

Executive Management Program

**PETER F. DRUCKER AND MASATOSHI ITO
GRADUATE SCHOOL OF MANAGEMENT
Claremont Graduate University**

MGT 584: Law, Ethics, and the Enterprise

a 2-unit course to be taught by

Rafael Chodos, Attorney at Law

Winter quarter, 2008

Seven 3-hour sessions on successive Saturday Afternoons, March 29th-May 10th

Instructor

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Course Summary: Individual and Collective; Current Trends; Law as Society's Quest for Integrity

Some of the central problems that have occupied humanity since the dawn of civilization involve the tension between our status as individuals and our status as members of groups or collectives. During the first half of the 20th century these problems played themselves out mainly in the political arena. But in North America today, where we have relative political stability, these same problems are making themselves felt in the legal arena.

At the beginning of the 21st Century, we see increasing tendencies throughout society to emphasize our status as members of groups and collectives and to de-emphasize our status as individuals. Everyone identifies himself as a member of an ethnic group, a religious group, a gender group, an economic status group, a professional group, a cultural group, a demographic group - or often still, as a participant in some kind of an *enterprise*. This tendency, fueled by developments in technology, the media, and the global business environment, makes itself felt in just about all areas of the law: in the law of commerce, the workplace, and the internet, and in the structure of courts and

of the legal profession. As today's leaders, and tomorrow's, we all need to be aware of these developments and decide how we are going to respond to them.

This course will begin with a brief survey of the most important ways law makes its impact felt on the enterprise: both inside the enterprise (in relations with and among employees, managers, executives, board members, and owners), and in dealings between the enterprise and its outside stakeholders (suppliers, partners, customers, communities, markets, and governments). But our survey will be imbedded in a much deeper discussion of the nature of law, and of the ways the law relates to ethical issues and to considerations of the enterprise as a human social construct. The enterprise will be considered both as an ethical actor itself, and as an influence or set of constraints on the ethical behavior of all the people who participate in it.

Executives need to have a *feel* for the way the law works and so, in addition to discussing some actual legal cases and some hypothetical ones, this course will involve role-playing elements in which the students will play all the roles involved in the legal system: client, attorney, witness, jury, judge, and even legislator/law-giver. The course also includes a segment on legal procedures so that the students can gain some sense of what the "life-history" of a lawsuit feels like.

The law's effort to resolve the tensions described here - tensions which arise naturally as part of the human condition - can be seen as a centuries-long search for integrity in interpersonal affairs. This course will look at the law in that light, and will invite the students into an exploration of what this kind of "integrity" means.

Teaching Objectives:

The course has two kinds of teaching objectives: the first involves the transfer of knowledge about the law to the students. In service of this objective, several of the sessions will survey specific areas of the law and will offer quick overviews of the essential principles in each area. Every session will involve reading and discussing legal cases - actual opinion from a court of appeal, or summaries of such opinions, or one or more hypothetical cases.

The law is a big topic and it is not possible to "cover" it in any meaningful way in the 21 hours we have together. Still, by the end of the course, students should be able to deal much more comfortably than at the outset with the legal problems and issues which are most likely to arise in their business lives.

The other teaching objective is a dialectical one: by thinking about the philosophical underpinnings of the issues we will cover, the course will develop our competency to think, speak, and write about the relationships among law, ethics, and the enterprise *authentically* and *convincingly*.

"*Authentically*" refers to a relationship between our words and our selves: are we saying what we really think? do we know what we really think? have we thought about the subject and is what we are saying the result of that thinking? The ability to speak authentically about important issues is part and parcel of the responsibility of a leader. Yet we will learn that when it comes to really big subjects like the nature of law, ethics, and the enterprise, it is very difficult to speak authentically about them

"*Convincingly*" refers to a relationship between our words and our listeners. To speak and write convincingly about a subject means to speak and write in such a way as to persuade others that what we are saying is true. This requires us to know about the subject, and to support our positions with authority. But authority is socially determined: to speak with authority we must have respect for our listeners and understand what *they* accept as authority. The study of legal cases will involve us in the study of the authority structure in which our legal system is imbedded: we will learn how lawyers and judges attempt to justify their positions by appeal to authority.

All of the sessions will involve class participation, and one of the sessions will involve a **mock trial** in which the students will break up into groups to take on the roles of parties, lawyers, witnesses, judges and jurors. By speaking to the questions raised in the class, and by participating in the mock trial, students will pursue both of the course's major objectives: learning about the law, and practicing how to speak, think, and write -- all at the same time!

General Notes about the Course Mechanics and the Reading List:

1. The course is scheduled for seven 3-hour sessions on successive Saturday afternoons from 1:00 PM to 4:00 PM. The readings and assignments have been designed with a view to making each 3-hour session require less than 4 hours of reading in advance and 2 hours of focussed thinking, in preparation for the discussion in class. If the readings take longer, please reduce the focussed thinking time: hopefully we will make up for it in the class discussions.

