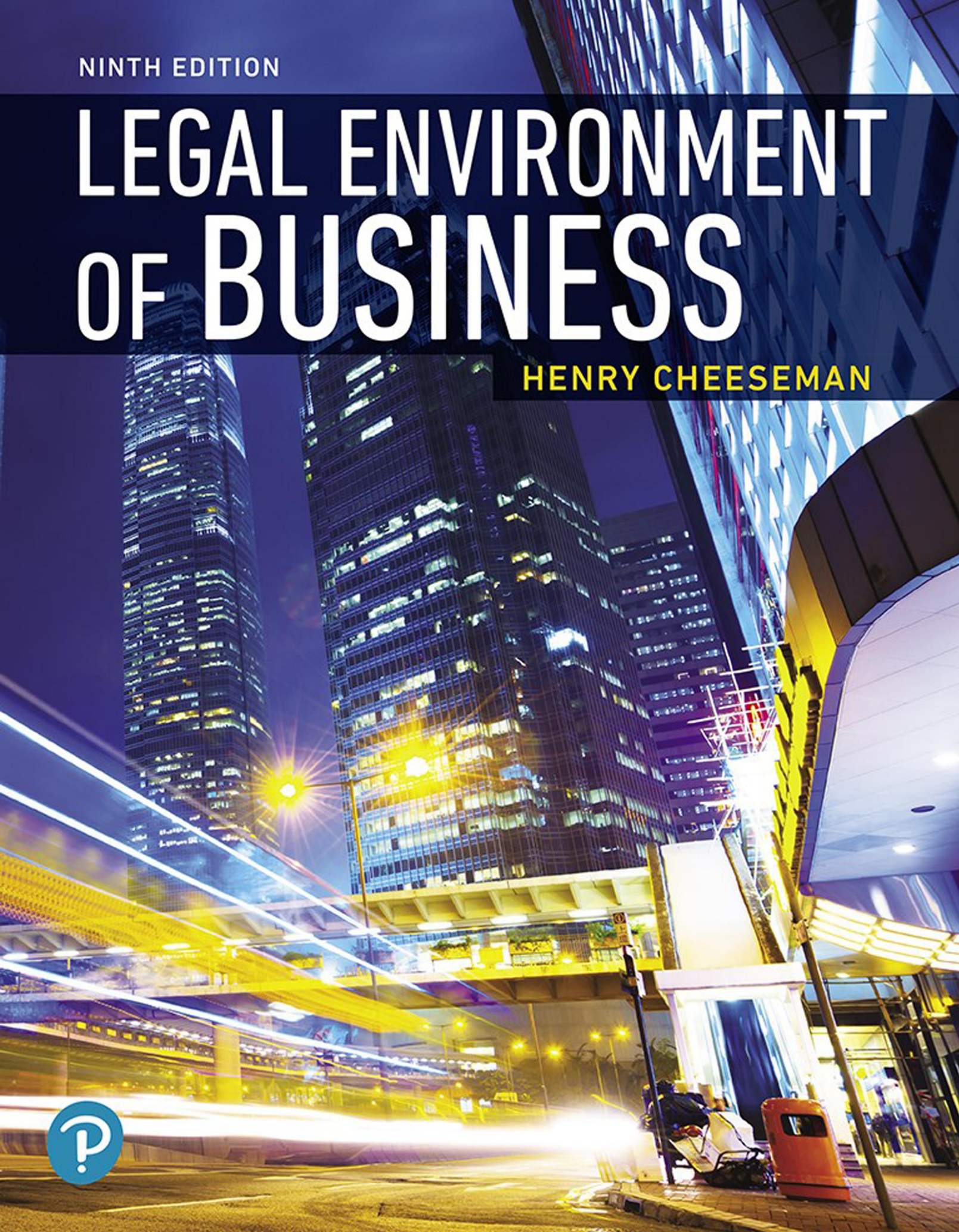
NINTH EDITION

LEGAL ENVIRONMENT OF BUSINESS

HENRY CHEESEMAN



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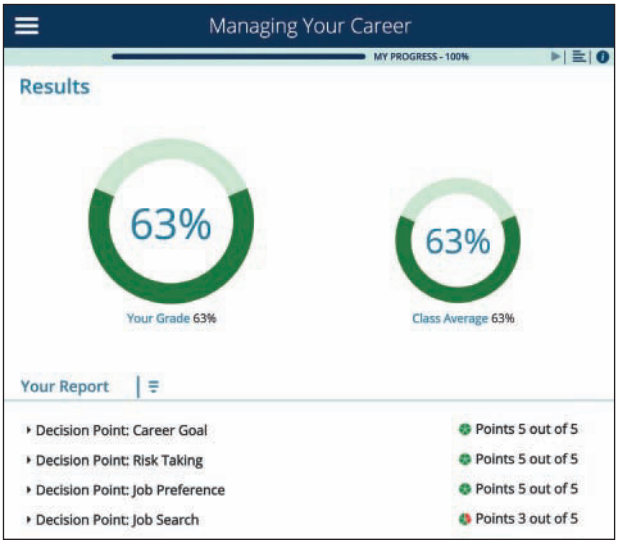

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LEGAL ENVIRONMENT OF BUSINESS

NINTH EDITION

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Pearson

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Interior Design: Pearson CSC
Cover Design: Pearson CSC
Cover Art: loveguli/gettyimages
Printer/Binder: LSC Communications, Inc./ Willard
Cover Printer: LSC Communications, Inc./ Willard

Library of Congress Cataloging-in-Publication Data

Names: Cheeseman, Henry R., author.
Title: Legal environment of business : online commerce, business ethics, and global issues / Henry R. Cheeseman, Professor Emeritus, Marshall School of Business, University of Southern California.
Description: Ninth edition. | Hoboken : Pearson, [2018] | Includes bibliographical references and index.
Identifiers: LCCN 2018042707 | ISBN 9780135173954 | ISBN 0135173957
Subjects: LCSH: Commercial law—United States. | LCGFT: Casebooks (Law)
Classification: LCC KF889 .C4336 2018 | DDC 346.7307—dc23 LC record available at https://lccn.loc.gov/2018042707

10 9 8 7 6 5 4 3 2 1

ISBN 10: 0-13-517395-7
ISBN 13: 978-0-13-517395-4

Dedication

To my wife, Jin Du, and to our new twins

Ziva and Xavier

BRIEF CONTENTS

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PREFACE

New to the Ninth Edition

This ninth edition of *Legal Environment of Business* is a significant revision of Professor Cheeseman's legal environment textbook that includes many new cases and features.

New U.S. Supreme Court Cases

Seven new U.S. Supreme Court cases, including:

- *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.* (Title VII applies to prevent religious employment discrimination against a Muslim female job applicant who was not hired because she wore a head scarf, which would have violated the clothing store's policy against sales personnel wearing head caps.)
- *Salman v. United States* (In a situation where an investment banker who gave insider trading tips of impending mergers to his brother who traded on the information and in turn tipped another person who also traded on the information, the last tippee can be held liable for illegal tippee trading even though the tipper did not personally receive money or property from the last tippee.)
- *OBB Personenverkehr AG v. Sachs* (A U.S. citizen who purchased a rail pass from an internet seller in Massachusetts to use in Europe and was seriously injured when she fell at a train station in Innsbruck, Austria, is barred from suing the Austrian railroad in U.S. district court based on sovereign immunity.)
- *Michigan v. Environmental Protection Agency* (The EPA acted unreasonably when it did not consider cost when it ordered power plants to spend $9 billion per year to reduce hazardous air pollutants that would yield benefits of reduced air pollution by only $6 million per year.)
- *Obergefell v. Hodges* (The U.S. Supreme Court held that same-sex couples may exercise the fundamental right to marry and held that state laws that did not permit or recognize same-sex marriages violated the Due Process and Equal Protection clauses to the U.S. Constitution.)
- *Tyson Foods, Inc. v. Bouaphakeo* (Class certified to bring a class action lawsuit against an employer to recover overtime pay.)
- *Goodyear Tire & Rubber Company v. Haeger* (Calculation of an award of lawyer's fees to a plaintiff as a sanction against a defendant for not disclosing evidence.)

CASE 5.2 U.S. SUPREME COURT *CASE Due Process and Equal Protection Clauses*

Obergefell v. Hodges
135 S.Ct. 2584, 2015 U.S. Lexis 4250 (2015)
Supreme Court of the United States

"Petitioners ask for equal dignity in the eyes of the law. The Constitution grants them that right."

—Kennedy, Justice

Facts
Michigan, Kentucky, Ohio, and Tennessee define marriage as a union between one man and one woman. State officials enforced these laws and refused to marry same-sex couples. Ohio, Tennessee, and

due process of law." This analysis compels the conclusion that same-sex couples may exercise the right to marry. The right to marry thus dignifies couples who wish to define themselves by their commitment to each other. Same-sex couples have the same right as opposite-sex couples to enjoy intimate association.

The right of same-sex couples to marry that is part of the liberty promised by the Four-

CASE 19.3 *U.S. SUPREME COURT CASE Religious Accommodation*

Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.
135 S.Ct. 2028, 2015 U.S. Lexis 3718 (2015)
Supreme Court of the United States

"Title VII requires otherwise-neutral policies to give way to the need for an accommodation."

—Scalia, Justice

Facts
Abercrombie & Fitch Stores, Inc. operates clothing stores. Consistent with the image Abercrombie seeks to project, the company imposes a Look Policy that governs its employees' dress. The Look Policy prohib-

Language of the U.S. Supreme Court
Abercrombie's primary argument is that an applicant cannot show disparate treatment without first showing that an employer has actual knowledge of the applicant's need for an accommodation. We disagree. An employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsub-

New State and Federal Court Cases

Twenty new state and federal court cases, including:

- *Carter's of New Bedford, Inc. v. Nike, Inc.* (A forum-selection clause was enforced that required a Massachusetts resident to bring a lawsuit against Nike in Oregon.)
- *DeCormier v. Harley-Davidson Motor Company Group, Inc.* (An exculpatory clause signed by a rider prior to participating at a Harley-Davidson motorcycle course was enforceable to prevent recovery of damages for injuries suffered by the rider in an accident.)
- *Federal Trade Commission v. Bronson Partners. LLC* (Several companies and their owners were found to have engaged in deceptive advertising for making miraculous and unverifiable weight loss claims about their products.)
- *Geshke v. Crocs, Inc.* (Crocs footwear does not present a heightened risk of danger to wearers riding escalators, so no breach of the implied warranty of merchantability occurred when a person wearing the footwear was injured while using an escalator.)
- *Kolodziej v. Mason* (A lawyer who, during an NBC interview, stated a $1 million challenge to anyone who could prove his theory of a case he was involved in was wrong, made the challenge in jest and it did not constitute an offer.)
- *McKee v. Isle of Capri Casinos, Inc.* (A patron playing a slot machine at a casino won $1.85; even though the machine malfunctioned and the screen showed $41,797,550, the casino's gambling contract, which stated that a "malfunction voids all pays," was enforced.)
- *SeaWorld of Florida, LLC v. Perez, Secretary, United States Department of Labor* (SeaWorld was held to have violated the general duty clause of the Occupation Safety and Health Act when a killer whale caused the death of a trainer during a water performance.)
- *United States v. Apple, Inc.* (Apple, which orchestrated a conspiracy among five major publishing companies to enter a price-fixing agreement to raise the retail price of digital books sold on Apple's iBookstore engaged in a *per se* price-fixing in violation of antitrust law.)

CASE 20.5 ***FEDERAL COURT CASE General Duty Standard***

SeaWorld of Florida, LLC v. Perez, Secretary, United States Department of Labor

748 F.3d 1202, 2014 U.S. App. Lexis 6660 (2014)
United States Court of Appeals for the District of Columbia

"The remedy imposed for SeaWorld's violations does not change the essential nature of its business."

—Rogers, Circuit Judge

Facts

SeaWorld of Florida, LLC, operates a theme park in Orlando, Florida, that is designed to entertain and educate paying customers by displaying and studying marine animals. Dawn Brancheau, a 15-year veteran trainer at SeaWorld, was interacting with Tilikum, a killer whale, during a performance before an audience in a pool at SeaWorld. The Secretary of Labor ... whales unless they are protected by physical barriers or decking systems, and imposed a $12,000 fine. SeaWorld petitioned for review.

Issue

Did SeaWorld violate the general duty clause?

Language of the Court

The remedy imposed for SeaWorld's violations does not change the essential nature of its business. There will still be human interactions and

CASE 9.5 ***STATE COURT CASE Exculpatory Agreement***

DeCormier v. Harley-Davidson Motor Company Group, Inc.

446 S.W.3d 668, 2014 Mo. Lexis 215 (2014)
Supreme Court of Missouri

"While exculpatory agreements will be strictly construed, this court will enforce exculpatory agreements to protect a party from liability for their own negligence."

—Breckenridge, Judge

Facts

Cynthia DeCormier participated in the Rider's Edge New Riders Course, an instructional course for new motorcycle riders sponsored by Harley-Davidson Motor Company Group, Inc. and conducted by St. Louis Motorcycle, Inc. d/b/a/ Gateway Harley- ... instructors should not have directed her to perform motorcycle exercises at the time of her accident. Harley-Davidson and Gateway filed a motion for summary judgment, alleging that the exculpatory clause signed by DeCormier before participating in the course released them from liability. The circuit court granted summary judgment in favor of Harley-Davidson and Gateway. DeCormier appealed the decision.

