Introduction

“The life of the law has not been logic: it has been experience.”

—Oliver Wendell Holmes Jr., 1881

“Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.”

—Robert M. Cover, 1983

Law is all over. Law is everywhere. Law is an enduring presence in our lives. Over a period of many years, I have opened my Law and Society class with the following questions for students: What was your most recent encounter with law? What was your most memorable encounter with law? I specifically instruct students not to ask me what I mean by law. It is their understanding of the term, their image of law, that I am interested in discussing. The responses do not surprise me. The most recent encounter is typically being pulled over by the police or the breaking up of a beer blast by police. The most memorable encounter is also likely to involve the police: for example, being arrested. We Americans tend to be socialized to think most readily of the police, and more specifically the police in their enforcement or crime-fighting role, when the notion of law is raised. The terms police and law are sometimes used interchangeably. The police are one conspicuous and important representation of law in our society, but law is a far more pervasive feature of our daily lives (Post 1963, 12; Friedman 1998a, 13 14).

The very building in which you are attending class is governed by legal codes. If, before class, you stopped somewhere for a meal, you were in a circumstance governed by health codes. If you went to work before class, you were subject to labor law and possibly occupational and workplace safety
standards. If you made a purchase prior to class, liability law or contract law may have been involved. If you stopped at the library before class to photocopystatic some research material, copyright law was involved. If you engaged in some form of search or communication on the Internet, you were subject to an emerging body of law governing this new medium.

You may encounter law as well if you need to consult a lawyer about such matters as divorce or a dispute with a landlord; if you are called for jury duty; if you do an internship with the probation department; or if you are sued in civil court in connection with an automobile accident. You should also recognize that you are more than likely to encounter law any time you hear the news on the radio or television or read a newspaper or newsmagazine; you are exposed to accounts of important court decisions, proposed new legislation, alleged violations of international law, polls of public opinion concerning ongoing legal controversies, high-profile trials, and the like.

**Making Sense of Law**

No single framework for understanding law, no one perspective on law, no core thesis about law is adopted here. Rather, law is viewed as many-hued, multi-faceted, often complex and contradictory. Law is everywhere; law is not always visible to us; law matters, and law does not matter; law is beneficial, and law is harmful. Perhaps Franz Kafka, the celebrated early twentieth-century author and native of Prague, had it right; he formulated several parables about law that suggest that it cannot be fully understood and comprehended by conventional accounts. It seemed to me to be false, then, and a distortion of a complex reality, to attempt to impose a unified framework on the study of how law and society interact. Nevertheless, it will be evident as readers progress that the author regards some perspectives as more useful and insightful than others and some themes as more central and powerful than others.

My own graduate education was in sociology, with a specialization in criminology. Over the past several decades I have always taught in multidisciplinary departments, and have specifically taught, in addition to sociology, criminal justice, philosophy, and anthropology courses. The influence of all these disciplines should be evident to readers of this book. I have also edited an interdisciplinary, law-focused journal (*Legal Studies Forum*) and have had considerable exposure to many other disciplinary perspectives on law, including jurisprudence, history, political science, psychology, economics, and literature. Accordingly, this text draws upon the scholarship of a broad range of disciplines, using whatever seems helpful in making sense of law in our lives.

Law is studied in different ways. Some of the literature on law is purely descriptive, and prescriptive. In other words this literature simply states what the law is and what practical procedures to follow to implement the law. Law professors have produced a large volume of such literature (commonly described as doctrinal analysis). Here some law or legal ruling is subjected to analysis in terms of its consistency or inconsistency with some relevant set of legal principles or objectives.

Very little of the literature drawn upon in this book falls into the categories of law-related writing just identified. Rather, most of the literature discussed here draws upon one of two traditions of social scientific analysis.
The *positivistic* tradition looks to the natural sciences for its model. Theories are formulated, and hypotheses are generated and subjected to empirical verification. This approach aspires to dispassionately discover, explain, and make valid predictions about law-related phenomena. The ultimate complexity and variability of the human and legal world, the difficulty of being objective about this world, and the practical or ethical constraints of subjecting humans to scientific tests, however, all act as barriers to the goal of achieving a true science of the sociolegal, that is, the relationship between law and society. Specific methods used within this model include experiments, surveys, observational studies, content analysis, and secondary data analysis.

The *humanistic* tradition looks to the humanities—philosophy, history, and literature—for its model. It adopts the premise that the world of the sociolegal is fundamentally different from the natural and physical world, and accordingly it rejects the positivistic approach. In the humanistic tradition, law and the sociolegal are more likely to be interpreted than explained, and stories about law are preferred to statistical analyses relating to law. Through applying relevant philosophical concepts to the sociolegal, or providing a detailed historical account, or looking to literary explorations of it, students can presumably arrive at a rich understanding of how law and society affect each other. The humanistic approach has been criticized for its possible biases, the difficulty of verifying its claims, and its failure to produce helpful generalizations.

Each approach has its limitations. Ideally, a multiplicity of different approaches complement each other, although it seems unlikely that anyone will wholly eliminate contradictions emanating from these different approaches.

One objective of this book is to introduce students to the scholarly literature on law and society, literature from all the disciplines listed earlier. This literature is vast, and to do full justice to it would require an impossibly large book. The objective here is to provide some preliminary guideposts to this literature, and to distill some of its essential themes.

No matter whether our knowledge about the law comes from direct experience or from vicarious experience, each of us is likely to evaluate our images and understanding of law through an *ideological* prism. We all come to the study of law with a certain set of beliefs. These beliefs may be rooted in such systems as a religious doctrine, a partisan political identification, or a broad philosophy of life and human existence. Individuals’ reactions to law and legal phenomena are strongly influenced, then, by a complex of beliefs they hold. Also, people have a tendency to see what they want to see.

As you approach the study of law and society, you should recognize the tensions and contradictions between the ways in which people experience law (directly or vicariously), what they learn about it through scholarly study, and what their beliefs tell them about law (see Box 1.1).

