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LAW 101

Everything You Need
to Know About
American Law

FOURTH EDITION

JAY M. FEINMAN

Law 101

Fourth Edition

JAY M. FEINMAN

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Law 101

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

Preface

Law is everywhere. Check the news any day 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 almost 500,000 volumes and innumerable online resources 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 always interesting and sometimes amusing or outrageous.

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 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, Dennis Braithwaite, Ed Chase, Kim Ferzan, Beth Hillman, Greg Lastowka, 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 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. Under presidential orders and Congressional legislation the detainees were denied access to the courts to review their status. 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.

- Marc Bragg bought and sold virtual land and other assets in Second Life, the enormously popular online role-playing game. When he exploited a gap in the game's code to acquire a parcel of land at a bargain price, Linden Research, the producer of Second Life, froze his account, depriving him of virtual property worth between \$4,000 and \$6,000 in the real world. Bragg sued Linden; Linden defended, claiming that property owned in Second Life was subject to the game's terms of service that gave Linden complete control over it. How does the law take property concepts dating back to medieval times and apply them to the Internet in the twenty-first century? If a virtual world is a community with its own norms and rules, should it have its own legal system as well, or should the existing legal system at least recognize the norms and rules as binding in real-world courts? See Chapter 7.
- On the evening of February 26, 2012, George Zimmerman, a neighborhood watch volunteer, called 911 in Sanford, Florida, to report "a real suspicious guy" who "looks like he is up to no good or he is on drugs or something." The "guy" was Trayvon Martin, a seventeen-year-old who had gone to a local 7-Eleven to buy a bag of Skittles. Zimmerman followed Martin and an altercation and struggle ensued, during which Zimmerman shot and killed Martin. When tried for homicide, Zimmerman pleaded self-defense, arguing that Martin had punched him and was hammering his head to the ground, and the jury acquitted Zimmerman. The case also raised questions about Florida's "Stand Your Ground" law, which allows people to use deadly force to defend themselves even if they could retreat from a dangerous situation. When should a person be able to kill in self-defense? See Chapter 8.

Most of the law is not about important cases like the president's definition of enemy combatants or dramatic cases like George Zimmerman's. Law penetrates our everyday life in many ways. Critics charge that in recent years we have become plagued with "hyperlexis"—too much law and too many lawyers—but law has pervaded our society from the beginning. Even before the Pilgrims landed in Massachusetts they formulated the Mayflower Compact, a legal document that governed their settlement of the new world. In colonial times, legal regulation of the economy, public conduct, and social morality was at least as extensive

as it is today. Common human failings such as fornication, drunkenness, and idleness were legally—and frequently—punished, and laws closely regulated economic affairs, prescribing the size of loaves of bread and the time and place at which goods could be sold. Ordinary litigation provided an occasion for public gathering, with great orations by the lawyers and much comment by the public. Today the law affects us individually when we rent apartments or own homes, marry, drive cars, borrow money, purchase goods, belong to organizations, go to school or work, and obtain health care and collectively when the government taxes, regulates the airwaves and cyberspace, polices crime, and controls pollution.

For all our endless fascination with the law, it is hard for most people to learn much about its substance. The law is so complex and voluminous that no one, not even the most knowledgeable lawyer, can understand it all. Moreover, lawyers and legal scholars have not gone out of their way to make the law accessible to the ordinary person. Just the opposite: Legal professionals, like the priests of some obscure religion, too often try to keep the law mysterious and inaccessible.

But everybody can learn something about the law. That is what *Law 101* is for. It explains the basics of the law—the rules, principles, and arguments that lawyers and judges use. Not all the law is here; there is just too much law for anyone to learn more than a few pieces of it here and there. That's one reason that most lawyers specialize, so that they can learn in depth the law of medical malpractice in New Jersey or federal tax law relating to corporations, for example. But all lawyers do know pretty much the same things when it comes to basic subjects and basic concepts, because they all go through a similar law school experience.

The public seems to be morbidly fascinated by law school as much as by law. Books and movies from *The Paper Chase* to *Legally Blonde* have fed the folklore of the first year of law school as an intellectually stimulating but grueling and dehumanizing experience. Because the first year of law school is the near-universal training ground for lawyers, this book focuses on the substance of what law students learn there as the core of knowledge that is useful and interesting to nonlawyers as well.

The first-year curriculum in nearly every American law school looks alike. A few topics are fundamental, and this book explores those topics. Constitutional law involves the structure of government (Chapter 2) and personal liberties protected from government action (Chapter 3). Civil procedure concerns the process of litigation (Chapter 4). Tort law concerns personal injuries (Chapter 5). Contract law is the law of private agreements (Chapter 6). Property law governs relationships among

people with respect to the ownership of things (Chapter 7). Criminal law defines wrongful conduct for which the state can deprive a person of life or liberty (Chapter 8). Criminal procedure prescribes the process of criminal adjudication and the rights of defendants (Chapter 9).

Nearly every law school offers courses in constitutional law, contract law, and the rest, and the courses taught in different schools resemble each other to a considerable degree in the materials used and the topics covered. Schools in New Jersey, Iowa, and California all teach basic principles of national law, often using the same judicial opinions and statutes. If you attend law school after reading this book, you will find much of the first year will be familiar to you. Every course is taught by a different professor, however, and every professor has a different perspective. Some of those differences in perspective are trivial, but some are crucial. One professor may be a political liberal, another a conservative. One may favor economic analysis as a key to understanding the law, while another takes a natural law approach. Each of these differences in perspective, and the many others that occur, leads to a very different understanding of what the law is. So while law students and lawyers all understand the same law in principle, they understand it in different ways.

