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Non-Exhaustive Glossary of Terms

A

**Act** – An alternative name for statutory law. *See Statutes.*

**Action** – An alternative name for lawsuit: the process that starts with a demand (through a document named complaint) for state intervention that one party (named plaintiff) makes in order to have her status quo restored and the other party (named defendant) punished physically (in a criminal action) or financially (in both criminal and civil action).

**Adjudication** – The formal ending of a lawsuit by a court and of a dispute by an administrative agency.

**Adjudicative Hearings** – Proceedings held by administrative agencies similar to trials held in courts of law.

**Administrative Agency** – A governmental body that issues rules and regulations and even adjudicates disputes between parties, according to powers delegated to it by the legislature (whether federal or state).

**Administrative Rules and Regulations** – The law issued by (federal or state) administrative agencies according to the powers delegated to them by legislatures that usually further details rules contained in (federal or state) statutes.

**Annotations** – Brief summaries of court decisions and other editorial explanations that the commercially published codes feature at the end of each statutory section. The written document (pleading) the defendant files in response to plaintiff’s complaint.

**Attorney** – Members of a profession regulated by state laws. One of their areas of expertise is to represent other people’s legal demands for relief in courts for a fee.

**Authority** – *See Binding Authority and Persuasive Authority.*
B

Bill – A legislative proposal that has not been enacted as law.

Binding Authority – The authority statutes command on disputes involving issues within their subject matter, and the authority higher courts decisions have on factually similar disputes brought to lower courts from the same jurisdiction.

Brief – (1) the alternative name for documents that attorneys file in support of their client’s legal demands;
(2) a summary of a court’s opinion.

C

Case – See Lawsuit.

Case Law – Alternative name for common law in its narrow meaning of ‘Judge–made law,” different from statutory or regulatory law.

Cause of Action – The legal grounds for a civil action.

Citation – (1) reference to authority supporting one’s legal argument;
(2) the form used for legal reference.

Civil Law – (1) the other major world legal system (unlike common law it does not officially recognize the precedential value of earlier decisions from higher courts from the same jurisdiction);
(2) the body of law that covers non–criminal matters.

Claim – A formal demand for state redress raised in an action.

Code – (1) a topical compilation of statutes or administrative rules and regulations;
(2) primary source of law.

Common Law – (1) the other major world legal system (unlike civil law it officially recognizes the precedential value of earlier decisions from
higher courts from the same jurisdiction);
(2) an alterative name for case law—the body of law that includes only court decisions.

**Complaint** – The document that starts a civil action.

**Constitution** – (1) the fundamental law of most national jurisdictions (written or not);
(2) primary source of law.

**Controversy** – *See Lawsuit.*

**Court Decision** – *See Judgment and Opinion.*

**D**

**Damages** – Monetary compensation ordered by a court to restore plaintiff's status quo.

**Defendant** – The person against whom the plaintiff (the initiating party) brings an action.

**Digital Repositories of Law** – Repositories of law available online. *See Print Repositories of Law.*

**Doctrine** – (1) a widely accepted legal principle;
(2) the product of writings of professors and other scholars that has a pervasive influence on both the making and application of civil and international law.

**Due Process of Law** – Constitutional guaranty of a person's enjoyment of her rights provided by the Fifth and 14th Amendment of the United States Constitution.

**E, F, & G - Intentionally Left Blank**
H

**Hearings** – See Adjudicative Hearings and Investigative Hearings.

**Holding** – The conclusion of law reached by a court in deciding a case or controversy.

I

**Injunction** – A court’s order that the defendant does or refrains from doing a certain act.

**Investigative Hearings** – Proceedings held by congressional committees prior to enactment of legislation.

J

**Judgment** – The formal conclusion of a case or controversy. See also Opinion.

**Jurisdiction** – (1) the geographical area in which law (in all its forms as court decisions, statutes and administrative rules and regulations) is binding;

(2) the boundaries of authority given to all law–making bodies to make law (decide cases, enact legislation or adopt rules and regulations).

L

**Law** – A double–meaning concept:

(1) a human ideal of order and predictability–see Rule of Law;

(2) the entire system of rules that materialize that ideal of order and whose enforcement may be state–imposed.
Law Review Articles – One type of secondary sources. Law review articles are usually published by law schools and are student–edited. They contain writings about the law. What distinguishes law review articles from treatises is their narrower scope, its more in depth treatment of the specific legal issue, and its more often acknowledged partisan view.

Lawsuit – A criminal or civil proceeding taking place in a court.

Legislative History – Documents that record the history of a statute from its introduction as a bill sponsored by a legislator to its enactment as a piece of legislation.

Litigate – Asking the state (usually by bringing a lawsuit) to sanction one’s demands to restore one’s status quo.

Litigant – A party to a lawsuit. See also Pro Se Litigant.

M

Motion – A formal request a party to a lawsuit makes to adjudge during the lawsuit.

O

Opinion – The document that records the conclusion reached by a court or administrative agency adjudicating a lawsuit. All court opinions have a well–set structure that contains a heading: the name of the parties, that of their attorneys and the judge issuing the opinion, as well as the name of the court in which the opinion was held down and the date it was pronounced. In addition, court opinions summarize the facts of the case, the legal issues involved in the parties’ claims, and the reasons on which the court’s conclusions are reached.
P

**Persuasive Authority** – The authority case law from other jurisdictions and secondary sources command.

**Plaintiff** – The person initiating the lawsuit.

**Primary Sources** – The repository of law, whether it is case law (e.g., reporters), statutes (e.g., codes), or rules and regulations (e.g., codes).

**Print Repositories of Law** – Repositories of law, which are available in print format. *See Digital Repositories of Law.*

**Procedural Law** – The body of law that covers the rules governing the administration of justice (the operation of the legal system) as opposed to substantive law, which covers the rules that provide the rights and obligations that enable society to function.

**Pro Se Litigant** – A party to a lawsuit that has no professional legal representation.

R

**Reporters** – (1) primary source;
(2) alternative name for reports;
(3) collections of court decisions, usually arranged loosely by period of time and the court making the decision.

**Reports** – (1) primary source;
(2) collections of court or administrative agency decisions.

**Repository** – (1) resource containing primary sources (for example reporters are case–law repositories);
(2) source of individual rights (for example, the Constitution is the repository of our main freedoms).

**Rule of Law** – A fundamental legal principle of the American legal system.
S

Secondary Sources – The repository of legal writings about the law that command only persuasive authority (such as law review articles and treatises).

Stare Decisis – Common law principle which states that old cases from higher courts in the same jurisdiction are the bases for new court decisions within the same fact pattern.

Statutes – Acts of a legislature.

Substantive Law – The body of law that covers the rules that provide the rights and obligations that enable society to function, unlike procedural law that cover the rules regarding the administration of justice—how to restore or preserve status quo through litigation of rights and obligations.

T

Treatise – (1) secondary source;
(2) comprehensive legal writing on an area of law, although less detailed or critical than a law review article.

W

Writ – (1) the form in which complaints were originally addressed to English courts;
(2) Writ of certiorari refers to the discretionary device used by the U.S. Supreme Court to hear cases.
Introduction

For I think it an undeniable position, that a competent knowledge of the laws of that society, in which we live, is the proper accomplishment of every gentleman and scholar; an highly useful, I had almost said essential, part of liberal and polite education.

A. THE UBIQUITOUS NATURE OF AMERICAN LAW AND ITS DUAL ROLE OF PRODUCT AND PRODUCER OF POPULAR CULTURE

When you start studying American law it is useful to be aware of all potential hindrances. Some of them are related to the current nature of American law as both a product and a producer of popular culture, and, as such, students unfamiliar with this aspect of it may fall prey to unfounded assumptions. Its ubiquitous presence in everybody’s life causes that many basic explanations about the law be absent from law classes, because American students already have an idea about the bigger picture of the legal system and how it works. On the other hand, such heavy presence may induce you to memorize legal information that comes from sources that lack proper authority, and improperly rely on it, for example, instead of developing a critical approach to legal information.

