

推开美国法律之门

你想知道的
美国法律体系的一切

第2版 [美]杰伊·费曼

2nd Edition

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Everything You Need to Know
About the
American Legal System



LAW 101

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出版者言

法律出版社于 2004 年获牛津大学出版社授权,在中国影印出版了《推开美国法律之门》的第 1 版。作者用清晰简明的语言,全面介绍了美国法律体系的框架以及基本原则:宪法、侵权、合同法、财产法、刑法、诉讼法等。作者使用问句作为每一章节的标题,为读者搭建各法律部门的基本哲学框架,并介绍了具有划时代意义的相关判例,读来或豁然开朗,或会心一笑,或掩卷沉思。

法律出版社通过与牛津大学出版社联系,获得 2006 年第 2 版的英文影印出版权。与第 1 版相比,第 2 版增加了最高法院的判例,并对宪法、合同法、知识产权法等章节内容进行了相应增补,以适应美国法律体系的不断变化。

本书第 2 版具有以下鲜明特色:

(1) 作为一部权威的美国法律体系概论,作者行文洗炼有力、用语简约、脉络清楚。掌握此书的基础内容后再看英美法律类书刊,读者不会再觉得晦涩难啃。

(2) 对中国读者而言,本书还是一部优秀的法律英语教材,读者在思考美国法律体系的同时也学习和应用了法律英语。

(3) 随着美国法律制度框架的修订,本书为中国读者打破交流之屏障,呈现最新知识体系。

由于这些特色,本书获得无数美国读者首肯,相信第 2 版英文影印本的出版也会赢得中国读者青睐。

法律出版社
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世上无天书

美国人为法律而眩迷,可不是? 法律虽然至关重要,却非常难掌握,所以人们觉得某些法制新闻简直骇人听闻。请看如下报刊头条案例:

- 在新墨西哥州阿尔伯克基市,一位名叫斯特拉 (Stella Liebeck) 的 79 岁老太太驾车到麦当劳外卖窗口,花 49 美分买了一杯咖啡。她用双腿夹住咖啡杯,揭开杯盖,往里加奶和糖。这时咖啡洒出来,烫伤了她的腿。斯特拉住院 7 天,接受包括皮肤移植在内的治疗。她将麦当劳告上法庭,其事实主张为麦当劳咖啡的烫热程度非常危险。陪审团裁决麦当劳为她的人身伤害赔偿 16 万美元,并支付惩罚性赔偿赔偿金 270 万美元,这笔金额相当于麦当劳两天的咖啡销售额(承审法官最终将该惩罚性赔偿金降低至 48 万美元)。你是否觉得侵权法原则杀气腾腾? 还是你认为对于该人身伤害的加害人来讲,这个判决非常公正呢? 请参阅第 5 章。

- 2001 年 9 月 11 日,恐怖分子袭击美国。布什政府宣称,作为三军总司令,总统有权认定外国或者本国公民为“敌方战员”,并可以将其不定期监禁在位于古巴关塔那摩湾的海军基地或者其他地点,而该认定无须经过法院审核。最高法院认为法院有权审核拘留情况,未经正当程序,不得不定期地监禁公民。为什么最高法院对事关国家安全的事务具有决定权? 大法官何以认定宪法对待类似案例的解释? 请参阅第 2 章。

- 希尔夫妇 (Rich and Enza Hill) 通过 Gateway 电脑公司订购了一台电脑,用信用卡付款。到货后,他们检查到盒内有新电脑、插线、使用手册等物,另发现一张纸,是一个格式合同,其中写明,除非希尔夫妇在 30 日内退回电脑,否则视为他们接受所有条

款。数月后,电脑瘫痪,而 Gateway 公司不愿意为他们修理。希尔夫妇诉诸法院。Gateway 公司的辩称理由是,格式合同中有一条白纸黑字地写明,希尔夫妇已经放弃诉讼权利,只能提请仲裁。法院认为,尽管希尔夫妇订购该电脑时, Gateway 公司并没有提供该仲裁条款,但是希尔夫妇没有如 Gateway 公司所要求的,将电脑打包,自费寄回,因此,作为合同的一部分,该仲裁条款应当得到遵守。在交易活动中,对自己没有看过、也不知晓内容的格式合同,你愿意受之约束吗? 请参阅第 6 章。

• 洛雷娜(Lorena Bobbitt) 经年忍受其丈夫约翰之施虐。某晚,约翰欲强暴洛雷娜,后因酒醉而睡去。洛雷娜到厨房拿了把刀,将约翰“去势”。在故意伤害诉讼中,洛雷娜的律师成功地辩解道:“洛雷娜得了受虐妇女综合症,这是引发她严重精神失常的原因。”陪审团判定她无罪,理由是精神错乱。洛雷娜一案中,“虐待之理由”是否运用得过了头? 还是你认为对她的刑事责任界限之认定是合适的? 请参阅第 8 章。

