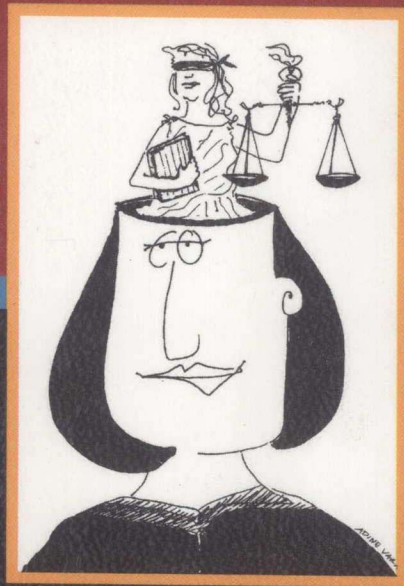


# Introduction to Law and Legal Reasoning



JANE C. GINSBURG

FOUNDATION PRESS

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INTRODUCTION TO

# LAW AND LEGAL REASONING

(College Edition to Legal Methods, 2nd Edition)

*by*

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. . . 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

\*

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## PREFACE

This course book serves an undergraduate course in introduction to law and 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 college 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, especially should they later begin law studies in professional school.

This course book seeks to prompt students to take a critical distance from the wielding of the methods. In this way, one hopes, students 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.

This course book includes a comparative law dimension. In addition to materials on civil law, this book 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. Americans should learn, from the outset, that our legal methods are neither the only, nor necessarily the best, ones. This text 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.

A course and a text like these should constantly prompt the student to ask whether an analysis leads to outcomes the student would have approved before starting an introductory law course. 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.

Finally, the illustrations of Adine Kernberg Varah, Esq. enliven this book. 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.

JANE C. GINSBURG

June 2003



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The illustrations of Adine Kernberg Varah, Esq. (Columbia Law School JD '95) that enlivened the First Edition 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.

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