SECOND EDITION

Law in the United States

Arthur T. von Mehren
Peter L. Murray

CAMBRIDGE

Law in the United States

SECOND EDITION

Arthur T. von Mehren
Harvard Law School

Peter L. Murray
Harvard Law School

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org
Information on this title: www.cambridge.org/9780521852067

First published 2007

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication Data
von Mehren, Arthur Taylor.
Law in the United States / Arthur T. von Mehren, Peter L. Murray. – 2nd ed.
p. cm.
Includes bibliographical references and index.
ISBN-13: 978-0-521-85206-7 (hardback) – ISBN-10: 0-521-85206-4 (hardback)
ISBN-13: 978-0-521-61753-6 (pbk.) – ISBN-10: 0-521-61753-7 (pbk.)
1. Law – United States. 2. Comparative law. I. Murray, Peter L. II. Title.
KF385.V66 2007
349.73–dc22 2006028592

ISBN 978-0-521-85206-7 hardback
ISBN 978-0-521-61753-6 paperback

9-26-05

Law in the United States, 2nd Edition

Law in the United States, 2nd Edition, is a concise presentation of the salient elements of the American legal system designed mainly for jurists of civil law backgrounds. It focuses on those attributes of American law that are likely to be least familiar to jurists from other legal traditions such as American common law, the federal structure of the U.S. legal system, and the American constitutional tradition. The use of comparative law technique permits foreign jurists to appreciate the American legal system in comparison with legal systems with which they are already familiar. Chapters of the second edition also cover such topics as American civil justice, criminal law, jury trial, choice of laws and international jurisdiction, the American legal profession, and the influence of American law in the global legal order.

Arthur T. von Mehren (1922–2006) was Professor of Law Emeritus at Harvard Law School. He represented the United States for thirty-eight years in the Hague Conference of Private International Law. He wrote 210 publications in English, French, Spanish, Italian, German, and Japanese. They include the groundbreaking *Civil Law System*, his pioneering two books and nine articles on Japanese law, his highly original *Law of Multistate Problems*, his foundational monographs on contract formation and form, his articles on jurisdiction, and his award-winning Hague lectures.

Peter L. Murray is the Robert Braucher Visiting Professor of Law from Practice at Harvard Law School. He served as the Faculty Director of the Harvard Legal Aid Bureau and continues to serve as Director of the Winter Trial Advocacy Workshop. He is the author of *Basic Trial Advocacy*, an advocacy training treatise; a co-author of Green, Nesson, and Murray's *Problems, Cases, & Materials on Evidence*; a co-author of Murray & Stürner, *German Civil Justice*; and an author and co-author of many legal articles. He has worked extensively in comparative law with particular reference to civil procedure in Germany and Europe.

Preface

The first edition of this book was an outgrowth of a series of lectures that were given by Professor von Mehren in the fall of 1983 and the spring of 1984 at the University of Ghent, Belgium. Professor von Mehren explained the focus of the book in the Preface to the first edition in the following terms:

> A principal focus of my legal scholarship during the last four decades or so has been to compare the Civil Law (especially as expressed in the legal systems of France and Germany) with the Common Law. Only the last three chapters of *Law in the United States: A General and Comparative View* are fully and explicitly comparative. However, the book as a whole rests on a comparative foundation: The topics selected for discussion are those that seemed to me most basic for a foreign jurist's understanding of the American legal scene. The treatment given each subject seeks to be sensitive to how a jurist not trained in American law – or, more generally, in the Common Law – can most easily find his way in the complex of legal orders that collectively comprise law in the United States.
>
> The book is designed to introduce but to be more than introductory. The matters discussed are of fundamental importance and, on occasion, of considerable difficulty; my effort and hope are not only to impart essential information but also to give basic understanding.

In the nearly two decades since *Law in the United States* first appeared in 1987, jurists from around the world have found its systemic analysis and comparative approach helpful to reaching an

understanding of the American legal system. Teachers of introductory courses on American law have used the work as a core text in their courses. The book's comparative orientation, which makes use of foreign jurists' preexisting knowledge of their own legal systems, has brought a richness to the dialogue that a purely descriptive approach would seem to lack.

