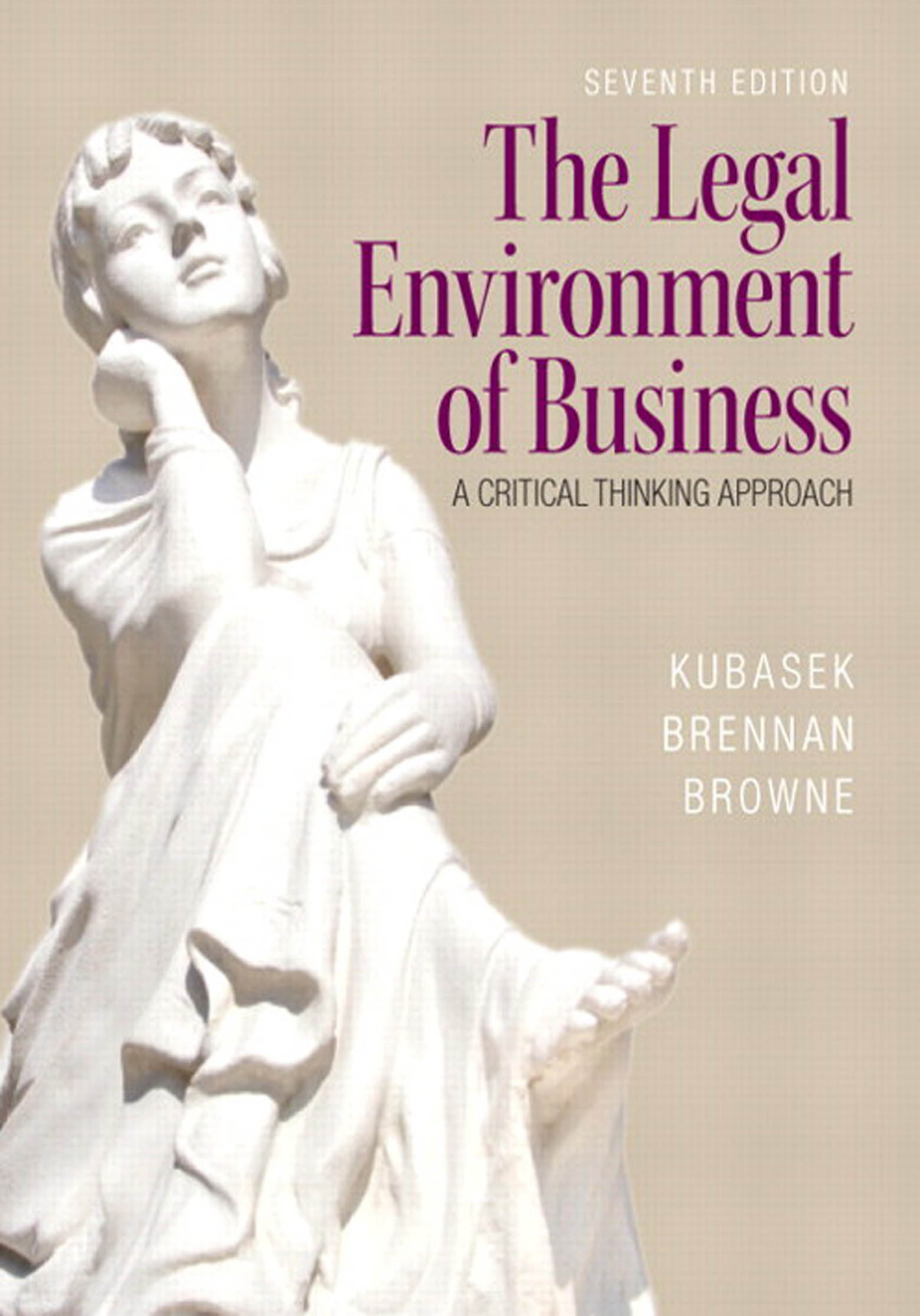
SEVENTH EDITION
The Legal Environment of Business
A CRITICAL THINKING APPROACH
KUBASEK
BRENNAN
BROWNE

THE LEGAL ENVIRONMENT OF BUSINESS

This page intentionally left blank

THE LEGAL ENVIRONMENT OF BUSINESS

A Critical Thinking Approach

SEVENTH EDITION

NANCY K. KUBASEK
BARTLEY A. BRENNAN
M. NEIL BROWNE

PEARSON

Boston Columbus Indianapolis New York San Francisco Upper Saddle River
Amsterdam Cape Town Dubai London Madrid Milan Munich Paris Montreal Toronto
Delhi Mexico City São Paulo Sydney Hong Kong Seoul Singapore Taipei Tokyo

Editor in Chief: Stephanie Wall
Executive Editor: Bob Horan
Program Management Team Lead: Ashley Santora
Project Manager: Karen Kirincich
Editorial Assistant: Kaylee Rotella
Executive Marketing Manager: Anne K. Fahlgren
Project Management Team Lead: Judy Leale
Production Project Manager: Ilene Kahn
Procurement Specialist: Nancy Maneri-Miller
Art Director: Jayne Conte
Text Designer: S4Carlisle Publishing Services
Cover Designer: Suzanne Behnke
Cover Photo/Illustration/Art: Shutterstock/Praisaeng
Full-Service Project Management: S4Carlisle Publishing Services
Composition: S4Carlisle Publishing Services
Printer/Binder: R. R. Donnelley/Roanoke
Cover Printer: Lehigh-Phoenix Color/Hagarstown
Text Font: ITC Garamond 10.5/12

Credits and acknowledgments borrowed from other sources and reproduced, with permission, in this textbook appear on the appropriate page within text.