Other obstacles are related to the origins of American law and the ways in which the sources of American public law create specific legal norms. For example, while, from the outside, the American legal system seems to change very little, the reality is that American law is very dynamic. Its dynamism relies on a rhetoric of individual rights that perhaps is little known to you. Additionally, while American students know that the federal structure of the American government is mirrored by the legal system, you may not be familiar with the American political system. Thus, it may be easier for native American students to understand that federal and state laws are not covered by one source of law, but instead such laws are located in distinct repositories of statutory and decisional law, whether at the federal or
state level. Thus, becoming familiar with these idiosyncrasies of American law is a prerequisite to both successful legal studies and research. In other countries, interest in law usually surfaces at times of political crises. For example, it is understandable that political circumstances of this time make exposure to law a daily occurrence. The fact that America was attacked and is currently engaged in military action raises legal issues that ask for everybody's opinion and understanding. For example, John Walker Lindh, an American citizen, fought for the Taliban, while knowing that the United States was engaged in hostilities against the Taliban. Looking beyond one's gut feelings, can we define his actions as treason? Is there a definition of treason under the U.S. legal system? Where can it be found: in a compilation of federal statutes or in a reporter of Supreme Court cases? How can it be located? (See Fig. 1)

**Fig. 1**

**Treason is defined in the **
United States Code:**

Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.

However, American law is everywhere today mostly because of its double nature of both a product of popular culture and a creator of popular culture. Whether reading a Grisham novel, watching NBC’s “Law and Order,” driving faster than the legal speed limit, or drinking McDonald’s’s hot coffee, law is never far away. You are exposed to law as a product of popular culture—in novels and TV shows—and you are exposed to law as a producer of popular culture. Here, trials of famous people become TV news shows. When you watch CNN or Fox News, and you hear the entertainer of the day has just been indicted by the Grand Jury, you are indirectly exposed to law as a producer of popular culture. However, you will be ill-advised to give such knowledge more weight than you would to any other TV shows. To the extent that American law has become both a product of popular culture and a creator of popular culture, everybody who lives in the United States or studies law in America is exposed to it. As a result, your first encounter with the American law is likely to be mediated:

Whether it comes from television and radio broadcasts, newspapers, periodicals, or Internet sites, be aware that like everywhere else, mediated information uses concepts defined according to the views of the show’s writers and producers or the creators of the printed material. Thus, faced with the flood of mediated legal information, developing a critical approach to legal information before you start studying law becomes a worthwhile enterprise. As an example of American law’s dual role as producer and product of popular culture, let’s take a look at the film “Monster,”

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which many of you might have seen because it won a 2004 Oscar in the Best Actress category. The movie depicts the life of young woman who, in 2002, was convicted and then executed for the killing of seven men. From watching this movie one learns that homicide is defined by each state’s law, that the Florida penalty for multiple homicide is the death penalty, and that Florida administers it through lethal injection. In this instance, law-rules regarding the execution of a convicted felon-produced popular culture—the celebrated movie and popular culture—the movie—further produced legal knowledge about those issues. Such information may be unreliable. Nevertheless, this shows the extent to which legal knowledge is part of the ordinary Americans’ general knowledge. To that extent, you too will benefit from understanding how American law works. It goes without saying that unless you study American criminal law, such mediated legal knowledge is and remains passive, and it rarely stirs the audience’s interest in questioning the legal issues and their outcomes—the crimes at hand and the way American society deals with them. Certainly, it is not intuitive to inquire into the legality of the death penalty although the American constitutional system prohibits inhuman punishment. (See Fig. 2)

Fig. 2

**Constitutional Amendment VIII**

Ratified on 12/15/1791 Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
Everybody comes in involuntary direct contact with the law at birth, when they become entitled to rights and freedoms automatically, as well as at death when those entitlements end. Many of you are already aware of the extent to which the idea of “legal rights” has become an intrinsic value that is widespread in the American culture. In no other legal system will you encounter this almost religious belief that a rights claim produces a universal and categorical entitlement. The only way to understand the value of such belief is by identifying the right itself, whether it is mentioned by the Constitution, a statute, or issued by a court, and then by searching its historical interpretation and application by courts.

Applying for a driver’s license, signing a lease, or marrying, like everybody else, you encounter law directly and voluntarily, too. If you apply for a driver’s license, you need to know that each state has its own specific rules, regarding paying a fee and furnishing proofs of identity. Those requirements under New York law are contained both in Vehicle and Traffic Law and in the rules issued by the Commissioner of Motor Vehicles. Under New York State law, that requirement is available from a statutory compilation which is easily identifiable through its “citation:” N.Y. VEH. & TRAF. Sect. 502. Deciphering such mysteries should be easy once you finished reading this book.

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2 See N.Y. COMP. CODES R. & REGS. tit. 15 § 7.1 et seq.
For Further Reading:


In-class questions:

1. Why do you think people should know how the legal system is organized?

2. What would be the best way to learn how to research the law in your opinion?
   a. What about free-of-charge databases?
   b. How would they compare with fee-based databases?
      • Do you know any such databases?
B. WHAT THIS BOOK OFFERS

This book is intended to help you obtain a solid introduction to the complex realm of American law by exposing you to both its esoteric and tangible aspects. Its premise is that you cannot study law if you do not know how to find the law, and vice-versa you cannot find the law if you do not have some minimal understanding of what the law is.

Like any abstract body of knowledge that rests on both tangible and intangible constructs of human intellect, studying law requires understanding both its abstract and concrete facet. Law is a discourse, a process of power, and tangible norms that make it all possible. Aside from theology, a body of knowledge about God’s word, all the other subjects explain something tangible: whether they are natural or man-made constructs. Linguistics builds on language. Musicology ultimately rests on tangible music sheets. Legal knowledge builds on the social function of law to ensure social order and stability. This goal is achieved though a myriad of legal norms that govern our social behavior. The abstract facet of law is far from uniform. It encompasses the ideal of order and predictability as well as the discourse of individual rights, for example. The ideal of order is translated into legitimate order by the requirements imposed by the “rule of law” on the tangible aspect of law-its innumerable norms that constitute different bodies of law, such as torts law, business law, criminal law, or intellectual property law. Studying law rests on understanding the social function of the concrete legal norms, and studying the different bodies of law-torts, intellectual property, etc.-requires being able to study
the concrete norms that constitute them as well. Those rules are tangible. Using the appropriate legal strategy, they can be found and analyzed accordingly.

Saying that understanding legal concepts is connected to one's ability to research the law is not unique. In critical legal thinking it resonates with any dialectical approach to study theory through practice. As intimated earlier, due to its social importance, studying law should be of interest to all. The interconnection between the ends-legitimate order-and the means-legal activity-becomes apparent only when you have access to both the concepts and their tangible normative source. Additionally, effective American legal research is not possible absent a minimal understanding of the American legal system and of its major idiosyncrasies. Legal systems-through their concrete legal norms-are meant to forge social legitimate order. As societies are dynamic entities, governing them is a dynamic task as well. Concrete norms by their nature, thus, have finite life. They need to change in order to accommodate a society's social and political needs, moral standards, and sense of justice. The American ideal of legitimate order has remained unchanged for a few centuries. However, when you study different areas of American law, you see that norms change continually. Thus, when researching the law you need to always update your research, but you also need to remember that those changes are limited in nature: they must conform to the core American cultural values that the “rule of law” defends. For example, on one hand, because all statutes are open to judicial review, and during that process courts may even alter or annul statutory provisions by declaring them unconstitutional, when you search for statutes you also need to search
for case law. On the other hand, knowing that that change has a limited nature will make it easier for you to accept the lack of results that updating your legal research will often produce. This book aspires to offer an intellectual point of view about American law, by laying down the foundation of life-long critical legal thinking skills. It aspires to guide you to always remember that irrespective of its abstract appearance, law has a tangible facet. How do you reach the goal of legitimate order? Why is a federal or state statutory approach favored? These are questions that will always be with you in your studies of the diverse bodies of law. It also aspires to direct you in your legal search to the appropriate sources, which help you understand the limits of your research. How do you know the value of this individual right? Where do you search for it? Is this the appropriate source you should use? Is this the only source you should check? Is this enabling norm still good law? These are all questions that you should become familiar with during your legal research. During your studies you will discover that sometimes it is easier to gain knowledge of American law in its abstract facet than in its concrete representation. Legal research is heavily dependant on your financial resources. For example, this book will point out to you the numerous free-of-charge repositories of law. However, it will also point out that you cannot update your search reliably unless you have access to fee-based electronic databases, such as Lexis and Westlaw, and within the last year, Bloomberg.

