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Chapter 1
Legal Heritage and the Information Age

What is the meaning of "It's the law"?

I. Teacher to Teacher Dialogue

One of the most common dilemmas facing instructors of business law is the issue of topic choice. By the very nature of the subjects we teach, the breadth of materials is so wide that choosing what to focus on in the limited classroom time we have with our students can be a most daunting task. This problem is especially complicated when the topics we are dealing with are all of deep interest and can stand alone as separate courses.

In this chapter, for example, we are asked to introduce students to topics ranging from the definitions and purposes of law to how our system affects business decisions, to some of the most important provisions found in the United States Constitution. Any one of these subparts can provide the raw materials for an entire course at the law school level. Our job must start with a self-evident, but sometimes forgotten, point: this is *not* law school. We are here not to train future lawyers but rather students who need to know enough about these issues to recognize that they *are* issues. The technical legal problems they may be facing later will ultimately need to be resolved using law and other practitioners.

The plus side of this dilemma is that because we have such a diverse menu to select from, we are able to pick and choose our areas of emphasis. For example, if your particular teaching and research interests lie in the area of ethics and the schools of jurisprudential thought from which they are derived, then by all means, run with it! Rather than trying to be all things to all people, it is better to focus your efforts on your strengths. This does not mean that you can short-change the other material. All key objectives of the chapter should be fully outlined and incorporated in both your lecture and materials outline. But if you have a particular interest and expertise in, for example, the Law and Economics School of jurisprudential thought, then use them as focal points of comparison in the evolutionary process that seeks to distinguish the older schools of jurisprudence from newer approaches to these issues. In any event, remember that philosophical studies of what law is and what its role is in the larger scheme of things have always posed questions virtually impossible to answer. This chapter represents attempts by great thinkers to answer the unanswerable. It would be far too presumptuous for us to think that we can teach, in a few hours, what the great philosophers of the world have tried to do over hundreds of years. Perhaps this is an early lesson in what wisdom is really all about: the more we know of history, the more we know of our own limitations. If we can get that point across, the course is off to a good start!

II. Chapter Objectives

1. Define *law*.
2. Describe the flexibility of the law.
3. List and describe the schools of judicial thought.
4. Learn the history and development of American law.
5. List and describe the sources of law in the United States.
6. Describe the doctrine of *stare decisis*.
7. Describe how existing laws are being applied to the digital environment and how new laws are being enacted that specifically address issues of the information age.
8. Learn what critical legal thinking is and how to apply it to analyzing legal cases.

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9. Learn how the material, cases, and lessons of this book will apply to your future career.

III. Key Question Checklist

- What is law?
- Once you have identified the kind of societal expectation of behavior, what standard of behavior is most appropriate? Does law codify the standard? Do one or more of the schools of jurisprudence support the standard?
- What are the sources of law in the United States?
- What bodies of law and/or ethical standards apply?
- How would you apply these standards to the facts?

IV. Chapter Outline

The first chapter objective is an introduction to the historical underpinnings of jurisprudential thought. This would include not only the functions of law listed in the summary, but also an early opportunity to introduce the role of ethics based on the various schools of jurisprudence discussed.

Introduction to Legal Heritage and the Information Age

Businesses that are organized in the United States are subject to its laws. They are also subject to the laws of other countries in which they operate. Businesses organized in other countries must obey the laws of the United States when doing business here. In addition, businesspeople owe a duty to act ethically in the conduct of their affairs, and businesses owe a responsibility not to harm society. This chapter discusses the nature and definition of law, theories about the development of law, and the history and sources of law in the United States.

What Is Law?

- Law consists of rules that regulate the conduct of individuals, businesses, and other organizations within society.
- It is intended to protect persons and their property against unwanted interference from others.
- Law forbids persons from engaging in certain undesirable activities.
- It is often, but not always, fair.
- Law must be flexible.

