Suggested Additional Assignments

### Research

Students should pick up an issue of any newspaper and find *ten* articles dealing with legal issues. The articles might refer to contract disputes, negligence suits, international trade agreements, statutory debates in Congress, environmental conflicts, employment issues, and so on. If researching articles in the classroom, make the search competitive—time how quickly students can find ten articles, or see who can find the most articles in two minutes. Students should select an article that interests them and be prepared to discuss it.

### Poll

At the beginning of a course, it can be useful to get a feel for student attitudes about law and lawyers. The instructor might copy and distribute this poll on the first day, have students collate the responses, and chart the results on the board as a prelude to discussion.

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | Strongly Agree: 5 | 4 | Neutral:  3 | 2 | Strongly Disagree: 1 |
| 1. A system of laws is essential in a democratic society. |  |  |  |  |  |
| 2. The American legal system is one of the best in the world. |  |  |  |  |  |
| 3. Lawyers are among the most dishonest people in the United States. |  |  |  |  |  |
| 4. Lawyers are paid too much. |  |  |  |  |  |
| 5. Being on a jury is a waste of time. |  |  |  |  |  |
| 6. Juries frequently award absurdly high judgments |  |  |  |  |  |
| 7. It is fairly easy to manipulate the legal system. |  |  |  |  |  |
| 8. The legal system often abuses large corporations. |  |  |  |  |  |
| 9. Other nations do a better job than the United States of resolving disputes. |  |  |  |  |  |
| 10. The typical business executive has more integrity than the average lawyer. |  |  |  |  |  |

Chapter Overview

### Chapter Theme

The principles discussed in this book are practical. Neither the book nor the course is a theoretical exercise. The law will affect students*,* regardless of their career, whether they want it to or not. The more students understand the law the more they can use it productively.

### Quotes of the Day

Here are two opposing thoughts on “goodness”: “True human goodness, in all its purity and freedom, can come to the fore only when its recipient has no power.” –Milan Kundera, Czech author (b. 1929). “What is good? All that heightens the feeling of power, the will to power, power itself in man.” –Friedrich Nietzsche, German philosopher (1844 1900).

### Approaching Law

Whether teaching in an undergraduate or MBA program students generally fall into one of four categories: (1) those who do not intend law as a career but approach the material with an open mind; (2) those in whom the course kindles a strong interest in law, who for the first time consider law as a career; (3) those who enter the course with a strong interest in law and plan to attend law school ; and (4) those who are in the course only because their program requires it. The instructor’s job is to try to engage students in all four categories. Students in categories (2) and (3) may be more willing to explore the nuances of legal principles and see connections between legal topics. Students in categories (1) and (4) may respond most favorably to practical applications of the law, such as understanding the law governing employment or landlord/tenant relationships.

Intro

### Complexity

It is often frustrating to students, citizens, and even lawyers that law is so complex. Anglo‑American legal history consists, in part, of a clash of powerful, competing interests: property ownership, ethics, raw power, business practices, personal responsibility, social mores, and the need for predictability, to list a few. To understand the interplay of these forces is to understand why law is complicated.

### Ambiguity

A related point is that many students—indeed, many non-lawyers—dislike the law’s ambiguity. They want to learn “the law” as a set of rules with unvarying application, and are uncomfortable with the “what if” scenarios through which lawyers learn to apply legal principles. Students must learn that law acquires meaning only through application. If students, especially those in categories (1) and (4) above, leave the course with greater understanding of why the law is ambiguous, why a lawyer’s first response to a question about the law is often “it depends,” then the instructor should consider it a success.

### Competing Interests

From a newspaper article about a legal issue, students should identify two or more *competing* interests. In an article about tobacco litigation, they might compare the tobacco companies’ property interest in a profitable commodity, the companies’ obligation to divulge what they knew concerning nicotine, the personal responsibility of those who chose to smoke, the state’s interest in reducing medical costs, the companies’ right to free speech (advertising), the federal government’s interest in regulating smoking, and the state’s obligation to protect children. The more important the legal issue, the less likely there is a simple solution to make everyone happy.