Issue

Is the exculpatory clause signed by plaintiff DeCormier enforceable?

New Special Features on Critical Legal Thinking, Ethics, and Information Technology

Twenty new special features, including:

- Ethics: *Nondisclosure of Evidence by Wal-Mart*
- Information Technology: *"Google" Trademark is Not a Generic Name*

Ethical

Ethics

Nondisclosure of Evidence by Wal-Mart

"Rather, any prejudice that the jury may have harbored was due to Wal-Mart's initial refusal to produce evidence of or admit the evidence of the grease spill."

—Rice, Justice

Holly Averyt, a commercial truck driver, slipped in grease while making a delivery to Wal-Mart store number 980 in Greeley, Colorado. Averyt ruptured a disc in her spine and injured her shoulder and neck. These injuries left her unable to perform many daily functions. Averyt sued Wal-Mart Stores, Inc., alleging claims of negligence and premises liability. Averyt's attorney sought evidence from Wal-Mart documenting the grease spill, but Wal-Mart denied the existence of the grease spill and did not turn over documents to Averyt. At trial, Averyt's spill and disclosed documents that confirmed the existence of the spill, including documents from three companies that were involved in cleaning up the spill. Wal-Mart ceased to deny the existence of the grease spill but instead asserted that it had exercised reasonable care to clean up the spill. The jury found in Averyt's favor and the court awarded her $11 million in damages. On appeal, the Colorado Supreme Court upheld Wal-Mart's liability and the award of damages. The court stated, "Any prejudice that the jury may have harbored was due to Wal-Mart's initial refusal to produce evidence of or admit the evidence of the grease spill. We do not find that the jury's award was the result of unfair prejudice." *Averyt v. Wal-Mart Stores, Inc.*, 265 P.3d 456, 2011 Colo. Lexis 857 (Supreme Court of Colorado, 2011)

- Critical Legal Thinking: *Volkswagen Emissions Scandal*
- Information Technology: *Initial Coin Offering (ICO)*
- Critical Legal Thinking: *Are FedEx Drivers Independent Contractors?*
- Critical Legal Thinking: *Interest Rates of Over 1,000% Per Year on Consumer Loans is Unconscionable*
- Information Technology: *Regulation Crowdfunding*
- Information Technology: *Social Media Posting and Photographs are Discoverable Evidence*

Information Technology

Social Media Postings and Photographs are Discoverable Evidence

"There is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media."

—Gross, Judge

Maria Nucci claimed that when she was in a store owned by Target Corporation she slipped and fell on a foreign substance on the floor of the store. Nucci sued Target to recover damages for her alleged injuries. Nucci claimed that she was seriously injured, experiences pain from the injury, suffers emotional pain and suffering, and suffers social media accounts for the two years prior to the date of the incident to the present. The trial court issued an order compelling discovery of the photographs from Nucci's social media sites. In upholding the order, the court of appeals stated, "The information sought, photographs of Nucci posted on Nucci's social media sites, is highly relevant. If a photograph is worth a thousand words, there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media." *Nucci v. Target Corporation*, 162 So.3d 146, 2015 Fla. App. Lexis 153 (District Court of Appeal of Florida 2015)

To improve student results, we recommend pairing the text content with ***MyLab Business Law****, which is the teaching and learning platform that empowers you to reach every student. By combining trusted author content with digital tools and a flexible platform, MyLab personalizes the learning experience and will help your students learn and retain key course concepts while developing skills that future employers are seeking in their candidates.*

From Mini Sims to Dynamic Study Modules, MyLab Business Law helps you teach your course, your way. Learn more at www.pearson.com/mylab/business-law.

Solving Teaching and Learning Challenges

Developing Skills for Your Career

Critical Legal Thinking

Checks and Balances

Certain **checks and balances** are built into the U.S. Constitution to ensure that no one branch of the federal government becomes too powerful. Following are several of these major checks and balances.

- The *judicial* branch has authority to examine the acts of the other two branches of government and determine whether those acts are constitutional.[4]
- The *executive* branch can enter into treaties with foreign governments only with the advice and consent of the Senate.
- The *legislative* branch is authorized to create federal courts and determine their jurisdiction and to enact statutes that change judicially made law.
- The president nominates individuals to be federal judges but a majority vote of the U.S. Senate is required to *confirm* the nominee as a federal judge.
- A president can be removed from office following impeachment and conviction for treason, bribery, or other crimes. The process starts in the House of Representatives, which can approve articles of impeachment by a majority vote. The Senate tries the case, where a two-thirds vote is required for conviction. If convicted, the president is removed from office.

If you haven't yet decided on a major, you may be thinking that this section isn't relevant to you. Let me assure you it is. Whether or not you plan on a career in business, the lessons you learn in this course will help you (in business and/or in your life in many ways). Moreover, it is only through the aggregate of your educational experience that you will have the opportunity to develop many of the skills that employers have identified as critical to success in the workplace. In this course, and specifically in this text, you'll have the opportunity to develop and practice these skills through features such as Critical Thinking Legal Questions and Information Technology Law cases.

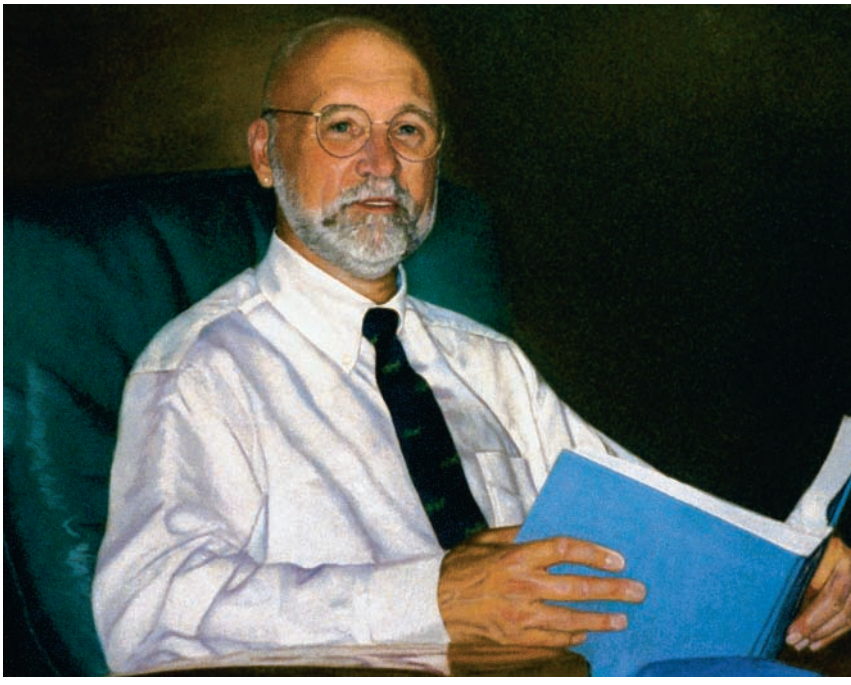
Instructor Resources

Business Law comes with the following teaching resources:

Supplements available to instructors at www.pearsonhighered.com	Features of the Supplement
Instructor's Manual Jeff Penley, J.D., Senior Professor of Business Law and Ethics Catawba Valley Community College Hickory, North Carolina 28602	• Chapter-by-chapter summaries • Examples and activities not in the main book • Teaching outlines • Teaching tips • Solutions to all questions and problems in the book
Case Solutions Henry Cheeseman, Professor Emeritus, Marshall School of Business, University of Southern California	Solutions to the end-of-chapter content.
Test Bank William J. Kresse, JD, MS, CPA/CFF, CFE, CGMA, Esq. College of Business Governors State University University Park, Illinois, USA	4,000 multiple-choice, true/false, short-answer, and graphing questions with these annotations: • Difficulty level (1 for straight recall, 2 for some analysis, 3 for complex analysis) • Type (Multiple-choice, true/false, short-answer, essay • Topic (The term or concept the question supports) • Learning outcome • AACSB learning standard (Written and Oral Communication; Ethical Understanding and Reasoning; Analytical Thinking; Information Technology; Interpersonal Relations and Teamwork; Diverse and Multicultural Work; Reflective Thinking; Application of Knowledge) • Page number in the text
Computerized TestGen	TestGen allows instructors to: • Customize, save, and generate classroom tests • Edit, add, or delete questions from the Test Item Files • Analyze test results • Organize a database of tests and student results.
PowerPoint Presentation Dr. Julie Boyles, Assistant Professor, University Studies Portland State University	Slides include the graphs, tables, and equations in the textbook. PowerPoints meet accessibility standards for students with disabilities. Features include, but not limited to: • Keyboard and Screen Reader access • Alternative text for images • High color contrast between background and foreground colors.

Legal Environment of Business, Ninth Edition, is available as an eBook and can be purchased at most eBook retailers.

ABOUT THE AUTHOR



Henry R. Cheeseman is professor emeritus of the Marshall School of Business of the University of Southern California (USC), Los Angeles, California.

Professor Cheeseman earned a bachelor's degree in finance from Marquette University, both a master's in business administration (MBA) and a master's in business taxation (MBT) from the University of Southern California, a juris doctor (JD) degree from the University of California at Los Angeles (UCLA) School of Law, a master's degree with an emphasis on law and economics from the University of Chicago, and a master's in law (LLM) degree in financial institutions law from Boston University.

Professor Cheeseman was director of the Legal Studies in Business Program at the University of Southern California. He taught business law, legal environment, and ethics courses in both the Master of Business Administration (MBA) and undergraduate programs of the Marshall School of Business of the University of Southern California. At the MBA level, he developed and taught courses on corporate governance, securities regulation, mergers and acquisitions, and bankruptcy law. At the undergraduate level, he taught courses on business law, the legal environment of business, ethics, business organizations, cyberlaw, and intellectual property.

Professor Cheeseman received the Golden Apple Teaching Award on many occasions by being voted by the students as the best professor at the Marshall School of Business of the University of Southern California. He was named a fellow of the Center for Excellence in Teaching at the University of Southern California by the dean of the Marshall School of Business. The USC's Torch and Tassel Chapter of the Mortar Board, a national senior honor society, tapped Professor Cheeseman for recognition of his leadership, commitment, and excellence in teaching.

Professor Cheeseman writes leading business law and legal environment textbooks that are published by Pearson Education, Inc. These textbooks include *Business Law; Contemporary Business Law; and Legal Environment of Business.*

Professor Cheeseman is an avid traveler and amateur photographer. All of the photographs that appear in this textbook (except the book cover photo) were taken by Professor Cheeseman.

ACKNOWLEDGMENTS

When I first began writing this book, I was a solitary figure, researching cases online and in the law library and writing text on the computer and by hand at my desk. As time passed, others entered upon the scene—copyeditors, developmental editors, reviewers, and production personnel—and touched the project and made it better. Although my name appears on the cover of this book, it is no longer mine alone. I humbly thank the following persons for their contributions to this project.

The Exceptional Pearson Professionals

I appreciate the ideas, encouragement, effort, and decisions of the management team at Pearson: Stephanie Wall, Director of Portfolio Management, and Melissa Feimer, Managing Producer, for their support in the publication of this book.

I'd also like to thank Lori Eschholz for her excellent copy editing of the manuscript, Natalie Doel for her outstanding proof-reading of this revision, and Gladys Soto, Content Producer at Pearson, for her many contributions to the book.

And a special thanks to Leah Grace Salazar, Editorial Project Manager at SPi Global, and Prince John William Carey, Downstream Project Manager at SPi Global, for their excellent work on producing the book. It was a delight working with such professionals, who I now consider friends.

I would especially like to thank the professionals of the sales staff of Pearson Education, particularly all the knowledgeable sales representatives.

Personal Acknowledgments

My Family

I would like to dedicate this book to my wife, Jin Du, and our twins, Ziva and Xavier.

My Relatives

I thank my parents—Henry B. and Florence, deceased—who had a profound effect on me and my ability to be a professor and writer. I also thank other members of my family, particularly my brother Gregory—with whom a special bond exists as twins—and the rest of my family, including my sister Marcia, deceased; Gregory's wife Lana; my nephew Gregory and his wife Karen; my niece Nicky and her husband Jerry; and my great nieces Lauren, Addison, and Shelby.

Students

I'd like to acknowledge the students at the University of Southern California (USC) and the students at other colleges and universities in the United States and around the world. Their spirit, energy, and joy are contagious. I love teaching my students (and, as important, my students teaching me). At the end of each semester, I am sad that the students I have come to know are moving on. But each new semester brings another group of students who will be a joy to teach. And thus, the cycle continues.

Colleagues

Certain people and colleagues are enjoyable to work with and have made my life easier as I have endeavored to write this new ninth edition of Legal Environment of Business.

I would like to thank Kerry Fields, my colleague who teaches business, international, real estate, and employment law courses at the University of Southern California, who is a superb professor and a wonderful friend.

I also thank Kevin Fields, my colleague who teaches business, corporation, and real estate law courses at the University of Southern California, who is an excellent professor and a close friend.

And I give special thanks to Helen Pitts, Debra Jacobs, Terry Lichvar, and Jean Collins, at the Marshall School of Business, who are always a joy to work with.

Business Law Professors

I would also like to thank the professors who teach business law, legal environment of business, and other law-related courses at undergraduate and MBA programs at colleges and universities in the United States and around the world for their dedication to the discipline. Their experience in the law and teaching ability make them some of the greatest professors on any college or university campus.