Library of Congress Cataloging-in-Publication Data
Kubasek, Nancy.
The legal environment of business : a critical thinking approach / Nancy K. Kubasek, Bartley A. Brennan, M. Neil Browne. — Seventh edition.
pages cm
Includes index.
ISBN-13: 978-0-13-354642-2
ISBN-10: 0-13-354642-X
1. Industrial laws and legislation—United States. 2. Commercial law—United States. 3. Trade regulation—United States. I. Brennan, Bartley A. II. Browne, M. Neil, III. Title.
KF1600.K83 2013
346.7307—dc23

2013029352

PEARSON

10 9 8 7 6 5 4 3
ISBN 10: 0-13-354642-X
ISBN 13: 978-0-13-354642-2

To the numerous students who appreciate the importance of developing their critical thinking skills for their personal growth and development.

NANCY K. KUBASEK AND M. NEIL BROWNE

To Sandra for everything.

BARTLEY A. BRENNAN

This page intentionally left blank

Brief Contents

This page intentionally left blank

Contents

Preface

***The Legal Environment of Business: A Critical Thinking Approach*, 7th edition,** is exactly what its name implies: a comprehensive textbook that not only helps students develop a thorough understanding of the legal environment of business, but also enhances their ability to engage in critical thinking and ethical analysis. Students thus develop the knowledge and skills necessary to survive in an increasingly competitive global environment.

The initial motivation for this book was the authors' perceptions that there was no legal environment book available that explicitly and adequately facilitated the development of students' critical thinking skills. Nor was there a book that really integrated ethical analysis throughout the text.

Some people may argue that the traditional method of case analysis allows students to develop their critical thinking skills. The problem with this approach, however, is that it focuses only on the analytical skills, while ignoring the evaluative component that is really the essence of critical thinking; it also lacks an ethics component. To engage in critical thinking necessarily includes consideration of the impact of values on the outcome being considered.

The use of cases in the legal environment of business classroom, however, can provide an excellent opportunity for the development of students' critical thinking abilities when the traditional case method is modified to emphasize development of these critical thinking skills. Additionally, as the students enhance their critical thinking skills, their understanding of the substance of the law also improves.

The following components of *The Legal Environment of Business: A Critical Thinking Approach* ensure that our goal of developing critically thinking students who understand the important concepts of business law and the legal environment of business is attained.

- **An explicit critical thinking model developed by the author of the best-selling critical thinking textbook is set forth in the first chapter.** An eight-step model has as its base the traditional method of case analysis, but adds crucial critical thinking questions that also incorporate ethical analysis. The steps are clearly explained, and students are encouraged to apply the steps to every case in the text.
- **Additional critical thinking and ethical analysis questions incorporated at the beginning of each chapter and after selected cases.** These additional questions help to reinforce the skills emphasized in the model.
- **"Thinking Critically about Relevant Legal Issues" essays at the end of each chapter, which give students additional opportunities to develop their critical thinking skills.** These essays, found at the end of each chapter, allow students to extend their use of their newly developed critical thinking skills beyond cases to the kinds of arguments they will encounter in their daily lives.

Other Points of Distinction

- **Explicit links connecting the law to other disciplines.** This text is the only legal environment book to respond to the call for more integration among courses in colleges of business. "Linking Law and Business" boxes explicitly state how the law in an area directly affects or is affected by a concept in one of the core areas of business, such as accounting, management, and marketing. These boxes appear in every chapter.
- **A balanced mix of classic and current cases.** This book contains many of the most significant classic and contemporary cases, including key U.S.

Supreme Court decisions handed down as recently as 2013. Whenever possible, cases were chosen that not only demonstrate important concepts but also contain fact situations that would interest students.

- **Emphasis on the global environment.** Many of our students will be working in countries other than the United States, and U.S. companies will have many dealings with foreign companies. Thus, an understanding of the global environment is essential for today's business student. This text emphasizes the importance of the global environment by using both the stand-alone and infusion approaches. Chapter 9 focuses explicitly on the global environment of business, and then we integrate global considerations into every chapter with our global dimensions sections and our "Comparative Law Corner," which allows students to see how U.S. law compares to that of other nations around the world. The feature can also sensitize students to the idea that if something is not working well in our country, it might make sense to see how some other countries address similar issues. Examples include:
  - Eminent domain in Germany
  - The judicial system in Germany
  - Corporate speech in Canada
  - Unions in Sweden
  - Pollution controls in Japan
- ***For Future Reading* feature.** We all want our students to become lifelong learners, and we especially want them to continue learning about the law. But how do they know where to go? This feature, found at the end of each chapter, provides a short list of books and articles related to the material in each chapter that interested students may read to learn more about the new areas of law they have just discovered.