**Images of Law**

A fundamental tension exists between the idealized image of law and what we may discover about the realities of law. In our time, it is difficult to sustain an image of law as a source of perfect order, impartiality, and justice. In a per-
One element of the image of law in a modern, complex society is that law is, or ought to be, a rational enterprise. For our purposes here, rational means that law is logical, understandable, fair-minded, predictable, and sound. There are some, however, who view law as illogical, incomprehensible, discriminatory, arbitrary, and counterproductive. In terms of the substance of law and decisions at law, many examples of odd laws can be provided. Listings of odd laws have been collected in some books (e.g., Hyman 1977; Napier-Andrews 1976; Shook and Meyer 1995). It has been illegal in Memphis, Tennessee, to drive a car while asleep; in Bexley, Ohio, to install slot machines in outhouses; in Lexington, Kentucky, to carry an ice cream cone in one’s pocket; in Oklahoma, to take a bite out of another person’s hamburger; and in New Jersey, to slurp soup in a public restaurant. It has been illegal in London to congregate with Egyptians and in Boston to take a bath. Numerous other such examples could be cited. These odd, or silly, laws remind us that laws are human creations. Almost anything can be declared against the law. We have to remind ourselves that such laws come into existence in a particular historical context and often spring from a particular circumstance. A decade later, the particular circumstance may have disappeared, but the law remains on the books.

Again, odd laws impress on us the point that laws need not be rational, at least by conventional, contemporary standards. On a more serious note, there is ongoing debate within our society over questions of whether existing laws prohibiting the use of marijuana or consensual homosexual relations are rational and justifiable.

In terms of the procedures of law, legal cases have not always been resolved by rational means. Trials by ordeal and animal trials are good examples. The trial by ordeal was a basic mechanism for resolving criminal cases in a tradition rooted in ancient Anglo-Saxon law; it was still used in some form in our own system of law into the nineteenth century; and it survives among certain societies in the contemporary world (Custer 1986; Tewksbury 1967). The essence of such trials was that the criminal defendant was subjected to an ordeal to determine guilt or innocence, and for an extended period of time in the English law an ordeal was the sole means for resolving questions of guilt or innocence. Ordeals ranged from requiring suspected wrongdoers to walk over hot coals to requiring the suspect to touch the victim’s corpse.

Trials of animals were held in Europe between the fourteenth and eighteenth centuries, and apparently became quite common between the fifteenth and seventeenth centuries (E. Cohen 1986). In France, in 1457, a pig and some piglets were tried for killing a five-year-old child. The pig was convicted and hung; the piglets were released to their owner on probationary status, insofar as there was no conclusive proof that they actually committed the killing. In France, in 1587, some flies were sued for destroying a vineyard, and a lawyer was appointed to handle their defense. In another French case, when rats failed to appear in court in response to a formal summons, their advocate pleaded their fear of cats as an excuse, and requested safe conduct for them. While these animal trials may appear to be bizarre by contemporary standards, we should also ask ourselves how some of our own adjudicatory procedures trials for young juvenile offenders, for example will look in some future time.
son's own experience with law, he or she may witness abuses and cynical trade-offs; such occurrences may be especially likely if the person belongs to a minority group. In the recent era, wrongdoing on all levels of lawmaking and law enforcement has been relentlessly exposed. Films and television dramas have for the most part incorporated a gritty, sometimes cynical, realism about law and lawmakers. They have largely abandoned earlier tendencies to portray law enforcement officers and judges in mythic or heroic terms.

College students who undertake the formal study of law and legal institutions, as you are doing now, become exposed to the many documented gaps between official standards and actual practices. But a general loss of innocence about law need not be equated with the adoption of a cynical outlook. It is possible to sustain a strong allegiance to the rule of law without being naive about the law's biases, abuses, and limitations. Law is indeed all over; law is everywhere.

One other dimension of the image of law must be addressed: What is the nature of the relation between the law and society, or the legal and the social? In one view, law is autonomous and must be understood wholly on its own terms, independent of a social context. In an extreme version of this view, law could be seen as equivalent to mathematics. Everyone understands that the laws of mathematics and fundamental mathematical precepts are universals, the same in the People's Republic of China and in the United States. The question of whether it makes any sense to think of law in this way is explored later in this text.

In another view, law and society are homologous, they correspond in origin and structure and cannot be understood independently of each other. In an extreme version of this view, law is wholly a reflection of a particular social order: Law in the People's Republic of China merely implements the values and objectives of that system, and law in the United States does the same for a very different system. Again, the question of the validity of such a way of thinking about law will be considered later.

There is a third basic perspective on the relation between law and society. In this view law and society are best thought of in interactive terms. This view recognizes that law and society each have some unique and independent dimensions but that they also interact on many levels, with reciprocal influences. Some version of this view is the most widely held; and it informs the perspective adopted throughout this book (see Figure 1.1).

The interactive model could alternatively be illustrated as in Figure 1.2, with reciprocal influences between social structure (e.g., social class), social processes (e.g., socialization), and law.

The Celebration of Law

In the conventional view, promoted by many of our political leaders, taught in high school civics classes, and held by many ordinary citizens, law is not only something good in itself, it is the principal means for ensuring that people can enjoy all the good things in life (Friedman 1990; Rodes 1976). Law in this view guarantees the possibility of a civilized existence and contributes to the enhancement of such an existence. Law alone makes freedom possible, along with the choices and rights associated with living in a free society. Law in some form, and the rule of law, is universally embraced by all
Figure 1.1 Relationship of Law and Society

A. Autonomous Model

Law

Society

B. Homologous Model

Law and Society

C. Interactive Model

Law

Law and Society

Society

Legal Social

Figure 1.2 Relationship of Law, Social Structure and Social Process

Time and Place

Law

Social Structure (e.g., social class)

Social Processes (e.g., socialization)

Representation of the interactive perspective on the relation of law and society. It shows that although both law and society have some unique and independent dimensions, they also have reciprocal influences.
societies aspiring to an orderly and productive existence. Ideally, and emphatically in the American tradition, law is rooted in democratic consensus. And law in this view is regarded as a profoundly rational entity with an inherent commitment to the promotion of justice and fairness. William Penn said, Any government is free to the people under it . . . where the laws rule, and the people are a party to those laws, and more than this is tyranny, oligarchy, and confusion (Shapiro 1993, 239).

In the conventional view, law fulfills some essential functions (Friedman 1977; Summers 1972). Law not only maintains order; it makes order possible. Law provides for the orderly, nonviolent resolution of all manner of conflicts and disputes. More specifically, law allows for social catharsis, or the release of justifiable anger and outrage directed at those seen as willfully engaging in harmful and destructive behavior, and it does so in a form minimizing the potential for further suffering and loss. Law more broadly is an instrument for the realization of justice. Law restores what has been lost, to the extent possible, to plaintiffs and victims, allocates responsibility and costs, and imposes appropriate penalties on guilty and negligent parties.

Law should serve, in the positive view, as a key element in the fostering and maintenance of a democratic political system. Law provides a fundamental constraint on the exercise of power by the political leadership and is the primary form of protection against tyranny. Law provides the framework for identifying human rights and for protecting those rights. Law allocates power and at the same time supervises the exercise of power.