Author's Personal Statement

While writing the preface and acknowledgments, I have thought about the thousands of hours I have spent researching, writing, and preparing this manuscript. I've loved every minute, and the knowledge gained has been sufficient reward for the endeavor. I hope this book and its supplementary materials will serve you as well as they have served me.

With joy and sadness,
emptiness and fullness,
honor and humility,
I surrender the fruits of this labor.

Henry R. Cheeseman

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PART

I

Legal Environment, Judicial System, Dispute Resolution, and Business Ethics

CHAPTER

1 Legal Heritage and the Information Age

U.S. CAPITOL, WASHINGTON DC
The U.S. Congress, which is a bicameral system made up of the U.S. Senate and the U.S. House of Representatives, creates federal law by enacting statutes. Each state has two senators and is allocated a certain number of representatives based on population. The U.S. Senate and U.S. House of Representatives are based in the Capitol building.

Learning Objectives and Chapter Contents

Introduction to Legal Heritage and the Information Age

What Is Law?

1.1 Define *law*.
CONTEMPORARY ENVIRONMENT • *Functions of the Law*

Flexibility of the Law

1.2 Describe the flexibility of the law
CRITICAL LEGAL THINKING • *Brown v. Board of Education*

Schools of Jurisprudential Thought

1.3 List and describe the schools of judicial thought.
GLOBAL LAW • *Command School of Jurisprudence of Cuba*

History of American Law

1.4 Learn the history and development of American law.
LANDMARK LAW • *Adoption of English Common Law in the United States*
GLOBAL LAW • *Civil Law System of France and Germany*

Sources of Law in the United States

1.5 List and describe the sources of law in the United States.
CONTEMPORARY ENVIRONMENT • *How a Bill Becomes Law*

Doctrine of *Stare Decisis*

1.6 Describe the doctrine of *stare decisis*.

Law in the Information Age

1.7 Describe how existing laws are being applied to the digital environment and how new laws are being enacted that specifically address issues of the information age.

Critical Legal Thinking

1.8 Learn what critical legal thinking is and how to apply it to analyzing legal cases.

Developing Skills for Your Career

1.9 Learn how the material, cases, and lessons of this book will apply to your future career.

"*Where there is no law, there is no freedom.*"

—John Locke (1632–1704)
Second Treatise of Government, Sec. 57

Introduction to Legal Heritage and the Information Age

In the words of Judge Learned Hand, "Without law we cannot live; only with it can we insure the future which by right is ours. The best of men's hopes are enmeshed in its success."[1] Every society makes and enforces laws that govern the conduct of the individuals, businesses, and other organizations that function within it.

Although the law of the United States is based primarily on English common law, other legal systems, such as Spanish and French civil law, also influence it. The sources of law in this country are the U.S. Constitution, state constitutions, federal and state statutes, ordinances, administrative agency rules and regulations, executive orders, and judicial decisions by federal and state courts.

Human beings do not ever make laws; it is the accidents and catastrophes of all kinds happening in every conceivable way that make law for us.

Plato (427–347 BCE)
Laws IV, 709

Businesses that are organized in the United States are subject to its laws. They are also subject to the laws of other countries in which they operate. Businesses organized in other countries must obey the laws of the United States when doing business here. In addition, businesspeople owe a duty to act ethically in the conduct of their affairs, and businesses owe a responsibility not to harm society.

This chapter discusses the nature and definition of law, theories about the development of law, the history and sources of law in the United States, and the application of the law to the information age.

What is Law?

1.1 Define *law*.

The law consists of rules that regulate the conduct of individuals, businesses, and other organizations in society. It is intended to protect persons and their property against unwanted interference from others. In other words, the law forbids persons from engaging in certain undesirable activities. Consider the following passage:

A lawyer without history or literature is a mechanic, a mere working mason: if he possesses some knowledge of these, he may venture to call himself an architect.

Sir Walter Scott
Guy Mannering, Ch. 37 (1815)

> *Hardly anyone living in a civilized society has not at some time been told to do something or to refrain from doing something, because there is a law requiring it, or because it is against the law. What do we mean when we say such things?*
>
> *At the end of the 18th century, Immanuel Kant wrote of the question "What is law?" that it "may be said to be about as embarrassing to the jurist as the well-known question 'What is truth?' is to the logician."*[2]

Definition of *Law*

The concept of **law** is broad. Although it is difficult to state a precise definition, *Black's Law Dictionary* gives one that is sufficient for this text:

law
That which must be obeyed and followed by citizens, subject to sanctions or legal consequences; a body of rules of action or conduct prescribed by controlling authority and having binding legal force.

> *Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force. That which must be obeyed and followed by citizens subject to sanctions or legal consequences is a law.*[3]

The following feature discusses the functions of the law.

Contemporary Environment

Functions of the Law

The law is often described by the function it serves in a society. The primary *functions* served by the law in this country are the following:

1. Keeping the peace

   Example Some laws make certain activities crimes.

2. Shaping moral standards

   Example Some laws discourage drug and alcohol abuse.

3. Promoting social justice

   Example Some laws prohibit discrimination in employment.

4. Maintaining the status quo

   Example Some laws prevent the forceful overthrow of the government.

5. Facilitating orderly change

   Example Laws are enacted only after considerable study, debate, and public input.

6. Facilitating planning

   Example Well-designed commercial laws allow businesses to plan their activities, allocate their productive resources, and assess the risks they take.

7. Providing a basis for compromise

   Example Laws allow for the settlement of cases prior to trial. Approximately 95 percent of all lawsuits are settled in this manner.

8. Maximizing individual freedom

   Example The rights of freedom of speech, religion, and association are granted by the First Amendment to the U.S. Constitution.

Commercial law lies within a narrow compass, and is far purer and freer from defects than any other part of the system.

Henry Peter Brougham
House of Commons, February 7, 1828

CONCEPT SUMMARY

FUNCTIONS OF THE LAW

1. Keep the peace	5. Facilitate orderly change
2. Shape moral standards	6. Facilitate planning
3. Promote social justice	7. Provide a basis for compromise
4. Maintain the status quo	8. Maximize individual freedom

Fairness of the Law

The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges.

Anatole France (1844–1924)

The U.S. legal system is one of the most comprehensive, fair, and democratic systems of law ever developed and enforced. Nevertheless, some misuses and oversights of our legal system—including abuses of discretion and mistakes by judges and juries, unequal applications of the law, and procedural mishaps—allow some guilty parties to go unpunished.

Example In *Standefer v. United States*,[4] Chief Justice Warren Burger of the U.S. Supreme Court stated, "This case does no more than manifest the simple, if discomforting, reality that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system."

Flexibility of the Law

1.2 Describe the flexibility of the Law

Law must be stable and yet it cannot stand still.

Roscoe Pound
Interpretations of Legal History (1923)

United States law evolves and changes along with the norms of society, technology, and the growth and expansion of commerce in the United States and the world. The following quote by Judge Jerome Frank discusses the value of the adaptability of law:

The law always has been, is now, and will ever continue to be, largely vague and variable. And how could this be otherwise? The law deals with human relations in their most complicated aspects. The whole confused, shifting helter-skelter of life parades before it—more confused than ever, in our kaleidoscopic age.

The constant development of unprecedented problems requires a legal system capable of fluidity and pliancy. Our society would be straightjacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial, and political conditions; although changes cannot be made lightly, yet rules of law must be more or less impermanent, experimental and therefore not nicely calculable.

Much of the uncertainty of law is not an unfortunate accident; it is of immense social value.[5]

Critical Legal Thinking

Are there any benefits for the law being "vague and variable"? Are bright-line tests possible for the law? Explain the statement, "Much of the uncertainty of law is not an unfortunate accident; it is of immense social value."

A landmark U.S. Supreme Court case—*Brown v. Board of Education*—is discussed in the feature below. This case shows the flexibility of the law because the U.S. Supreme Court overturned a past decision of the Court.

Schools of Jurisprudential Thought

1.3 List and describe the schools of judicial thought.

The philosophy or science of the law is referred to as **jurisprudence**. There are several different philosophies about how the law developed, ranging from the classical natural theory to modern theories of law and economics and critical legal studies. Legal philosophies are discussed on the following two pages.

WEB EXERCISE

To view court documents related to *Brown v. Board of Education*, go to **www.loc.gov/exhibits/brown/brown-brown.html**.

jurisprudence
The philosophy or science of law.

Critical Legal Thinking

Brown v. Board of Education

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place."

—Warren, Justice

Slavery was abolished by the Thirteenth Amendment to the Constitution in 1865. The Fourteenth Amendment, added to the Constitution in 1868, contains the Equal Protection Clause, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." The original intent of this amendment was to guarantee equality to freed African Americans. But equality was denied to African Americans for a century. This included discrimination in housing, transportation, education, jobs, service at restaurants, and other activities.

In 1896, the U.S. Supreme Court decided the case *Plessy v. Ferguson*.[6] In that case, the state of Louisiana had a law that provided for separate but equal accommodations for African American and White railway passengers. The Supreme Court held that the "separate but equal" state law did not violate the Equal Protection Clause of the Fourteenth Amendment. The "separate but equal" doctrine was then applied to all areas of life, including public education.

It was not until 1954 that the U.S. Supreme Court decided a case that challenged the "separate but equal" doctrine as it applied to public elementary and high schools. In ***Brown v. Board of Education***, a unanimous Supreme Court, in an opinion written by Chief Justice Earl Warren, reversed prior precedent and held that the separate but equal doctrine violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution. In its opinion, the Court stated:

> *Today, education is perhaps the most important function of state and local governments. We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.*

After *Brown v. Board of Education* was decided, it took court orders as well as U.S. army enforcement to integrate many of the public schools in this country. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 1954 U.S. Lexis 2094 (Supreme Court of the United States, 1954).

Critical Legal Thinking Questions

It has been said that the U.S. Constitution is a "living document"—that is, one that can adapt to changing times. Do you think this is a good policy? Or should the U.S. Constitution be interpreted narrowly and literally, as originally written?

WASHINGTON MEMORIAL, WASHINGTON DC

Washington DC is the capital of the United States of America. It is the seat of the federal government in this country. The U.S. Congress, the President of the United States, the U.S. Supreme Court, and most federal government agencies are located at the capital.

Natural Law School

The law is not a series of calculating machines where definitions and answers come tumbling out when the right levers are pushed.

William O. Douglas
Dissent, A Safeguard of Democracy (1948)

The **Natural Law School** of jurisprudence postulates that the law is based on what is "correct." Natural law philosophers emphasize a **moral theory of law**—that is, law should be based on morality and ethics. Natural law is "discovered" by humans through the use of reason and choosing between good and evil.

Examples Documents such as the U.S. Constitution, the Magna Carta, and the United Nations Charter reflect this theory.

Historical School

The **Historical School** of jurisprudence believes that the law is an aggregate of social traditions and customs that have developed over the centuries. It believes that changes in the norms of society will gradually be reflected in the law. To these legal philosophers, the law is an evolutionary process.

Example Historical legal scholars look to past legal decisions (precedent) to solve contemporary problems.

Analytical School

The **Analytical School** of jurisprudence maintains that the law is shaped by logic. Analytical philosophers believe that results are reached by applying principles of logic to the specific facts of a case. The emphasis is on the logic of the result rather than on how the result is reached.

Example If the U.S. Constitution would have freed the slaves or granted females the right to vote, it would probably not have been ratified by the states in 1788.

Sociological School

The **Sociological School** of jurisprudence asserts that the law is a means of achieving and advancing certain sociological goals. The followers of this philosophy, known as *realists*, believe that the purpose of law is to shape social behavior. Sociological philosophers are unlikely to adhere to past law as precedent.

Even when laws have been written down, they ought not always to remain unaltered.

Aristotle (384–322 BCE)

Examples Laws that make discrimination in employment illegal and laws that impose penalties for drunk driving reflect this theory.

Command School

The philosophers of the **Command School** of jurisprudence believe that the law is a set of rules developed, communicated, and enforced by the ruling party rather than a reflection of the society's morality, history, logic, or sociology. This school maintains that law changes when the ruling class changes.

Example During certain military conflicts, such as World War II and the Vietnam War, the federal government has enacted draft laws that require men of a certain age to serve in the military if they meet certain physical and other requirements.

Critical Legal Studies School

The **Critical Legal Studies School** proposes that legal rules are unnecessary and are used as an obstacle by the powerful to maintain the status quo. Critical legal theorists argue that legal disputes should be solved by applying arbitrary rules that are based on broad notions of what is "fair" in each circumstance. Under this theory, subjective decision making by judges would be permitted.

Example This school postulates that rape laws often make it difficult for women to prove legally that they have been raped because these laws have mostly been drafted from a male's perspective. Therefore, says this school, these laws should be ignored and the judge should be free to decide whether rape has occurred in his or her subjective decision-making.

Law and Economics School

The **Law and Economics School** believes that promoting market efficiency should be the central goal of legal decision making. This school is also called the **Chicago School**, named after the University of Chicago, where it was first developed.

Example Proponents of the law and economics theory suggest that the federal government's policy of subsidizing housing—by a law that permits a portion of interest paid on mortgage loans to be deducted from an individual borrower's federal income taxes and laws that created government-sponsored enterprises (Fannie Mae and Freddie Mac) that purchase low-rate interest mortgages made by banks and other lending institutions—provide incentives so that too many homes are built. If these laws did not exist, then the free market would determine the exact number of homes that should be built.

