law.[4] Further, these philosophers believed that law changes slowly and invisibly as human conduct changes.

A major advantage of historical jurisprudence is that it promotes stability in law. In fact, much law is largely grounded in judicially approved custom.

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Our contemporary American real estate law,[5] property law,[6] and contract law[7] are some of the areas in which long-standing practices continue to be recognized as law. Custom has also played an important role in determining the meaning of the Constitution. Appellate courts such as the U.S. Supreme Court trace provisions of the Bill of Rights to their historical statutory and case law antecedents. They do this because they recognize that some beliefs, practices, procedures, and relationships between people and the state have become fundamental to our culture.

Occasionally a sovereign will enact legislation that significantly contravenes long-standing custom. A few years ago, the Massachusetts legislature enacted a mandatory seat belt law. Many citizens believed that the state was infringing on a matter of personal choice. They insisted that the matter be placed on the ballot, and the law was repealed in a statewide referendum.[8]

A major problem with historical jurisprudence is determining at what point a practice has become a custom. How long must a practice have been followed, and how widely must it be accepted, before it is recognized as customary?

Utilitarian Law

The **utilitarian** conception of law focused on the social usefulness of legislation rather than on metaphysical notions of goodness and justice.[9] Utilitarians thought that government was responsible for enacting laws that promote the general public's happiness. They believed that the desire to maximize pleasure and minimize pain is what motivates people, and that legislatures were responsible for inducing people to act in socially desirable ways through a legislated system of incentives and disincentives.[10] For example, if the pain imposed by a criminal sentence exceeds the gain realized by an offender in committing the offense, future criminal actions will be deterred. Additionally, they thought that law should focus on providing people with security and equality of opportunity. They maintained that property rights should be protected because security of property is crucial to attaining happiness. People, they thought, should perform their contracts because increased commercial activity and economic growth produce socially beneficial increases in employment.

Utilitarians also favored the simplification of legal procedures. They opposed checks and balances, legal technicalities, and complex procedures. They believed that these "formalities" increased the costs and length of the judicial process and made the justice system ineffective and unresponsive to the needs of large numbers of average people. Modern utilitarians would favor small claims courts, with their simplified pleading requirements, informality, low cost, and optional use of lawyers.

Utilitarian influence can be found in legislative enactments that require the nation's broadcasters to operate "in the public interest," in "lemon laws," and in other consumer protection legislation. A major problem with utilitarianism is that not everyone agrees about what is pleasurable and what is painful. And many, if not most, political scientists would dispute that legislators actually make decisions according to the pleasure–pain principle.

Analytical Positivism

Analytical positivism asserted that law was a self-sufficient system of legal rules that the sovereign issued in the form of commands to the governed. These commands did not depend for legitimacy on extraneous considerations such as reason, ethics, morals, or even social consequences.[11] However, the sovereign's will was law only if it was developed according to duly established procedures, such as the enactments of a national legislature.

Thus, the apartheid laws passed by the previously all-white South African legislature were "the law" of that country at that time to the same extent that civil rights legislation enacted by the U.S. Congress was the law of this country. Each of these lawmaking bodies was exercising sovereign power in accordance with provisions of a national constitution. Positivists would maintain that individuals and governmental officials have no right to disobey laws with which they personally disagree due to moral, ethical, or policy objections. Positivists also

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would maintain that trial jurors have a legal obligation to apply the law according to the judge's instructions, even if that means disregarding strongly held personal beliefs about the wisdom of the law or its application in a particular factual dispute.

Members of this philosophical school would view disputes about the goodness or badness of legal rules as extra-legal.[12] They would maintain that such issues do not relate to the law as it is. This approach promotes stability and security. It also legitimizes governmental line drawing (such as laws that specify the age at which people can lawfully drink or vote, or those that determine automobile speed limits).

In the United States, people often disagree with governmental decisions about foreign policy, as well as about such issues as housing, the financing of public education, health care, abortion, environmental protection, and the licensing of nuclear power plants. Many contend that governmental officials are pursuing wrongful, and sometimes immoral, objectives. Such concerns, however, are generally unpersuasive in our courts. If governmental officials are authorized to make decisions, act within constitutional limitations, and follow established procedures, even decisions that are unpopular with some segments of society are nevertheless law.