Definition of *Law* – According to Black's Law Dictionary, "Law, in its generic sense, is a body of rules of action or conduct prescribed by controlling authority, and having binding legal force. That which must be obeyed and followed by citizens subject to sanctions or legal consequences is a law."

Functions of the Law

- *Keeping the peace* – e.g., making certain activities crimes
- *Shaping moral standards* – e.g., enacting laws that discourage drug and alcohol abuse
- *Promoting social justice* – e.g., enacting statutes that prohibit discrimination in employment
- *Maintaining the status quo* – e.g., passing laws preventing the forceful overthrow of the government
- *Facilitating orderly change* – e.g., passing statutes only after considerable study, debate, and public input
- *Facilitating planning* – e.g., well-designed commercial laws allow businesses to plan their activities, allocate their resources, and assess their risks

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- *Providing a basis for compromise* – e.g., approximately 95 percent of all lawsuits are settled prior to trial
- *Maximizing individual freedom* – e.g., the rights of freedom of speech, religion, and association granted by the First Amendment to the U.S. Constitution

Fairness of the Law – Overall, the United States legal system is one of the most comprehensive, fair, and democratic systems of law ever developed and enforced. However, some misuses and oversights of our legal system, including abuses of discretion and mistakes by judges and juries, unequal applications of the law, and procedural mishaps, allow some guilty parties to go unpunished.

Flexibility of the Law – U.S. law has evolved and grown as a reflection of changes in society, technology, and commerce. The same general principles that established the foundation of our nation still exist; however, legal modifications exhibit the flexibility and maturity of our system to be able to adapt to the changing commercial, social, and ethical environments.

Critical Legal Thinking: *Brown v. Board of Education*
This section discusses the United States Supreme Court's rejection of the "separate but equal" doctrine that endorsed separate schools for black children and white children.

Schools of Jurisprudential Thought

- *Natural Law School* – Postulates that law is based on what is "correct" and that law should be based on morality and ethics
- *Historical School* – Believes that law is an aggregate of social traditions and customs
- *Analytical School* – Maintains that law is shaped by logic
- *Sociological School* – Asserts that law is a means of achieving and advancing certain sociological goals
- *Command School* – Believes that law is a set of rules developed, communicated, and enforced by the ruling party
- *Critical Legal Studies School* – Maintains that legal rules are unnecessary and that legal disputes should be solved by applying arbitrary rules based on fairness
- *Law and Economics School* – Believes that promoting market efficiency should be the central concern of legal decision making

Global Law: *Command School of Jurisprudence of Cuba*
In 1959, Fidel Castro led a revolution in Cuba. What followed was a communist/socialist government that expropriated and nationalized much private property, and installed a command economy and system of jurisprudence. Economic productivity fell substantially in Cuba as a result, with major shortages of essential goods and services. Cuba is now permitting limited free-market measures, but approximately 90 percent of workers are still government employees.

History of American Law
When the American colonies were first settled, the English system of law was generally adopted as the system of jurisprudence. This was the foundation from which American judges developed a common law in America.

English Common Law

- Law developed by judges who issued their opinions when deciding a case
- The principles announced in these cases became *precedent* for later judges deciding similar cases
- The English common law can be divided into cases decided by the:

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- Law courts
- Chancery (Equity) courts
- Merchant courts

Landmark Law: *Adoption of English Common Law in the United States*
Common law is discussed in this section. In the United States, law, equity, and merchant courts have been merged. Most U.S. courts permit the aggrieved party to seek both legal and equitable orders and remedies.

Global Law: *Civil Law System of France and Germany*
Romano-Germanic civil law system is the model for countries adopting civil codes. The Civil Code and the parliamentary statutes that expand and interpret it are the sole sources of law in most civil law countries. The adjudication of a case is the application of the code or the statutes to a particular set of facts. In some civil law countries, court decisions do not have the force of law. This is in contrast to Anglo-American common law, where laws are created by the judicial system and through congressional legislation.