CONCEPT SUMMARY

SCHOOLS OF JURISPRUDENTIAL THOUGHT

School	Philosophy
Natural Law	Postulates that law is based on what is "correct." It emphasizes a moral theory of law—that is, law should be based on morality and ethics.
Historical	Believes that law is an aggregate of social traditions and customs.
Analytical	Maintains that law is shaped by logic.
Sociological	Asserts that the law is a means of achieving and advancing certain sociological goals.
Command	Believes that the law is a set of rules developed, communicated, and enforced by the ruling party.
Critical Legal Studies	Maintains that legal rules are unnecessary and that legal disputes should be solved by applying arbitrary rules based on fairness.
Law and Economics	Believes that promoting market efficiency should be the central concern of legal decision making.

The following feature discusses the Command School of jurisprudence of Cuba.

Global Law

Command School of Jurisprudence of Cuba

HAVANA, CUBA

Cuba is an island nation located in the Caribbean Sea less than 100 miles south of Key West, Florida. In 1959, Fidel Castro led a revolution that displaced the existing dictatorial government. Castro installed a communist government that expropriated and nationalized much private property. The communist government installed a one-party rule over the country and installed a command economy and system of jurisprudence. Under a state-controlled planned economy based on socialist principles, the production of goods and food items in Cuba fell substantially, and major shortages of houses, medical supplies, and other goods and services occurred. After more than five decades of a command economy, Cuba is permitting limited free-market measures, but 90 percent of workers are still employed by the government.

History of American Law

1.4 Learn the history and development of American law.

When the American colonies were first settled, the English system of law was generally adopted as the system of jurisprudence. This was the foundation from which American judges developed a common law in America.

English Common Law

English common law was law developed by judges who issued their opinions when deciding cases. The principles announced in these cases became *precedent* for later judges deciding similar cases. The English common law can be divided into cases decided by the *law courts*, *equity courts*, and *merchant courts*.

English common law
Law developed by judges who issue their opinions when deciding a case. The principles announced in these cases became precedent for later judges deciding similar cases.

Law Courts Prior to the Norman Conquest of England in 1066, each locality in England was subject to local laws, as established by the lord or chieftain in control of a local area. There was no countrywide system of law. After 1066, William the Conqueror and his successors to the throne of England began to replace the various local laws with one uniform system of law. To accomplish this, the king or queen appointed loyal followers as judges in all local areas. These judges were charged with administering the law in a uniform manner, in courts that were called **law courts**. Law at that time tended to emphasize the form (legal procedure) over the substance (merit) of a case. The only relief available at law courts was a monetary award for damages.

Chancery (Equity) Courts Because of some unfair results and limited remedies available in the law courts, a second set of courts—the **Court of Chancery (or equity court)**—was established. These courts were under the authority of the Lord Chancellor. Persons who believed that the decision of a law court was unfair or believed that the law court could not grant an appropriate remedy could seek relief in the Court of Chancery. Rather than emphasize legal procedure, the chancery court inquired into the merits of the case. The chancellor's remedies were called *equitable remedies* because they were shaped to fit each situation. Equitable orders and remedies of the Court of Chancery took precedence over the legal decisions and remedies of the law courts.

Two things most people should never see made: sausages and laws.

An old saying

Merchant Courts As trade developed during the Middle Ages, merchants who traveled about England and Europe developed certain rules to solve their commercial disputes. These rules, known as the "law of merchants," or the **Law Merchant**, were based on common trade practices and usage. Eventually, a separate set of courts was established to administer these rules. This court was called the **Merchant Court**. In the early 1900s, the Merchant Court was absorbed into the regular law court system of England.

The following feature discusses the adoption of English common law in the United States.

Landmark Law

Adoption of English Common Law in America

All the states—except Louisiana—of the United States of America base their legal systems primarily on the English common law. In the United States, the law, equity, and merchant courts have been merged. Thus, most U.S. courts permit the aggrieved party to seek both legal and equitable orders and remedies.

The importance of common law to the American legal system is described in the following excerpt from Justice Douglas's opinion in the 1841 case *Penny v. Little*:

The common law is a beautiful system, containing the wisdom and experiences of ages. Like the people

(continued)

it ruled and protected, it was simple and crude in its infancy and became enlarged, improved, and polished as the nation advanced in civilization, virtue, and intelligence. Adapting itself to the conditions and circumstances of the people and relying upon them for its administration, it necessarily improved as the condition of the people was elevated. The inhabitants of this country always claimed the common law as their birthright, and at an early period established it as the basis of their jurisprudence.[7]

Currently, the law of the United States is a combination of law created by the judicial system and by congressional legislation.

The following feature discusses the development of the civil law system in Europe.

Global Law

Civil Law System of France and Germany

One of the major legal systems that developed in the world in addition to the Anglo-American common law system is the **Romano-Germanic civil law system**. This legal system, which is commonly called the **civil law**, dates to 450 BCE, when Rome adopted the Twelve Tables, a code of laws governing Roman society. A compilation of Roman law, called the *Corpus Juris Civilis* ("Body of Civil Law"), was completed in CE 534. Later, two national codes—the **French Civil Code of 1804 (the Napoleonic Code)** and the **German Civil Code of 1896**—became models for countries that adopted civil codes.

In contrast to the Anglo-American law, in which laws are created by the judicial system as well as by congressional legislation, the civil code and parliamentary statutes are the sole sources of the law in most civil law countries. Thus, the adjudication of a case is simply the application of the code or the statutes to a particular set of facts. In some civil law countries, court decisions do not have the force of law.

Many countries in Europe still follow the civil law system.

STATUE OF LIBERTY, NEW YORK HARBOR

The Statue of Liberty stands majestically in New York Harbor. During the American Revolution, France gave the colonial patriots substantial support in the form of money for equipment and supplies, officers and soldiers who fought in the war, and ships and sailors who fought on the seas. Without the assistance of France, it is unlikely that the American colonists would have won their independence from Britain. In 1886, the people of France gave the Statue of Liberty to the people of the United States in recognition of the friendship that was established during the American Revolution. Since then, the Statue of Liberty has become a symbol of liberty and democracy throughout the world.

Sources of Law in the United States

1.5 List and describe the sources of law in the United States.

In the more than 200 years since the founding of the United States and the adoption of the English common law, the lawmakers of this country have developed a substantial body of law. The *sources of modern law* in the United States are discussed in the paragraphs that follow.

Constitutions

The **Constitution of the United States of America** is the *supreme law of the land*. This means that any law—whether federal, state, or local—that conflicts with the U.S. Constitution is unconstitutional and therefore unenforceable.

Constitution of the United States of America
The supreme law of the United States.

The principles enumerated in the U.S. Constitution are extremely broad because the founding fathers intended them to be applied to evolving social, technological, and economic conditions. The U.S. Constitution is often referred to as a "living document" because it is so adaptable.

The U.S. Constitution established the structure of the federal government. It created three branches of government and gave them the following powers:

- The **legislative branch (Congress)** has the power to make (enact) the law.
- The **executive branch (president)** has the power to enforce the law.
- The **judicial branch (courts)** has the power to interpret and determine the validity of the law.

The Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age.

Woodrow Wilson
Constitutional Government in the United States (1927)

Powers not given to the federal government by the Constitution are reserved for the states. States also have their own constitutions. **State constitutions** are often patterned after the U.S. Constitution, although many are more detailed. State constitutions establish the legislative, executive, and judicial branches of state government and establish the powers of each branch. Provisions of state constitutions are valid unless they conflict with the U.S. Constitution or any valid federal law.

Treaties

The U.S. Constitution provides that the president, with the advice and consent of two-thirds of the Senate, may enter into **treaties** with foreign governments. Treaties become part of the supreme law of the land. With increasing international economic relations among nations, treaties will become an even more important source of law that will affect business in the future.

treaty
A compact made between two or more nations.

Federal Statutes

Statutes are written laws that establish certain courses of conduct that covered parties must adhere to. The U.S. Congress is empowered by the Commerce Clause and other provisions of the U.S. Constitution to enact **federal statutes** to regulate foreign and interstate commerce.

statute
Written law enacted by the legislative branch of the federal and state governments that establishes certain courses of conduct that covered parties must adhere to.

Examples The federal Clean Water Act regulates the quality of water and restricts water pollution. The federal Securities Act of 1933 regulates the issuance of securities. The federal National Labor Relations Act establishes the right of employees to form and join labor organizations.

Federal statutes are organized by topic into **code books**. This is often referred to as **codified law**. Federal statutes can be found in these hardcopy books and online.

The feature on the following page describes how a bill becomes law.

Critical Legal Thinking

Why is the process of the U.S. Congress enacting statutes so complex? What checks and balances are built into the system before a bill can become law?

State Statutes

State legislatures enact **state statutes**. Such statutes are placed in code books. State statutes can be accessed in these hardcopy code books or online.

Examples The state of Florida has enacted the Lake Okeechobee Protection Act to protect Lake Okeechobee and the northern Everglades ecosystem. The Nevada Corporations Code outlines how to form and operate a Nevada corporation. The Texas Natural Resources Code regulates oil, gas, mining, geothermal, and other natural resources in the state.

Contemporary Environment

How a Bill Becomes Law

The **U.S. Congress** is composed of two chambers, the **U.S. House of Representatives** and the **U.S. Senate**. Thousands of **bills** are introduced in the U.S. Congress each year, but only a small percentage of them become law. The process of legislation at the federal level is as follows:

1. A member of the U.S. House of Representatives or U.S. Senate introduces a bill in his or her **chamber**. The bill is assigned a number: "H.R. [number]#" for House bills and "S [number]#" for Senate bills. All bills for raising revenue must originate in the U.S. House of Representatives.
2. The bill is referred to the appropriate **committee** for review and study. The committee can do the following: (1) reject the bill; (2) report it to the full chamber for vote; (3) simply not act on it, in which case the bill is said to have died in committee—many bills meet this fate; or (4) send the bill to a **subcommittee** for further study. A subcommittee can let the bill die or report it back to the full committee.
3. Bills that receive the vote of a committee are reported to the full chamber, where they are debated and voted on. If the bill receives a majority vote of the chamber, it is sent to the other chamber, where the previously outlined process is followed. If the second chamber makes no changes in the original bill, the bill is reported for vote by that chamber. If the second chamber makes significant changes to the bill, a **conference committee** that is made up of members of both chambers will try to reconcile the differences. If a compromise version is agreed to by the conference committee, the bill is reported for vote.
4. A bill that is reported to a full chamber must receive the majority vote of the chamber, and if it receives this vote, it is forwarded to the other chamber. If a majority of the second chamber approves the bill, it is then sent to the president's desk.
5. If the president signs a bill, it becomes law. If the president takes no action for 10 days, the bill automatically becomes law. If the president vetoes the bill, the bill can be passed into law if two-thirds of the members of the House and two-thirds of the members of the Senate vote to override the veto and approve the bill. Many bills that are vetoed by the president do not obtain the necessary two-thirds vote to override the veto.

Because of this detailed and political legislative process, few of the many bills that are submitted by members of the U.S. House of Representatives or U.S. Senate become law.

Ordinances

ordinance
Law enacted by local government bodies, such as cities and municipalities, counties, school districts, and water districts.

State legislatures often delegate lawmaking authority to local government bodies, including cities and municipalities, counties, school districts, and water districts. These governmental units are empowered to adopt **ordinances**. Ordinances are also codified.

Examples The city of Mackinac Island, Michigan, a city of 19th-century Victorian-style houses and buildings, has enacted ordinances that keep the island car free, keep out fast-food chains, and require buildings to adhere to era-specific aesthetic standards. Other examples of city ordinances include zoning laws, building codes, and sign restrictions.

Executive Orders

executive order
An order issued by a member of the executive branch of the government.

The executive branch of government, which includes the president of the United States and state governors, is empowered to issue **executive orders**. This power is derived from express delegation from the legislative branch and is implied from the U.S. Constitution and state constitutions.

Example In response to North Korea's pursuit of nuclear and missile programs, the launching of ballistic missiles in the area of Japan and other countries, cyber-attacks on United States government and other computer systems in the U.S., and engaging in other actions that are detrimental to the interests of the United States and constitute a threat to national security, the president issued executive orders freezing the assets of the government of North Korea and the Workers' Party of

WHITE HOUSE, WASHINGTON DC
The White House is located at 1600 Pennsylvania Avenue, Washington DC. The White House is the principal residence and office of the President of the United States of America.

Korea located in the United States, and prohibiting U.S. companies and individuals from selling or transferring products and services to the government of North Korea and parties associated with the government of North Korea that relate to energy, metal, graphite, mining, coal, transportation, financial services, software, and any other products and services that would benefit the nuclear and missile program of the government of North Korea.

Regulations and Orders of Administrative Agencies

The legislative and executive branches of federal and state governments are empowered to establish **administrative agencies** to enforce and interpret statutes enacted by Congress and state legislatures. Many of these agencies regulate business.

administrative agencies
Agencies (such as the Securities and Exchange Commission and the Federal Trade Commission) that the legislative and executive branches of federal and state governments are empowered to establish.

Examples Congress has created the Securities and Exchange Commission (SEC) to enforce federal securities laws and the Federal Trade Commission (FTC) to enforce consumer protection statutes.