But is law really just a closed system of rules and the product of a sovereign? Doesn't international law exist despite the absence of a sovereign? Don't contracting parties routinely create their own rules without any sovereign's involvement unless a dispute arises that results in litigation? And is law really morally neutral? Shouldn't the positivist approach be criticized if it protects governmental officials who act unfairly?

SOCIOLOGICAL JURISPRUDENCE, LEGAL REALISM, AND LEGAL SOCIOLOGY

After the Civil War, the nation's economy rapidly expanded, and America moved toward a market economy. Along with this expansion came new technologies, new products, and changing legal attitudes about government's rights to interfere with private property. Laissez-faire was in vogue, and although it contributed to expanding the economy, it also produced monopolies, political corruption, environmental pollution, hazardous working conditions, and labor–management conflict. The U.S. Supreme Court often opposed social reforms initiated by state governments. In *Lochner v. New York,* for example, the Court struck down a reform statute that limited bakers to ten-hour workdays and sixty-hour work weeks.[13] The majority ruled that this statute unreasonably infringed on the rights of employees and employers to negotiate their own contracts. The Court also declared the Erdman Act unconstitutional in *Adair v. United States*.[14] Congress enacted the Erdman Act to stop the railroad monopolies from discharging employees who joined labor unions. Congress, said the Supreme Court, had no right under the Interstate Commerce Clause to regulate labor relations in the railroad industry.

The excesses of laissez-faire produced social and economic unrest among farmers and laborers in particular, and produced political pressure for reforms. These factors culminated in the rise of the Progressive Movement. The Progressives sought an expanded governmental role in the economy. They wanted government to pay attention to reforming and to enact laws that would regulate special interests. The Progressives rejected the notion that law is based on immutable principles and deductive reasoning, and therefore is unrelated to political, social, and economic factors in society. Too often, they contended, the courts had ignored what Benjamin Cardozo would call the "pursuit of social justice."[15]

Sociological Jurisprudence

Roscoe Pound, of Harvard Law School, published an article in the 1911 *Harvard Law Review* that picked up on Progressive themes and announced a philosophy of law called sociological jurisprudence.[16] Pound argued against what he called "mechanical jurisprudence," with its backwardness

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and unjust outcomes in individual cases. He advocated that governments become proactive in working to promote social and economic reforms and that judges become more socially aware of the impact of their decisions on society.[17]

Early sociologists were interested in examining jurisprudence from a social-scientific perspective. They focused on what they called the living law—not just the law declared by legislatures and courts, but also the informal rules that actually influence social behavior. The sociological school maintains that law can only be understood when the formal system of rules is considered in conjunction with social realities (or facts). In this sense, it is similar to the historical school. However, the historical school approached time in terms of centuries, whereas the sociological school focused on ten- or twenty-year segments.

Sociological jurisprudence theorists, for example, would note that during the last sixty years the courts and legislatures have made many attempts to eliminate racial discrimination in voting, housing, employment, and education, and that the law on the books has changed significantly. It is equally clear from scholarly studies, however, that discrimination continues. The written law provides for equal opportunity, and on the surface racial discrimination is not as obvious as it once was. But the social facts continue to reveal subtle forms of racism that law has not been able to legislate or adjudicate away. Similarly, employment discrimination against women, older workers, and persons with disabilities continues despite the enactment of federal and state legislation that legally puts an end to such practices. Informally enforced social norms that condone bigotry and inflict personal indignities and economic inequities on targeted segments of society are not easily legislated away.

Although this approach effectively points out the discrepancies between the promise and the reality of enacted law, it often fails to produce practical solutions to the problems. Should judges be encouraged to consider social consequences in addition to legal rules in reaching decisions? If so, might this not result in arbitrary, discretionary decisions that reflect only the personal preferences of one particular jurist or group of jurists?

Legal Realists

During the early decades of the twentieth century, the social sciences were emerging. Academics and judges were attempting to borrow the scientific methods that had been used to study the natural and physical sciences and use them to examine social institutions. From the late 1920s through the middle 1930s, juries, and judges in particular, were subjected to empirical scrutiny by reformists such as Jerome Frank and Karl Llewellyn, who called themselves **legal realists.** The realists focused on the extent to which actual practices varied from the formal legal rules.[18] They believed that judges were influenced more by their personal convictions than by established and immutable rules. Llewellyn made a very important distinction between the legal rules and precedent-setting cases that were often cited as the basis for deciding why cases were won and lost (which he called "paper" rules) and the "real" rules of decisions that were undisclosed unless revealed by behavioral research.[19] Llewellyn believed that judges made law instead of discovering it, and he went so far as to proclaim that law was merely "what officials do about disputes."[20] Rules, the realists pointed out, do not adequately account for witness perjury and bias, and neither do rules compensate for the differing levels of ability, knowledge, and prejudice of individual lawyers, judges, and jurors. Because the realists produced little theory and research, they primarily blazed a trail for the legal sociologists to follow.