绝大部分法律不会涉及如总统定义“敌方战员”之类的重要案例,但是法律已经渗透到美国老百姓生活的方方面面。近年来,有人抱怨我们身边的法律、身边的律师太多太多了——但实际上,清教徒在登陆麻省之前就订立了《五月花公约》,好规制他们在新世界的生活。与当下相比,殖民时代对经济秩序、公共行为和社会道德等的法律规范在广度上不分伯仲。普通人的生活失当,如通奸、酗酒、懒散等,都经常受到法律的惩罚。法律细致地规范经济事务,甚至规定了面包的尺寸、货物销售的时间地点。普通诉讼程序的进行正好为公众集会提供了场合,律师慷慨陈词,大众交头接耳。如今,当公民进行房屋买卖和租赁、结婚、驾车、借款、购物、结社、上学、上班、看病等活动时,法律影响的是公民个体;而当涉及政府征税、传媒和网络监管、打击犯罪、污染控制时,法律影响的是公民整体利益。

由于法律逻辑繁复、资料如海,普罗大众要了解其本质实在是太困难,即便是最为睿智的法律专业人士也无法窥其全貌。更甚者,律师和法学家们不希望把法律解释得明白易懂,与此相反,他们如同某些隐晦宗教的牧师一般,故意将法律神秘化、疏远化。

本书解释了法律的基础理论——规则、原则、律师和法官使用的论据。法律的内容自然远远超出本书范围,但是需要我们收集和掌握的法律太多了,不可能学得完。所以这是律师也要术业有专攻的原因,比如他们对新泽西州对医疗过失的法律规定、联邦税法涉及公司的规定等了如指掌。不过律师确实了解部门法的基本概念,那是因为他们受过大同小异的法学院教育。

公众对于法学院的感觉与对法律本身的感觉同样眩晕。由于《力争上游》、

《律政俏佳人》等影视书刊的渲染,人们把法学院一年级经历看作知识的炼狱,觉得学生要接受惨无人道的轰炸。一年级对法律人而言是普适的训练场,本书要教会这些一年级学生的正是法律知识的核心内容。

美国法学院一年级的课程都很近似。有些专题是基础性的,而本书阐述的即为基础原则。宪法规定了政府结构(第2章),规定了公行为之下对个人自由的保护(第3章);民事诉讼涉及诉讼程序(第4章);侵权法涉及人身伤害(第5章);合同法是关于私人协议的法律(第6章);财产法调整当事人对物的所有权关系(第7章);刑法对不法行为进行定义,让国家藉此剥夺公民的生命或自由(第8章)。刑事程序法规定了刑事判决所必需的程序以及被告人的权利(第9章)。

几乎每所法学院都开设宪法、合同法以及其他学科的课程。在这些基础课程中,不同院校使用的资料大同小异、讲述的知识点也没有大差异。新泽西州、衣阿华州和加利福尼亚州的院校在讲授国内法时,借用的是同样的司法判决和制定法。阅毕此书再上法学院读书,你会发现一年级的课程非常熟悉。不过,你还会察觉,对待同一门课程,老师的视角是不同的,而且有些视角判若鸿沟:有的自由,有的保守;有的偏爱法律经济学分析进路,有的喜欢自然法。视角不同,对法律的理解自然不同,所以法学院学生和法律专业人士或许会理解同一个法律原则,但理解的方式却颇有差异。

本书的写作过程当然也有自己的视角。作者参考了国内顶尖学者的成就,其中一些已被广泛接受,但也有一些偏保守的方面,小结如下:

法律并不藏在书本之中。提及法律,我们首先联想到书:重若磐石的教材、封皮上布满尘土的判例、图书馆中成排成排的制定法和司法判决书。书本确实教会我们法律知识,但不代表法律。法律不在字里行间,而存在于行为之中、存在于法官、律师和普通公民的互动之中。

试想一下我们经常遇到的法律问题:限速。州际公路的法定限速为多少?查阅书本得知答案是65英里/小时。事实远不止如此。你在新泽西州收费高速公路以65英里/小时的速度行驶,就要做好被后面的卡车司机闪大灯催让到慢速车道的准备。在这里的限速值还是要高一些,警察也是这样执法的,超个3—5英里/小时,他决不给你罚单。要是他真这样开了,法官会嘲笑他。实践中,法院不愿浪费时间对付超速1—2公里的人,警察的测速雷达也不会那么精准。那么法律究竟希望我们以多快的速度驾驶呢?答案应该与书本里教育的不一样。

要掌握法的精神,我们必须审视现实事件,从事件中归纳出理论与概念,但是法律的基石永远是事实,而非理念。我们在法学院所学习的一个本事就是思考某些进入诉讼程序的事件,并学习理解解决该事件的司法判决,我们称之为案