New to This Edition

- Added an exciting new pedagogical feature to every chapter beginning with Chapter 4. This new feature, "Applying the Law to the Facts," provides periodic hypothetical situations to which the students apply legal concepts they have just learned. This feature allows the students to continually check their understanding of new legal concepts as they read the material.
- Reorganized and updated the cyber law material by integrating it throughout the book in the chapters where it is substantively appropriate, rather than grouping it all in one cyberlaw chapter.
- Discussion of recent significant changes in the law that may have an effect on business, such as the overturning of the Defense of Marriage Act, discussed in Chapters 5 and 18.
- Updated cases. Cases in this edition have been significantly updated. We have retained the classic cases from the previous edition, as well as those that students find especially interesting or that do an exceptional job of illustrating an important point of law. All of the other cases have been replaced by more current cases that will be of greater interest to our students and that capture the most current changes in the law. A few examples of new cases include:
  - *AT&T Mobility LLC v. Concepcion et ux* (Chapter 4)
  - *Florida v. Jardines* (Chapter 5)
  - *Bilski v. Kappos* (Chapter 14)
  - *Vance v. Ball State University* (Chapter 21)

- Case problems. Approximately one-third of the case problems from the seventh edition have been replaced with more current case problems.
- Revised "For Future Reading" sections. Suggested readings at the end of each chapter have been updated to emphasize more current legal issues.

For Instructors

We offer electronic supplements to meet the unique teaching needs of each instructor. Supplements that accompany this text are available for download by instructors only at our Instructor Resource Center, at www.pearsonhighered.com/irc.

- **Instructor's Manual**
- **Test Item File**
- **E-mail case updates.** Adopters of the book may subscribe to a list that will provide regular case updates via e-mail, consisting of edited versions of newly decided cases, as well as suggestions for where they would fit in the text. To subscribe, just send an e-mail to Nancy Kubasek at nkubase@bgsu.edu and ask to be added to the CTLEB list.
- **PowerPoints**

This page intentionally left blank

Acknowledgments

The author would like to acknowledge, with thanks, the following reviewers of the current and past editions of this text:

Robert Aalberts, University of Nevada, Las Vegas
Victor Alicea, Normandale Community College
Carlos Alsua, University of Alaska, Anchorage
S. Catherine Anderson, Queens University of Charlotte
Teddy Jack Armstrong, Carl Albert State College
Janie Blankenship, Del Mar College
William Bockanic, John Carroll University
Heidi Bulich, College of Business, Michigan State University
Kimble Byrd, Rowan University
Greg Cermignano, Widener University
Glenn Chappell, Coker College
William Christian, College of Santa Fe
Linda Christiansen, Indiana University Southeast
Patrick Cihon, Whitman School of Management, Syracuse University
Michael Costello, University of Missouri–St. Louis
Robert Cox, Salt Lake Community College
Jamey Darnell, Barton College
Regina Davenport, Pearl River Community College
Kevin Derr, Pennsylvania College of Technology
Julia Derrick, Brevard Community College
David F. Dieteman, Penn State Erie, The Behrend College
Joseph Dworak, San Jose State University
Bruce Elder, University of Nebraska, Kearney
Gail Evans, University of Houston, Downtown
David Forsyth, ASU Polytechnic
Lucky Franks, Bellevue University
Samuel B. Garber, DePaul University
Rosario Girasa, Pace University
Van Graham, Gardner-Webb University
John Gray, Loyola College in Maryland
David Griffis, University of San Francisco
Jason Harris, Augustana College
Norman Hawker, Haworth College of Business, Western Michigan University
Richard Hunter, Seton Hall University
Marilyn Johnson, Mississippi Delta Community College
Nancy Johnson, Mt. San Jacinto Community College
Catherine Jones-Rikkers, Grand Valley State University
James Kelley, Notre Dame de Namur University
Lara Kessler, Grand Valley State University
Ernest King, University of Southern Mississippi
Audrey Wolfson Latourette, Richard Stockton College of New Jersey
Larry Laurent, McCoy College of Business, Texas State University
Marty Ludlum, Oklahoma City Community College
Leslie S. Lukasik, Skagit Valley College
Vicki Luoma, Minnesota State University
Daniel Lykins, Oregon State University
Bryan Jon Maciewski, Fond du Lac Tribal and Community College
Maurice McCann, Southern Illinois University
George McNary, College of Business Administration, Creighton University
Don Miller-Kermani, Brevard Community College

David Missirian, Bentley College
Odell Moon, Victor Valley College
Henry Moore, University of Pittsburgh, Greensburg
Mark Muhich, Mesabi Range Community & Technical College
Kimber Palmer, Texas A&M International University
Steve Palmer, Eastern New Mexico University
Darka Powers, Northeastern Illinois University
Charles Radeline, St. Petersburg College
Linda Reid, University of Wisconsin–Whitewater
Bruce Rockwood, College of Business, Bloomsburg University
Robert Rowlands, Harrisburg Area Community College
Kenneth J. Sanney, Central Michigan University
Ira Selkowitz, University of Colorado at Denver and Health Sciences Center
Mary Sessom, Cuyamaca College
James Smith, Bellevue University
Craig Stilwell, Michigan State University
Pamela Stokes, Texas A&M–Corpus Christi
Keith Swim, Jr., Mays Business School, Texas A&M University
Harold Tepool, Vincennes University
Daphyne Saunders Thomas, James Madison University
David Torres, Angelo State University
Kyle Usre, Whitworth College
Deborah Walsh, Middlesex Community College
Joe Walsh, Lees-McRae College
Dalph Watson, Madonna University
Mary Ellen Wells, Alvernia College
John Whitehead, Kilgore College
John Williams, Northwestern State University
Levon Wilson, Georgia Southern University
Rob Wilson, Whitworth College
Andrew Yee, University of San Francisco

About the Authors

NANCY KUBASEK is a Professor of Legal Studies at Bowling Green State University, where she teaches the Legal Environment of Business and Environmental Law courses. For eight years she team-taught a freshman honors seminar on critical thinking and values analysis. She has published another undergraduate textbook with Pearson Education, *Environmental Law* (7th ed., 2010) and more than 75 articles. Professor Kubasek's articles have appeared in such journals as the *American Business Law Journal,* the *Journal of Legal Studies Education,* the *Harvard Women's Law Journal,* the *Georgetown Journal of Legal Ethics,* and the *Harvard Journal on Legislation*. She received her J.D. from the University of Toledo College of Law and her B.A. from Bowling Green State University.