Legal Sociologists

Legal sociologists such as Donald Black have gone beyond the legal realists. Using quantitative methodological tools, they examine such factors as the financial standing, race, social class, respectability, and cultural differences of those involved in disputes.[21] In addition, they evaluate the social facts of the lawyers and judges working on the case, as well as those of the parties. In theory, legal outcomes should not be affected by differences in the socioeconomic status of the litigants, because all are

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"equal" before the law. Individual plaintiffs, for example, should be able to win when suing multinational corporations. But legal sociologists claim that the facts do not support this theory.[22] The rule of law is a myth, they say, because legal rules fail to take into account the impact of social diversity on litigation. Discrimination is a fact of modern life, and different combinations of social factors will produce disparate legal outcomes.[23] Donald Black points out that disputes between friends, neighbors, and family members are rarely litigated because "law varies directly with relational distance."[24] It can be argued persuasively that well-trained lawyers should decide only after carefully considering the relevant social factors and relationships whether to settle a case or go to trial, whether to try a case to a judge or a jury, and whether to appeal.[25]

Legal sociologists raise issues that challenge fundamental postulates of our society. If people become convinced that legal outcomes are largely a function of sociological considerations, rather than the application of impartial rules, the integrity of the judicial process itself will be undermined, as will the legitimacy of government. If research, however, can reveal more precisely how various combinations of sociological factors influence legal outcomes, this information could be used either to eliminate the bias or to develop alternative mechanisms for resolving particular types of disputes.

OBJECTIVES OF LAW

One of the foundations of our society is the belief that ours is a nation committed to the rule of law. No person is above the law. Our shared legal heritage binds us together as Americans. We use law to regulate people in their relationships with each other and in their relationships with government. Law reflects our societal aspirations, our culture, and our political and economic beliefs. It provides mechanisms for resolving disputes and for controlling government officials. Private law includes property, family, tort, probate, and corporate law. Public law includes constitutional, criminal, and administrative law. Common to both, however, are certain legal objectives.

Continuity and Stability

It is important that established laws change gradually. Litigants have greater confidence that justice has been done when preexisting rules are used to determine legal outcomes. Laws work best when people become aware of them and learn how they work and why they are necessary. Stable laws are also more likely to be applied uniformly and consistently throughout a jurisdiction and will be better understood by those charged with enforcement.

Stable laws are also very important to creating and maintaining a healthy economy because they are predictable and serve as a guide for conduct. Businesspeople, for example, are not likely to incur risk in a volatile legal and political environment. They are likely to feel more comfortable in making investments and taking economic risks where it appears likely that the future will resemble the present and the recent past. This stability is threatened by society's appetite for producing rules. Various state and federal legislative and administrative rule-making bodies are currently promulgating so many regulations that it is difficult, if not impossible, for affected citizens to stay current.

Adaptability

In one sense, it would be desirable if society could create a great big "legal cookbook" that contained a prescribed law or rule for every conceivable situation. We would then only have to look in the cookbook for definitive answers to all legal problems. In reality, there is no such cookbook. Legislators produce statutes that have a broad scope and that are designed to promote the public's health, safety, welfare, and morals. Judges make law in conjunction with resolving disputes that have been properly brought before the court. Experience has shown that legislative enactments and judicial opinions produce imperfect law. Lawmakers cannot anticipate every factual possibility. Courts, in

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particular, often feel compelled to recognize exceptions to general rules in order to provide justice in individual cases. Judges often find that there are gaps in the law that they have to fill in order to decide a case, or that a long-standing rule no longer makes any sense, given current circumstances and societal values. In this way, law adapts to social, environmental, and political changes within our evolving society.