2. The “**thinking assignments**” are meant to provoke you to think and ask questions. You are not expected to come up with complete answers to the questions or with convincing analyses of the topics. Some of the “thinking assignments” involve specific questions; others involve simply the outline of topics we plan to cover in class. Please think about those topics before we get to them, and ask any questions you may have as we cover them in class.

3. The 3-hour sessions will each be divided into two or three “segments”. These divisions are made explicit in the detailed course outline below. We will generally take a 15-minute break around half-way into each session.

4. In addition to the **assigned readings**, the reading list includes some suggested **supplemental readings**, which you should feel free to read and bring up in class if you care to do so. These are marked “SUPP” in the reading lists. Additional materials will be presented at each of the sessions that will not be included in the CoursePack.

5. Because many of you will be commuting across long distances, the instructor has taken the time to record some of the more accessible readings and make them available to you as MP3 files/podcasts. These audio files will be made available through Claremont's SAKAI site, and if that site proves inconvenient, through another site which the instructor will set up. These readings are marked “**MP3**” in the reading lists. These same readings are also in the CoursePack.

6. **Writing Assignments:** Each of the first six sessions includes one or two short Writing Assignments (each two pages or less), but you need submit only a total of three for the whole course - any three that interest you. Obviously, everything you submit should be original with you.

7. **Attendance is required** at each session of the course, and the grading formula gives high weight to class participation. That formula is as follows:

Class participation	50%
Short Writing Assignments	20%
Final assignment and Mock trial	30%

The reason the “final assignment and mock trial” elements are grouped together is that you will all be taking different roles in the mock trial, and some of the roles will be less demanding than others. For those who get “easier” roles, the Final Assignment will have greater weight.

8. The course will involve us in discussions of fundamental ideas relating to the sources of law and its legitimacy, the nature of our relationship to groups, the nature of legal authority as well as of authority in general. Some of the readings, and some of the instructor's views, might be viewed by some of you as incorrect, outrageous, or even philosophically offensive. But one of the purposes of this course is to provoke real thought about the underlying issues, so disagreement - especially vehement disagreement - is heartily encouraged.

Summary Outline of the Sessions:

Session 1: Introductions and Provocations. A survey of our existing views about law, ethics, and the enterprise. Fictional case of the Speluncean Explorers.

Session 2: Law's Impact on the Enterprise; Taxonomy and Energetics of the law. Cases and article on sexual harassment law.

Session 3: Rules vs. Principles; Ambulatory Responsibility and the Enterprise. Cases on statutes of limitation, statute of frauds, enterprise liability.

Session 4: Fiduciary Duties; Law and Psychology. Jack and the Beanstalk. Mary's Case.

Session 5: Intellectual Property; Sources of Law. Cases. Distribute materials for mock trial.

Session 6: Legal Procedure; Managing the Legal Case. Life history of a litigation. Alternative Dispute Resolution. Click 'N Go case.

Session 7: Mock trial. If time permits: Revisit the Provocations

Reading List:A. Two Books:

The reading assignments for each of sessions 2-6 include selections from these two books:

1. Rafael Chodos, THE LAW OF FIDUCIARY DUTIES (Blackthorne Legal Press, 2001) [Abbreviated here as “FidDut”.]

This heavy tome (1700 pages, seven pounds) by the instructor is a modern "treatise", “practice aid”, and textbook all rolled into one. By browsing through this book you can get a strong sense of the flavor of the law. Many specific reading assignments will be drawn from the book, and the table of contents itself will serve as a jumping off point for some of our discussions. Many of the cases we will discuss are summarized in this book, and they are referred to in the detailed outline below. If you wish, you can read the case summaries referred to in each passage of the text - but this will not be required except in a few instances which are listed in the readings below.

2. Robert W. Emerson, BUSINESS LAW (Barron's, 2004 edition)

This very easy-to-read paperback book presents an overview of business law for the lay business person. While none of the discussion in this book is particularly profound or even thought-provoking, the book is still a very useful reference for you because it does cover, in an intelligent way, most of the topics we will mention in the course.

B. The rest of the assigned readings for each session, consisting of excerpts from books and selected cases, are listed in the Detailed Course Outline as well as in the following list.

The supplemental background readings are marked “SUPP” in the following list. They are not assigned but you should feel free to read them and, if you like, discuss them with the Instructor privately or bring them up in class when appropriate.

Some of the readings are deliberately chosen because they are both entertaining and instructive. Some of the readings are more “dry” and difficult. The reading assignments try to mix these styles so that the burden of preparing for each class will be lighter.

Some of the readings are designated “QR” for “quick read” - by which it is meant that you need not study them closely but should rather read them quickly to see their overall structure and general drift.

The Assigned Readings and Supplemental Readings will all be found in the CoursePack.

