

LEGAL METHODS

CASES AND MATERIALS

THIRD EDITION

JANE C. GINSBURG

FOUNDATION PRESS

75TH ANNIVERSARY

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CASES AND MATERIALS

LEGAL METHODS

THIRD EDITION

by

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75TH ANNIVERSARY

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395 Hudson Street
New York, NY 10014
Phone Toll Free 1-877-888-1330
Fax (212) 367-6799
foundation-press.com

Printed in the United States of America

ISBN 978-1-59941-539-0



TEXT IS PRINTED ON 10% POST
CONSUMER RECYCLED PAPER



. . . I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules, the paradise of a justice that would declare itself by tokens plainer and more commanding than its pale and glimmering reflections in my own vacillating mind and conscience. I found “. . . that the real heaven was always beyond.” As the years have gone by, I have become reconciled to the uncertainty, because I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.

Benjamin Nathan Cardozo, *The Nature of the Judicial Process* 166 (1921)

To George
and Paul and Clara

*

PREFACE

This casebook serves a course in introduction to legal reasoning. It is designed to initiate students in the legal methods of case law analysis and statutory interpretation. In a course of this kind, students should acquire or refine the techniques of close reading, analogizing, distinguishing, positing related fact patterns, and criticizing judicial and legislative exposition and logic. All of this is fairly standard to the first year, indeed, the first semester, of law school. I hope that students learn from a course in legal methods not only familiarity with these new techniques, but sufficient mastery of them to avoid losing sight of the practical consequences of their implementation.

Law students' introduction to law can be unsettling: the sink or swim approach favored by many schools casts students adrift in a sea of substantive rules, forms and methods. By contrast, the Legal Methods course seeks to acquaint students with their new rhetorical and logical surroundings before, or together with, the students' first encounters with the substance of contracts, torts, or other first year courses. This approach may not only be user friendly; it should also prompt students to take a critical distance from the wielding of the methods. In this way, one hopes, students may avoid (or at least broaden) the tunnel vision that so often afflicts beginning law students. They should learn that "thinking like a lawyer" does not mean letting oneself be seduced by the artifice of enunciating and manipulating categories. Nor does it mean diligently and complacently working one's way through a text without stepping back to inquire whether the resulting interpretation makes any common sense.

Indeed, "common lawyers" have long understood that it is more important to attend to a decision's reasoning than simply to parrot the rule for which a decision is said to stand. Thomas Littleton, an English treatise writer who died in 1481, cautioned his son the aspiring lawyer not to take for granted that things written in treatises (including his own) in fact correctly state the law; rather they are guideposts to understanding the law that emerges from "the arguments and reasons."

Notwithstanding that certain things that be noted and specified in the said books be not law, yet [they are] such things that make thee more apt and able to understand, and learn the arguments and the reasons of the law. For by the arguments and the reasons in the law, a man may sooner come to the certainty and to the knowledge of the law.

Littleton's Tenures in English, London 1556.

This edition of the casebook has augmented the comparative law dimension of its predecessor. In addition to retaining the materials on civil law, this edition affords a glimpse of the variations among common law jurisdictions, including the U.K. and other Commonwealth countries. Just as common lawyers and civilians' methodologies often diverge, so the formulation of precept and argument by English judges can seem rather alien to Americans, despite our shared common law orientation. American lawyers should learn, from the outset, that our legal methods are neither the only, nor necessarily the best, ones. This casebook does not purport to provide systematic instruction in foreign law, however. Its aspiration is more modest, yet also more fundamental: by offering an occasional comparative law perspective, to challenge the insularity that too often characterizes American legal thought and practice. An appreciation of other common law approaches as well as of civil law systems is likely to become increasingly important to tomorrow's lawyers; the start of legal studies is as good a place as any to begin to promote that understanding.