### Experience with Lawyers

If one is teaching graduate students or others who have actual business experience working with lawyers, it can be an excellent introduction to the course to elicit the pros and cons of those experiences. One fun way to do so is to ask students “why lawyers are great” and “why lawyers are frustrating.” Typical reasons given for “why lawyers are great:” “they help me avoid getting into trouble;” “they help to get me out of trouble;” and, “I can blame things on them.” Typical reasons given for “why lawyers are frustrating: “they are expensive;” “they make everything too complicated;” “they are slow;” “they don’t respond to my questions;” “they tell me what I don’t want to hear;” and, “they don’t know how to give “yes or no” answers.”

The Role of Law in Society

### Power

Laws affect nearly everything we do every day. At work, employment law and contract law issues control how many hours we can work, conditions of the work environment and even matters of ownership of our ideas. In our leisure time, we deal with the law through banking, copyright protections, and contracts (remember that gym membership contract you signed?).

### Importance

A society cannot function without laws. No society we know of has existed without some kind of laws.

### Fascination

Because law is so powerful and pervasive, humans tend to be fascinated with it. Americans have earned the label “sue-happy” because we tend to expect the courts to solve many problems. We are also enthralled with watching high-profile court cases through television coverage. The O.J. Simpson murder trial in 1995 was one of the most heavily viewed events in the history of television. The 2011 trial of Casey Anthony is a more recent example of this fascination.

Origins of Our Law

U.S. law has English roots, but draws influence from many different societies. The law also grows and adapts to the changing needs of a changing society.

### Precedent

Law balances the need for predictability with the need for change. Students should consider the values served by precedent in their own lives and the circumstances under which a court should be free to modify or ignore precedent. For example, students may depend upon contract law to prevent a landlord from raising their rent, and upon employment law to protect them from discrimination and sexual harassment in the workplace. If the common law changed with every lawsuit, no one could conduct business with certainty.

j0199759Case: *Oculist’s Case*[[1]](#footnote-1),

**Facts:** The defendant, attempting to heal the plaintiff, left him blind in one eye. The plaintiff has sued in trespass, a forerunner of today’s tort action. The defendant made a procedural argument, claiming that the plaintiff should have brought an action of covenant.

**Issues:** Did the plaintiff bring the wrong type of suit? Assuming the defendant’s care was defective, could he be liable in any type of action?

**Holding:** The court ignores the procedural point and reaches the merits. It holds that because the plaintiff voluntarily submitted himself to the defendant’s care, the latter cannot be liable, even if his conduct caused the harm. The court distinguishes a deliberate attack, which would be actionable, from this accidental harm, where it finds no liability. More importantly, the court bases its judgment on a previous medical case involving accidental death. That case was dismissed, so this one should be as well: precedent begins to take hold.

**Question:** What is a procedural argument?

**Answer:** A procedural argument focuses on *how a dispute should be resolved.* In this case, the lawyer is arguing that the court should not even hear the case because the plaintiff has filed the wrong type of suit.

**Question:** Why did the defendant’s attorney make a procedural argument?

**Answer:** To avoid reaching the merits. The defendant may or may not be able to show that he exercised “reasonable care” (or whatever standard a fourteenth‑century court might have applied), but he is clearly better off if he can avoid the issue altogether.

**Question:** Is it good to allow procedural arguments?

**Answer:** Some procedural arguments are undoubtedly useful. An assertion that a federal court lacks jurisdiction ought to be resolved before trial, as should an argument that the defendant never received adequate notice of the claims against him. However, when a court becomes entangled in prolonged procedural arguments, it may cause society to conclude that lawyers are using tricky devices to avoid justice, diminishing respect for law.

**Question:** In a lawsuit today, would the plaintiff need to demonstrate that the defendant *deliberately* harmed him?

**Answer:** No. In a negligence case, the plaintiff need only show that the defendant failed to act as a reasonable person.

Sources of Contemporary Law

### United States Constitution

The supreme law of the land, the U.S. Constitution establishes the federal government and distributes powers among the federal and state governments and individual citizens. It also creates a system of checks and balances among the branches.

**Legislative power** is the ability to create new laws; it is balanced by executive power of the veto and judicial power of interpretation and determination of validity.

**Executive power** is the ability to enforce laws; it is balanced by the legislative power to override a veto and to impeach and the judicial power to interpret.

