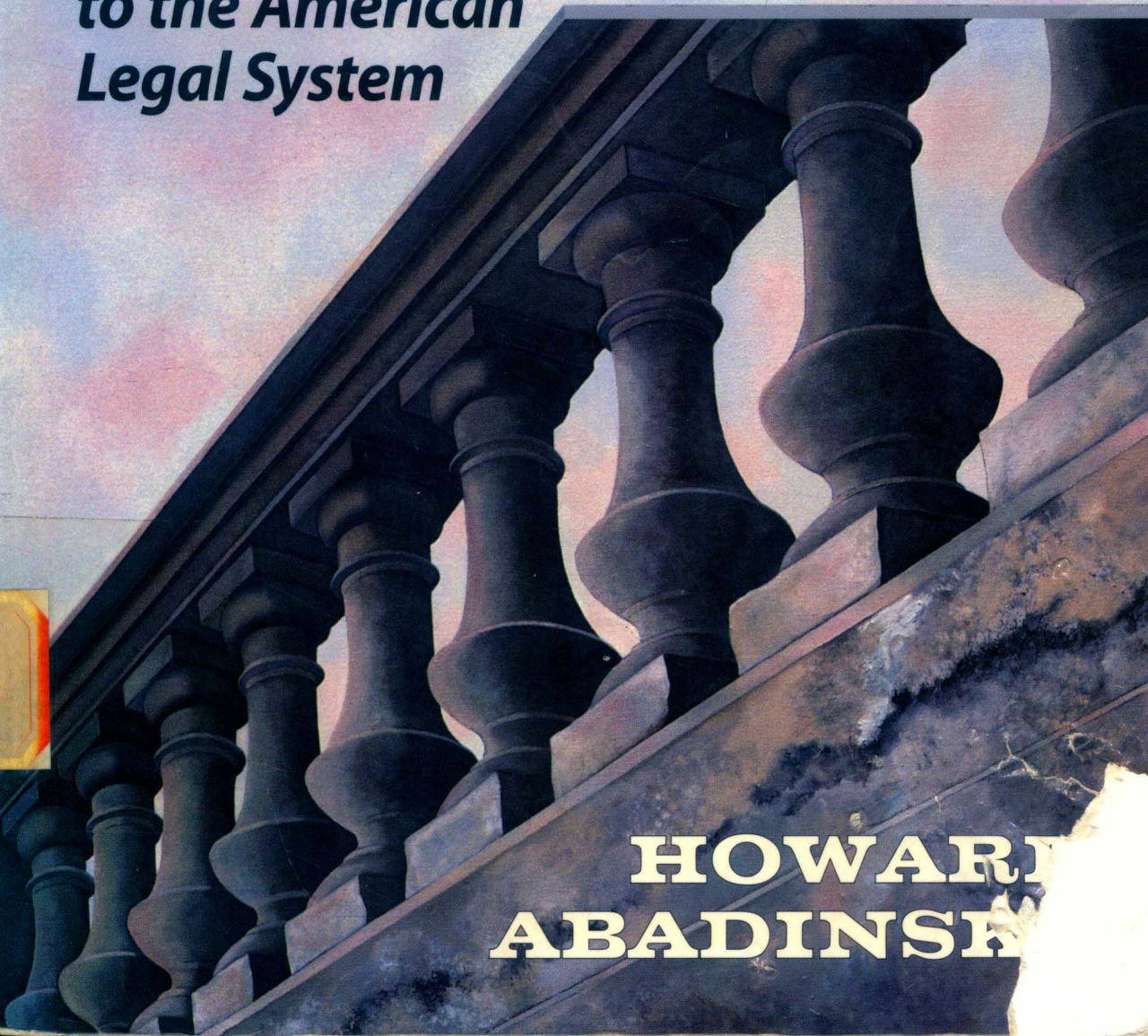
FOURTH EDIT

LAW AND JUSTICE

An Introduction to the American Legal System



HOWARD ABADINSK

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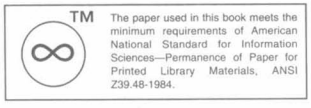

