

Chapter 1

INTRODUCTION TO LAW

Suggested Additional Assignments

Research

Students should pick up an issue of any newspaper. They should see how quickly they can spot *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 they time themselves as they search, they should be able to find ten articles in two minutes or less. 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. This poll can be copied and distributed on the first day; both students and professor may find the responses interesting.

	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. The American legal system is deeply flawed and needs major reforms.					
4. The American legal system makes no sense.					
5. Lawyers are among the most dishonest people in the United States.					
6. Lawyers are paid too much.					
7. Being on a jury is a waste of time.					
8. Juries frequently award absurdly high judgments.					
9. It is fairly easy to manipulate the legal system.					

	Strongly Agree: 5	4	Neutral: 3	2	Strongly Disagree: 1
	Strongly Agree: 5	4	Neutral: 3	2	Strongly Disagree: 1
10. The legal system often abuses large corporations.					
11. Large corporations often abuse the legal system.					
12. Other nations do a better job than the United States of resolving disputes.					
13. There is no real value in learning about law unless you are going to law school.					
14. 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 you*, regardless of your career, whether you want it to or not. The more you understand the law, the more you can use it for your own productive purposes.

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)

Origins of Our Law

Key Issue: Complexity

It is often frustrating to students, citizens, and even lawyers that law is so complex. There are reasons for its intricacy. Anglo-American legal history consists, in part, of the clash of powerful, competing interests,

such as ownership of property, ethics, raw power, business practices, personal responsibility, and the need for predictability. To understand the interplay of these forces is to see why law is complicated.

Action Learning

From a newspaper article about a legal issue, students should identify two or more *competing* interests. For example, in an article about a securities suit, they should compare (1) the right of an injured investor to seek compensation and (2) the right of a corporation to be free of vexatious litigation. 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 it is that there is a simple solution that will make everyone happy.

Current Focus: Collective Responsibility

Anglo-Saxon society demonstrated collective responsibility through the tithing. Partnerships are a modern example of collective responsibility; but in many states partnerships are becoming less popular, particularly among professionals, precisely because of the potential liability for a partner's acts. Limited liability companies are growing steadily more popular, in part because of this issue. Yet at the same time, some states are creating a *new* kind of collective responsibility: parental responsibility.

In the past few years, about half of the states have passed laws holding parents potentially responsible for the criminal acts of their children. In Idaho, courts may require parents to pay detention costs for a juvenile. In Louisiana, parents can be found guilty of improper supervision of a minor and fined up to \$1,000 and imprisoned.

Question: Are parental responsibility laws good?

Answer: Those who favor parental responsibility laws argue that parents are failing to supervise children adequately and that law-abiding citizens are tired of high rates of juvenile crime. Opponents claim that juvenile criminals come from troubled homes, where a fine or a parental prison sentence will only exacerbate the problem and lead to more crime.

Here is another example of collective responsibility. A university freshman died of alcohol poisoning following binge drinking at a fraternity. A state prosecutor charged eight members of the fraternity with manslaughter, claiming that they played various roles in his death, including illegally serving him liquor and carrying him, unconscious, to his dormitory room, where he died.

Question: Should fraternity members be criminally responsible for deaths from alcohol poisoning? Does it matter whether the surviving fraternity members

- knew that the student was under age?
- bought the alcohol?
- served the alcohol to the student?
- failed to obtain medical help when the student became unconscious?

Answer: Serving alcohol to a minor is a crime in most states, and that could lead to criminal liability for the drinker's death, as well. Failing to obtain medical help is generally not a crime, but some states might find criminal liability for those who caused the harm in the first place. There are few final answers in this area, but the trend is clearly toward broader—and harsher—liability.

Key Issue: Precedent

Precedent is a vital part of our system because it yields predictability. The common law evolves slowly because life would be impossible if the "rules of the game" were rewritten every week.

Question: What are some laws you depend upon?

Answer: Students depend upon contract law to prevent a landlord from raising the rent during the tenancy; upon landlord-tenant law to ensure a habitable apartment; upon warranty law to guarantee

the quality of a new consumer product; and upon tort law to convince a fast-food restaurant to maintain its physical facilities and food in a safe condition. If the common law were free to change with every lawsuit, no one could conduct business with any certainty.

Key Issue: Substantive vs. Procedural Law

Substantive rules of law state the rights of the parties. Procedural rules tell how a court should go about settling disputes.

Case: *Oculist's Case*, p. 7¹

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.

Issue: 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. But 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

Key Issue: Federal Form of Government

One reason for the complexity of our law is federalism.

Question: In most industrial nations, no local governments wield as much power as the states do in this country. Is state government wise? Mention some pros and cons of state power.

