

Legal, Ethical, & Social Environment  
BSAD 8010

Spring 2003

Wednesday night Roskens Hall 214  
Thursday 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.

Key Slides

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1

**Ethics requires coherence at the subjective level.**

**can** power to act  
**may** authorization to act  
**should** ethical to act

An action can be subjectively ethical  
and objectively unethical: **2x2 matrix.**  
**Legal** **ILlegal**

**Ethical**  
**UnEthical**

The criteria for ethical behavior can be stated  
in the **negative** (e.g., most of Ten Commandments) or  
in the **positive**. (e.g., Golden Rule).

The law often uses the **Veil of Ignorance**.

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

Both USA law and capitalism require  
**knowing and voluntary**.

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

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

**KNOWING**

actual knowledge  
receipt of notice  
reason to know

**subjective**  
**objective**  
**objective**

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**EFFICIENCY AS ETHICS: Utilitarianism**  
**Greatest good for the greatest number.**

**Upon which horns do you wish to be gored?**  
**ends** justify the means  
**means** justify the ends

**Individualism** via **profit maximization**.  
**Social good** via **cost minimization**.

**Efficiency**

**IF** **profit maximization**  
**AND IF** **cost minimization.**

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**Major Forces of Change**

Approximately  
the year  
**1500**

**GUN POWDER**  
**NEW WORLD**  
**PRINTING PRESS**  
**RURAL**  
**LABOR SHORTAGE**

Approximately  
the year  
**2000**

**WMD**  
**ONE WORLD**  
**COMPUTER**  
**URBAN**  
**LABOR SURPLUS**

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Recalling **bounded rationality**,  
**Points of Reference**  
reveal divergent ethical outcomes when using  
**Efficiency as Ethics.**

**POINTS OF REFERENCE**

**Individual**  
**Subgroup(s)**  
**Society**

Questions of **loyalty** and of **obligation**.

An individual "belongs" to **multiple sub-groups**.  
Individuals and subgroups can avoid **spillover costs**.

As an aggregation of all sub-groups,  
Society must internalize all spillover costs.  
**Profit** and ethics varies by level of **aggregation**.

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**Risk cannot equal zero.**

**MARKET AND LAW FAIL IF RISK IS EITHER**

**not known  
or  
not voluntarily accepted**

**What criteria will  
you  
use to define "ethical"?**

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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**

**is the power to declare act of either the  
Legislative and Executive  
unconstitutional.**

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Seeking to be **objective**, 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.**

**All express contracts are implied,  
but not all implied contracts are express.**

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**The law reacts to problems.**

The legislature sees **groups** while  
the judiciary sees the **plaintiff and the defendant**.  
The legislature and the judiciary both design law  
based on what each sees and both **design law for  
the reasonable person within a group**.

The **legislature** tends to act when:

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

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**Process versus Substantive**

**DUE PROCESS**

**notice  
and  
hearing**

**both notice and hearing must be proportional  
to the interest(s) involved  
life, liberty, and property**

***Only government must provide due process.***

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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**

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## CIVIL v. CRIMINAL BURDENS OF PROOF

**CRIMINAL:** beyond a reasonable doubt  
(roughly 99% sure)

**CIVIL:** preponderance of the evidence  
(at least 50.01% sure)

these burdens are different because of  
standing to sue and  
complaint requirements,  
one act may yield several causes of action

## 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

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

## 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

## 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)

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## 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.

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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

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## 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.

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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

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$$\text{PROFIT} = \pi = \text{TR} - \text{TC}$$

$$\text{TR} = P * Q$$

$$\text{TC} = \text{FC} + \text{VC}$$

$$\begin{aligned} \text{TC}_E &= \text{land} + \text{labor} + \text{capital} + \text{entrepreneurial ability} \\ &= \text{rent} + \text{wages} + \text{interest} + \text{normal profit} \end{aligned}$$

$$\begin{aligned} \text{TC}_A &= \text{land} + \text{labor} + \text{capital} \\ &= \text{rent} + \text{wages} + \text{interest} \end{aligned}$$

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**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      existing  
 versus  
 ATC new < ATC old      new entrant

**NON-PRICE DETERMINANTS OF SUPPLY**  
 # & size of sellers  
 horizontally sum  
 costs for inputs  
 prices of related goods  
 substitutes (A or B)  
 compliments (A and B)  
 taxes  
 technology  
 expectations

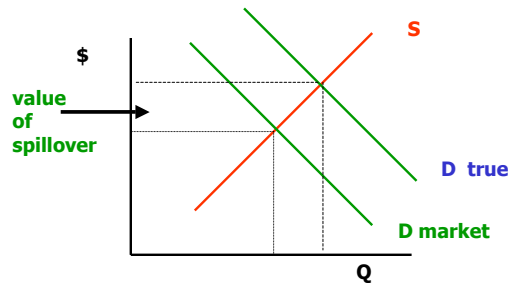
**DEMAND**  
 # & size of buyers  
 horizontally sum  
 income  
 prices of related goods  
 substitutes (A or B)  
 compliments (A and B)  
 tastes  
 expectations

Technology is dynamic.  
 Expectations are volatile.