Justice, Speed, and Economy

Although most people would agree with the preamble to the U.S. Constitution that it is the role of the government "to establish justice," there is no consensus about what that means. Some see justice as a natural law–type settlement, which means each party to a dispute receives what he or she is due. To other people justice means that a specified process was followed by governmental institutions. In some situations, justice requires the elimination of discretion so that law is applied more equally. In other situations, justice requires the inclusion of discretion (equity) so that the law is not applied too mechanically. In this respect, it is helpful to look at recent history. Our current notions of justice with respect to race, gender, sexual orientation, and class differ from the views of many of our forebears. Posterity will probably have a concept of justice that differs from our own.

Rule 1 of the Federal Rules of Civil Procedure provides that procedural rules should be construed "to secure the just, speedy and inexpensive determination of every action." Although it would be desirable if our judicial systems could satisfy all three of these objectives, they are often in conflict. As a society we continually have to make choices about how much justice we desire and can afford.

Consider a society dedicated to achieving the highest possible levels of justice in its judicial system. Elaborate measures would be required to ensure that all relevant evidence has been located and all possible witnesses identified and permitted to testify. In such a society, all litigants would be entitled to the services of investigators, thorough pretrial discovery procedures, and qualified and experienced trial attorneys. Great care would have to be taken to ensure that jurors were truly unbiased and competent to render a fair verdict. Only highly probative evidence would be permitted as proof, and various levels of appellate review would be required to consider carefully whether significant substantive or procedural errors were made at trial. Obviously, such a process would be very slow and very expensive. Denying deserving plaintiffs a recovery until the process had run its course could itself be unfair, because a recovery would be denied for several years.

Instead, some judicial systems build in cost-cutting measures such as six-person instead of twelve-person juries. They also make it easier for juries to reach decisions by permitting less-than-unanimous verdicts. Although each cost-cutting step risks more error in the system, there are limits to how much justice society is willing to provide. People have a multitude of needs, including medical care, housing, education, and defense, as well as a limited interest in paying taxes. These competing needs have to be prioritized. In recent years, governmental funding of poverty lawyers has been greatly reduced. This has occurred at a time when the cost of litigating average cases has risen substantially. As the costs of using the legal system increase, fewer persons will be able to afford to use litigation to resolve their disputes. Private attorneys often decline to represent a potential client if the likely recovery in the case will not produce an acceptable profit.

An example of how law balances the desire for justice with a concern for cost appears in the case of *Goss v. Lopez* (which can be read on the textbook website). In that case the U.S. Supreme Court determined that public school administrators only have to provide rudimentary procedural due process to students who face short suspensions. The Supreme Court explained that requiring schools to provide students with extensive trial-type procedures would make the disciplinary process too expensive. In Chapter XIV we examine alternative methods for resolving disputes.

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Determining Desirable Public Policy

Historically, law has been used to determine desirable public policy. It has been used to establish and then abolish discrimination on the basis of race, gender, age, and sexual preference. Law has been used to promote environmental protection and to permit resource exploitation. Through law, society determines whether doctors can assist in suicides, whether people of the same sex can marry, and which kinds of video games minors can purchase.

ORIGIN OF LAW IN THE UNITED STATES

The British victory over the French in the French and Indian War and the signing of the Treaty of Paris (1763) concluded the competition between the two nations for domination of North America. A French victory might well have resulted in the establishment of the French legal system in the colonies along the Atlantic seaboard. The British victory, however, preserved the English common law system for what would become the United States. The following discussion highlights some of the important milestones in the development of the common law.

The Origins of English Common Law

Anglo-Saxon kings ruled England prior to 1066. During the reign of Edward the Confessor (1042–1066), wealthy landowners and noblemen, called earls, gained power over local affairs. There was no central legislature or national judicial court. Instead, the country was organized into communal units, based on population. Each unit was called a hundred and was headed by an official called the reeve. The primary function of the hundred was judicial; it held court once each month and dealt with routine civil and criminal matters. Local freemen resolved these cases in accordance with local custom.[26]

The hundreds were grouped into units called shires (counties), which in earlier times often had been Anglo-Saxon kingdoms. The shire was of much greater importance than the hundred. The king used it for military, administrative, and judicial purposes. The king administered the shires through the person of the shire reeve (sheriff). Royal sheriffs existed in each of the shires throughout the country. The sheriff was the king's principal judicial and administrative officer at the local level. Sheriffs collected taxes, urged support of the king's administrative and military policies, and performed limited judicial functions.[27] The shire court, composed of all the freemen in the county, was held twice a year and was presided over by the bishop and the sheriff.[28] It handled criminal, civil, and religious matters that were too serious or difficult for the hundred court, as well as disputes about land ownership.[29] The freemen in attendance used local custom as the basis for making decisions, even in religious matters, resulting in a variety of regional practices throughout the country. Anglo-Saxon law did not permit a person to approach the king to appeal the decisions of these communal courts.[30]