Congress or the state legislatures usually empower these agencies to adopt **administrative rules and regulations** to interpret the statutes that the agency is authorized to enforce. These rules and regulations have the force of law. Administrative agencies usually have the power to hear and decide disputes. Their decisions are called **orders**. Because of their power, administrative agencies are often informally referred to as the "fourth branch of government."

Judicial Decisions

When deciding individual lawsuits, federal and state courts issue **judicial decisions**. In these written opinions, a judge or justice usually explains the legal reasoning used to decide the case. These opinions often include interpretations of statutes, ordinances, and administrative regulations and the announcement of legal principles used to decide the case. Many court decisions are reported by electronic research services such as Lexis, on the internet, and in books.

judicial decision
A decision about an individual lawsuit issued by a federal or state court.

CONCEPT SUMMARY

SOURCES OF LAW IN THE UNITED STATES

Source of Law	Description
Constitutions	The U.S. Constitution establishes the federal government and enumerates its powers. Powers not given to the federal government are reserved to the states. State constitutions establish state governments and enumerate their powers.
Treaties	The president, with the advice and consent of two-thirds of the Senate, may enter into treaties with foreign countries.
Codified law: statutes and ordinances	Statutes are enacted by Congress and state legislatures. Ordinances are enacted by municipalities and local government bodies. They establish courses of conduct that covered parties must follow.
Executive orders	Issued by the president and governors of states. Executive orders regulate the conduct of covered parties.
Regulations and orders of administrative agencies	Administrative agencies are created by the legislative and executive branches of government. They may adopt rules and regulations that regulate the conduct of covered parties as well as issue orders.
Judicial decisions	Courts decide controversies. In doing so, a court issues an opinion that states the decision of the court and the rationale used in reaching that decision.

Priority of Law in the United States

As mentioned previously, the U.S. Constitution and treaties take precedence over all other laws in the United States. Federal statutes take precedence over federal regulations. Valid federal law takes precedence over any conflicting state or local law. State constitutions rank as the highest state law. State statutes take precedence over state regulations. Valid state law takes precedence over local laws.

Doctrine of Stare Decisis

1.6 Describe the doctrine of *stare decisis*

precedent
A rule of law established in a court decision. Lower courts must follow the precedent established by higher courts.

Based on common law tradition, past court decisions become **precedent** for deciding future cases. Lower courts must follow the precedent established by higher courts. That is why all federal and state courts in the United States must follow the precedents established by U.S. Supreme Court decisions.

The courts of one jurisdiction are not bound by the precedent established by the courts of another jurisdiction, although they may look to each other for guidance.

Example State courts of one state are not required to follow the legal precedent established by the courts of another state.

stare decisis
Latin for "to stand by the decision." Adherence to precedent.

Adherence to precedent is called the doctrine of ***stare decisis*** ("to stand by the decision"). The doctrine of *stare decisis* promotes uniformity of law within a jurisdiction, makes the court system more efficient, and makes the law more predictable for individuals and businesses.

The doctrine of *stare decisis* is discussed in the following excerpt from Justice Musmanno's decision in *Flagiello v. Pennsylvania*:

> *Without* stare decisis, *there would be no stability in our system of jurisprudence.* Stare decisis *channels the law. It erects lighthouses and flies the signal of safety. The ships of jurisprudence must follow that well-defined channel which, over the years, has been proved to be secure and worthy.*[8]

A court may later change or reverse its legal reasoning if a new case is presented to it and change is warranted. The U.S. Supreme Court has stated, "Overruling precedent is never a small matter. What we can decide, we can undecide. But *stare decisis* teaches that we should exercise that authority sparingly." [9]

Justice will not be served until those who are unaffected are as outraged as those who are.

Benjamin Franklin (1706–1790)

Critical Legal Thinking

Why was the doctrine of *stare decisis* developed? What would be the consequences if the doctrine of *stare decisis* was not followed?

Law in the Information Age

1.7 Describe how existing laws are being applied to the digital environment and how new laws are being enacted that specifically address issues of the information age

In a span of about three decades, computers and other electronic devices have revolutionized society. Computers, once primarily used by businesses, have permeated the lives of most families as well. In addition, many other electronic devices are commonly in use, such as smartphones, tablets, televisions, digital cameras, and electronic game devices. In addition to the digital devices, technology has brought new ways of communicating, such as email and texting, as well as the use of social networks.

The information age arrived before new laws were written that were unique and specific to this environment. Courts have applied existing laws to the new digital and technological environment by requiring interpretations and applications. In addition, new laws have been written that apply specifically to this new digital and information technology environment. The U.S. Congress has led the way, enacting many new federal statutes to regulate the new environment.

The application of existing laws to the digital and technology environment and new laws that have been enacted that specifically address legal issues of the information age are discussed in various chapters throughout this text.

Critical Legal Thinking

1.8 Learn what critical legal thinking is and how to apply it to analyzing legal cases.

The U.S. Supreme Court, which is comprised of 9 justices, often issue non-unanimous decisions. Why? It is because each justice has analyzed the facts of a case and the legal issue presented, applied critical legal thinking to reason through the case, and come up with his or her own conclusion. The key is that each justice applied critical thinking in reaching his or her conclusion.

Critical thinking is important to all subjects taken by college and university students, no matter what their major or what course is taken. But critical thinking in law courses—referred to as *critical legal thinking*—is of significance because in the law there is not always a bright-line answer; in fact, there seldom is. This is where the famous "gray area" of the law appears. Thus, the need for critical thinking becomes especially important in solving legal disputes.

Defining *Critical Legal Thinking*

What is critical legal thinking? **Critical legal thinking** consists of investigating, analyzing, evaluating, and interpreting information to solve simple or complex legal issues or cases. Critical legal thinking requires intellectually disciplined thinking. This requires a person to recognize and identify problems, engage in logical inquiry and reasoning, evaluate information and appraise evidence, consider alternative perspectives, question assumptions, identify unjustified inferences and irrelevant information, evaluate opposing positions and arguments, and assess one's own thinking and conclusions.

Critical Legal Thinking

A method of thinking that consists of investigating, analyzing, evaluating, and interpreting information to solve a legal issue or case.

Your professors have a deep understanding of critical legal thinking that they have developed during years of study in law school, in teaching and

scholarship, and often in private practice or government employment as well. Over the course of the semester, they will impart to you not only knowledge of the law but also a unique and intelligent way of thinking through and solving complex problems. Critical legal thinking can serve 21st century students and leaders.

Socratic Method

Socratic method
A process that consists of a series of questions and answers and a give-and-take inquiry and debate between a professor and students.

In class, many law professors use the **Socratic method** when discussing a case. The Socratic method consists of the professor asking students questions about a case or legal issue to stimulate critical thinking by the students. This process consists of a series of questions and answers and a give-and-take inquiry and debate between a professor and the students. The Socratic method stimulates class discussions. Good teachers recognize and focus on the questions and activities that stimulate the mind.

IRAC Method

Legal cases are usually examined using the following critical legal thinking method. First, the *facts* of the case must be investigated and understood. Next, the *legal issue* that is to be answered must be identified and succinctly stated. Then, the *law* that is to be applied to the case must be identified, read, and understood. Once the facts, law, and legal issue have been stated, critical thinking must be used in applying the law to the facts of the case. This requires that the decision maker—whether a judge, juror, or student—*analyze*, examine, evaluate, interpret, and apply the law to the facts of the case. Last, the critical legal thinker must reach a *conclusion* and state his or her judgment. In the study of law, this process is often referred to as the **IRAC method** (an acronym that stands for **issue**, **rule**, **application**, and **conclusion**) as outlined in the following:

IRAC method
A method used to examine a law case. *IRAC* is an acronym that stands for *issue*, *rule*, *application*, and *conclusion*.

I = What is the legal *issue* in the case?
R = What is the *rule* (law) of the case?
A = What is the court's *analysis* and rationale?
C = What was the *conclusion* or outcome of the case?

This text—whether in its print or electronic version—offers students ample opportunities to develop and apply critical legal thinking. The text contains real-world cases in which actual disputing parties have become embroiled. The law cases are real, the parties are real, and the decisions reached by juries and judges are real. Some cases are easier to decide than others, but all provide a unique set of facts that require critical legal thinking to solve.

Developing Skills for Your Career

1.9 Learn how the material, cases, and lessons of this book will apply to your future career.

If you are not pursuing a profession in law, you may think this book is irrelevant to your future career. Let me assure you, that is not the case. Whatever career path you follow, you will be able to take the lessons from this book and develop career skills that are useful, regardless of the future job you will hold. Communication, critical thinking, collaboration, knowledge application and analysis, business ethics and social responsibility, and information technology application are key to a successful career today, and this book will help you develop many of these employment skills.

Court cases presented throughout the text will develop your critical legal thinking skills as you are asked to apply what you have learned to situations similar to those that you may encounter during your career. Some cases

push beyond legal thinking, and into the question of ethical thinking. As you pick apart complex cases and legal issues, you will develop your analytical thinking skills.

Class discussion, homework, and content found in MyLab Business Law will develop your written and oral communication skills through meaningful discussion and assignments, honing your ability to communicate effectively.

This book, its content, cases, special features, critical thinking questions, and other material and assignments, will well prepare you to solve actual business issues that you will encounter during your future career.

Key Terms and Concepts

Administrative agencies (13)
Administrative rules and regulations (13)
Analytical School (6)
Bills (12)
Brown v. Board of Education (5)
Chamber (12)
Civil law (10)
Code book (11)
Codified law (11)
Command School (7)
Committee (12)
Conference committee (12)
Constitution of the United States of America (11)
Court of Chancery (equity court) (09)
Critical Legal Studies School (07)
Critical legal thinking (15)
English common law (9)
Executive branch (president) (11)
Executive orders (12)
Federal statute (11)
French Civil Code of 1804 (the Napoleonic Code) (10)
German Civil Code of 1896 (10)
Historical School (6)
IRAC method (16)
Judicial branch (courts) (11)
Judicial decision (13)
Jurisprudence (5)
Law (3)
Law and Economics School (Chicago School) (7)
Law courts (9)
Law Merchant (9)
Legislative branch (Congress) (11)
Merchant Court (9)
Moral theory of law (6)
Natural Law School (6)
Orders (13)
Ordinances (12)
Precedent (14)
Romano-Germanic civil law system (10)
Sociological School (7)
Socratic method (16)
Stare decisis (14)
State constitution (11)
State statute (11)
Statute (11)
Subcommittee (12)
Treaties (11)
U.S. Congress (12)
U.S. House of Representatives (12)
U.S. Senate (12)

Law Case with Answer

Minnesota v. Mille Lacs Band of Chippewa Indians

Facts When the Constitution was ratified by the original colonies in 1788, it delegated to the federal government the exclusive power to regulate commerce with Native American tribes. During the next 100 years, as the colonists migrated westward, the federal government entered into many treaties with Native American nations. One such treaty was with the Ojibwe Indians in 1837, whereby the tribe sold land located in the Minnesota territory to the United States. The treaty provided, "The privilege of hunting, fishing, and gathering wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians."

The state of Minnesota was admitted into the Union in 1858. In the late 1900s, the state of Minnesota began interfering with Native American treaty rights, particularly concerning hunting and fishing rights. Minnesota wanted to restrict the hunting and fishing rights granted in the federal treaty. In 1990, the Mille Lacs Band of the Ojibwe Indians sued the state of Minnesota, seeking declaratory judgment that they retained the hunting, fishing, and gathering rights provided in the 1837 treaty and an injunction to prevent Minnesota from interfering with those rights. The state of Minnesota argued that when Minnesota entered the Union in 1858, those rights were extinguished.

1. Were the treaty rights granted to the Mille Lacs Band of the Ojibwe Indians by the federal government in 1837 extinguished when the state of Minnesota was admitted as a state in 1858?

2. Did the state of Minnesota act unfairly when it interfered with Native American treaty rights?

Answer No, the treaty rights granted to the Mille Lacs Band of the Ojibwe Indians by the federal government in 1837 were not extinguished when the state of Minnesota was admitted as a state in 1858. The state of Minnesota argued that the Ojibwe's rights under the treaty were extinguished when Minnesota was admitted to the Union. But in making this legal argument, the state of Minnesota was wrong. There is no clear evidence of federal congressional intent to extinguish the treaty rights of the Ojibwe Indians when Minnesota was admitted as a state in 1858. The language admitting Minnesota as a state made no mention of Indian treaty rights. Therefore, the Ojibwe Indians still possess those treaty rights.

