

**Legal, Ethical, & Social Environment
BSAD 8010**

Fall 2002

**Monday night Roskens Hall 218
Tuesday nights Roskens Hall 218**

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NOTICE

Each student is expected
to **obtain and** to **sustain actual knowledge**
of the contents of all of these slides.

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1

Process versus Substantive

DUE PROCESS

**notice
and
hearing**

**both notice and hearing must be proportional
to the interest(s) involved**

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The law favors the **objective** over the **subjective**.

The "**reasonable person**" is a legal fiction.

KNOWING

actual knowledge
receipt of notice
reason to know

subjective
objective
objective

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Separation of Powers,
in order of importance,
from top to bottom and from left to right

Individual v. Government
Federal v. State

Within Government's Three Branches

legislature: makes law

executive: enforces law

judiciary: interprets law

JUDICIAL REVIEW
power to declare act of
Legislative and Executive
unconstitutional.

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Both contracts and evidence
can be either express or implied.
When referring to contracts,

EXPRESS

all terms known by the parties'

WORDS

oral
or
written

IMPLIED

all terms known by the parties'

acts
words, and/or
circumstance.

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The law reacts to problems.

The **legislature** tends to act when:

1. **unequal bargaining power;**
2. **history of abuse; and/or**
3. **disparate impact.**

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STANDING TO SUE

injury in fact
easy to prove
constitutional requirement

and
within zone of protected interest
hard to prove
judicial efficiency

plaintiff will make arguments
consistent with public policy

SUPREMACY CLAUSE, Art. VI, ¶ 2: preemption doctrine

Art. VI, ¶ 2 also is the source of
Judicial Review.

Preemption is NOT favored,

but MAY be allowed IF:

1) clear intent (silence?) of Congress AND
national interests outweigh State interests;

OR

2) express intent of Congress AND
need for uniformity.

CONCURRENT POWERS UNLESS DIRECT CONFLICT

FEDERALISM PRESUME CONCURRENT POWERS

State's POLICE POWER

power of the State to regulate to protect the People's

health
safety
morals
and
general welfare

There is no federal Police Power.

FREE SPEECH

POLITICAL free speech

right of speaker

time, place, manner

reasonable regulations

no content regulation of political speech

COMMERCIAL free speech

right of listener

time, place, manner

reasonable regulations

content regulation of commercial speech

IF substantial governmental interest

AND IF regulation is proportional,
directly furthers, AND least restrictive alternative

FEDERAL GOVERNMENT

COMMERCE CLAUSE:

commerce among the several States

pre - 1937 direct Effect (result)

transportation,

but not manufacturing nor retailing

post- 1937 close and substantial Affect (cause)
transportation AND manufacturing

core powers

penumbras

emanations

tree

shadow

breeze

transportation

manufacturing

retail

PRIVACY

reasonable expectation of privacy

"Privacy" never appears in the USA Constitution.

First use in USA legal literature in 1890.

Constitutional right of privacy is found

via Amendments IX and X

and is a part of "liberty".

NOTE: 4th Amendment

home and papers

WARRANT requires probable cause

criminal v. regulatory probate cause

NOTE: 5th Amendment

criminal testimony

BUT public records; and corporations

(versus custodian)

14th Amendment applies to the States

Due Process Clause

Incorporation Doctrine
a.k.a.
Absorption Doctrine

14th Amd. due process
equals
Bill of Rights' fundamental rights,
not verbatim

Major Forces of Change

Approximately
the year
1500

GUN POWDER
NEW WORLD
PRINTING PRESS
RURAL
LABOR SHORTAGE

Approximately
the year
2000

FISSION
ONE WORLD
COMPUTER
URBAN
LABOR SURPLUS

14th Amendment Equal Protection Clause
Rational Basis Test

presumed valid
social and economic regulation
rational relationship to a
legitimate State interest

Heightened Judicial Review Test (e.g., gender)

presume no sensible basis
for different treatment
substantial relationship to
important government interest

Strict Scrutiny Test (i.e., race, alienage, nat. origin)

seldom relevant to achievement of
least drastic means of achieving
compelling State interest

CAPITALISM

ELEMENTS (means) and **FUNCTIONS** (ends)

private property

embody self interest

prices

measure self interest

markets

coordinate self interest

competition

regulate self interest

government

facilitates
p.p., p., m., & c.