ABOUT THE AUTHOR

Howard Abadinsky is professor of criminal justice and law and society at Saint Xavier University/ Chicago. He was an inspector for the Cook County Sheriff's Office for eight years and a New York State parole officer and senior parole officer for fifteen years. The author holds a B.A. from Queens College of the City University of New York, an M.S.W. from Fordham University, and a Ph.D. from New York University. He is the author of several books, including *Organized Crime*, fifth edition, *Probation and Parole*, sixth edition, and *Drug Abuse*, third edition.

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PREFACE

This book is designed for courses on the law and judicial process that transcend the disciplines of political science, sociology, and criminal justice. The writer has attempted to take advantage of his background in these disciplines to provide a comprehensive book that can be used alone or along with more particular treatments of the topics contained in the eight chapters. The book opens with a chronology so students can more easily trace the evolution of law and justice and the important historical events related to them.

Chapter 1 prepares the reader for subsequent chapters by examining the problem of defining law, natural law, rational law, common law, equity, and civil (code system) law. The chapter discusses statutory law, legal reasoning, case law, administrative law, and the application of law through a comparison of the inquisitional system used in Continental Europe and the adversarial system used in England and the United States.

Chapter 2 is a history of the development of American law and justice from colonial times through the twentieth century and provides grounding for topics in later chapters.

Chapter 3 examines legal education, the development of bar associations, and the practice of law. The chapter discusses differences between law schools, criticism of legal education, the law school curriculum, and the stratification of the legal profession.

Chapter 4 reviews the history and development of court systems, the variety of ways in which they are organized, court administration, and reform. A major portion of the chapter examines the appellate courts, particularly the operations of the U.S. Supreme Court and the controversies surrounding the policy-making aspects of the judicial branch.

Chapter 5 looks at the key actors: the lawyers, judges, prosecutors, attorneys for plaintiffs, and attorneys for defendants in criminal and civil cases. The role of the trial judge is discussed and methods for selecting judges are compared and contrasted. The office of prosecutor is examined, including the ways in which it can be organized and their implications. The discussion of the criminal defense attorney—private counsel, public defender, court-appointed counsel—focuses on the difficult problems encountered in the practice of criminal law. The chapter ends with a discussion of federal legal services and attorneys practicing public interest law.

Chapter 6 begins with a review of the evidence needed to convict in a criminal case, the due process guarantees to which every criminal defendant is entitled, and the relevant Supreme Court decisions that have affected defendant rights. The trial process is examined from pretrial activity, to the *voir dire* hearing, to the judge's charge to the jury. The differences between the indeterminate

and various types of determinate sentencing are reviewed as a prelude to the presentence report and the sentencing hearing. The chapter ends with a discussion of probation, parole, and executive clemency.

Chapter 7 contrasts the civil trial process with the criminal trial and examines issues surrounding the contingency fee and class action lawsuits. The chapter ends with a review of the juvenile justice system and the important Supreme Court decisions that have affected the juvenile court.

Chapter 8 provides an in-depth examination of the method most frequently used to decide-criminal and civil cases—plea bargaining and negotiation. The chapter ends with a discussion of alternative methods of dispute resolution in both civil and criminal matters.

A glossary of legal terms used in this book follows chapter 8.

The author is grateful for the confidence shown in his work by Nelson-Hall president, Stephen Ferrara. And a special thanks to Steven Long, who took special care editing this edition, and Tamra Phelps for her outstanding design and production skills.