Law both creates and promotes desirable social values. Law symbolically defines normative boundaries within society, clearly delineating the differences between right and wrong and between fundamentally acceptable and unacceptable behavior. Law both encourages and compels us to respect the life and personhood of others and to respect the rights as well as the privacy of others. Law tells us to pay our taxes; law tells us not to snort cocaine. Law promotes a healthier environment, better work conditions, and safer consumer products. And law may transcend the symbolic promotion of rights when it becomes the specific means of creating or providing opportunities. Anti-discrimination law and equal opportunity law can be cited as obvious illustrations of this function of law. Affirmative action law, although controversial, is a specific legal initiative to extend opportunities for employment and advancement to members of disadvantaged groups who might otherwise not have enjoyed such opportunities.

Law has some practical and mundane functions. Law provides a structure for, and facilitates, a broad range of private transactions and productive activities. Law defines what constitutes wealth and property and provides opportunities for acquiring wealth and property. Law identifies and distributes all manner of benefits to qualified citizens. Law is a mechanism through which society may formally define relationships including the most intimate relations between family members and the obligations attached to such relationships. Law provides a structure (and site) for depositing and maintaining many different types of records.

While many scholars and legal professionals embrace and propound the positive views of law and its functions discussed here, there is also a body of literature, by other scholars and legal professionals, that criticizes the law.
The Critique of Law

Law has been characterized as a profoundly negative dimension of the human environment. Thomas Cooper wrote, in 1830, that “the law, unfortunately, has always been retained on the side of power; laws have uniformly been enacted for the protection and perpetuation of power” (quoted in Shapiro 1993, 241). The critique of law comes from many sources. In the radical or anarchic version of the critique of law, it has been portrayed as an instrument of oppression and exploitation (Beirne and Quinney 1982; Kairys 1998). In this view law advances and protects elite interests and values. Law is a mechanism that the powerful use to coerce, dominate, and intimidate the powerless.

The Radical Critique

In the radical critique, law is inherently oriented toward the preservation of the status quo. Law plays an instrumental role, more specifically, in the preservation of private property and a grossly disproportionate share of the wealth generally in the hands of the few. Law is either directly a tool of the ownership class or is relatively autonomous but oriented toward the long-term survival of the system. Insofar as law contributes to the maintenance of order, this purpose is fulfilled on behalf of the interests of the elite class.

In the radical critique, law contributes importantly to the legitimation of domination and the maintenance of hierarchy. In other words, law helps justify the concentration of power in the hands of the few and the privileges of some members of society in relation to everyone else. What law ordains is accepted simply because it is law. Law is violence, we are told (Cover, 1986). Law is terror put into words (d’Errico 1975). Law legitimates its own violence, then. Law promotes attitudes and actions harmful to people, and it does so through the use of language.
Law in the negative view is seen as promoting conflict rather than resolving it. And rather than eliminating differences between people and bringing them together, law contributes to categorizing people in terms of perceived differences and thereby reinforcing prejudice, discrimination, and misunderstanding (Minow 1990, 9). Law all too often, in many different ways, creates confrontations between citizens and the state.

In sum, in the radical critique, law perpetuates injustice, fosters conflict, and promotes selfish interests. Table 1.1 summarizes the positive and negative functions that have been attributed to law.

The Conservative Critique

A critique of law is also associated with the right, or conservative forces, going back at least to Edmund Burke’s criticism of the legal order established in the wake of the French Revolution (O’Hagan 1984, 21). In the modern era, ultraconservative forces and the far right have been especially critical of law being used as an instrument for achieving a liberal agenda and of its ultimate infringement of individual rights. A central thesis of the right-wing critique of law, then, highlights the claim that law interferes with the natural freedom citizens are entitled to enjoy. For example, some rightist critics have attacked tax law and gun control laws as unjustifiable attempts by the state, through the mechanism of law, to confiscate the property of citizens and to deprive them of weapons they are naturally entitled to own. In somewhat less extreme conservative views, law all too often interferes with the natural law of the market and accordingly has a damaging or destructive impact on productive activity and the creation of new wealth. This right-wing critique of law, except at its extreme fringes, is less focused on law as an institution than it is on the perceived misuse and misapplication of law. Although conservative forces typically favor less application of law to the activities of businesses, they favor more vigorous application of law to conventional lower-class offenders.

Law’s Unfulfilled Promises

The critique of law is not limited to those at the far ends of the ideological spectrum. The rule of law tends to be strongly supported within mainstream ideological thought, but there is much criticism of the perversion of law to fulfill the purposes of special interest groups or to improperly implement the law or to incur waste of time or money.

Virtually all of us can find some specific law, or some legal ruling, or some action undertaken by an official of law to be offensive. Law by its very nature cannot fulfill everyone’s expectations and perceptions of justice. One of the paradoxes of living in a society that claims to venerate the rule of law is the production of unrealistic aspirations for what law can accomplish. Passage of the Civil Rights Acts of 1964 and 1968 swept away formal barriers to integration and equal opportunity but could not legislate racism per se out of existence; it could not obliterate deeply embedded social and psychological patterns of behavior that impeded the realization of equality. Accordingly, there has been much frustration and anger over the gap between the superfi-
cial promise of such law and the disadvantaged conditions that too many African Americans and other minority groups have continued to experience.

The Internal Critique of Law

The critique of law comes not only from those who are outsiders, that is, who are not legal professionals, but also from those within the profession of law. Some of these critics rank at the top of their profession. Such critiques, however, are typically focused not on law as an institution but rather on the way it is used, or abused. Warren Burger (a Chief Justice of the U.S. Supreme Court) complained during his tenure in the 1970s and 1980s about the incompetence of a high percentage of lawyers who practice before the Court, the filing of frivolous lawsuits, inexcusable delaying tactics, and unsightly advertising by lawyers (Footlick 1978; Margolick 1984). Derek Bok, a former law professor, Dean of the Harvard Law School, and President of Harvard University, in a widely noted speech in 1983, was critical of the cost and inefficiency of the legal system, its emphasis on conflict, its extension of substantial advantage to the privileged, and its diversion of so many of our best and brightest minds to essentially nonproductive activity (Fiske 1983). Law professor Paul F. Campos (1998) has argued that a perverted worship of legal reasoning and the endless call for more law is symptomatic of some form of collective mental illness!