Answer: Some pros:

¹ LI Ms. Hale 137 (1), Fo. 150, Nottingham.

- The country is huge, and state government keeps some political power physically nearer the people.
- Different geography, industry, population, and mores mean diverse concerns and opinions in different areas, and a local government can be more sensitive to these local pressures.
- As technology and social issues change, the law should be able to evolve more rapidly on a local level than on a national level.

Some cons:

- Distances that were substantial in the horse-and-buggy era are crossed quickly by airplane or instantly by telecommunications: state borders have little meaning.
- A corporation doing business in all states may have to meet 51 different sets of federal and state regulations.
- It is a waste of time for society to investigate the same issue—say, liability for toxic waste—51 times, and to pass 51 different responses to the same concern.

Classifications of Law

Key Issue: Criminal and Civil Law

Most law is civil law. Most law depicted on television is criminal. Therein lies a challenge for many students. Civil law does not involve guilt or punishment, the two concepts that television law endlessly portrays.

Question: What is wrong with this sentence: “The court found Sheila guilty of breaching the contract”?

Answer: Breach of contract is a civil law issue, and therefore does not involve guilt or punishment. If the plaintiff wins, the defendant must pay compensation.

Question: Why does society distinguish between criminal and civil law?

Answer: With criminal law, society outlaws behavior that proves threatening to the whole populace. Arson is dangerous because it costs lives, destroys property, and drives up insurance costs. Civil law is different. Sheila’s breach of contract does not threaten the fabric of society, and no prosecutor will seek to jail her. Yet an injured party is entitled to compensation. With civil law, society establishes certain ground rules but requires the parties themselves to resolve disputes.

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? Are race and sex discrimination so

inconsequential that we can permit them to go unregulated? Should companies be free to dump toxic waste wherever they want? The answers, claim many, are too obvious to need stating.

Key Issue: 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.

Question: What is your reaction 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 letters responding to the principal's statements. With which letters do you agree? Why?

Answer: The letters themselves provide answers pro and con.

Question: If you believe the principal has *the right to ignore* a law he regards as unethical, then answer 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: By contrast, if you believe the principal has *no right to ignore* a law he regards as unethical, then answer this: Are there any laws you would not obey? If you had been a school principal in the South in the early 1950s, would you 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.

Quotes of the Day

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—Friedrich Nietzsche, German philosopher (1844-1900)

Question: Which commentator is correct about the relationship of power and good? Does power corrupt? Or is a person useful to society only if he has the power to utilize his goodness?

Answer: Nietzsche believed that the basic human drive was the will to power. He thought that power would enable a person to re-create himself into something better, and loftier, and that a truly good person could not exist without it. Kundera shows deep suspicion of power, evidently agreeing with Lord Acton (1834-1902) that, "Power tends to corrupt and absolute power corrupts absolutely." The relationship of power to goodness is a useful one to have in mind in a law course.

Question: When parties with unequal power create a contract, should the law more vigorously protect the weaker party?

Answer: When two corporations contract, courts generally ignore inequalities of bargaining power unless one party had a huge advantage and used it unfairly. When a corporation deals with a consumer, both the UCC and the courts tend to give greater protection to the consumer, though not always.

Question: Shouldn't a court always look out for a weak party, whether corporate or consumer?

Answer: Probably not. The more a court "protects" one party, the more it interferes with the parties' ability to contract. Generally, courts begin with the assumption that adults are able, and entitled, to make their own deals and that they should live with the results.

WORKING WITH THE BOOK'S FEATURES

Analyzing a Case

Case: *Kuehn v. Pub Zone*,² p. 16

Facts: Maria Kerkoulas owned the Pub Zone bar. She knew that several motorcycle gangs frequented the bar, and she knew, based on experience, that they were dangerous and prone to attacking customers without provocation. Kerkoulas posted a sign that prohibited any motorcycle gang from entering the bar wearing their “colors”; she believed that gangs without their colors were less prone to violence, and experience proved her right.

Rhino, Backdraft, and other members of the Pagans, a motorcycle gang, entered the bar wearing their colors. Kerkoulas allowed them to stay for one drink. The Pagan members followed a customer, Karl Kuehn, into the men’s room, where without provocation they beat him causing a brain hemorrhage, disc herniation, and numerous fractures of facial bones. Kuehn was forced to undergo various surgeries, including eye reconstruction.

Kuehn sued the pub and a jury awarded him \$300,000 in damages. The trial judge overruled the jury’s verdict, holding that the pub’s owner could not have foreseen the attack and had no duty to protect Kuehn. Kuehn appealed.

