

1 course topic are either
 2 [1] critical & hard;
 3 [2] critical & easy;
 4 [3] less important & hard; or
 5 [4] less important & easy
 6 students are responsible for items [2], [3], and [4].

7 8 **INTRODUCTION**

9 USA law focuses upon actions that are knowing and voluntary.
 10 subjective v. objective
 11 **knowing:** actual knowledge (subjective) (i.e., scienter)
 12 receipt of notice (objective)
 13 reason to know (objective)
 14 adhesion contract
 15 **due process:** notice and hearing, both proportional to the interest(s) involved
 16

17 **CHAPTER ONE**

18 reasonable expectations
 19 Reasonable Person

20 **separation of powers**

21 Individual v. government
 22 federal v. State
 23 legislative v. executive v. judicial
 24 (make law v. enforce law v. interpret law)
 25 **Judicial Review**
 26 (statutes v. regulations v. cases)

27 equity v. law
 28 maxims v. case of first impression & precedence & *stare decisis*
 29 latches v. statute of limitations (can toll) & statutes of repose

30 **express:** words: oral or written (p. 214)

31 **implied:** acts, words, **and/or** circumstances

32 Natural Law School and *Declaration of Independence* v. USA *Constitution*

33 ethics ≠ law; and law ≠ ethics

34 Art. VI, para. 2: **Supremacy Clause** & Judicial Review

35 preemption (p. 80) & uniform State laws (see, Art. I, sec. 8, cl. 1)

36 analogy (e.g., distinguishable) v. deductive syllogism v. linear

37 precedence v. binding v. authoritative v. persuasive

38 **precedence:**

39 [a] settled expectations;

40 [b] court's legitimacy (e.g., jurisdiction); and

41 [c] workable (e.g., eroded)

42 substantive law (e.g., *Substantive Due Process*) creates a right

43 v. procedural law (e.g., *Procedural Due Process*) enforces a right

44 civil law v. criminal law (only the legislature can create a crime)

1 court's **jurisdiction**:
 2 subject matter
 3 (e.g., bankruptcy), and
 4 geographic
 5 (i.e., substantial minimal contacts [e.g., jurisdiction of download
 6 {p. 34; 87}])
 7 **taking**: *due process* + public use + just compensation (p. 24; 77; 973)
 8 v. mere regulation
 9 dormant Commerce Clause

10

11 **CHAPTER TWO**

12 complaint: [a] cause of action; [b] court's jurisdiction; and [c] remedy
 13 substantial minimal contacts = purposefully avails; long arm statutes

14 confidential v. privileged (p. 42 & 1041)

15 privileged v. predatory

16 choice of: forum v. venue v. law v. language

17 **standing to sue**: injury in fact **and** within the zone of protected interests

18 role of trial court: find fact and apply law

19 role of appellate court: find error and interpret law

20 **appellate** court will **affirm** the **trial** court **unless** there is an:

21 **clear error of fact,**

22 ***non-harmless error of procedure, or***

23 **any error of law**

24 **person**: natural v. legal

25 All consumers and all citizens are natural persons;

26 some legal persons are corporations.

27 **good faith** SUBJECTIVE G.F. OBJECTIVE G.F.

28 consumer, non-UCC honesty in fact *none*

29 consumer, UCC HiF and commercially reasonable

30 merchant HiF and commercially reasonable

31 fiduciary (utmost GF) HiF and personalized objective

32 federal jurisdiction: federal question v. diversity of citizenship

33 ADR: but, discovery, public, precedence, and neutral

34 **adhesion contract**:

35 public policy is hostile towards adhesion contracts

36 because these contracts are less knowing and less voluntary.

37 However, some contracts must be adhesion contracts

38 (e.g., insurance; Equal Protection),

39 in which case the law is less hostile.

40 An ambiguity in an adhesion contract is interpreted against the drafter;

41 unless the non-drafting party had the opportunity to

42 discover and object (i.e., receipt of notice) to the ambiguity,

43 in which case the adhesion contract ambiguity is interpreted reasonably.