Those who have run for high political office in recent American history have often found that criticism of law—specific laws and legal rulings, judges and other lawmakers, and the legal profession—are popular themes that resonate with many voters. Following his re-election in 1936, Franklin D. Roosevelt attacked the nine old men of the U.S. Supreme Court, primarily on the grounds that they were trying to overturn or block New Deal legislation, and he tried, unsuccessfully, to increase the size of the Court so that he could appoint judges sympathetic to his causes (White 1976, 192). President Jimmy Carter observed, in 1978, that ninety percent of our lawyers serve ten percent of our people. We are over-lawyered and under-represented (Roth and Roth 1989, 152). Ronald Reagan attacked governmental regulation and government lawyers (Schechter 1990). President George Bush and his vice president Dan Quayle attacked the civil justice system for an alleged epidemic of costly lawsuits. Although this campaign was unsuccessful, it is remarkable that the antilawyer theme was pursued by a vice president who was himself a lawyer and the husband of a lawyer.

Hyperlexis: ‘Too Much Law’

Other paradoxes pertaining to law often present themselves. If, on the one hand, we have come to expect law to provide solutions to an exceptionally broad range of social problems and conditions, we also tend to find law overblown and excessively intrusive. The claim that there is too much law (and too many lawyers) is commonplace. The term hyperlexis refers to the excessive growth of law (Manning 1977). By almost any measure, law has indeed been a growth industry in America (Footlick 1977; Friedman 1998a). Legislative bodies (from local to federal) add more than 150,000 new laws to the
books each year. More laws mean more lawsuits, and the number of cases filed, at least in some jurisdictions, has led to a widely perceived litigation explosion. Defining and measuring litigation is more complicated than one might think, but for now, we will say that litigation is a pursuit of some goal by using the courts. (There is more discussion of this topic later.)

The scope of litigation has broadened; some forms of litigation (e.g., medical malpractice suits) have increased exponentially, and case filings in the federal courts have risen dramatically. Class action lawsuits, where a large number of plaintiffs (sometimes many thousands) are joined in a legal action, became far more common in the 1970s than earlier; although their numbers declined in the 1980s, they were certainly a controversial element of the legal landscape in the 1990s (Martin 1988; Institute for Civil Justice 1997). Class action lawsuits were controversial because they were said to have bankrupted many companies and to have enriched lawyers rather than having adequately compensated plaintiffs. The growth of litigation was accompanied by growth in the size of the legal profession: it almost quadrupled during the second half of the twentieth century, and it grew at a substantially faster rate than did the population.

## Law Versus Common Sense

Another critique of law focuses on its defiance of common sense and its imposition of burdensome, unnecessary, and counterproductive rules and requirements in an ever-widening range of circumstances. New York lawyer Philip K. Howard (1994), in his best-selling *The Death of Common Sense: How Law Is Suffocating America*, pursued this thesis. His book begins with an account of the failed attempt in 1988 of Mother Teresa’s Missionaries of Charity to transform an abandoned building in the Bronx into a homeless shelter. The attempt failed as a result of the onerous (and allegedly unreasonable) requirements of the New York City municipal code. (For example, the code called for the installation of a costly elevator.)

Howard’s book identifies many other cases where allegedly excessive legal red tape, or the extension of ever more rights and entitlements, frustrated the realization of socially worthwhile endeavors and where adherence to the rules and regulations seemingly became an end in itself. In a similar vein Walter Olson’s (1997) *The Excuse Factory: How Employment Law Is Paralyzing the American Workplace* argues that American companies are increasingly constrained from conducting their business particularly in hiring and firing in a sensible way because of the threat of lawsuits claiming discrimination, defamation, wrongful termination, sexual harassment, and the like. In this view, the present character of the law, on the pretext of protecting the rights of various classes of people, sabotages productive economic activity.

## The Paradox

In the final analysis, whether people are better off or worse off if they have more law today is a matter of ongoing dispute. On the one hand, an argument can be put forth that people’s rights are more fully protected, harmful activities are more fully addressed, and inequities and injustices are more
likely to be corrected with the extension of law. On the other hand, arguments can be put forth that the law has become too intrusive, that economic inefficiencies and job losses result from excessive litigation, and that the privileged and powerful always have the advantage in the long term when there is more law. In sum, in America an enduring love/hate relationship with law persists. There are many historical contradictions and cultural sources of ambivalence. The American republic was, after all, founded on a lawless rebellion, or revolution; from the outset, nevertheless, the Founding Fathers professed a commitment to a nation of laws. The Constitution is one of the sacred objects of American history and an icon of the American rule of law. It is widely venerated and has been a source of inspiration for constitutions in many developing countries. On the other hand, in American history, there has been the frontier tradition with its resistance to formal legal controls; this stance is also widely celebrated in the present. In an America of the twentieth century an ongoing tension existed between the demand for more and more law in a rapidly growing, exceptionally heterogeneous, and increasingly complex society; at the same time a certain proportion of the citizenry has vigorously protested a perceived expansion and growing oppressiveness of the law. This paradox of wanting both more and less law is a source of tension in American society. It is not, however, the only issue that provokes contention. The following section presents a number of law-related issues around which debate currently swirls.

Current Issues Before the Law

From all sides, it often seems, we are confronted with contentious debates on law-related issues (Katsh 1998; Roleff 1996). On some matters pertaining to law there is broad agreement: That willful homicide or the sexual molestation of children should be forbidden by law is a matter of general consensus. In a large, complex society, however, one can always find some individuals or small groups who dissent from or challenge any law or social norm. An entity known as the National Association for Man/Boy Love (NAMBL), for example, advocated the position that even young children should be permitted to engage in consensual sexual relations with adults (Leo 1983). Such a group is marginalized in the extreme within our society and is subject to condemnation or prosecution. On the other end of the scale, a high level of consensus exists that parents should have the right to establish bedtimes for their minor children and require their participation in household chores and that such matters should not be addressed by governmental laws. Even here one might find extreme proponents of children’s rights who would object to the imposition of any such constraints on the freedom of children, but again they would tend to be wholly marginalized within society and devoid of any measurable influence.

Between those issues on which there is a high level of consensus, whether in favor of the law or against it, there are many law-related issues on which members of society are divided. Some of the legal issues identified here have been debated over a long period of time; capital punishment is one such issue. Other issues have only surfaced recently: the use of surrogate mothers is one
such issue. Many issues that were once heatedly debated including witchcraft trials, slavery, Jim Crow laws (sanctioning segregation), voting rights for women, and the prohibition of liquor are no longer live issues in American society. And some issues that currently divide people in other countries around the world, including genital mutilation of young girls (in some African countries), religious control over marriage (in Israel), basic rights of women (in some Muslim countries), and the right to dissent (in China, among other countries) are also not live issues in American society.