It was unfair of the state of Minnesota to try to extinguish clearly delineated legal rights granted to the Ojibwe Native Americans more than 150 years before. The state of Minnesota was obviously unfairly trying to take away rights granted to Native Americans so that others in society—namely non–Native American hunters and fishers—would benefit. The hunting, fishing, and gathering rights guaranteed to the Ojibwe Native Americans in the 1837 treaty are still valid and enforceable. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 119 S.Ct. 1187, 1999 U.S. Lexis 2190 (Supreme Court of the United States)

Critical Legal Thinking Cases

1.1 Fairness of the Law In 1909, the state legislature of Illinois enacted a statute called the Woman's 10-Hour Law. The law prohibited women who were employed in factories and other manufacturing facilities from working more than 10 hours per day. The law did not apply to men. W. C. Ritchie & Co., an employer, brought a lawsuit that challenged the statute as being unconstitutional, in violation of the equal protection clause of the Illinois constitution. In upholding the statute, the Illinois Supreme Court stated:

> *It is known to all men (and what we know as men we cannot profess to be ignorant of as judges) that woman's physical structure and the performance of maternal functions place her at a great disadvantage in the battle of life; that while a man can work for more than 10 hours a day without injury to himself, a woman, especially when the burdens of motherhood are upon her, cannot; that while a man can work standing upon his feet for more than 10 hours a day, day after day, without injury to himself, a woman cannot; and that to require a woman to stand upon her feet for more than 10 hours in any one day and perform severe manual labor while thus standing, day after day, has the effect to impair her health, and that as weakly and sickly women cannot be mothers of vigorous children.*
>
> *We think the general consensus of opinion, not only in this country but in the civilized countries of Europe, is, that a working day of not more than 10 hours for women is justified for the following reasons: (1) the physical organization of women, (2) her maternal function, (3) the rearing and education of children, (4) the maintenance of the home; and these conditions are, so far, matters of general knowledge that the courts will take judicial cognizance of their existence.*
>
> *Surrounded as women are by changing conditions of society, and the evolution of employment which environs them, we agree fully with what is said by the Supreme Court of Washington in the Buchanan case; "law is, or ought to be, a progressive science."*

Is the statute fair? Would the statute be lawful today? Should the law be a "progressive science"? *W. C. Ritchie & Co. v. Wayman, Attorney for Cook County, Illinois, 91 N.E. 695, 1910 Ill. Lexis 1958 (Supreme Court of Illinois)*

Ethics Case

1.2 Ethics Case In 1975, after the war in Vietnam, the U.S. government discontinued draft registration for men in this country. In 1980, after the Soviet Union invaded Afghanistan, President Jimmy Carter asked Congress for funds to reactivate draft registration. President Carter suggested that both males and females be required to register. Congress allocated funds only for the registration of males. Several men who were subject to draft registration brought a lawsuit that challenged the law as being unconstitutional, in violation of the Equal Protection Clause of the U.S. Constitution. The U.S. Supreme Court upheld the constitutionality of the draft registration law, reasoning as follows:

> *The question of registering women for the draft not only received considerable national attention*

and was the subject of wide-ranging public debate, but also was extensively considered by Congress in hearings, floor debate, and in committee. The foregoing clearly establishes that the decision to exempt women from registration was not the "accidental by-product of a traditional way of thinking about women."

This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration. Men and women are simply not similarly situated for purposes of a draft or registration for a draft.

Justice Marshall dissented, stating:

The Court today places its imprimatur on one of the most potent remaining public expressions of "ancient canards about the proper role of women." It upholds a statute that requires males but not females to register for the draft, and which thereby categorically excludes women from a fundamental civil obligation. I dissent.

Rostker, Director of Selective Service v. Goldberg, 453 U.S. 57, 101 S.Ct. 2646, 1981 U.S. Lexis 126 (Supreme Court of the United States)

1. What arguments did the U.S. Supreme Court assert to justify requiring males, but not females, to register for the draft?
2. Is the law, as determined by the U.S. Supreme Court, fair?
3. Do you agree with the dissent?

Notes

1. *The Spirit of Liberty*, 3rd ed. (New York, NY: Alfred A. Knopf, 1960).
2. "Introduction," in *The Nature of Law: Readings in Legal Philosophy*, M. P. Golding (New York, NY: Random House, 1966).
3. *Black's Law Dictionary*, 5th ed. (St. Paul, MN: West).
4. 447 U.S. 10, 100 S.Ct. 1999, 1980 U.S. Lexis 127 (Supreme Court of the United States).
5. *Law and the Modern Mind* (New York, NY: Brentano's, 1930).
6. 163 U.S. 537, 16 S.Ct. 1138, 1896 U.S. Lexis 3390 (Supreme Court of the United States, 1896).
7. 4 Ill. 301, 1841 Ill. Lexis 98 (Ill.).
8. 208 A.2d 193, 1965 Pa. Lexis 442 (Supreme Court of Pennsylvania).
9. 135 S.Ct. 2401, 2015 U.S. Lexis 4067 (Supreme Court of the United States, 2015).

CHAPTER

2 Ethics and Social Responsibility of Business

BUSINESS ETHICS

Businesses are compelled to obey the law. In some circumstances, they may be able to obey the law but engage in conduct that would be deemed by many to be unethical. Do businesses owe a duty to act ethically in the conduct of their business even though the law would permit this conduct?

Learning Objectives and Chapter Contents

"Ethical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live."

—John F. Dillon
Laws and Jurisprudence of England and America Lecture I (1894)

Introduction To Ethics and Social Responsibility of Business

Businesses organized in the United States are subject to its laws. They are also subject to the laws of other countries in which they operate. In addition, businesspersons owe a duty to act ethically in the conduct of their affairs, and businesses owe a social responsibility not to harm society.

Although most laws are based on ethical standards, not all ethical standards have been enacted as law. While the law establishes a minimum degree of conduct expected by persons and businesses in society, ethics demands more. This chapter discusses business ethics and the social responsibility of business.

Ethics and the Law

2.1 Describe how law and ethics intertwine.

Ethics and the law are intertwined. Sometimes the rule of **law** and the rule of **ethics** demand the same response by a person confronted with a problem.

ethics
A set of moral principles or values that governs the conduct of an individual or a group.

Example Federal and state laws make bribery unlawful. A person violates the law if he or she bribes a judge for a favorable decision in a case. Ethics would also prohibit this conduct.

But sometimes the law demands certain conduct but a person's ethical standards are contrary.

Example Federal law prohibits employers from hiring certain illegal alien workers. Suppose an employer advertises the availability of a job and receives no response except from a person who cannot prove citizenship of this country or does not possess a required visa. The worker and the worker's family are destitute. Should the employer violate the law and hire this person? The law says no, but ethics may say yes.

However, in some situations, the law may permit an act that is ethically wrong.

Example Occupational safety laws set minimum standards for emissions of dust from toxic chemicals in the workplace. Suppose a company can reduce the emission below the legal standard by spending additional money. The only benefit from the expenditure would be better employee health. Ethics would require the extra expenditure; the law would not (see **Exhibit 2.1**).

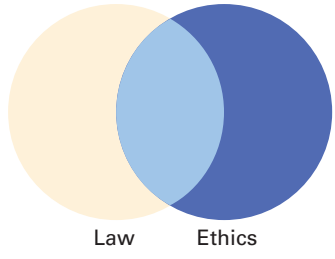

Exhibit 2.1 LAW AND ETHICS

Business Ethics

2.2 Describe and apply the moral theories of business ethics.

How can ethics be measured? The answer is very personal: What one person considers ethical another may consider unethical. However, there do seem to be some universal rules about what conduct is ethical and what conduct is not. The following material discusses five major theories of ethics: (1) *ethical fundamentalism*, (2) *utilitarianism*, (3) *Kantian ethics*, (4) *Rawls's social justice theory*, and (5) *ethical relativism*.

Ethical Fundamentalism

ethical fundamentalism
A theory of ethics in which a person looks to an outside source for ethical rules or commands.

Under **ethical fundamentalism**, a person looks to an *outside source* for ethical rules or commands. This may be a book (e.g., the Bible, the Koran) or a person (e.g., Karl Marx). Critics argue that ethical fundamentalism does not permit people to determine right and wrong for themselves. Taken to an extreme, the result could be considered unethical under most other moral theories. For example, a literal interpretation of the maxim "an eye for an eye" would permit retaliation.

Utilitarianism

utilitarianism
A moral theory stating that people must choose the action or follow the rule that provides the greatest good to society.

Utilitarianism is a moral theory with origins in the works of Jeremy Bentham (1748–1832) and John Stuart Mill (1806–1873). This moral theory dictates that people must choose the action or follow the rule that provides the *greatest good to society*. This does not mean the greatest good for the greatest number of people.

WEB EXERCISE
Visit the website of Starbucks Corporation at **www.starbucks.com/responsibility/sourcing/coffee**. Read the information about Starbucks ethical sourcing of coffee.

Example If an action would increase the good of 25 people by 1 unit each and an alternative action would increase the good of 1 person by 26 units, then, according to utilitarianism, the latter action should be taken.

Utilitarianism has been criticized because it is difficult to estimate the "good" that will result from different actions, it is difficult to apply in an imperfect world, and it treats morality as if it were an impersonal mathematical calculation.

He who seeks equality must do equity.

Joseph Story (1779–1845)
Former justice of the U.S. Supreme Court
Equity Jurisprudence (1836)

Example A company is trying to determine whether it should close an unprofitable plant located in a small community. Utilitarianism would require that the benefits to shareholders from closing the plant be compared with the benefits to employees, their families, and others in the community from keeping it open.

Kantian Ethics

Immanuel Kant (1724–1804) is the best-known proponent of **Kantian ethics**, also called **duty ethics**. Kant believed that people owe moral duties that are based on

POTALA PALACE, TIBET
A person's culture helps shape his or her ethical values.

universal rules. Kant's philosophy is based on the premise that people can use reasoning to reach ethical decisions. His ethical theory would have people behave according to the *categorical imperative* "Do unto others as you would have them do unto you."

Kantian ethics (duty ethics) A moral theory stating that people owe moral duties that are based on universal rules, such as the categorical imperative "Do unto others as you would have them do unto you."

Example According to Kantian ethics, keeping a promise to abide by a contract is a moral duty even though that contract turns out to be detrimental to the obligated party.

The universal rules of Kantian ethics are based on two important principles: (1) consistency—that is, all cases are treated alike, with no exceptions—and (2) reversibility—that is, the actor must abide by the rule he or she uses to judge the morality of someone else's conduct. Thus, if you are going to make an exception for yourself, that exception becomes a universal rule that applies to all others.

Example If you rationalize that it is acceptable for you to engage in deceptive practices, it is acceptable for competitors to do so also.

A criticism of Kantian ethics is that it is difficult to reach consensus on what the universal rules should be.

The following U.S. Supreme Court case involves the issue of ethics.

The notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers.

Dissent by Justice Oliver Wendell Holmes Jr.
Tyson & Bro-United Theatre Ticket Officers v. Banton
273 U.S. 418, 47 S.Ct. 426, 1927 U.S. Lexis 707 (1927)
Supreme Court of the United States

CASE 2.1 U.S. SUPREME COURT CASE Moral Theory of Law and Ethics

POM Wonderful, LLC v. Coca-Cola Company

134 S.Ct. 2228, 2014 U.S. Lexis 4165 (2014)
Supreme Court of the United States

"Lanham Act suits provide incentives for manufacturers to behave well."

—Kennedy, Justice

Facts

POM Wonderful, LLC (POM) is a grower of pomegranates, a fruit, and a maker and distributor of pomegranate juice and juice blends. POM produces and sells a pomegranate-blueberry juice blend that consists of 85 percent pomegranate and 15 percent blueberry juices.

The Coca-Cola Company's Minute Maid Division makes a juice blend that contains 0.3 percent pomegranate, 0.2 percent blueberry juice, and 0.1 percent raspberry juice. The Coca-Cola pomegranate blueberry juice is actually made with 99.4 percent apple and grape juices.

Despite the minuscule amount of pomegranate and blueberry juices in the blend, the front label of the Coca-Cola product displays the words "POMEGRANATE" and "BLUEBERRY" in all capital letters on two separate lines. Below those words, Coca-Cola placed the phrase "flavored blend of 5 juices" in much smaller type. Coca-Cola's front label also displays a vignette of blueberries, grapes, and raspberries in front of a halved pomegranate and a halved apple.

POM sued Coca-Cola under Section 43 of the federal Lanham Act, which allows one competitor to sue another to recover damages for unfair competition arising from false and misleading product descriptions. Coca-Cola tried to avoid POM's lawsuit by asserting that the Federal Food, Drug, and Cosmetic Act (FDCA) did not require any different labeling. The U.S. district court and the U.S. court of appeals held in favor of Coca-Cola. POM appealed to the U.S. Supreme Court.

Issue

Can a private party bring an unfair competition lawsuit under the Lanham Act against a competitor that challenges the truthfulness of a food label?

(continued)

Language of the U.S. Supreme Court

The Lanham Act creates a cause of action for unfair competition through misleading advertising and labeling. Coca-Cola is incorrect that the best way to harmonize the statutes is to bar POM's Lanham Act claim. By serving a distinct compensatory function that may motivate injured persons to come forward, Lanham Act suits provide incentives for manufacturers to behave well.

Decision

The U.S. Supreme Court held that POM may proceed with its Lanham Act unfair competition lawsuit against Coca-Cola and remanded the case for further proceedings.

Eventually, a jury decided that Coca-Cola's labeling did not deceive the public.

Critical Legal Thinking Questions

Do you think that Coca-Cola was trying to trick consumers into buying cheap apple-grape juice by labeling it pomegranate-blueberry juice? Do you think Coca-Cola acted ethically in this case?

Rawls's Social Justice Theory

John Locke (1632–1704) and Jean-Jacques Rousseau (1712–1778) proposed a *social contract* theory of morality. Under this theory, each person is presumed to have entered into a social contract with all others in society to obey moral rules that are necessary for people to live in peace and harmony. This implied contract states, "I will keep the rules if everyone else does." These moral rules are then used to solve conflicting interests in society.

Rawls's social justice theory
A moral theory asserting that fairness is the essence of justice. The theory says that each person is presumed to have entered into a social contract with all others in society to obey moral rules that are necessary for people to live in peace and harmony.

