

BUSINESS LAW 115

Fall 1993

**Teacher: Ernest S. Pierucci
44 Montgomery Street, Suite 900
San Francisco, CA 94104
(415) 986-1338**

Campus

Office: G326, Hours 7:30 p.m. to 8:30 p.m., Thursday, Phone: 4597

Text: "Business Law and the Regulatory Environment"

Lusk Series, Eighth Edition

INTRODUCTION

Welcome to Business Law. This can be an exciting and interesting experience for you. We will study and explore the first principles of law, the structure and procedure of courts, the basic elements of criminal law, torts, contracts, sales and agency. The course will look at the connections between these areas of study and the relationship between law and other disciplines such as History, Economics, Accounting, Business Administration and Mathematics. In the context of the development of a better understanding of the human person, we will study the way the law develops, how courts decide cases and the impact of the law on business. The course will attempt to develop your skills of close and critical reading, concise argumentation, and clear and effective written and oral communication.

I want to stress that it is critical that you are prepared before you enter class and that you attend class. You are the principal agents of your own education; I can only cooperate with you. I will not lecture extensively. I will not go over the material in the text unless you have specific questions or I believe that the material is critical. However, you will be responsible for all the assigned material in the text. Further, you will be responsible for the material I do cover in short lectures and comments in class. Ask questions, if you do not understand.

Most classes will proceed as discussions between you and me. I will call on students and ask questions about the cases and material in the text or the questions raised in the supplemental readings. With any luck, students will respond, a conversation will occur and we can all learn something about Business Law.

In order to do well in this class you must read the assignments very carefully. It is important that you thoroughly understand the facts of each case presented in the text. You must brief each case. See pages 20 and 21 of the text. Ask me if you have any questions about the process of briefing a case. It is not easy at first and requires practice.

You must be an active reader, always asking yourself questions as you read the text and assignments. The supplemental readings and questions are just that, supplemental. You must prepare all aspects of each assigned chapter. You should outline each chapter,

before class. You should expect to spend no less than two hours preparation time for each class. Some classes will require substantially longer preparation.

My grading policy is attached hereto. Read it very carefully. If you have any questions, ask me. Also please note that I do not accept late assignments without an acceptable, written statement of good cause as to why you were late.

Attached hereto are supplemental readings for the first four chapters we will cover. The first reading is quite lengthy and is not easy. You will need to spend about 5 to 6 hours preparing before the first class meeting. I will refer back to the materials in the first supplemental reading throughout the course. Therefore, close and careful reading of the material is important.

Once again, I stress that you will be expected to participate in the class on a continuing basis. BE PREPARED. If you are having problems with the class, see me, call me, contact me. I will make whatever arrangements are appropriate to meet with you.

GRADING POLICY

(Business Law 115/116)

Your first concern in this class is probably the grade you hope to get. The desire to do well in the class is commendable and you have a right to know how I approach the issue of grades.

First, you should understand that I recognize that the most important and profound act you can perform with regard to this class can not be measured, tested or evaluated. Learning is a part of what makes us human beings. We all have the desire to know; its part of our nature. Learning is one of the parts of our nature called into being and continuously sustained in being by God. To make the free and conscious decision to participate in the good of learning for its own sake is a decision to be as fully human as possible. It is a decision to participate in the very act of your own creation. As such, it is an ethical act. It can not be taught. I can not persuade you to do it. It may occur at any time. It may never occur.

Learning solely to get a particular grade means that you view the course as a means to an end. In this view, the course has no inherent value and is dependent for its value on something outside of it and you. The course is simply something you do to get to some other thing - a grade, graduation, a job.

The study of business law can be seen as a participation in a purpose which is part of your nature. It can be seen as a means to an end. It can be viewed as some of both. The decision you make regarding this issue is really what is most important in this class. The answer will only be known by you.

No matter how secondary grades ultimately are, it is a fact that by long standing custom and practice, they are an integral part of education. You, the College administration, graduate schools, employers, and your parents expect grades to be a fair measure of what can be measured in this course. Accordingly, I take them very seriously. I believe they must be earned. I also believe that a "C" is an honorable grade. In this course, a "C" means average work for a St. Mary's upper division student. I consider that to be a significant standard; one that requires consistent, hard work to achieve.

Learning, I believe, occurs in conversation. Accordingly, your grade will, in significant part, be dependent on your participation in the class. I recognize that not all students excel in all manner of expression. Accordingly, I try to give you a variety of ways to demonstrate your progress. With these principles in mind, the following is an outline of the grading policy for this semester.

1. Participation. 200 points

I recognize that evaluating participation can be somewhat subjective in nature. Given the fact that I am trying to evaluate the quality and the quantity of your questions, comments and answers in class, it would be impossible to eliminate the subjective dimension.

I do take roll every day. Unexcused absences will be considered in your grade. Consistent attendance will help your grade.

I call randomly on students almost every day in class. Demonstration of sustained and in depth preparation will significantly enhance your grade. Failure to be prepared will significantly hurt your grade. You should thoroughly read and study the assigned text and supplemental readings before class. You should outline the material and be familiar with its content and structure before you enter the classroom. In addition, I expect you to brief each assigned case. (See page 20-21 of the text.) You should be prepared to answer questions regarding each case and the concepts explained in the text.

I will often ask the class if there are any questions about the material. Thoughtful questions that demonstrate that you have studied the assigned readings and are trying to get beyond a mere surface understanding will enhance your grade.

In short, I am looking for each of you to help advance the conversation in the class.

Twice during the semester I will call on each of you for a "formal" recitation on a case or concept in the book. Each one of these recitations will be worth a maximum of 25 of the 200 points. You may "pass" once during the semester. You have to be present to use your pass. My evaluation sheet for the recitation is attached.

2. Four Papers. 50 points each.

During the course of the semester I will assign four papers. Each paper will normally be 3 to 4 typed pages, double spaced. You are to keep a copy of your paper and turn them in with standard three hole punch on the left margin. (I put them in a binder so I do not lose them.)

