**CHAPTER 1: LAW, LEGAL REASONING, AND THE LEGAL PROFESSION**

*LECTURE OUTLINE*

1. Discuss the *Twisdale* case that opens this chapter. It provides an interesting vehicle for discussing the functions of law and legal interpretation.

a. Have your students identify the various functions of the law and then discuss which specific functions are furthered by this antiretaliation aspects of the Civil Rights statute.

b. In the context of legal interpretation, the court found that Twisdale did seem to be protected based on the literal language of the statute. However, it looked beyond the plain meaning to reject his claim. Specifically, the court believed that interpreting the law in a manner that would protect him from retaliation would undermine the purpose of the statute. It is conceivable that the court is motivated by public policy concerns as well.

c. What do your students think of courts who do look at intent and public policy? Use this as a lead-in for a discussion of legal jurisprudence.

2. Question students about their definitions of “law.” Make certain they understand the importance of law in all aspects of our lives.

3. Discuss the various *functions* that law serves in society. You might do this by having the students identify some of them.

a. Discuss the conflicts that arise between and among the various functions of law. For example, there often are conflicts between the goals of individual freedom and achieving social justice. You might wish to discuss the sodomy case (*Lawrence v. Texas*) in this light. Note the problems that arise when there is no clear consensus on what is just.

b. Ask the students if they think that law ever is “over used.” They are likely to cite numerous examples. For instance, this might be a time to talk about the product liability cases that are regularly in the headlines. Perhaps the case involving the woman who burned herself with coffee from McDonalds would be appropriate here.

c. Have the students discuss what it means to have the law maintain order. You might ask students if maintaining order means maintaining the status quo. This can lead to a discussion of legal realism and views that law is used by those in power to retain their power.

4. There is a tendency for people to think of law as imposing duties without considering how it establishes and preserves rights. Talk about how our system tries to match rights with corresponding duties.

a. Explain how the duties, rights, and privileges make up *substantive law*.

b. Explain that *procedural law* provides the framework within which substantive laws are created and enforced. Point out that Chapters 2 and 4 offer a more detailed discussion of procedural law.

5. Ask the students to think of an example of a duty imposed by substantive law that might violate some moral or ethical belief. This might be a good time to talk about the various schools of legal jurisprudence. Have them speculate how a legal positivist would differ from a legal sociologist or natural law theorist in handling such situations.

6. Contrast criminal law with civil law.

a. Point out that society considers it much worse to be convicted of a crime than to be held civilly liable. Explain how, as a result, there are more exacting procedural safeguards to protect a defendant in a criminal trial than in a civil trial.

b. Note the difference between compensatory damages and punitive damages. Discuss the current uproar over punitive damages and the Supreme Court’s attempt to rein them in. (See *State Farm Mutual Automobile Insurance v. Campbell*, 123 S.Ct. 1513 (U.S. Sup.Ct. 2003) (establishing guideposts for calculating punitive damages).

c. Point out that often one can be subject to sanctions under both criminal and civil laws without violating the proscription against “double jeopardy.” Find out if the students think that punitive damages in a civil trial, coupled with fines in a criminal trial, constitute a type of double jeopardy.

*United States v. Farinella*

Farinella was charged with the crime of misbranding food after he changed the “best when purchased by” message on bottles of salad dressing. The court rejected the FDS’s argument that Farinella violated federal law because he failed to gain FDA approval before changing the dates. This is because there is no federal law requiring such advance approval.

*Points for Discussion*: This case is placed in the text as an example of the general rules underlying criminal law. Specifically, a person generally cannot be convicted of a crime unless he or she violates a statute. Here, since there was no statute, there could be no criminal violation.

7. The brief introduction to our legal system should be a review for most students.

a. The constitutional law material is more heavily discussed in Chapter 4. An argument can be made for it to be presented immediately following this chapter. However, we believe students should first review Chapter 2’s discussion of the dispute resolution system.

b. Talk about the role of the courts in determining the constitutionality of legislation. Do they believe this gives the courts too much power?

c. Explain the relationship between state laws and federal laws. Make certain the students understand that state laws may not violate the federal constitution and must be consistent with federal statutes.