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READING LIST

Reference No.	Title	Author	Session(s)	
1	<i>The Case of the Speluncean Explorers</i> , originally Harvard Law Review, 1949. Reprinted in Peter Suber, <i>Nine New Opinions</i> (Routledge 1998) pp 5-32.	Lon Fuller	1	
2	<i>Moral Reasoning: A Practical Guide for Leaders</i> HBR 9-604-054	Sandra J. Sucher	1	
3	The Genealogy of Morals (Golfing tr. Doubleday Anchor 1956) First Essay (pp 158-188)	Friedrich Nietzsche	1	
4	The Theory of Business Enterprise, (Cosimo Classics, 2005 -reprint), Ch. VIII, pp 128-143	Thorstein Veblen	1	QR
5	What's a Business For? (JBR Reprint R0212C, 2002)	Charles Handy	2	
6	Protecting the Righteous Employer against Abusive Sexual Harassment Claims [Amer. Jnl. of Trial Advocacy 1995, Reprints to be supplied]	Rafael Chodos	2	Supp
7	The Authoritative and the Authoritarian (Univ. of Chicago Press 1986), Chap 5, Authenticity pp 41-59)	Joseph Vining	2	Supp
8	<u>The Partnership of the Cat and the Mouse</u>	Fictional case - FidDut 1514-1520.	2	Supp MP3
9	The Shakedown, HBR Reprint R0503A	Phil Bodrock	3	
10	The Quest for Responsibility (Cambridge Univ. Press, 1998) pp 9-21, 45-92	Mark Bovens	3	MP3

Reference No.	Title	Author	Sessi on(s)	
11	San Jose Construction, Inc. v . S.B.C.C. Inc.	Appellate Case, Filed Oct. 12, 2007, H031066. CA 6. Santa Clara County	4	
12	<u>Escape from Freedom</u> (Avon Books, 1969, pp. Chap 1, pp. 17-38; Chap. V, “Mechanisms of Escape,” pp. 157-230.	Erich Fromm	4	
13	<u>Wolf v. Superior Court (Disney). Cases I and II</u>	107 Cal.App.4th 25; Summary of Second opinion	4	
14	Mary’s Case (unpublished story - 1992)	Rafael Chodos	4	MP3
15	Human Rights as Politics and Idolatry (Princeton Univ. Press 2001), pp. 53-98.	Michael Ignacief	5	
16	The Economic Structure of Intellectual Property Law (Harvard/ Belknap 2003) pp 11-36.	William M. Landes and Richard Posner	5	
17	Emergence of Knowledge Society (in <u>The Essential Drucker</u> , Chap 23, Collins Business 2001)	Peter Drucker	5	
18	<u>ProCD Inc. v. Zeidenberg</u>	86 F.3d 1447 (USCA 7th Circuit, 1996)	5	
19	<u>Legality and Legitimacy</u> (Jeffrey Seitzer tr., Duke Univ. Press 2004) Introduction at pp. 3-14	Carl Schmitt	5	MP3
20	<u>Code and Other Laws of Cyberspace</u> (Basic Books 1999). Chap 10, “Intellectual Property” at pp. 122-141	Lawrence Lessig	5	QR
21	Trust and Honesty, Oxford Univ. Press (2006), Chap. 9, pp 136-151.	Tamar Frankel	6	
22	Murphy v. Check N Go	Appellate Case Filed Oct. 17, 2007, A144442, CA1/1 San Francisco	6	

Reading List

Reference No.	Title	Author	Session(s)	
23	Treatise on Law (Regnery Publishing 1956, 2001 reprint) pp 11-16, 105-116	Thomas Aquinas	2 5	Supp MP3
BOOK	The Law of Fiduciary Duties - many selections	Rafael Chodos	2, 3, 4, 5, 6	
BOOK	Business Law (Barron's 4th Edn. 2004)	Robert W. Emerson, JD	2, 3, 4, 5, 6	

SESSION ONE (March 29th): INTRODUCTIONS and PROVOCATIONS

Session Objective: In this first session we will begin with a series of introductions: to each other, and then to the subject matter of the course. The word "provocations" in the title line refers to the list of attitudes and preconceptions below, which are intended to provoke you to think about these issues. We will begin here to speak and write about the deep issues the course will address: the nature of law, the nature of ethics, the nature of the enterprise, and the relations among these three. Our focus for this session will be on *authenticity*: can we speak to each about these topics honestly and from our real selves?

Reading Assignment: “The Case of the Speluncean Explorers” by Lon Fuller; “Moral Reasoning” by Sandra J. Sucher; Nietzsche, *Genealogy of Morals*, First Essay (pp 158-188 in Golfing translation, Doubleday Anchor 1956) and QR Chapter 8 in Thorstein Veblen’s, *Theory of the Business Enterprise*.

Writing Assignment: Please write a “short essay” [no more than 2 double-spaced pages] on either one of the following questions:

Question 1a: Which, if any, of the following can properly called an “enterprise”: a lynch mob, the Ku Klux Klan, the Catholic Church, the local church, the United States of America, the Netherlands. Explain your answer.

Question 1b: What is "authority"? What is "obedience"? Explain the relationship between them, and say whether either of them is inherently good, inherently bad, or inherently necessary for human society to function.