Active in her professional associations, Professor Kubasek has served as president of the TriState Regional Academy of Legal Studies in Business, and president of the national professional association, the Academy of Legal Studies in Business (ALSB). Committed to helping students become excited about legal research, she organized the first Undergraduate Student Paper Competition of the ALSB's Annual Meeting, an event that now provides an annual opportunity for students to present their original legal research at a national convention. She has also published several articles with students and has received her university's highest award for faculty–student research. She states:

> The most important thing that a teacher can do is to help his or her students develop the skills and attitudes necessary to become lifelong learners. Professors should help their students learn the types of questions to ask to analyze complex legal issues, and to develop a set of criteria to apply when evaluating reasons. If we are successful, students will leave our legal environment of business classroom with a basic understanding of important legal concepts, a set of evaluative criteria to apply when evaluating arguments that includes an ethical component, and a desire to continue learning.
>
> To attain these goals, the classroom must be an interactive one, where students learn to ask important questions, define contexts, generate sound reasons, point out the flaws in erroneous reasoning, recognize alternative perspectives, and consider the impacts that their decisions (both now and in the future) have on the broader community beyond themselves.

BARTLEY A. BRENNAN is an Emeritus Professor of Legal Studies at Bowling Green State University. He is a graduate of the School of Foreign Service, Georgetown University (B.S. International Economics); the College of Law, State University of New York at Buffalo (J.D.); and Memphis State University (M.A. Economics). He was a volunteer in the United States Peace Corps, was employed by the Office of Opinions and Review of the Federal Communications Commission, and worked in the general counsel's office of a private international corporation. Professor Brennan has received appointments as a visiting associate professor at the Wharton School, University of Pennsylvania, and as a Research Fellow at the Ethics Resource Center, Washington, D.C. He is the author of articles dealing with the Foreign Corrupt Practices Act of 1977, as amended; the business judgment rule; law and economics; and business ethics. He has published numerous articles in such journals as the *American Business Law Journal, University of North Carolina Journal of International Law,* and the *Notre Dame University Journal of Legislation*. He is a coauthor of *Modern Business Law* (3d ed.). He has testified on amending the Foreign Corrupt Practices Act before the Sub-Committee on International Economics and Finance of the House Commerce, Energy, and Telecommunications Committee.

M. NEIL BROWNE is a Distinguished Teaching Professor of Economics, director of IMPACT, an Honors Residential Learning Community Centered around the Principles of Intellectual Discovery and Moral Commitment, and coach of the Mock Trial Team at Bowling Green State University. He received a J.D. from the University of Toledo and a Ph.D. from the University of Texas. He is the coauthor of seven books and more than a hundred research articles in professional journals. One of his books, *Asking the Right Questions: A Guide to Critical Thinking* (6th ed.), is a leading text in the field of critical thinking. His most recent book, *Striving for Excellence in College: Tips for Active Learning,* provides learners with practical ideas for expanding the power and effectiveness of their thinking. Professor Browne has been asked by dozens of colleges and universities to aid their faculty in developing critical thinking skills on their respective campuses. He also serves on the editorial board of the *Korean Journal of Critical Thinking*. In 1989, he was a silver medalist for the Council for the Advancement and Support of Education's National Professor of the Year award. Also, in 1989, he was named the Ohio Professor of the Year. He has won numerous teaching awards on both local and national levels. He states:

> When students come into contact with conflicting claims, they can react in several fashions; my task is to enable them to evaluate these persuasive attempts. I try to provide them with a broad range of criteria and attitudes that reasonable people tend to use as they think their way through a conversation. In addition, I urge them to use productive questions as a stimulus to deep discussion, a looking below the surface of an argument for the assumptions underlying the visible component of the reasoning. The eventual objectives are to enable them to be highly selective in their choice of beliefs and to provide them with the greater sense of meaning that stems from knowing that they have used their own minds to separate sense from relative nonsense.

PART ONE

Introduction to the Law and the Legal Environment of Business

Part One introduces the concept of critical thinking. A business manager needs to learn and practice asking questions that ensure the selection of the best advice and subsequent strategy. In addition, we provide an overview of how the American legal system works. This overview requires us to understand alternative philosophies of law, alternative philosophies of ethics, how the constitutional foundations of our legal system work to resolve both criminal and civil disputes, and alternative methods of resolving disputes. Part One concludes with a discussion of white-collar crime, a major problem in the legal environment of business.

1

Critical Thinking and Legal Reasoning

- THE IMPORTANCE OF CRITICAL THINKING
- A CRITICAL THINKING MODEL
- THE CRITICAL THINKING STEPS
- USING CRITICAL THINKING TO MAKE LEGAL REASONING COME ALIVE
- APPLYING THE CRITICAL THINKING APPROACH

The Importance of Critical Thinking

critical thinking skills The ability to understand the structure of an argument and apply a set of evaluative criteria to assess its merits.