Sanctity of Life Issues

One set of contentious legal issues can be called sanctity of life issues. Abortion, euthanasia, and capital punishment are three such issues; each involves the deliberate termination of life in some sense. (Questions concerning participation in warfare, hunting, and medical experimentation on animals could also be classified as sanctity of life issues.) Those who support capital punishment do not necessarily support the legalization of abortion, and vice versa. A person’s position on the various sanctity of life issues seems to be related to his or her attitudes on such matters as punitiveness (Cook 1998). The issue of abortion whether or not it should be legally available has been exceptionally contentious in America, especially since the controversial U.S. Supreme Court decision in Roe v. Wade (1973) (Binion 1997; O’Connor 1996; Solinger 1998).

The status of the human fetus beyond the specific issue of abortion has also raised questions about fetal protection and crimes of mothers against developing fetuses through substance abuse (Daniels 1993).

Questions pertaining to some forms of euthanasia have become increasingly important in conjunction with medical advances allowing for the maintenance of life in extreme circumstances (e.g., of the profoundly injured or the terminally ill) (Dworkin, Frey, and Bok 1998). Specifically, the issue of whether physician-assisted suicide should be legally permitted has arisen.

Although polls continue to suggest that a majority of Americans support the death penalty, a significant and articulate minority campaigns actively against this extreme penalty (Bedau 1998). Insofar as positions on these sanctity of life issues are likely to reflect deeply felt and often highly personal moral intuitions, they tend to be intractable and difficult to reconcile. Some extremists, a very small number of proponents of the pro-life position on abortion, have committed murders against abortion clinic personnel, and a small number of right-to-die proponents have subjected themselves to criminal prosecution by participating in assisted suicides.

If Americans are beset with some complex legal questions relating to the termination of life, we also face challenging issues relating to the creation of life (Dolgin 1997). Advances in reproductive technology and biogenetics have generated issues about surrogate motherhood, age limitations on motherhood, the ownership of embryos, multiple pregnancies resulting from the use of fertility drugs, genetic engineering, and the possibility of cloning human beings (Brownsword, Cornish, and Llewelyn 1998; Pence 1998; Rae 1994). More specifically, these issues include the question of whether women who serve as surrogate mothers for couples unable to have a child of their own should have a right to renego on the arrangement and keep the child
after birth, or should at least have some custodial rights; conversely, what happens if the contracting couple no longer wants the child after birth, especially if the child is born with significant defects?

Should surrogate motherhood itself be legally banned as a form of baby selling? If new reproductive technology makes it possible for women to sustain a pregnancy and give birth even after age sixty, should legal prohibitions be imposed on the grounds that the child (and society) is likely to experience significant adverse consequences? Should a woman retain the right to attempt to have a child from an embryo even if she is now divorced from the husband who provided the sperm and he objects? Should a woman be allowed to continue with a pregnancy involving many fetuses as a consequence of using fertility drugs, even if the multiple fetuses threaten her health, have a high probability of being born with serious defects, and are certain to impose astronomical medical costs on other parties? Should any legal restrictions be placed on an expanding technological capability of engineering the genetic endowment of children, or is such engineering purely beneficial for all parties? And if we develop the capability of actually cloning human beings, should this be legally permitted?

**Rights Issues**

One of the principal law-related themes of the latter half of the twentieth century was the dramatic increase in rights consciousness. The Civil Rights Movement of the 1950s and early 1960s, challenging segregation and second-class citizenship of African Americans, highlighted the fact that some social groups have been systematically deprived of fundamental rights and that through collective action such a deprivation could be challenged (Kluger 1975). The success of this movement in sweeping away the legal barriers confronting African Americans inspired and influenced other disadvantaged groups. Although some of the legal victories on behalf of African Americans and minority groups generally have been widely accepted by the mainstream of society, other such victories have been the focus of heated, ongoing debate (Bell 1980; Greene 1989). For example, the abolition of official segregation

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**Box 1.2**

**Gay Marriage**

At the end of 1999 the Supreme Court of Vermont instructed the legislature either to legalize gay marriage or to ensure that gay couples receive the same benefits extended to heterosexual couples (Goldberg 1999). At the outset of the twenty-first century Vermont has adopted, and several states were moving toward, the recognition of same-sex unions. On the other hand, laws against gay marriage had been adopted in some twenty-seven states, and such laws were being considered in various other states. This issue is certain to remain a contentious one in the years ahead.
has been widely accepted, whereas court-enforced busing and affirmative action have often been opposed.

The final decades of the twentieth century witnessed the emergence of a vigorous women’s rights movement, as well as a gay rights movement, and somewhat lower-profile rights movements on behalf of the physically disabled, the mentally challenged and the mentally ill, illegal aliens, prisoners, and children. Each of these movements has encountered, in varying degrees, resistance, which may range from the highly organized to the subtle and personal. For example, despite the removal of most formal discrimination against women, they continue to experience disadvantages and informal discrimination (Dusky 1996).

Legal protection against housing and employment discrimination directed at gay people has been widely supported, but attempts to openly allow gays in the military encountered strong resistance. Initiatives on behalf of gay custodial or adoption rights, as well as legally sanctioned gay marriages (see Box 1.2), have provoked especially vigorous resistance (Baird and Rosenbaum 1997; Blasius 1994). Americans are far from a full consensus on the scope of accommodations that should be made for the handicapped; the right of the mentally ill to reject involuntary treatment; or the specific nature of privileges (such as conjugal visits) to which prisoners are entitled (Alpert 1980; Lotito, Soltis, and Pimentel 1992; Sales and Shah 1996). Finally, any children’s rights movement, if it can be truly said to exist, is in its infancy (Freeman 1996). In one landmark case a minor child won the legal right to be emancipated from negligent parents, rendering him available for adoption by foster parents (DePalma 1992). It remains to be seen, however, whether such a case anticipates a broader extension of rights to children or is something of an aberration.

Age has always been a criterion for certain legal rights, responsibilities, and restrictions, but many issues pertaining to age-related law are unsettled. In the United States a fundamental contradiction concerning age long existed, namely, that a young man could be old enough to be drafted, and possibly fight for his country and lose his life, without being old enough to cast a vote for local municipal officers. This contradiction was resolved with the Twenty-sixth Amendment to the Constitution, which lowered the voting age to eighteen. The legal age for drinking, however, has varied among the states, although now it has been raised by most states to twenty-one; it remains a contentious issue for many young people (Wolfson 1995). On the other end of the age spectrum, the abolition of mandatory retirement continues to be a source of some debate (Levine 1988). As the twenty-first century progresses, changes in the age distribution of the population will surely have an impact on this issue.