This book will make it easier for you to be aware of both the strengths and weaknesses of your legal research. This book will briefly describe the meanings of law in American legal studies. It will also explain the sources of American public law.
Thus, you will learn about the branches of the government and how they all make American law: Congress passes statutes, courts hand down decisions, the President issues Presidential orders, and administrative agencies issue regulations. You will learn about the repositories of American public law. You will learn that statutes are collected in codes, court decisions in reporters, and agency regulations in codes as well. It will become apparent that while the sources of law are accessible to the public both in paper and electronic formats, you need to choose a specific repository according to your legal research query. The information you have when you start your search will control your choices. Thus, this book will bring you up to speed and fill in the gap between your understanding about American law and that of a native student. It will bring you to the same level of understanding of American law as any American law student. This book will help you understand all these and more about the sources of law.

Naturally, understanding American law is a long process. It takes law practitioners years of study and practice. However, like learning any other subject, when studying law one starts with the ABC’s. It makes a difference how any first class is taught. If the teaching process is not right, it can discourage people from pursuing the subject any further. Hopefully this book is the right beginning of what could become a lifetime interest in American law-starting with the way in which it works, and ending with how and whether law can be an instrument of justice, for example. However, do not browse through this book hoping to find the equivalent of a legal cook-book, a “how-to” manual. You need to have a minimal understanding
of the social functions of American law, and then about how concrete legal norms work. There are ways to locate specific norms as there are ways to make sure that they are still good law. This book will provide answers to all these questions. However, there are no recipes worth following in doing legal research other than a few major principles that will be further detailed. From a theoretical point of view, it will always depend on what you know when you start your research, and what you want to have learned by the end of the process. From a practical point of view it will always depend on your time availability and finances. Researching American law reliably can be expensive at both levels: its finding component may require some time exclusively devoted to locate the law, while its updating component relies heavily on fee-based databases. This book is structured into six chapters. Chapters 1 and 2 will talk about law and explain what it is. They will attempt to decipher the double meaning of law as an ideal of a temporal order, where the rule of law strives to make sure that the concrete temporal rules achieve. They will also provide an understanding of the limits within which concrete legal norms may change in order to help you successfully strategize your legal research. Chapter 3 will lay down the foundation of the process of finding the law. It will emphasize the role of scholarly publications as ways of finding the specific legal rules and of understanding their scope within our democracy. It will also talk about the sources of law and the governmental institutions that devise public law. It will explain where the law is while it will give you a sense of how American law emerges and works. It will briefly point out the repositories of law: those sources of law that represent the published manifestations
of the law. In legal research those are called “primary sources.” It will bring law closer to you as it talks about the various print and online repositories of law. It will pay distinct attention to the online repositories that can be freely accessed from any computer with Internet access. Through this chapter, it will become apparent that there are many ways to access American legal norms. The next three chapters of the book will talk about each major source of public law in the United States. Chapter 4 will focus on statutory law. It will explain what it is, and where and how you find it. Chapter 5 will focus on decisional law. Similarly, it will explain what it is, where it is, and how you can find it. Chapter 6 will follow the same pattern while focusing on administrative law. These chapters will draw on the information presented in Chapters 1, 2, and 3 and will detail the sources for each type of law.
Chapter 1
A Dynamic Legal System
Shaped by Long-Lasting Principles

[ ... ] law is a rule of civil conduct [ ... ] commanding what is right and prohibiting what is wrong. Blackstone’s The Study, Nature, and Extent of the Law When we study lawwe are not studying a mystery [ ... ] The means of the study are a body of reports; of treatises, and of statutes, in this country and in England, extending back for six hundred years [ ... ]

10 Harvard Law Review 457, 457 (1897)
A. INTRODUCTION

It has often been remarked that the American people have an “uncanny reverence for law.”\(^1\) Lawyers breed in large numbers, and we are maybe the most litigious nation on earth. One reason may be that we are never too far from law or legal discourse. Talks about individual rights and due process of law thrive in school, at home, on TV, and even MTV. Legal concepts generate perhaps more popular culture (including songs and movies) than they do academic writings. American general culture often covers legal knowledge. Many know that state law defines murder and manslaughter, and many know that intention tells them apart. Of course, few know what state law is or how to find those statutes, such as the Pennsylvania ones,\(^2\) that define those felonies, and distinguish between intentional and involuntary homicide (See Fig. 3).

In the same way European high school students learn about Bergson, and other little known philosophers,\(^3\) for their graduation examination—which the

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**Fig. 3**

18 PA.CONS.STAT. ANN. Sect 2501 (2009): “A person is guilty of criminal homicide [murder in the first degree, defined in 2502(a)] if he intentionally ... causes the death of another human being.”

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\(^2\) See, e.g., Pennsylvania law: under Pennsylvania law 18 PA. CONS. STAT. ANN. § 2501 “A person is guilty of criminal homicide [murder in the first degree, defined in 2502(a)] if he intentionally ... causes the death of another human being.”
French call le baccalauréat—Americans take civics classes and learn about law. American high school graduates often know that the U.S. Supreme Court has been the guarantor of our individual freedoms, and phrases such as “You are breaking the law” and “I will take you to court” are part of the popular vocabulary. Indeed, unlike other nations, we can say that the Supreme Court gave us the right to purchase contraception⁴, and the right to have a private sexual relationship with a same-sex partner.⁵ For example, in 1965, in a case called Griswold v. Connecticut, the U.S. Supreme Court recognized a zone of intimate privacy for married couples, which covered the woman’s right to decide whether her marital sexual conduct was reproductive or not.⁶ In 2003, in another case Lawrence v. Texas, the Court similarly recognized a zone of intimate privacy for same-sex couples.⁷ Americans also know about the impact the Secretary of the Interior’s listing of a species as endangered has on the future of industrial projects within the area where that species cohabitates. Indeed, here, the snail darter put an end to a dam project as a result of a Supreme Court decision.⁸

In 1978, in a case called TVA v. Hill, the U.S. Supreme Court recognized that “the snail darter is a living entity which is genetically distinct and reproductively isolated from other fishes” according to a federal statute known as The Endangered Species Act

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³ In 1994 the French high school students were tested in Saint Augustin, Bergson, and Spinoza. See Les annales du baccalauréat—épreuves de philosophie juin 1994. To access the document go to http://www.adminet.com
² Griswold v. Connecticut, 381 U.S. 479 (1965)
⁴ Griswold v. Connecticut, 381 U.S. 479 (1965)
of 1973. The U.S. Supreme Court thus prohibited TVA, a federal agency, from finishing the construction of the Tellico dam on the Tennessee River, although it was virtually completed, because it would have eradicated the snail darter population. (See Fig. 4)

How does this widespread legal knowledge affect you? It suffices to say that if you have a good understanding of basic concepts of American law you will avoid making inaccurate assumptions. Understanding the nuances of the legal jargon will only help you be effective in strategizing legal research. Once you are able to identify concepts you can easily identify the sources of American public law: how they make the law, where the law is located, and how you can find it. Only then you will have freed your intellectual prowess to concentrate on the specific legal subjects of American law, on their rich subtleties, and study and research them proficiently.

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8 See *TVA v. Hill*, 437 U.S. 153 (1978) (“the Secretary [of the Interior] formally listed the snail darter as an endangered species on October 8, 1975. 40 Fed. Reg. 47,505–47,506; see 50 C.F.R. §17.11(i) (1976). In so acting, it was noted that “the snail darter is a living entity which is genetically distinct and reproductively isolated from other fishes.” 40 Fed. Reg. 47,505).
For Further Reading:


In-Class Exercises:

1. Find the U.S. Supreme Court opinions mentioned in this section

2. Where would you go (databases) to find them?

3. Skim those U.S. Supreme Court opinions
   a) Can you understand their language?
   b) If not, underline the concepts you have problems understanding.
B. AMERICAN LAW HAS BOTH AN ABSTRACT AND A CONCRETE FACET; ONLY THE LATTER CONSTITUTES THE OBJECT OF LEGAL RESEARCH

That both “law” and “laws” are concepts with multiple meanings may not come as a surprise to you. In any legal system, law is often viewed as the means to reach an ideal of legitimate order, while laws are specific types of recorded legal norms that make that ideal possible. Law is also a branch of knowledge that studies the rules governing people’s behavior in relation to each other. Law is both discourse about power and power in action. The discourse studies legal rules from a multitude of perspectives. If legal philosophy, in its wider sense promotes “general reflection on the nature of legal institutions,” legal methods and legal research explain how those institutions (the legislative, executive, and administrative branches) work and how we can research their products (statutes, cases, and administrative rules, regulations, or decisions). Thus, if law, including American law, aims at “making society more stable and enabling people to flourish,” then in legal philosophy you study how that goal is reached—the end of the process—and in legal research you learn how to locate the means to reach that end—the concrete norms of conduct that the state enforces when they are violated.