LAW AND JUSTICE CHRONOLOGY

1950–1792 B.C.E.: Hammurabi
1200–1080: Moses
384–322: Aristotle
300: Greek Stoics
638–558: Solon
450: Twelve Tables of Rome, a written code
106–43: Roman statesman Marcus Tulius Cicero
533 C.E.: Code of Justinian
1086: Origins of English common law
1225–1274: Thomas Aquinas
1492: Columbus reaches the Americas
1607: Jamestown, the first English settlement in America, is established
1620: Mayflower lands at Plymouth
1776: Declaration of Independence
1781: Articles of Confederation ratified
1783: Revolutionary War ends
1787: Philadelphia Convention
1788: *Federalist Papers*; Constitution ratified
1789: Judiciary Act sets the Supreme Court's membership at six and creates three circuit courts; French Revolution begins
1791: Bill of Rights ratified
1793: *Chisholm v. Georgia* (states can be sued in federal court by citizens of other states)
1798: Eleventh Amendment ratified (in a reaction to *Chisholm*, affords states sovereign immunity)
1803: *Marbury v. Madison* (power of judicial review)
1804: Napoleonic Code
1816: *Martin v. Hunter's Lessee* (upheld the appellate jurisdiction of the Supreme Court as the "final word" over all federal *and* state courts)
1819: *McCulloch v. Maryland* (extends the power of the federal government by discovering the Constitution's "implied powers")
1820: Missouri Compromise (Maine is admitted as a free state and Missouri as a slave state, and slavery is banned in much of the Louisiana Purchase)
1824: *Gibbons v. Ogden* (asserts the federal government's supreme authority over the regulation of interstate commerce)
1829–37: Jacksonian era
1833: *Barron v. Baltimore* (Bill of Rights does not apply to states)
1848: "Field Code" of civil procedure enacted in New York
1857: *Scott v. Sandford* (while a state could confer citizenship on a Negro, this does not effect his status in another state nor does it give rise to a claim of constitutional protection even within the granting state)
1861–65: Civil War
1868: Fourteenth Amendment ratified (applies Bill of Rights to states)
1870: Christopher Columbus Langdell at Harvard
1873: *Slaughterhouse* Cases (recognition of "states' rights" against federal authority)

1875: Judiciary Act (provides federal courts with extensive jurisdiction)
1876: Reconstruction Era ends
1879: West Publishing Company established the *National Reporting System*
1890: Sherman Antitrust Act (criminalized restraint of trade/monopoly)
1895: *United States v. E.C. Knight & Co.* (limits the application of the Sherman Antitrust Act)
1896: *Plessy v. Ferguson* ("equal but separate" accommodations for whites and blacks is reasonable)
1905: *Lochner v. New York* (New York statute providing maximum hours for bakers is unconstitutional)
1908: *Adair v. United States* (Congress has no power with respect to union activities)
1914: War begins in Europe; *Weeks v. United States* (establishes exclusionary rule in federal cases)
1917: Russian Revolution; United States enters World War I
1918: World War I ends
1919: *Schenck v. United States* (limits free speech when there is "a clear and present danger")
1920–1933: Prohibition
1920: Nineteenth Amendment grants women the right to vote
1928: Mussolini dictatorship
1929: Great Depression begins
1932: Franklin D. Roosevelt elected president; Norris-La Guardia Act (strips federal courts of their power to issue injunctions in labor disputes); *Powell v. Alabama* (if a defendant in a capital case lacks an attorney and a fairly chosen jury, he or she cannot be convicted)
1933: Hitler named chancellor
1935: Wagner (National Labor Relations) Act (gives explicit protection to the rights of workers to organize)
1937: Court packing plan
1939: War begins in Europe
1940: *Minersville School District v. Gobitis* (requiring pledge of allegiance in school is constitutional)
1941–45: World War II
1943: *West Virginia Board of Education v. Burnette* (overturned the 1940 *Gobitis* decision)
1944: *Korematsu v. United States* (upheld a relocation order for Americans of Japanese ancestry)
1950–53: Korean War
1952: *Youngstown Sheet and Tube Co., et al. v. Sawyer* (ruled that President Truman had acted beyond his constitutional authority in seizing steel mills during the Korean War)
1953: Earl Warren appointed to Supreme Court
1954: *Brown v. Board of Education* (school segregation is unconstitutional)
1957: Federal troops sent to Little Rock, Arkansas, to enforce *Brown*
1961: *Mapp v. Ohio* (applies the exclusionary rule to the states)
1961–1973: Vietnam War
1962: *Baker v. Carr* (Gerrymandering unconstitutional—"one person, one vote"); *Engle v. Vitale* (prescribed religious ceremonies in public schools are unconstitutional)
1963: *Gideon v. Wainwright* (states must provide counsel for all indigents in felony cases)
1965: *Griswold v. Connecticut* ("right to privacy" voids statute prohibiting birth control devices)
1966: *Miranda v. Arizona* (prior to questioning, the police must make a suspect aware of the right to remain silent)
1967: *In re Gault* (extends due process protections to juvenile court)
1969: Warren Burger appointed Chief Justice
1973: *Roe v. Wade* (strikes down laws prohibiting abortion)
1974: *United States v. Nixon*; President Nixon resigns
1986: William Rehnquist appointed Chief Justice