Success in the modern business firm requires the development of **critical thinking skills**. Business leaders regularly list these skills as the first set of competencies needed in business. *Critical thinking* refers to the ability to understand what someone is saying and then to ask specific questions enabling you to assess the quality of the reasoning offered to support whatever advice someone has given you. Because firms are under increasing competitive pressure, business and industry need managers with advanced thinking skills.[1] Highlighting this need, a report by the U.S. secretary of education states that because "one of the major goals of business education is preparing students for the workforce, students and their professors must respond to this need for enhancing critical thinking skills."[2]

Calls for improvements in critical thinking skills also come from those concerned about business leadership. David A. Garvin of the Harvard Business School told the New York that there is a general feeling in the business community that business leaders need to sharpen their critical thinking skills.[3] As a future business manager, you will experience many leadership dilemmas: All such questions require legal analysis and business leadership, guided by critical thinking.

The message is clear: Success in business today requires critical thinking skills, and there is no better context in which to develop them than in the study of business law. Critical thinking skills learned in the Legal Environment of Business course will be easily transferred to your eventual role as a manager, entrepreneur, or other business professional. The law develops through argument among various parties. Critical thinking about these arguments gives direction to the development of more effective law.

Legal reasoning is like other reasoning in some ways and different in others. When people, including lawyers and judges, reason, they do so for a purpose. Some problem or dilemma bothers them. The stimulus that gets them

[1] C. Sormunen and M. Chalupa, "Critical Thinking Skills Research: Developing Evaluation Techniques," *Journal of Education for Business* 69: 172 (1994).

[2] *Id.*

[3] John Baldon, "How Leaders Should Think Critically," *HBR Blog Network,* January 20, 2010.

thinking is the *issue*. It is stated as a question because it is a call for action. It requires them to do something, to think about answers.

For instance, in our Legal Environment of Business course, we are interested in such issues as:

1. Under the National Labor Relations Act, when are union organizers permitted to enter an employer's property?
2. Do petroleum firms have liability for the environmental and economic effects of oil spills?
3. Must a business fulfill a contract when the contract is made with an unlicensed contractor in a state requiring that all contractors be licensed?

These questions have several possible answers. Which one should you choose? Critical thinking and ethical reasoning moves us toward better choices. Some of your answers could get you into trouble; others could advance your purpose. Each answer is called a *conclusion*. The **conclusion** is a position or stance on an issue, the take-away that the person giving you advice wants you to believe.

conclusion A position or stance on an issue; the goal toward which reasoning pushes us.

Business firms encounter legal conclusions in the form of laws or court decisions and in the advice they receive from people with formal legal training. As businesses learn about and react to decisions or conclusions made by courts, they have two primary methods of response:

1. Memorize the conclusions or rules of law as a guide for future business decisions.
2. Make judgments about the quality of the conclusions.

This book encourages you to do both. What is unique about this text is its practical approach to evaluating legal reasoning. This approach is based on using critical thinking skills to understand and evaluate the law as it affects business.

There are many forms of critical thinking, but they all share one characteristic: They focus on the quality of someone's reasoning. Critical thinking is active; it challenges each of us to form judgments about the quality of the link between someone's reasons and conclusions. In particular, we will be focusing on the link between a court's reasons and its conclusions.

A Critical Thinking Model

You will learn critical thinking by practicing it. This text will tutor you, but your efforts are the key to your skill as a critical thinker. Because people often learn best by example, we will introduce you to critical thinking by demonstrating it in a model that you can easily follow.

We now turn to a sample of critical thinking in practice. The eight critical thinking questions listed in Exhibit 1-1 and applied in the sample case that follows illustrate the approach you should use when reading cases to develop your critical thinking abilities.

As a citizen, entrepreneur, or manager, you will encounter cases like the one that follows. How would you respond? What do you think about the quality of Judge Cedarbaum's reasoning?

EXHIBIT 1-1

THE EIGHT STEPS TO LEGAL REASONING

8. Is there relevant missing information?
7. How appropriate are the legal analogies?
6. What ethical norms are fundamental to the court's reasoning?
5. Does the legal argument contain significant ambiguity?
4. What are the relevant rules of law?
3. What are the reasons and conclusion?
2. What is the issue?
1. What are the facts?

CASE 1-1

United States of America v. Martha Stewart and Peter Bacanovic
United States District Court for the Southern District of New York, 2004
U.S. Dist. LEXIS 12538

Defendants Martha Stewart and Peter Bacanovic were both convicted of conspiracy, making false statements, and obstruction of an agency proceeding, following Stewart's sale of 3,928 shares of ImClone stock on December 27, 2001. Stewart sold all of her ImClone stock after Bacanovic, Stewart's stockbroker at Merrill Lynch, informed Stewart that the CEO of ImClone, Samuel Waksal, was trying to sell his company stock. On December 28, 2001, ImClone announced that the Food and Drug Administration (FDA) had not approved the company's cancer-fighting drug Erbitux. Thereafter, the Securities and Exchange Commission (SEC) and the United States Attorney's Office for the Southern District of New York began investigations into the trading of ImClone stock, including investigations of Stewart and Bacanovic. Following Stewart's and Bacanovic's criminal convictions, the defendants filed a motion for a new trial, alleging that expert witness Lawrence F. Stewart, director of the Forensic Services Division of the United States Secret Service, had committed perjury in his testimony on behalf of the prosecution. As the "national expert for ink analysis," Lawrence Stewart testified about the reliability of defendant Bacanovic's personal documents that contained information about Martha Stewart's investments in ImClone.

Judge Cedarbaum

Rule 33 provides: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." However, "in the interest of according finality to a jury's verdict, a motion for a new trial based on previously-undiscovered evidence is ordinarily 'not favored and should be granted only with great caution.'" In most situations, therefore, "relief is justified under Rule 33 only if the newly-discovered evidence could not have been discovered, exercising due diligence, before or during trial, and that evidence 'is so material and non-cumulative that its admission would probably lead to an acquittal.'"