For example, society maintains order by enforcing particular rules. If you do not pay your rent, the landlord can evict you, and if you refuse to leave the

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10 Id.
13 Id. at 1.
premises, the sheriff—or another law enforcement officer—will forcibly move you and your belongings out into the street. Those rules can easily become the object of legal research. Some of the rules we obey in our daily activities are known under the term “laws.” They are man-made because they are passed by citizens organized in assemblies and thus different from the laws of nature that one studies in physics, biology, or chemistry classes. As often observed, unlike the laws of nature or society, which describe natural or social phenomena, legal norms prescribe our conduct and make our future predictable. For example, legal norms divide our actions in lawful and unlawful. Legal norms also identify which unlawful actions are criminal, and which ones are punished with loss of liberty, or even with loss of life. To the extent that the severity of the punishment is rationalized as a necessary social deterrent of that activity, legal sanctions create legal obedience, and a predictable tomorrow. In all legal systems the abstract and the concrete aspect of the law are interconnected. The degree varies from system to system. Generally, if you think about constitutional rights and principles, within the frame of the American legal system, you will first tend to define them abstractly. But rights do not exist abstractly. They can be found only in “historical constitutions and political systems.” Furthermore, such rights are interpreted and “actualized” in the context of a given society and its legal order. The right to own property has very specific meanings from one historic period to another and from one social class to another.

15 Id.
Moreover, like all domestic legal norms, American legal norms also are expected to make the ideal of legitimate social order feasible. As W. Friedmann remarked, every legal system is supposed to implement a just legal order whose meaning, of course, changes from one historical epoch to another and from one society to another.17 Friedmann’s “purposeful enterprise”18 remains open to change. Thus, norms in his view mirror all changes societies encounter: changes in people’s needs as well as changes in their mores and in their perception of social ideals. While the ideal of legitimate order remains constant, its meaning changes in time.

What constitutes legitimate today is different from its 19th century meaning, and, as shown below, what was legitimate in the 18th century lost that status in the 19th century. For all these reasons, in this book, law is approached as a concept, a

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**Fig. 5**

*Constitution of Massachusetts: Declaration of Rights, art. 30 (1780). Art. XXX.* In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.

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16 On the rights of the American lower class, also known as the “underclass,” see, e.g., Christopher Jencks, *Rethinking Social Policy. Race, Poverty, and the Underclass* (1992).
18 *Id.* at 21.
signifier, with two meanings. Law signifies both the ideal of order and predictability in any given society and the concrete legal norms that make it feasible. The American ideal of order is often perceived under the guise of the role of the “rule of law.” Perhaps it is easier to explain how legal norms help achieve this ideal if we explain the role played by the “rule of law.” Technically the “rule of law” can be regarded as a principle of sovereignty of the laws over men. Many of you must have heard the famous but cryptic phrase describing the aspirations of the American Founding Fathers to create “a government of laws and not of men.”19 (Fig. 5)

More simply, the American ideal of government requires a legal system that reduces the impact of human whims in the government to a minimum. Think about the rule of law as a fundamental political ideal for the Anglo-American notion of good government, as the intermediary between the concrete legal norm and the ideal of order that norm is supposed to achieve. The rule of law is supposed to shape the American legal system according to the political ideals of social stability and predictability. While the rule of law is a controversial political ideal, and its requirements are not set in stone, they can be nevertheless summarized. For example, Michael Moore identified six values of the rule of law—separation of powers, equality and formal justice, liberty and notice, substantive fairness, procedural fairness, and efficient administration.20 On the other hand, F. A. Hayek, more conservatively,21 identified only two main requisites—generality and predictability.22

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19 Constitution of Massachusetts: Declaration of Rights, art. 30 (1780).
22 F.A. Hayek, The Road to Serfdom (1944).
Though the rule of law is a debatable concept, few deny its role as a legal watchdog. The rule of law implements this role through its procedural and substantive requirements. The procedural requirements impose restraints in the way government exercises its legal authority, and the substantive requirements impose constraints on the content of the exercised legal authority, so that they do not violate a vital core of American cultural values, which translate into the American ideal of legitimate order and predictability. Those values are, of course, vastly inspired by the British ones, due to the historical development of the American society—a former British colony. When a body of concrete rules becomes perceived by the majority as illegitimate, the system replaces them, because one of the constraints the “rule of law” imposes on the American legal system is preserving legitimate order. Of course, there are many problems with the concept of legitimate order. Nevertheless, its very existence emphasizes what is commendable about the American legal system. Its purpose is to minimize individual whims and create a social order accepted by the many and not imposed by the few. The requirements imposed by the rule of law affect the concrete norms to the extent that those, which do not comply, are “rejected.” Additionally, as mentioned before, legal norms govern human behavior, which is open to constant change. Within the U.S. legal system, legal norms exist only to the extent they ensure the American ideal of social order and stability. This ideal mirrors the socio-political needs of each historical period, as well as its sense of justice and moral standards. Concrete norms, which cannot play that role, are changed, amended, or replaced with others more suited to promote the society’s
ideal of stability. The next example is sufficiently dramatic to exemplify the interplay between the abstract and concrete facet of American law. It will illustrate the nature of the dynamism of this legal system. It will show how the rule of law acts as a constraint on the American legal system to dispose of those norms whose content ceases to promote a legitimate order according to core Anglo-American values. This complex nature of the American legal system should translate into your constant need to update your legal research to make sure that your concrete findings are still part of the legal system, in other words, are still good law. Additionally, if you understand that all changes must come within a well-defined cultural frame you will freely accept the often lack of or the meek results of your updating efforts.
For Further Reading:


TONY HONORE, ABOUT LAW. AN INTRODUCTION. (2000)


FRIEDMANN, LEGAL THEORY. (5th ed. 1967).


Steven Burton, Particularism, Discretion, and the Rule of Law, 36 NOMOS 178 (1994).


In-class exercises:

• What connection can you see between the rule of law and legal research?
C. INDIVIDUAL NORMS ARE OPEN TO CHANGE

The rule of law has been identified with the values promoted by Western democracies, and especially with the Anglo-American ones. Within these cultural limits, the rule of law promotes social stability. Understanding how the rule of law works is understanding the core Anglo-American values as well.

For example, the American and English cultures and values remained similar even after the American colonies gained their independence from the British Empire. They are rooted in liberal individualism. Liberal individualism has both a religious and a secular component. Its religious facet has been explained as relying on the Protestant Reformation’s emphasis on faith and individual contact with God, instead of a mediated-by-Church divine contact. Its secular element relies on modern secular philosophy, which focuses on the needs of the individual instead of those of the community. Moreover, it is ingrained in the classical laissez-faire economics of unrestrained competition; it does not value communitarian approaches to life, and thus it mostly relies on individual rights against the government. As a result of these common ideals, American and English political institutions have remained similar even after the American colonies gained their independence. There is one notable exception, however. America lacks the lawmaking institution of the monarchy. The two legal regimes differ also. For example, England’s legal system does not have a judicial institution at its pinnacle. Nevertheless, the American legal system continued its British

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“common law” tradition. Both systems have come to rely on judge-made law (court decisions) as a better-suited means to promote their cultural values, rather than on assembly-made law (statutory law), which traditionally defines the “civil law” system—the other major Western legal system. A common law approach to law, unlike the civil law one, emphasizes gradual, almost individualistic, legal change. By its very own nature, judge-made law relies on solving the conflict of the interested parties that brought the specific lawsuit; each court decision is binding upon the parties to the lawsuit. Of course, due to the precedential value of court decisions in common law systems, a court decision from a superior court is expected to dictate the ways in which similar factual cases are decided by inferior courts. Still, absent a new decision, the subsequent parties are not bound directly by the precedent. Unlike judge-made law, whose effect is incremental by nature because it binds only the few parties to the litigation, a statute is binding upon large populations from the moment of its enactment.

