

Legal, Ethical, & Social Environment
 BSAD 8010-001 &-002
 Fall 2004
note: a fuller set of Key Slides in Spring 2003
note: an abbreviate set in Summer 2004
 Tuesday & Wednesday nights
 Roskens Hall 214

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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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The law favors the **objective**
 (e.g., reasonable person)
 over the **subjective**
 (e.g., scientist).

To function as theorized,
 both USA law and Capitalism require
 transactions where the actions of all participants are
 both **knowing** and **voluntary**.

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CAPITALISM

ELEMENTS (means)	and	FUNCTIONS (ends)
private property		embody self interest
prices		measure self interest
markets		coordinate self interest
competition and government		regulate self interest and facilitates p.p., p., m., & c.

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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

Expectations are volatile
(i.e., capable of fast and large changes).
 Technology is dynamic *(i.e., volatile network effect).*

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not on Memorization Exam, but on Final Exam

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.

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KNOWING is critical
 to both the law and to economics.

Broadly, the law uses three levels of knowledge.
 Generically, all that is required is the
 lowest level of objective knowledge
 (i.e., **reason to know**).

However,
 to set a higher transaction cost and/or
 to increase liability for the actor, the law might
 require a higher level of objective knowledge
 (i.e., **receipt of notice**) or
 require the highest level, subjective knowledge
 (i.e., **actual knowledge** [e.g., scientist]).

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The "**reasonable person**" is a legal fiction.
The reasonable person is a **legal standard for behavior**.

An actor's behavior
that fails to satisfy the reasonable person standard
creates legal liability for the actor.

The law seeks to satisfy **reasonable expectations**
based on what a reasonable person
would have objectively known at the time of an action.

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Seeking to be **objective**, both contracts and evidence
can be either express or implied.

When referring to contracts,
EXPRESS contracts have
all terms known by the parties'
WORDS
(oral
or
written);

IMPLIED contracts have
all terms known by the parties'
acts
words, and/or
circumstance.

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Separation of Powers,
in order of importance and power,
ranks the participants
from top to bottom and from left to right.

Individual v. Government

Federal v. State

then within a government's three branches:
legislature v. executive v. judiciary

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The function of the legislature is to **make** law,
the function of the executive is to **enforce** the law, and
the function of the judiciary is to **interpret** the law.

The USA has a **weak** separation of powers and
Nebraska has a **strong** separation of powers
between the branches.

JUDICIAL REVIEW

is the power of the judiciary to **declare unconstitutional**
an act of any branch of government
that is contrary to the *Constitution*.

Judicial Review is **implied** in the USA *Constitution* and
express in most State constitutions.

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The law reacts to problems: it can not anticipate.

The **legislature tends to react** when:

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

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Each State has the Police Power.
The federal government
has very little of the Police Power
(*e.g., general welfare*).

A State's **POLICE POWER** is the
power of the State to regulate to **protect the People's**
health
safety
morals
and
general welfare.

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All governments in the USA owe all legal persons in the USA the duty of procedural due process; but, private persons do not owe that duty.

PROCEDURAL DUE PROCESS is notice and hearing, with both the notice and the hearing proportional to the interest(s) involved.

Both the USA *Constitution's* 5th and 14th Amendments list the core interests as life, liberty, and property

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One of the federal government's greatest powers is the USA *Constitution* Art. I, sec. 8, cl. 3 **COMMERCE CLAUSE**.

Domestically, the Commerce Clause reads, Congress shall have the power ... to regulate commerce among the several States.

The Court's interpretation of the word among has varied materially. pre – 1937 direct Effect (i.e., result) on commerce between the several States

post- 1937 close and substantial Affect (i.e., cause) on commerce between the several States

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The law often uses triads for the purpose of analysis of lawful power. When doing so the law uses the word core to identify the greatest power, then penumbra to identify medium power, and emanation to identify the weakest power. In the context of the Commerce Clause it looks like the table below. Note, this method of analysis calls for identifying who has the discretion.

