

JAMES V. CALVI
SUSAN COLEMAN

■第四版

美国法律与法律体系



American Law and Legal Systems

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West Texas A&M University

A Member of the Texas A&M University System

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内 容 简 介

本书是介绍美国法律与法律体系的一本很好的教科书,适合本专科法学专业学生使用。本书主要内容包括:概述、美国法的历史、法庭组织、程序和证据、宪法、刑法、行政法、环境法、侵权法、合同、财产制度等。本书内容翔实,案例材料丰富,书后还附有关键术语表和索引。较之前三版,增加了很多新材料,尤其是增加了环境法方面的内容。

出版前言

为适应经济社会发展的需要,以高质量的高等教育迎接经济全球化和新科技革命的挑战,培养数以千万计的高质量专门人才,教育部明确要求各高等院校创造条件使用英语等外语进行公共课和专业课教学,从而缩短我国在有关专业教学上与国际先进水平的差距,同时不断提升我国大学生的外语水平。其中一个重要的措施是在高等学校推动使用外语优秀教材。

为使高校学生能够及时使用世界先进水平的法学新教材,高等教育出版社受教育部高教司委托,聘请熟悉国内外教学和学科发展水平的专家,从欧美现行教材中遴选、引进了这批具有国际领先水准的英文版教材,以影印形式出版,供开设相应课程的高等学校选用。

引进这批教材时遴选和评定的依据主要有以下几个方面:(1)引进的教材与1998年教育部颁行的专业目录及后来批准的目录外专业所规定的主要课程相对应,内容符合专业培养目标和教学要求。(2)版本要新。国外的大学教科书一般三年左右即修订再版一次,增补新的内容。这批教材选择的都是国外权威教科书的最新版本,内容涵盖了相应学科最新进展的介绍和现实案例的分析。(3)内容规范简明,适合教学。由于这批影印教材主要是针对我国大学本科层次法学专业的基础课程和主干课程的,专家们在选择时充分考虑了内容的严谨、规范以及表述的准确性,同时考虑了使用外语教材可能遇到的课时限制问题,在内容相同的几种流行版本中选择相对简明的版本。另外,按照教育部的要求,这批教材的定价采取了与国内版教材相同的标准。

由于这批教材的作者所在国家的经济、政治、社会文化等与我国均有所不同,书中内容和观点难免有偏颇和错误之处,希望读者在阅读时注意鉴别。

我们希望这批影印教材的出版,对各高等院校的法学专业的教学有所促进和帮助。

高等教育出版社

2002年9月

*For Professor Richard A. Jackson—
master teacher, colleague, and friend*

**AMERICAN LAW
AND LEGAL SYSTEMS**

PREFACE

A decade has passed since the publication of the first edition of *American Law and Legal Systems*. We are struck by how much law reflects the old adage, "The more things change, the more they stay the same." At times it seems as if the law moves at a glacial pace, yet in the last ten years much has happened in the field of law. The growth of the Internet has caused the rethinking of the concept of intellectual property. The various political controversies have altered, for better or worse, the relations of the three branches of the national government under the separation of powers doctrine. The emphasis on globalism has changed how we view the environment and our concepts of private property. At the same time, one of the law's main virtues is that it does not change too radically, thereby bringing stability to our affairs. We have tried to write a book that captures both the change in, and the stability of, the law. Dealing with this paradox of change and stability is what makes the study of law so fascinating.

A goal of any new edition is to update the material, using more current examples to illustrate key points. Whenever appropriate, we have tried to use examples to which today's student can easily relate. The major change has been the addition of a new chapter on environmental law (Chapter 9).

Environmental law is a fast-growing and often neglected area of the law that we believe is likely to continue to increase in significance. At the same time, we have eliminated dated material.

We would like to thank our families, who by now are getting used to these periodic revisions but who nevertheless must endure our absences and crankiness. Next, thanks to our colleagues in the Department of History and Political Science of West Texas A&M University for their continued support. A special note of thanks goes to our departmental secretary, Marilyn McMillen, who always meets our frantic deadlines with calm and serenity. Our special thanks to those who reviewed our revision plans and made many helpful suggestions for which we are truly grateful: Richard A. Brisbin, Jr., West Virginia University; Mark A. Graber, University of Maryland; David C. Larkin, Arizona State University; and Kevin T. McGuire, University of North Carolina at Chapel Hill.