Most papers will be case problems that call for you to identify the legal issue, explain the controlling rule of law, apply the rule of law to the facts and reach a conclusion. I expect you to follow the directions given in the assignment. Typically, this will mean following the outline just mentioned. Note that this outline is very closely linked to the way you should brief cases and reflects the way the law develops through syllogistic reasoning. The papers are meant to be exercises in understanding both the substance of the law and how the law develops.

The legal issue is normally not some board question such as, "Did A breach his contract with B?" The issue is precisely the legal problem presented. Again see pages 20 and 21 of the text.

The statement of the controlling rule of law is your opportunity to demonstrate a clear and comprehensive understanding of the body of law that will control the answer to the legal issue. I want to know that you know the relevant legal rules. An incorrect statement of the law or a reference to a rule of law that is not relevant to the issue will hurt your grade.

The application of the facts to the law is your opportunity to show that you know how the law relates to the facts. Most of the problem cases can be decided at least two ways. I am looking for a demonstration that you have considered all the facts and have perceived how each fact can impact the outcome of the case. I want to see a well reasoned argument using all of the facts. Many times students will see excellent arguments that I did not consider when writing the assignment.

You should state a clear conclusion that is supported by the rule of law and the argument based on the facts of the case.

You are expected to demonstrate command of the English language. Clear, concise sentences that present a well thought out and tight argument will enhance your grade. With the first paper I want you to submit an outline and at least one draft. If you receive a grade lower than 75%, 38 points, you must submit the outline and draft with all papers until you receive a grade of 75% or higher.

3. Three tests, including the final. 250 points

There will be 2 tests during the term worth 50 points each. The tests will have objective, true/false, fill in, etc., and essay questions.

There will be a final worth 150 points. The final will cover the entire semester.

4. Summary

The total possible points are 650. I will generally be guided by the St. Mary's policy of 10% A's, 25% B's, 50% C's, 10% D's and 5% F's. However, I will not impose any artificial restraints on any grade category. Theoretically, everyone could get A's or F's.

As a rule, 95% or above is an A, 90% to 94% is an A-, 87% to 89% is B+, 83% to 86% is a B, 80% to 82% is a B-, 77% to 79% is a C+, 73% to 76% is a C, 70% to 72% is a C-. Below 70% is a D. Below 60% is an F.

During the year I will give you the opportunity to earn extra credit points by answering questions about St. Mary's trivia and writing short papers about topics related to business law and business administration.

IF YOU HAVE ANY QUESTIONS ABOUT THIS POLICY, PLEASE CONTACT ME.

CLASS PARTICIPATION EVALUATION

DATE:

NAME OF STUDENT:

TOPIC/CASE:

DID THE STUDENT DEMONSTRATE THAT HE/SHE HAD READ AND PREPARED THE CLASS ASSIGNMENT?

WAS THE STUDENT ABLE TO ANSWER QUESTIONS ABOUT THE FACTS AND STRUCTURE OF THE CASE?

DID THE STUDENT UNDERSTAND THE REASONING OF THE CASE?

DID THE STUDENT DEMONSTRATE ANY INSIGHT INTO HOW THE CASE OR TOPIC FIT INTO THE STRUCTURE OF THE CHAPTER AND COURSE AS A WHOLE?

DID THE STUDENT DEMONSTRATE COMMAND OF THE ENGLISH LANGUAGE?

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Supplemental Reading For Chapter One

An extensive study of jurisprudence is beyond the scope of this course. However, it is critical that you understand that the law is not a body of rules that stands by itself. What a law is, why a law should be obeyed, indeed, the very existence of law all depend on ideas outside the law. As Judge John T. Noonan put it:

Jurisprudence, the philosophy of law, is an art that does not attract every law student, and its masters are not many. But that law depends on ideas more extensive than law --ideas such as intention and causation, individual and corporate responsibility, guilt and justice; that the legal concepts may be affected by such nonlegal concepts as repentance, forgiveness, and charity; and that the most fundamental of legal concepts, that of the person, has metaphysical dimensions--all of these inputs of jurisprudence need both integration in the curriculum and their own specific examination. 67 Notre Dame L. Rev 1037

In the tradition of St. Mary's, this course is taught primarily with the goal of helping you obtain an integrated understanding of knowledge and thereby a better understanding of the human person. This course will always show great respect for the text and the study of the technical aspects of law; however, you will always be asked to seek out first principles and ask how the subject matter of this course relates to other courses.

The nature of law as seen by Judge Noonan and the tradition of learning at St. Mary's make for a good marriage. The law is an excellent field in which to seek relationships between various disciplines because so many are in play. The following readings are meant to expand on the text and give you some idea of the dimensions of jurisprudence.

The first reading is from the book Moral Foundations of Constitutional Thought by Graham Walker of Princeton University. Prof. Walker's book is subtitled Current Problems, Augustinian Prospects. He suggests that the philosophy of St. Augustine provides a useful means of understanding the normative claims of the American Constitution. While the book deals specifically with the philosophical basis for constitutional interpretation, a portion of the book provides an excellent, concise overview of the most influential schools of jurisprudence. (Be careful to note that the terms Walker uses, such as Moral Realism, mean something different than terms used in the text, such as American Legal Realism). The overview will also help you understand the distinction between the deontological and the teleological ethical theories that are introduced on page 19 of the text.

The second reading is a selection for the Summa Theologica by Thomas Aquinas. This reading is taken from the Collegiate Seminar. As you read it ask yourself whether the text has accurately characterized Aquinas' position. You should also attempt to understand why the Thomist definition of a law is: an ordinance of reason for the common good promulgated by one who has care for the community.

The last reading is from The Rights of Man and Natural Law by Jacques Maritain. It is a spirited exposition of the natural law and the common good. It should help you penetrate Aquinas. Also note how on page 151 Maritain locates "business law" within the grand scheme of the natural law.