**Judicial power** is the power to interpret laws and determine their validity; it is balanced by the executive power to appoint justices and legislative power to approve justice nominees. Congress can also amend the Constitution with the approval of the states.

### Fundamental Rights

The Constitution also grants many of our most basic liberties, generally found in the amendments to the Constitution.

### Statutes

The Constitution gives to the Congress the power to pass laws on various subjects. A proposed law is called a bill; a bill that has become law is called a statute.

### Common Law

The collective body of court decisions throughout history comprise the common law. Judges of all courts below the Supreme Court will refer to previous cases (precedent) to rule on present cases. The principle that precedent is binding on later cases is called *stare decisis*, meaning, “let the decision stand.”

### Court Orders

Sometimes judges issue court orders on a particular person or entity. This may be an order to do something or an order to refrain from some action.

### Administrative Law

Administrative agencies are created by Congress or by an order of the President. Their purpose is to carry out the day-to-day work of enforcing the statutes passed by Congress. Agencies have the power to create regulations, which are as binding as laws.

### Treaties

The President may make treaties (agreements) with foreign nations, but these treaties must be ratified by a 2/3 vote of the U.S. Senate. After ratification, treaties are binding on all citizens.

Classifications

### Criminal and Civil Law

Most non-lawyers experience criminal law in the media, but most lawyers practice civil law. Civil law does not involve guilt or punishment, two legal concepts with which students are likely most familiar. Correct terminology is important—a court does not find a civil defendant “guilty” of negligence or breach of contract, it finds him “liable” for negligence or breach of contract. Chapter 8 addresses criminal law.

### Law and Morality

Law and morality are clearly different yet obviously related. How should a citizen respond to a law that seems immoral? As an example, look at the Proposition 187 controversy.

**General Questions:** What are students’ reactions to the controversy surrounding Proposition 187 in California? A high school principal refused to comply with the law because he considered it unethical. The text supplies several bullet points responding to the principal’s statements. With which argument(s) do students agree, and why?

**Question:** Those who believe that the principal has *the right to ignore* a law he regards as unethical should consider this: Suppose a state law requires a home seller to notify any potential buyer of serious hidden defects, such as a cracked foundation. A seller regards the law as an immoral interference with his right to dispose of property. Must he obey the law?

**Answer:** Perhaps citizens have a somewhat greater right to make moral decisions concerning laws that affect human rights, but no such value judgments concerning contract law principles.

**Question:**  Those who believe that the principal has *no right to ignore* a law he regards as unethical should consider whether there are any laws they would not obey. Ask them to imagine being a school principal in the South in the early 1950s: would they have enforced racial segregation because it was the law?

**Answer:** Racial segregation had no legitimate purpose, whereas supporters of Proposition 187 say that its purpose is entirely sensible: to reduce tax expenditures for illegal aliens.

Jurisprudence

“The foundation of our national policy will be laid in the pure and immutable principles of private morality. There is no truth more thoroughly established, than that there exists in the economy and course of nature, an indissoluble union between virtue and happiness.” –George Washington, First Inaugural Address, 1789.

Some claim that the American legal system has taken us too far from Washington’s ideal world, arguing that we place too many moral issues in the hands of judges and juries, that we allow government regulators to control too many matters. They argue that only by limiting the roles of government and the courts can we permit true morality to flourish. These critics would like to see most if not all federal regulatory agencies disbanded, permitting “private morality” once more to rule.

Others strongly disagree, claiming that governmental regulation forces recalcitrant individuals and companies to follow the common morality, something they would not do unless faced with potential legal penalties. Would we be comfortable shopping if meat were not inspected? Should new drugs simply be tested on unwitting consumers, rather than subjected to FDA review? The answers, claim many, are too obvious to need stating.

### Theories of Jurisprudence

Ask students to identify examples of legal positivism, natural law, and legal realism from their own experience. They may find that they do not ascribe consistently to only one of these theories. For example, many undergraduate students are legal positivists with regard to, say, a landlord’s obligation to maintain minimum levels of habitability required by the state sanitary code, but not with regard to laws prohibiting persons under 21 from purchasing alcohol. Students from different socio-economic classes may disagree as to the legality of racial profiling by police. By exploring examples such as these, students gain deeper understanding of the meaning of the theories of jurisprudence and may understand their own views of the law more objectively.