Finally, we would like to thank the professional people at Prentice Hall with whom we worked. First, thanks to Beth Gillett, Political Science editor, for the opportunity to do a fourth edition. We also want to thank Nicole Conforti, associate editor, and V. Nelson, copy editor, for all their wonderful help. We especially wish to thank Merrill Peterson for doing such an excellent job of coordinating the production of this edition. His patience and guidance made this edition the smoothest yet.

James V. Calvi
Susan Coleman



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INTRODUCTION

In order to understand the American legal system, one must first come to terms with the question: What is law? Americans have always had ambivalent feelings about law. Our rhetoric is full of noble ideals such as "equal justice under law" and the "rule of law." We pride ourselves on having a "government of laws, not men," and on the assertion that "no one is above the law." At the same time, disregard for the rule of law has been part of our political tradition. We are a nation born of violent revolution, and during our frontier period vigilante groups often took the law into their own hands. Even in our own time we debate the role of civil disobedience in the civil rights, animal rights, abortion, and antinuclear movements. *Civil disobedience* is the belief that a person has a moral right to disregard an unjust law. In our own time the debate over the role of civil disobedience continues. In the 1960s, the radical left believed ending the war in Vietnam or achieving civil rights for African Americans justified the use of violence. In the 1990s, the radical right used similar arguments to justify violence against abortion clinics. Some paramilitary militia groups even challenged the legitimacy of the government itself.

In many ways the questions we ask ourselves about the nature of law are the same ones we ask about our political system and about society at large. How do we account for the conflicting attitudes Americans have toward law? How can persons who are law abiding one minute turn into a lynch mob the next? How can a nation founded on the basis of its citizens' "inalienable rights" systematically deny those rights to African Americans and other minorities? How can we explain these contradictions? The answers to these questions are not easy, but we can begin to understand the paradox by understanding the nature of law both in general terms and in American society specifically.

In this chapter we will focus on several aspects of law in the United States. First, we will examine the functions of law in society. Second, we will discuss the source of law in society in order to help us understand why people do or do not obey the law. Next we will define the different kinds of law in our legal system, with examples of the various forms the law takes. Finally, we will conclude with a case study of *Bob Jones University v. United States*, which illustrates a number of the chapter's major points.

FUNCTIONS OF LAW IN SOCIETY

Society tends to place far too much emphasis on the negative aspects of law. Many view the law as a list of things they are forbidden to do. Perhaps this attitude is only natural, given our socialization. As children we were continually told, "Don't do this" and "Don't touch that," so it is understandable that our first contact with authority has negative connotations. Law, like the restrictions placed on us by our parents, defines the boundaries of acceptable and unacceptable behavior. But law is more than just a list of forbidden activities; it touches every aspect of our lives and should be viewed as a positive force. Following are some of the functions of law in our society.

Law bestows benefits on people. One of the positive aspects of law that perhaps we seldom consider is that it bestows benefits upon people. Government, no matter what its form, uses its law-making power to determine who receives certain benefits and who does not. Laws deciding eligibility for programs like Social Security, food stamps, unemployment compensation, and veterans' benefits are just a few examples; laws determining who may operate an automobile, practice law, sell real estate, or receive tax deductions are some others. Law is thus closely connected to the political system since it is government that determines "who gets what, when, and how."¹ The law becomes a major concern of interest groups who try to secure the passage of laws beneficial to them while blocking the passage of those that harm their interests. Finally, it is the government's ability to meet the demands of interest groups and its fairness in allocating benefits that provide an important measure of governmental effectiveness.

