

# Encyclopedia of Law & Society: American and Global Perspectives

## Social Change and Law

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In a gradual but unending process, the law changes society, and society changes the law. This constant impact of one on the other is a product of human behavior and social interaction. The interrelationship of law and society makes it impossible to examine the effects of law on society without considering the reverse effects. Consequently, this entry will first consider briefly the ways society affects the law and then examine the law's effect on society. It will do this from the perspectives of the new institutional economics, emphasizing the importance of norms of cooperation, although other perspectives could result in different but just as useful analysis.

## Social Pressures on the Law

Scholars as different as Friedrich von Hayek (1899–1992) and Lawrence Friedman have argued that a country's law grows out of its culture and society. In this sense, there is a natural law, not a legal order prescribed by a deity, but laws reflective of the beliefs of the people. Hayek believed that tribal chiefs and monarchs were limited by the beliefs of the governed, and he even attributed the origins of the freedom of the British to the constraints on the king that flowed from the belief that the common law was a natural law. This cultural basis for much of the law is the reason for the similarity of laws across many countries. Countries with a liberal tradition respecting individual rights will have similar laws that reflect that tradition. Similarly, countries with market economies will have similar economic laws because the needs of market transactions will drive the content of the laws.

The influence of society on the law is a long-run process. When people in a society are divided over an issue or when some push for faster change, interest groups often try to change the law to their benefit, by lobbying the legislature or by using the courts to achieve change. Given the potential impact of court decisions, it is not surprising that groups have used litigation as a social tool. For example, the litigation strategies of the National Association for the Advancement of Colored People (NAACP) throughout a good part of the twentieth century to end segregation in the United States are wellknown. More recently, cultural wars have been waged in legislatures and courts by advocacy groups that span the political spectrum and focus on a broad array of issues.

Although a few judicial decisions may lead society to change (for instance, the decision of the Massachusetts Supreme Judicial Court in *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941, 2003, legalizing same-sex marriage may be that type of case), the vast majority of decisions reflect the prevailing beliefs of society. School desegregation is a good example of that. In the decades before 1954, when the U.S. Supreme Court decided *Brown v. Board of Education* (347 U.S. 483), there had been tremendous changes in attitude toward African Americans and significant integration in many parts of the country, even in education. [p. 1380 ↓ ] “It was in this receptive soil that the Supreme Court planted the seed of *Brown*” (Kluger 1975: 749). Of course, some resisted this change, especially throughout the South, but the courts and federal government pushed many people into reluctant acceptance of integrated schools. Then, as people learned to live with integrated schools, attitudes slowly changed into acceptance of integration. This story of changing attitudes toward racism, followed by a momentous decision in *Brown*, and then by even greater changes in attitude, illustrates the cycle of social change influencing legal change, which influences social change.

## Law's Influences on Society

In all countries, in all cultures, throughout all time, the law has influenced human conduct and affected society. This must be so because the law mandates conduct by individuals, groups, and legal entities. Anyone can list scores of statutes that have had profound effects on contemporary life, from different types of tax laws to securities regulation, from environmental controls to workplace safety, and from antidiscrimination laws to religious freedoms. One can say the same for innumerable decisions by courts and agencies that have affected people's lives. For example, there are safer playgrounds and products in the United States today thanks to the civil tort system, but there is also defensive medicine, higher insurance costs, and a loss of physicians in some places.

Jurists know famous court decisions for their impact on society. *Marbury v. Madison* (5 U.S., 1 Cranch, 137, 1803) made the Supreme Court supreme, *Dred Scott v. Sandford* (60 U.S., 19 How., 393, 1857) hastened the start of the Civil War, and *Brown v. Board of Education* moved the country to end racial segregation in education. Without the Supreme Court's decision in *Bush v. Gore* (531 U.S. 98, 2000), there was a good

chance the Florida recount would have made Al Gore president. Then, one can tell a “want of the horseshoe nail” story and say there would have been no war in Iraq, and so on.