PERSON

is a legal concept that has continually evolved
with respect to

who is a person

LEGAL

NATURAL

what rights and obligations exist
means of enforcement

U.S. Constitution

person is not dependent upon citizenship

only within the U.S. for non-citizens

Customs Service is contact before the border

SHUT DOWN RULE $TR < VC$

which is the same as

$$TR/Q < VC/Q$$

which is the same as

$$P < AVC$$

DESTRUCTIVE COMPETITION

TR is persistently

less than TC,

but more than VC

Rapid Technological Change

$$ATC_{new} < AVC_{old}$$

versus

$$ATC_{new} < ATC_{old}$$

HISTORY OF CAPITALISM

pre 1500	PRE-CAPITALISM (FEUDALISM) self sufficient manor
1500 - 1800	MERCANTILISM self sufficient nation
1750 - 1890	FREE CAPITALISM self sufficient individual
1860 - 1920	INDUSTRIAL CAPITALISM self sufficient firm
1890 - 1930	FINANCIAL CAPITALISM self sufficient industry
1915 -	RESPONSIVE CAPITALISM
1930 -	REGULATED CAPITALISM
2000 -	???

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GOOD FAITH

consumer
subjective: honesty in fact

merchant
subjective: honesty in fact
objective: commercial reasonableness

UTMOST GOOD FAITH

fiduciary duty
subjective: honesty in fact
objective: personalized

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NON-PRICE DETERMINANTS OF

SUPPLY **DEMAND**

# & size of sellers	# & size of buyers
horizontally sum	horizontally sum
costs for inputs	income
prices of related goods	prices of related goods
substitutes (A or B)	substitutes (A or B)
compliments (A and B)	compliments (A and B)
taxes	tastes
technology	
expectations	expectations

Technology is dynamic.
Expectations are volatile.

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An "agent" **acts for and acts instead of** the "principal" when the agent acts **within the "agents" scope of authority.**

The "agent" is **not acting personally**, rather, the "principal" is acting.

An agency is created by **express or implied** acts of the parties

the "principal" must act
agreement between the agent and principal
not necessarily a contract
capacity needed by "principal"
consideration not needed by either

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EFFICIENCY AS ETHICS:

Greatest good for the greatest number.
(Utilitarianism)

Individualism via **profit maximization.**

Social good via **cost minimization.**

Efficiency

IF

profit maximization

AND IF

cost minimization

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Law attaches liability to knowing and voluntary acts.

who **CONTROLS** what & how?

P & A **P:** what & how; **A:** what & how

P & IC **P:** what; **IC:** how

ER & EE **ER:** what & how; **EE:** none

P & A share liability by degree of control.

In a **P & IC** relationship,
the **P** can **shift liability** for **negligence** to **IC**,
but the **P** can **not shift liability** for **strict liability** to **IC**.

ER has all liability for **EE's** acts within scope.

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"principal" is **vicariously liable** for "agent's" contracts, torts, and crimes if "agent" acting **within the scope of authority**.

reasonable expectations of the parties

Upon whom is the 3rd party justifiably relying ?
undisclosed principal

partially disclosed "principal"

fully disclosed "principal"

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ELEMENTS OF A CONTRACT

AGREEMENT

offer identical to acceptance
mirror image rule

CONSIDERATION

legally sufficient
not necessarily "fair price"
objective intent

CAPACITY

ability to grasp the natural consequences of one's actions

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Communications between an "agent" and a "principal", at a minimum, are confidential. Only some are privileged.

confidential v. privileged communications

PRIVILEGED: attorney - client

If **past action**, then absolute.

Court can **not** compel testimony.

If **future and criminal**, then attorney may have prior obligation to disclose.

CONFIDENTIAL: accountant - client

Court may compel testimony.

Otherwise, disclosure is a breach of a fiduciary duty.

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REALITY OF ASSENT

voluntary

presume voluntary

disprove voluntary by the presence of

common law fraud

duress

mistake

undue influence

each of these strip a person of capacity

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A contract is a legally enforceable agreement between two or more parties whereby they make the future more predictable.