CONTENTS

1

AN INTRODUCTION TO LAW AND JUSTICE

This chapter introduces themes and concepts discussed throughout the book. We will examine the law, its attributes and definitions, and the ways in which it can be implemented.[1] We will move from the concept of natural law to capitalism's need for rational law. Since legal tradition in the United States has borrowed from two rational systems of law—common/case law and civil law—we will examine and compare them. We will distinguish between inquisitional and adversarial systems, and between mediation and arbitration, as methods for resolving disputes. These distinctions will prepare the reader for more detailed examinations of law and justice in later chapters.

Law: The Problem of Definition

The concept of law is ancient—references to written law date back to about 2400 before the Common Era (B.C.E.) (Draper 1989). Most modern books on law, however, do not define the phenomenon—as if the obvious need not be defined—yet the definition of law can be as complex as its application. The word *law* is believed to be derived from one of two Old Norse terms: *log* or *lag*. The former means to lay down or determine; the latter refers to a team, the concept of binding people together (Aubert 1983). Although central to the functioning of society, law has defied authoritative definition. Even lawyers and judges have no generally agreed-upon definition of law: "For them it is simply what they practice and what courts do" (Loh 1984: 23). The noted jurist Jerome Frank (1970: xiii) admits that he "seriously blundered" in offering a definition of the word law because "that word drips with ambiguity," and he concluded that efforts of defining are

1. This book is concerned with law and justice in the United States. While the legal systems of England and Continental Europe are discussed, this is not a book on comparative law and justice. Thus, other systems of law, (e.g., socialist, Hindu, or Moslem) are not discussed. Similarly the evolving area of Native American tribal law are beyond the scope of this book.

futile. The German philosopher Immanuel Kant (1724–1804) faulted lawyers for being unable to agree on a definition of the subject matter of their profession. He proceeded to construct his own definition, which found no more universal acceptance than the others that have been offered (Berman and Greiner 1980).[2]

"Society is possible only on the basis of order" (Hoebel 1974: 12), and law can be conceived of as simply a body of rules governing a social order. The earliest societies, however, knew no law, but instead relied on the force of custom, magic, religion, and social pressure (Draper 1989). Social scientists disagree over the point at which law can be said to exist in a society: How is law to be distinguished from social rules and customs, the norms of a society (Sigler 1968)? A *norm* indicates societal expectations of what is right, or "normal"; in short, of what ought to be. In his well-known elaboration, William Graham Sumner (1840–1910) ordered norms in a hierarchical manner:

- *Folkways* are unplanned social rules enforced by informal controls such as ridicule and ostracism; there is a sense of obligation, but it is relatively weak.
- *Mores* are similar, but there is an imperative to comply, and violations are met with a strong sense of moral indignation.
- *Customary law* involves rules enforced by specific sanctions imposed by the community as a whole, although certain persons may be delegated to carry out the task.
- *Enacted law* is similar to customary law but, as the term implies, the rules are deliberately set out by official representatives of the community—they are explicit and carry the weight of the community.