<u>POWER</u>	<u>ANALOGY</u>	<u>COMMERCE APPLICATION</u>
core powers	tree	transportation
penumbras	shadow	manufacturing
emanations	breeze	retail

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Federal preemption of a State's laws 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.

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A plaintiff must have **STANDING TO SUE** the defendant. Standing to sue requires the plaintiff to have an injury in fact and to be within zone of protected interests.

In the USA, civil trials require proof at the level of the preponderance of the evidence (e.g., 50.1% sure). In the USA, criminal trials require proof at the level beyond a reasonable doubt (e.g., 99% sure).

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In a crime, the plaintiff is the State. In a crime, the injured party is the State. The victim does not have standing to sue for a crime. The victim probably has standing to sue for a tort.

The elements of all crimes are:
1. bad deed aka actus rea
2. bad thought, and aka mens rea
3. no defense.

Only the legislature has the power to create a crime. A legislative attempt to create a crime is void for vagueness if a reasonable person who did read the statute would not know what was prohibited.

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A **trial court** finds fact & applies law, while an **appellate court**: finds error & interprets law.

Upon appeal, the appellate court will **AFFIRM** the trial court **UNLESS** the appellate court finds

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

Because of the different burdens of proof, most non-harmless errors of procedure are in criminal trials. Persons ignorant of the separations of power and the law call them "**technicalities**".

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The law recognizes real property (*e.g. fixtures*) and personal property (*e.g., securities*), as well as tangible property (*e.g., goods*) and intangible property (*e.g., intellectual property*). Each form of property has its own array of rights.

If the defendant **interferes with reasonable use and enjoyment** of the plaintiff's real property, then the defendant has created a **nuisance**.

Governments in the USA have the power of **Eminent Domain**, which is the power of government to **take private property for a public purpose upon due process and upon payment of just compensation**.

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The four main forms of intellectual property are:

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 .

All knowledge starts in the **public domain**, a fraction of it always remains in the public domain during its capture as IP, and it always returns to the **public domain**.

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EXCLUSIVE COPYRIGHTS LIMITED BY:

FAIR USE (a major limitation),

1. **purpose** of copy
(e.g., non-profit in-class educational use);
2. **nature** of the work
(e.g., books get more protection than data);
3. **substantiality of the copying**
(e.g., small portions versus whole);
and (*but, in effect, an "and/or"*)
4. **effect on the market**
(e.g., 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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ELEMENTS OF A CONTRACT

Agreement
Consideration
Capacity
Reality of Assent
Form and
Legal Subject Matter

ELEMENTS OF COMMON LAW FRAUD

The defendant **knowingly** and **intentionally** misrepresents a **material fact** thereby inducing the plaintiff's **justifiable reliance** **AND** causing the plaintiff's **injury**.

material = big enough would have changed mind

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Statute of Frauds

IF a contract is for the

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 the contract must include a **written memorandum of material terms** (i.e., **parties' (one signature!) consideration time AND subject matter**) **with sufficient definiteness to support the court's enforcement.**

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

The "agent", legally, is **not acting personally**, rather, the "principal" is acting, and thus the "principal" is **vicariously liable.**

But, ethically the "agent" always acts personally.

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Every partner is **simultaneously a principal and an agent** for the other partners.

Absent an express agreement to the contrary, a the law imposes a presumed **equal division** of partnership **profit, management, and assets** on the partners.

Any agreement between the partners that changes the presumptive equal division only binds the partners: **it does not bind third parties** (unless the third party consents).

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The law uses three standards of **GOOD FAITH.**

consumer (*always a natural person*)
subjective: honesty in fact
objective: objectively know nothing

merchant
subjective: honesty in fact
objective: commercial reasonableness

fiduciary duty: aka **UTMOST GOOD FAITH**
subjective: honesty in fact
objective: personalized objective

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GENERAL ELEMENTS OF ALL TYPES OF TORTS

1. **duty of care**
2. **breach** of the duty
3. **injury**
4. **proximate cause**, and
5. **no defenses.**

Proximate cause is legal cause, *not factual cause.*

Proximate cause exists if, *at the time of defendant's breach*, a reasonable person would have **reasonably foreseen** the plaintiff's injury.