例。每个案例均始于现实事件,如希尔夫妇从 Gateway 公司购买电脑、布什总统对敌方战员的定义等。这些案例有助于我们思考每一个具体事件以及可以运用的法律原则。本书的思路也是这样,作者会借用一些有趣案例阐述法律原则。

法并不神秘。基于法律藏在书本中这样一个错误认识,人们认为法律非常神秘,至少与普通人的生活很遥远。要想理解和适用法律,我们需要有专业知识,但是要想理解法律的基本原则,并不一定要经过普通法的专门训练。法律是生活的反应,其中的原则和要点与我们生活中的经历并无不同。比如说,合同法就是对人们订立、解释、遵守或违反商业或非商业协定等一系列活动的释评。非专业人士很难理解合同成立或者《防止欺诈法》的客观理论(当然,读完本书第6章就会明了),但他们经常与承诺和合同发生联系。交缠两指许下承诺后,你能作废该承诺吗?你答应带孩子去看电影,结果突然有一个重要的商业会议,你可以反悔吗?或者你突然又不想去了,可以临时反悔吗?你新买的电视机坏掉了,可以退回给商家吗?

这些是我们日常生活中经常遇到的事情。法律给我们提供了探讨这些争点与原则的空间,其基本理念可以为每一个非专业人士所接受。

法律问题不能简单作答。法律是生活的反映。生活太复杂了,法律问题与简单思维格格不入。

生活的复杂化体现在两个方面,第一,以生活基本信息之杂芜,很难提炼出法律要点,做出合适解答。以前面的限速为例,如果我们得出这样的结论:“超过这个速度驾驶的都是犯罪行为”,那就排除了例外,如“家长送病重垂危的孩子驶往医院时可能要超速”。而如果制定一个模糊规则,称“应根据具体情况,以合理速度驾驶”,我们接下来面对每个具体案例时,都会对该规则如何适用而争论不休。

第二,人们对待问题的看法都有两面性,这是我们认为生活很复杂的原因。社会需要清晰的法律规则,以确保法律的稳定、公平、可以预测。但我们也应当平衡个案,以免由于适用规则带来不公平的结果,更能将陷于规则困境的当事人解救出来。

政客大抵希望民众把法律问题简单化。最近几年,美国人已经习惯私生活被竞选广告和单纯的意识形态口号所充斥:要解决社会问题,就应当减少诉讼、严刑峻法。从本书的视角来看,政客所言并非解决之道。

法律是政治冲突的阵地。最终用法律手段来解决的社会问题都是政治论战的结果。这不仅仅是选举意义上的驴象之争,而是社会资源、社会价值之争。社会重大问题的司法判决作出之前,公众会觉得波诡云谲:谁会是本案的获益者?谁生存?谁死亡?孰对?孰错?我们从譬如堕胎之争等宪法问题里可一窥价值

冲突之端倪,当然从其他法律要点中也可察觉。比如,快餐连锁店销售了大量致胖食物,对公众因此患上的与肥胖相关的病症,他们是否因此应当承担民事责任?大家都能以更开阔的视野来评判我们的司法判决。

人民才是法的制定者。法律有时披上自然规律的外衣。法律与司法判决以固定的司法原则为后盾,给人以亘古不移的印象,让人几乎要忽略一点:法只是人制定的规则。律师和法官在打断别人时的语气,就仿佛法律是一个客观存在:“根据法律规定……”“根据该判例的原则……”他们说的都是狗屁。法都是人制定的,“法律”或者“判例”绝无控制民众的可能,应当是民众控制它们。一小撮人——特权享有者、大权在握者、法律研究者——把持了法律系统,他们应当有责任让公民建立这种观念,可他们却没有。对于某些案件,其争点是否为堕胎?产品制造者的民事责任范围是什么?口头协议的有效性如何?这些问题,不仅是律师和法官有权追求公平有效的结果,普通公民也有判断权。

本书剥掉了法律的神秘外衣,使非专业人士能了解法律背后的规则、原则和冲突。但本书并不会教你如何做自己的律师。你在本书中学不到离婚协议或者遗嘱的起草技巧,也学不到小额索赔的诉讼技巧。也许你能找到技巧大全类的图书,但本书只讨论现象背后更为重要的法律原则,而不讨论问题本身的现实解决之道。掌握了本书的知识,如果遇到实际问题,你再使用技巧大全或者与律师沟通,就会更清楚规则背后的原理。本书与其他法律学术专著或《手把手教你写遗嘱》等图书的不同之处在于:本书的阅读体验令人精神愉悦。少儿图书作家莱莫尼(Lemony Snicket)写过这样一段话:“法律书又臭又长,让人望而却步。”但本书不同。《推开美国法律之门》就像法律本身一样,让你猜、给你讲述逸闻趣事、给你提出饶有趣味的问题,并激发你求知的渴望。