Contracts are in addition to the preexisting, involuntary social contract

ELEMENTS OF A CONTRACT

Agreement

Consideration

Capacity

Reality of Assent

Form

Legal Subject Matter

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COMMON LAW FRAUD

knowing

intentional

misrepresentation of a material fact

justifiable reliance AND

causing injury

for future reference

SECURITY LAW FRAUD

drop the three subjective factors

and

expand the objective factors twice

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MISTAKE

unilateral mistake

mistake is **objectively known**
to the non-mistaking party
and
the mistake is a **material fact**

mutual mistake

both parties make the
same mistake of the same **material fact**

FORM

Statute of Frauds

IF

1. sale of "goods" of at least \$500
2. sale of land
3. **must** last more than one year
4. guarantee debts of another **OR**
5. in consideration of marriage

THEN

written memorandum of material terms

parties (signature [s?])

consideration

time AND

subject matter

need sufficient definiteness

to support court enforcement

DURESS

typically,
physical force
objectively sufficient warrant the decision made

can be,
emotional force
however, emotional force far less objective;
and also see **undue influence**

can be,
economic force
however, focus in on source of force
poverty or competitive, thus **privileged**
versus
created by opposing party, thus **predatory**

Capacity is about the **ability to know**.

Capacity does not go to whether the person does or does not know. Capacity merely establishes that the person can know.

Some transactions require more ability
to see the natural consequences of one's actions
(either due to complex causation
or more of consequences are in the future),
in which case more capacity is required.

UNDUE INFLUENCE

The defendant objectively has the
opportunity and inclination
to take advantage of the abused party
AND
the abused party's behavior shows a
result that is objectively consistent with
having been abused.

Note use of "abused party" rather than plaintiff.

Is Anna Nicole Smith an example of undue influence?

Material is a term often used in the law,
but with **very different meanings**.

At its root meaning,
material is something that the law will recognize
as significant.

As capacity varied by type of transaction,
so does material.

Material varies by the parties'
type of relationship
and the
objective intent to harm.

TORTS

part of social contract

PLAINTIFF IS AN INDIVIDUAL

wrong done to the individual
compensation, not punishment

TYPES OF TORTS

Intentional

create harm

Negligence

create risk of harm

Strict Liability

social risk allocation, not based on fault

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PRE-INDUSTRIAL REVOLUTION PRODUCTS

simple products

information equal

equal control of risk

production (seller)

is equal to

use (consumer)

personal relationships

information rich

equal size

small absolute MES

encourage production

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GENERAL ELEMENTS OF ALL TYPES OF TORTS

1. duty of care

2. breach of the duty

res ipsa loquitur

per se negligence

statutory standard of care

3. injury

4. proximate cause

(i.e., legal, not factual, cause)

Proximate cause if the plaintiff's injury is
reasonably foreseeable by the defendant
at the time of the defendant's breach.

5. no defenses

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POST-INDUSTRIAL REVOLUTION PRODUCTS

complex products

aggregate information

consumer

firm

industry

true market: CPSC

unequal control of risks

access to information

latent defects

impersonal transaction

mass marketing & advertising

loss of consumer information

loss of privity and standing to sue

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ASSUMPTION OF THE RISK

knowing AND voluntary

RISK CANNOT BE ZERO

CHANGING REASONABLE EXPECTATIONS

Who is LIABLE?

maker

seller

PRIVITY

What is an ERROR?

design

v. construction

v. label

goods

v. service

v. product

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POST-INDUSTRIAL REVOLUTION PRODUCTS

unequal size

small v. large MES

ability to bear cost

deep pocket

ability to spread cost

mass market

liability creates a natural monopoly?

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STRICT LIABILITY

not fault based
based on social risk allocation

Restatement of Torts Section 402A

business
sells
defective product in
unreasonably dangerous condition
which
reaches user
without substantial change in condition,
and causes physical harm

MARKET SHARE LIABILITY

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REAL PROPERTY

ground, water, air, and fixtures

FIXTURES

personal property that is still removable,
but so firmly affixed as to become part of
the realty

measured by objective intent

trespass: exclusive possession

physical invasion

nuisance

reasonable use and enjoyment

standing to sue

public nuisance

private nuisance

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UCC WARRANTIES

implied for ordinary purpose

MERCHANTABILITY

implied for a particular purpose

seller knows of buyers reliance

express

seller's affirmation of fact &
basis of the bargain

DISCLAIMERS

clear and conspicuous

NOT for personal consumer injury 2-318

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ZONING uses the Police Power and the Power of
Eminent Domain

Power of a government to **take**

private property for a public purpose

upon **due process** and

payment of **just compensation**

"mere regulation" v. "taking"

C.E.R.C.L.A.

it is no longer feasible to **abandon** property
that you once owned or managed

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PROPERTY part of social contract,
but malleable to individual desires **bundle of rights**

PERSONAL PROPERTY

any property that is not real property

tangible

"goods"

intangible

contract rights

securities

intellectual property

BAILMENT

transfer only possession,

not transfer of ownership

half way between contract and property

need neither capacity nor consideration

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Pollution is not bad. **Too much pollution is bad.**

Pollution in excess of the ecosystem's
regenerative ability is too much pollution.