The undersigned first used *Law in the United States* as a teaching text in a course on Introduction to American Law given at the University of Freiburg, Germany, in 1998. Although the first edition was allowed to go out of print by around 2000, it has continued as the core text in a number of long and short courses on the American legal system taught at Harvard Law School, the University of Freiburg, and the University of St. Gallen Master of European and International Business Law program in the years since. Over the years, supplementary materials have been created to cover areas of American law not treated in the first edition.

Although there had been discussions with Professor von Mehren about a second edition for some years, it took John Berger of the Cambridge University Press to get the project off the ground. His suggestion in 2003 that it was high time for a new edition of Professor von Mehren's small classic resulted in the collaboration for this volume.

The second edition retains virtually all of the contents of the first edition, although updated and somewhat rearranged to facilitate use of the work as a course text. This rearrangement reflects the junior author's preferences from nearly ten years of teaching in this area. As was the case with the first edition, the chapters are configured to be more or less freestanding, so that colleagues can freely select and rearrange the material to suit their own pedagogical approaches. Chapters 2 (American Common Law), 6 (American Civil Justice), 9 (Choice of Law, International Civil Jurisdiction, and Recognition of Judgments in the United States), and 10 (The American Legal Profession) contain

considerable additional material new to the second edition. Chapters 7 (American Criminal Justice), 8 (American Trial by Jury), and 11 (The United States and the Global Legal Community) are entirely new.

Although all the new and updated material in the second edition was discussed with Professor von Mehren, the original plan that he would carefully review and contribute to all of the new and revised material was frustrated by his untimely death on January 6, 2006. Thus, only Chapters 1 and 2 bear the imprint of his recent editing. For the remaining new material in the second edition, the undersigned bears the responsibility and, for any errors, the sole blame.

During the last thirteen years of his productive life as Joseph Story Professor of Law Emeritus at Harvard Law School, Professor von Mehren was assisted by a succession of gifted young German law academics, the Joseph Story Research Fellows. Following Professor von Mehren's death, the last phases of preparation of the manuscript for the second edition were greatly aided by the helpful assistance of Dr. Eckart Gottschalk, the last Story Fellow, who carefully read each chapter and contributed helpful comments and suggestions.

Professor von Mehren's extraordinary career as international legal scholar and teacher has been of immense meaning and influence on many levels in the United States and abroad. This second edition is dedicated to his memory.

Peter L. Murray
Cambridge, Massachusetts
July 2006

Contents

1

The Sources of American Law

A CONSIDERATION OF THE SOURCES OF LAW IN A LEGAL order must deal with a variety of different, although related, matters. Historical roots and derivations need explanation. The system's formal allocation of authority over the creation and adaptation of legal rules and principles deserves attention, as do the manner in which legal rules are presented and the processes of analysis through which they are applied. Finally, those structural features somewhat particular to the legal system that may affect significantly its general style and operational modes should be discussed.

A. HISTORICAL ROOTS

Historically speaking, American private law's source is the English common law. The reception on the North American continent of the common law is considered in Chapter 2, The American common law. A few words can be said here respecting certain structural features of the common law thus received that have particular importance for American law's general style and modes of operation.

The common law makes extensive use of juries in the administration of civil as well as criminal justice. The jury, which always deliberates separately from the judge, is basically responsible for

deciding disputed issues of fact. Widespread use of juries carries with it a number of consequences, some of which are mentioned later in this chapter or considered in greater detail in Chapters 6 and 8. These include concentration of the trial at first instance into a single episode, the development of a sophisticated and complex body of exclusionary rules of evidence, and giving community feelings and views greater weight in the administration of justice than is the case where professionals alone bear responsibility.

Another ramification of jury trial is the unacceptability of the civil law principle of *double degré de juridiction*. In a jury-trial system, there is no opportunity to redo the case at the first level of appellate review. On the one hand, considerations of cost and feasibility stand in the way of constituting a jury for each appeal in which factual issues might be raised; on the other, allowing appellate courts, sitting without juries, to decide contested factual issues would drastically reduce the significance of jury trial. Accordingly, American appellate review is limited to questions of law, including whether the evidence presented at first instance was sufficient to justify a reasonable trier of fact making particular findings.