But the mere fact that a witness committed perjury is insufficient, standing alone, to warrant relief under Rule 33. "Whether the introduction of perjured testimony requires a new trial initially depends on the extent to which the prosecution was aware of the alleged perjury. To prevent prosecutorial misconduct, a conviction obtained when the prosecution's case includes testimony that was known or should have been known to be perjured must be reversed if there is any reasonable likelihood that the perjured testimony influenced the jury." When the Government is unaware of the perjury at the time of trial, "a new trial is warranted only if the testimony was material and 'the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.'"

Since *[United States v.] Wallach,* the Second Circuit has noted that even when the prosecution knew a witness was committing perjury, "where independent evidence supports a defendant's conviction, the subsequent discovery that a witness's testimony at trial was perjured will not warrant a new trial."

Defendants have failed to demonstrate that the prosecution knew or should have known of Lawrence's perjury. However, even under the stricter prejudice standard applicable when the Government is aware of a witness's perjury, defendants' motions fail. There is no reasonable likelihood that knowledge by the jury that Lawrence lied about his participation in the ink tests and whether he was aware of a book proposal could have affected the verdict.

The verdict, the nature of Lawrence's perjury, and the corroboration that Lawrence's substantive testimony received from the defense's expert demonstrate that Lawrence's misrepresentations could have had no effect on defendants' convictions.

First, the jury found that the Government did not satisfy its burden of proof on the charges to which Lawrence's testimony was relevant. Defendants do not dispute that Bacanovic was acquitted of the charge of making and using a false document, and that none of the false statement and perjury specifications concerning the existence of the $60 agreement were found by the jury to have been proved *beyond a reasonable doubt*. . . . In other words, the jury convicted defendants of lies that had nothing to do with the $60 agreement. The outcome would have been no different had Lawrence's entire testimony been rejected by the jury, or had Lawrence not testified at all.

Defendants argue that acquittal on some charges does not establish that the jury completely disregarded Lawrence's testimony. They contend that the $60 agreement constituted Stewart and Bacanovic's core defense and that the "@60" notation was evidence which supported that defense; thus, to the extent that awareness of Lawrence's perjury could have caused the jury to discredit his testimony and have greater confidence in the existence of the agreement and the validity of the notation, the jury would have been more willing to believe defendants' version of the events.

This argument is wholly speculative and logically flawed. The existence of the $60 agreement would not have exonerated defendants. It would not have been

inconsistent for the jury to find that defendants did make the $60 agreement, but that the agreement was not the reason for the sale. Defendants do not persuasively explain how knowledge of Lawrence's lies could have made the jury more likely to believe that the agreement was the reason for the sale.

As an initial matter, defendants overstate the importance of the $60 agreement to this prosecution. That a $60 agreement was the reason for Stewart's sale was only one of many lies defendants were charged with telling investigators to conceal that Stewart sold her stock because of Bacanovic's tip.

In addition to the substantial basis for concluding that the jury's decision could not have been affected by the revelation of Lawrence's misrepresentations, ample evidence unrelated to the $60 agreement or to Lawrence's testimony supports defendants' convictions.

The testimony of Faneuil, Perret, and Pasternak supports the jury's determinations that Stewart lied when she told investigators that she did not recall being informed of Waksal's trading on December 27. . . .

Finally, Faneuil's testimony supports the jury's determination that Stewart lied when she claimed not to have spoken with Bacanovic about the Government investigation into ImClone trading or Stewart's ImClone trade (Specifications Six and Seven of Count Three). Faneuil stated that Bacanovic repeatedly told him in January 2002 and afterward that Bacanovic had spoken to Stewart and that everyone was "on the same page."

But defendants fail to explain how the revelation of this perjury—if in fact it is perjury—could have affected the verdict. Defendants cannot escape the fact that the jury acquitted Bacanovic of Count Five and both defendants of making false statements relating to the existence of the $60 agreement, and the fact that ample evidence supports the charges of which the jury convicted defendants.

Motion for a new trial *denied*.

Before we apply critical thinking to this case, notice that the law is a place where people actively disagree. They are fighting over responsibilities, rights, and fairness. Business law provides a scenario in which parties can peacefully settle the disputes they will inevitably have. Law is and always has been an alternative to war and physical fights. It is a human invention that should make us proud that we can do better than use physical force to settle disagreements.

Now let's get to work, learning how to use the law optimally in a business environment.

First, review the eight steps of a critical thinking approach to legal reasoning in Exhibit 1-1. Throughout the book, we will call these the *critical thinking questions*. Notice the primary importance of the first four steps; their purpose is to discover the vital elements in the case and the reasoning behind the decision. Failure to consider these four foundational steps might result in our reacting too quickly to what a court or legislature has said. The rule here is: We should never evaluate until we first understand the argument being made.

The answers to these four questions enable us to understand how the court's argument fits together and to make intelligent use of legal decisions. These answers are the necessary first stage of a critical thinking approach to legal analysis. The final four questions are the critical thinking component of legal reasoning. They are questions that permit us to evaluate the reasoning and to form our reaction to what the court decided.

You will develop your own workable strategies for legal reasoning, but we urge you to start by following our structure. Every time you read a case, ask yourself these eight questions. The remainder of this section will demonstrate the use of each of the eight steps. Notice that the order makes sense. The first four follow the path that best allows you to discover the basis of a particular legal decision; the next four assist you in deciding what you think about the worth of that decision.