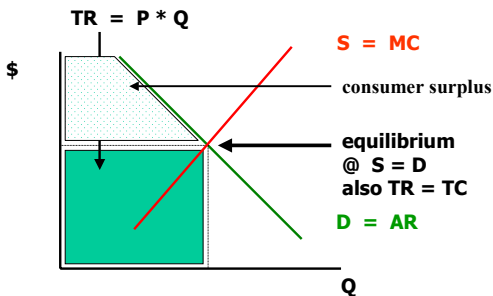
**HISTORY OF CAPITALISM**

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

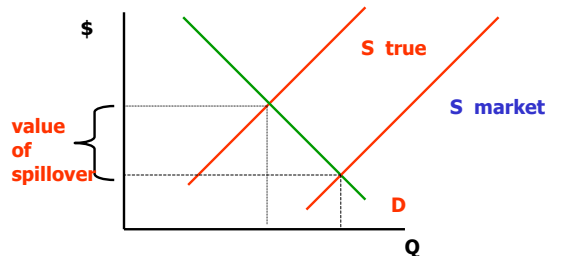
spillover benefits: get more than buy & pay less



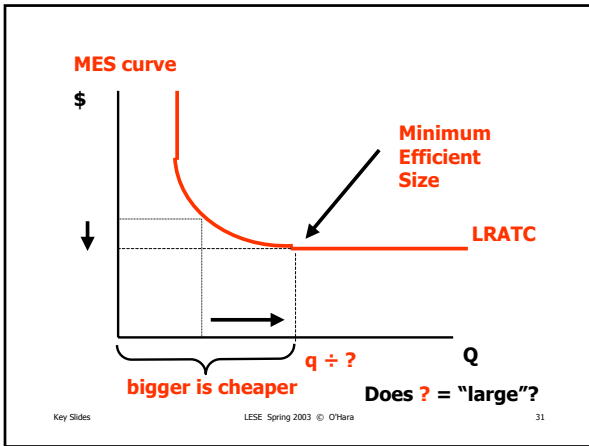
**Supply and Demand curves**



spillover costs: buy more, pay less



Note: the boxes are not the same as spillover benefits



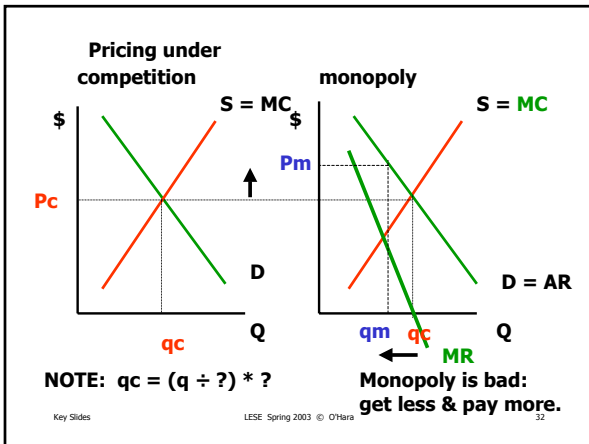
An "agent" **acts for and acts instead of** the "principal" when the agent acts **within the "agents" scope of authority.**

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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**Law attaches liability to knowing and voluntary acts.**  
**who CONTROLS what & how?**

<b>P &amp; A</b>	<b>P: what &amp; how</b>	<b>A: what &amp; how</b>
<b>P &amp; IC</b>	<b>P: what</b>	<b>IC: how</b>
<b>ER &amp; EE</b>	<b>ER: what &amp; how</b>	<b>EE: none</b>

**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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**GOOD FAITH**  
**consumer**  
 subjective: honesty in fact  
 objective: objectively know nothing

**merchant**  
 subjective: honesty in fact  
 objective: commercial reasonableness

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

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**With respect to**  
**tax laws and laws to protect employees,**  
**the courts look to the substance,**  
**rather than the form,** of an agency relationship to categorize the "agent" as either an employee or an independent contractor.

**CRITERIA**  
 skilled  
 own methods of the trade  
 hired by and paid by the task  
 supervision focuses on the deadline,  
 not the means of completing the task  
 separate business entities

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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**  
contract > tort > crime

Upon whom is the 3rd party justifiably relying ?  
**undisclosed principal**  
**partially disclosed "principal"**  
**fully disclosed "principal"**

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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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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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#### **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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#### **Professional's Liability for TORT**

Majority rule is malpractice liability to 3rd parties. To whom is the duty of care is owed?

Is **privity** required? The courts are split.

**Ultramares Rule** (Nebraska)

near privity rule  
party with primary benefit

**Restatement Rule**

foreseen third party

**Minority Rule**

reasonably foreseeable third party

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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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## 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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## 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?*

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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**

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## 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**

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## 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**

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**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.