Thinking Assignment: Be prepared to present your opinions on at least six (two from each group) of the provocative issues listed in the following list of “attitudes and preconceptions”:

Segment A: Introductions and discussion of the case of the Speluncean Explorers. Were the explorers an “enterprise”? Would their decisional processes have been helped by the procedures outlined in the Sucher paper?

Segment B: Discuss the “provocative issues” and any submitted responses to the written assignment.

A. Law is...

<p>a system of rules (rather than principles) A set of constraints (a set of restraints) A system of dispute resolution A burden on business An indispensable ally of business A set of recipes for behavior (how to get things done) An expression of societal values A "language game" -- a modality of interaction Ultimately universal Hopelessly local and parochial A necessary evil Society's on-going quest for integrity</p>	<ol style="list-style-type: none"> 1. Are any of these propositions clearly true? 2. Are any of them clearly false? 3. Can any of them be both true and false at the same time?
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B. Ethics are...

<p>A system of principles (rather than rules) Aspirational: requires more than mere compliance Personal Inevitably fuzzy Ultimately universal Hopelessly local and parochial Beyond law, concerns areas with which law is not concerned The basis of law Situational Positional Inevitably the province of religion</p>	<ol style="list-style-type: none"> 1. Are any of these propositions clearly true? 2. Are any of them clearly false? 3. What is the relationship between law and ethics?
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[continued on next page]

C. **The Enterprise....**

<p>Is one or more persons acting with a conscious purpose (...a shared purpose, ...a mission) Is a fundamental social unit (like the family) Is a voluntary association (unlike the family) Is inevitably impermanent Is a matrix of cooperation Requires management Must be structured Makes the world a better place (when it is successful) Inevitably contributes to the deterioration of the world Is a seedbed of corruption Becomes dangerous as it gets larger Is always either growing or dying: never stable Takes advantage of nature's laws Would prefer a world without human law</p>	<ol style="list-style-type: none"> 1. To what extent is the structure of the enterprise determined by “the human condition”: the place of authority, obedience, loyalty, trust. 2. Is a “business enterprise” a special kind of enterprise? And if so, how is it special?
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End of Session 1 Outline

Session 2 (April 5th): Law's Impact on the Enterprise: A Taxonomy; The Energetics of the Law

Session Objectives:

[a] We offer a theoretical framework within which we can think about the law's impact on the enterprise, and we make an inventory of the areas in which that impact is most conspicuous.

[b] We take note of the fact that the law is not static: it changes as the result of societal change, and it brings about societal change. Because of this, we can say that it has an "energetics". We study one example of the way the law moves very quickly: sexual harassment law, 1980 to the present.

[c] We review - also very quickly - various systems of classification which have been applied to "The Law" over the centuries. While our first segment starts with the enterprise and identifies the fields of law which apply to it, this segment will start with classifications of law as an abstract study.

Reading Assignment:

For Segment A: Law's impact

FidDut Secs. 1:1-1:13, pp. 1-28, for a sense of how fiduciary duties arise in "enterprises." And Secs. 3:8, 3:8a and 3:18, pp. 144-150, 178-181, on "loyalty" - a core concept. Barron's, pp. 518-536 [on Employment law]. 537-549 [on Labor Relations]. Charles Handy, 'What's a Business For?' (on governance principles).

Sexual Harassment: *Meritor Savings* (US Supreme Court, 1986) - syllabus only. *Lyle v. Warner* (2006, Calif. Supreme Court).

For Segment B: Legal Taxonomy

Review Barron's iii-ix, the Table of Contents. UCLA Law School Curriculum. QR: Old Testament, Book of Exodus, Chaps 21-22; Code of Hammurabi.

Suggested supplemental reading: *Protecting the Righteous Employer Against Abusive Sexual Harassment Claims* (R. Chodos, 1995); Thomas Aquinas, *Treatise on Law*, pp. 11-16, on the various “kinds” of law.

Writing Assignment: 2 pages or less.

Choice 1: The year is 2025. You have been sent by the United States government as an emissary to a newly discovered planet named "Druckeria" to help the inhabitants draft a new set of laws. Your advance staff has told you that the planet is home to two distinct races, each with a roughly equal population of 10 million (for a total of 20 million). The races are distinguishable by the color of their feet: one race has blue feet, and the other has green feet. Otherwise they seem the same: white skin, totally hairless, about six feet tall.

A deep enmity exists between these two races because, about 5000 years earlier, the BlueFoot king raped the GreenFoot queen - and neither he nor his descendants ever apologized. There were no offspring of this unfortunate union - a fact which has allowed the two races to flourish without any detectable signs of intermarriage. Another source of hostility between the races has to do with the natural resources on Druckeria: just one river runs through the planet, whose origin is in the northern mountains; and it winds its way through the planet's inhabited regions, passing successively through lands occupied by GreenFeet and BlueFeet. The arable land of Druckeria lies entirely within the BlueFoot regions, while all the minerals lie beneath the surface of the GreenFoot regions.

The Druckerians have never had any written laws, and this is part of the problem. The US government has sent you here because reports have come back from some NASA missions suggesting that Druckeria has enormous abiotic petroleum reserves. There are also reports that the Druckerians grow large amounts of marijuana and that in fact, marijuana and its derivatives form a major part of their diet. Because of this, they have never developed a petroleum industry.