STATIC LIMITS

DYNAMIC LIMITS

Increased **population** and increased **industry**
created the ability of humans to **exceed** the
regenerative abilities.

Fundamentally, both the
QUANTITY and the **QUALITY**
of human generated pollution has changed.

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Pollution is a **zero priced** (public) good because no one owns the regenerative ability.

Impact of pollution is **unpredictable**.

Geopolitical boundaries
restrain governmental solutions

starve today v. die of poisoning tomorrow

It is feasible
to have an ecology without economy,
but
it is not feasible
to have an economy without an ecology.

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Anti-trust law

Both the federal and the State governments make it both criminally and civilly actionable to **injury competition** or to **destroy competition**.

Covenant not to Compete

ancillary to legitimate business interest(s)
reasonable time and area

Nebraska: one year & one county

reform versus sever versus void

Rule of Reason

proportional to your
legitimate business interest(s)

Per Se Unreasonable

price fixing, horizontal division of territories,
group boycotts, tying

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FEDERAL HAZARDOUS WASTES

paper trail
notice
civil & criminal

TOXIC PRODUCTS

paper trail
regulate use (least restrictive)
notice to EPA

WILDLIFE

all life forms equal
Gene pool
extinction = irreversible?

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Common Law of Contracts: reasonable expectations

Old Common Law

all assignments and delegations
violate the parties reasonable expectations.

New Common Law: freedom of assignment

most delegations
violate reasonable expectations

most assignments
do not violate reasonable expectations

However, each party is material
in a personal services contract.

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CRIMES

part of social contract
PLAINTIFF IS THE STATE
wrong done to the state
punishment, not compensation

ELEMENTS

1. bad deed or *actus rea*
2. bad thought or *mens rea*

CAPACITY

minors
insane

3. no defense
be careful, a DEFENSE admits
both deed and thought,
but justifies the deed

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INSTRUMENTS

specialized contract that accepts all third parties

requirements of an instrument
must be **on the face** of the instrument

writing

signed by maker or drawer

any mark

with the current intent to
authenticate the document

unconditional promise or order to pay

payable to order or bear

fixed amount of money

on demand or a definite time

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HDC: Holder in Due Course
holder
for value
not = consideration

in good faith
recall three types
use merchant's for instruments
and
without notice
overdue
dishonor
claims or
defenses

Perfection
Financing Statement
written

signature of debtor
description of collateral
to put world on notice
of potential claims to ownership
name and addresses
debtor
creditor

PRIORITY

- * first to perfect then first to secure
- * buyers in the ordinary course of business
good faith
- * consumer sale to consumer

SECURED TRANSACTIONS

Security Interest
written agreement or possession
debtor sign
describe collateral
to grant and
to allocate ownership interests
debtor has rights to collateral

PMSI: Purchase Money Security Interest

BANKRUPTCY

CHAPTER 7
LIQUIDATION

CHAPTER 11
BUSINESS REORGANIZATION
business future income
debtor in possession
cram down

CHAPTER 13
INDIVIDUAL REPAYMENT PLANS
consumer future income
Super Discharge

Perfection
possession
necessary for some collateral
e.g., bearer instruments
filing
necessary for some collateral
e.g., general intangibles
e.g., patent
automatic
PMSI in consumer goods
proceeds
scope of security interest
proceeds v. after acquired v. floating lien

AUTOMATIC STAY

Trustee
powers
collect estate, preserve, account
General Powers
Assumption Rights
Preferences
Fraudulent Transfers
may be reversed, Trustee's discretion

Creditors' Meeting
debtor MUST attend or denied discharge

Property Distribution
priority, with general **unsecured** creditors last

DISCHARGE
Objections to discharge

Reaffirmation of Debt
prior court approval

Federal Arbitration Act of 1929
favors arbitration for **commercial transactions**
however
legislative intent to **exempt** from arbitration
the **enforcement of "rights"**
(no exemption for SEC or RICO)
and
commercial transactions need to satisfy State's
general rules for contracts

FAA **liberally construed** to encourage
enforcement of arbitration agreements
e.g., administrative agency's standing to sue

Negotiation: the art of reaching an agreement
voluntary
not binding
parties engage in discussions seeking a
mutually satisfying resolution

Mediation
may or may not be voluntary
not binding
third party guide: **in search of solution**

Facilitation
voluntary
not binding
third party guide: **in search of interests**

limited judicial review of both the
process
and
award
focus on compliance with arbitration agreement

Role of Precedence in Arbitration
typically, no precedence;
but, with labor arbitration
Rule of Shop

Concurrent State and Federal Powers
but
Commerce Clause
Supremacy Clause

Arbitration
parties choose whether
voluntary or mandatory
and/or
not binding or binding

choosing arbitration made either
by prior agreement
or
at time of dispute (rule in Nebraska: capacity)
selection of arbitrators
typically: by you, by me, and then by our
award
both greater and lesser than court's remedy

Preparation
is the best path to mutual understanding.