This similarity survived at least one major institutional difference. For example, until late into the 19th century, almost a century after the American colonies liberated themselves from the English yoke, there were quite a few American states, including Delaware and Kentucky, which held human beings as property, as slaves.

American law contained complex property rules, which held the slave as the “absolute property of his owner.” At the federal level the institution of slavery was used to allot more Congressional representation to the states that recognized it. Article I, Section 2, paragraph 3 of the Constitution implicitly sanctioned the

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24 Id. at 281.
institution—although never by name: it counted slaves as three fifths taxable citizens.\textsuperscript{26} Because a state which recognized slavery had more representatives in Congress than a state that had the same number of voters but no slaves, it can be argued that the Constitution protected and certainly did not discourage slavery.

The English legal system never recognized the institution of slavery. In fact, “A slave or negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in his enjoyment of his person, and his property,” Blackstone wrote in 1765. \textsuperscript{27}

Eventually the American legal system abolished this institution. It is worth mentioning that the change did not affect the existing principles of liberal individualism, which persisted. Notwithstanding slavery, the American and the English societies and their legal systems remained similar. How do we explain the similarity and its stability? First it should be noted that to the extent slavery was part of the American property rules, it had a limited role in promoting social stability and predictability, according to the contemporary social values. To the extent that slavery was a body of legal norms, like all such norms it was open to change according to both the social and political context surrounding that human behavior and the views that the majority held about it. When slavery ceased to correspond to the American ideal of legitimate order, as viewed by the majority, it stopped promoting social stability within the core of contemporary social values. When the majority decided that slavery needed to

\textsuperscript{26} 6 \textit{Encyclopedia of American Constitution} Appendix 3, at 2957 (2d ed.).
\textsuperscript{27} Ehrlich’s Blackstone, at v and 71 (1959).
be abandoned, America faced a bloody civil war. Indeed, despite President Lincoln’s insistance that the Civil War was only “a struggle against secession” and not one to end the institution of slavery, the war had the effect of constraining the confederate states to accept constitutional amendments that made slavery illegal. The 13th Amendment “upgraded” the American legal system: it outlawed slavery. As a result, it mirrored the contemporary moral standards. On December 18, 1865, the 13th Amendment’s ban on slavery and involuntary servitude within “any place subject to [the United States] jurisdiction” became effective. By ridding itself of unjust laws, the system promoted order and stability. As a result, circumscribed in legal normativism, slavery, as an institution, was dissolved within the legal system. This change in the American legal system can be explained as the result of the requirements imposed by the rule of law.

The rule of law requires that all legal norms correspond to certain procedural and substantive constraints. Otherwise, they cannot promote social order and stability within the chosen type of democratic government. When legal norms lose their aura of legitimacy, they are replaced according to well-established procedures. Similarly, when legal norms are the result of legitimate exercise of power, and their content does not violate the core social values that define the social ideal of order, despite their arguable merit, those rules are not replaced. The next three examples will further illustrate the dynamic nature of the American legal system within the well-

29 Id. at 282.
established political limits of the rule of law. Although apparently at random, legal norms are changed only when the institutions in charge of overseeing the functioning of the legal system perceive it necessary. Statutes are declared unconstitutional only when aggrieved parties raise that issue and courts find the argument persuasive. Court decisions are superseded by statutes or overruled by other court decisions also when they do not fit within the legal values promoted by the American legal system. Administrative rules and decisions are open to change by the issuing administrative body, statutes, or courts. The next examples will illustrate a few of the contemporary idiosyncrasies of the American legal system that you should be aware of in you legal studies. Legal norms are open to change, but change comes within cumbersome procedures. Often social and legal change depends on the existence of an aggrieved party willing to start the process. However, unlike in a civil law system, where researching includes updating by the very nature of the system—the codified statute will mention its most recent amendment—in a common law system, such as the American one, researching does not include updating. Statutes are open to change that comes from courts. Sometimes the codified version of federal statutes will include the most recent court opinion that bears on that statute. But there is no foolproof assurance about that. Moreover, statutes are collected in separate repositories from court opinions. Aside from these mechanical aspects of legal research, you need to develop a “feeling” for it that rests on a clear understanding of how the systems work.
Further Reading:


EHRLICH’S BLACKSTONE (1959).

In class-exercises:

1. How would you define the rule of law in your own terms?

2. How can the rule of law be understood?
   • Is it part of the abstract or tangible aspect of law?
D. LEGAL NORMS ARE OPEN TO JUDICIAL AND CONGRESSIONAL SCRUTINY

The United States is a federation of 50 states. Its governing body combines a centralized federal body and 50 state governments. At both levels, each branch of the government makes law that conforms to the requirement of the rule of law. They are both procedural and substantive restraints. The rule of law requires any legal system to be stable. Only stable systems can aspire to satisfy the requirements of generality and prospectivity. So, once an assembly has properly enacted a statute, absent an aggrieved party, there is no judiciary recourse, and absent judiciary process, it often makes more political sense to leave it untouched. The sign of a good government is the diversity of its norms that cover as many political interests as possible. Norms that may not necessarily achieve any regulatory effect, and thus may not be an example of legal normativism, may, nevertheless, represent specific interests uncovered by other statutes. Through such norms, the legal system is able to represent a large constituency, which is needed in any representative democracy. Again, they will rarely be changed. The next examples should also introduce you to another important aspect of the American legal heritage: the interplay between the legislative and the judicial branches. For more than a century, the judiciary has been at the pinnacle of the American legal system deciding what the Constitution is and what rules violate the Constitution. The American judiciary is in charge of interpreting the law enacted by the legislative branch, and sometimes courts minorities-have overruled statutes that mirror majoritarian positions. Thus, you always need to make sure that your legal research covers court decisions. The examples below illustrate that to the extent
each lawmaking governmental branch respects procedural restraints and exercises publicly justifiable power, the norms they make will rarely be questioned or changed, irrespective of their social merit as long as their content does not defy the values promoted by the rule of law.

When you study American law, this observation will help you understand why some U.S. Supreme Court decisions are still good law or why others are being incrementally changed. When you do legal research, the above observation will help you remember that while you constantly need to update your results often, there is nothing out there affecting your research results. The next three examples will hopefully make it easier for you to see the interplay between legal stability and change, which is only another facet of the interplay between the abstract and concrete facet of American law. They should both emphasize the need for updating and the difficulty of ending your research when you may not find anything new to add. Sometimes, you feel that there should be something more and there is not. Developing a sense of confidence in your research results is also part of the complexities of American legal research. When you become aware of these idiosyncrasies of the American legal system you will also understand how to better strategize your legal research.


When Congress passes a statute following the usual congressional procedure, and it thus exercises publicly justifiable power, we accept the rule contained in that statute as being law, or, in the words of the renowned legal philosopher
Hart, we recognize it as valid, as legitimate, and we obey it. Few inquire into the merits of a piece of legislation and even fewer challenge it, even though its merits may be arguable, as long as it does not violate any constraints imposed by the “rule of law.” Nevertheless, a thorough researcher will update his statutory results with a search for all relevant court decisions. For example, in an effort to change the culture of alcohol consumption on college campuses, in December 1997, in the U.S. House of Representatives, Representative Joseph P. Kennedy II proposed a resolution aimed at changing the campus culture and at supporting healthier student choices about alcohol. That was the “Collegiate Initiative to Reduce Binge Drinking,”31 House Resolution 321, and it called on all college and university administrators to adopt a code of principles designed to create a campus environment that deemphasizes the role of heavy drinking in student life. Initially, the resolution was advertised as not creating “a legally binding requirement for college campuses, and as not requiring any formal voting.”32 (Fig. 6).