*Coach v. Goofellow*

Goodfellow, the owner of a flea market, made no real effort to prevent the sale of counterfeit products on its premises despite receiving clear notice that trademark infringement was occurring. Despite the fact that the applicable statute said nothing about contributory trademark liability, the court held that Goodfellow could be liable for the violations because he continued to facilitate the infringing activity despite having knowledge of its occurrence.

*Points for Discussion:* Explain how the court basically developed a law of contributory trademark infringement without any direct statutory command. This is an example of the common law. Make certain that this kind of flexible lawmaking is more likely to occur within the realm of civil law than with criminal law.

8. The material on statutory interpretation can be extremely important in laying the foundation for how lawyers think. More importantly, it teaches students valuable critical thinking skills. Take the students through the process for interpreting statutes. You may discuss statutory interpretation and legal jurisprudence together. Note how positivists often have problems moving beyond the “plain meaning” of words while natural law theorists and legal sociologists are accused of ignoring them.

*Yates v. United States*

Yates was accused of throwing undersized fish into the Gulf of Mexico in order to prevent authorities from discovering that he had been harvesting undersized fish. He was charged with violating a statute which prohibits individuals from destroying or concealing tangible objects with the intent of impeding an investigation. The court found that Yates did not violate the statute because that specific provision was designed to prohibit financial fraud.

*Points for Discussion:* Explain how the court looked beyond the plain meaning of the statute, concluding that not tangible object falls within the meaning of the law. Explain that when a court looks at the context of a law, it is examining the purpose of the law (and sometimes the policies that might be implicated by enforcing or dismissing the complaint).

9. Discuss the concept of *stare decisis*.

a. Note how *stare decisis* promotes stability.

b. Note how *stare decisis* permits change.

c. Explain how the rule against *ex post facto laws* does not apply to instances where the court has reinterpreted a statute. Discuss how this can pose problems for people who relied on the original interpretation.

10. The materials on jurisprudence are designed to illustrate how peoples’ values shape their interpretation of the law. You might recommend that students examine each decision is the chapter and indicate what school of jurisprudence the judge appears to represent. Have them analyze a case from the point of view of each of the schools of thought.

a. Contrast the legal positivist with a natural law thinker. Emphasize that students should not confuse natural law with any particular religion. Discuss the *Rochin* case referred to in the section on Natural Law. Discuss why a court might feel compelled to explain that its decision is not based on natural law.

*Sesay v. Attorney General*

Sesay was kidnapped by rebels and forced, at gunpoint, to carry their weapons and supplies. After escaping, he entered the United States and requested asylum. This request was refused because the applicable immigration statute does not allow the granting of asylum to individuals who have knowingly afforded material support to terrorists. The court refused to overrule the denial of asylum because the immigration statute did not contain a duress exception.

*Points for Discussion:* It is not clear that this court adheres to legal positivism. However, the court’s unwillingness to consider the fact that Sesay was forced to assist the rebels certainly takes on the appearance of a positivist decision. The court makes clear that despite an inequitable result, Congress or the Executive Branch (not the courts) must address this issue. This illustrates the harshness that may attend legal positivist decision. Explain how a legal sociologist court might reach a different result.

b. Explain how legal sociologists often have a social agenda and, accordingly, make decisions that promote that view of how the world should be ordered. Discuss the *Buck v. Bell* case that is referenced in the section on f Sociological Jurisprudence. Explain how this case arose at a time when societies, following the advice of geneticists, believed that the human stock could be strengthened by weeding out weaker members. (This was part of the impetus for Nazi Germany’s pursuit of a master race.) In the final line of the decision, in support of its ruling that Carrie Buck could be sterilized, the court said: “Three generations of imbeciles are enough.” How do your students feel about this statement? How do they feel about the case?

c. Students have a more difficult time comprehending legal realism. You might explain realism as a way of examining the suspected motivations of other decision makers or law enforcers. Rather than accept the decision maker’s explanation of her decision at face value, the realist reads between the lines to see if there is a hidden agenda. You may ask students if they believe that a person is able to shed his/her personal biases upon becoming a judge.