Preparation
includes much more than analysis
of each party's interests.

Preparation includes
analysis,
perception,
prioritization,
anticipation,
and development of **objective criteria**
as well as **options for mutual gain.**

A negotiator should **identify** the **topics** of discussion as well as the **sequence** of discussions.

Specific attention should be given to what the negotiator is willing to **trade** (and for what!) in order to obtain the desired **outcomes**.

You should clearly **identify** your **BATNA** **reservation aspiration**, and the expected **ZOPA**.

tensions are inherent
can not eliminate, can only manage

distributive gain v. joint gains (create value)
asymmetric information fuels this tension
trust

empathize v. assert
an experiential tension
both, not either/or

principal v. agent
incentives and monitoring

Tensions inherent in all negotiations

creating value v. distributing value

empathy v. assertiveness

principals v. agents

Sources of Value

differences between the parties

resources

relative valuation

forecasts (belief and likelihood)

risk preferences

averse v. neutral v. taker

risk shifting towards efficient carrier

time preferences

event v. payment

non-competitive similarities

economies of scale

and

economies of scope

Deals and disputes are negotiated in the shadow of the law.

Lawyers have special opportunities to create value; but, misused, lawyers are wasteful and costly.

Seek fair and durable commitments

which are more likely if

define and allocate transaction **risks**

understand underlying **interests**,

*rather than mere **positions**,*

understand and address **legal opportunities** and risks,

identify and accommodate **decision points**,

design efficient **processes**,

and manage **expectations**.

Preparation for negotiation always is inadequate

Expect ethical dilemmas.

Asymmetric information

material

would change the conclusion

see slides on Contracts

latent

a reasonable inspection will not discover

Strategic Opportunism

concealed: reservation value and BATNA

independent generation and confirmation of info

ZOPA v. range of BATNA to aspiration value

sculpting perceptions

Hard Bargaining Tactics

1. Extreme claims followed by small, slow concessions.
2. Commitment tactics.
3. Take-it-or-leave-it offers.
4. Inviting unreciprocated offers.
5. Flinch.
6. Personal insults and feather ruffling.
7. Bluffing, puffing, and lying.
8. Threats and warnings.
9. Belittling the other party's alternatives.
10. Good cop, bad cop.

Functional if [a] in a single transaction and/or [b] opponent is an aggressive negotiator.

Disastrous in sequential transactions with a reasonable negotiator.

Agency Costs

agent's interest will not necessarily align with the principal's

PREFERENCES

reputation as a repeat player

INCENTIVES

"success" reach with different outcomes

INFORMATION

availability
kinds
discovery

Unproductive Tendencies:

suboptimal lack of nimbleness

Competitor (high assertion)

advantage with distribution

Accommodator (high empathy)

focused on sustaining a relationship but, imbalanced and prone to exploitation

Avoider (low assertion and low empathy)

conflict unproductive, wait for it to go away

PARTNERSHIP LAW

borrows heavily from agency law

every partner is

simultaneously a principal and an agent for the other partners

partnership and each of the partners has **unlimited personal liability**

no person (for most purposes) **so tax pass through**

At the Table

reciprocal processes

empathy loop

inquire > respond >

demonstrate > test > inquire

do not agree if you disagree

unambiguous understanding

unambiguous lack of agreement

transition from empathy to assertion

verify understandings

assert your story

verify they *heard* what you said

and that you said what they heard

dynamic process

focused on fair and durable commitments

PARTNERSHIP LAW

general partnerships

common law

unlimited personal liability

partnership

each partner is a **general partner**

limited partnerships

statutory

unlimited personal liability in two locations

limited partnership

and

each **general partner**

limited personal liability

each **limited partner**

limited partners can lose limited liability protection

ULPA: easy to lose
participate in management
e.g., personal name in
partnership name