Fig. 6
Alcohol Policies Project
http://www.cspinet.org/booze/janalert.htm

32 Alcohol Policies Project, at http://www.cspinet.org/booze/janalert.htm
However, soon afterwards a Senate resolution was introduced, and a legislative measure followed suit. Within a year since its introduction, Congress passed the “Collegiate Initiative To Reduce Binge Drinking and Illegal Alcohol Consumption” as a binding statute. (Fig. 7)

No one challenged this act in court. A lot of good-will press coverage ensued. The students’ response to the legislative proposal was quick and swift. It criticized Congress’s attempt to change college culture through legislation. It pointed out its limits: all this legislation did was to outline ways to fight binge drinking in its manifestations, while it failed to address its societal or cultural causes. The legislation identified the national high drinking age as being the culprit. Some may say that there is no way to enforce that piece of legislation, and there is no clear data to gauge whether it had any real effect in making students stop heavy drinking-defined according to the 1997 study published by Harvard's School of Public Health. (Fig. 8)

Furthermore, the Resolution notes that:

- many college presidents rank alcohol abuse as the number one problem on campus;
- alcohol is a factor in the three leading causes of death for 15-24 year olds; alcohol is involved in a large percentage of campus rapes,

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36 Id.
37 Henfry wechsler et al., College Binge Drinking in the 1990s: A Continuing Problem Results of the Harvard School of Public Health 1999 College Alcohol Study, at http://www.hsph.harvard.edu/cas/Documents/monograph_2000/cas_mono_2000.pdf See also http://www.hsph.harvard.edu/cas
violent crimes, student suicides, and fraternity "hazing" drinking; 
• almost half (44 percent) of all students qualify as binge drinkers; and 
• heavy drinking causes problems for students who drink and has "second hand" effects for other students. Heavy drinking is defined as "the consumption of at least five drinks in a row for men or four drinks in a row for women."

No one can measure whether the change in the drinking behavior, if any, was a direct result of a toothless statute, which only called upon universities to appoint a task force made up of administrators, faculty, students, and greek system representatives to work toward reducing alcohol problems on campuses. Perhaps, the norm needed to have required universities to take anti-drinking measures and to have attached financial implications to those requirements instead of encouraging universities to take steps in that direction. Nevertheless, the legislation encountered only slight initial opposition. Congress passed it as a sign that the existing culture of a well-identified segment of the population needed to be changed. It may be inept, but there is no requirement under the "rule of law" that all American legal norms be efficient. Furthermore, this law promotes drinking responsibly, which is part of the American Protestant values, and the culture promoted by the rule of law.

That being said, finding this piece of statutory law will not end your research. Due to the role played by the judiciary in American law, you will always need to make sure that there is no court decision interpreting that statute, which may adversely affect the result of your research. At the same time, there are instances when updating your research will not produce any additional documents. You need to become comfortable with that result despite your own feelings about the merits of a particular piece of legislation.
“SEC. 119. BINGE DRINKING ON COLLEGE CAMPUSSES.
   “(a) SHORT TITLE.—This section may be cited as the
   ‘Collegiate Initiative To Reduce Binge Drinking and Illegal
   Alcohol Consumption’
   “(b) SENSE OF CONGRESS.—It is the sense of Congress that,
in an effort to change the culture of alcohol consumption
on college campuses, all institutions of higher education
should carry out the following:
   “(1) The president of the institution should appoint a task
force consisting of school administrators, faculty,
students, Greek system representatives, and others to
conduct a full examination of student and academic
life at the institution. The task force should make
recommendations for a broad range of policy and
program changes that would serve to reduce alcohol
and other drug-related problems. The institution
should provide resources to assist the task force
in promoting the campus policies and proposed
environmental changes that have been identified.
Fig. 7 (cont.)

“(2) The institution should provide maximum opportunities for students to live in an alcohol-free environment and to engage in stimulating, alcohol-free recreational and leisure activities.

“(3) The institution should enforce a 'zero tolerance' policy on the illegal consumption of alcohol by students at the institution.

“(4) The institution should vigorously enforce the institution's code of disciplinary sanctions for those who violate campus alcohol policies. Students with alcohol or other drug-related problems should be referred for assistance, including on-campus counseling programs if appropriate.

“(5) The institution should adopt a policy to discourage alcoholic beverage-related sponsorship of on-campus activities. It should adopt policies limiting the advertisement and promotion of alcoholic beverages on campus.

“(6) The institution should work with the local community, including local businesses, in a 'Town/Gown' alliance to encourage responsible policies toward alcohol consumption and to address illegal alcohol use by students.
2. Judicial and Congressional Review of Court Decisions

Courts are the ultimate arbiter of justice in American law. As a result, when you research statutory or administrative law you need to check how the courts have interpreted it. Additionally, when you research case law, you need to check more recent decisions from the appropriate superior courts, or the courts of last resort from each jurisdiction as well. As shown later in this book, the federal government has a federal judiciary branch and each state government has its own state judiciary, and case law from the courts of each jurisdiction may be reversed and remanded by the court of last resort from that jurisdiction.

The U.S. Supreme Court is the ultimate legal arbiter. Its decisions, which follow the Court’s well-established procedure, are seldom overruled by the Court or questioned by Congress in subsequent legislation. To the extent the content of its decisions corresponds to our contemporary values, and the Court exercises publicly justifiable power, the rule of law does not require them to be discarded, although they may be, arguably, a wrong statutory interpretation. Nevertheless, sometimes the Court decides not to follow its own precedents and reverses itself, or a congressional
statute may supersede a Court’s decision and render it inapplicable. As a result, while apparently rarely necessary, you still need to update and check the status of your research of Supreme Court decisions. For example, in 1990, Congress passed the “Gun-Free School Zones Act of 1990,” which declared it unlawful for any individual to possess a firearm in a school zone. Congress limited the offense to the type of firearm. In Section 922(j)(2)(A) Congress stated that:

> It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone. (emphasis added)

Alfonso Lopez, a 12th-grade student, who went to Edison High School in San Antonio, Texas, carrying a concealed .38-caliber handgun and five bullets, was charged with violating the statute. He challenged the federal statute’s constitutionality, and filed a lawsuit in the appropriate federal court. The U.S. Supreme Court accepted a review of the decision, by granting a writ of certiorari, and held that Congress did not have the authority to make firearms’ possession a federal offense. In deciding the case—whose title became *United States v. Lopez,* after the name of the parties involved—the Court ignored the provision underlined above and held that:

> The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress “[t]o regulate Commerce ... among the several States.” (emphasis added)

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38 18 U.S.C. § 922
The Court did not see any specific commercial qualification on the type of firearm involved, although it may reasonably be argued to the contrary. Its decision has remained unchallenged in Congress. While a bill to reauthorize the ban on undetectable firearms was introduced in the House in 2004\(^1\) (Fig. 9), the statutory provisions of the *Gun-Free School Zones Act of 1990* continue to remain unconstitutional and thus not binding. When the Supreme Court decides the unconstitutionality of a statute, the only recourse is for Congress to address that finding by passing another statute that incorporates the Court’s suggestion.

**Fig. 9**


Here is another example. In 1996, Congress passed the *Communications Decency Act* (CDA)\(^2\), which criminalized using any computer network to display “indecent” material unless the content provider uses an “effective” method to restrict access to that material by anyone under the age of 18. The U.S. Supreme Court, in *Reno v. American Civil Liberties Union*, declared the statute unconstitutional.\(^3\) (Fig. 10).

\(^1\) H.R. 3348 (2004).
In response to the Court’s decision, in 1998, Congress passed the *Child Online Protection Act (COPA)* in what can be called a follow-up to the Supreme Court’s invalidation of CDA (Fig. 11).

COPA, unlike CDA, targeted only commercial Web sites and only indecent material that was “harmful to minors.” Nevertheless, in *Ashcroft v. American Civil Liberties Union, 535 U.S. 564 (2002)*, the Court did not give its stamp of approval to the revamped legislative version, and enjoined the state from enforcing it while it remanded the case for further examination by the lower court. When the lower court’s opinion reached the Supreme Court in *Ashcroft v. American Civil Liberties Union, 542 U.S. 656 (2004)*, the Court held that “the statute likely violates the
First Amendment” and, again, refused to enforce it. But the CDA/COPA example does not reflect the average situation. Usually Congress accepts the Supreme Court’s interpretations of its statutes. Due to the position of the Supreme Court at the pinnacle of the American federal legal system, no legal research is ever finished without a comprehensive search for a Supreme Court decision on point. Of course, often such a decision does not exist. Nevertheless, your research needs to include this part of the process as well.