Sources of Law in the United States
In the more than 200 years since the founding of the United States and the adoption of the English common law, U.S. lawmakers have developed a substantial body of law. The sources of modern law in the United States include the federal and state constitutions, federal treaties, federal and state statutes, local ordinances, executive orders, regulations and orders of administrative agencies, and judicial decisions.

Constitutions
- ❖ The U.S. Constitution establishes the federal government and enumerates its powers
- ❖ Powers not given to the federal government are reserved to the states
- ❖ State constitutions establish state governments and enumerate their powers

Treaties – The president, with the advice and consent of the Senate, may enter into treaties with foreign governments.

Federal Statutes – Statutes are written laws that establish and enforce certain courses of conduct. Congress enacts federal statutes, while state legislatures enact state statutes. Federal statutes are organized by topic into code books. This is often referred to as codified law. Federal statutes can be found in these hardcopy books and online.

State Statutes – State legislatures enact state statutes. Such statutes are placed in code books. State statutes can be assessed in these hardcopy code books or online.

Contemporary Environment: *How a Bill Becomes Law*
The U.S. Congress is composed of two chambers, the U.S. House of Representatives and the U.S. Senate. Thousands of bills are introduced in the U.S. Congress each year, but only a small percentage of them becomes law. First, a bill must be sponsored by a member of the U.S. House of Representative or the U.S. Senate. It is then referred to the appropriate committee for review and study. Bills that receive the vote of a committee are reported to the full chamber, where they are debated and subjected to vote. If the bill receives a majority vote from the full chamber and a subsequent second chamber, it is then forwarded to the U.S. president. The bill becomes law when it is signed by the president.

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Ordinances – State legislatures often delegate lawmaking authority to local government bodies, including cities and municipalities, counties, school districts, water districts, and such. These governmental units are empowered to adopt ordinances. Ordinances are also codified.

Executive Orders – The executive branch of the government (the U.S. president) is empowered to issue executive orders.

Regulations and Orders of Administrative Agencies – Administrative agencies are created by the legislative and executive branches of government. They may adopt administrative regulations and issue orders that regulate the conduct of covered parties.

Judicial Decisions – When deciding individual lawsuits, federal and state courts issue judicial decisions. In these written opinions, a judge usually explains the legal reasoning used to decide the case. These opinions often include interpretations of statutes, ordinances, and administrative regulations and the announcement of legal principles used to decide the case.

Priority of Law in the United States – The U.S. Constitution and treaties take precedence over all other laws, followed by federal statutes and federal regulations. Federal law takes precedence over conflicting state law, which has precedence over local laws. Similarly, state constitutions take precedence over state statutes and regulations.

Doctrine of Stare Decisis – Based on common law tradition, past court decisions become precedent for deciding future cases. Lower courts must follow the precedent established by higher courts. All federal and state courts in the United States must follow the precedents established by U.S. Supreme Court decisions. Adherence to precedent is called the doctrine of *stare decisis* ("to stand by the decision"). The doctrine of *stare decisis* promotes uniformity of law within a jurisdiction, makes the court system more efficient, and makes the law more predictable.

Law in the Information Age – The electronic age arrived before new laws were written that were unique and specific for this environment. Courts have applied existing laws to the new digital environment by requiring interpretations and applications. In addition, new laws have been written that apply specifically to this new environment. The U.S. Congress has led the way, enacting many new federal statutes to regulate the digital environment.

Critical Legal Thinking
Critical thinking in law courses, referred to as critical legal thinking, is significant because in the law there is not always a "bright-line" answer. The need for critical thinking is especially important in solving legal disputes.

Defining Critical Legal Thinking
Critical legal thinking is a method of thinking that consists of investigating, analyzing, evaluating, and interpreting information to solve a legal issue or case.

Socratic Method – The Socratic method is a process that consists of a series of questions and answers and a "give-and-take" inquiry and debate between a professor and students.