This book has a perspective, too. It couldn't be any other way. The perspective of this book is informed by much of the best scholarship about the law. Some of the elements of the perspective are widely accepted, and others are more controversial. The perspective can be summed up in a few insights about the law, as follows.

Law is not in the law books. Books are one of the first things that come to mind when we think about law: fat texts almost too heavy to lift; dust-covered, leather-bound tomes of precedents; law libraries filled with rows and rows of statutes and judicial opinions. While books tell us a lot about the law, they are not the law. Instead, law lives in conduct, not on the printed page; it exists in the interactions of judges, lawyers, and ordinary citizens.

Think, for example, about one of the laws we most commonly encounter: the speed limit. What is the legal speed limit on most interstate highways? Someone who looked only in the law books might think the answer is 65 mph, but we know better. If you drive at 65 mph on the New Jersey Turnpike, be prepared to have a truck bearing down on you, flashing its lights to get you to pull into the slow lane. The speed limit according to drivers' conduct is considerably higher than 65. And legal officials act the same way. The police give drivers a cushion of 3 to 5 mph, never giving a speeding ticket to someone who is going 66. If they did, the judges would laugh them out of traffic court. As a practical

matter, the court doesn't want to waste its time with someone who violated the speed limit by 1 or 2 mph, and as a matter of law, the police radar often isn't accurate enough to draw that fine a line anyway. So what is the law on how fast you can drive? Something different than the books say.

To understand the law, then, we have to examine events as they occur in the world. We can generalize from those events and create theories and concepts to inform our understanding of the law, but the touchstone is always the world and not the idea. One way this is done in law school is by focusing on individual fact situations that give rise to litigation and on the judicial opinions that resolve the situations, known as *cases*. Each of these cases starts out as a real-world event, such as the killing of Trayvon Martin by George Zimmerman or the detention of enemy combatants, and becomes the vehicle for thinking about many related events in a way that allows us to go back and forth between the particular fact situation and a general principle of law. This book follows that model and uses many interesting cases to explore legal principles.

Law is not secret. Along with the mistaken notion that the law resides in the books goes the equally mistaken idea that law is secret, or at least inaccessible to the ordinary person. To understand and apply the law at the advanced, technical level that lawyers do requires professional knowledge, but to understand the basic substance of the law does not. Law reflects life. The principles and issues embodied in the law are not different from those that we experience in other aspects of our lives. Contract law, for example, is a commentary on the way people make, interpret, keep, and break their promises in commercial and noncommercial settings. Few nonlawyers can describe the objective theory of contract formation or the Statute of Frauds (you will be able to after you read Chapter 6), but they have thought a lot about contracts and promises. If you cross your fingers when you make a promise, does it mean that the promise doesn't count? If you promise to take your children to the movies, are you off the hook if an important business meeting comes up in the meantime? What about if you just don't feel like it? If your newly purchased television doesn't work, can you return it to the store? And so on.

These are the kinds of issues that we all confront every day. The law provides a different forum for the discussion of these issues and the exploration of the principles, and the basic ideas involved are wholly accessible to the nonlawyer.

There are no simple answers. Law reflects life, and life is complicated. Therefore, legal problems defy simple solutions.

Life is complicated in two ways. First, things are often messy, so it is hard to define a legal issue and construct an appropriate solution. Think about the speed limit. If we formulate a clear rule, in this instance “driving faster than the speed limit is a crime,” we will inevitably end up with exceptions, such as “a parent rushing a desperately ill child to the hospital may exceed the speed limit.” If we formulate a fuzzy rule—“drive at a speed that is reasonable under the circumstances”—we will engender arguments in every case about how the rule should apply.

Second, life is complicated because we often are of two minds about an issue. We would like to have clear legal rules to ensure consistency, fairness, and predictability. But we want to make room for the equities of individual cases in which the application of a rule would produce an unfair result, in order to relieve a particular party of the hardship of the rule.

Politicians often would like us to think that there are simple answers to tough legal questions. Over the past few years we have become accustomed to sound-bite politics and simplistic ideologies that assert that all our problems can be solved by cutting down on frivolous litigation, getting tough on crime, making people responsible for their actions, or adhering to some other slogan. From the perspective used in this book, it's just not so.

Law is a battleground of political conflict. The complex questions with which law deals and our conflicting responses to them are the stuff of political controversy. This is not politics in the Republican–Democratic, electoral sense, but a struggle over social resources and social values just the same. At stake in legal decisions are the most fundamental kinds of questions with which any society has to grapple: Who gets what? Who lives and who dies? What is right and what is wrong? Everyone can see this in major constitutional issues like the abortion controversy, but it applies to all other legal issues, too. Should fast-food chains be liable for obesity-related illnesses because they promote and sell super-sized portions of fattening foods? We have to see all legal decisions like this as political in a broad sense.

People make the law. Often, the law appears to be part of the natural order of things. The law and legal decisions can be seen as inevitable, based on immutable principles of justice, hardly the product of human action at all. Lawyers and judges speak as if the law itself were acting, free from their intervention: “The law requires that. . .” or “The precedents determine a result. . . .” Nonsense. Law is made by people, and “the law” or “the precedents” never control anything; we control them. All this view does is let a small group of people—the privileged, the politically powerful, and the legal professionals—control the legal