44 arbitration can be binding or non-binding

45 federal preemption of enforceability of arbitration *contracts* in Commerce

46 mediation in NEB: mandatory in divorce if children; privileged mediation

47 Some pretrial and all settlement conferences are privileged

1 CHAPTER THREE

2 contingency fees: never in UK; rarely in Canada; only civil in USA

3 affirmative defense

4 counter suit v. cross suit

5 Motion to Dismiss:

6 assume as true all claimed by nonmoving party

7 as well as assume as true all reasonable inferences,

8 and moving party still wins as a matter of law

9 Summary Judgment:

10 no material question of fact (e.g., parties agree on the facts),

11 and moving party wins as a matter of law

12 discovery reduces surprise and increases settlement: depositions (i.e., oral questions);

13 interrogatories (i.e., written questions); volunteered documents (e.g., computer

14 hard drives)

15 express constitutional rights receive Substantive Due Process (see, Chap 4)

16 relevant (i.e., more likely): hearsay v. excited utterance

17 burden of proof

18 criminal > 99% **beyond a reasonable doubt**

19 civil [rare] ≈ 75% clear and convincing

20 civil > 50.1% **preponderance of the evidence**

21 indictment ≈ 25% probable cause (i.e., only look at evidence of guilt)

22 arrest ≈ 10% probable cause (i.e., reasonable person could believe)

23 relationship between trial and appellate courts

24 law provides a defendant: law does not provide a defendant with money.

25

26 CHAPTER FOUR

27 typo p. 77; disagree p. 79

28 **binary** conclusions based on **triad** analysis

29 separation of powers:

30 NEB. express

31 federal form of government

32 Art. I, sec. 9, cl. 1: technological change surprises the law

33 **Police Power** is the power of the State government to regulate for the People's health,

34 safety, morals, and general welfare

35 power to **tax** is the power to destroy:

36 but, may not do indirectly that which may not do directly

37 general controls the specific

38 person: natural (e.g., citizen) v. mere legal (e.g., corporation)

39 Art. IV, sec. 2: Privileges *and* Immunities (see also, Amd. XIV, sec. 1: *or*)

40 Art. IV, sec. 1: Full Faith and Credit: domestic comity (see Chap. 52)

41 Art. I, sec. 8, cl. 3: **Commerce Clause**

42 AMONG: between = direct **E**ffect pre-1937

43 within = close and substantial **A**ffect post-**1937**

44 **core penumbra emanations**

45 transportation manufacturing retail

46 Art. I, sec. 8, cl. 4: naturalization; bankruptcy

47 Art. I, sec. 8, cl. 5: coin money; weights and measures

- 1 Art. I, sec. 8, cl. 7: Post Offices and post roads
 2 Art. I, sec. 8, cl. 8: copyright and patent
 3 Art. I, sec. 8, cl. 9: courts
 4 Art. I, sec. 8, cl. 18: make all laws ... necessary and proper
 5 Art. I, sec. 9 & 10: denial of powers
 6 exclusive (rare) powers v. concurrent (ordinary) powers
 7 ([express grant + express denial] = exclusive)
 8 all foreign affairs to federal government (e.g., naturalization; treaties)
 9 paper money; bankruptcy
 10 **Preemption** is *not favored*, but *may* be allowed if:
 11 1. clear intent of Congress and national interests outweigh State interests;
 12 or
 13 2. **express** intent of Congress **and** need for **uniformity**.
 14 preempt if direct conflict (e.g., dormant Commerce Clause); presume concurrent powers
 15 **Bill of Rights**
 16 Amd. I: free religion, speech, press, assembly, petition government
 17 **Free Speech:**
 18 reasonable time, place, and manner regulations
 19 **political** speech: **no** content regulation
 20 **commercial** speech: content regulation if and only if:
 21 [a] directly furthers substantial government interest;
 22 [b] proportional to that interest; **and** [c] least restrictive alternative
 23 **unprotected** speech: defamatory; criminal; obscene (not equal porn, indecent)
 24 Amd. II: militia's arms
 25 Amd. III: quarter soldiers
 26 Amd. IV: **warrants** if unreasonable searches upon probable cause
 27 personal v. statistical probable cause
 28 custodian v. owner of business records
 29 Amd. V: Grand Jury; double jeopardy;
 30 **self incrimination**
 31 only natural persons:
 32 corporation's employee as custodian; who is the attorney's "client"?
 33 **due process**
 34 *substantive* (i.e., fundamental rights: travel; privacy; voting; Amd. I)
 35 **privacy** is an implied, yet fundamental, right
 36 reasonable expectation of privacy
 37 *procedural*: i.e., notice & hearing, both proportional to interest(s) involved
 38 **taking** requires *due process* + public use + just compensation
 39 Amd. VI: speedy & public trial; **jury**; confront witness; Assistance of **Counsel**
 40 Amd. VII: if \$20, then jury; facts by jury
 41 Amd. VIII: no excessive bail; no cruel and unusual punishment
 42 **Amd. IX**: enumeration not disparage
 43 **Amd. X**: not delegate nor denied, then to the States and/or People
 44 Amd. XI: State's **sovereign immunity** in federal courts
 45 Amd. XIII: no involuntary servitude