Changing social values or patterns of behavior have generated new legal standards and new forms of rights. Until recently in America, no right to a smoke-free environment was widely recognized, but an antismoking movement developed rapidly toward the end of the twentieth century, pushing through legislation that banned smoking in many public places, including some workplaces (Rabin and Sugarman 1993). In response, some smokers have made claims for recognition of their rights as smokers.

Even though sexual harassment has surely existed since time immemorial, the right to be free from such harassment, at least in the workplace, has also gained recent recognition (Conte 1990). On the other hand, there are
those who argue that sexual harassment has been too broadly defined, so it has negative consequences for workplace relationships. While sexual harassment and smoking laws are relatively recent matters of contention, there are issues that have been the focus of contention in America since the time the Constitution was ratified. Many forms of these arguments continue through today. These are matters of free speech and privacy.

**Free Speech and Privacy Issues**

Freedom of speech and a free press are among the most sacred tenets of a democratic society such as the United States, and are rights guaranteed by the First Amendment to the Constitution. It is widely understood that the proclamation of heretical, blasphemous and thoroughly unpopular ideas cannot be suppressed, but many other issues arise in this context: for example, does the right to free speech encompass such diverse forms of expression as libel of public figures, obscenity, inciting illegal activity, and hate speech? The specific scope of free speech and press rights as protected by the First Amendment has led to a large body of judge-made law (Kalven 1988). In a landmark decision, *New York Times v. Sullivan* (1964), the United States Supreme Court held that critics of official conduct could not be found guilty of libel unless they had disseminated deliberate or reckless falsehoods. This ruling did not inhibit some public officials from suing critics; for example, General William Westmoreland, Commander of U.S. forces in Vietnam, sued CBS for libel in a high-profile case (Abrams 1985). The network had claimed in a documentary that the General had suppressed information about enemy numbers. Westmoreland eventually withdrew his suit. Such lawsuits raise the question of whether the media are often inhibited from exposing or criticizing public figures because they fear undertaking the large expense of defending themselves in a lawsuit.

In another important case, a well-known fundamentalist preacher, Reverend Jerry Falwell, sued the notorious men's magazine *Hustler* after the magazine published a crude and obscene representation of him in a drunken incestuous rendezvous with his mother in an outhouse; although the jury awarded a sum of money to Falwell, the United States Supreme Court overturned the award, reinforcing the right to criticize (or make fun of) public figures (Taylor 1988). This case was featured in a popular film about the publisher of *Hustler*, *The People v. Larry Flynt*. Just as there is dispute about what constitutes libel, there is a long and torturous legal history of trying to discriminate between art, which should be protected as a form of free expression, and blatantly pornographic material subject to legal controls (deGrazia 1992). The Supreme Court over a period of decades attempted to produce a standard for identifying pornography (including of no redeeming social value and offensive to community standards), but these attempts have been seen as difficult to enforce (Robel 1989). The dissemination of pornographic material and images through the Internet has been a special concern, since children have easy access to some of this material. Even so, the Supreme Court overturned a restrictive Communications Decency Act as overly broad and in violation of the First Amendment (Godwin 1998; Mendels 1999). The question of whether pornography should be legally suppressed or should be tolerated has been heatedly debated in the past few
years, with at least some feminists aligned with the conservative forces calling for suppression.

In a related vein, legal cases have arisen in connection with attempts to ban certain inappropriate books from public libraries and with attempts by school administrations to censor student-run newspapers that publish material offensive to school personnel (Lony 1990). The issue of whether flag burning is a form of free speech has provoked especially strong reactions from self-described American patriots (Goldstein 1996). Provocation in another sense arises in connection with speech that wantonly offends or demeans some group (i.e., that is racist, sexist, homophobic, and so on). While the Courts have generally held that such speech is protected by the First Amendment, school administrators have often regarded this type of speech as a form of harassment that they should ban (Wolfson 1997). College campuses in particular have grappled with the dilemma of encouraging free speech while acting against speech that has a poisonous influence on the campus environment or that is experienced as harassment (including sexual harassment) (Shiell 1998).

When some form of speech or expression is alleged to be a direct cause of harmful behavior, the issue becomes especially complicated. Indeed, just such a connection is claimed by feminist critics of pornography, that is, that it encourages debasing and violent behavior toward women, including rape (MacKinnon 1993). In the 1970s, NBC-TV was sued after a young girl was raped by four youths apparently imitating a rape they had just seen in an NBC film, *Born Free* (*Time*, 1978). A publisher of action books, Peder Lund (Paladin Press), was sued in the 1990s when a man who committed an especially savage triple murder was found to have purchased and specifically followed instructions in a book entitled *Hit Man: A Technical Manual for Contractors*, which Lund had published (Brooke 1996). The courts have also been reluctant to establish precedents in such cases for fear they might encourage broad censorship.

At first glance, it might seem difficult to see a connection between political campaign funding and free speech. But from 1976 on, the United States Supreme Court has consistently held that campaign donations cannot be constitutionally limited in amount or source because they represent a form of free speech (Turow 1997). Of course, a practical consequence of this position is that wealthy individuals and organizations continue to have a highly disproportionate influence in our political system and that meaningful campaign-financing reform is difficult to accomplish. Although the defense of free speech has been historically associated with those on the liberal or leftist side of the political spectrum, in the recent era this constituency has sometimes called for restrictions (e.g., on hate speech), while conservative and corporate constituencies have called for fewer restrictions, not only on campaign spending but on advertising for such products as tobacco (Lewis 1998). Also, the extraordinarily rapid expansion of the worldwide Internet has generated a variety of legal issues about what can be disseminated through this medium and what types of controls, if any, are permissible. Altogether, contentious issues in the realm of free speech and press are likely to persist for some time.

The right to privacy is another sacred tenet of American society. It is not specifically mentioned in the Constitution, but the Supreme Court has recognized that a general right to privacy is implicit in this document (McWhirter
The right to privacy issue intersects with other issues, such as reproductive freedom, abortion, and physician-assisted suicide. The legitimate objective of law enforcement agencies to investigate possible criminal activity can clash with privacy rights of individuals, and the right of the press to report news can create the same type of conflict. In *The Right to Privacy* Ellen Alderman and Caroline Kennedy (1995) claim that Americans experience today a growing number of intrusions on their privacy. These intrusions include some justice system practices, such as strip searches following arrests on minor offenses; drug and school searches; prosecutions of pregnant women; interventions against the right to die; the relentless invasions by the media into the lives of both famous and ordinary citizens; and employer investigations and surveillance of employees.