11. Students might enjoy a role-playing exercise involving a prosecutor, a defense attorney, and a judge. You might wish to discuss United States v. Tilghman, 134 F.3d, 414 (D.C. Cir. 1998). The case involves a judge’s vigorous questioning of a criminal defendant in such a manner that seemed to indicate that the judge doubted the defendant’s honesty. The court found that the judge prejudiced the defendant’s case and, accordingly, reversed the conviction and ordered a new trial. It might initiate a better discussion of the appropriate roles of each participant in the adversary system.

*Apple v. Samsung Electronics*

Samsung’s law firm failed to redact confidential information in documents that Apple was required to share with Samsung’s attorneys. Samsung’s law firm failed to contact either Apple or Samsung of this error and, as a result, over 200 Samsung employees gained access to the information. Both Samsung and its law firm were sanctioned for this.

*Points for Discussion:* Note that the original error, inadequately redacting the documents, would not have drawn sanctions from the court. It was the law firm’s and Samsung’s failure to immediately stop the distribution of the information that angered the court. Explain how this law firm overstepped the bounds of his duty to zealously represent his client. Discuss how we determine the parameters of that duty.

12. Discuss the concept of a *fiduciary*. Make certain the students understand the importance of this concept and the duty of loyalty within an adversary system. At the same time, you might explore the potential conflicts of interest that may confront an attorney representing a client.

13. Talk about the concept of confidentiality. You may wish to discuss the following two cases.

1. In *Brett v. Berkowitz*, 706 A.2d 509 (Sup.Ct. Del. 1998), a former client sued her attorney for sexual harassment. During discovery she sought the names of other clients with whom the lawyer may have had sexual contact. The Delaware Supreme Court denied her request, claiming that revelation of their names would violate the attorney/client privilege by disclosing the fact that they had consulted a lawyer on domestic relations matters.

b. In *Kobluk v. University of Minnesota*, 574 N.W.2d 436 (Sup.Ct. Minn. 1998), a professor was challenging his denial of tenure. As a part of discovery, he sought copies of two preliminary drafts of the letter he received notifying him of university’s decision to deny him tenure. The original copy was written by the university provost, who then sent it to the university counsel for revision. The second copy was written by the counsel after a discussion with the provost. The provost then drafted a final letter which was sent to the professor. The court was forced to decide if the drafts constituted communications relating to the purpose of seeking or rendering legal assistance and if they were made in confidence. The court viewed the drafts as a request for, and the offering of, legal advice. Further, it noted that the drafts were marked, “CONFIDENTIAL DRAFT.” Accordingly, the court upheld the confidentiality of the drafts and denied the professor’s discovery request. It stated that the test of confidentiality was “whether the client intended to keep the specific draft confidential and whether the client and the attorney took all steps reasonably necessary to prevent disclosure.”

*United States v. Gorski*

Gorski retained a law firm to restructure his business so that it would appear that it was in compliance with a revised statute. When he was charged with violation of the statute, the court ordered his law firm to produce the communication between Gorski and the firm. The court found that those communications were not protected by the attorney-client privilege because Gorski was using the law firm to carry out fraudulent activities.

*Points for Discussion:* Make certain the students understand the test that courts use when considering the applicability of the crime-fraud exception to the attorney-client privilege. Have the students compare and contrast the attorney-client privilege and the work product privilege. Make certain they understand how they differ.

14. The concept of *preventive law* is central to a course designed for business students. The interest of business people in law ordinarily is strictly instrumental—to use their knowledge of the law to reach business objectives. Explain how knowledge of the law can avoid losses as well as permit opportunities.

*Petters v. Katten Muchin Rosenman LLP*

An attorney failed to advise his clients of risks inherent in an investment transaction they were making. When the investment turned out to be a fraudulent scheme, the investors sued their attorney for legal malpractice. The court agreed that they had stated a legal claim for malpractice.

*Points for Discussion:* Stress that the decision of whether to go through with the investment, in spite of any inherent risk was a decision for the clients—not the attorney—to make. However, it was the lawyer’s duty to point out those risks so that the clients could make an informed decision as to how much risk they were willing to bear.

