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Steven Vago

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Preface

Over the past twenty years, the previous and progressively more comprehensive editions of this book not only became popular with law and society scholars, but were adopted as textbooks in more than 350 colleges and universities in the United States and abroad. Extra printings for each edition along the way confirmed the usefulness of the text and the growing interest in the subject matter. This seventh edition is a result of the wide acceptance and demonstrated utility of the earlier versions. While reflecting the intent, perspectives, and basic plan of preceding versions, this edition continues to enhance the message with extensive new input. The material is more focused, reorganized and presented in a more integrated and relevant way for the benefit of students. The book remains in tune with ongoing global changes in legal systems and extensively incorporates the most recent theoretical developments and the latest research results. Much of the book has been rewritten to further increase clarity and readability and to include new trends, concerns, and controversies. The temptation to engage in merely cosmetic changes and verbiage alterations that are common in revisions has been successfully resisted. If a particular section was up-to-date, clear and useful, I did not change it just for the sake of change. Throughout the various revisions, my purpose remained the same: to prepare a book that is pedagogically sound, full with ideas and insights, informative and provocative to read, and distinctive in its coverage of the subject.

A substantial amount of new material has been included in this edition. The coverage now includes detailed and up-to-date discussions on the transformation of legal systems in Central and Eastern Europe and the former Soviet Union and some of the unintended consequences that promoted organized crime; critical race theory; community policing in Japan; trends in sentencing guidelines; and a variety of new developments in alternative dispute resolution and in the death penalty controversy. The many changes that have been suggested by students and reviewers have been considered and incorporated. All the chapters have been fully updated and expanded to reflect ongoing trends and current developments. There are close to 375 new

resources and references, a significantly expanded list of further readings at the end of each chapter, and I have greatly increased the number of cross-cultural illustrations. I made a point once again of further emphasizing clarity of language at the expense of professional jargon.

The objective of this book is to serve as an undergraduate text in one-term courses. Although the book was written primarily for college students, anyone with an interest in law and society will find it useful, informative and provocative. The classroom tested and refined material has been organized and presented in a logical fashion, and each chapter builds on the previous one. Should one prefer a different organization of the contents, it would not detract from the value of the book. For example, if one desires, Chapter 9, Researching Law in Society, can be read after Chapter 2, Theoretical Perspectives, rather than at the end of the book. For a quick chapter overview, some readers may want to look at the detailed summaries. The suggested further readings are designed to provide a starting point for interested readers to pursue further a particular topic and to reflect alternative perspectives.

As I noted in previous editions, the study of the interplay between law and society is fundamentally eclectic. Knowledge about it has accumulated haphazardly. Intellectual developments in the field are influenced by a number of theoretical perspectives, resulting in a variety of strains of thought and research. In a sense, once again, more questions will be raised than answered. The abundance of unanswered questions and unexpected developments keeps the study of law and society challenging and appealing.

Writing a book always requires the cooperation, support and encouragement of many people. Prentice Hall reviewers Carol Bohmer, Ohio State University, Margaret Platt Jendrek, Miami University-Ohio; Suzanne Samuels, Seton Hall University; and Jeffery T. Ulmer, Pennsylvania State University made insightful and valuable suggestions. I also thank the many students (who over the years read and commented on and constructively criticized the multiple versions of the manuscript) for their no-nonsense feedback, demand for clarity, aversion to redundancy, reluctance to take things for granted, and willingness to talk back to their professor. Once again, without sounding redundant, it was most gratifying to work with production editor Kim Gueterman who superbly orchestrated the completion of this book. I am especially appreciative of the work of Ann Sieger who did an excellent job of editing this manuscript. The index was expertly prepared by Aristide Sechandice. As with the preceding editions and other scholarly endeavors, this work could not have been realized without the continuous generous pecuniary, moral, and spiritual support of the Vago Foundation, which alone provided the necessary infrastructure, secretarial services, library assistance, and magnanimously covered all expenses incurred in the preparation of this book.

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1 Introduction

With the advent of the twenty-first century, law increasingly permeates all forms of social behavior. Its significance and pervasiveness resonate on all walks of life. In subtle and, at times, not so subtle ways, a complex and voluminous set of laws governs our entire existence and our every action. It determines registration at birth and the distribution of possessions at death. Laws regulate prenuptial agreements, marriage, divorce, and the conduct of professors in the classroom. Laws set the speed limit and the length of school attendance. Laws control what we eat and where and what we buy and when, and how we use our computers. Laws protect ownership and define the boundaries of private and public property. Laws regulate business, raise revenue, provide for redress when agreements are broken, and uphold social institutions, such as the family. 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 predominantly recent references cited also makes the text a valuable source for both 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 has been written originally for the undergraduate student, I opted for 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, since

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, or advocate or defend a certain position, the chapter topics, references and suggested further readings will provide the necessary first step toward the further exploration of most law and society related issues.