3. Judicial Review of Administrative Decisions

This final example will briefly focus on the interplay between administrative and decisional law. It will illustrate that administrative rules and decisions, which conform to the requirements of the rule of law and the society’s ideal of stability, although open to judicial review, are rarely reversed. However, the need for updating remains, as it remains the need to develop a sense of confidence in your research results when you do not find anything more.

This time we will look at the product of administrative lawmaking: an agency decision. For example, the Federal Communications Commission (FCC), upon a complaint from a father that his son heard an offensive monologue broadcast by a radio station, decided in its memorandum opinion that the “Filthy Words” monologue by comedian George Carlin contained words that depicted sexual and excretory activities. Therefore, it condemned it as indecent, according to an applicable statutory provision. Arguably, the FCC decision can be described as illegal censorship, and the federal court of appeal that reviewed it reversed it on those grounds. The Supreme Court granted
the writ of certiorari and agreed to review the decision. The Supreme Court reversed the lower court’s decision and upheld the FCC’s ban. In its decision, abbreviated as *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the United States Supreme Court held that:

> The FCC was warranted in concluding that indecent language within the meaning of Sect. 1464 was used in the challenged broadcast. The words “obscene, indecent, or profane” are in the disjunctive, implying that each has a separate meaning. Though prurient appeal is an element of “obscene,” “it is not an element of “indecent,” “which merely refers to nonconformance with accepted standards of morality.” 438 U.S. at 727 (emphasis added)

The Court let us see its reasoning: it upholds administrative decisions that do not offend the core American values, and it will reverse the ones that violate them. Those values are rooted in morality, justice, and liberal individualism. It is the role of the rule of law to preserve a legal system that promotes those values. It is not the role of the rule of law to advance a perfect legal system. However, to the extent that such a principle works, concrete norms are open to various types of change according to the demands of the rule of law that requires all legal norms to promote legitimate order of an ever-changing social body. This potential change and the hierarchical structure rooted in the common law features of the American legal system demand that you update all your research endeavors and make sure that your search has covered appropriate court decisions as well.

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48 Id.
52 Id. at 727.
E. THE ABSTRACT FACET OF AMERICAN LAW IS SIMILAR TO THAT OF ANY DOMESTIC LEGAL SYSTEM

Studying and researching law are heavily influenced by the basic characteristics of each legal system and by the extent you master them. If you remember that there are many common elements among all domestic legal systems, you may be able to focus on the idiosyncrasies of the American legal system faster and achieve better results in your legal studies. First of all, all domestic legal systems have an abstract and a concrete facet. They all promote social order through concrete norms. For example, the discourse about the “rule of law” belongs to the historical discourse about the constraints all legal systems face. However, the constraints exercised by the rule of law are emphatically secular, and they are of relatively recent origin. The rule of law functions as a constraint on the American legal system. Perhaps its functions are not familiar to you. But you already know that all legal systems have known various societal constraints that made possible the preservation of every given type of state-based social organization. For example, the Soviet legal system was shaped by constraints, which one may regard as similar in nature to those imposed by the rule of law. Due to them, the legal system contained only norms that mirrored the Soviet societal values. For example, Soviet law did not allow private ownership of the means of production, such as an enterprise. To the contrary, American law does not recognize the Soviet-type of property, and the only property norms that it contains are those focused on private property. The difference in their property laws underscores the difference between the social values the two societies herald as
fundamental. Such basic understanding of how all-legal systems work will let you form appropriate expectations in your legal studies. Especially if you research law using non-authoritative sources available through the Internet, understanding this basic principle will assist your research and signal that you should discard those results that do not fit within the American society’s general values, for example. Thus, think about the rule of law as the intellectual reminder of your need to update your research. If courts are the ultimate arbiter of what violates the requirements imposed by the “rule of law,” then you always need to know how the courts have interpreted any statutory or administrative law.

As mentioned above, legal systems have always faced constraints. Whether they are summoned under the “rule of law” or studied separately as legitimacy, morality, and justice, they are known to you to a large extent. People freely obey those concrete norms if they view them as legitimate, moral, and just. The American rule of law is aware of these demands imposed on legal systems and incorporates those values within its substantive requirements. A brief review of these constraints will further make the similarities between the American legal system and your own legal system more transparent. At the same time, the rich and multifaceted nature of the American legal system will become more obvious and, with it, the idiosyncrasies that spring from it. Among those is a comparatively complex research and updating process.

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53 For a generally accepted analysis of the cultural differences between a socialist and a capitalist society, see, e.g., F.A. Hayek, The Road to Serfdom 32 et seq. (1994).

First we will briefly focus on legitimacy. There are many ways to define legitimacy. For example, it has been explained through the source of legal norms: God, nature (the natural order of things), or the state of people. The Christian natural law tradition was based on the obvious superiority of God as the legitimizing source of law. The civic republican natural law tradition emphasized the state of nature as the ultimate legitimizing source of law, while the positivist tradition emphasized the state—the political human institution—as the ultimate source of legitimacy. The classic legal theories that focus on legitimacy are natural and positive law theories.\(^{55}\)

All natural law theories legitimize a legal system through divine or natural power. At their core is that idea that legal principles simply exist as they manifest themselves to the universal conscience of mankind. Of course, they all acknowledge differences among domestic legal systems (human laws), but those are explained as due to differences in legal cultures, or using Hegel’s expression, to the ways humans mediate the divine principles of law.\(^{56}\) Of course, there are many variations within this classical school of thought. Positive law theories focus on legitimacy also. They emphasize the state (historically, the city-state\(^{57}\)) as the ultimate source of law. This does not mean that there are no other theories focused on this issue, including

\(^{55}\) This does not mean that there are no other theories focused on this issue, including sociological theories of law, utilitarianism, etc.

\(^{56}\) G.W.F. Hegel, Phenomenology of Spirit 287 (A.V. Miller trans., 1977) (Human law in its universal existence is the community, in its activity in general is the manhood of the community, in its real and effective activity is the government). See also Simone Goyard-Fabre, Les Fondements de l’Ordre Juridique, at 37 (1992).

sociological theories of law, utilitarianism, etc. “La loi, [wrote Carre de Malberg] est le fait etatique positif,”\textsuperscript{58} which can be translated as “Law is the existing positive law.”

The American legal thought has also dealt with legitimacy issues from both a natural and positive law perspective. For example, Thomas Jefferson justified the American Revolution on the illegitimate nature of British law, which had violated unalienable rights of the people.\textsuperscript{59} Later, in the 18th century, James Wilson further explained the legitimacy of the American legal system as residing in God and the will of the people. Unlike monarchist theories, which legitimized legal norms through the divine connection between the king and God, American legal thought always thrived on the principle of legitimacy derived from the sovereign people. For example, James Wilson insisted that:

The supreme power or sovereign power of the society resided in the citizens at large; and that, therefore, they always retain the right of abolishing, altering or amending their constitution, at whatever time, and in whatever manner, they shall deem it expedient.\textsuperscript{60}

American legal thought continued the major progress added by English legal theories. Both the natural and positivist English legal thought viewed the man-made laws more than mere commands from God translated by men into laws. It viewed legal norms as rooted in the social compact made between the government and its sovereign people. Briefly, the American natural legal thought was originally built on Locke’s social contract, and not on the classical and Christian explanation of the

\textsuperscript{58} Cities—Polis, are the oldest forms of political organizations. Simone Goyard-Fabre, \textit{LES FONDEMENTS DE L’ORDRE JURIDIQUE}, at 99 (1992) (internal quotes omitted).

\textsuperscript{59} David Richards, \textit{FOUNDATIONS OF AMERICAN CONSTITUTIONALISM} 18-30 (1989).

\textsuperscript{60} 1 \textit{THE WORKS OF JAMES WILSON} 17 (1804).
Locke’s social contract was limited: Its players—the sovereign people and the government—had limited powers. The sovereign people gave up certain rights so that the government could be able to function within restricted boundaries.