With regard to Rochin, be prepared to discuss the following questions:

1. How can a judge determine what the "notions of justice of English-speaking peoples" are? Does he rely on History? Anthropology? Sociology? Philosophy?
2. Are those notions simply conventional with no relation to anything ultimately real?
3. What is wrong with a revival of natural law? What would Maritain say about this decision?
4. Where would the Rochin decision fit on Walker's chart?

With regard to MacPherson, be prepared to discuss the following questions:

1. How did Cardozo's argument proceed from a mislabeled poison to a faulty automobile wheel? What do they have in common? How do they differ? How does one "test" a mislabeled poison? How does one test or examine an automobile wheel?

2. Is the progress of Cardozo's argument compelling in the same manner as a proposition in Euclid?

3. Were not faulty stagecoaches just as dangerous as faulty automobiles? Is Cardozo basing his decision on an assumption that should be subject to scientific or historical analysis? If as Holmes says, the life of the law is experience, not logic, then whose experience is important and how is that experience to be recorded and retrieved? Why are judges, lawyers and the law the custodians of that "experience"?

With regard to Weber, be prepared to discuss the following questions:

1. What technique of statutory interpretation did Brennan use?

2. How can the last sentence on page 18 be reconciled with McDonald?

3. Under Brennan's argument would affirmative action programs to remedy discrimination against Protestants, women, or Estonians be permissible under Title VII?

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Supplemental Reading for Chapter Two

1. Why should government expend the time, effort and money necessary to resolve private disputes? Is it just to make sure that disputes are decided without resort to violence or oppression of the weak by the strong? Does society as a whole have a stake in the "correct" and "just" outcome of a particular private contractual dispute or is its only concern that the dispute is peaceably decided without force or coercion?

Does a correct and just outcome of private disputes have anything to do with the progress of business? If so, what?

Must the outcome not only be correct and just, but must it also be perceived that way by society? Which is more important, the perception by the society or the correctness of the outcome?

Is what Maritain and Aquinas call the "common good" affected by the outcome of private disputes?

2. On pages 30 and 31 of the text the adversary system is discussed. How would the problems with the adversary system be eliminated by some other system? Would the investigators and judges of that system be any more accurate and impartial? Does the adversary system respect the fact that the client, either an individual or a corporation, has rights at stake and that the client should have the right to make its, his or her own case?

3. With respect to Knowles vs. Modglin, be prepared to discuss the following questions;

Why were Damon and Hems treated differently by the court?

What specific facts made the difference?

Can you express the court's decision with respect to Damon as a syllogism? The same question for Hems?

Use this case as a basis for understanding the difference between in personam and subject matter jurisdiction.

4. Attached hereto are the forms of Summons, Writ of Execution and Notice of Levy used in the State of California. Read them carefully. What would ultimately happen if a person refused to turn property over to the sheriff? Note and be prepared to discuss the fact that the object of civil procedure seems to be to subject persons to the physical power of the state in order to resolve private disputes.

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Supplemental Reading for Chapter Three

1. Read the United States Constitution and Federalist 10, by James Madison.

2. How does the text's explanation of the Constitution square with Madison's view?

3. How, if at all, do Federalist 10, and Maritain's and Aquinas's view of the common good relate?

4. Make sure you understand the section State and Federal Power to Regulate. The concept of "police power" is critical to understanding the regulation of business. Also make sure you understand the section Means-Ends Tests.

5. Under Wickard, is there any commercial enterprise that Congress could not regulate under the Commerce Power? Does Wickard rely on any particular theory of economics? If so, what?

6. What would be the affect on private life if the SFAA case was decided the other way? Does the expansion of the definition of government activity assist the preservation of individual rights? Would moral realists and moral conventionalists take a different view of this case?

7. In Badger, what specific argument was decisive in Marshall's decision? With respect to assisting parents' attempts to be the primary influence on their children's education, can government do anything other than give "the most limited incremental support"?

Does this federal statute really "reduce the adult population to reading only what is fit for children"?

8. With regard to Stanglin, what argument would you make against the ordinance on behalf of the children 14 to 18? How would you counter that argument?

9. In Eagerton, what was Marshall's primary policy argument against a strict application of the impairment of contracts clause? Think of specific examples where a strict application of the clause would limit a state's ability to govern.

10. After McClendon, could a Texas law require that employees on the job, for at least five years, can only be fired because of their poor job performance or because of demonstrated financial hardship of the employer without such law being preempted by ERISA?

11. Identify the precise property right the government is affecting in Seawall. Identify the precise manner in which the government is taking that property right. What does this case say about the common good? Is this a case of simply the good of the many against the good of the few? What does protection of individual property rights have to do with "the public good"? Do you agree with the dissent in the case? If so, why?

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Supplemental Reading for Chapter Five

1. In The Rights of Man and Natural Law, Maritain said:

I am taking it for granted that you also admit that man is a being gifted with intelligence, and who, as such, acts with an understanding of what he is doing, and therefore with the power to determine for himself the ends which he pursues.

On page 101 the text says:

Criminal intent [mens rea] may be inferred from the nature of an accused's behavior, because a person is normally held to have intended the natural and probable consequences of her acts. (emphasis in the original)

If Maritain is wrong about the capacity of the human person to determine his own ends through his intelligence, is there any basis for the statement in the text? If so, what would that basis be? What would a moral conventionalist say is the basis of mens rea?

Is there, as Noonan suggested, a relationship between causation and intention?

2. On page 98 the text states:

Whether a given act is classed as criminal is a social question.

In The Rights of Man and Natural Law, Maritain said:

...[B]eing possessed of a nature, being constituted in a given, determinate fashion, man obviously possesses ends which correspond to his natural constitution and which are the same for all...

If Maritain is wrong, is the moral conventionalist view the only basis for a society to determine what acts are to be classed as criminal? Is an act criminal because it, at some level, is against the nature of the human person? Is an act criminal simply because the legislature says it is?