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**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**.

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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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**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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## 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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**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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### 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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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.

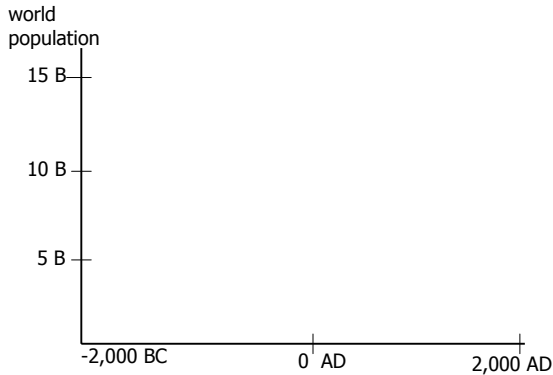
Pollution is a **zero priced** (public) good because no one owns the regenerative ability.

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.**

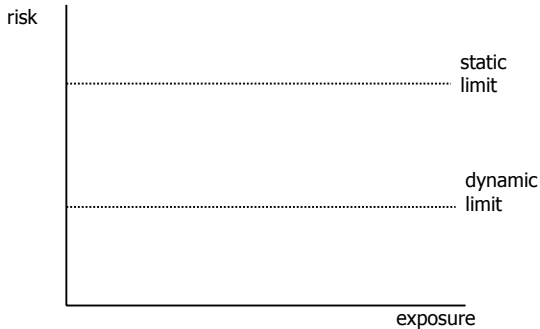


**FEDERAL HAZARDOUS WASTES**

**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?**



**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**

recall **civil versus criminal burden of proof**  
recall **appellate court review** of trial court  
recall **frequency of error** found by appellate courts

**CRIMES MUST BE CREATED BY THE LEGISLATURE**

but, **void for vagueness**  
but, **punitive damages**  
but, **contempt of court**

**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**

**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

**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**

**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.

**Defenses**

**personal**  
**voidable**  
good against holder, but not HDC

**universal (or real)**  
**void**  
good against HDC

**H t HDC: Holder through a HDC**  
**may sell HDC status**  
but **not reacquisition**  
notice ok, but not fraud

## 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

### 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

### Property Distribution

priority, with general unsecured creditors last

### DISCHARGE

Objections to discharge

### Reaffirmation of Debt

prior court approval

## **PARTNERSHIP LAW**

borrowed 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**

partnership is not a person  
(for most purposes)  
so tax pass through

presumed equal division of  
profit and management

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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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## **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**

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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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## **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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## CORPORATE SHAREHOLDERS

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

## SHAREHOLDER VOTING (i.e., management)

### Shareholder Agreements

shares versus fiduciary duty

### Cumulative Voting

in Nebraska, a  
constitutional right and requirement

### Proxy Voting

sell right to management to increase income

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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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**separation of ownership and control**

**SHAREHOLDERS** elect the **Board of Directors**.

**BOARD OF DIRECTORS** appoints the **Officers**.

**OFFICERS** manage the corporation.

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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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The corporate **officers are agents**  
**members of Board of Directors are not agents.**

The **Board is the physical embodiment of the principal.**

Therefore

**officers and directors have limited personal liability**

Small business owners of corporations  
must waive limited liability  
to obtain loans

**CAUTION: do NOT waive**  
**limited personal liability**  
**with every check you write**

**NOTE: fully disclose the principal**

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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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**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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**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

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**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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**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

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**Workplace safety**  
Risk cannot equal zero.

**MARKET AND LAW FAIL IF RISK IS EITHER**  
not known  
or  
not voluntarily accepted

**Employee's View of Workplace risk**  
limited information  
one worker  
justification for unions  
complex causation  
present value of risk premium

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## **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.

**OSHA Specific Duty Clause.**

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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.

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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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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.

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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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## 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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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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## 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

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.

## 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

## 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.**

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.

## 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.**

### 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**

### 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.

### 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.**

### 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 **prior, written, and signed contract.**

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

### 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.

**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.

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.

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

**INFORMATION**

independent **ECONOMIC VALUE** from secrecy

**REASONABLE EFFORTS TO MAINTAIN SECRECY**

**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*

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**.

**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.

Courts favor employers is allocating ownership of trade secrets created within an agency context.  
**Inevitable Disclosure**

**Covenant Not To Compete**  
proportional to legitimate business interest  
**reasonable time and area**  
Nebraska: one year & one county  
reform versus sever versus void

### 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.

#### 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

#### 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

#### 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**

#### 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**

**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**

**PURCHASE OF ASSETS**

potential Clayton Act section 7 liability

approval required by

selling corporation's Board and shareholders

if

selling all of its assets

or if

substantially changing its business

acquiring corporation's Board

**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

**PROXY**

disclose if solicit voting rights

"materiality" lower than 1933 Act

control of assets owned by investor

**TENDER OFFER to buy stock**

uncertainty  
manipulates the market

"materiality" about 5 % of shares