IRAC Method – The IRAC method is used to examine a law case. IRAC is an acronym that stands for issue, rule, application, and conclusion. The process is dictated by four questions:
1. (I) What is the legal *issue* in the case?
2. (R) What is the *rule* (law) of the case?
3. (A) What is the court's *analysis* and rationale?

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4. (C) What was the *conclusion* or outcome of the case?

V. Key Terms and Concepts

- Administrative agencies—Agencies (such as the Securities and Exchange Commission and the Federal Trade Commission) that the legislative and executive branches of federal and state governments are empowered to establish.
- Administrative rules and regulations—Used by administrative agencies to enforce statutes. These rules and regulations have the force of law.
- Analytical School—School of jurisprudence maintaining that the law is shaped by logic.
- Bills—Many bills are introduced each year in the U.S. Congress, from which only a few eventually become law.
- *Brown v. Board of Education*—A landmark Supreme Court case in which a unanimous decision reversed prior judicial precedent and held that the "separate but equal" doctrine violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The decision led to the banning of school segregation.
- Chamber—The U.S. Congress is composed of two chambers, the U.S. House of Representatives and the U.S. Senate.
- Civil Law—A code of laws applicable to Romans. Also known as the Romano-Germanic civil law system.
- Code book—Federal statutes are organized by topic into code books.
- Codified law—Federal statutes that have been organized into code books.
- Command School—School of jurisprudence that believes that the law is a set of rules developed, communicated, and enforced by the ruling party rather than a reflection of the society's morality, history, logic, or sociology.
- Committee—Bills from either of the two chambers of the U.S. Congress are reviewed and studied by an appropriate committee. The committee may reject the bill, report it to the full chamber for a vote, not act on it, or send it to a subcommittee for further study.
- Conference committee—A committee made up of members of both the U.S. House of Representatives and the U.S. Senate.
- Constitution of the United States of America—The supreme law of the United States.
- Court of Chancery (equity court)—Court that granted relief based on fairness.
- Critical Legal Studies School—School of jurisprudence that proposes legal rules are unnecessary and are used as an obstacle by the powerful to maintain the status quo.
- Critical legal thinking—A method of thinking that consists of investigating, analyzing, evaluating, and interpreting information to solve a legal issue or case.
- English common law—Law developed by judges who issued their opinions when deciding a case. The principles announced in these cases became precedent for later judges deciding similar cases.
- Executive branch (president)—A branch of the U.S. government that has the power to enforce the law.
- Executive orders—An order issued by a member of the executive branch of the government.
- Federal statute—Written laws, enacted by the U.S. Congress, that regulate foreign and interstate commerce.
- French Civil Code of 1804 (the Napoleonic Code)—One of the models used by countries that adopted civil codes. In most countries adhering to a civil law system, the civil code and parliamentary statutes are the sole sources of law.