How does all of this relate to U.S. vs. Parks? What would a moral conventionalist say about that decision? What would a moral realist say? What do you say?

3. On page 99 the text says that in order for a person to be convicted of a crime the state must, inter alia:

... prove beyond a reasonable doubt that he did in fact
commit the actions charged against him

This standard of proof is considered one of the most important protections of liberty in America. What does it really mean?

California Penal Code Section 1096 provides:

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

Under California law no further instruction than this needs to be read to the jury defining or explaining the concept of proof beyond a reasonable doubt. Accordingly, California law implies that any twelve adults chosen at random from its citizenry will be able to understand and apply this instruction to any criminal charge up to, and including, a death penalty case. You, of course, could one day soon be a juror in a criminal case. How do you understand the terms "moral evidence", "abiding conviction", "moral certainty" and "the truth of the charge"?

How is this related to the fact that the jurors are chosen because of their lack of any independent knowledge of the facts of the case? The jury must rely on testimony, under oath, of other persons.

What intellectual discipline or disciplines lead to a moral certitude of the truth of a charge? Is this the same conviction you have about the truth of a proposition in Euclid, a particular interpretation of history, or the safety of a new drug?

What "conviction" must the jury have before they can "convict" the defendant? Does the real significance of the reasonable doubt standard rely on the intellectual and moral development of the individual jurors?

4. With regard to Texas vs. Johnson, could Johnson have been constitutionally prosecuted under a statute that prohibited open fires in public places? Is the comment about a gesture

by an "unknown man" relevant to the decision? Is the nation made up of unknown men and women? Is the life of the law their experience or the experience of "known" men and women?

5. With regard to Dow Chemical, what could Dow do to obtain a constitutional right of privacy? Cover all 2,000 acres? When does the technology cross the line and "give rise to a constitutional problem"? What standards should apply to make that decision? The mass availability of the technology? Its intrusiveness?

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Supplemental Reader for Chapter Six

1. On page 124, the text speaks of "the human interests that tort law protects." Thereafter, for example, on page 124 under Battery, it speaks of a "fundamental personal interest" as a "right". Are rights and personal interests the same thing? Are personal interests related to personal obligations? Do I determine for myself what my interests are or what my rights are? What would a moral conventionalist say to this? What would a moral realist say? What is tort law really protecting?

2. For each of the "Interests Protected by Tort Law" listed on page 140 in Figure 2 can you think of a duty required to be performed by the human person?

3. Note for each tort defined in the text, its basic elements are set out and then note how each element is explained. For example, battery includes the element of intent and the concept of transferred intent is included in that element. You should memorize each tort and its basic elements, but you must also understand the meaning and application of each element as explained in the text and the cases.

4. In England, did Garley also batter Rash? Why was S&M Foods, Inc. a defendant?

5. The Defamation section, starting on page 127 is not easy. However, this is an important issue, especially in employee relations, so be sure to carefully outline it.

6. The Lewis case is most interesting and is an important look at the complexity of employment relations. The case is also fairly complicated. Walk through each step of the decision.

a. Is Equitable responsible for the communication made by the former employees themselves. Yes or no? Why?

- b. Is the truth of the communication to be determined by whether or not the plaintiffs' records show that they were fired for gross insubordination or whether or not they actually were insubordinate?
 - c. Should the qualified privilege of employers regarding information relating to an employee's discharge be applicable in a "self-publication" case?
 - d. Why was the privilege not available to Equitable?
7. In Midler, note that Judge Noonan is the man quoted in the supplemental reading for the first chapter. Understand the reason that this is not a copyright case.
8. For Ford, do a time line showing when Braun harassed Ford, when Ford complained and when Revlon acted. For what acts of harassment by Braun is Revlon held responsible and why?
9. In Borland, what is the difference between nuisance and trespass? Why was that difference important in this case? What was the trespass?

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Supplemental Reader for Chapter Seven

1. It is essential that you thoroughly understand and memorize the elements of:
 - a. Duty
 - b. Breach of Duty
 - c. Actual and legal (proximate) cause of plaintiff's injury
2. On page 145, the text says,

Holding infant industries totally responsible for all of the harms they caused could have seriously impeded the process of industrial development. To avoid such a result, new tort rules were needed. In response to these growing social pressures, the courts created the law of negligence.

Isn't this true of individuals as well? If you were held responsible for every harm you caused would not that impede your progress as an individual? If you stop to think about it we all cause or participate in causing any number of injuries. One way to look at the law of torts is that it determines which ones of those injuries we ought to be responsible for.

3. Is the law of torts in any way connected to Aquinas' view that "man has a natural inclination to live in society " and therefore should "avoid offending those among whom [he] has to live." See Summa page 638.

4. In Waters, note that the central issue is whether or not the defendant owed Waters a duty? A duty **to do what** for Waters and people like her? Did the defendant owe any duty to the people on the sidewalk? What?

5. In Culli, know the difference between constructive notice and actual notice. Is the court telling Marathon that it has to hire more employees? If so, why? What risk does Marathon run if it does not hire more employees? Does Marathon's duty under tort law determine some of its business practices?

6. Carefully study the section on proximate cause. Even if you cause and are legally responsible for an accident or some harm, does that mean that you should be responsible for all the harm caused by your negligent act. If you negligently caused an automobile accident that delayed the commute through the Caldecott tunnel for two hours, should you be liable to pay for all of the value of the work time lost due to the delay? Why? Why not?

How do these considerations relate to Republic of France?

7. What is the difference between Nixon and Waters?

8. In Mazzagatti, on page 156, the court speaks of "the sum total of policy considerations." What might those considerations be and why are they important in this case?