As of the date of your arrival, the two races are engaged in minor skirmishes of the sort that have marred their history for generations: incursions by one race into the other's territory followed by plundering of the other's resources. Partly as a result of these constant skirmishes, the whole planet is mired in poverty and the only inhabitants with any leisure or resources at all are the royal families of each race. But these royal families do not have any real power: they are charismatic leaders of their people, but they have no authority to tax or to wage war.

You are about to address your staff for the first time after arriving at Druckeria, and you want to start the whole legislative project rolling. You have to prepare a 2-page memo, double-spaced, outlining the work to be done. Obviously your memo will be just a very broad outline: you may simply want to ask some questions, or you may want to list the areas of legislation that you believe will be needed. Please give me a copy of your memo once you have prepared it.

Choice 2: You may find Choice 1 totally impossible and ridiculous even to contemplate. In two pages or less, please say why you think so.

Thinking Assignment: Because we are flying over a terrain in this session, the thinking assignments are labelled “Discuss” and are imbedded in the outline below.

Segment A: Law’s Impact on the Enterprise

1. Intra-Enterprise

Human Resources Law

Workplace regulation

Discrimination issues

Employee Benefits / ERISA

The employee contract

Intellectual property, the freedom to compete

Legislative goals: avoid gross imposition on workers; protect workers; safety; minimum wage standards. Facilitate pursuit of ethical goals?

Ethical goals: Self-expression? Finding meaning? Security? Education/self-improvement?

Discuss: (1) The term "human resources": its history and its political and social implications. (2) Men and machines/men as machines. (3) Guest worker programs and discrimination policies.

Governance

The Board of Directors

Management

Financial governance

Legislative goals: Protect minority shareholders. Protect majority shareholders? Protect purchasers of shares. Relationship between the Board and the Management.

Ethical goals: Encourage corporate "social responsibility"? Encourage efficiency/productivity/profitability? Promote personal development of the work force? of the individuals in the work force?

Discuss: (4) The purpose of governance. Governance in America versus Europe, ... versus Japan. (5) To whom are the Directors answerable? What about the Hewlett-Packard case (spying on board members)? (6) The corporation as a "mini-democracy": one share ... one vote.

2. Extra-enterprise

Contract Law

Suppliers, Partners, Independent Contractors, Agents.

Contracts/Consumer law

Customers: warrantees, form contracts, contracts of adhesion.

Tort law

Negligence. Product defects.

Property Law

Leases. Intellectual Property

Governmental Regulation

Local - building codes, parking, permits

State - regulation, employment law, consumer law,

Federal - Markets, interstate commerce, environmental

White collar crime;

Taxation

Discuss: (7) The basic notions of contracts. Remedies. SUPP *The Partnership of the Cat and the Mouse* (MP3) FidDut 1514-1520. (8) Consumer law. Contract vs. Tort. (9) Sales vs. Licenses.

3. **Competition - Enterprise to Enterprise.**

Employee's right to compete

Unfair competition

The tort of interference with prospective economic advantage

Monopolies - de facto, de jure. Antitrust law.

Discuss: When does the duty of loyalty, once arisen, end?

Segment B: The taxonomy of laws

1. The 1st-year law curriculum in America
2. The study of law in other countries
3. Classifications of Law through the ages - a taste.

Hammurabi
Old Testament
Rabbinic
Church
Medieval
Early Modern
Modern

*** END OF SESSION TWO ***

Session 3 (April 12th): RULES VS. PRINCIPLES; AMBULATORY RESPONSIBILITY AND THE ENTERPRISE AS AN ETHICAL ACTOR

Session Objectives:

1. We begin to think about how “rules” differ from “principles”, by studying a few examples in contemporary law.
2. We take a look at what we mean by “ethical responsibility” and examine some ways in which responsibility moves from a particular individual actor to his associates and to the groups in which he is a member.

Reading Assignment: On Statutes of Limitation, Barron’s, pg. 90, FidDut 7:10-7:15, pp. 467-478; *Jack and the Beanstalk* [FidDut pp 1508-1514]. on Covenant of Good Faith and Fair Dealing, FidDut Secs. 6:b, pp. 405-440. Read case summaries of *Jones v. Kelly* (1929) [FidDut 812-813]; *Eads v. Marks* [FidDut 922-923].

On Ambulatory Responsibility: FidDut Secs 1:31-1:32 [pp 72-80]. Barron’s 283-289. Bovens, Chap. 2, 9-21; Chaps. 5 and 6, pp. 45-92; *The Shakedown* (Bribery in foreign lands).

Writing Assignment (choose either one):

Question 3a: What is the difference between a “rule” and a “principle”? Please articulate a clear example of something that is a rule but not a principle; and then articulate a clear example of something that is a principle but not a rule.

Question 3b: Is it ever fair to punish a group because of the behavior of less than all of its members? Does your answer depend on how many are “less than all”?