- 1 **Amd. XIV**, sec. 1: dual citizenship; Priv. or Immun.; due process; Equal Protection
 2 due process **Absorption Doctrine**: States bound by Bill of Rights
 3 *Equal Protection Clause*
 4 **Rational Basis Test**:
 5 *presumed valid*: social or economic reg.; rational basis; legitimate govt. interest
 6 **Heightened Judicial Review**:
 7 gender, legitimacy, handicap; substantially related; important govt. interest
 8 **Strict Scrutiny**:
 9 race, national origin, citizenship; necessary; compelling govt. interest
 10 Amd. XIV, sec. 5: Congress power to enforce
 11 Amd. XVI: income tax without apportionment
 12 Amd. XIX: a woman is a person
 13 Amd. XXVII: Congressional pay raise only after next election
 14
 15
 16
 17
 18

19 **CHAPTER FIFTY-TWO**

- 20 USA *Constitution* is a treaty: Senators are ambassadors
 21 international law is the predictable projection of power
 22 customs, executive agreements, treaties, international organizations
 23 treaties
 24 Art. II, sec. 2: President + 2/3 Senate
 25 but, Fast Track Legislation
 26 Art. VI, para. 2: supreme law of law: pursuance v. under the authority
 27 **comity**: consistent with the public policy of the accommodating nation
 28 but, Art. IV, sec. 1: Full Faith and Credit clause
 29 express v. implied and specific controls the general
 30 **Act of State**
 31 judiciary of Nation A not review Nation B's domestic governmental acts
 32 what if Nation B acting within Nation A?: sovereign immunity, sometimes
 33 **sovereign immunity**
 34 Amd. XI
 35 which do domestic business *_always_* prefer: quotas or tariffs?
 36 **dumping** is exporting unemployment
 37 common law: Individual can command judge to decide case of first impression
 38 civil (or code) law: cases of first impression referred by court to the legislature for
 39 answer when and if the legislature chooses to decide
 40 which USA State and which Canadian Province are like Mexico and use civil law?
 41