Laws not based on societal norms are unlikely to gain general compliance. Prohibition in the United States (1920–1933) is a good example.

According to Max Weber, laws are "norms which are directly guaranteed by legal coercion" (1967: 14). Conduct that violates a social norm may be impolite or perhaps eccentric, and it can cause the violator to be shunned by those who are aware of the norm-violative behavior. Behavior that violates the law, however, draws punishment. Punishment, if it is to be "lawful," must be imposed by persons specifically authorized by society; thus, law represents the rules of conduct backed by the organized force of the community (Abraham 1975).

> Laws and formal mechanisms of enforcement emerge when societal complexity renders custom ineffective in controlling behavior and the need for explicit controls becomes increasingly greater. Homogeneity gives way to heterogeneity. Common interests shrink in relation to special interests. Face-to-face relations exist not between all of the members of the society but only among a progressively smaller proportion of them. Genealogical kinship links not all the members as it did before but only a progressively smaller proportion of them. Access to material goods becomes more and more indi-

2. For a discussion of the elements included in "law," see Hart (1961).

SOCIETAL NORMS AND PROHIBITION

Herbert Packer (1968: 263) reminds us that people do not necessarily respond to new criminal laws by acquiescence, particularly when they do not conform to the norms of a large part of the population. He points out that resistance can be fatal to the new law, and moreover, when this happens "the effect is not confined to the immediate proscription but makes itself felt in the attitude that people take toward legal prescriptions in general." Thus, primary resistance or opposition to a new law such as Prohibition can result, secondarily, in disregard for laws in general: negative contagion. During Prohibition a "general tolerance of the bootlegger and a disrespect for federal law were translated into a widespread contempt for the process and duties of democracy" (Sinclair 1962: 292).

PRIVATE RULES TO PUBLIC LAW

There is an "increasing tendency for the norms of private legal systems to be judicially recognized, as, for example, in a medical malpractice suit in which the code of ethics of the American Medical Association is invoked; in a suit involving the internal relations of a trade union in which the union's constitutional provisions are accorded legal status by the court; or in a suit by a student against a college or university in which the institutions disciplinary rules are judicially recognized" (Evan 1962: 176). The once private nominating practices of political parties are now rigidly governed by (public) law.

> rect, with greater possibilities for uneven allocation, and the struggle among the members of a given society for access to the available goods becomes intensified. Everything moves to increase the potentialities for conflict within the society. (Hoebel 1974: 293)

"It is the formality of legal processes which makes legal relations a special and unique type of social relations, distinct from informal (that is, undefined, spontaneous, intimate) relations" (Berman and Greiner 1980: 28).

"Law is distinguished from mere custom in that it endows certain selected individuals with the privilege-right of applying the sanction of physical coercion" (Hoebel 1974: 276).[3] Benjamin Cardozo (1924: 52) adds the necessity of regular enforcement by courts of law. Law, he says, "is a principle or rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged."[4] That norms require a formal mechanism for enforcement presupposes that there may be those who do not,

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3. Edwin Schur (1968: 75) finds this problematic because it fails to distinguish between law and government: "Not only does this seeming indistinguishability make their separation for analytical purposes impossible, but also it renders the notion of a government *subject* to law meaningless."

4. The term "court" is derived from a time when the king in his court served as a judge. Medieval English judges acted as agents of the king, conducting their business in court (Rabkin 1989).

DEFINITION OF LAW

Law consists of norms* regularly enforced by coercion, by persons authorized by society, as stipulated by courts of law.

*Admittedly, this definition is not without problems. Positive law may reflect the norms—the power—of economic elites and not necessarily *societal* norms.

or will not, support them in all instances, although Weber (1967) points out that custom may be far more determinative of conduct than the existence of legal enforcement machinery.

In sum, law appears to have four components:

1. norms
2. regularly enforced by coercion
3. by persons authorized by society
4. as stipulated by courts of law.