Thinking Assignment: Are either “rules” or “principles” eternal, or do they change as circumstances change? What role does “custom” play in the formation and development of law? Read what Aquinas thought, *Treatise on Law* pp. 105-116 [Supp/MP3]. In *The Shakedown*, what is the difference between the payments to the Phone Company and the proposed payments to Simonenko? In that case, is there any difference between the responsibility of the company and the personal, individual responsibility of Zhuk himself?

SEGMENT A: Rules vs. Principles

- A. Reductionist attempts at lawmaking
 - 1] Historical view
 - 2] Modern codes

- B. Three specific “rules”
 - Statute of Frauds
 - Statutes of Limitation
 - Exempt/Non-exempt employees
- C. Contract/Tort distinction
 - Covenant of Good Faith and Fair Dealing
 - Jones v. Kelly. Eads v. Marks - case summaries*

SEGMENT B: AMBULATORY RESPONSIBILITY AND THE ENTERPRISE

- A. Historical: tribes, families, peoples, nations
- B. Different kinds of ambulatory responsibility
 - Joint tortfeasor
 - Vicarious liability
 - Respondeat Superior [Barron’s pp 284-285]
 - Strict Liability
 - Conspiracy
 - Enterprise liability - RICO
- C. The Enterprise as an Ethical "Actor" or "Agent".

Discuss the readings in Bovens, Chaps. 2, 5 and 6, re the enterprise as an ethical actor.

*** END OF SESSION THREE ***

Session Four (April 19th): Fiduciary Duties; The Psychological Dimension of Law

We can identify two major intellectual developments in the early decades of the 20th century that revolutionized the way we see ourselves: psychology and sociology. Psychology showed us a self behind the curtain - the world of subconscious "drives" and motives, things that cast our actions in a completely different light from the narcissistic and simplistic views of the late 19th Century. The reason Freud is said to have been a pioneer is that he opened our eyes to this formerly hidden dimension of ourselves.

Sociology on the other hand, focussed on groups - on their dynamics, how they form and grow and die, what keeps them together.

The sociologist views people as members of groups while the psychologist views them as complex individuals who, although their inner dynamics may have been greatly influenced by other individuals and by groups, are still individuals.

These two ways of looking at ourselves were in competition in the early decades of the last century. But after World War II, certain economic developments gave a big "boost" to sociology: the rise of the media, and the post-industrial escalation and institutionalization of business activity in general. As the media became more widespread their audience became less local and they found themselves forced to present a world of "types" and "groups" and "communities": individual people, with all their subtle, complicated idiosyncrasies were too complicated to present. The only exceptions were celebrities and even they - as Drucker pointed out (Autobiography of a Bystander, Intro.) are less "people" than they are "personae".

Businesses too became progressively depersonalized, and every customer came to be seen as a representative of a "type" of customer - rather than as an individual. Peter Drucker remarked in several places on the fact that most people, in the last half of the 20th Century, came to work in institutions - rather than as "loners". But not just workers: customers and suppliers, too; and soon, everyone in the whole world sees himself as a member of a group - an ethnic group, a religious group, an economic group, a racial group, even a national group.

Whether all this is to be seen as a beneficial increase in "efficiencies of scale" or as a dangerous tendency towards totalitarianism is an open question: there is no question that it has happened. And these trends have had a great

impact on the law. We will have time to explore the rise of intellectual property law and of consumer law, and of class actions, in sessions 5 and 6.

But in this session, we will survey the one area where the "psychological" view of the individual prevails: the law of fiduciary duties.

Reading Assignment:

Segment A: Barron's 412-430. In *FidDut*, Tbl of Contents, pp. vi-xiv; *Wolf v. Superior Court (Disney)* - 1st case; summary of 2d case. Duty to Account: *FidDut*, pp. 130-137 [the *res*]; 185-208 [duty to account]; 487-491 [presumptions]. 335-355 [tracing]. *Purdy v. Johnson* (1917) summary, *FidDut* 775-777. *San Jose Construction v SBCC*.

Segment B: *The Three Who Were Betrayed*, in *FidDut*, pp. 1520-1541. Erich Fromm, in *Escape From Freedom*, Chap 1, pp. 17-38; QR Chap. V, "Mechanisms of Escape," pp. 157-230.

Writing Assignment:

Question 4a: In any given case, how will the outcome change if we do or do not recognize a "fiduciary duty", as opposed to a "contract obligation" or a "tort obligation"?

Question 4b: Are corporate governance scandals like Enron and Worldcom, the result of people breaking the rules, or the result of bad rules?

Thinking Assignments:

1. Does the statute of limitations play any role in the case of *The Three Who Were Betrayed*?
2. Was it proper for the judge to concern himself at all with the feelings of betrayal that he mentioned? Or are such feelings beside the point for the law?
3. For Segment B, please review and be prepared to discuss the 8-part outline below of parallels between law and psychology.