RULPA: hard to lose
3rd party detrimentally relies

also
limited partnerships must have
at least one general partner
most States allow a
corporation to be the general partner

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TYPES OF CORPORATIONS

domestic (e.g., Nebraska)
substantial minimum contacts
foreign (e.g., Iowa)
alien (e.g., Canada)

close corporations
Shareholder Agreements
proportional to legitimate business interests
distinguish vote shares v. vote as Directors

Corporation by Estoppel
de facto corporation

de jure corporation

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Hierarchy of laws and rules
controlling corporations:
U.S. Constitution

U.S. laws

State's Constitution

State laws

Articles of Incorporation

Corporate By Laws

Board of Directors' Resolutions

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CORPORATE SHAREHOLDERS

owners of **undivided fractional interests**
income: i.e., dividends
management
assets

SHAREHOLDER VOTING (i.e., management)
Shareholder Agreements
Cumulative Voting
Constitutional right and requirement in Nebraska
Proxy Voting
sell right to management to increase income

separation of ownership and control

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Promoter's Liability

Promoter is personally liable,
at a minimum,
until the contracts are offered to the corporation
after its formation.

Usually, the promoter still is personally liable
if
corporation rejects contracts.

subscription contracts
who are the parties?
subscribers also liable to other subscribers

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SHAREHOLDERS elect the **Board of Directors.**

BOARD OF DIRECTORS appoints the **Officers.**

OFFICERS manage the corporation.

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Pierce the Corporate Veil

often a derivative lawsuit

shareholder and/or director made personal liable

lawsuit in equity

based on shareholder's or director's
fraud, illegality, injustice

thinly capitalized

ignored formalities

commingled assets

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Wagner (National Labor Relations Act), 1934 right to organize

"direct effect"

v.

"close and substantial affect"

secret election

laboratory conditions

justifiable reliance on unilateral offer

bargaining unit

labor or management?

question of agent's loyalty

implement v. formulate policy

independent judgment

managed care

nurses v. doctors

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BUSINESS JUDGMENT RULE

immunizes both Directors and officers
but to different degrees

requires the Directors and officers to
use their best judgment
to obtain corporation's best interests

no conflict of interests

Directors: disclose and abstain

officers: disclose and obtain approval

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86

Wagner (National Labor Relations Act), 1934 subjects of bargaining

mandatory

wages,

hours, and

terms and conditions of employment

past contracts

permissive

prohibited

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BUSINESS JUDGMENT RULE, continued

Directors and officers are not insurers
no liability for honest mistakes
of an informed decision
(i.e., required to seek out information)
made within the scope of authority
upon a reasonable basis
using the care of ordinarily prudent person
in a like position and circumstances

officers
know or should know more
than Directors

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87

Risk cannot equal zero.

MARKET AND LAW FAIL IF RISK IS EITHER

not known

or

not voluntarily accepted

INDUSTRIAL REVOLUTION

impersonal relationships

abuse of unequal bargaining power

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90

Employee's View of Workplace risk

limited information
one worker
justification for unions

complex causation

present value of risk premium

FEDERAL LAW OF WORKPLACE SAFETY

OSHA: Occupational Safety and Health Act
safe and healthful working conditions
degree of objectivity

OSHA General Duty Clause: arising from
IF 1) known risk of
2) serious physical injury which is
3) preventable
THEN 4) **absolute duty**
to remove the cause of the risk.

STATE LAW

employment at will

common law: slow, favors employer
fellow servant

failed duty to report

assumption of risk: normal risk
known and voluntary

contributory negligence
bar v. offset

statute: fast, favors employee

Workers' Compensation Insurance

no fault

employee v. independent contractor

insurance rating

industry and firm

The employer's legitimate business interest is
in obtaining, retaining, and promoting
objectively qualified employees.

The equal employment opportunity laws
outlaw the use of specific types of
cheap information
due to its inherent inaccuracy.

The employer is required to determine whether
the individual applicant is objectively qualified,
rather than
being allowed to rely on stereotypical indicators
which show that different groups are
differentially objectively qualified.

STATE LAW: Workers' Compensation Insurance

the insured risks include those risks which are

ARISING OUT OF
risk peculiar

AND
HAPPENING IN THE COURSE OF EMPLOYMENT
time and place

going and coming rule

The legislature has directed the courts
to **presume**
employer actions which are **disproportionate** to
the employer's legitimate business interests
when
the employer makes "employment decisions" of
who is objectively qualified
based on specific types of cheap information.

