

# Introduction

Law seeks to work in the world. It seeks to order, change, and give meaning to the society of which it is a part. It deploys various tools—rules and regulations, rewards and incentives, threats and promises—to accomplish these meaning-giving, ordering, changing tasks. But what gives law its special character is the fact that when all is said and done, it can, and does, deploy violence.

It will come as no surprise to say that violence of all kinds is done every day with the explicit authorization of legal institutions and officials or with their tacit acquiescence. Some of this violence is done directly by legal officials, some by citizens acting under a dispensation granted by law, and some by persons whose violent acts subsequently will be deemed acceptable.

As the legal scholar Robert Cover once observed, despite its significance, law's violence has played a small role, and occupied little space, in legal theory and jurisprudence.<sup>1</sup> This book is designed to help remedy this omission. Although some scholars now attend to the literary dimensions of legal life and some to the normative or philosophical ideas with which law is engaged, law, unlike literature or philosophy, orders the social world in a direct way. This book starts with this simple premise—law seeks to work in the world—and describes law and legal processes as socially organized, thereby connecting legal study to the study of society in two different senses.

First, the readings in this book highlight law's responsiveness to various dimensions of social stratification. They draw attention to the question of when, why, and how legal decisions respond to the social characteristics (e.g., race, class, gender) of those making the decisions as well as those who are subject to them and when, why, and how they should do so. These questions inevitably raise issues of

justice and fairness. In so doing, they highlight the moral dimensions of legal life.

Second, the book treats law itself as a social organization, emphasizing the complex relations among its various component parts (e.g., judges and jurors, police and prosecutors, appellate and trial courts). In this regard, the book examines the traditional subjects of professional legal study—namely, appellate court opinions—and describes some of the most pressing controversies concerning the nature of legal interpretation while asking how those opinions take on meaning in social life. It also asks whether, and how, judicial decisions are translated into practice. Can those at the top of law's own bureaucratic structure effectively control the behavior of others in the legal system's chain of command? This question directs attention to the putative gap between law on the books and law in action.

Questions about law's social organization are venerable questions in the social scientific study of law. They allow teachers in a variety of disciplines to come to the study of law in a coherent and engaging way. Other texts and readers provide materials with which teachers might construct these arguments about the social organization of law. This reader provides a thematically integrated treatment of these arguments, putting the question of how the law is socially organized at the center of its concerns. It integrates treatment of law's various institutions and actors into a broader framework, which highlights the challenges that law faces as it seeks to work in the world.

The book offers students a perspective on legal life that treats law as a set of institutions and practices combining moral argument, distinctive interpretive traditions, and the social organization of violence. It is based on the belief that the systematic study of law advances the goals of a liberal education. This

conclusion rests on two general observations: one concerns the importance of law in culture and society and the other, the capacity of legal study to engage and enhance the intellectual, analytic, and imaginative capacities of undergraduates.

First, law pervades much of our lives and provides a forum in which the distinctive temper of a culture may find expression. In this country and abroad, it plays a major, though variable, role in articulating values and dealing with conflict. Although the role of law has never been more substantial or controversial in the United States, in countries from Argentina and Brazil to South Africa and those of Eastern Europe, people are seeking to develop their own versions of the rule of law as a means of ordering their societies.

The pervasiveness of law reflects human tendencies to engage in normative argument as a regular part of social interaction and to interpret social action in the language of right and wrong. Law, however, is more than a branch of applied ethics; in many cultures, the concept of legal legitimacy is associated not only with the adequacy or normative appeal of legal commands, but also with elaborate rhetorical practices and traditions of reading and interpreting. Finally, law finds its most vivid expression when moral argument and interpretation issue in force. Although law depends on persuasion, inducements, and voluntary compliance, force (or its possible application) remains the critical tool for legal enforcement.

The study of law invites examination of a wide range of critical questions about persons and the ways they live together, raising issues traditionally linked to liberal inquiry. Legal study of the kind that this book is designed to promote provides a useful and engaging way to sharpen students' skills as readers, as interpreters of culture, and as citizens schooled in what Aristotle would have regarded as a kind of practical wisdom, a knowledge that extends beyond theoretical understanding to

civic and moral action. To understand legal materials, students are required to develop habits of close reading and hone their interpretive, imaginative, and analytic abilities. Understanding those materials requires great attentiveness, the ability to see how arguments are constructed, and the willingness to imagine alternative possibilities. Because law is concerned with resolving disputes, the student of law is invited to test his or her ethical arguments and textual understandings in a context where decisions must be made and force often must be deployed. In each of these respects, legal study complements the general education objectives of the liberal arts.