9. Do the players in an intramural football game assume the risk of injury during the game? All injuries or just some?

10. In Indiana Harbor, be sure you understand what the properties of acrylonitrile have to do with the court's decision.

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Supplemental Reader for Chapter Nine

Carefully reread pages 195 through 199. Note the section entitled The Nature of Contracts. For Hobbes a contract, i.e. a promise of future performance, is void in the state of nature. Contracts only exist if the state, i.e. the common power, can compel

performance. Accordingly, is there a nature of contracts that is different than the exercise of the power of the state? If the agreement of two parties is void absent the power of the state, what difference does the power of the state make? If contract law does not enforce real agreements between real people in society, does the power of the state give rise to an obligation to the promisee or simply to the state?

In the section entitled The Social Utility of Contracts the text says that "contracts enable persons acting in their own interests to enlist the support of the law in furthering their personal objectives." If, in the state of nature, persons are "in a condition of war of every man against every man", how does the advent of the law, i.e. state power, change that relationship? Why is not a court of law simply another place to fight the war? If Hobbes is correct, why should there be any "social" benefit to the realization of personal objectives? Indeed, if Hobbes is correct, in what sense is there a society?

With this in mind, reread the section on Legal Positivism on page 8 and the supplemental reading from Walker from the first chapter. If Hobbes is correct, how does one speak of "unjust enrichment", "fairness" and other such concepts within the context of contracts?

Consider the position of Aquinas that it is natural for us to live in society and that, therefore, we ought not offend those with whom we live. Does this differ from the view of Hobbes? Also consider that Aquinas views the law as existing for the common good.

Rather than the law of contracts being a place where simply one personal objective prevails over another personal objective, it is possible to view contract law as assisting in the development of a just society. This development comes not from imposing peace on otherwise warring individuals. Rather, it comes from the view that a contract can be a meeting of the needs, desires and preferences of persons who can only fulfill those needs, desires and preferences through social intercourse with one another. Accordingly, by enforcing contracts, when they are not unjust, the law promotes the development of individual persons and the common good.

Read and consider the attached supplemental readings. The first is from Aquinas and the second is from Centesimus Annus, an encyclical by John Paul II. On this view, can the terms "unjust enrichment" and "fairness" mean something in the context of contract law?

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Supplemental Reader For Chapter Ten

1. Carefully consider the introduction to this chapter, the subjective and objective theories of contract and the quotation from Judge Learned Hand. Does a contract really have "nothing to do with the personal, or individual, intent of the parties"? Is a contract an

obligation that attaches by "mere force of law" to words and acts that represent a "known intent"? Can the law impose meaning on words? Does Hand's view divorce contract law from the real life of people? Is contract law a mechanistic trap we fall into if we use certain magic words?

2. Assume for a moment that the "concept of mutual agreement" does in fact "lie at the heart" of contract law and that the intent of the parties is decisive as to whether a mutual agreement has been reached. Is the process of determining the intent of a person any different in contract law than it is in criminal law? In the chapter on crimes we encountered the idea that a person is deemed to have intended the natural and probable consequences of her acts. You were asked to consider the relationship between that idea and Maritain's position that persons are endowed with reason, act with an understanding of what they are doing and, therefore, can choose the ends they will pursue. Since we are persons endowed with reason our actions do reveal our intentions. Can the objective theory of contracts be understood in this way?

3. Consider once again the words of Judge Noonan "that law depends on ideas more extensive than the law -- ideas such as intention and causation.." Now consider the Restatement (Second) definition of an offer

the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

Is the "manifestation of willingness" related to the idea that my action and words reveal my intention? Is the understanding by another person "that his assent to the bargain is invited and will conclude it" caused by the revelation of my intention?

4. Do Maritain's and Noonan's views differ from Hand's position?

5. In Action Ads, Inc. would the case had been decided differently if Judes' attorney proved that Action Ads had one standard health insurance program for its eligible employees and that the program would have covered Judes' injury?

6. THIS IS IMPORTANT. YOU MUST UNDERSTAND THE UCC'S CONCEPT OF CONTRACT FORMATION AND THE "GAP-FILLING RULES" DISCUSSED ON PAGE 213 OF THE TEXT. CAREFULLY STUDY THIS SECTION. GO TO THE BACK OF THE BOOK AND READ THE UCC SECTIONS CITED ON PAGE 213. MAKE SURE YOU UNDERSTAND THE SIGNIFICANCE OF THE UCC AND GAP-FILLING IN CAGLE.

7. In McAdoo, would the case have been decided differently if the hospital form was absolutely clear that Mr. McAdoo would be personally liable for the cost of the care of his estranged wife? Does the last sentence of the case mean exactly what it says? Was this case decided under the objective or subjective theory of contracts? Does it matter which theory one uses? What was McAdoo's intention?

8. In Newman, what is the significance of the "reasonable person" standard? How does this differ, if at all, from the reasonable person standard in negligence?

9. In Warner Electric, Inc., what duty did John Price Associates have to Warner Electric? Assuming John Price Associates had the right to rely on Warner Electric's bid, did Warner Electric have the right to the subcontract if it was the lowest responsible bidder?

10. In Lyon, what would Lyon have to do to transmit the signed counter offer to Renault? By walking into Renault's office with the signed offer, did he transmit it? At what point in time would Lyon have been bound to the contract? Would he have been bound at any time prior to actually handing the signed counter offer to Renault? When would he reveal his intention?

11. UNDERSTAND WHAT IT MEANS TO BE THE "MASTER OF THE OFFER." UNDERSTAND HOW CLEAR AND CONCISE COMMUNICATION CAN HEAD OFF MANY PROBLEMS IN CONTRACT LAW.

BUSINESS LAW 115

Supplemental Reader For Chapter Eleven

1. Is the issue of intention to contract the same in the consideration of acceptance as it is in the consideration of offer.

