

**INTRODUCTION
TO THE LAW
AND LEGAL
SYSTEM OF THE
UNITED STATES**

THIRD EDITION

by

William Burnham

Professor of Law
Wayne State University
Law School

WEST GROUP
ST. PAUL, MINN. 2002

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Eagan, Minnesota 55123

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Printed in the United States of America
ISBN 0-314-06661-6

PREFACE

This introductory book on the law and legal system of the United States is intended for people interested in the U.S. legal system who have not completed law school at a U.S. law school. Within that category, I have three primary groups in mind: (1) law students, lawyers and legal scholars from foreign countries, (2) U.S. graduate and undergraduate college students, and (3) members of the general reading public in the United States. This book can be used either as the text for an introductory course on U.S. law, as a reference or for self-study.

In the process of writing the book, I have come to realize the difficulty of producing a book that will “work” for three such diverse groups. In places, readers will find some compromises and special efforts to accommodate one or another group. I hope readers from the other groups are not put off by them. For reasons set out below, the first group — foreign lawyers — is the primary group I had in mind when writing. Nonetheless, undergraduate students, whether “pre-law” or not, should find it useful as an overview of the primary topics and methodology covered in law school. Graduate students in non-law disciplines should find the book useful if they are working in a field that intersects with law. Layperson members of the general public may wish to skip footnotes and parts of the text that are too specialized, but should find the book useful. In addition, nonlegal professionals who work regularly with lawyers or law will find this book a useful insight into both.

The original idea for this book grew out of two frustrations. The first was my effort to find a text for a course, “Introduction to American Law,” that I was called upon to teach while on a faculty exchange at the University of Utrecht Law School in the Netherlands in 1990 and 1992. Books for U.S. lawyers and law students were clearly unsuitable because they are too detailed. In any event, they are narrowly focused on one or two major substantive law areas. Books intended for undergraduate college students, primarily business law and constitutional law books, are useful only for teaching those two areas of the law and, in any event, are often overly simplistic and “un-lawyerlike” in their presentation. There did not seem to be anything in between. I also heard complaints from foreign law graduates studying for an advanced law degree at U.S. law schools. They often want to get an overview of U.S. law, but the one year they are in residence at their U.S. law school does not afford them the time to take a sufficient variety of courses to get a broad exposure to U.S. law. This is especially so if they fill the larger part of their schedule with courses in their speciality area.

The second frustration that led me to attempt this project comes from the opposite perspective — my difficulties as a *student* of foreign law trying to learn about other legal systems. Books on other countries’ systems written for foreign audiences tend to deal in generalities that make it hard to picture how the system actually operates and what the principal legal concepts are. At the same time, many such books are quick to give the author’s own impressions of the differences in systems based on those generalities, without giving sufficient detail to allow me, as the reader, to decide for myself how that system fits into my own frame of reference.

Accordingly, my approach in this book has been to try to provide a sufficiently detailed summary of the principal features of the law and the operation of the legal system in the United States to allow readers to get a real “feel” for it and to make their own judgments. I have largely dispensed with my own comparative observations, though there are some. When U.S. institutions or laws have been the subject of criticisms, I have sought to provide an outline of both sides of the question. To aid readers who wish to find out even more about particular areas of the law, I have put in many citations to original materials, particularly cases and statutes, and to books and articles that will provide more detailed information. The Reader’s Guide and Bibliographic Introduction that follows this Preface generally explains the books and cases cited and makes some general comments on the organization of the book. It should help in reading and using the book.

Acknowledgments During this project, I have come to realize how understated acknowledgments in the preface of a book are. I simply could not have written this book without the interest and assistance of my colleagues and friends. Primary among those who provided assistance on various chapters were G. Thomas Munsterman, Martin Kriegel, Kathryn Heidt, Marcia Major, Leroy Lamborn, Robert Sedler, Jonathan Weinberg, Janet Findlater, George Feldman, Steven Calkins, Joseph Grano, Frederica Lombard,

Suellyn Scarnecchia, Kingsley Brown, Stephen Schulman, Diana Pratt, Edward Wise, Peter Henning, Vincent Wellman, Alan Schenk, Michael Sinclair, John Dolan, Margaret Mahoney, Peter Bal, Helen Kabatova and Hans Pijls. Prominent among the student assistants who worked on this project were Damon Whitmore, Mary Kosmalski, Kathy Murphy, Tom Bishoff, David Zack, and Dmitri Shevtsov. Editorial assistance was provided by Susan Hartman, Marilyn Preston, Frank DeMita and Nancy Shafer. Diagrams are by Laura Kootsillas. I also owe a special word of thanks to Tom Berreman, now retired from West Publishing, who maintained his interest in this project through several interruptions and difficulties.