These specific types of cheap information are
called **PROTECTED CLASSES**.

Every one is a member of every protected class.

PROTECTED CLASSES

Race
Color
Religion reasonably accommodate
National Origin
Sex
Age
Physical Handicap reasonably accommodate
major life activity

The question is not whether you are "male" or "female".
The question is whether "sex" was used to indicate "qualified".

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97

Reverse Discrimination v. Affirmative Action

court ordered affirmative action
recruitment and hiring and promotion
corrects **adjudicated past discrimination**

voluntary affirmative action
recruitment
expand pool of qualified applicants
correct **self identified past discrimination**
clean hands?

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100

Title VII of the Civil Rights Act of 1964
employer's legitimate business interest
to hire and promote objectively "qualified" persons

Three ways to **objectively prove** that the
employer did not hire or promote
objectively qualified persons.

Disparate Treatment
individual

Disparate Impact
group

Pattern or Practice
group

Employer's may have and prove a
plausible, alternative, legitimate explanation.

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Sexual Harassment

definition of sexual harassment
Defendant

reasonable person would
subjectively intend harassment

Plaintiff

reasonable person would
subjectively perceive harassment

to avoid personal liability
managers must

develop a policy
communicate the policy
enforce the policy

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101

Title VII of the Civil Rights Act of 1964

Bona Fide Occupational Qualifications BFOQ
NEVER Race or Color
business necessity
"necessity" = reasonably necessary

narrow interpretation
perspective of the public policy
not perspective of business

Bona Fide Seniority Plan
may not use seniority to discriminate

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The **public domain** contains all knowledge
that
is not protected by intellectual property law.

All intellectual property law
provides **protection that is limited**,
either
in **duration** (e.g., patent and copyright)
or in **scope** (e.g., **FAIR USE** in copyright).

Unauthorized use
of protected intellectual property
is an infringement
of the property owner's rights.

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PATENTS

protect **ideas**
reduced to physical practice

COPYRIGHTS

protect **expressions** of ideas

TRADEMARKS

protect marks that
identify
a source of goods or services

TRADE SECRETS

protect
commercially valuable
generally unknown
information

RIGHTS OF PATENTS

A patent is a **legal monopoly**.
The patent owner has the legal right to exclude.
You may **EXCLUDE** others from:

MAKING,
USING,
SELLING, and
IMPORTING.

DURATION: patent is a legal monopoly of
twenty (20) years; but **maintenance fees** are at
3 1/2 years,
7 1/2 years, and
11 1/2 years.

The society makes a **trade** with you:
in exchange for you **disclosing** your invention
the government grants you a **legal monopoly**
on your idea for a limited term.

Your patent application must disclose
your idea so clearly that a **person of ordinary skill:**
is **enabled to practice** the invention, and
is shown the **best way** to practice the invention.

The patent application supports the patent claims
which are the basis for the legal protection of the
legal monopoly. Unauthorized use of the
protected claims is patent infringement.

Hired to Invent

patents require a human inventor
employees own patents unless hired to invent
a prior, written, signed contract

Reverse Engineering

patents require disclosure
therefore
reverse engineering does not defeat a patent

TO OBTAIN A PATENT

Your invention must satisfy:

subject matter,

genuineness,

true inventor (i.e., human) must sign

usefulness,

novelty, and

not obvious in light of current technology.

Genuineness and usefulness are easy to satisfy.

COPYRIGHTS

protection of the expression of an idea,
rather than the idea

exclusive ownership right to expression

ORIGINAL

works of authorship **FIXED**
in a **TANGIBLE MEDIUM** of expression
from which works may be
PERCEIVED, REPRODUCED, or otherwise
COMMUNICATED.

AUTOMATIC COPYRIGHT
REGISTRATION IS NOT NECESSARY, *but registration must precede filing a copyright infringement suit.*

RIGHTS OF COPYRIGHTS
EXCLUSIVE RIGHT TO:

- * COPY,
- * prepare **DERIVATIVE** works,
- * **DISTRIBUTE**,
- * **PERFORM** works in public, and
- * **DISPLAY** works in public.

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TRADE MARKS are exclusive right to use a specific **MARK** on a product or service to **IDENTIFY** a **SOURCE**.

Gain exclusive right by use by **AFFIXING** the mark.

Federal protection is national.
State protection is limited to area in the State where the mark has been used.

A **prior federal** registration of a mark **PREEMPTS** subsequent State trademark rights.

BUT prior State use or registration is **not preempted** by subsequent federal registration.