- 1 **CHAPTER FIVE**
- 2 objective v. subjective
- 3 knowing: actual knowledge, receipt of notice, and reason to know
- 4 **Bounded Rationality**
- 5 person: natural v. legal
- 6 good faith: consumer (non-UCC & UCC), merchant, fiduciary
- 7 2x2 matrix: **ethics ≠ law; and law ≠ ethics**; gray areas of the law
- 8 can = power
- 9 may = law
- 10 should = ethics
- 11 future tense: might, may, ought
- 12 *ethics requires the power to act*; the law does not.
- 13 business ethics: profit max **and** cost min
- 14 POINTS of REFERENCE
- 15 Individual can
- 16 subgroup(s) can
- 17 society can not avoid spillover costs
- 18 punitive damages:
- 19 [1] degree of reprehensibility;
- 20 [2] ratio of compensatory to punitive (e.g., typical max of 10:1);
- 21 [3] legislatively created civil fines or criminal fin
- 22 leading others towards ethics: from top and from bottom organization
- 23 knowledge varies by role, as does law.
- 24 SOxA requires reporting up the chain of command,
- 25 ultimately to the Board of Directors if necessary.
- 26 means justify the ends (duty based ethics)
- 27 ends justify the means (Utilitarianism)
- 28 Golden Rule v. Golden Rule
- 29 knowledge distinguishes ignorance v. lie
- 30 "cost / benefit analysis" really is benefit / cost analysis (= profit)
- 31 bribery correlates with war: rule of law
- 32 when in Rome do as SEC requires
- 33 bribery (purchase & sale of discretion) v. grease (ministerial facilitation)

- 1 **CHAPTER SIX and CHAPTER SEVEN**
- 2 privileged v. predatory
- 3 objective v. subjective
- 4 standing to sue
- 5 good faith
- 6 type of torts:
- 7 [1] intentional;
- 8 [2] negligence;
- 9 [3] strict liability (not fault based; *social risk allocation*)
- 10 do not focus on the names of specific torts or their specific elements
- 11 unless specifically covered in class (e.g., NEB a&b = assault)
- 12 focus on the generic characteristics (e.g., defenses to a&b on p. 121)
- 13 **elements** of all torts (see, negligence on p. 140)
- 14 [1] duty of care
- 15 [2] breach of the duty of care
- 16 [3] **proximate cause**: what a Reasonable Person in the position of the
- 17 defendant would have **reasonably foreseen** at the time of the
- 18 defendant's breach the plaintiff's injury (i.e., Bounded Rationality)
- 19 **actual cause**: *chain of events until superseding cause*
- 20 [4] injury, and
- 21 [5] no defenses
- 22 **Assumption of the Risk** (see, p. 145)
- 23 plaintiff **knowing and voluntarily** exposes the plaintiff
- 24 to the risk of harm created by the defendant
- 25 contributory negligence is a **bar** to suit (coupled with actual cause)
- 26 comparative negligence is an **offset** at suit (coupled with proximate cause)
- 27 defamation: slander (= oral); libel (= written);
- 28 unlike slander which does, slander *per se* do not
- 29 require proof of **special damages** (i.e., actual economic loss)
- 30 if public figure, then either actual malice or reckless disregard
- 31 common law **fraud**
- 32 [1] knowing
- 33 [2] intentional
- 34 [3] misrepresentation of a *material* fact
- 35 [4] proximate cause
- 36 [5] damages
- 37 an expert's opinion is a fact
- 38 wrongful interference with [a] contractual relationship; [b] business relationship
- 39 at will employment (Amd. XIII)
- 40 license need not be a contract, but can be
- 41 latent defect
- 42 vicarious liability via imputed knowledge
- 43 damages, see p. 341 - 347 as well as p. 143
- 44 *res ipsa loquitur*
- 45 negligence *per se*
- 46 strict liability for abnormally dangerous activities, but see p. 457 and 957