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- German Civil Code of 1896—One of the models used by countries that adopted civil codes. In most countries adhering to a civil law system, the civil code and parliamentary statutes are the sole sources of law.
- Historical School—School of jurisprudence that believes the law is an aggregate of social traditions and customs that have developed over the centuries.
- IRAC method—A method used to examine a law case. "IRAC" stands for issue (What is the legal issue in the case?), rule (What is the law pertaining to the case?), application (What is the court's analysis and rationale?), and conclusion (What was the conclusion or outcome of the case?).
- Judicial branch (courts)—A branch of the U.S. government that has the power to interpret and determine the validity of the law.
- Judicial decision—A decision about an individual lawsuit issued by federal and state courts.
- Jurisprudence—The philosophy or science of law.
- Law—That which must be obeyed and followed by citizens, subject to sanctions or legal consequences; a body of rules of action or conduct prescribed by a controlling authority and having binding legal force.
- Law and Economics School (Chicago School)—School of jurisprudence that believes that promoting market efficiency should be the central goal of legal decision making.
- Law courts—Courts that developed and administered a uniform set of laws decreed by the kings and queens after William the Conqueror; in this system of jurisprudence, legal procedure was emphasized over the particular merits of a case.
- Law Merchant—Rules based on based on common trade practices and usage that were applied by merchants around England and Europe, during the Middle Ages, to solve commercial disputes. Also known as the "law of merchants."
- Legislative branch (Congress)—A branch of the U.S. government that has the power to enact the law.
- Merchant Court—The separate set of courts established to administer the "law of merchants."
- Moral theory of law—Theory proposing that the law should be based on morality and ethics.
- Natural Law School—School of jurisprudence postulating that the law is based on what is "correct."
- Order—A decision of an administrative agency.
- Ordinance—Laws enacted by local government bodies, such as cities and municipalities, counties, school districts, and water districts.
- Precedent—A rule of law established in a court decision. Lower courts must follow the precedent established by higher courts.
- Romano-Germanic civil law system—Legal system dating back to 450 BCE when Rome adopted the Twelve Tables, a code of laws applicable to the Romans. Commonly known as civil law.
- Sociological School—School of jurisprudence asserting that the law is a means of achieving and advancing certain sociological goals.
- Socratic method—A process that consists of a series of questions and answers, and a give-and-take inquiry and debate between a professor and students.
- *Stare decisis*—Latin for "to stand by the decision." Adherence to precedent.
- State constitution—Constitution that establishes the legislative, executive, and judicial branches of state government and the powers of each branch.
- State statute—Statute enacted by state legislatures and placed in code books.

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- Statute—Written law enacted by the legislative branch of the federal and state governments that establishes certain courses of conduct to which covered parties must adhere.
- Subcommittee—Studies bills sent by the committee. After review, the subcommittee may either let the bill expire or report it back to the full committee.
- Treaties—Compacts made between two or more nations.
- U.S. Congress—Branch of the government that creates federal law by enacting statutes.
- U.S. House of Representatives—One of two chambers of the U.S. Congress.
- U.S. Senate—One of two chambers of the U.S. Congress.

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Chapter 1

Legal Heritage and the InformationAge

Answer to Critical Legal Thinking Case

1.1 Fairness of the Law

Many students will react that the statute is unfair as it does not afford women equal status in the workplace. In light of today's standards, that position is well founded. However, it is a useful exercise to consider arguments for the opposite position in the context of the time period. In enacting such a statute, the legislature presumably entertained the view that women had special needs, were subject to certain weaknesses, and therefore the demands made on them had to be accommodated in the workplace. That these premises, i.e., special needs and presumed weaknesses, might be false does not necessarily preclude one from acting morally. Moralists might label this ignorance as excusable in that it is "invincible," i.e., an ignorance that cannot be destroyed or offers no moral reason for doing so. Of course, modern experience and knowledge require that we question these premises. It almost certainly would not be lawful today. Not only have the items relevant to the test of equal protection broadened under present constitutional interpretations, but also Title VII of the Civil Rights Act of 1964 prohibits any discrimination on the basis of sex in the "terms, conditions and benefits of employment." *W. C. Ritchie & Co. v. Wayman, Attorney for Cook Country, Illinois*, 91 N.E. 695, 1910 Ill. Lexis 1958 (Supreme Court of Illinois)

Answer to Ethics Case

1.2 Ethics Case

The better case is made by the dissent. The law has not been progressive in this instance. It is likely that legislators entertained an unconscious premise that women should not be required to fight a war. This speculation might be supported by the fact that the majority of the Supreme

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Court summoned a technical legal point to justify their ruling. The Court held that Congress was the proper party to articulate the public policy that women should not fight at the front, thereby removing themselves from any further consideration of the substantive issue, i.e., whether equality was being served as a matter of fairness. *Rostker, Director of the Selective Service v. Goldberg*, 453 U.S. 57, 101 S.Ct. 2646, 1981 U.S. Lexis 126 (Supreme Court of the United States)