The leading proponent of the modern justice theory was John Rawls (1921–2002), a philosopher at Harvard University. Under **Rawls's social justice theory**, fairness is considered the essence of justice. The principles of justice should be chosen by persons who do not yet know their station in society—thus, their "veil of ignorance" would permit the fairest possible principles to be selected.

Example Pursuant to Rawls's social justice theory, the principle of equal opportunity in employment would be promulgated by people who would not yet know if they were in a favored class.

As a caveat, Rawls also proposed that the least advantaged in society must receive special assistance to realize their potential. Rawls's theory of social justice is criticized for two reasons. First, establishing the blind "original position" for choosing moral principles is impossible in the real world. Second, many persons in society would choose not to maximize the benefit to the least advantaged persons in society.

Ethical Relativism

ethical relativism
A moral theory stating that individuals must decide what is ethical based on their own feelings about what is right and wrong.

Ethical relativism holds that individuals must decide what is ethical based on *their own feelings* about what is right and wrong. Under this moral theory, if people meet their own moral standard in reaching a decision, no one can criticize them for it. Thus, there are no universal ethical rules to guide a person's conduct. This theory has been criticized because action that is usually thought to be unethical (e.g., committing fraud) would not be unethical if the perpetrator thought it was in fact ethical. Few philosophers advocate ethical relativism as an acceptable moral theory.

The following U.S. Supreme Court case concerns the nondisclosure of evidence in a lawsuit.

CASE 2.2 U.S. SUPREME COURT CASE Nondisclosure of Evidence

Goodyear Tire & Rubber Company v. Haeger

137 S.Ct. 1178, 2017 U.S. Lexis 2613 (2017)
Supreme Court of the United States

"That uncertainty points toward demanding a do-over."

—Kagan, Justice

Facts

Leroy, Donna, Barry, and Suzanne Haeger sued the Goodyear Tire & Rubber Company to recover monetary damages for injuries they suffered after the family's motorhome swerved off the road and flipped over. The plaintiffs alleged that a Goodyear G159 tire on the vehicle caused the accident because the tire was not designed to withstand the level of heat generated when the tire was used on a motorhome at highway speeds. Discovery in the case lasted several years. The plaintiffs repeatedly demanded that Goodyear turn over internal test results for the G159, but the company's responses were both slow and unrevealing in content. The parties finally settled the case for an undisclosed sum of money.

Later, the plaintiffs' lawyer learned that Goodyear had disclosed a set of test results in another case that had not been disclosed to the plaintiffs that showed that the G159 tire got unusually hot at speeds between 55 and 65 miles per hour. The plaintiffs sued Goodyear to recover their entire lawyer's fees of $2.7 million they expended on their case. The U.S. district court awarded the plaintiffs this amount of damages, and the U.S. court of appeals affirmed the judgment. Goodyear appealed to the U.S. Supreme Court, alleging that the award of lawyer's fees should not be the entire amount expended by the plaintiffs, but should be limited to an amount determined to be related to Goodyear's misconduct.

Issue

Should the plaintiffs recover their entire lawyer's fees of $2.7 million?

Language of the U.S. Supreme Court

Goodyear, the U.S. district court found, had engaged in a years-long course of bad-faith behavior. Here, the conduct arose to a truly egregious level. Federal courts possess the ability to fashion an appropriate sanction for conduct which abuses the judicial process. A sanctioning court must determine which fees were incurred because of, and solely because of, the misconduct at issue. No such finding lies behind the $2.7 million award. That uncertainty points toward demanding a do-over.

Decision

The U.S. Supreme Court held that the plaintiffs cannot automatically recover the entire lawyer's fees they spent on the case but can recover the amount of lawyer's fees caused by Goodyear's withholding of evidence. The Supreme Court remanded the case for a determination of this amount.

Critical Legal Thinking Questions

Did Goodyear act ethically in this case? Should the plaintiffs be awarded the entire amount they spent on lawyer's fees? Do you think the amount of damages that will be awarded will prevent similar conduct in the future?

Social Responsibility of Business

2.3 Describe and apply the theories of the social responsibility of business.

Businesses do not operate in a vacuum. Decisions made by businesses have far-reaching effects on society. In the past, many business decisions were based solely on a cost–benefit analysis and how they affected the bottom line. Such decisions, however, may cause negative externalities for others.

Example The dumping of hazardous wastes from a manufacturing plant into a river affects the homeowners, farmers, and others who use the river's waters.

CONCEPT SUMMARY

THEORIES OF ETHICS

Theory	Description
Ethical fundamentalism	Persons look to an outside source (e.g., the Bible, the Koran) or a central figure for ethical guidelines.
Utilitarianism	Persons choose the alternative that would provide the greatest good to society.
Kantian ethics	A set of universal rules that establish ethical duties. The rules are based on reasoning and require (1) consistency in application and (2) reversibility.
Rawls's social justice theory	Moral duties are based on an implied social contract. Fairness is justice. The rules are established from an original position of a "veil of ignorance."
Ethical relativism	Individuals decide what is ethical, based on their own feelings as to what is right or wrong.

social responsibility of business
A theory stating that corporations and businesses should act with awareness of the consequences and impact that their decisions will have on others.

Social responsibility requires corporations and businesses to act with awareness of the consequences and impact that their decisions will have on others. Thus, corporations and businesses are considered to have some degree of responsibility for their actions.

Four theories of the **social responsibility of business** are discussed in the following paragraphs: (1) *maximize profits*, (2) *moral minimum*, (3) *stakeholder interest*, and (4) *corporate citizenship*.

Maximize Profits

WEB EXERCISE
Visit the website about making changes at Wal-Mart at **www.changewalmart.org**. What is one of the issues currently being discussed on this site?

maximize profits
A theory of social responsibility stating that a corporation owes a duty to take actions that maximize profits for shareholders.

The traditional view of the social responsibility of business is that business should **maximize profits** for shareholders. This view, which dominated business and the law during the 19th century, holds that the interests of other constituencies (e.g., employees, suppliers, residents of the communities in which businesses are located) are not important in and of themselves.

Milton Friedman, who won the Nobel Prize in economics when he taught at the University of Chicago, advocated the theory of maximizing profits for shareholders. Friedman asserted that in a free society, "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception and fraud."[1]

The following feature discusses an extensive fraud committed by a large corporation.

Critical Legal Thinking

Volkswagen Emissions Scandal

"Americans expect corporations to operate honestly and provide accurate information."

—U.S. government

The Volkswagen Group is a German company that manufactures and sells automobiles worldwide. Some of its brand-name automobiles include Audi, Porsche, Jetta, Passat, Beetle, and Golf.

In the early 2000s, Volkswagen produced a new diesel engine, but it was unable to develop one that met United States environmental standards which limited the amount of nitrogen oxide (NOx) pollution that an automobile could emit.

Therefore, Volkswagen would not be able to sell its new diesel cars in the United States.

Not to be deterred, the executives and engineers at Volkswagen devised a scheme whereby they did not change the diesel engines but did sell diesel automobiles in the United States. They built into their diesel cars a device and software that could detect when their diesel automobiles were being tested by equipment of the U.S. Environmental Protection Agency (EPA) when there was no movement of the automobile except repetitive circling of the tires. The automobile was programmed to activate a short program whereby the emissions of the vehicle would be below EPA emission standards. However, the software could detect when an automobile was not being tested and was being driven on roads where tires move up and down and sideways, at which time the software would disable the temporary pollution controls. Volkswagen's diesel vehicles spewed NOx emissions 40 times greater than permitted by law.

Volkswagen marketed its diesel cars as "clean diesels," and won awards and received U.S. tax breaks. During 2009 to 2015, Volkswagen sold more than 500,000 diesel vehicles containing the trick software in the United States. Several scientists at West Virginia University discovered the deception, and the Volkswagen emission scandal was made public. When confronted with the truth, Volkswagen executives lied and destroyed relevant evidence.

The U.S. government brought civil fraud and criminal charges against Volkswagen. Consumers who purchased these vehicles—which could not be driven because they violated emission standards—brought civil class action lawsuits against Volkswagen.

Eventually, Volkswagen agreed to pay $16 billion to settle the class action civil claims. Pursuant to the settlement, car owners will sell their vehicles back to Volkswagen. In 2017, in a settlement reached with the U.S. government, Volkswagen pleaded guilty to 3 criminal counts and agreed to pay $4.3 billion in civil and criminal fines. The company was placed on probation for 3 years and will be highly monitored so that no further violations occur. Six of Volkswagen's executives were criminally indicted for their participation in the deception.

The U.S. government issued the statement "Americans expect corporations to operate honestly and provide accurate information."

Critical Legal Thinking Questions

How pervasive was the emission fraud? How did Volkswagen get away with its fraudulent scheme for so long a period? How many executives and engineers at Volkswagen would have had to participate in the deception for it to work? Should the Volkswagen executives serve jail time? If yes, for how long?

The ethics of U.S. companies outsourcing jobs to workers in foreign countries is discussed in the Global Law feature on the following page.

Moral Minimum

Some proponents of corporate social responsibility argue that a corporation's duty is to *make a profit while avoiding causing harm to others*. This theory of social responsibility is called the **moral minimum**. Under this theory, so long as business avoids or corrects the social injury it causes, it has met its duty of social responsibility.

moral minimum
A theory of social responsibility stating that a corporation's duty is to make a profit while avoiding causing harm to others.

Example A corporation that pollutes a body of water and then compensates those whom the pollution has injured has met its moral minimum duty of social responsibility.

The legislative and judicial branches of government have established laws that enforce the moral minimum of social responsibility for corporations.

The ultimate justification of the law is to be found, and can only be found, in moral considerations.

Lord MacMillan
Law and Other Things (1937)

Examples Occupational safety laws establish minimum safety standards for protecting employees from injuries in the workplace. Consumer protection laws establish safety requirements for products and make manufacturers and sellers liable for injuries caused by defective products.

The Ethics feature on page 29 discusses how the landmark Sarbanes-Oxley Act promotes ethics in business.

Stakeholder Interest

Businesses have relationships with all sorts of people besides their shareholders, including employees, suppliers, customers, creditors, and the local community. Under the **stakeholder interest** theory of social responsibility, a corporation must consider the effects its actions have on these *other stakeholders*. For example, a corporation would violate the stakeholder interest theory if it viewed employees solely as a means of maximizing shareholder wealth.

stakeholder interest
A theory of social responsibility stating that a corporation must consider the effects that its actions have on persons other than its shareholders.

Global Law

Is the Outsourcing of U.S. Jobs to Foreign Countries Ethical?

HUE, VIETNAM

"Outsourcing" is one of the most despised words for workers in the United States who have lost their jobs to workers in foreign countries. Companies in the United States often outsource the production of many of the goods that are eventually sold in the United States (e.g., clothing, athletic shoes, toys, furniture, televisions, and electronic products). The reason they do so is because they can produce the goods at a lower cost in foreign countries (because workers in many foreign countries are paid substantially less than workers in the United States) and then make higher profits when they sell the goods in the United States.

But why are goods cheaper to make in many foreign countries? By having their goods made in foreign countries, companies avoid the expenses of complying with U.S. worker protection laws that would apply if the products were made in the United States. Some of these laws are occupational safety laws that require workplaces to be safe to work in; workers' compensation laws that pay workers if they are injured on the job; fair labor standards laws that prevent child labor and require the payment of minimum wages and overtime wages; laws that allow workers to form and join unions; laws that require some employers to provide health insurance to employees; laws that require employers to pay Social Security taxes for employees to the U.S. government; laws that prohibit discrimination based on race, sex, disability, age, and other protected classes; and so on. Thus, to avoid compliance with and therefore the costs of these laws, U.S. companies outsource the production of their goods to workers in other countries that do not provide these worker protections and benefits.

Is it ethical for U.S. companies to export the production of their goods to foreign workers who have few of the required worker protections and benefits of workers in the United States? Who benefits by having goods made in foreign countries?

Ethics

Sarbanes-Oxley Act Requires Public Companies to Adopt Codes of Ethics

In the late 1990s and early 2000s, many large corporations in the United States were found to have engaged in massive financial frauds. Many of these frauds were perpetrated by the chief executive officers and other senior officers of the companies. Financial officers, such as chief financial officers and controllers, were also found to have been instrumental in committing these frauds. In response, Congress enacted the **Sarbanes-Oxley Act of 2002**, which makes certain conduct illegal and establishes criminal penalties for violations.[2] In addition, the Sarbanes-Oxley Act prompts companies to encourage senior officers of public companies to act ethically in their dealings with shareholders, employees, and other constituents.

Section 406 of the Sarbanes-Oxley Act requires a public company to disclose whether it has adopted a **code of ethics** for senior financial officers, including its principal financial officer and principal accounting officer. In response, public companies have adopted codes of ethics for their senior financial officers. Many public companies have voluntarily included all officers and employees in the coverage of their codes of ethics.

Ethics Questions How effective will a code of ethics be in preventing unethical conduct? Can you recall any situation that you may have read about where officers of a public company acted unethically?

The stakeholder interest theory is criticized because it is difficult to harmonize the conflicting interests of stakeholders.

Example In deciding to close an unprofitable manufacturing plant, certain stakeholders would benefit (e.g., shareholders and creditors), whereas other stakeholders would not (e.g., current employees and the local community).