Another characteristic of the common law derives from the emergence, alongside the traditional common law courts, of a separate judicial hierarchy, the courts of equity. These courts developed and administered a body of rules and principles – the law of equity – that supplemented the common law. By the fourteenth and fifteenth centuries, the King's courts had become in many matters rigid and narrow in their approach. Over the years, the kinds of issues needing adjudication had expanded beyond the traditional jurisdiction of these courts to include matters ill suited to their jury trial processes and the common law doctrines they applied. Reform could have been accomplished by reshaping the common law, but this approach would have required creative

judicial activity in a degree and at a rate that was perhaps then unacceptable. The needed changes could also have been undertaken by the legislature; however, the society of the time was not accustomed to such extensive legislative intervention. Allowing a new body of rules and principles to emerge from the work of a different judicial hierarchy provided a solution that avoided these difficulties and was compatible with the judicial process's central position in the legal order.

An uneasy truce between common law and equity was maintained by the principle that equity would act only where the remedy at law was inadequate. For example, the law courts did not grant specific performance of contracts. Equity would order specific performance but only if money damages – the remedy at law – could not put the obligee in a position substantially equivalent to that which he or she would have enjoyed had the contract been performed. Unlike the courts of law, equity was prepared to recognize a distinction between legal and equitable interests and entitlements; the law of trusts, developed by the courts of equity, rests on this distinction.

Although the equity courts, like the common law courts, operated without any abstract code of legal principles, either substantive or procedural, the equity courts frequently cited and purported to apply more or less abstract "maxims" of equity as guides to decision making. However, most of these maxims, such as "equity will not leave undone that which ought to have been done," were couched at such a level of generality that they could be and frequently were cited to support almost any conceivable equitable argument or disposition.

The courts of equity not only administered a special body of rule and principle, they also differed institutionally from the common law courts. For example, equity did not use juries. As a consequence, trials in equity could – and did – proceed as a series of

episodes, whereas the trial at law was a single, continuous event. The absence of the jury also affected the law of evidence; in particular, exclusionary rules had in equity courts much less importance than at law.

The existence of parallel and overlapping judicial hierarchies always creates complications for a legal system. By the nineteenth century in both England and the United States, these complications had become considerable; furthermore, law reform no longer depended on the existence of separate courts of equity. American courts of law and equity alike had demonstrated a creative capacity; moreover, legislation now provided an effective means of law reform. The New York Constitution of 1846 abolished the court of chancery; the New York Code of Civil Procedure (1848), drafted by David Dudley Field, merged law and equity. By 1900, the movement thus begun had been emulated by many sister states.

The disappearance of separate courts of equity did not, however, do away with the law of equity. That body of rule and principle still complements the body of rule and principle deriving from the work of the common law courts. Moreover, the historical distinction between proceedings at law and in equity continues to have procedural consequences. In particular, the right to trial by jury, guaranteed by the U.S. Constitution and by the constitutions of several states (e.g., Constitution of Massachusetts, Articles XII and XV), does not attach to matters that historically were within the equity jurisdiction.

The emergence in England of a separate hierarchy of courts of equity did not foreshadow a general proliferation of judicial hierarchies. In particular, neither in England nor in the United States did a separate system of administrative courts emerge; matters falling within what the French call the *droit administratif* and the Germans *Verwaltungsrecht* are handled by the regular courts.

B. ALLOCATION OF AUTHORITY TO CREATE AND ADAPT LEGAL RULES AND PRINCIPLES

With the Declaration of Independence in 1776, the former colonies fully controlled the allocation of authority over the creation and adaptation of their public and private laws. Colonial history and the form taken by the struggle to obtain independence led to the new states breaking with English tradition by adopting written state constitutions, such as the Constitution of Massachusetts adopted in 1780. These state constitutions constitute the ultimate source of state law; they formally allocate the authority to make and adapt law.

The importance of the Constitution of the United States (1789) as a source of American law and the special role played by the U.S. Supreme Court are discussed in Chapter 5. In this chapter, the allocation of lawmaking and adapting authority is discussed in general terms with special attention given to the work of the courts.

American state constitutional arrangements provide for legislatures; subject to such limitations as flow from the state or federal constitution, these have ultimate formal authority to make and to change law. With rapid and pervasive changes in economic, political, and social circumstances, such as those occurring late in the nineteenth century and throughout the twentieth century, legislatively formulated rules and principles have assumed ever-increasing importance. This is particularly true of public law. Although the American colonies inherited and applied a common law of crimes for a time after the Revolution, it is safe to say that by the end of the nineteenth century all American public law had its formal source in legislation.

The product of American legislatures is not, of course, to be compared to a European code, but rather to more usual legislative products. It is worth remarking that, on occasion, the