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

Holding: Yes, the jury’s verdict was reinstated. Judge Payne said that although a business owner is not an insurer of the visitor’s safety, and therefore is ordinarily under no duty to exercise can care, such a duty does exist where that business owner knows or has reason to know that the acts of a third person are occurring or are about to occur. A business owner knows, or has reason to know, from past experience that there is a likelihood of conduct on the part of a third party in general, which is likely to endanger the safety of a visitor.

Here, the pub owner had a duty to take reasonable precautions against the danger posed by the Pagans because the gang was known by Kerkoulas to be violent based on her own experience and from other sources. Moreover, there was already a prohibition based on the likelihood of violence, of gang members wearing their colors in the pub. This was not enforced on the night in question and the Pagan members were allowed to enter the pub. The pub had a duty to employ “reasonable” safety precautions.

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 not foreseeable.

Question: What did the trial court conclude?

Answer: The court overruled the jury’s verdict and held that the Pub Zone had no duty to Kuehn.

Question: What did the appellate court decide?

Answer: That the Pub Zone *did* have a duty. The court reinstated the jury’s verdict.

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

Answer: The court said that the pub knew or should have known that the gang members were violent. Based on Kerkoulas’ experience and other sources, violence was foreseeable. It did not matter that vi-

² 364 N.J. Super. 301, 835 A.2d 692, Superior Court of New Jersey, Appellate Division, 2003.

olence by those particular gang members may not have been foreseeable, it was enough that violence in general by the Pagans was foreseeable.

Question: Does this mean that business owners will always be liable when an attack occurs on their property?

Answer: No. A business owner owes a duty to employ “reasonable” safety precautions. The Pub Zone already had in place reasonable safety precautions: the prohibition against bikers wearing their colors, and that prohibition, together with calling the police when a breach occurred, had been effective in greatly diminishing the occurrence of biker incidents on the premises. The problem for the Pub Zone was that the policy was not enforced the night in question; once entry was achieved, the Pub Zone remained under a duty to exercise reasonable precautions against the attack.

Question: In your view, did the court rule correctly?

Question: Assume that you are the manager of a club. You know that certain customers have a history of violence, you do not want a repetition of the *Kuehn* incident. What should you do?

Answer: Several steps should help:

- Acknowledge the potential problem. Businesses get into trouble when they assume that nothing will go wrong.
- Create a system for handling violence on the premises. You may choose to call the police each time an incident occurs, and/or you may need to hire extra security inside and outside the club.
- Train all staff to be aware of the problem. Emphasize that customer safety is paramount.

You Be the Judge: *James v. Meow Media*,³ p. 20

Note: There are two reasons for using this case. First, it 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 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. Like the defendants in *Kuehn v. Pub Zone*, the defendants in *James v. Meow Media* asked the court to dismiss the case, claiming they owed no duty to protect the victims. Students can begin to see how one legal issue links together many cases.

Facts: Michael Carneal, a 14-year-old freshman at Heath High School in Paducah, Kentucky, brought a .22-caliber pistol and five shotguns to school and shot into a crowd of students killing three and wounding five. He was arrested and convicted of murder.

An investigation revealed that Carneal regularly played violent video games and owned a copy of *The Basketball Diaries* (1995) in which a character played by Leonardo DiCaprio envisions murdering a teacher and several classmates.

³ 300 F.3d 683, Sixth Circuit Court of Appeals, 2002.

The parents of the victims sued the producers of *The Basketball Diaries* and the video games alleging that they knew or should have known that they were creating an unreasonable risk of harm to innocent people, and that such games and movies made young people insensitive to violence, and more likely to commit such appalling acts.

The producers of the games and movie claimed that they owed no duty to the victims and that Carneal's actions were not foreseeable.

The trial court dismissed the case ruling that Carneal's acts were unforeseeable and that there was no duty to protect the victims and the parents appealed.

Issue: Did the producers have a duty to protect the victims from harm caused by their products?

Answer: No. The parents claim that the producers acted negligently in distributing their products to young people, and that negligence caused the death of the victims. Under Kentucky law the parents must first be able to establish that the producers owed a duty of care to the victims. The district court held that the producers did not owe the victims a duty and the court agreed. To determine whether a duty exists, the harm that resulted must have been foreseeable. In this case, it was impossible to predict that the video games and the movie would incite Carneal, or anyone else, to violence. Carneal's reaction to the games and movie was too abnormal to expect the producers to have foreseen it. It is too much of a stretch to say that because Carneal shot characters in a video game, or saw it in a movie, it is foreseeable to the producers of those games and that movie that he would shoot students in school.