2. The "Battle of the Forms" is not an easy area of the law. However, it is a very important and practical concept. The best way to get into the area is to consider carefully the problem it is meant to address. The text lays out a good portion of the problem, however, the following may also help you understand the problem UCC 2-207 is attempting to resolve. Large and small companies engage in many transactions. Each one of those transactions can be very important to both of the companies involved. Many important legal issues may come up if anything goes wrong with the transaction. Warranties, damages for late delivery, timing of payment, all these and more can come into play. However, it simply does not make economic sense to stop the flow of commerce and negotiate the details of each and every transaction and write a separately negotiated, detailed contract for each transaction. Therefore, many companies use preprinted forms with the terms and conditions they each want to apply to the transaction. As the text points out, the chances that these will "match" are not very good. Which of the conflicting terms will govern the transaction? That is what UCC 2-207 tries to

resolve. Also consider that the offeree can simply say NO to the offer and end any question of whether an agreement was reached. Therefore, the UCC seems to give the terms of the offer a preference in determining what terms apply to the transaction.

3. Carefully read Egan Machinery. Understand how 2-207 controls the outcome of the case. Why did Mobil's language comply with 2-207(2)(a)? Why did Egan's language fail to meet the standard of the last clause of 2-207(1)? **HOW WOULD YOU REWRITE EGAN'S LANGUAGE? DRAFT ALTERNATIVE LANGUAGE AND BRING IT TO CLASS.**

4. How much money did Gordon Getty make by taking the Texaco offer over the Pennzoil offer? What would have happened in this case if Getty Oil and Pennzoil could not come to terms on the "details" of their "agreement in principle"? Was the issue here the fact that the principle of selling to Pennzoil was violated by the actions of Texaco and Getty Oil?

5. In Great Western Sugar Co., what role does the UCC play in the decision? Was the delay between December 2 and late January at all important in the decision?

6. Be sure to understand the section on communication of acceptance and the differences between the traditional law of contracts, the UCC and the Restatement (Second).

7. In Soldau, what is the rationale for the "effective when mailed" rule for acceptances? Does the fact that the acceptance has been dispatched have anything to do with "manifestation of assent?"

BUSINESS LAW 115

Supplemental Reader for Chapter Twelve

1. What is the relationship between "bargain" and "exchange" in the definition of consideration?

2. In Harrington, compare the court's statement that "[t]he fairness of the agreement is irrelevant" with Aquinas' statement quoted in the supplemental reader for Chapter 9.

3. In Gross, would the doctrine of promissory estoppel have assisted Diehl Specialties International? Would this case have been decided differently if the UCC applied?

4. Are "good faith" and "honesty in fact" questions of intention? How did the court determine in Roth Steel if Sharon acted in good faith?
5. In County Fire Door, what was bargained for and given in exchange by each party? Why did not the court apply UCC 1-207 in County Fire Door's favor?
6. In Passander, did the 1972 employment contract have anything to do with the payment of the remaining half of the 1971 bonus?
7. In Grouse, could Grouse reasonably rely on an offer of at will employment? How would you measure his damages? If Grouse could prove that he could have stayed indefinitely at his old job, what damages would he be due? Would he have to prove that he could have performed satisfactorily in the job he turned down to get any damages on account of his rejection of the job offer?

BUSINESS LAW 115

Supplemental Reader for Chapter Thirteen

1. What is the relationship between the concern for the reality of the consent of the parties to a contract and the concern that the contract reflects the true intentions of the parties? What is the relationship between the reality of the consent of the parties and a bargained for exchange of value?
2. Reread the quotation from Learned Hand on page 211. What bearing do the concerns of this chapter have on the ideas expressed by Judge Hand?
3. What is relationship between the reality of consent and the ideas expressed in the quotation from Centesimus Annus that is part of the supplemental reader for chapter 9?
4. In Cousineau, does the standard of "wholly irrational, preposterous or in bad faith", relieve the party to whom a false statement is made of all responsibility to act reasonably?
5. In Wilkin, what kind of "personal property" was included in the agreement between Wilkin and the Bank? Why was not art included? What is the significance of a mutual mistake about a vital fact upon which the parties based their bargain? If the Wilkins were allowed to keep the art, would the court be enforcing a bargain that never really

occurred? Did Wilkins communicate an intention to keep art work and thereby cause the Bank to understand that the art was part of the bargain?

6. In Rich & Whillock, Inc., did Ashton give Rich & Whillock any consideration for the settlement agreement or the release? Was R&W's signature on the settlement agreement and release the result of a bargained for exchange?

7. If one assumes that the common good is advanced by the freely bargained for exchanges by persons acting together to fulfill their needs and responsibly chosen desires and preferences, what is the impact of fraud, coercion and mistake on the development of the common good?

BUSINESS LAW 115

Supplemental Reader for Chapter Fourteen

1. Does something bother you about the Dodson and the Webster Street Partnership cases? Why are minors given this freedom to be irresponsible? Who is the law trying to protect? What duties do the minors have? What duties do adults have?

2. Do intention, causation, bargain and exchange matter in Dodson? If not, why not?

3. Why should a minor's misrepresentation of age matter?

4. What should be the rule if both parties are intoxicated when the contract is made?

5. Would a moral realist view the issue of capacity differently than a moral conventionalist?

6. WRITE A BRIEF SUMMARY OF WHAT YOU THINK THE LAW OUGHT TO BE WITH REGARD TO CONTRACTS BETWEEN ADULTS AND MINORS AND BRING IT TO CLASS.