As the late A. Bartlett Giamatti wrote when he was President of Yale,

The law is not simply a set of forensic or procedural skills. It is a vast body of knowledge, compounded of historical material, modes of textual analysis and various philosophical concerns. It is a formal inquiry into our behavior and ideals that proceeds essentially through language. It is a humanistic study—both as a body of material wrought of words and a set of analytic skills and procedural claims involving linguistic mastery. . . . To argue, therefore, for courses in the parts, principles and purposes of law is not to argue for “professional” training in college in the techniques, accumulated lore and diverse iterations of method that training for the profession also entails. It is rather to argue for philosophic, textual and historical concerns, as one would argue for the teaching of any humanistic or . . . scientific inquiry meant to educate the nonprofessionally inclined student. It is to argue that the medium of cohesion and conflict, ligature and litigation, that is the law, must be part of the educated person's perspective in order to appreciate one of the grandest, systematic ways of thinking human beings have developed for their survival.<sup>2</sup>

Traditionally, texts about law and society have been organized around major actors and

institutions with chapters on police, defense lawyers, prosecutors, judges, and so forth. This book takes a different approach. Because law seeks to work in the world, legal institutions are preoccupied with issues of social organization, with the question of how they can respond effectively to social demands and to social problems. At the same time, they face the dilemma of responding to inconsistent and contradictory demands. People want law to be impartial and evenhanded, yet they also want legal institutions and officials to be sympathetic and responsive. They want law to be accessible, but worry about a so-called litigation explosion. They want law to be an effective deterrent and hence want adequate severity, but also demand equity and lenient treatment. Finally, law needs to both dispense

and control violence, to allow and yet control discretion. Exploring these paradoxes provides the organizational frame for this book.

### Notes

1. "Violence and the Word," 95 *Yale Law Journal* (1986), 1601.
2. "The Law and the Public," address to the Second Circuit Judicial Conference, September, 1982, pp. 36–37. Judge Richard Posner, also an Adjunct Professor of Law at the University of Chicago, echoes Giamatti's sentiment. "Law," Posner argues, is now "an interesting subject of intellectual contemplation, a very important social system . . . studied for its own sake quite apart from any training in the legal profession." *National Law Journal*, January 9, 1989. ♦

# Part I

## *When Law Fails*

It is very hard to imagine society without law. This challenge arises because law does many things without which organized social life would be very difficult. Law sets down rules for the conduct of citizens. Here you might think of the criminal law, the laws prohibiting robbery, assault, and murder. Where a society is committed to the “rule of law,” it establishes rules for those who make the law, e.g., the procedures that legislatures must follow if they are to enact valid law. In addition, ordinary citizens may look to law to establish mechanisms and procedures through which they can resolve disputes. If neighbors, for example, cannot agree on the precise location of their property line, they may bring their disagreement to a court for resolution. In each of these areas, law also contains visions of justice, of what a society must do or refrain from doing if it is to respect the rights and dignity of its citizens. Thus, for example, when the Eighth Amendment to the Constitution forbids the infliction of “cruel and unusual punishment” on those found guilty of crimes, it recognizes that even criminals have rights.

Each of these things helps to establish society’s minimum normative content, its basic framework of shared values. Perhaps most important, law also seeks to bring order and security into the world. Its rules tell us what

we can and cannot do. Law establishes agencies, such as the police, whose job it is to translate those rules into action and, in so doing, provide a framework of safety within which citizens can go about their daily lives.

The readings in the first section of this book present several examples of instances in which that framework of the police did not protect citizens. They each describe violence outside the law and thus remind us of the dangers of a world beyond law. We confront violence arising unexpectedly in a recreational setting, in the family, on the streets of our cities, and in a terrorist attack on the United States. If law seeks to work in the world, what can we learn about its nature and limits by examining examples of the dangerous world that law seeks to order?

As you read the selections in Section I, ask yourself whether each, or any, should be counted as a failure of the law. Or, are they tragedies that no legal order, no matter how diligent and effective, could reasonably be expected to prevent? Your answer to these questions might change as a result of reading the selections in Section II, each of which presents a different argument about how law is supposed to serve the society of which it is a part. ♦