Segment A: Fiduciary Duties

- A. Anatomy of a legal duty
- B. Fiduciary Duty as Midway between Contract and Tort
- C. Trust as giving rise to a duty
Vulnerability

- Fiduciary's possession of the res
- D. Presumptions.
- E. Corporate Settings

Segment B: Law and Psychology Share Common Concerns

We often tend to think of lawsuits as something similar to sports arenas: combatants vie for victory, playing by the rules only insofar as it is necessary for them to do so. We presume that if there were no umpires, they would act completely differently. But the truth is that many lawsuits are brought because someone feels injured. Particularly where individuals are suing, the lawsuit tends to be an expression of an underlying ethical/emotional disturbance, and the function of the court is to resolve this disturbance in a completely satisfying way.

It is useful to think of law and psychology as sister disciplines, each dealing with the same eight underlying issues but in a different way. The issues are: Boundary; Honesty/Integrity; Power and Authority; Anger; the sense of Victimization; the notion of Letting Things Go; Risk and uncertainty; and the sense of Ritual.

Here is an overview of the way these underlying issues make themselves felt in each field:--

OUTLINE OF PARALLELS

1. BOUNDARY

Psychology

The sense of ego; self-esteem; relationship with family and larger groups; clarity about social and moral responsibility; "splitting".

Law

The sense of entitlement; privacy; taking and discharging legal responsibility; property; rights which accrue to members of groups as opposed to individuals.

2. HONESTY/INTEGRITY

Honesty is a relationship between our words and the facts. Integrity is a relationship between our words, the facts, and our actions.

Psychology

Integrity as a fundamental psychological value. -- Concepts of "consistency", "owning" one's past conduct and taking responsibility for it; owning one's future self and taking responsibility for it. [Josiah Royce]

Law

The purpose of the law is to take the right action for the facts as found. The law of evidence deals with the evaluation of honesty; the substantive law deals with integrity. - The attitude towards precedent and the doctrine of stare decisis. Giving audience to all voices and considerations. The published judicial opinion

3. POWER AND AUTHORITY

Psychology

Illegitimate power and irrational authority (Erich Fromm) versus rational power and legitimate authority. Degrees of power: "empowerment" and "disempowerment"; dignity in the presence of power; child/adult roles.

Law

Sources of law. Sources of the court's power: the basis of its legitimate authority. Codes of judicial conduct. The court as parent. Contemporary attitudes towards individuals playing authoritative roles.

4. ANGER

Psychology

Legitimate and illegitimate anger. Destructive versus constructive anger. The target of anger: displaced anger. The purpose of anger. The conscious and unconscious expressions of anger

Law

Law as a socially sanctioned system for the expression and resolution of anger. Retribution in the criminal law. The "angry" lawyer, and the place given to anger in our legal procedures.

5. THE SENSE OF VICTIMIZATION

Psychology

The focus on the victim versus the focus on the perpetrator. The willingness to play the role of victim. The courage not to be a victim. The rehabilitation of the victim. The notion of "victim's rights".

Law

The rights of the victim. The role the victim should play in determining punishments. the role the victim should play in fashioning legislation and social policy. The function of money damages in civil suits.

6. LETTING THINGS GO

Psychology

... versus "sticking" to them. The Japanese notion of "sappari" versus the English, "detachment". Working through suffering as opposed to denying or evading it. The presence of the past

Law

Statutes of limitation and "bright lines" in the law. The psychological effects of bringing a lawsuit and the extent to which the court should concern itself with them.

7. RISK AND UNCERTAINTY

Psychology

The healthy personality can tolerate risk: the fearful one cannot. The healthy risk-taker versus the gambler. Accepting the unfavorable outcome

Law

Allocations of risk. Insurance and the law of indemnity. Contract damages versus tort damages. The limits of personal choice (voluntary servitude, waivers of fundamental rights)

8. THE SENSE OF RITUAL**Psychology**

"Language games", "roles", "scripts". Repetitions; the role of stylized affirmation. Feeling tone in human relations and whether the sense of ritual deepens it. The relationship between ritual and myth. The degree to which ritual is necessarily "mindless" and the degree to which it heightens consciousness.

Law

Legal procedure. The forms of action and recognized story lines. Rituals of trial and judgment. The appropriate place of ritual in the courtroom. Alternative systems of procedure.

**** END OF SESSION FOUR ****

Session 5 (April 26th): INTELLECTUAL PROPERTY; THE SOURCES OF LAW

Objectives: (1) To make the student aware of the reach of intellectual property law - which is a relatively new area of the law. (2) To provoke discussion about the sources of law's legitimacy.

Segment A: Intellectual Property

Introduction: The rise of the personal computer (late 1970s) followed by the rise of the internet, (Netscape - 1993) made it possible to copy and distribute things without printers, without paper, and without physical contact between publisher, sales person, and consumer. The personal computer, which started out its life as a computational tool, morphed into a database tool, then, in the late 1990s, into an entertainment center, and in the early years of the new millenium, into a constantly available communications center.