Modern technology has created newer and even broader opportunities for invading privacy. One invention is the telephone listening device. In the landmark decision of *Katz v. U.S.* (1967), the United States Supreme Court affirmed the proposition that conversations carried on over a telephone wire enjoy a presumption of privacy; accordingly, listening in on such conversations requires a search warrant. The capacity to engage in observing citizens or gathering confidential information about them has been greatly extended by contemporary methods of surveillance and computerized data banks. Various controversies arise, then, on where to draw the line between protecting privacy and realizing other legitimate purposes of investigation or information gathering.

Issues of privacy are closely linked with issues of confidentiality. It is well known that confidences between priest and parishioner, lawyer and client, doctor/therapist and patient, and welfare agency and client and records pertaining to these relationships are generally protected by law from public, involuntary disclosures. But the ultimate scope of such confidentiality is not always clear. If a confession to a priest produces crucial information about serious criminal activity; if a lawyer’s client discloses engagement in ongoing fraud; if a doctor’s patient is HIV-positive and at high risk to infect unknowing parties; if a therapist’s patient discloses homicidal intent or sexual abuse of a minor; or if a welfare agency client has been implicated in the death of a child, do the confidentiality provisions apply? The legal system has produced various formal responses to such questions.

**Family Issues**

The dissolution of the family is hardly new, although the breakup of families through divorce has increased exponentially in the past few decades. In one interpretation, legal reforms such as no-fault divorce were actually introduced with the hope of discouraging divorce, but such laws obviously failed (DiFonzo 1997). Both the increase in divorce and other changes pertaining to gender roles have produced new and sometimes painful controversies (Dusky 1996). For example: Is reliance on mediation in divorce cases likely to work to the disadvantage of women? Is community property division or some other formula more or less fair? Should divorced spouses who remarry still be eligible for alimony? Should maternal custody of children be privileged over most qualified parent? At what age, if any, should minor children be allowed to choose their preferred custodial arrangement? And so on.
Although no-fault divorce became the norm in most states in the final decades of the twentieth century, by the century’s end there was some backlash against this standard, and there has been a call for making it somewhat more difficult to obtain divorces. It remains to be seen how far this backlash movement will go.

**Issues Concerning Legal Processes**

Enduring legal controversies arise in connection with so-called *victimless crimes* (Meier and Geis 1997). Willful homicide, rape, burglary, armed robbery, larceny, auto theft, arson, and other forms of conventional crime are prohibited by law, and that is not a matter of controversy. By the same token, few people, if any, say that poor table manners, personal rudeness, tardiness, or bad taste in clothing should be classified as crimes, punishable by law. A category of activities does exist, however, which has been the focus of considerable public disagreement. People argue about whether these activities should be proscribed by formal law, and if so, with what penalties. These activities have included gambling, illicit drug use, prostitution, pornography, and consensual homosexual activity.

Gambling has become widely legalized in many, but not all, forms and has been actively promoted by state and local governments eager for the relevant tax income. Public sentiment is still strongly supportive of laws making distribution and sale of various so-called illicit drugs, from marijuana to cocaine to heroin, illegal, although the level of support varies according to the particular drug; calls for decriminalization or outright legalization are fairly widespread.

Prostitution and pornography represent two forms of the commercialization of sex. They have long existed and have inspired a range of law-related responses in different historical contexts. Within contemporary American society, there is less support for legalization of prostitution than for legalization of pornography, but in both cases there has been a fair amount of *de facto* legalization, or unwillingness of police and courts to enforce laws that remain on the books.

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**Box 1.3**

**Drunk Drivers and Auto Confiscation**

In New York City, in 1999, Mayor Rudolph Giuliani ordered the city’s permanent seizure of cars whose drivers were found to be driving drunk, including first offenders (Finder 1999). Although civil libertarians (or the drivers themselves) complained that this was a punishment which presumed guilt prior to any such finding in the court, the practice is in line with long-standing principles in Anglo-American law, which authorize property confiscation in connection with various illegal acts. Since the value of cars varies greatly, as does the wealth of those charged with drunken driving, a forfeiture might be far more punitive in one case than in another.
The United States has a long history of legal proscriptions against almost every imaginable form of intimate sexual behavior, with the exception of marital, procreative, missionary-position sexual intercourse in a private setting. These illegal forms of sexual activity have included everything from consensual homosexual relations to masturbation to fornication to adultery to oral-genital sex. If many of the relevant laws are no longer enforced, some are still on the books. In the case of consensual homosexual relations, approximately half the states define it as criminal activity.

**Criminal Justice**

Crime and criminal justice are major preoccupations of both the general public and politicians, so they generate ongoing debate on many enduring issues as well as newly raised issues.

Our legal system contends with an ever-expanding range of controversial defenses offered for criminal conduct, including black rage, parental abuse, premenstrual syndrome, battered wife, and even obsessed fan syndrome (Dershowitz 1994; Wilson 1997). These defenses have been collectively labeled the “abuse excuse.” In one interpretation, any acceptance of such defenses reflects a reaction to the increasing toughness of our justice system’s response to crime, as they provide juries or judges with a rationale for excusing an accused whom they do not think deserves the prevailing legal penalty. Such defenses in most cases are unsuccessful. But it remains to be seen whether they will, over time, be more widely embraced by both the general public and the justice system.

Many other ongoing controversies are associated with the criminal justice system. They include questions about plea bargaining, preventive detention, sentencing practices, and victim impact statements. Some of these controversies are explored in later chapters (see Box 1.3).

**Business**

A general increase in consciousness of the harmful consequences of some corporate activities conflicts with pro-business claims that interference with free market activities has harmful economic consequences. Accordingly, there are ongoing debates on product liability law; environmental protection and workplace safety standards; and the criteria for antitrust actions or insider trading prosecutions. Product liability refers to a company’s responsibility when its products cause harm; antitrust actions refer to efforts to challenge anticompetitive or monopolistic business practices; and insider trading refers to trading on the basis of information not available to the general public, which is prohibited by law (see Box 1.4).

Tobacco companies have been successfully sued by states to compensate them for the high health costs associated with tobacco use; gun makers are also facing lawsuits claiming their responsibility for gun-related violence (Higgins 1998; Fried 1999). Whether such lawsuits will be initiated against still more types of businesses, and whether these initiatives will be supported by both the public and the justice system, remains to be seen.
Health and Medicine

In the realm of physical health a new threat such as AIDS generates a whole series of complicated legal issues: for example, mandatory testing; exceptions to general standards of confidentiality; distribution of clean needles and condoms; standards for discrimination or exclusion; and liability to criminal charges against HIV-positive individuals who knowingly have unprotected sex (Dalton et al. 1987). At century’s end, an increasing number of states were adopting laws intended to protect the public from HIV infection (Richardson 1998). The future direction of law on this matter was going to be guided by the balance between public fear of AIDS and sympathy for HIV-positive individuals and those afflicted with AIDS.

