**CHAPTER 1: LAW, LEGAL REASONING, AND THE LEGAL PROFESSION**

*LECTURE OUTLINE*

1. Discuss the *Twisdale* case that opens this chapter. (This was a Chapter 1 case in the previous edition of the book.) It provides an interesting vehicle for discussing the functions of law and legal interpretation.

a. Have your students identify the various functions of the law and then discuss which specific functions are furthered by the anti-retaliation aspects of the Civil Rights statute.

b. In the context of legal interpretation, the court found that Twisdale did seem to be protected based on the literal language of the statute. However, it looked beyond the plain meaning to reject his claim. Specifically, the court believed that interpreting the law in a manner that would protect him from retaliation would undermine the purpose of the statute. It is conceivable that the court is motivated by public policy concerns as well.

c. What do your students think of courts who do look at intent and public policy? Use this as a lead-in for a discussion of legal jurisprudence.

2. Question students about their definitions of “law.” Make certain they understand the importance of law in all aspects of our lives.

3. Discuss the various *functions* that law serves in society. You might do this by having the students identify some of them.

a. Discuss the conflicts that arise between and among the various functions of law. For example, there often are conflicts between the goals of individual freedom and achieving social justice. You might wish to discuss the sodomy case (*Lawrence v. Texas*) in this light. Note the problems that arise when there is no clear consensus on what is just.

b. Ask the students if they think that law ever is “over used.” They are likely to cite numerous examples. For instance, this might be a time to talk about the product liability cases that are regularly in the headlines. Perhaps the case involving the woman who burned herself with coffee from McDonalds would be appropriate here.

c. Have the students discuss what it means to have the law maintain order. You might ask students if maintaining order means maintaining the status quo. This can lead to a discussion of legal realism and views that law is used by those in power to retain their power.

4. There is a tendency for people to think of law as imposing duties without considering how it establishes and preserves rights. Talk about how our system tries to match rights with corresponding duties.

a. Explain how the duties, rights, and privileges make up *substantive law*.

b. Explain that *procedural law* provides the framework within which substantive laws are created and enforced. Point out that Chapters 2 and 4 offer a more detailed discussion of procedural law.

5. Ask the students to think of an example of a duty imposed by substantive law that might violate some moral or ethical belief. This might be a good time to talk about the various schools of legal jurisprudence. Have them speculate how a legal positivist would differ from a legal sociologist or natural law theorist in handling such situations.

6. Contrast criminal law with civil law.

a. Point out that society considers it much worse to be convicted of a crime than to be held civilly liable. Explain how, as a result, there are more exacting procedural safeguards to protect a defendant in a criminal trial than in a civil trial.

b. Note the difference between compensatory damages and punitive damages. Discuss the current uproar over punitive damages and the Supreme Court’s attempt to rein them in. (See State Farm Mutual Automobile Insurance v. Campbell, 123 S.Ct. 1513 (U.S. Sup.Ct. 2003) (establishing guideposts for calculating punitive damages).

c. Point out that often one can be subject to sanctions under both criminal and civil laws without violating the proscription against “double jeopardy.” Find out if the students think that punitive damages in a civil trial, coupled with fines in a criminal trial, constitute a type of double jeopardy.

*United States v. Farinella*

Farinella was charged with the crime of misbranding food after he changed the “best when purchased by” message on bottles of salad dressing. The court rejected the FDS’s argument that Farinella violated federal law because he failed to gain FDA approval before changing the dates. This is because there is no federal law requiring such advance approval.

*Points for Discussion*: This case is placed in the text as an example of the general rules underlying criminal law. Specifically, a person generally cannot be convicted of a crime unless he or she violates a statute. Here, since there was no statute, there could be no criminal violation.

7. The brief introduction to our legal system should be a review for most students.

a. The constitutional law material is more heavily discussed in Chapter 4. An argument can be made for it to be presented immediately following this chapter. However, we believe students should first review Chapter 2’s discussion of the dispute resolution system.

b. Talk about the role of the courts in determining the constitutionality of legislation. Do they believe this gives the courts too much power?

c. Explain the relationship between state laws and federal laws. Make certain the students understand that state laws may not violate the federal constitution and must be consistent with federal statutes.