Law reflects society's values. Interest groups do not use the law just to promote their selfish economic interests. Law has important symbolic value in our society. Interest groups, like pro-life and pro-choice groups, want the law to promote certain values that they cherish in society. This is why some people and groups are willing to work to promote school prayer, ban flag desecration, and punish homosexuality. It is why others are equally willing to push for separation of church and state, freedom of expression, and tolerance of individual lifestyles. People on both sides of a controversial issue believe it is important for the law to reflect the correct view—which, of course, means their personal view of public policy. This eagerness of groups to see their views reflected in the nation's laws occupies the major portion of political debate in a country.

Law creates new programs. The next function of law is closely related to a previous one. Government, by passing laws that bestow benefits, must create both new programs and the bureaucracies to administer them. Programs such as flood control, crop insurance, welfare benefits, and highway construction by their very nature benefit people in varying degrees. Some programs, like highway construction and flood control, are seemingly for the general welfare but also bestow benefits (like big profits) on highway contractors and insurance companies. Battles between the president and Congress over the nation's budget are actually struggles over the funding levels of new and existing programs that have been created by the government.

Law proscribes certain activities. As we have noted, most of our thinking about law centers around what we may *not* do. Law forbids behavior that causes harm to other people or to their property. Some behavior is termed *malum in se*, or "wrong in itself." Consequently, the law forbids murder, rape, arson, theft, and other forms of antisocial behavior. There are also laws banning activities that, while not harmful in themselves, are forbidden simply because society disapproves of them. Neither parking in a "no parking" zone nor letting the meter expire is really wrong in itself, but both are against the law. These are examples of *malum prohibitum*—acts that are wrong merely because they have been prohibited by government. Finally, some forms of behavior—such as gambling, prostitution, physician-assisted suicide, or homosexual activities—are debatable as to whether they are wrong in themselves or simply wrong because a majority in society thinks they should be prohibited. In any case, it is only by banning and punishing certain activities that people can live together in society in relative harmony.

Law provides predictability. One final function of law is to provide a measure of predictability so that we can conduct our affairs with some certainty. Contract law is a good example of law fulfilling the need for predictability; without contracts enforceable in courts, businesspersons could

not conduct their affairs. We also seek predictability because we want some assurance that those in power will not act arbitrarily. One element of due process is the requirement that a law forbidding an activity cannot be "void for vagueness."² Some Supreme Court justices, for example, have expressed concern over upholding pornography laws when the Court itself has such difficulty defining pornography.³ Lawyers want some assurance that the law governing the outcome of yesterday's cases will serve as guideposts for today's decisions and tomorrow's cases. That assurance is why lawyers so eagerly look for *precedents*, cases previously decided, when presenting cases. Lawyers hope that such precedents will help guide the judge's decision and make the outcome more predictable.

Despite the comforting assurances of predictability that we seek in the law, there is, paradoxically, unpredictability as well. Professor Lief Carter reminds us that if law always predicted the outcome of disputes, people would never go to court. When the law fails to predict the outcome of a dispute and both sides believe they have a chance to win, lawsuits follow.⁴ Carter notes that the use of ambiguous wording in statutes and court opinions is one reason for the unpredictability of law. Phrases such as "due process of law" and "beyond a reasonable doubt" illustrate the ambiguity of the language of law.⁵

These functions of law give us some clues about the nature of law by making us aware of its purpose for a society. Law can be seen as a battle for scarce resources, as a way of organizing society, or as a source of predictability and stability. But understanding the functions of law in society is not enough. Another important aspect of law is the *source* of law in a society. We now turn our attention toward understanding why people obey the law.

SOURCES OF LAW IN SOCIETY

It is because law performs such important functions that it becomes necessary to examine the source of law in society. The source of law concerns not only the legitimacy of the law in the eyes of the people, but also the legitimacy of the lawmaker. In an absolute monarchy, the will of a single individual and the law are one and the same. In the film *The Ten Commandments*, the Pharaoh had only to say, "So let it be written, so let it be done," and his word became law. How can the will of a single person be so readily accepted by others as binding? In other words, from where did the Pharaoh derive his power, and why did his people obey him?

The answer to why humans obey can be as varied as humans themselves, but generally the reasons can be reduced to two: People obey either because they believe that they should or because they are afraid not to. Compliance with the law is much easier to effect if the lawmaker can convince the people that he or she has the right to make the law. In some societies—ancient