**SUMMARY OF JURISPRUDENCE**

Legal Positivism Law is what the sovereign says.

Natural Law An unjust law is no law at all.

Legal Realism Who enforces the law counts more than what is in writing.

Analyzing a Case

j0199759Case: *Kuehn v Pub Zone*[[2]](#footnote-2),

**Facts:** Maria Kerkoulas owned the Pub Zone bar, frequented by many motorcycle gangs, and knew from her own experience and conversations with police that some of the gangs, including the Pagans, were dangerous and prone to attack customers for no reason. Kerkoulas posted a sign prohibiting any motorcycle gangs from entering the bar while wearing “colors,” that is, gang insignia. Based on her experience, she believed that gangs without their colors were less prone to violence.

Rhino, Backdraft, and several other Pagans pushed past the bouncer wearing colors and approached the bar. Although she saw their colors, Kerkoulas served them one drink. They later moved towards the back of the pub, and Kerkoulas believed they were departing. In fact, they followed a customer named Karl Kuehn to the men’s room, where without any provocation they savagely beat him, causing serious injuries.

Kuehn sued the Pub Zone. The jury awarded him $300,000 in damages. The trial court judge overruled the jury’s verdict and granted judgment for the Pub Zone, meaning that the tavern owed nothing. The judge ruled that the pub’s owner could not have foreseen the attack on Kuehn, and had no duty to protect him from an outlaw motorcycle gang. Kuehn appealed.

**Issue:** Did the Pub Zone have a duty to protect Kuehn from the Pagans’ attack?

**Holding:** Yes. Whether a duty exists depends upon an evaluation of a number of factors including the nature of the underlying risk of harm, the opportunity and ability to exercise care to prevent the harm, the comparative interests of, and the relationships between or among the parties, and, based on considerations of public policy and fairness, the societal interest in the proposed solution.

Since the possessor [of a business] is not an insurer of the visitor’s safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual.

The totality of the circumstances presented in this case give rise to a duty on the part of the Pub Zone to have taken reasonable precautions against the danger posed by the Pagans as a group. There was no reason to suspect any particular Pagan of violent conduct, but Kerkoulas knew the gang collectively had engaged in random violence. Thus, Kerkoulas had knowledge, as the result of past experience and from other sources, that there was a likelihood of conduct on the part of third persons in general that was likely to endanger the safety of a patron at some unspecified future time.A duty to take precautions against the endangering conduct thus arose.

**Question:**  What kind of case is this, civil or criminal?

**Answer:** Civil.

**Question:** What is the difference?

**Answer:** In a civil suit, one party is suing the other. In a criminal prosecution, the government is seeking to punish someone for conduct that society will not tolerate.

**Question:** Who is the plaintiff and who the defendant?

**Answer:** Kuehn is the plaintiff and Pub Zone is the defendant.

**Question:** What is the key issue in this civil suit?

**Answer:** Whether Pub Zone had a duty to protect Kuehn.

**Question:** Why does Pub Zone claim it had no duty to Kuehn?

**Answer:** The attack was unforeseeable and Pub Zone was not responsible for guaranteeing the personal safety of its patrons.

**Question:** What did the trial court conclude?

**Answer:** Although the jury found in favor of Kuehn and awarded him $300,000 in damages, the trial court judge overruled the verdict and damage award and granted judgment for Pub Zone.

**Question:** What did the appellate court decide?

**Answer:** That Pub Zone *did* have a duty to protect Kuehn. The court reinstated the jury verdict and damage award.

**Question:** Why did the court decide that Pub Zone had a duty?

**Answer:** Kerkoulas’ sign prohibiting patrons from wearing gang colors, and the Pub Zone’s practice of calling police when patrons violated this rule, showed the Pub’s awareness of the risk of violence of such gangs. Kerkoulas also knew that the Pagans had participated in past acts of random violence. Thus, Pub Zone had a duty to take precautions against such violence.

**Question:** What should Pub Zone have done to satisfy its duty?

**Answer:**

* Enforce its existing rules. Despite Pub Zone’s policy against gang colors, Kerkoulas allowed the Pagans to remain in the bar and drink.
* Train bouncers and all other staff to be aware of patrons from whom such violence is foreseeable. If such patrons refuse to leave the club when asked, Pub Zone should be consistent in calling the police to address the problem.