BUSINESS LAW 115

Supplemental Reader for Chapter Fifteen

1. Carefully read the Introduction to this chapter. Is it coherent? What is the public interest? Does the public interest differ from "the interests that usually favor the enforcement of an agreement?" Are those "interests" different than the "social concerns" to which they are sometimes "subordinated?" What do the first two sentences mean?
2. The text sets up a model of competing interests that are weighed and evaluated by the courts and legislatures. By what standards do "social concerns" "outweigh" the public interest in enforcing private agreements? Must these interests be seen as competing? What if one took a moral realist, teleological view and said that an interest in enforcement of a private contract exists only to the extent that it advances the common good? Is that a competitive model? Would the law's concerns for fairness and the "public interest" make sense in the light of such a teleological model? Reread the section on the Common Good that is part of the Maritain reading from the supplemental reader for the first chapter.
3. In Blossom Farm Products, what does it mean that Blossom "tacitly knew" about the mislabeling? Why did the party that actually did the mislabeling end up with a \$138,306 advantage?
4. In Steamatic of Kansas City, be sure that you understand what "stock of customers" and "good will" mean. Note also in that case the court said, "Covenants not to compete restrain commerce and limit the freedom of an employee to pursue his trade." Note that the court is concerned not only with competition and commerce but also the freedom of a person to work.
5. Attached is the portion of the California Civil Code that addresses unlawful contracts. This is not a complete expression of California law on the subject; but, it gives you an idea of the basics. Note that section 1670.5 is identical to UCC 2-302. California did not adopt UCC 2-302 as part of the California Commercial Code. However, by including the language of 2-302 in the Civil Code, California made that provision applicable to all contracts, not such contracts for the sale of goods. This is an example of the development of modern contract law and the influence of the UCC.
6. In Milligan, would the result have been different if Milligan hit a tree that had been involved in five serious accidents in the previous two months?

7. On page 313, the text says,

In view of the central position of the family as a valued social institution, it is not surprising that an agreement that unreasonably tends to interfere with family relationships will be considered illegal.

Is the family central because it is valued or is it valued because it is central? Even if a social institution is not valued or central, can the law "unreasonably" interfere with it?

8. Review the sections on undue influence and duress in light of the section on unconscionability. What do they have in common? How do they differ? **BE PREPARED TO DISCUSS THESE IDEAS.**

9. On page 314, the text refers to contract terms that "shock the conscience of the court." Is that the same conscience that was shocked in Rochin on page 11? Ultimately, should the same standards of conscience apply to commercial transactions and criminal investigations?

10. In John Deere Leasing, what is meant by "the option to purchase price" and what role does it play in the decision? Did Blubaugh know that he did not understand the provisions of the lease? Were the provisions that were difficult to read part of the offer? If the lease had been type set so that it was easy to read and

Blubaugh had initialed each paragraph, would the case have been decided differently? How does this case compare to McAdoo on page 217.

11. In Murphy, did Ms. Murphy bargain for anything other than a television set at the standard retail price? Did she receive anything more than the television set?

12. How would Hobbes approach the concerns of this chapter? What would unconscionability mean to him?

BUSINESS LAW 115

Supplemental Reader for Chapter Sixteen

1. On page 326 the text sets out the six kinds of contracts that are most often within statute of frauds. Do they share anything in common that would make written evidence of the agreement particularly important?

2. What is the difference between written evidence of an agreement and a written agreement?

3. What does it mean to be "within the statute of frauds?"

4. What does collateral mean?

5. In Al Booth's, Inc., where were the appliances located when Boyd-Scrap became insolvent and did not pay Al Booth's?

6. In Hickey, what does the court mean by "the evidentiary function of the statutory formalities?" How does the Restatement (Second) part performance doctrine that was used in Hickey differ from the promissory estoppel doctrine explained on page 339?

7. In Hodge, do you agree that, for the purposes of the statute of frauds, there is no difference between an employment contract for life and an employment contract that is intended to last until retirement? Exactly what was Evans Financial's argument? How did Evans try to distinguish this case from the precedent supported by "the overwhelming majority of courts?"

8. Was the transaction between the Sarah C. Getty Trust and Pennzoil Co., described on page 234, within the statute of frauds? Why? Why not?

9. In Goldkist, Inc., would Goldkist's written confirmation have been enforceable against Goldkist even if the Brownlees were not merchants under the UCC? What facts led the court to determine that the Brownlees were merchants?

10. Be sure you understand how the methods of satisfying the UCC statute of frauds differ from the methods traditionally required under the statute of frauds.

11. On page 339 the text states:

Many courts fear that enforcing oral contracts on the basis of a party's reliance will essentially negate the statute [of frauds].

Do you agree with that statement? Do you think the statute of frauds is a good idea? Attached is the California version of the statute of frauds. Note that additions were made in the 1980s. Is the statute of frauds just a 17th-century concept or is it relevant to our age? What do you think?

12. How does Slivinsky differ from Grouse on page 259? When was Slivinsky hired? What role did the Application play in the court's decision? What was the consideration for the written Employment Agreement? How does the court determine if the parties

intended the Application and Employment Agreement to be the final expression of their agreement?

13. Be sure you understand the difference between a completely integrated contract and a partially integrated contract.

14. What is the relationship between the principal objective of the parties and their intent?

15. Why should the handwritten provisions of a contract prevail in a conflict with the preprinted provisions of that contract? Does it have anything to do with the ideas of bargain and exchange?

BUSINESS LAW 115

Supplemental Reader for Chapter Seventeen

1. Note that we have finished the section of the book that explains the elements of a contract. We are now exploring other aspects of contract law. This chapter addresses the issue of the rights and duties of persons who did not actually establish the elements of the contract. The third party did not participate in the bargaining that led to the contract.

2. The fact that third parties can obtain rights to the performance of contracts that they did not create is critical to the expansion of economic activity. For example, consider carefully how important it is for a business to be able to assign its accounts receivable to improve its cash flow.