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EXCLUSIVE COPYRIGHTS LIMITED BY:

FAIR USE (a major limitation),

1. **purpose** of copy
non-profit in-class educational use
2. **nature** of the work
books get more protection than data
3. **substantiality of the copying**
small portions versus whole
and (*but, in effect, an "and/or"*)
4. **effect on the market**
portion of the potential market for copies

Fair use is part of the **public domain** during the duration of the copyright.

Parody is a constitutional right.

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110

For federal protection, must use or intend to use (e.g., investment in marketing plan) in interstate commerce.

Trademarks are for products;
Service Marks are for services.

Marks are to aid the consumer, accordingly, parody of a trademark is **NOT** permissible.

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DURATION

human author

life + 70 years,

corporate author

creation + 120 years,

publication + 95 years

is more than 100 years "limited"?

WORK - MADE - FOR - HIRE

Employers are the "author" for works created by employees **within scope of employment**, unless there is a **signed contract prior to creation**.

In contrast, principals are not authors, thus **independent contractors** are the "author" unless there is a **signed contract prior to creation**.

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LIKELIHOOD OF CONFUSION

as to the source are **not permitted**.
Focus on the consumer.

In 1999, Congress adopted an **anti-dilution act** for **famous** trademarks and to stop cybersquatters.

Parody of a trademark, unlike parody of copyright, is not permitted if the parody is likely to create confusion.
Mutant of Omaha

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DISTINCTIVENESS

inherently distinctive

fanciful
arbitrary
suggestive

not inherently distinctive = **descriptive**
descriptive is protectable
if **secondary meaning**

not distinctive
generic

REVERSE ENGINEERING is a proper taking.

Recall that trade secrets are not exclusive.

The discovery of the trade secret
by another does not, by itself, end your trade secret.

However, the general disclosure of your trade secret
by any person, including an unlawful disclosure,
does end your trade secret.

The elements of the **UTSA definition** of
"trade secret" are:

INFORMATION

independent **ECONOMIC VALUE** from secrecy

REASONABLE EFFORTS TO MAINTAIN SECRECY

securities markets require

1. **VALUATIONS** which are
accurate and
timely

valuations require **INFORMATION** which is
accurate
timely AND
complete

and

2. **LIQUIDITY**

entry

raise capital

exit

fixed asset to cash

Trade secrets can offer protection that
patents and copyrights cannot.

Subject matter nearly unlimited.

Duration of protection is as long as
the secret stays generally **not known**.

Trade secrets need **not** be **exclusive**.

Protection against **improper taking**,
either because the taking is
unlawful or is improper **under the circumstances**.

STATES' REGULATION OF SECURITIES

paternalistic

merit review

common law fraud

now redefined like Federal law

FEDERAL REGULATION OF SECURITIES

concurrent powers

States create the corporations

FULL DISCLOSURE

1933 Securities Act: **ISSUE**

1934 Securities Exchange Act: **TRADING**

1933 SECURITY ACT: first issue

SECURITY

is an investment of money
in a common enterprise
with a reasonable expectation of profit
with profit derived from the
undeniably significant (sole?) efforts of others.

INSIDER INFORMATION: disclose v. not trade

Section 10b

what you know and do: fact, not law

TIPPEE

independent duty to disclose
if
tip via breach of a fiduciary duty

**NOT NEGLIGENCE
NEED SCIENTER**

SECURITY LAW FRAUD

1. MISREPRESENTATION OR OMISSION
OF MATERIAL FACT and
2. causing INJURY

affirmative duty to seek and speak the truth

material = reasonably prudent investor
would wish to know beforehand

compare with contract law
"material" = if had known,
would have changed
the bargain

INSIDER INFORMATION: disclose v. not trade

Section 16b

status offense: who you are
imputed knowledge and use of knowledge

10% stockholder; director; officer

know because of access; law, not fact

SHORT SWING "PROFITS"

derivative suit
standing to sue

EXEMPT TRANSACTION SECURITIES

exempt from disclosure at time of issue
still securities, so fraud provisions apply

PRIVATE

access AND
sophistication

SMALL

\$1.0 M

INTRASTATE

- A) seller
- B) buyer AND
- C) capital comes to rest

recall constitutional law of federal preemption

trial court: finds fact & applies law
appellate court: finds error & interprets law

upon appeal,
the appellate court will AFFIRM
the trial court UNLESS

1. clear error of fact by the trial court
2. non-harmless error of procedure
by the trial court
or
3. any error of law by the trial court