The current edition also reorganizes and augments the statutory materials. While students tend to adapt readily to case law analysis, they often find statutory interpretation less congenial. Cases tell stories; statutes enunciate rules. And the enunciation may be extremely opaque. Perhaps because statutory text lacks the both human drama and the expository charm of case law, casebooks on statutory interpretation, including earlier editions of this one, tend to present issues of interpretation through judicial opinions that construe the statutes in question, rather than confronting students directly with the statutes themselves. To remedy that shortcoming, this edition adds extensive excerpts from statutes (such as the 2007 California "dead celebrities" law) whose subject matter the students may find engaging. The materials in Part III thus encourage students to decipher the text in order to understand the problem to which the statutory text responds and the ways the text addresses the problem. Students should also inquire whether the text satisfactorily solves the problem as well as whether it may create new problems. The Review Problems in Part IV add further to the prior collection of statutory provisions for the students to work through.

Finally, a course, and a casebook, like these should constantly prompt the student to ask whether an analysis leads to outcomes the student would have approved before starting law school. One goal of a Legal Methods course is to push the student to go beyond stating a conclusion, to articulate and evaluate the steps and arguments leading to that conclusion. But if "thinking like a lawyer" may require students to think differently than before because it demands that they spell out their reasoning and justify their responses, it by no means demands that they believe in different goals or principles than before. Rather, they should be all the better equipped to advance the positions to which they subscribe.

JANE C. GINSBURG

March 2008

ACKNOWLEDGEMENTS

As with the 1996 First Edition of this casebook, I continue to owe a great deal to the work of my Columbia Law School colleagues Arthur Murphy, the late John M. Kernochan, and the late Harry Jones, whose *Legal Method: Cases and Text Materials*, Copyright © 1980, The Foundation Press, Inc., provided the initial foundation of this casebook. I hope that they would find that this book respects and continues in their spirit.

The illustrations of Adine Kernberg Varah, Esq. (Columbia Law School JD '95) that enlivened the First and Second Editions reappear in this edition, along with additional illustrations newly created for this edition. Ms. Varah's unique depictions encapsulate a variety of concepts in legal methods with humor and striking acumen. I trust that readers will agree that her contributions have made this book both more thought-provoking and more fun.

I am also indebted for new or revised text notes to Professor Gary Bell of the National University of Singapore (and formerly Associate in Law, Columbia University), to Lionel Bently, Herschel Smith Professor of Intellectual Property Law, University of Cambridge (UK), and to Simona Gory, Associate in Law, Columbia University, 2006-08 (Columbia LLM 2008). Many thanks for research assistance to Emily Weiss, Columbia Law School class of 2009.

Other Associates with whom I have worked over the years, and whose suggestions have consistently improved this book, deserve thanks as well: Wade Wright, Associate in Law 2007-09; Professor Anthony Colangelo, Southern Methodist University Law School; Professor Melissa Murray, Boalt Hall School of Law; Professor Yane Svetiev, Brooklyn Law School; Daniel Kalderimis (Columbia LLM 2004), Judith Smith (Columbia LLM 2003), Professor Jo Mossop of Victoria University, Wellington, N.Z.; Professor Andrew Perlman, Suffolk Law School; Professor Camille Nelson, St. Louis University; Professor Bradley Wendel, Cornell Law School; Professor Adele Blackett, McGill University, Montréal Canada; William Ryan, Esq. (Columbia JD '92, LLM 1997); Professor Donna Young, Albany Law School; Professor Lorne Sossin, University of Toronto Law School; Professor Celia Taylor, University of Denver College of Law.

From the First and Second Editions, thanks also to my Columbia colleagues Richard Briffault and Peter Strauss and my former colleague, Rice University President David Leebron, and to Prof. William Eskridge of the Yale Law School, as well as to past research assistants: Judith Church, Esq. (Columbia JD '92); Ashima Dayal, Esq. (Columbia JD '96); Cathleen Ellis

(Columbia JD 2004); Justine Harris, Esq. (Columbia JD '96); Suk Kim, Esq. (Columbia JD '94); Cristine Mesch-Sapers, Esq. (Columbia JD '95); Olivia Radin (Columbia JD '04), Alison Wang, Esq. (Columbia JD '97); and David Zlotchew, Esq. (Columbia JD '96).

Thanks for administrative support on this edition to Nersa Miller, and, for past editions, to Nick Giannou and Gabriel Soto.

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