You Be the Judge: *Soldano v. O’Daniels*[[3]](#footnote-3)

Note: There are two reasons for using this case. First is to introduce students to the “You Be the Judge” feature. There is one such case in almost every chapter. The text provides the facts and issue and then, in place of the court’s holding, gives competing arguments for the two sides. The text’s authors wrote the arguments, often based on majority and/or dissenting opinions in the case. Since students do not have the “answer,” they are forced to think for themselves.

An instructor can use these cases in many ways.

* Divide the class in two and assign each side to argue for one of the parties.
* Have students vote on the outcome before and after revealing the court’s holding.
* Require students to prepare a short paper giving their own “holding.”
* Have one or two students argue each side before the “court” (the professor and remaining students).

The second reason for using this case is that it builds on the issue of negligence introduced in the *Kuehn v Pub Zone* case, above. This time the court confronts a fight that resulted in a death. The victim’s distraught family members sued the owner of a bar, claiming that one of his employees was partly responsible for the death. Once again, the defendant asked the court to dismiss the case, claiming that he they owed no duty to protect the victims—the same argument made by the Pub Zone.

**Facts:** In the days before cell phones, a fight broke out at Happy Jack’s Saloon. A Good Samaritan ran across the street to the Circle Inn. He asked the bartender at the Circle Inn to let him use the telephone to call the police but the bartender refused.

Back at Happy Jack’s Saloon, the fight escalated, and a man shot and killed Soldano’s father. Soldano sued the owner of the Circle Inn for negligence. He argued the bartender violated a legal duty when he refused to hand over the Inn’s telephone, and that, as the employer of the bartender, O’Daniels was partially liable for his father’s death.

The lower court dismissed the case, citing the principle that generally, a person does not have a legal responsibility to help another unless he created a dangerous situation in the first place. Soldano appealed.

**You Be The Judge:** Did the bartender have a duty to allow the use of the Circle Inn’s telephone?

**Argument for the Defendant:** Your honors, my client did not act wrongfully. He did nothing to create the danger. The fight was not even on his property. We sympathize with the plaintiff, but it is the shooter, and perhaps the bar where the fight took place who are responsible for his father’s death. Our client was not involved. Liability can only be stretched so far.

The court would place a great burden on the citizens of California by going against precedent. The Circle Inn is Mr. O’Daniel’s private property. If the court imposes potential liability on him in this case, would citizens be forced to open the doors of their homes whenever a stranger claims that there is an emergency? Criminals would delight in their newfound ability to gain access to businesses and residences by simply demanding to use a phone to “call the police”.

The law has developed sensibly. People are left to decide for themselves whether to help in a dangerous situation. They are not legally required to place themselves in harm’s way.

**Argument for the Plaintiff:** Your honors, the Circle Inn’s bartender had both a moral and a legal duty to allow the use of his establishment’s telephone. The Circle Inn may be privately owned, but it is a business and is open to the public. Anyone in the world is invited to stop by and order a drink or a meal. The Good Samaritan had every right to be there.

We do not argue that the bartender had an obligation to break up the fight or endanger himself in any way. We simply argue he had a responsibility to stand aside and allow a free call on his restaurant’s telephone. Any “burden” on him or on the Circle Inn was incredibly slight. The potential benefits were enormous. The trial court made a mistake in concluding that a person *never* has a duty to help another. Such an interpretation makes for poor public policy.

There is no need to radically change the common law. Residences can be excluded from this ruling. People need not be required to allow telephone-seeking strangers into their homes. This court can simply determine that businesses have a legal duty to allow the placement of emergency calls during normal business hours.

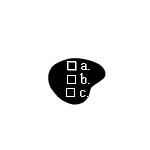
**Holding:** The case was reversed and remanded to trial court.

**Question:** Did the bartender owe a duty?

**Answer:** Yes, the bartender owed a duty to the plaintiff’s decedent to permit the patron from Happy Jack’s to place a call to the police or to place the call himself.