*Coach v. Goofellow*

Goodfellow, the owner of a flea market, made no real effort to prevent the sale of counterfeit products on its premises despite receiving clear notice that trademark infringement was occurring. Despite the fact that the applicable statute said nothing about contributory trademark liability, the court held that Goodfellow could be liable for the violations because he continued to facilitate the infringing activity despite having knowledge of its occurrence.

*Points for Discussion:* Explain how the court basically developed a law of contributory trademark infringement without any direct statutory command. This is an example of the common law. Make certain that this kind of flexible lawmaking is more likely to occur within the realm of civil law than with criminal law.

8. The material on statutory interpretation can be extremely important in laying the foundation for how lawyers think. More importantly, it teaches students valuable critical thinking skills. Take the students through the process for interpreting statutes. You may discuss statutory interpretation and legal jurisprudence together. Note how positivists often have problems moving beyond the “plain meaning” of words while natural law theorists and legal sociologists are accused of ignoring them.

*Lozman v. City of Riviera Beach*

Lozman was accused of ignoring admiralty laws that require the payment of dockage fees for “vessels” docked in a city-owned marina. The court found that his floating home was not a vessel under the meaning of the relevant statute.

*Points for Discussion:* Explain how the court looked beyond the plain meaning of the statute, concluding that not every floating structure is a vessel. In particular, have the students identify the “purpose” and “public policy” arguments made by the court.

9. Discuss the concept of *stare decisis*.

a. Note how *stare decisis* promotes stability.

b. Note how *stare decisis* permits change.

c. Explain how the rule against *ex post facto laws* does not apply to instances where the court has reinterpreted a statute. Discuss how this can pose problems for people who relied on the original interpretation.

*Lawrence v. Texas*

The U.S. Supreme Court struck down a Texas sodomy statute that prohibited sexual relations between same-sex partners. In reaching its conclusion, the Court overturned *Bowers v. Hardwick*, a previous decision upholding a similar Georgia sodomy statute. The Court explained that its actions would not undermine respect for the judicial system, in part, because there was no individual or societal reliance on *Bowers*. Further, it believed that the rationale of *Bowers* was unsound, emphasizing that it was not correct today and was not correct when it was decided.

*Points for Discussion:* Once again, we have chosen to present a non-business case. Further, students may find this case long and somewhat difficult. However, it is timely and controversial. As importantly, it illustrates both how the Court uses previous decisions and, ultimately, overturns a precedent case. Finally, courts today clearly are struggling with how to give meaning to this case. As such, it should provide a great vehicle for exploring the concept of *stare decisis*.

10. The materials on jurisprudence are designed to illustrate how peoples’ values shape their interpretation of the law. You might recommend that students examine each decision is the chapter and indicate what school of jurisprudence the judge appears to represent. Have them analyze a case from the point of view of each of the schools of thought.

a. Contrast the legal positivist with a natural law thinker. Emphasize that students should not confuse natural law with any particular religion. Discuss the *Rochin* case referred to in the section on Natural Law. Discuss why a court might feel compelled to explain that its decision is not based on natural law.

*Bowles v. Russell*

After being convicted of murder, Bowles failed to appeal within the prescribed 30-day period. Still, the pertinent statute still gave him 14 days to re-open the filing period. However, the district court mistakenly informed Bowles that he had 17 day to re-open the filing period. Bowles filed the motion within the 17-day period but after the 14-day period. The U.S. Supreme Court, despite Bowles reliance on the district court’s information, disallowed Bowles’s motion.

*Points for Discussion:* It is not clear that this court adheres to legal positivism. However, the court’s unwillingness to consider Bowles’s reliance interests and its insistence on adhering to the strict language of the statute takes on the appearance of a positivist decision. The court makes clear that despite an inequitable result, Congress (not the courts) must address this issue. This illustrated the harshness that may attend legal positivist decision.

b. Explain how legal sociologists often have a social agenda and, accordingly, make decisions that promote that view of how the world should be ordered. Discuss the *Buck v. Bell* case that is referenced in the section on f Sociological Jurisprudence. Explain how this case arose at a time when societies, following the advice of geneticists, believed that the human stock could be strengthened by weeding out weaker members. (This was part of the impetus for Nazi Germany’s pursuit of a master race.) In the final line of the decision, in support of its ruling that Carrie Buck could be sterilized, the court said: “Three generations of imbeciles are enough.” How do your students feel about this statement? How do they feel about the case?

c. Students have a more difficult time comprehending legal realism. You might explain realism as a way of examining the suspected motivations of other decision makers or law enforcers. Rather than accept the decision maker’s explanation of her decision at face value, the realist reads between the lines to see if there is a hidden agenda. The *Hogan* case, referenced in the section on Legal Realism, is likely to trigger discussion. You may ask students if they believe that a person is able to shed his/her personal biases upon becoming a judge.