本书每一章都设有问答。这些提问如同各章的提纲,你可以据此选读章节内容。有些专题甚至提问多余解答,没有确定答案。法学院学生经常被这样设问,觉得通往真理的道路布满荆棘。法律的学习过程就是这样。有些法律问题没有明晰的解答,甚至永远悬而不决。法院不可能对一切事情作出判断;对于疑难问题作出公正的解答是每一个有理性的公民的权利和责任。通读本书之后,希望你也能成为上下求索于漫漫真理之路的一员。(译文/青枝)

***To Leah and Keith,
and, always, Carole***

Preface

Law is everywhere. Listen to the television news any evening and you'll hear about a notorious criminal trial, a massive lawsuit, or a new constitutional claim. And it all seems so complicated. Why are there legal technicalities that trip up the police and allow criminals to get off? Why does litigation take so long and cost so much? How do the courts figure out how the words of the Constitution apply to situations the framers never dreamed of?

Lawyers are trained to understand issues like these, and there are plenty of resources to help them. The library at my law school has over 400,000 volumes in which lawyers can find statutes, judicial opinions, and learned commentary on the law. This book is for everybody else. *Law 101* is a basic explanation of the rules and principles that lawyers and judges use. The premise of the book is straightforward: It's not easy to decide legal questions, but anyone can acquire a basic understanding of what the questions involve.

Each of the substantive chapters of the book covers one of the basic subjects that every lawyer learns during the first year of law school: constitutional law, civil rights, civil procedure and the litigation process, torts, contracts, property, criminal law, and criminal procedure. In each chapter you will learn the fundamental principles that underlie the subject, acquire a legal vocabulary, and see how the rules are applied in ordinary and unusual situations. (If you want simple definitions of even more legal terms, consult this book's companion volume, *1001 Legal Words You Need to Know*.) The book not only tells you about the law—more importantly, it engages you in the process of lawmaking by asking you to think about the tough questions and troubling cases that lawyers and judges face. You will have some fun along the way as well, because the situations the law deals with are sometimes amusing or outrageous, and always interesting.

After reading this book, when you hear about controversial legal issues you will have a better sense of the background and the complexity of the issues and you will be better able to make your own judgments about what the law should be. You also will be better prepared to think about the legal problems that you may encounter in everyday life, from owning a home to suing someone to asserting your constitutional rights. If you ever have considered going to law

Preface

school, *Law 101* will give you a taste of what it is like. And if you are a student, either in law school or elsewhere, it will give you the big picture of basic legal subjects that otherwise can be hard to obtain.

Although I am a lawyer and law professor, writing and revising this book have been as much of an education for me as I hope it will be for its readers. I have had to rethink many subjects that are not my specialties, and I have freshly examined areas I have studied for years. I am very grateful to all of those who helped me in the process. Carl Bogus, Ed Chase, Beth Hillman, Thomas LeBien, Earl Maltz, Stanislaw Pomorski, Mike Sepanic, Rick Singer, Allan Stein, and Bob Williams gave me excellent comments. Elizabeth Boyd, Sheryl Fay, Nicole Friant, Amy Newnam, and Beth Pascal provided helpful research assistance. Chris Carr and Bill Lutz gave early support. Rutgers School of Law, Camden, and its deans provided an environment in which work of this kind could be done. Most of all, thanks to John Wright, who made it happen.

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There Are No Secret Books

You Can Understand the Law

Americans are fascinated by the law. And why not? The law is important, intellectually challenging, and sometimes outrageous. Consider some cases that have made front page news:

- Stella Liebeck, seventy-nine years old, bought a cup of coffee for forty-nine cents at the drive-through window of a McDonald's in Albuquerque, New Mexico. As she placed the cup between her legs to remove the lid to add cream and sugar, she spilled the coffee, scalding herself. Liebeck's injuries sent her to the hospital for seven days for burn treatment, including skin grafts, so she sued McDonald's, alleging that the coffee was dangerously hot. A jury awarded her \$160,000 to compensate her for her injuries and \$2.7 million to punish McDonald's, an amount the jury calculated was equal to two days of coffee sales for McDonald's. (The trial judge later reduced the punitive damage award to \$480,000.) Was this an outrageous example of a tort system run amok, or a fair judgment for an injured victim against a wrongdoer? See Chapter 5.
- Following the terrorist attacks of September 11, 2001, the administration of President George W. Bush claimed that the president had the authority as commander-in-chief to designate both foreign nationals and United States citizens as "enemy combatants" and hold them indefinitely at the naval base at Guantanamo Bay, Cuba, and elsewhere without being subject to review by the courts. The Supreme Court held the courts had the power to review the detentions, and citizens could not be held indefinitely without due process. Why does the Supreme Court get to decide issues involving national security, and how do the justices know what the Constitution means in cases like these? See Chapter 2.