- 1 **CHAPTER EIGHT**
- 2 separation of powers
- 3 preemption
- 4 exclusive powers v. concurrent powers
- 5 grant of powers v. limitation on powers
- 6 **public domain**
- 7 property: real v. personal (see, Chap. 47 & 48); tangible v. intangible
- 8 Art. I, sec. 8, cl. 8: exclusive rights and limited times; patent & copyright
- 9 intellectual property: patent, copyright, trademark, trade secrets
- 10 Exhibit 8-1, p. 155: add preemption; reverse engineering; and parody
- 11 **patent: idea reduced to practice**
- 12 subject matter (not laws of nature, not abstract ideas),
- 13 genuine, novel, useful, and not obvious
- 14 first to invent v. first to file
- 15 disclosure in patent application
- 16 scope leaves some trade secret to be captured by **reverse engineering?**
- 17 duration 20 years
- 18 TRIPS
- 19 **copyright: expression of an idea**
- 20 fixed in a tangible medium; can be perceived
- 21 automatic registration
- 22 statutory damages
- 23 duration: human life + 70 years; corp. + 100 years
- 24 **FAIR USE:** [1] purpose of the use; [2] nature of the work;
- 25 [3] ; substantiality of the copying; and/or [4] effect on the market.
- 26 *moral right:* personal identification of author with the work
- 27 **parody** is a constitutional right
- 28 DMCA: felony to defeat security measures
- 29 **trademark: allow buyer to uniquely identify a source**
- 30 *focus on the right of the consumer* rather than the owner of the mark
- 31 **parody** is an infringement
- 32 federal Commerce Clause and State's Police Power
- 33 prior State use **not** preempted by subsequent federal registration
- 34 distinctiveness of a mark (i.e., identify a source):
- 35 [1] generic, [2] secondary meaning (e.g., descriptive);
- 36 [3] fanciful, arbitrary, suggestive
- 37 duration: use in commerce
- 38 *dilution* of a famous mark (e.g., cybersquatting) requires actual damages
- 39 good faith
- 40 **trade secret: [1] information; [2] economic value; and [3] reasonable efforts to protect**
- 41 grant of powers v. limitation of powers: only *international* federal TS
- 42 Restatement of Torts v. Uniform Trade Secrets Act
- 43 not exclusive rights; not limited duration
- 44 protection against improper taking (i.e., misappropriation)
- 45 **reverse engineering** is a lawful means of obtaining ownership

- 1 **CHAPTER NINE**
- 2 capacity: crime > contract > tort > wills
- 3 legislature must create a crime; but, unitary executive (see, p. 194)
- 4 tort is harm to an individual with remedy of compensation
- 5 crime is harm to society with remedy of punishment (i.e., victim lacks standing to sue)
- 6 **burden of proof** (see, ToL p. 3, line 17)
- 7 felony v. misdemeanor
- 8 Grand Jury v. petit jury
- 9 **elements of crime:**
- 10 *actus reus* (i.e., bad act) **and** *mens rea* (i.e., bad thought) **and** no defenses
- 11 **scienter**
- 12 degree of crime
- 13 attempt crime requires specific intent and is minus one degree from completed crime
- 14 person: natural v. legal
- 15 vicarious liability and imputed knowledge
- 16 **"principal" "agent" control liability**
- 17 principal agent shared what & how shared
- 18 principal independent contractor (IC) P what; IC how per control
- 19 *strict liability to P*
- 20 employER employEE ER: what & how all to ER
- 21 float a check v. kite a check
- 22 mail and wire fraud
- 23 bribery v. grease
- 24 insider trading: SEC 10b-5 (i.e., tippee) and SEC 16b (i.e., statutory insider)
- 25 money laundering: bundle \$10k
- 26 RICO (Racketeer influenced and Corrupt Organizations) Act
- 27 two predicate acts within 10 years
- 28 civil liability (e.g., forfeiture)
- 29 *full breadth of Congressional authority*
- 30 capacity:
- 31 infancy (i.e., **age of majority in NEB = 19**)
- 32 try child as an adult if objectively prove child has subjective capacity
- 33 intoxication: involuntary v. voluntary
- 34 insanity
- 35 [1] M'Naghten test; [2] irresistible impulse test; or
- 36 [3] (majority rule) lacks substantial capacity
- 37 presumption of capacity, burden to disprove on defendant
- 38 prosecutorial discretion
- 39 ignorance of the law is no excuse:
- 40 but, [1] mistake of fact; and [2] justifiable reliance on one's attorney
- 41 self defense: NEB must escape, if feasible; COLO may attack attacker
- 42 liberty restraints on governmental authority:
- 43 burden of proof
- 44 entrapment
- 45 Amd. IV and Amd. V: exclusionary rule (e.g., fruit of the poisonous tree)
- 46 Amd. IV, V, VI, and VII: *Miranda* Rule
- 47 Sentencing Guidelines and the separation of powers