**Question:** What is an argument for imposing this duty?

**Answer:** many people just “don’t want to get involved” and no rule should be adopted which would require a citizen to let a stranger in his house to use the telephone.

Multiple Choice Questions

1. The United States Constitution is among the finest legal accomplishments in the history of the world. Which of the following influenced Franklin, Jefferson, and the rest of the Founding Fathers?

1. English common-law principles
2. The Iroquois’ system of federalism
3. Both A and B
4. None of the above

Answer: C. Both English common law and the Iroquois’ system of federalism shaped the Constitutional framers’ ideas.

2. Which of the following parts of the modern legal system are “borrowed” from medieval England?

1. Jury trials
2. Special rules for selling land
3. Following precedent
4. All of the above

Answer: D. Countless parts of our modern system originated in merry olde England.

3. Union organizers at a hospital wanted to distribute leaflets to potential union members, but hospital rules prohibited leafleting in areas of patient care, hallways, cafeterias, and any areas open to the public. The National Labor Relations Board (NLRB), a government agency, ruled that these restrictions violated the law and ordered the hospital to permit the activities in the cafeteria and coffee shop. What kind of law was it creating?

1. A statute
2. Common law
3. A constitutional amendment
4. Administrative regulation

Answer: D. – The NLRB, as an agency, creates regulations. Congress creates statutes, and judges shape the common law.

4. If the Congress creates a new statute with the President’s support, it must pass the idea by a \_\_\_\_\_\_\_\_\_\_\_\_ majority vote in the House and the Senate. If the President vetoes a proposed statute and the Congress wishes to pass it without his support, the idea must pass by a \_\_\_\_\_\_\_\_\_\_\_\_ majority vote in the House and Senate.

1. simple; simple
2. simple; 2/3
3. simple; 3/4
4. 2/3; 3/4

Answer: B. – 51% to pass initially, 2/3 if an override is necessary.

5. What part of the Constitution addresses most basic liberties?

1. Article I
2. Article II
3. Article III
4. Amendments

Answer: D. – I is legislative powers, II executive, III judicial. Amendments contain the liberties, among other things.

**Case Questions**

1. Burglar Bob breaks into Vince Victim’s house. Bob steals a flat screen TV and laptop, and does a significant amount of damage to the property before he leaves. Fortunately, Vince has a state of the art security system. It captures excellent images of Bob, who is soon caught by police.

Assume that two legal actions follow, one civil and one criminal. Who will be responsible for bringing the civil case? What will be the outcome if the jury believes that Bob did in fact burgle Vince’s house? Who will be responsible for bringing the criminal case? What will be the outcome this time if the jury believes that Bob burgled Vince’s house?

Answer: The civil case will be brought by Victim, and the outcome of a successful case against Bob would be some type of monetary award such as restitution. The criminal case will be brought by state prosecutors and the outcome would be imprisonment for Bob.

2**.** As “The Oculist’s Case” indicates, the medical profession has faced large number of lawsuits for centuries. In Texas, a law provides that, so long as a doctor was not reckless and did not intentionally harm a patient, recovery for “pain and suffering” is limited to no more than $750,000. In many other states, no such limit exists. If a patient will suffer a lifetime of pain after a botched operation, for example, he might recover millions in compensation.

Which rule seems more sensible to you – the “Texas” rule, or the alternative?

Answer: Answers will vary.

3.**You Be the Judge: WRITING PROBLEM** Should trials be televised? Here are a few arguments to add to those in the chapter. You be the judge.

**Arguments against Live Television Coverage:** We have tried this experiment and it has failed. Trials fall into two categories: Those that create great public interest and those that do not. No one watches dull trials, so we do not need to broadcast them. The few that are interesting have all become circuses. Judges and lawyers have shown that they cannot resist the temptation to play to the camera. Trials are supposed to be about justice, not entertainment. If a citizen seriously wants to follow a case, she can do it by reading the daily newspaper.

**Arguments for Live Television Coverage:** It is true that some televised trials have been unseemly affairs, but that is the fault of the presiding judges, not the media. Indeed, one of the virtues of television coverage is that millions of people now understand that we have a lot of incompetent people running our courtrooms. The proper response is to train judges to run a tight trial by prohibiting grandstanding by lawyers. Access to accurate information is the foundation on which a democracy is built, and we must not eliminate a source of valuable data just because some judges are ill-trained.