11. Students might enjoy a role-playing exercise involving a prosecutor, a defense attorney, and a judge. You might wish to discuss United States v. Tilghman, 134 F.3d, 414 (D.C. Cir. 1998). The case involves a judge’s vigorous questioning of a criminal defendant in such a manner that seemed to indicate that the judge doubted the defendant’s honesty. The court found that the judge prejudiced the defendant’s case and, accordingly, reversed the conviction and ordered a new trial. It might initiate a better discussion of the appropriate roles of each participant in the adversary system.

*Lasar v. Ford Motor Company*

The defendant’s attorney disobeyed the judge’s instructions by making indirect reference to the fact that the plaintiff may have been drinking and was not wearing a seatbelt when his vehicle rolled over. As a result, the judge declared a mistrial, discharged the jury and imposed monetary sanctions on the defendant (Ford) and its attorney.

*Points for Discussion:* Explain how this attorney overstepped the bounds of his duty to zealously represent his client. Discuss how we determine the parameters of that duty. Some students may not understand why the jury was not supposed to know that the plaintiff was not wearing a seatbelt or may have been drinking. This trial was supposed to discover if the door latch on the vehicle was defectively made. Thus, the issue of whether the plaintiff was wearing a seatbelt or had been drinking was not relevant to that point. However, the evidence introduced by the defendant’s attorney may have distracted the jury from the legal issue.

12. Discuss the concept of a *fiduciary*. Make certain the students understand the importance of this concept and the duty of loyalty within an adversary system. At the same time, you might explore the potential conflicts of interest that may confront an attorney representing a client.

13. Talk about the concept of confidentiality. You may wish to discuss the following two cases.

1. In *Brett v. Berkowitz*, 706 A.2d 509 (Sup.Ct. Del. 1998), a former client sued her attorney for sexual harassment. During discovery she sought the names of other clients with whom the lawyer may have had sexual contact. The Delaware Supreme Court denied her request, claiming that revelation of their names would violate the attorney/client privilege by disclosing the fact that they had consulted a lawyer on domestic relations matters.

b. In *Kobluk v. University of Minnesota*, 574 N.W.2d 436 (Sup.Ct. Minn. 1998), a professor was challenging his denial of tenure. As a part of discovery, he sought copies of two preliminary drafts of the letter he received notifying him of university’s decision to deny him tenure. The original copy was written by the university provost, who then sent it to the university counsel for revision. The second copy was written by the counsel after a discussion with the provost. The provost then drafted a final letter which was sent to the professor. The court was forced to decide if the drafts constituted communications relating to the purpose of seeking or rendering legal assistance and if they were made in confidence. The court viewed the drafts as a request for, and the offering of, legal advice. Further, it noted that the drafts were marked, “CONFIDENTIAL DRAFT.” Accordingly, the court upheld the confidentiality of the drafts and denied the professor’s discovery request. It stated that the test of confidentiality was “whether the client intended to keep the specific draft confidential and whether the client and the attorney took all steps reasonably necessary to prevent disclosure.”

*United States v. Stewart*

Martha Stewart, under indictment for securities law violations, sent an e-mail to her attorney explaining her actions. She also forwarded a copy of the e-mail to her daughter. The U.S. attorney prosecuting her case sought access to the e-mail. The court concluded that Stewart waived the attorney-client privilege by sharing the e-mail with her daughter. However, it refused to compel disclosure of the e-mail’s contents because it was protected by the work product privilege.

*Points for Discussion:* Have the students compare and contrast the attorney-client privilege and the work product privilege. Make certain they understand how Stewart could have waived the former but not the latter.