I would also like to thank my Dutch and other European Erasmus Program students at the University of Utrecht for inspiring me to write this book and then suffering through early editions. Similarly exposed to a prior temporary edition were my foreign lawyer LL.M. students in my class at the University of Michigan Law School, who provided constructive feedback. Several Russian judges and lawyers were also exposed to previous versions of some chapters in a temporary Russian edition produced for the Federal Judicial Center and the American Bar Association's Central and East-European Law Initiative. In addition, I tried out lecture forerunners of several chapters on Russian law students at the law department of Moscow State Institute for International Relations, at the Moscow Law Institute and at the Russian State Humanities University, where I lectured while I was on a Fulbright teaching fellowship in Moscow in 1991.

I have written in several areas of law in which I am not a specialist. The noted comparativists Zweigert and Kötz have observed how, when nonspecialists venture into unfamiliar territory, certain dangers lurk — “natives” with sharp arrows in the thickets on whose turf I am treading. But if my fellow “nonnative” friends here and abroad get something worthwhile from this work, it will have been worth it.

March 1995

William Burnham

PREFACE TO THE SECOND EDITION

The second edition has undergone a thorough updating in all areas and considerable expansion in many, particularly those on private law subjects. Case law is current through the United States Supreme Court's 1997-98 term and partially into the 1998-99 term.

Major Additions There were four major additions to the text: (1) a section on environmental law, including toxic substance cleanups, federal environmental impact statements and the Endangered Species Act, added to the business law chapter; (2) expanded treatment of Article 2 of the Uniform Commercial Code and federal and state consumer protection laws, including Truth in Lending, credit reporting, bill collection practices and Federal Trade Commission rules, reflected in a change of the name of the contracts chapter to "Contracts and Commercial Law"; (3) a section on intellectual property — copyright, patents and trademarks — added to the property chapter; and (4) a new chapter on tax law, added as Chapter XVI.

Other Additions and Changes Other additions and changes of note are the following: in constitutional law, updating the "new federalism" balance that has been struck by Supreme Court cases in the last two terms and inclusion of the latest cases on civil liberties; in business law, adding the new federal legislative changes regulating stockholder derivative actions, and expanding treatment of limited liability companies (LLCs), in light of their continued growth and approval by tax authorities; in torts, including discussions of the latest cases from the Supreme Court regarding constitutional limits on punitive damages, and more extended treatment of strict liability, including contributions of the Third Restatement of Torts on Product Liability; in criminal law, expanding coverage of duress, necessity and entrapment, adding new material on the federal Racketeer-Influenced and Corrupt Organizations (RICO) law, corporate criminal liability and "white collar" crime, and more detail on strict liability offenses, including a discussion of corporate criminal liability; in family law, adding sections on adoption of children, guardianships over and civil commitment of the mentally ill and retarded, and updating family law cases dealing with advances in reproductive technology.

Stylistic Changes General editorial changes have been made, as well. Some sections have been shortened or rewritten to make them more readable. Case citations and examples have been expanded to better illustrate the concepts being discussed.

Index The index has been expanded considerably to make the book easier to use as a reference book on the law. Additional multiple finding aids have been added and every effort has been made to cover not just topical, but also conceptual entries. In addition, many of the additions are of a type that permit the book to be used as a legal "dictionary." There are numerous new separate entries of legal terms, concepts, institutions and doctrines with cites to the pages on which the entry is defined. In addition, when there is more than one subentry under an entry, the "defined" subentry is listed first.

Internet Sources Since the first edition was published, the availability of primary legal sources on the Internet has expanded considerably. Because many readers, both foreign and domestic, do not have access to full and up-to-date collections of U.S. law books in their local libraries, cites to sources for U.S. legal materials on the Internet have been added in Appendix B, together with information for contacting the major publishers of printed legal materials.