Conclusion

Within virtually any branch of law today—tax law, consumer law, environmental law, labor law, welfare law, and so on—we can identify public policy controversies. Also, in a world increasingly described in terms of globalization, issues such as international bans on nuclear weapons and land mines or the desirability of establishing a permanent international criminal court arise. The identification here of law-related controversies is by no means exhaustive. Indeed, such a listing might go on almost endlessly. The issues identified in the preceding paragraphs can be, and surely will be, endlessly debated. Many different arguments, from the highly principled to the purely pragmatic, can be and will continue to be put forth on behalf of one or the other side of these issues. These issues should be of special interest to students of law and society because they bring into sharp relief the interaction of legal and social variables; those who acknowledge and work from this point

**Box 1.4**

**Copyrights and Patents**

Copyrights and patents did not exist before 1790 in the United States, and artists and would-be inventors were free to copy and use the ideas of others. The basic and generally commendable objective of the copyright and patent law was to ensure that both creative individuals and corporations would get a fair return for their efforts. In 1790, the first year of the patent law, examiners (including Thomas Jefferson) issued three patents; in 1998, 147,521 patents were issued to Americans alone (Gleick 2000; Lewis 2000). Copyright protection is in effect for twenty-eight years and was made renewable for a second twenty-eight year period (greatly benefiting such corporations as Disney, who can then extend their control over the use of Disney characters).

The present era has witnessed pervasive foreign piracy of American-produced intellectual property, with annual losses in the billions to the film, music, software, and book publishing industries. In this sense, holders of copyrights have been victimized. Some critics claim, however, that granting of copyright protection has become too broad and liberal, with aspiring artists and the general public as victims of greedy copyright holders.
of view have a sociolegal perspective. This perspective allows one to understand the following: What are the primary social factors that influence or shape both the character of an issue (such as euthanasia or affirmative action) and the public perception of it or the specific response to it? Conversely, what are the identifiable social (and behavioral) consequences of existing legal policy pertaining to the issue, or a hypothetical legal policy at odds with existing policy? Scholars with the sociolegal perspective want to know how the social influences the legal and how the legal affects the social. In the final chapter of this book at least some of these issues are explored in more depth, specifically within the context of the relation between law and social change.

**Law in America Today**

Law is all over. Law is everywhere. In America an ongoing love/hate relationship with law persists.

On the one hand, Americans generally venerate the tradition of a nation under law. The Constitution and the Bill of Rights are sacred documents in American history. Key concepts of these documents, including due process and equal protection, are deeply ingrained in the national consciousness. Americans have come to expect total justice, as Lawrence M. Friedman (1985), puts it, that is, a proper legal remedy for any blameworthy loss or injury. Certainly, when Americans are victims of crime or suffer a private injury of some kind, they want the law to be there for them. And if legislators are constantly enacting new laws, it is surely because at least some of their constituents are demanding such laws to address a wide range of perceived problems.

On the other hand, we have always had, as David Ray Papke (1998) puts it, *Heretics in the Temple: Americans Who Reject the Nation’s Legal Faith.* Anti-abortion activists and members of right-wing militias are contemporary representatives of this tradition. But many ordinary Americans also express considerable frustration (or anger) with a nation of lawyers. Most Americans hope to avoid contact with legal authorities and lawyers and may take this into account in planning their daily lives.

The preceding two paragraphs have set forth American views of law in exceptionally broad terms. More specifically, the well-off and well-connected and those who belong to the historically dominant group in society are more likely to view law in positive terms than those who are poor and who belong to a minority group.

In their illuminating study of law in the everyday lives of ordinary Americans (*The Common Place of Law*), Patricia Ewick and Susan Silbey (1998) find that Americans tend to experience law in contradictory ways: magisterial and remote at some times and all-too-human at other times. Unsurprisingly, however, most Americans do not spend much time at all specifically thinking about law. In that sense, law would seem to be at best a marginal presence in their lives. Of course, for a minor proportion of Americans—those being processed by the felony courts; those involved in a major civil lawsuit; those engaged in a complicated divorce and child custody case—law becomes for a time an all-consuming dimension of their lives. As suggested earlier, law lies invisibly behind many of our mundane, daily activities. We can hardly avoid law
entirely when it is so pervasively highlighted in our media. But these consider-
atations aside, people in their everyday lives generally prefer to think about things
other than law, and most people initiate legal action only reluctantly. According
to Ewick and Silbey (1998, 196), people are often disappointed in laws inability
to address the troubles that plague their everyday lives.

The reactions of Americans to the role of law in the Clinton scandals, at
the end of the twentieth century, captured well some of the contradictory per-
ceptions of law. Americans as a whole expect their President to uphold the
law and comply with it, and it would be contrary to traditional American val-
ues to consider the President above the law. However, a majority of Ameri-
cans were apparently distressed by the Independent Counsel’s relentless
legalistic pursuit of the President, and especially his intrusive exploration of
Clinton’s sexual conduct. Although Americans want a law-abiding President,
they did not in this case display much appetite for a seemingly endless legal
investigation and proceeding against the President.

Americans departed the twentieth century and entered the twenty-first,
then, with profound ambivalence toward law and many contradictory per-
ceptions of it. In the inevitably complex, dynamic, and expanding society of
the future, law will be an unavoidable, and arguably growing, presence. The
need to understand law as fully as possible will surely increase. But the tradi-
tional American love/hate relationship to law is also sure to endure.

### Key Terms and Concepts

| abuse excuse | litigation explosion |
| autonomous model | odd laws |
| copyright/patent | positivistic tradition |
| homologous model | radical critique of law |
| humanistic tradition | sanctity of life issues |
| hyperlexis | total justice |
| ideological prism | trials by ordeal |
| interactive model | victimless crimes |

### Discussion Questions

1. Explain why it might be difficult to effectively study law following the
   positivistic tradition. What are the advantages and disadvantages of a
   humanistic approach to the study of law?

2. Discuss the three views that explain the relationship between law and soci-
   ety autonomous, homologous, and interactive.

3. According to the radical critique of law, how does law discriminate?

4. Explain America’s love/hate relationship with the law.

5. Which legal policy issues are especially difficult to resolve, and why?