Corporate Citizenship

The **corporate citizenship** theory of social responsibility argues that business has a responsibility to do good. That is, business is responsible for helping to solve social problems that it did little, if anything, to cause.

Example Under the corporate citizenship theory of social responsibility, corporations owe a duty to subsidize schools and help educate children.

This theory contends that corporations owe a duty to promote the same social goals as individual members of society. Proponents of this "do good" theory argue that corporations owe a debt to society to make it a better place and that this duty arises because of the social power bestowed on them. That is, this social power is a gift from society and should be used to good ends.

A major criticism of this theory is that the duty of a corporation to do good cannot be expanded beyond certain limits. There is always some social problem that needs to be addressed, and corporate funds are limited. Further, if this theory were taken to its maximum limit, potential shareholders might be reluctant to invest in corporations.

Section 406 of the Sarbanes-Oxley Act
A section of the act that requires a public company to disclose whether it has adopted a code of ethics for senior financial officers.

corporate citizenship
A theory of social responsibility stating that a business has a responsibility to do good.

Public Benefit Corporations

2.4 Define *public benefit corporation* and describe the social purposes served by these corporations.

Most states have passed legislation creating a new form of corporation, called the **public benefit corporation**, often referred to as a **benefit corporation** or **B corporation** or **B corp**. A benefit corporation is a for-profit corporation, but with missions additional to the pure profit motive. One purpose of a B corporation is to generate benefits for society. Unlike traditional corporations, where the shareholder is the main stakeholder, B corps by law allow directors and officers to

Public benefit corporation (benefit corporation or B corporation or B corp)
A corporation that requires directors and officers to make decisions to accomplish general-public benefits and stipulated specific public benefit purposes stated in the articles of incorporation and to consider stakeholders other than shareholders, such as employees, customers, suppliers, and the community, when making corporate decisions.

CONCEPT SUMMARY

THEORIES OF SOCIAL RESPONSIBILITY

Theory	Social Responsibility
Maximize profits	To maximize profits for stockholders
Moral minimum	To avoid causing harm and to compensate for harm caused
Stakeholder interest	To consider the interests of all stakeholders, including stockholders, employees, customers, suppliers, creditors, and the local community
Corporate citizenship	To do good and solve social problems

consider other stakeholders in making corporate decisions. These include employees, customers, suppliers, and the community.

A B corporation's stated purpose is to create *general-public benefits*. This includes considering social issues and protecting the environment. In addition, B corps can name *specific public benefit purposes*, such as reducing the company's carbon footprint, engaging in sustainability efforts, giving 25 percent of its profits to charity, and the like. B corps are sometimes referred to as *mission-driven businesses* and *social purpose corporations*. Most states have enacted legislation that permits B corps.

Companies such as Patagonia, Method, Ben and Jerry's, Etsy, Kickstarter, AltSchool, and others have chosen to conduct business as B corporations.

Key Terms and Concepts

Code of ethics (29)
Corporate citizenship (29)
Ethical fundamentalism (22)
Ethical relativism (24)
Ethics (21)
Ethics and the law (21)
Kantian ethics (duty ethics) (23)
Law (21)
Maximize profits (26)
Moral minimum (26)
Public benefit corporation (benefit corporation or B corporation or B corp) (29)
Rawls's social justice theory (24)
Sarbanes-Oxley Act of 2002 (29)
Section 406 of the Sarbanes-Oxley Act (29)
Social responsibility of business (26)
Stakeholder interest (27)
Utilitarianism (22)

Law Case with Answer

Starbucks Corporation v. Wolfe's Borough Coffee, Inc.

Facts Starbucks Corporation and Starbucks U.S. Brands LLC (Starbucks) is a purveyor of specialty coffees and products sold in more than 10,000 locations worldwide. Starbucks owns more than 60 valid trademarks and service marks (marks) under which it operates its stores and sells coffee and other products. "Starbucks" is one of the most recognizable brand names in the United States and around the world.

Wolfe's Borough Coffee, Inc., doing business as Black Bear Micro Roastery (Black Bear) manufactures and sells roasted coffee beans and related products via internet order and from retail outlets. Black Bear uses the trademark names "Mister Charbucks," "Mr. Charbucks," and "Charbucks Blend." Starbucks sued Black Bear, alleging that the defendant caused trademark dilution in violation of the Federal Trademark Dilution Act by blurring of the name Charbucks with Starbucks and causing a likelihood of confusion. Starbucks requested that the court issue an injunction prohibiting Black Bear from using Charbucks marks.

1. Do you think that the defendant was consciously using the name recognition of the famous Starbucks marks when it used the "Charbucks" name?
2. Was Black Bear's use of the Charbucks name legal?
3. Was Black Bear's use of the Charbucks name ethical?

Answer The U.S. court of appeals found only minimal similarity and weak evidence of association between Charbucks junior marks and Starbucks senior marks and concluded that Starbucks failed to prove that Charbucks marks are likely to dilute the famous "Starbucks" marks. The court refused to issue Starbuck's requested injunction.

The court noted that there is no question that "Starbucks"—an arbitrary mark as applied to coffee—is highly distinctive. The ultimate legal question the court had to answer was whether the Charbucks marks likely caused an association arising from their similarity to the Starbucks marks, which impairs the Starbucks marks' tendency to identify the source of Starbucks products in a unique way. The court concluded: "Here, minimal similarity strongly suggests a relatively low likelihood of an association diluting the senior mark." The court held that the distinctiveness, recognition, and exclusive use of the Starbucks marks did not overcome weak evidence of actual association between the Charbucks and Starbucks marks. The court of appeals held that Starbucks had failed to prove a likelihood of dilution and thus permitted defendant Black Bear to continue using the "Charbucks" name in selling coffee and related products.

Even though defendant Wolfe's conduct was found not to be unlawful, it is highly likely it consciously chose the name "Charbucks" because it is similar to the "Starbucks" name. It is highly unlikely that the name Charbucks was chosen other than for such similarity. In addition, Charbucks was in the same business as Starbucks, selling coffee, not selling dissimilar consumer goods. This seems like a case where the court made a wrong decision or that the law's reach was limited. *Starbucks Corporation v. Wolfe's Borough Coffee, Inc.*, 736 F.3d 198 (United States Court of Appeals for the Second Circuit, 2013)

Critical Legal Thinking Cases

2.1 False Advertising Papa John's International, Inc., is the third-largest pizza chain in the United States, with more than 2,050 locations. Papa John's adopted a new slogan—"Better Ingredients. Better Pizza."—and applied for and received a federal trademark for this slogan. Papa John's spent over $300 million building customer recognition and goodwill for the slogan, which has appeared on millions of signs, shirts, menus, pizza boxes, napkins, and other items and has regularly appeared as the tagline at the end of Papa John's radio and television advertisements.

Pizza Hut, Inc. is the largest pizza chain in the United States, with more than 7,000 restaurants. Pizza Hut launched a new advertising campaign in which it declared "war" on poor-quality pizza. The advertisements touted the "better taste" of Pizza Hut's pizza and "dared" anyone to find a better pizza. Pizza Hut also filed a civil action in federal court, charging Papa John's with false advertising in violation of Section 43(a) of the federal Lanham Act.

What is false advertising? What is puffery? How do they differ from one another? Are consumers knowledgeable enough to see through companies' puffery? Is the Papa John's advertising slogan "Better Ingredients. Better Pizza." false advertising? *Pizza Hut, Inc. v. Papa John's International, Inc.*, 227 F.3d 489, 2000 U.S. App. Lexis 23444 (United States Court of Appeals for the Fifth Circuit)

2.2 Liability Johns-Manville Corporation is a profitable company that makes a variety of building and other products. It was a major producer of asbestos, which was used for insulation in buildings and for a variety of other uses. It has been medically proven that excessive exposure to asbestos causes asbestosis, a fatal lung disease. Thousands of employees of the company and consumers who were exposed to asbestos and contracted this fatal disease sued the company for damages. Eventually, the lawsuits were being filed at a rate of more than 400 per week.

In response to the claims, Johns-Manville Corporation filed for reorganization bankruptcy. It argued that if it did not, an otherwise viable company that provided thousands of jobs and served a useful purpose in this country would be destroyed and that without the declaration of bankruptcy, a few of the plaintiffs who first filed their lawsuits would win awards of hundreds of millions of dollars, leaving nothing for the remainder of the plaintiffs. Under the bankruptcy court's protection, the company was restructured to survive. As part of the release from bankruptcy, the company contributed money to a fund to pay current and future claimants. The fund was not large enough to pay all injured persons the full amounts of their claims.

Is Johns-Manville liable for negligence? Was it ethical for Johns-Manville to declare bankruptcy? Has Johns-Manville met its duty of social responsibility in this case? *In re Johns-Manville Corporation*, 36 B.R. 727, 1984 Bankr. Lexis 6384 (United States Bankruptcy Court for the Southern District of New York)

Ethics Cases

2.3 Ethics Case McDonald's Corporation operates the largest fast-food restaurant chain in the United States and the world. It produces famous foods such as the Big Mac hamburger, Chicken McNuggets, the Egg McMuffin, and other foods. A McDonald's survey showed that 22 percent of its customers are "Super Heavy Users," meaning that they eat at McDonald's 10 times or more a month. Super Heavy Users make up approximately 75 percent of McDonald's sales. The survey also found that 72 percent of McDonald's customers were "Heavy Users," meaning they ate at McDonald's at least once a week.

Jazlyn Bradley consumed McDonald's foods her entire life during school lunch breaks and before and after school, approximately five times per week, ordering two meals per day. When Bradley was 19 years old, she sued McDonald's Corporation for causing her obesity and health problems associated with obesity.

Plaintiff Bradley sued McDonald's in U.S. district court for violating the New York Consumer Protection Act, which prohibits deceptive and unfair acts and practices. She alleged that McDonald's misled her, through its advertising campaigns and other publicity, that its food products were nutritious, of a beneficial nutritional nature, and easily part of a healthy lifestyle if consumed on a daily basis. The plaintiff sued on behalf of herself and a class of minors residing in the state of New York who purchased and consumed McDonald's products. McDonald's filed a motion with the U.S. district court to dismiss the plaintiff's complaint. *Bradley v. McDonald's Corporation*, 2003 U.S. Dist. Lexis 15202 (United States District Court for the Southern District of New York)

1. Did plaintiff Bradley state a valid case against McDonald's for deceptive and unfair acts and practices in violation of the New York Consumer Protection Act?
2. Did McDonald's act ethically in selling products that it knows cause obesity?
3. Should McDonald's disclose the information regarding Heavy Users?

2.4 Ethics Case Kaiser Aluminum & Chemical Corporation entered into a collective bargaining agreement with the United Steelworkers of America, a union that represented employees at Kaiser's plants. The agreement contained an affirmative-action program to increase the representation of minorities in craft jobs. To enable plants to meet these goals, on-the-job training programs were established to teach unskilled production workers the skills necessary to become craft workers. Assignment to the training program was based on seniority, except that the plan reserved 50 percent of the openings for black employees.

Thirteen craft trainees were selected from Kaiser's Gramercy plant for the training program. Of these, 7 were black and 6 white. The most senior black trainee selected had less seniority than several white production workers who had applied for the positions but were rejected. Brian Weber, one of the rejected white employees, instituted a class action lawsuit, alleging that the affirmative-action plan violated Title VII of the Civil Rights Act of 1964, which made it "unlawful to discriminate because of race" in hiring and selecting apprentices for training programs. The U.S. Supreme Court upheld the affirmative-action plan in this case. The decision stated:

> *We therefore hold that Title VII's prohibition against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans. At the same time, the plant does not unnecessarily trammel the interests of the white employees. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.*

United Steelworkers of America v. Weber, 443 U.S. 193, 99 S.Ct. 2721, 1979 U.S. Lexis 40 (Supreme Court of the United States)

1. Why did the federal government enact Title VII of the Civil Rights Act of 1964? Explain.
2. Do companies owe a duty of social responsibility to provide affirmative-action programs?
3. Does anyone suffer economic loss because of affirmative action-programs?

2.5 Ethics Case Warner-Lambert Company has manufactured and distributed Listerine antiseptic mouthwash since 1879. Its formula has never changed. Since Listerine's introduction, the company has represented the product as being beneficial in preventing and curing colds and sore throats. Direct advertising of these claims to consumers began in 1921. Warner-Lambert spent millions of dollars annually advertising these claims in print media and in television commercials.

After 100 years of Warner-Lambert's making such claims, the Federal Trade Commission (FTC) filed a complaint against the company, alleging that it had engaged in false advertising, in violation of federal law.

Four months of hearings were held before an administrative law judge that produced an evidentiary record of more than 4,000 pages of documents from 46 witnesses. After examining the evidence, the FTC issued an opinion which held that the company's representations that Listerine prevented and cured colds and sore throats were false. The U.S. court of appeals affirmed. *Warner-Lambert Company v. Federal Trade Commission*, 562 F.2d 749, 1977 U.S. App. Lexis 11599 (United States Court of Appeals for the District of Columbia Circuit)

1. Is Warner-Lambert guilty of fraud? If so, what remedies should the court have imposed on the company?
2. Why did Warner-Lambert make claims that Listerine cured colds?
3. Did Warner-Lambert act ethically in making its claims for Listerine?

Notes

1. Milton Friedman, "The Social Responsibility of Business Is to Increase Its Profits," *New York Times Magazine*, September 13, 1970.
2. Public Law 107-204 (2002).