"Some laws compel conduct while others serve to facilitate voluntary actions by providing guidelines for them.[5] It is useful to think of law as comprising a set of authoritative and prescriptive rules for conduct. Some rules instruct persons in what they must or must not do (for example, 'pay your taxes'; 'do not segregate public school pupils on the basis of race'); others tell people how to do what they wish to do so that their actions are legally enforceable, that is, backed by the power of the state (for example, 'this is how to make a valid contract'; 'follow these steps in setting up a partnership')" (Loh 1984: 24). There are also laws that create benefits, such as Social Security, while others deal with the functions of bureaucratic entities such as a department of transportation responsible for building and maintaining public roads.

As we have defined it, law is amoral—witness the laws of Nazi Germany or the Fugitive Slave Acts of the United States. The idea of morality in law is associated with the concept of *natural law*—before there was law in the form of rules deliberately set forth by a human society—positive law—there was the "law of nature," or natural law.

5. The assertion that some laws simply facilitate private action poses a problem because there are instances when law may actually hamper such efforts: "A rule that demands high levels of formality cannot simply be said to *facilitate* private ordering, but may instead facilitate ordering only for certain legally sophisticated parties with particular expectations about their dealings with others" (Kelman 1987: 233).

Natural Law

In the body of law revealed to Moses on Mount Sinai—for example, thou shalt not steal, thou shalt not murder—we can find universal elements that more contemporary observers refer to as natural law. "The term 'natural law' designates a theory which holds that law necessarily has a moral basis and that its criteria are grounded in something more than ordinary experience—'in nature.' Natural law accepts as viable the quest for an absolute ideal of justice" (Levy 1988: 3).[6]

Natural law, while not requiring a belief in a deity, refers to a higher law, primordial or law of nature[7]—in other words, rules for living that are binding to all human societies. Natural law was expounded by Aristotle (384–322 B.C.E.) and the Greek Stoics[8] (circa 300 B.C.E.), helping to form the basis of the legal philosophy of the Roman statesman Marcus Tulius Cicero (106–43 B.C.E.) as explicated in his *De legibus* ("On the Laws") and other works (Kelly 1993). In fourth century B.C.E. Greece, "men came to realize that societies which could not easily be dismissed as primitive cherished different and even conflicting customs. This shattering discovery provoked a search for universal principles of conduct, based upon human nature, that might underlie the variety of customs and serve as criteria for their assessment. The philosophic doctrines fashioned in the course of the quest for these overarching norms were used by Roman lawyers" (Unger 1976: 76–77).

As derived from Aristotle and ancient philosophy, natural law doctrines were united into a Christian framework by Thomas Aquinas (1225–1274) who argues in *Summa Theologica* that positive law (law derived out of the political process), if it violates natural law, is not law but a corruption of law. According to many references in Church doctrine, natural law is rooted in human nature—divine law written on the human heart (Fuchs 1965), the principles of which are known or at least knowable by anyone (Boyle 1992). In the language of the Declaration of Independence, truths that are self-evident—a moral consensus.

During the Middle Ages (from the fall of the Roman Empire to the Renaissance), the concept of natural law served the interests of the Church in its dealings with secular powers, and in the hands of the Papacy it was an impediment to the growth of nation states (Aubert 1983). According to Church doctrine, the source of all natural law is divine and, thus, "the Church in her own Code emphatically refuses to recognize any legislation that contradicts the natural law" (Fuchs 1965: 8). The concept of natural law was later used by an emerging middle class to counter the power of feudal nobility and later the divine right of the monarch in order "to preserve an area of individual freedom and initiative secure from interfer-

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6. R. C. Van Caenegem divides natural law into that having religious origins, the other rational, for which " 'law of reason' is therefore more accurate than 'natural law' " (1994: 118).

7. Richard Posner (1990) states that the term natural law is an anachronism—nature is amoral.

8. Stoicism, a philosophical movement that lasted about five hundred years, emphasized the laws of nature and reason over emotion.