Answer: For most of the “You Be the Judge” writing problems we provide the case citation and holding. For this question, of course, there is no definitive answer.

4. Leslie Bergh and his two brothers, Milton and Raymond, formed a partnership to help build a fancy saloon and dance hall in Evanston, Wyoming. Later, Leslie met with his friend and drinking buddy, John Mills, and tricked Mills into investing in the saloon. Leslie did not tell Mills that no one else was investing cash or that the entire enterprise was already bankrupt. Mills mortgaged his home, invested $150,000 in the saloon—and lost every penny of it. Mills sued all three partners for fraud. Milton and Raymond defended on the ground that they did not commit the fraud, only Leslie did. The defendants lost. Was that fair? By holding them liable, what general idea did the court rely on? What Anglo-Saxon legal custom did the ruling resemble?

Answer: The partners are indeed liable. *Bergh v. Mills*, 763 P.2d 214 (Wyo. 1988). That is the essence of a partnership: all partners are liable for the acts of any partner committed in the partnership’s normal business. This is the general idea of collective responsibility. It relates to the “tithing” of English legal history, in which all tithing members were legally responsible for the conduct of the others.

Answer: Answers will vary.

5. Kuene v. Pub Zone and Soldano v. O’Daniels both involve attacks in a bar. Should they end in the same way? If so, which way—in favor of the injured plaintiffs or owner-defendants? Or, should they have different outcomes? What are the key facts that lead you to believe as you do?

Answer: Answers will vary.

Discussion Questions

1. In the 1980s, the Supreme Court ruled that it is legal for protesters to burn the American flag. This activity counts as free speech under the Constitution. If the Court hears a new flag burning case in this decade, should it consider changing its ruling, or should it follow precedent? Is following past precedent something that seems sensible to you: always, usually, sometimes, rarely, or never?

Answer: Answers will vary.

1. When should a business be held legally responsible for customer safety? Consider the following statements, and consider the degree to which you agree or disagree:

a. A business should keep customers safe from its own employees.

b. A business should keep customers safe from other customers.

c. A business should keep customers safe from themselves. (Example: an intoxicated

customer who can no longer walk straight.)

d. A business should keep people outside its own establishment safe if it is reasonable to do so.

Answer: Answers will vary.

1. In his most famous novel, *The Red and the Black,* the French author Stendhal (1783–1842) wrote: “There is no such thing as ‘natural law’: this expression is nothing but old nonsense. Prior to laws, what is natural is only the strength of the lion, or the need of the creature suffering from hunger or cold, in short, need.” What do you think? Does legal positivism or legal realism seem more sensible to you?

Answer: Natural law should be a question in the back of our minds throughout the course, because it is a reminder of morality, and law without morality is despotism. Nonetheless, Stendhal is obviously correct that both strength and need help to create law. The important thing for this course is continually to apply moral principles to the rules you study, and make your own determinations about whether natural law really plays a role.

1. Before becoming a Supreme Court justice, Sonia Sotomayor stated in a speech to students: “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.” During her Senate confirmation proceedings, this statement was heavily probed and criticized. One senator said that the focus of the hearings was to determine whether Judge Sotomayor would “decide cases based only on the law as made by the people and their elected representatives, not on personal feelings or politics.” (Sotomayor convinced many of her critics, because the Senate confirmed her by a vote of 68–31.) Should judges ignore their life experiences and feelings when making judicial decisions?

Answer: Answers will vary.

5. Consider the following statements, and consider the degree to which you agree or disagree:

a. I believe that members of Congress usually try to do the right thing for America.

b. I believe that Presidents usually try to do the right thing for America.

c. I believe that Supreme Court Justices usually try to do the right thing for America.

Answer: Answers will vary.

1. LI MS. Hale 137 (1), fo. 150, Nottingham, 1329 [↑](#footnote-ref-1)
2. 364 N.J.Super.301, 835 A.2d 692 Superior Court of New Jersey, Appellate Division, 2003 [↑](#footnote-ref-2)
3. 141 Cal. App. 3d 443, Court of Appeal of California, 5th Appellate District, 1983. [↑](#footnote-ref-3)