As a result, the U.S. Constitution forged a limited federal government. Under the guise of “federalism” the sovereign people delimited federal government power. (Fig. 11) The people preserved their inalienable or natural rights. The constitutionally recognized fundamental rights were the right to life, liberty, and property. This combination of inborn right to individual liberty and vested property has characterized the role of the rule of law within the American legal system from its revolutionary beginnings. In fact, the American Revolution can be viewed as a response to an illegitimate act of the legislatures to restrain such a fundamental act.

61 Discussing the American natural law theorists that followed the Christian explanation of the origin of state, see James McClellan, Joseph Story’s Natural Law Philosophy, 5 BENCHMARK 85 (1994).
The Stamp Act can be viewed as a non-legitimate property law statute that attempted to take property from the Americans-by taxing them-and give it to the English.

Morris Cohen noted last century a direct nexus between the American Revolution and the American legislatures’ impotence in regulating property rights. It took them a long time to be able to legitimately pass statutes that restrained those fundamental rights.62 Briefly, the American positivism comes through Hobbes. It is worth noting that Hobbes viewed the law as the command of the monarch and thus its primary source was the collection of king’s Christian explanation of the origin of state.63

Although debatable in the 17th century64 Britain, today, indeed, statutes seem to prevail as the primary source of law in the American legal system, despite its strong common law features. Both natural and positive law theories continued to be developed in the Anglo-American legal tradition, as questions about the reasons beyond our obedience of the legal rule only increased in our days.

Lon Fuller, for example, talked about the interplay between the need for a legitimate source of law: the sovereign law-making authority, which itself is determined by law, and the law itself.65 From a natural law perspective, Fuller focused on law as a particular means to an end, an enterprise of governing human conduct, and on the “internal morality” of the law.66 He viewed the latter the reason for legal

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65 See, e.g., Lon Fuller, The Problems of Jurisprudence (1949).
68 Id. at 100–10.
obedience. At the opposite theoretical end, H.L.A. Hart in *The Concept of Law*, for example, propels the discussion about law to legal validity, which offered additional explanations for legal obedience. Hart’s explanation starts with Max Weber’s observation about coercion (avenging the norm’s violation) and goes further connecting the traditional legal value of justice (the result of appraisal) to non-law values such as fairness.

Rooted in positivism is the main American school of legal thought: realism, and its late 20th-century heir, critical legal studies (CLS). Both see law as a state product, except for the private rules such as those used in the common law tradition of contractual free bargaining, for example. However, as Oliver Wendell Holmes, Jr., Karl Llewellyn, or John Dewey pointed out, American realism is less interested in issues of legitimacy of the source of law as the reason for our legal obedience than in studying the social role of the law. American realism, as Harvard Professor Duncan Kennedy stated, is about what the law “is” instead of what the law “ought” to be. The greatest achievement of the realists was the emphasis on the fact that law was a means to social objectives and law needs to be measured by its social consequences.

Legitimacy, thus, can be related to the sources of public law and the ways those sources exercise their authority. Understanding the discourse of natural and positive rights in American law allows you to be more flexible and search for

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statutory, decisional, or administrative law to support your argument. Furthermore, when there is nothing authoritative on point, as the Supreme Court has stated, then, any persuasive source is useful within certain limits. For example, the way in which the rule of law works allows one to argue in favor of a new fundamental right, in addition to those mentioned by the Constitution. This argument rests on a two-fold claim: on the one hand, the American fundamental rights are not limited to the ones mentioned by the Constitution, and, on the other hand, all rights that qualify as inherent rights, for example, may become fundamental.

The individual decision becomes thus justified, as the American Ronald Dworkin noted, by its coherence within the “existing” law. From your perspective, such decisional flexibility points out the commonality between the American legal system and the civil law system. The latter one thrives on this type of argument. The ideals of morality and justice have also placed constraints on legal systems, and the American rule of law uses them as similar constraints too. For example, not all legitimate rules, which come through the proper channels, are or ought to be obeyed as law. In fact, the rules that do not answer the ever-changing social circumstances are often not obeyed. In those situations, order and predictability depends on that society’s ability to formulate new rules that are more apt to reflect those changes. In other words, another reason for updating your research is the changes in the majoritiarian definition of justice or morality that might have caused new statutes to be enacted or different decisions to be issued.

From our first democratic beginnings, Americans believed that the people had a right to change the law when it seemed to them unjust. Legal theoreticians use that belief, for example, to explain the Americans’ constitutional right to the judiciary (access to courts and to a jury of one’s own peers). The rule of law inspires respect in our laws because it promotes more than social stability. It promotes justice, often regarded as “a matter of public interest.” However, often justice has been viewed as a procedural value, by contrast with arbitrary exercise of power. For example, the right to jury trials in criminal matters has been viewed as “a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants.” It is interesting to note that while justice is easily accepted as a universal concept that transcends cultures, the rule of law has often been defined as local, because enforcing entities have traditionally been local. A cross-cultural definition of justice with which you may already be familiar resides with the Greek philosopher, Aristotle, in his Nicomachean Ethics.

Aristotle first spoke about distributive justice, which covers the way in which a society is organized, corrective justice, which helps understand the ways in which undesired changes to the social organization are corrected, retributive justice, which addresses the types of retribution a society favors, and commutative justice.

Talking about commutative justice, it should be said that the American views of what that is change dramatically in time. For example, property rules ensure that

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75 7 Timothy O. Lenz, Changing Images of Law in Film and Television Crime Stories 8 (2003).
78 Id. at 1129–34.
individuals (persons or corporations) can own property. While “highly deserving security,” the revolutionary American politicians, like Wilson, also underlined the principle that property should be a democratic end not a means in itself. Property rules are thus expected to change from one epoch to another, according to the majority's political views about what can be held as property. As detailed above, when Amendment XIII abolished slavery, the body of the American property rules changed dramatically. However, the individual nature of property rules did not change: private property remained the core of our property rules. Only the object of that ownership changed in order to adjust to the majority's views of what was moral to be held in property. Similarly, when the majority regards as immoral holding Mickey Mouse in quasi-perpetual copyright ownership, Congress will act accordingly, and adjust the copyright law to that view, and stop extending the copyright protection for Disney's monopoly over Mickey, Minnie, and Goofy.

This chapter briefly explained how law exists because humans need structured societies. Social order is achieved through concrete temporary rules that conform to each society's values. Each society develops its own constraints over legal norms. Those constraints mold legal norms so that they become an effective legal system that corresponds to the society's governing needs. When those needs change or disappear then the rules change or disappear, too. All legal norms have a clear role. They promote legitimate order. Legislative and administrative norms, as well as decisional law, govern our future and make sense of our conflict for today and tomorrow. Of

79 1 The Works of James Wilson 30 (1804).
80 Id.
course, law depends on other enduring ideals as well. Prime among them are legality of rules and justice. However, while law aspires to be perceived as atemporal, you should avoid falling prey to such an assumption.

Ultimately law is a social tool that has a concrete role and a concrete lifespan, and, when it needs to be changed, it should be changed to avoid letting it become a social oppressor. Perhaps the Civil War could have been avoided if slavery rules had been abandoned and deemed illegal at an earlier phase in American history. For a researcher, the temptation to believe that law is atemporal may cause deficient studies. For a practitioner, such a belief produces incomplete results, and incomplete results are tantamount to professional malpractice. American law is an abstract human construct to the extent that all law is an abstract human construct. However, its ideal of legitimate order rests on concrete legal norms that mirror specific societal needs. When they do not satisfy those needs anymore, and thus are unable to promote legitimate order, they are amended or replaced.

The American legal system is thus dynamic, and understanding its dynamism helps you both strategize your studies and your legal research. The next chapter will go a step further in explaining how the concrete, definite rules of law are created by legislation, judiciary, and administrative bodies. Thus, you will be able to identify the sources of American law, locate their repositories, find the specific legal norms you may want to research, and then update them.
For Further Reading:


G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT 287 (A.V. Miller trans., 1977) (Human law in its universal existence is the community, in its activity in general is the manhood of the community, in its real and effective activity is the government).


LON FULLER, THE PROBLEMS OF JURISPRUDENCE (1949).


MAX WEBER, ON LAW IN ECONOMY AND SOCIETY


TIMOTHY O. LENZ, CHANGING IMAGES OF LAW IN FILM AND TELEVISION CRIME STORIES (2003).

ARISTOTLE, NICOMACHEAN ETHICS (D. Ross trans., 1925).