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The most powerful and generic defense in USA law is the **ASSUMPTION OF THE RISK** defense. The defendant has a good defense of **Assumption of the Risk** if the **plaintiff knowingly AND voluntarily** exposes the plaintiff to the risk of the harm created by the defendant's breach of the duty of care.

RISK CAN NOT BE ZERO.

Muda CAN NOT BE ZERO.

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By statute, both the federal and the State governments make it both criminally and civilly actionable to **injury competition** or to **destroy competition** (e.g., antitrust laws).

The common law has long recognized as lawful some **Covenants not to Compete.** A CntC is lawful if **ancillary to the parties' legitimate business interest(s)** (i.e., **reasonable time and area** [e.g., Nebraska: one year & one county]).

A CntC must be contract in Nebraska.

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The courts interpret the antitrust statutes using the **Rule of Reason**.

The Rule of Reason allows any restraint of trade that is **proportional** to the parties' **legitimate business interest(s)**.

There are four restraints of trade that **experience** teaches are **always disproportionate** to the parties' legitimate business interests, and thus are **Per Se Unreasonable**:

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

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UCC (*i.e.*, *Uniform Commercial Code*) contracts are special contracts, and often UCC contracts replace the requirement of consideration with a requirement for **value**.

A **signature** is any mark with the **current intent** to authenticate the document.

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A **negotiable instrument** is a UCC contract that accepts all third parties.

The requirements of an instrument, must be **on the face** of the instrument:

writing,
signed by maker or drawer,
unconditional promise or order to pay,
payable to order or bear,
fixed amount of money, and
on demand or a definite time.

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A security agreement creates a security interest (*i.e.*, **attachment**) that establishes the creditor's ownership rights in the collateral.

Priority of creditor ownership rights goes first to creditors based on sequence of perfection, and second to creditors based on sequence of attachment.

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Security Interest can be created by a **written** agreement (*or by creditor possession*) (*signature of debtor*) that describes the collateral to grant and to allocate **ownership interests**, and debtor has rights to collateral.

Perfection of a security interest can be automatic (*e.g.*, *proceeds*) or by a **Financing Statement** that is written

(*signature of debtor*) describes collateral to **put world on notice** and of potential claims to ownership, and provides the **names and addresses** of the debtor and the creditor.

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Hierarchy of laws and rules controlling corporations:

USA Constitution
USA laws
USA regulations
State's Constitution
State laws
State regulations
Articles of Incorporation
Corporate By Laws
Board of Directors' Resolutions

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Corporations allow investors to limit personal liability to the amount of their investment. To **Pierce the Corporate Veil** is to impose unlimited personal liability on a shareholder or a director.

This suit always is in **equity** and often is a **derivative lawsuit**.

The Court of Equity will grant a suit to Pierce the Corporate Veil if the shareholders or directors used the corporate form to commit **fraud, illegality, or injustice**; **thinly capitalized** the corporation; **ignored the formalities** of the corporate form; and/or **commingled assets**.

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The **Business Judgment Rule** **immunizes** both Directors and officers, but to different degrees. Directors and officers are **not insurers**: they have no liability for **honest mistakes**.

The BJR requires the Directors and officers to use their **best judgment** to obtain **corporation's best interests**.

Directors and officers must have **no conflict of interests** with the corporation. To avoid conflicts, the **Directors** must **disclose and abstain**, while **officers** must **disclose and obtain approval**.

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The Business Judgment Rule requires the Directors and officers to make **informed decisions**, which means they **must seek out information**.

The decision must be made **within the scope of authority** and upon a **reasonable basis** using the care of **ordinarily prudent person** in a **like position and circumstances**

Accordingly, officers get less protection from the BJR because **officers objectively know more** than Directors.

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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.

SECURITY LAW FRAUD

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

material = reasonably prudent investor **would wish to know** beforehand

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