Not only the well-known cases influence society. Thousands of court decisions, some resolving seemingly minor or technical issues, have turned out to have a large impact on economic, political, or cultural issues. For example, a surprising decision by the District of Columbia Court of Appeals was an important impetus to restructuring the telecommunications industry. For nearly forty years, the Federal Communications Commission (FCC) treated long-distance voice telephone service as a legal monopoly possessed by AT&T, not to give AT&T monopoly profits but for important economic and social reasons that benefited the country. As technology changed, the FCC opened up other telecommunications services to competition, such as data transmission, but nevertheless continued to protect AT&T's monopoly in ordinary voice long distance. In the mid-1970s, MCI entered that protected market in violation of its tariff, which allowed MCI only to provide certain business long-distance services. Although the FCC ordered MCI to stop offering ordinary long-distance services, the D.C. Court overturned that decision on appeal in the *Execunet* case (561 F.2d 365, 1977), ruling that the FCC first had to find that banning competition was in the public interest. This conclusion was a surprise, given that the established practice of treating ordinary long-distance telecommunications as a monopoly had been reaffirmed in scores of agency decisions routinely upheld by the courts for decades. On remand, the FCC tried again to stop MCI, but that decision was reversed by the D.C. Court (*MCI Telecommunications Corp. v. FCC.*, 580 F.2d 590, 1978). Ultimately, the FCC capitulated and allowed MCI to enter this market, soon to be followed by other long-distance suppliers. With its core monopoly now open to competition, AT&T was much more willing to settle the government's antitrust suit two years later and break up the corporation. The D.C. Court's preference for competition in *Execunet* was an important factor in the dramatic transformation of telecommunications in the United States.

The reasoning of court opinions, not just the outcome, can also have an effect on society. For example, affirmative action can be supported by various arguments, such as an obligation to confer benefits on people whose ancestors were enslaved pursuant to legal authority or as a vehicle for helping the economically disadvantaged. In *Regents of the University of California v. Bakke* (438 U.S. 265, 1978), the [p. 1381

↓ ] Supreme Court struck down as unconstitutional the University of California's use of affirmative action in admissions to medical school. In his separate opinion, Justice Lewis Powell emphasized the importance of diversity in higher education, an argument not considered central at that time to the justification for affirmative action. Over the years, as schools sought to admit more African Americans, they found support in Justice Powell's emphasis on diversity. Eventually, the quest for diversity became an important tenet of universities in admissions and other educational policies. In *Grutter v. Bollinger* (539 U.S. 306, 2003), a majority of the Supreme Court endorsed the importance of diversity in higher education when it approved the admissions policy of the University of Michigan law school.

The judicial decisions described above have had profound effects on society, but it is difficult to say how different the world would have been if they had never been decided. For example, it is inconceivable that the Civil War would never have taken place if there had been no *Dred Scott* case. At most, the decision hastened the war. School desegregation would have occurred in the United States without the decision in *Brown v. Board of Education*, probably later and in a different manner, but it would have occurred. It was technological change that changed the telecommunications industry and hence telecom regulation. The *Execunet* decision affected the timing, pace, and manner, but it did not cause deregulation. The law is important, sometimes extremely important, but it is far from the only engine of social change.

## Institutions and Norms

In considering the effect of law on society, it is important to note that law is only one of the rules of the game that structure human interaction. These rules, referred to as *institutions* in the nomenclature of the new institutional economics, provide a framework of incentives that channel human behavior and shape economic, political, and social organization. Institutions can be either informal or formal. Informal institutions include such things as norms, codes of conduct, and business conventions. Some formal institutions are created by nongovernmental groups and may include religious precepts or housing subdivision land use restrictions. Many nonlegal institutions can greatly influence human behavior, as illustrated by the fervor of some religiousbased opposition

to legalized abortion. In general, however, most of very powerful formal institutions are legal, such as constitutions, statutes, regulations, and court decisions.