# ANSWERS TO QUESTIONS AND PROBLEM CASES

1. Some of the primary functions of law are to keep the peace, enforce standards of conduct, maintain the status quo, facilitate planning, and promote social justice.

2. Courts make law in three ways: (1) through *interpretation*; (2) by “finding” the *common law*; and (3) through *judicial review*.

3. The court’s failure to consider the equitable problems involved with this outcome makes it appear to be a legal positivist decision. Rather than trying to remedy what appears to be an unfair result, the court confined its analysis to a literal reading of the statute. This sounds like the thinking of a legal positivist. *Bowles v. Russell*, 127 S.Ct. 2360 (U.S. Sup.Ct. 2007).

4. No. While Stewart's e‑mail to her lawyer was originally protected by her attorney‑client privilege, she waived that privilege when she forwarded a copy to her daughter. This is because subsequent disclosure to a third party by a client of a communication with his attorney eliminates whatever privilege the communication may have originally possessed. However, the work product doctrine protects against invading the privacy of an attorney's course of preparation. A document acquires work product protection if it was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation. Stewart's e‑mail fits comfortably within this definition: it is a document prepared by a party. Next, we must determine whether Stewart waived the protection by forwarding the e‑mail to her daughter. Most courts have found waiver only when the disclosure substantially increased the opportunities for potential adversaries to obtain the information. By forwarding the e‑mail to a family member, Stewart did not substantially increase the risk that the government would gain access to materials prepared in anticipation of litigation. For the foregoing reasons, Stewart's e‑mail is work product protected from production in response to the government's subpoena. *United States v. Stewart*, 287 F.Supp.2d 461 (S.D.N.Y. 2003)

5. The court could distinguish this case from the precedents upholding the privity doctrine by interpreting it as falling within the realm of the recognized exceptions to that doctrine. An automobile with a defective wheel could be likened to a falsely labeled poison because the potential dangers should be foreseeable. Likewise, this case is similar to the scaffold case since in both cases it was foreseeable that third persons would use and could be injured by the product. Of course, the court also could have overruled the privity doctrine based on public policy grounds. *MacPherson v. Buick Motor Co*., 111 N.E. 1050 (N.Y.Ct.App. 1916).

6. The court will use the process of statutory interpretation to decide this question. It will begin by looking at the plain meaning of the word “vessel” to see if floating home clearly falls within its that term. If the plain (dictionary meaning and common usage) does not conclusively decide the case, the court will look into the legislative history in order to determine the intent of Congress when it enacted the statute. Here the court concluded that the statutory intent applies to an “artificial contrivance capable of being used *as a means of transportation on water*. Consequently, in our view a structure does not fall within the scope of this statutory phrase. A court might also look beyond this purpose inquiry to determine if there are public policy arguments for or against finding the floating home to be a vessel within the meaning of the statute. It ultimately concluded there were policy arguments against labeling the craft as a vessel. Adopting a version of the “anything that floats” test would place unnecessary and undesirable inspection burdens upon the Coast Guard. *Lozman v. City of Riviera Beach*, 133 S.Ct. 735 (U.S. Sup.Ct. 2013).

7. Yes. An attorney's notes containing his impressions, conclusions, opinions, or legal theories are immune from discovery under the work product privilege. Johnson, upon his discovery of Yukevich's notes, should not have examined the document any more than was necessary to determine that it was privileged, and should have notified Yukevich immediately to avoid any potential prejudice. Because the consequences of Johnson’s actions were irreversible, disqualification is justified. *Rico v. Mitsubishi Motors*, 10 Cal.Rptr.3d 601 (4th Ct.App. 2004).

8. The court will use the process of statutory interpretation to decide this case. It must determine if her behavior “delivered” the cocaine to the child. Because there is some ambiguity in that language, the court will examine the legislative history of the statute to see if the purpose of the law was designed to encompass behavior such as Jennifer’s. It might also look at public policy to see if society would be better off if she was punished under this particular statute. *Johnson v. Florida*, 602 So.2d 1288 (Sup.Ct. Fla. 1992).