14. The concept of *preventive law* is central to a course designed for business students. The interest of business people in law ordinarily is strictly instrumental—to use their knowledge of the law to reach business objectives. Explain how knowledge of the law can avoid losses as well as permit opportunities.

# ANSWERS TO QUESTIONS AND PROBLEM CASES

1. Some of the primary functions of law are to keep the peace, enforce standards of conduct, maintain the status quo, facilitate planning, and promote social justice.

2. Courts make law in three ways: (1) through *interpretation*; (2) by “finding” the *common law*; and (3) through *judicial review*.

3. The court could have possibly found an exception to the immunity provisions of the statute in case. It could have concluded that, since some of the content of the false profile was formulated in response to Matchmaker's questionnaire, Matchmaker itself was an information content provider. However, rather than consider the deplorable outcome, the court confined its analysis to a literal reading of the statute. This sounds like the thinking of a legal positivist. *Carafano v. Metrosplash.com*, 339 F.3d 1119 (9th Cir. 2003).

4. The court would use the processes of *stare decisis* and legal interpretation to determine if the electronic License Agreement constituted a writing. First, it would look to past cases to see if they have answered this question either expressly or implicitly. If this did not provide a convincing answer, it would look to plain and ordinary meaning of the terms “writing” and “written” to see if they include any electronic writings. Courts frequently look to dictionaries in order to determine the plain meaning of words and particularly examine how a word was defined at the time the statute was drafted and enacted. It would seem that the plain meaning of the word “written” does not exclude all electronic communications. Of course, that does not mean that all electronic communications may be considered “written.” Next, if the court still was not certain of the proper disposition of the case, it could turn to an investigation of the congressional intent at the time the Federal Arbitration Act was enacted. Finally, it might turn to public policy. There it would be likely to discover that national policy encourages arbitration of disputes. Thus, the court would be likely to rule that the electronic agreement did constitute a writing. *In re RealNetworks*, 2000 U.S. Dist. LEXIS 6584 (N.D. Ill. 2000).

5. The court could distinguish this case from the precedents upholding the privity doctrine by interpreting it as falling within the realm of the recognized exceptions to that doctrine. An automobile with a defective wheel could be likened to a falsely labeled poison because the potential dangers should be foreseeable. Likewise, this case is similar to the scaffold case since in both cases it was foreseeable that third persons would use and could be injured by the product. Of course, the court also could have overruled the privity

doctrine based on public policy grounds. *MacPherson v. Buick Motor Co*., 111 N.E. 1050 (N.Y.Ct.App. 1916).

6. The court will use the process of statutory interpretation to decide this question. It will begin by looking at the plain meaning of the word “common carrier” to see if AOL clearly falls within its purview. If there is no ambiguity, the inquiry will end at this stage. However, if the plain (dictionary meaning and common usage) do not conclusively decide the case, the court will look into the legislative history in order to determine the intent of Congress when it enacted the statute. Because the Communications Act is administered by the FCC, the court will pay special deference to any interpretation made by that agency in any of the regulations that it has promulgated. Ultimately, the court may turn to public policy for guidance on whether it would be wise to consider AOL or other Internet service providers as common carriers to be regulated by the Communications Act. In this particular case, the court held that AOL was not a common carrier and, therefore, could not be found to have violated the Communications Act. *Howard v. America Online*, 208 F.3d 741 (9th Cir. 2000).

7. Yes. An attorney's notes containing his impressions, conclusions, opinions, or legal theories are immune from discovery under the work product privilege. Johnson, upon his discovery of Yukevich's notes, should not have examined the document any more than was necessary to determine that it was privileged, and should have notified Yukevich immediately to avoid any potential prejudice. Because the consequences of Johnson’s actions were irreversible, disqualification is justified. *Rico v. Mitsubishi Motors*, 10 Cal.Rptr.3d 601 (4th Ct.App. 2004).

8. The court will use the process of statutory interpretation to decide this case. It must determine if her behavior “delivered” the cocaine to the child. Because there is some ambiguity in that language, the court will examine the legislative history of the statute to see if the purpose of the law was designed to encompass behavior such as Jennifer’s. It might also look at public policy to see if society would be better off if she was punished under this particular statute. *Johnson v. Florida*, 602 So.2d 1288 (Sup.Ct. Fla. 1992).