One defines an institution by how it is enforced as well as by the written terms of the rule. Judicial or bureaucratic enforcement of written rules can give a clearer (and sometimes different) meaning to rules. Even if a law is on the books, nonenforcement creates the same situation as if the law had never been enacted. Thus, any analysis of the effect of law on society must examine the law as applied and enforced, not just the law on the books.

The law's influence on society will be greater to the extent that people comply with the law, even when it is against their self-interest. It is understandable that businesspeople will accept a loss in a transaction to establish a reputation that will bring them more business in the future. However, people comply with legal rules that cause losses, even if there is no possibility of a long-term gain. The question of a society's support for and acceptance of the legal rules is part of the broader question of how groups overcome collective action problems—or, as Robert Putnam noted, how does a society create “social capital...such as trust, norms, and networks, that can improve the efficiency of society by facilitating coordinated actions” (1993: 167). In economic terms, it is the same as asking how to minimize free riding; in game-theoretic terms, it is asking how to induce people to cooperate rather than to defect.

The question of why people sacrifice for the common good has been one of the most studied questions over the ages. Not surprisingly, many economists emphasize the importance of incentive structures—a system of laws, sanctions, and rewards—to induce cooperative behavior and to limit free riding. Political economists point out that cooperation is the product of the interest seeking of the members of society, or that cooperation results because people see that cooperative groups do better economically and socially than groups lacking cooperation. There is some truth in those approaches, **[p. 1382 ↓ ]** but social norms are crucial to understanding the law's effects on society. To the extent that a law reflects social norms, enforcement costs will be lower as citizens will be more willing to follow the law. If social norms promote adherence to contractual obligations and fairness in business dealings, there will be less need to resort to judicial enforcement of contractual and business obligations. Not only will the legal system operate more efficiently, the economy will be more likely to grow.

Several theories discuss how to instill cooperative norms that support respect for law. First, many commentators cite the norm of reciprocity as key to instilling cooperation. When people perceive that others are behaving cooperatively, the norm leads them to do the same, but when they perceive that others are shirking or otherwise taking advantage of them, they retaliate and refuse to cooperate, even if doing so exposes them to significant material advantage. Reciprocity leads to “tit for tat” in experimental games and in one-on-one relations in society. However, reciprocity also more broadly means that a person will be prone to cooperate if the person perceives that a good portion of society cooperates. Numerous experiments with a prisoner's dilemma game with repeated play in a population of at least eight to ten players show that the players will cooperate if they believe that most players are cooperating. Without a supportive social context, it is harder for other-regarding norms to predominate. This is like the broken-windows theory of law enforcement: if the government enforces housing codes to make an area look better, there will be less crime because the people will appear to be more lawabiding. Similarly, mutual trust in the cooperation of others has a strong effect on the overall level of cooperation in a society.

Second, people are more likely to exhibit otherregarding preferences when they believe that those preferences enjoy the support of a respected authority, which means that court pronouncements can be an effective means to cooperation. For example, part of the NAACP strategy was to use court victories as a way to legitimize integration and to shape people's attitudes. Courts need citizens to support or at least accept their decisions if they are to be a respected authority. As a result, judges are mindful of controversial issues and cautious as they use up their political capital. In the United States, many legal doctrines are available to avoid dealing with extremely controversial cases, like standing, ripeness, and the political question doctrine. For example, although Congress never declared war on Vietnam, the Supreme Court rejected all attempts to litigate the constitutionality of that war, saying it was a political question and thus not a question for the courts. Consequently, the Court avoided entanglement in an issue that would have resulted in a great loss of respect. The opinion in the *Bush v. Gore* election dispute contains an expression of the Court's great reluctance to play a significant role in who would become president. Before rendering its ultimate decision, the Court attempted to dispose of the case by a bland *per curiam* opinion that sent the case back to the Florida Supreme Court (*Bush v. Palm Beach County Canvassing Bd.*,



531 U.S. 70, 2000). Nevertheless, the case returned in a way that forced the Court to reach the merits of the tricky, arcane, and highly controversial legal issue. The Supreme Court also found a middle ground in dealing with the delicate issue of affirmative action in higher education. It held that the University of Michigan's undergraduate admission policies were unconstitutional but those of the university law school were constitutional, even though both policies had led to very similar results (compare *Gratz v. Bollinger*, 539 U.S. 244, 2003, with *Grutter v. Bollinger*, 539 U.S. 306, 2003).