The Anglo-Saxon king had a number of functions. He raised armies and a navy for the defense of the kingdom. He issued writs, which were administrative letters containing the royal seal.[31] The **writs** were used to order courts to convene and sheriffs to do justice, and to award grants of land and privileges.[32] The king administered the country with the assistance of the royal household, an early form of king's council.[33] He also declared laws (called dooms),[34] sometimes after consulting with the Witan, a national assembly of important nobles.[35]

When Edward the Confessor died childless in 1066, the candidates to succeed him were his brother-in-law, Harold, Earl of Wessex, and his cousin, William, Duke of Normandy (a French duchy). Harold was English and the most powerful baron in the country. William was French. Each claimed that Edward had selected him as the next king. William also claimed that Harold had agreed to support William's claim to the throne.[36] Harold, however, was elected king by the Witan and was crowned. William's response was to assemble an army, cross the English Channel, and invade England.

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The Norman Invasion

In 1066, Duke William of Normandy, with 5,000 soldiers and 2,500 horses, defeated the Anglo-Saxons and killed King Harold at the Battle of Hastings.[37] William became king of England, and the Normans assumed control of the country. Although the Anglo-Saxons had implemented a type of feudalism before the invasion, the Normans developed and refined it. Feudalism was a military, political, and social structure that ordered relationships among people. Under feudalism, a series of duties and obligations existed between a lord and his vassals. In England, the Normans merged feudalism with the Anglo-Saxon institution of the national king. William insisted, for example, that all land in England belonged ultimately to the king, and in 1086 he required all landholders to swear allegiance to him.[38] In this way, all his barons and lords and their vassals were personally obligated to him by feudal law. At his coronation, King William decreed that Englishmen could keep the customary laws that had been in force during the reign of the Anglo-Saxon King Edward the Confessor. This meant that the hundred and shire courts could continue to resolve disputes between the English as they had in the past.[39] William did, however, make one significant change in the jurisdiction of the communal courts: he rejected the Anglo-Saxon practice of allowing church officials to use the communal courts to decide religious matters. Instead, he mandated that the church should establish its own courts and that religious matters should be decided according to canon (church) law, rather than customary law.[40] William also declared that the Normans would settle their disputes in the courts of the lords and barons, in agreement with feudal law.

England at that time consisted of two societies, one French and the other English.[41] French was the language spoken by the victorious Normans, as well as by the king, the upper classes, the clergy, and scholars.[42] Following the invasion, English was only spoken by the lower classes, and it did not achieve prominence and become the language of the courts and the "common law" until 1362.[43] The French legacy can be seen in many words used by lawyers today. *Acquit, en banc, voir dire, demurrer, embezzle*, and *detainer* are some examples of English words that were borrowed from the French. Although the Normans spoke French, formal documents were written in Latin. This may help to explain why students reading judicial opinions in the twenty-first century encounter Latin words such as *certiorari, subpoena, mens rea, actus reus, in camera, mandamus, capias*, and *pro se*.

The Development of the Common Law

Over time, marriages between Norman and English families blurred the old class system. William's son Henry (who became Henry I), for example, married a descendant of the Anglo-Saxon royal house.[44] It was not until after 1453, when the French drove the English out of France (except for Calais), however, that the Normans and English were unified as one nation.

William died in 1100. The most important of his successors—in terms of the development of the common law—were Henry I and Henry's grandson, Henry II. After the death of the very unpopular William II, the nobles elected Henry I as king. Henry I had promised the nobles that if elected he would issue a charter in which he pledged to respect the rights of the nobles.[45] He also promised to be a fair ruler in the manner of William I. This charter is significant because it was a model for the most famous of all charters, the Magna Carta.[46]

Henry I ruled during a prosperous period and strengthened the king's powers while making peace with the church and feudal barons. He also strengthened the judiciary by requiring members of his council, the Curia Regis, to ride circuit occasionally throughout the country to listen to pleas and supervise the local courts. During this period, the communal courts, the religious courts, and the feudal courts of the barons were still meeting, and there was much confusion over jurisdiction.[47] Henry I encouraged people who distrusted the local courts to turn to the king for justice.

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