Question: Isn't this a cold-hearted decision? Why doesn't the court sympathize with the parents' tragedy?

Answer: The judges are probably sympathetic, but they must consider more than the plaintiffs' grief. This court was convinced that permitting a negligence claim to go forward here would open the floodgates to countless similar claims of *foreseeable harm*. Every time anything bad occurred after someone had watched a violent movie or played a violent video game the injured party would claim the damage had been foreseeable.

Question: Maybe it really *was* foreseeable, and maybe it would be *good* to have more such lawsuits, to control the amount of violence that appears in film and video games.

Answer: Maybe, but the court did not think so. The court believes that except under extraordinary circumstances, people are entitled to assume parties will not commit intentional criminal acts because most people are deterred from committing crimes given the punishment that can follow. In addition, the court did not want to impose tort liability on expression and ideas and the effect those expressions and ideas could have on a person. To do so would conflict with the First Amendment.

Question: Shouldn't Carneal's parents have taken more responsibility? Obviously he could not handle the violent images he saw in the games and movies. Shouldn't his parents have supervised him more closely? Can Meow Media sue the Carneals and have the court find them liable for not doing their job as parents?

Answer: The producers cannot countersue over the Carneals' parenting because, even if the Carneals' parenting is at fault, they have not injured the producers. The expense of defending the lawsuit does not constitute a legal injury in this case.

Question: Have other bereaved relatives filed suit against entertainment firms?

Answer: Yes. The number of plaintiffs and lawsuits in such cases is increasing. For example, the parents of a 19-year-old sued CBS and Ozzy Osbourne when their son killed himself after listening to an Ozzy Osbourne song. The parents claimed that the lyrics of the song were designed to appeal to troubled youth like their son.

General Question: Are there any movies that you have seen that you believe could cause an unstable youth to hurt someone? Do video games cause increased violence on the playgrounds of elementary schools? If so, what, if anything, should society do about the problem? Should courts be involved? Should Congress?

ADDITIONAL QUESTIONS

1. Can one person really understand all of the legal issues mentioned at the beginning of this chapter? For example, can a business executive know about insider trading and employment law and environmental law and tort law and all of the others? Will a court really hold one person to such knowledge?

Answer: Yes. Whatever business you choose to engage in, courts and the general public alike will expect you to know what you are doing. This does not mean that you need to know everything a lawyer knows. It does mean that you must be able to anticipate legal problems. Sometimes you will know exactly what to do, other times you will know enough to call a lawyer. If you permit sexual harassment in your company, the company is liable whether you understood the law or not. If you casually agree to manufacture and sell a new product with a friend, you may have created a binding contract, an agency relationship, or a partnership. Courts will look at what you *did*, not what you understood.

2. Why does our law come from so many different sources?

Answer: Because of our legal and political history. Our legal traditions come from the common law and equity courts of England. Common law is simply the body of decisions made by judges over the years. We have English common law roots, but we now have 50 states plus the federal government, all creating common law. Equity traditions add another dimension. In addition, the legislatures of each state, and Congress, pass statutes. The United States Constitution adds more complexity, by guaranteeing individual liberties. Administrative agencies govern the day-to-day working of many aspects of commerce and daily life. In short, there is no such thing as “the law.” It comes to us from all of these sources.

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) ruled that these restrictions violated the law and ordered the hospital to permit the activities in the cafeteria and coffee shop. The NLRB cannot create common law or statutory law. What kind of law was it creating?

Answer: The NLRB is an administrative agency. Congress created the NLRB to oversee all aspects of federal law regulating labor-management relations. The NLRB frequently makes rulings like the one described here. In order to enforce its rulings, though, the NLRB often must go to court.

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 insolvent. 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 didn’t 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.

5. **ETHICS** Confucius did not esteem written laws, believing instead that good rulers were the best guarantee of justice. Does our legal system rely primarily on the rule of law or the rule of people? Which do you instinctively trust more? Legal realists argue that the “rule of law” is a misleading term. What point are they making, and how does it relate to Confucius’s principles? Confucius himself was an extraordinarily wise man, full of wisdom about life and compassion for his fellow citi-

zens. Since he was extraordinary, what does that tell us about other rulers by contrast? How does that affect Confucius's own views?

Answer: In a sense, legal realists share some ideas with the great Chinese lawgiver. The realists argue that what is written matters far less than who enforces the laws. Confucius also put primary emphasis on having wise leaders. The danger, of course, with relying on a government of people, rather than laws, is that it is difficult to get wise, honest people to lead society and basically impossible to find anyone remotely as good as Confucius.