The Critical Thinking Steps

FACTS

First we look for the most basic building blocks in a legal decision or argument. These building blocks provide the context in which the legal issue is to be resolved. Certain events occurred; certain actions were or were not taken;

particular persons behaved or failed to behave in specific ways. Change certain facts, and the decision will go the other way. We always wonder, what happened in this case? Let's now turn our attention to the *Stewart* case:

1. Martha Stewart sold 3,928 shares of her ImClone stock on December 27, 2001.
2. On December 28, 2001, ImClone announced the FDA's rejection of its new cancer-fighting drug, which caused the company's stock to lose value.
3. Stewart and Bacanovic were convicted of conspiracy, making false statements, and obstruction of an agency proceeding.
4. Expert witness Lawrence Stewart was accused of perjuring himself in the testimony he gave prior to the defendants' conviction.
5. According to a federal rule and case law, perjury of a witness could constitute grounds for a new trial.

ISSUE

In almost any legal conflict, finding and expressing the issue is an important step in forming a reaction. So important is the definition of the issue, that many times the lawyers in a legal suit spend considerable effort trying to get the judge or jury to see the issue a particular way so that they have a better chance of winning the case. The issue is the question that caused the lawyers and their clients to enter the legal system. Usually, there are several reasonable perspectives concerning the correct way to word the issue in dispute.

1. In what instances may a court grant a new trial?
2. Does perjury of a witness mean that defendants should have a new trial?
3. Do the regulations in Rule 33 and relevant case law permit the defendants to have a new trial?

Do not let the possibility of multiple useful ways to word the issue cause you any confusion. The issue is certainly not just anything that we say it is. If we claim something is an issue, our suggestion must fulfill the definition of an issue in this particular factual situation.

REASONS AND CONCLUSION

reason An explanation or justification provided as support for a conclusion.

Judge Cedarbaum held that the defendants should not have a new trial. This finding by Judge Cedarbaum is her conclusion; it serves as her answer to the legal issue. Why did she answer this way? Here we are calling for the **reasons**, explanations or justifications provided as support for a conclusion.

1. Under Rule 33 and relevant case law, perjury is not sufficient to justify a new trial, unless (a) the government knew about the perjury or (b) the perjured testimony was so material that without it the verdict would probably have resulted in acquittal of the defendants.
2. The defendants did not demonstrate that the government knew or should have known about the perjured testimony.
3. The jury would still have convicted the defendants apart from Lawrence's testimony.
4. Defense experts agreed with Lawrence on the "most critical aspects of his scientific analysis."

Let's not pass too quickly over this very important critical thinking step. When we ask *why* of any opinion, we are showing our respect for reasons as the proper basis for any assertion. We want a world rich with opinions so we can have a broad field of choice. We should, however, agree with only those legal opinions that have convincing reasons supporting the conclusion. Thus,

asking *why* is our way of saying, "I want to believe you, but you have an obligation to help me by sharing the reasons for your conclusion."

RULES OF LAW

Judges cannot offer just any reasoning they please. They must always look back over their shoulders at the laws and previous court decisions that together provide a foundation for current and future decisions. They must follow precedents, the decisions in past cases with similar facts.

This particular case is an attempt to match the words of the Federal Rules of Criminal Procedure, specifically Rule 33, and its regulations with the facts in this instance. The court also references case law, specifically the Second Circuit's ruling in *United States v. Wallach*. What makes legal reasoning so complex is that statutes and findings are never crystal clear. Judges and businesspeople have room for interpretive flexibility in their reasoning.

AMBIGUITY

The starting point for thinking about this important critical thinking standard is recognizing that a word does not have just one meaning. Thus, when I say a particular word to you, there is no reason I should presume that the meaning I had in mind is transferred into your mind in exactly the same form as it left my mouth. As soon as we realize the flexibility of words, a huge responsibility falls onto our shoulders. We have to seek clarity in what people say to us. Doing so is only fair to them.

The court's reasoning rests on its implied assumptions about the meaning of several ambiguous words or phrases. (An **ambiguous** word is one capable of having more than one meaning in the context of these facts.) For instance, Judge Cedarbaum stated that Rule 33 permits the court to grant a new trial if the "interest of justice so requires." But what is the "interest of justice"?

ambiguous Susceptible to two or more possible interpretations.

Does the interest of justice entail strict conformity to legal precedents? Or could the court's reliance on certain precedents result in some form of injustice in the *Stewart* case? If we adopt the former definition, we would be more inclined to conclude that the judge's denying the defendants' motion for a new trial was consistent with the "interest of justice." However, if the legislators who created Rule 33 intended a definition of "justice" that placed a stronger emphasis on judicial fairness, for example, perhaps we would be less supportive of Judge Cedarbaum's decision.

Another illustration of important ambiguity in the decision is the court's use of the term *reasonable likelihood,* referring to the probability that Lawrence's alleged perjury could not have affected the jury's verdict—but what degree of probability is a "reasonable likelihood"? Does this level of probability suggest that knowledge of Lawrence's testimony could have affected the jury's verdict? If we interpret "reasonable likelihood" as still including the possibility that knowledge of Lawrence's perjury could have affected the jury, we might reach a conclusion that differs from the court's decision. If we assume a definition of "reasonable likelihood" similar to "beyond a reasonable doubt," however, we would be more inclined to agree with the judge's decision. Hence, until we know what "reasonable likelihood" means, we cannot fairly decide whether the judge made the appropriate decision.