3. You need to know the meaning of the terms obligor, obligee, assignor, assignee, delegator and delegatee.

4. Read and be sure you understand UCC 2-210.

5. Why should the assignment of future wages be prohibited?

6. In Douglass, what does "inure" mean? Was Special Products bound by the terms of Page-Wilson's contract with Douglass? Did Special Products have to honor the bargain that Page-Wilson made with Douglass?
7. Why is there a "strong public policy favoring assignability?"
8. Carefully consider all of the ramifications of the rule that the assignee "steps into the shoes of his assignor."
9. Do you favor the American rule or the English rule on successive assignments? Why?
10. Understand what a novation is.
11. The delegation of a duty does not extinguish the duty owed to by the delegator. Why? You must understand this concept.
12. In Brooks, understand the distinction between the obligee agreeing to the delegation and the obligee agreeing to release the obligor from liability. Why was this case remanded?
13. Understand the approach of the UCC and the Restatement regarding the delegatee's assumption of duties. Is it fair?
14. Be sure you know the meaning of intended beneficiary, incidental beneficiary, donee beneficiary and creditor beneficiary.
15. In Warren, note that Anderson took delivery of the ring and gave it to Warren. The defendant apparently had no direct dealings with the defendant until she brought the ring in because of the chip. Did the defendant sell Anderson a fake or did it replace a real diamond with a fake? Does it matter in this case? What is the significance of the Florida Deceptive and Unfair Practices Act?
16. In Spiklevitz, note that the court held that Markmil's agreement to assume the debt to Spiklevitz created "a new and separate obligation." Was this important in deciding the statute of limitation issue raised by Markmil? Why? Why not?
17. When do the rights of third party beneficiaries vest?

BUSINESS LAW 115

Supplemental Reader for Chapter Eighteen

1. In Gildea, was the offer illusory? See page 247. Did Kapenis have complete discretion to determine what was suitable? Does the parol evidence rule apply?
2. What is the difference between a condition precedent and a condition subsequent?
3. Is there any relationship between the concept of a constructive condition and the position of Hobbes expressed on page 195?
4. What is the role of good faith and the reasonable person standard in conditions to performance? Can all contracts be expressed in purely objective terms? Are the concepts of personal satisfaction and contractual obligation mutually exclusive?
5. Should the law always require strict performance? Why? Why not?
6. In Reale, did Reale impart anything of value to Linder? If so what?
7. To a moral conventionalist what could good faith and fair dealing mean? What could they mean to a moral realist?
8. In Dierberg, would it have made a difference if Dierberg did not have to close on the other transaction until May 17, 1988? Would it have made a difference if Miceli had called her the day before? Could Dierberg simply have insisted that the transaction close on time or not at all without showing that any harm would have come to her because of the delay?
9. Note that a common characteristic of excuses for non performance is that the excuse arises after the formation of the contract.
10. Could the written contract for the Eden Exercise Salon provide that Boyd would not be excused from performance even if she could not physically use the facilities? Would that be substantively unconscionable?
11. What is the difference between impossibility and commercial impracticability? Is the standard of commercial impracticability too loose?
12. In Wolf Trap, what is the relationship between "a basic assumption upon which a contract [is] made" and the ideas of bargain and exchange? Was the contractual provision that Wolf Trap would provide the lighting equipment the equivalent of Wolf Trap accepting the risk of a power outage? What was the difference between the trial court's approach and the approach of the appeals court with regard to the issue of foreseeability? With whom do you agree?

13. Are the remedies for breach of contract in any way related to any particular theory of economics?
14. Know the distinctions between and among expectation interest, reliance interest and restitution interest.
15. Do you agree with the court in Parker? Why was it important that the comparison was between a "female lead" in a song-and-dance production and a "female lead" in a western? Would Thelma and Louise agree with the court? I believe that Ms. MacLaine's next movie was Two Mules for Sister Sarah.
16. Know the distinctions between and among loss in value, consequential damages and incidental damages.
17. Compare Clifton to Waters, page 147, and Nixon, page 152. What duty may have been assumed by Clifton? What is the relationship between the duty and the issue of damages?
18. Can a liquidated damages provision in a contract give rise to an unconscionability issue? How?
19. What is the difference between money damages and equitable remedies?

BUSINESS LAW 115

Supplemental Reader for Chapter Nineteen

1. Is the result in Data Processing Services, Inc. consistent with Neilson Business Equipment Center on page 205? Does the court's analysis of precedent remind you of MacPherson on page 14? What does the fact that Smith bargained for DPS's "knowledge, skill and judgment" to meet Smith's "specific needs" have to do with the result? Would the result be the same if the disk purchased from DPS with the programming on it was defective and the disk caused damage to Smith's data base?

2. In Russell, why was it significant that Michigan did not require documents of title for boats? How was the boat to be "delivered" to Clouser? Be sure you read UCC 2-401(3)(b) and UCC 2-509.

3. In R.H. Macy's, what does it mean that Equitable and Ideal moved to have the case dismissed because no cause of action was stated against them? If Draper's title to the ring was void and not voidable, what would have been the out come of this case? If you were the attorney for **Equitable** what would be your argument at trial? What evidence would you try to introduce to prove your case? If you were the attorney for **Ideal** what would be your argument at trial? What evidence would you try to introduce to prove your case?

4. In Porter, you have to treat the facts somewhat like a mystery story. Be sure that you clearly understand the facts of this case. Be sure you read UCC 2-403. Who is UCC 2-403 intended to estop and why? What is the role of "provenance" in this case? To what standard of conduct were Drew-Bear and Feigen held? How is that standard of conduct relevant under 2-403? What does ham and cheese have to do with it?

5. In Morauer, read UCC 2-509(1) and 2-504. When were the gold coins "delivered?" When were the silver coins "delivered?" In order to avoid the DC tax, did the gold coins have to be delivered to Morauer's home in Maryland? Should the answer to this question have any bearing on whether or not 2-509(1)(b) should apply?

6. In Fisher, be sure that you understand the concept of "avoidable preference." The purpose of the doctrine is to prevent some creditors from gaining an unfair advantage over the other creditors simply because the debtor (bankrupt) favors them with payments or other property transfers just before filing for bankruptcy. In light of the "avoidable preference" doctrine, how does the court determine if Fisher had a property interest in the minks?

7. In Curtina, be sure that you understand the rationale of the bulk transfer law. Who is it trying to protect and how? Do you agree that periodic sales of off-season and obsolete inventory should be exempt from the bulk transfer law?