Publishers of entertainment products - mainly music and videos - started lobbying the Congress for increased protection. The 27-year life of a copyright has now been extended to 120 years plus in some cases [see Coyright Term chart]. At the same time, the ability of publishers to monitor the use of their products has been vastly increased by computer and internet technology. Unlike the person who buys a copy of a printed book and is free to use it as he likes after that - provided only that he does not copy it, or counterfeit it - the person who buys a computer program or a work of creative originality on the internet gets just a "license": he is not the owner; there is no "first copy". The results of all this have been a frenzy of lawmaking coupled with an increasingly tolerated invasion of the desktop - which used to be the computer owner's private space.

Patent protection too has been extended to software and to business processes, and there is constant pressure to authorize the patenting of other "inventions".

Reading list:

Segment A: The Economic Theory of Property in Landes and Posner, pp. 11-36.
Drucker, "Emergence of Knowledge Society." QR Lawrence Lessig, in Code and Other Laws of Cyberspace, Chap 10, "Intellectual Property" at pp. 122-141. In Barron's, pp. 550-558.
ProCD v. Zeidenberg 86 F.3d 1447 (7th Circ. 1996), the "shrink-wrap license" case.

Writing Assignment:

Topic 5a. The law of property is economically motivated, and justifiable, if at all, only on economic grounds. True or false, and why?

Topic 5B: The analogy between physical property and intellectual property is ultimately not convincing. True or false, and why?

Thinking Assignment: Please be prepared to discuss the issues in the following outline.

Segment A: Intellectual Property

- A. The "Information society"
The "knowledge worker"
The commoditization of
attention
knowledge
- B. The basic categories of Intellectual Property
Copyright
Trademark
Patent
Trade Secret
- C. The impact of technology on IP
Copying
Imitating
“Publishing”
The Granularity of Innovation
- D. Trade Secrets and Employee Relations

Nondisclosure agreements
The right to compete
What is a “trade secret”?

Segment B: Sources of Law

Reading Assignment for Segment B: Human Rights as Idolatry, in Michael Ignatieff, *Human Rights*, pp. 53-98. *Introduction*, pp. 3-14, in *Legality and Legitimacy* by Carl Schmitt.

By what right does anyone make a law? Who gave anyone the authority to make laws over other people? How do we validate laws? what makes us believe in their legitimacy?

Different answers have been given to this question down through the ages, and are still be given now in different places around the world:--

Divine law

Royal law

Common law

Sources of law: constitution, legislation, court rulings, custom/mores

Note: At the end of this session, we will take time to divide into groups in preparation for the mock trial, and the instructor will hand out the “trial preparation packets”. You will have two weeks to prepare your case; and you can bring any questions you may have to class during Session 6.

****** End of Session 5 ******

Session 6 (May 3d): Procedure; Managing the Projection of the Enterprise on the Legal Plane

Reading assignments: *Mary's Case*, narrative of a case -- relates to the "feel" of the procedure, and to the relationship between law and psychology.

Murphy v. Click 'N Go, appellate case - relating to arbitration agreements. and contracts of adhesion.

Tamar Frankel, in Trust and Honesty, Chap. 9, "The Shift From Professions to Businesses", pp. 136-151. Joseph Vining, in The Authoritative and the Authoritarian, Chap 5, "Authenticity," pp. 41-59.

CCP Secs. 638 and 639 [reference proceedings], 1280 ff. [arbitration]

Barron's 49-67. FidDut 479 - 494.

Writing Assignment:

Some people criticize the "alternative dispute resolution" industry as a way around the legal system which is available only to the wealthy. They say it tends to undercut the standard system of public courts, and that it allows for kinds of secrecy and privacy that are inappropriate in a democracy. What do you think? And why?

Thinking assignment:

What is an "independent and un-biased" judge? What is an "independent and un-biased" juror? What is it to have "an open mind" about a case?

A. LEGAL PROCEDURE(S)

A. Life History of a Lawsuit

Pleading. Discovery. Motions. Trial. Judgment. Appeal(s).
Civil. Class Action. Criminal

B. People involved

in-house lawyers
outside lawyers/ law firms.
Transformation of the legal profession into a business.
Bureaucratization of the judicial function.
Inside Witnesses: Persons most knowledgeable

- C. Gathering Evidence
 - Internal documentary. Federal Rules/Electronic discovery
 - External - through legal process
 - Presumptions rebuttable and irrebuttable.
 - Burdens of proof.

- D. Alternative Dispute Resolution Procedures
 - Mediation
 - Arbitration
 - Judicial/Private
 - Binding/Non-binding

SEGMENT B: MANAGING THE ENTERPRISE'S PROJECTION ON THE LEGAL PLANE

- A. Monitoring Compliance
- B. Appraising Risk
- C. Minimizing Risks
- D. Relationships

****** End of Session 6 ******

Session 7 (May 10th): Mock Trial; Revisiting the Inventory of Preconceptions and Attitudes

This session will consist mainly of the mock trial. If we have time left over (which is doubtful), we will use it to revisit the list of “preconceptions” we considered in Session One.

No special reading assignment.

No special writing assignment.

Thinking assignment: Be prepared for your role in the mock trial!