A New Audience? As stated in the original preface, this book is primarily for foreign law students and lawyers, U.S. undergraduate college students, and the general U.S. reading public. However, law students *in the U.S.* have told me that they have used the book to give them "the big picture" of the law, as a general reference and as an information source for deciding what elective courses to take. Recent graduates have told me that they find it to be a useful compendium of "what you would have learned in law school had you been paying attention." The most commented-on use is by first-year law students who come to law school with an undergraduate, family or personal background devoid of law and lawyers. They find that the book gives them an essential context for better handling the rigors and complete immersion of the first year.

Acknowledgments Providing assistance in helping me understand the intricacies of environmental law — yet another area in which I am not an expert — were Professors Robert H. Abrams, Zygmunt Plater and

Kathryn Heidt. New colleagues who have been extraordinarily helpful are Eric Kades, Peter Henning, Dennis Devaney, Christopher Peters and Katherine White. John Dolan, an old colleague whom I was unable to corner for the first edition, graciously assisted on the expanded commercial law sections of the second. And Tom Munsterman of the National Center for State Courts was his usual helpful self in updating materials on state courts and pointing out new trends related to jury trials. Shela Khan worked tirelessly to track down updates of various materials, legal and nonlegal, for the second edition. My secretary, Nancy Shafer, provided useful editing help and kept me organized.

The assistance of Martin Kriegel, J.D., LL.M., was absolutely essential in putting together the tax chapter. In addition, he took a keen interest in the rest of the book and helped in clarifying my thinking in many other areas.

I would also like to thank the participants and administrators of various programs and institutions that have invited me to teach using the book. Among them are law students in my classes at the Universities of Utrecht and Maastricht in the Netherlands, foreign lawyers and law-students participating in the Orientation in American Law and Orientation in American Business Law held each summer in Ann Arbor by the American Institute of Legal Education, and several groups of young law teachers from Russia, Ukraine, Belarus, Georgia, Moldova, Armenia, Azerbaijan, Kazakstan, Uzbekistan, Tajikistan, Turkmenistan and Kirgizia whom I taught in programs sponsored by the Institute for Constitutional and Legislative Policy in Budapest (COLPI). Zaza Namoradze of COLPI has been particularly helpful in arranging these latter training sessions.

I welcome comments on any aspect of this book. Please address them to me at Wayne State University Law School, 471 West Palmer Street, Detroit, Michigan 48202; w.burnham@wayne.edu; 313-577-3928 (voice) or 313-577-2620 (fax).

April 19, 1999
Detroit, Michigan

William Burnham

PREFACE TO THE THIRD EDITION

The major change in this edition is the introduction of a new chapter, entitled International Aspects of U.S. Law. The chapter was added in recognition of the continuing process of globalization of law and business, as well as the increased interest among law students and lawyers in law and litigation that has international dimensions. The other substantial change is in the form of selective rewriting, revision and reorganization throughout the book in the interest of greater clarity and conciseness, such as in the area of state action and takings of property without just compensation.

As was the case with the second edition, the third has undergone a thorough updating. It is current as of March 2002, although the reader will find some miscellaneous updating even beyond that date. As is often the case, constitutional law, particularly federalism and individual rights, including criminal due process rights, demanded the lion's share of attention in updating.

Acknowledgments For assisting in revisions of commercial law necessitated by changes in the Uniform Commercial Code, I am indebted to Kathryn Heidt of the University of Pittsburgh Law School. My colleague, Brad Roth, was good enough to help me through the intricacies of international law in the new chapter by providing comments on my draft of that new chapter. Martin Kriegel, as before, assisted in presenting the complexities of tax law in a well organized and coherent manner. John Rothchild provided input on the sections on copyright law in the property chapter.

Mike Allen (WSU class of 2003) was a tireless worker in getting some of the more technical aspects of the book finished. Ryan Milligan (class of 2002) also assisted.

Foreign lawyers from successive sessions over the last several years of the American Institute for Legal Education, David Entin, Director, have provided helpful comments. Law students in my classes while teaching at the University of Trento (Italy), Mari State University Law Faculty (Mari Republic, Russia), and Kwansai Gakuin Law Department (Nishinomiya, Japan) have also made helpful suggestions. A special thanks goes to Professor Luisa Antonioli, my co-teacher in Anglo-American Law at the University of Trento, who provided me with running commentary that was both enlightening and engaging as I dragged her and our class through the book during my term in Trento.

April 2, 2002
Detroit, Michigan

William Burnham