eleventh edition

Law and Society

Steven Vago and Steven E. Barkan

Law and Society

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

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

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

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

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

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

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

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PREFACE

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

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

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

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

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

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CHAPTER 1
INTRODUCTION: MAKING SENSE OF LAW AND SOCIETY

CHAPTER OUTLINE

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LEARNING OBJECTIVES

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

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

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

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

OVERVIEW OF THE STUDY OF LAW AND SOCIETY

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

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

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

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

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

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

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

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

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

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

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

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

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

SOCIAL SCIENTISTS AND LAWYERS

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

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

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

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

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

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

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

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

DEFINITIONS OF LAW

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

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

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

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