Finally, education can be very important in instilling cooperative norms, whether through religion, parenting, or schooling. The media can also play an important educational role. People teach cooperative norms by ostracizing lawbreakers and treating them as immoral. Making the names of lawbreakers widely known, as through registers of sexual offenders, helps that end. Many know Robert Putnam's proposition that participation in civic, social, or other organizations imbues traits and skills that can make for good citizens.

In the United States, the framers of the Constitution undertook an educational campaign through the *Federalist Papers*. It was easier to educate people about the rule of law in the formative years of the United States than it would have been elsewhere because the country was sparsely populated. In addition, much of the population was at least somewhat educated or interested [p. 1383 ↓ ] in issues of governance since before the Revolutionary War, and the British common law culture had laid a foundation for the rule of law. The framers succeeded in developing cultural traditions to maintain the authority of the new Constitution. These traditions have been reinforced over the centuries to make respect for the Constitution and the rule of law deeply embedded in the culture of the United States. From the time of elementary school, students are taught about the importance of respect for legal rules, while immigrants learn this in citizenship classes.

Judges, as well as other respected government leaders, have lectured and written opinions that are designed to instill respect for the rule of law. Constitutional courts have a great capacity to exercise moral leadership. As Eugene Rostow once remarked of the U.S. Supreme Court, "a high court is an educational body, and its members are inevitably teachers in a great and vital national seminar" (Cepl and Gillis 1996: 123).

These descriptions about cooperation and human behavior are, of course, generalizations. Not every person responds the same way to the same influences. Some people may learn civic traits by participating in social clubs; others will not. The same holds for the degree to which people are influenced by reciprocity or the views of respected authority. Cooperative norms are distributed differently in various populations, with some people at one end always cooperating, and some people at the other end always defecting. Thus, it is difficult to make definitive statements about what can be done to make a society more law-abiding. Nonetheless, some aspects of societies in general are closely related to the effectiveness of laws.

In every society, some people will act in their own self-interest, disregard the well-being of others, and even take advantage of or hurt others, regardless of the influences described above. The only way officials can make these people comply with the law is through an effective criminal and civil law system (which includes the laws themselves as well as a competent, honest judiciary to enforce them). A legal system should be effective enough to punish intentional wrongdoers, whether through criminal laws punishing theft or through civil laws dealing with breach of contract, for example. This will not only deny them the fruits of their antisocial acts, it will also act as a deterrent to future wrongdoing by them and by others who would be otherwise disposed to act that way. Any society will have people who would cheat, renege on obligations, and generally take advantage of others if they thought they would not be punished. An effective legal system will deter many of these people from acting this way. Of course, no system can punish every intentional wrongdoer nor deny all of them the fruits of their selfish acts. As long as the legal system adequately deals with a significant portion of them, the risk of criminal and civil sanctions will be high enough to deter many of those tempted to act antisocially. In this way, an effective criminal and civil law system will help instill compliance with the law in those people who would rank in the lower end of the distribution of cooperative norms.

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*See also*

- [Administrative Law and Agencies, Politics of](#)

- [Affirmative Action Programs](#)
- [Attitude Formation and Change](#)
- [Commons, John R.](#)
- [Communitarianism](#)
- [Compliance with Law](#)
- [Courts, Lawmaking by](#)
- [Culture, Legal](#)
- [Game Theory](#)
- [Gap Problem](#)
- [Hayek, Friedrich August von](#)
- [Hurst, J. Willard](#)
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- [Legitimacy](#)
- [Markets](#)
- [Reciprocity](#)
- [Rule of Law](#)
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