ETHICAL NORMS

The primary ethical norms that influence judges' decisions are justice, stability, freedom, and efficiency. Notice that each of these words is an abstraction, something we cannot touch, smell, hear, or see. As important as these ethical norms are, they are simply an invitation to a conversation—a conversation focusing on the meaning being used in this particular instance. Judge Cedarbaum expresses

EXHIBIT 1-2

CLARIFYING THE PRIMARY ETHICAL NORMS

A judge's allegiance to a particular ethical norm focuses our attention on a specific category of desired conduct. We have, or think we have, an understanding of what is meant by freedom and other ethical norms.

But do we? Ethical norms are, without exception, complex and subject to multiple interpretations. Consequently, to identify the importance of one of the ethical norms in a piece of legal reasoning, we must look at the context to figure out which form of the ethical norm is being used. The types of conduct called for by the term *freedom* not only differ depending on the form of freedom being assumed, but at times they can contradict each other.

As a future business manager, your task is to be aware that there are alternative forms of each ethical norm. Then a natural next step is to search for the form used by the legal reasoning so you can understand and later evaluate that reasoning.

The following alternative forms of the four primary ethical norms can aid you in that search.

Ethical Norms	***Forms***
1. Freedom	To act without restriction from rules imposed by others To possess the capacity or resources to act as one wishes
2. Security	To provide the order in business relationships that permits predictable plans to be effective To be safe from those wishing to interfere with your property rights To achieve the psychological condition of self-confidence such that risks are welcomed
3. Justice	To receive the product of your labor To provide resources in proportion to need To treat all humans identically, regardless of class, race, gender, age, and so on To possess anything that someone else was willing to grant you
4. Efficiency	To maximize the amount of wealth in our society To get the most from a particular input To minimize costs

herself as a defender of stability or order. (Here is a good place to turn to Exhibit 1-2 to check alternative definitions of *stability*.) She is unwilling to grant a new trial simply on the fact that one of the witnesses allegedly committed perjury. Instead of granting the defendants' motion, Judge Cedarbaum elevates the "interest of according finality to a jury's verdict," even if the prosecution knew or should have known about the alleged perjury. Citing previous case law, she holds to those precedents that grant new trials only in rare instances.

ANALOGIES

Ordinarily, our examination of legal analogies will require us to compare legal precedents cited by the parties with the facts of the case we are examining. Those precedents are the analogies on which legal decision making depends. In this case, Judge Cedarbaum relies on several legal precedents as analogies for her ruling, including *United States v. Wallach*.

In this particular precedent, the Second Circuit held that even if the prosecution knew of a witness's perjury, the court should not grant a new trial when other "independent" evidence is sufficient to convict a defendant. The worth of this analogy depends on a greater understanding of independent evidence. In other words, what constitutes independent evidence? And is the strength of independent evidence in the *Stewart* case comparable to the independent evidence

in *Wallach*? Or are there significant differences between the two cases such that the court's reliance on *Wallach* is unwarranted in this case?

To feel comfortable with the analogy, we would need to be persuaded that the independent evidence in the *Stewart* case is basically similar to the independent evidence in the precedent, *United States v. Wallach*.

MISSING INFORMATION

When any of us makes a decision, we always do so on the basis of less information than we would love to have. In the search for relevant missing information, it is important not to say just anything that comes to mind. For example, where did the defendants eat Thanksgiving dinner? Anyone hearing that question would understandably wonder why it was asked. Ask only questions that would be helpful in understanding the reasoning in this particular case.

To focus on only relevant missing information, we should include an explanation of why we want it with any request for additional information. We have listed a few examples here for the *Stewart* case. You can probably identify others.

1. How well informed is Judge Cedarbaum with respect to the deliberations of the jury? If her understanding of the jurors' preverdict discussions is very limited, the defendants' request for a new trial might be more convincing, because Judge Cedarbaum repeatedly contends that jurors' knowledge of Lawrence's alleged perjury would not have affected the jurors' decision.
2. Congress, as it does with any legislation, discussed the Rules of Criminal Procedure before passing them. Does that discussion contain any clues as to congressional intent with respect to the various conditions required for a defendant to receive a new trial? The answer would conceivably clarify the manner in which the court should apply Rule 33.
3. Are there examples of cases in which courts have examined fact patterns similar to those in the *Stewart* case but reached different conclusions about a new trial? The answer to this question would provide greater clarity about the appropriateness of using certain case precedents, thereby corroborating or undermining Judge Cedarbaum's decision.

Many other critical thinking skills could be applied to this and other cases. In this book, we focus on the ones especially valuable for legal reasoning. Consistently applying this critical thinking approach will enable you to understand the reasoning in legal cases and increase your awareness of alternative approaches our laws could take to many problems you will encounter in the legal environment of business. The remaining portion of this chapter examines each of the critical thinking questions in greater depth to help you better understand the function of each.

Using Critical Thinking to Make Legal Reasoning Come Alive

Our response to an issue is a *conclusion*. It is what we want others to believe about the issue. For example, a court might conclude that an employee, allegedly fired for her political views, was actually a victim of employment discrimination and is entitled to a damage award. Conclusions are reached by following a path produced by reasoning. Hence, examining reasoning is especially important when we are trying to understand and evaluate a conclusion.

There are many paths by which we may reach conclusions. For instance, I might settle all issues in my life by listening to voices in the night, asking my uncle, studying astrological signs, or just playing hunches. Each method could produce conclusions. Each could yield results.