OVERVIEW

Since the earliest time, in every human society there have been mechanisms for the declaration, alteration, administration, and enforcement of the rules by which people live. Not all societies, however, utilize a formal legal system (courts, judges, lawyers, and law enforcement agencies) to the same degree. For example, throughout the third world, the formal systems of property rights taken for granted in advanced nations simply do not exist. As the renowned economist Hernando de Soto (2001) points out in his influential book, *The Mystery of Capital*, 80 percent of the poor people in the developing world 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. The notion of holding title to property is limited primarily to a handful of elites whose assets are "paperized" in the formal documents and legal structures common in the West.

Further, traditional societies rely almost exclusively 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, 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. Since 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 commentator has noted: "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 eloquent words of Oliver Wendell Holmes, Jr. (1881:5), "The law embodies the story of a nation's development through many centuries" and 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, 2001; 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, that make, for example, the law of the Eskimos different from the law of the French (Friedman, 1998, 2002).

In sociology, the study of law embraces a number of well-established areas of inquiry (Cotterrell, 1994; Friedrichs, 2001). The discipline 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 mechanisms of social control, issues of human rights, power arrangements, the relationship between public and private spheres and formal contractual commitments (Baumgartner, 1999; McIntyre, 1994; Selznick, 1968:50). 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 rapprochement of sociology (along with economics, psychology and other social sciences) (Roesch, et al., 1999; Posner, 2001) and law is not novel. Early American sociologists, after the turn of the 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."

4 Chap. 1 Introduction

The writings of these early sociologists have greatly influenced the development of the school of legal philosophy that became a principal force in American sociological jurisprudence. [Sociological jurisprudence is the study of law and legal philosophy, and the use of its ideas in law to regulate conduct (Lauderdale, 1997:132). It is based on a comparative study of legal systems, legal doctrines, and legal institutions as social phenomena and considers law as it actually is—the "law in action" as distinguished from the law as it appears in books.] 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 the Second World War, which 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 anxious 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; Law & Society Review, 1995:5). These efforts will undoubtedly be sustained by the aftermath of the tragic events following the World Trade Center and Pentagon terrorist attacks on September 11, 2001.

Currently, a number of universities offer undergraduate, graduate or joint degree programs in law and society, such as the School of Justice Studies at Arizona State University, the Jurisprudence and Social Policy at University of California—Berkeley, the Department of Law, Jurisprudence and Social Thought at Amherst College, University of Wisconsin, and University of Massachusetts—Amherst. There are also a number of major research institutes such as the Center for Law and Society at Berkeley, the Institute for Law and Society at New York University and the Institute for Legal Studies at the University of Wisconsin (Abel, 1995:10).

But interest in law and society is not confined to the United States. Adam Podgorecki, a Polish sociologist, has analyzed a number of distinct

national styles in social-science work related to law. Scandinavian scholars have emphasized the social meaning of justice. In particular, they have investigated knowledge of the law and attitudes toward it. Italian social scientists have been concerned with empirical investigations of judges and the process of judging. With the end of the Soviet Union, the legitimacy of its law also died. Russian social scientists are now looking into the processes involved in the transformation of socialist legal systems into more Western, market-oriented ones with studies on privatization, jointventures, leadership successions and the reintroduction of juries in criminal cases. German sociologists are studying the socio-legal implications of reunification, changing demographic composition of the population due to immigration and the ways of coping with economic contrast and rising nationalism. Additionally, there is a flourishing interest in law and society in Japan, initiated by the many problems Japan experienced with the reception of European law and more recently by the growing anti-Japan sentiments brought about by perceptions of "unfair" trade practices. Both nationally and internationally, a number of organizations have been formed and centers established to study the multifaceted interaction between law and society (Rehbinder, 1975:13-48). More recently, the International Institute for the Sociology of Law was founded in 1988 by the International Sociological Association (Research Committee on Sociology of Law) and the Basque government. The Institute is located in the Old University of Onati (Spain), and by the mid-1990s it had a full-fledged masters program and an International Doctorate in Sociology of Law program. By early 2002, the success and reputation of the Institute created a long list of applicants anxious to gain admission.

Few sociologists concerned with the study of law and society would question 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). I share I. D. Willock's (1974:7) position that "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.

But the study of law by sociologists is somewhat hampered by difficulties of interaction between sociologists and lawyers. Language-based approaches to issues are different in the two professions (Conley and O'Barr, 1998) and as Edwin M. Schur correctly notes, "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 goes on to say: "Sociologists and lawyers are engaged in quite different sorts of enterprises," and notes that "the