6. Tommy Parker may have been involved in some unsavory activities as an officer in a failed savings and loan institution. A federal agency, the Office of Thrift Supervision (OTS), ordered Tommy not to spend or waste any of his own assets while it was investigating him. Later, Tommy and his wife, Billie, got divorced and divided their property. On February 18, the OTS filed papers in court asking for an order that Billie not spend any of her assets. Billie received a copy of the papers on February 20, and the hearing took place on February 24, without Billie in attendance. The court ordered Billie not to spend any assets except for essential living expenses. Billie appealed, claiming that under court rules she was entitled to five days' notice before the hearing took place and that weekend days are not counted. She had had only two business days' notice. Assume that her counting of the days was correct (which it was). Explain the difference between procedural law and substantive law. Which type of law was Billie relying on? Should her appeal be granted?

Answer: Billie was relying on procedural law. Substantive law probably would have allowed OTS to get a court order barring her from spending assets. Rather than fight, and lose, on the substantive law, she was arguing that the notice was defective. The appeals court agreed. *Parker v. Ryan*, 960 F.2d 543, 1992 U.S. App. LEXIS 10485 (5th Cir. 1992). OTS may try again, but this procedure was clearly defective.

7. Plaintiff Miss Universe, Inc., owns the trademark "Miss U.S.A." For decades, the company has produced the Miss U.S.A. beauty pageant seen by many millions of people in the United States. William Flesher and Treehouse Fun Ranch began to hold a nude beauty pageant in California. They called this the "Miss Nude U.S.A." pageant. Most of the contestants were from California; the majority of states were not represented in the contest. Miss Universe sued Flesher and Treehouse, claiming that the public would be confused and misled by the similar names. The company sought an equitable remedy in this lawsuit. What does "equitable" mean? What equitable remedy did Miss Universe seek? Should it win?

Answer: Plaintiff sought an injunction, and won. *Miss Universe, Inc. v. Flesher*, 605 F.2d 1130 (9th Cir. 1979). "Equitable" comes from the old Court of Chancery, where the Chancellor had the power to "do the equitable thing"—i.e., whatever was right. He was not bound by the limited remedies available in the law courts. A common equitable remedy is the injunction, which is an order to stop doing something. Here, the court affirmed a preliminary injunction, which means that the court ordered the defendants to stop using the "Miss Nude U.S.A." name while the trial went on.

8. **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. Argument 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. Argument 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 the grandstanding in which some lawyers may

engage. 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.

9. 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?

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.

10. **ROLE REVERSAL** Each Practice Test contains one Role Reversal feature, in which we challenge you to create your own exam question. The goal is to think creatively and accurately. Crafting questions is a good way to reinforce what you understand and recognize the areas you need to review. Your professor may ask you to submit the questions in writing or electronically or to prepare an overhead slide.

Answer: The question should be challenging enough that the average student will need to stop and think, but clear enough that there is only one answer. Useful questions can be formatted as essay, short answer, or multiple choice. Notice that some exam questions are very direct, while others require deeper analysis. Here are two examples. The first focuses on a definition.

Question: Legal positivism is:

- (a) A decision by an appeals court affirming the trial court.
- (b) A decision by an appeals court reversing a trial court.
- (c) A theory of jurisprudence insisting that the law is what the sovereign says it is.
- (d) A theory of law requiring that current cases be decided based on earlier decisions.
- (e) A theory of law requiring that current cases be decided by a majority vote of the judges.

Answer: As you know, the correct answer is c.

The next question demands that the student spot the issue of law involved (foreseeability) and correctly apply it to the facts provided.

Question: Marvin asks Sheila, a qualified auto mechanic, to fix his engine, which constantly stalls (stops) while driving. When Marvin returns, Sheila informs him that the engine is now “Perfect—runs like a top.” Marvin drives home along Lonesome Highway. Suddenly, the car stalls. Sheila has not fixed it. Marvin pulls over and begins the long walk to the nearest telephone. A blimp flies overhead, advertising “Top” brand tires. Tragically, the blimp suddenly plummets to earth and explodes 20 feet from Marvin, seriously injuring him. Marvin sues Sheila. Sheila’s best defense is that:

- (a) The falling blimp is so bizarre that Sheila could never have foreseen it.
- (b) Sheila made reasonable efforts to fix the engine.
- (c) Marvin should have checked the engine himself.
- (d) Marvin should have carried a cell phone with him in case of emergencies.
- (e) Sheila is a qualified mechanic, and her work is presumptively sufficient.

Answer: The correct answer is a. Notice that the same facts could be used as an essay question, simply by deleting the multiple-choice answers. Now it is your turn for Role Reversal: Draft a multiple-choice question focusing on legal realism.