

Ethics and Employment Law Challenge by Ilse Hawkins

In making employment decisions, a manager must determine what is legally and ethically owed to a person or a group of employees “since with the conduct of business, human happiness or misery, is inextricably interwoven.”¹ The importance of incorporating an ethical analysis into the teaching of business law has been demonstrated by the willingness of several professors to wrestle with the teaching of these concepts as described in prior articles,² by the inclusion of an ethics chapter in many of the textbooks we use in our courses,³ and from the demands of the media that educational institutions, especially business schools, produce ethical leaders to reduce the scandals that can plunge employees and other stakeholders into financial distress at a minimum.⁴ Arguably, for the individual manager no decision is more important than choosing whom to hire and fire,⁵ and future managers must have the capability of anticipating not only the legality of their courses of action, along with the checklist and script provided by human resources, but also whether their decisions in several employment contexts can be justified from an ethical standpoint, the perspective that gives their judgments humanity.

Studies to determine awareness of ethical issues have been published in the *Journal of Legal Studies in Education* in addition to articles that enhance the study of law through ethical analysis.⁶ Several articles and textbooks have utilized scenarios to encourage students to apply ethical principles,⁷ and a behavioral analysis has been applied to analyze the conduct of those involved in unethical behavior disputing the concept that the business person will behave rationally.⁸ Typically, these scenarios do not require the student to address the legality of the issue at the same time.

While clearly one must be aware of an ethical dilemma to deal with it effectively, including avoiding an ethical problem, and utilizing the duty-based, rights-based, and utilitarian decision making models are important tools in analyzing the “many shades of grey”⁸ of ethical dilemmas, Mary Gentile, PhD., argues that business students need “preparation and practice for... hard, often risky, intricate values-based action.”⁹ The Ethics and Employment Law Challenge described in this paper is an effort to provide practice in value-based action. The challenge involves real decisions made in business, with the names of the actual parties disguised to motivate the students to analyze the legal and ethical issues, rather than just look up results on the internet.

Management necessarily involves making decisions that affect employees. Therefore, in an effort to encourage students to practice making difficult employment decisions and justifying their decisions legally and ethically, I adapted an exercise from the ethics bowl competition for undergraduates which is organized by the Association for Practical and Professional Ethics.¹⁰ At the ethics bowl, the students sit in teams at tables facing each other and engage in a discussion of the ethical issues. There are judges and a moderator who sit at a table between the two teams.

Because the professor for the course will probably need to act as the moderator, and since the professors who are acting as judges may not be lawyers, they should be provided with a summary of the anticipated legal arguments, which are included in Part II of this paper.

Students were assigned to teams, and they divide the preparation of the cases among the team members. The four employment cases included in Part II involved requests for concessions from unions,¹¹ a racial harassment suit disguised as sexual harassment,¹² executive compensation,¹³ and pharmacists' freedom of conscience.¹⁴ This last case is very controversial which many professors prefer to avoid discussing, and that is why the students decide who handles which case. It is also a great case for demonstrating when the law and an individual employee's morality may not coincide. Given the current controversy in the courts in a case on appeal, filed by the University of Notre Dame¹⁵ ethical courage requires that we not ignore the issue or engage in statements that do nothing to clarify the situation.¹⁶ However, it is also important that the judges recruited to assist the professor for the course, are not those who will score the students on the positions that they take rather than on the merits of the argument. Since the professors who have served as judges for our presentations thus far, have a background in ethical issues, it has not been necessary to provide them with a summary of anticipated ethical arguments, but they are given the ethical glossary to which the students may have contributed.

The first difficulty in preparing the students was to help them envision the process. I used the judges' training videos available online from the APPE¹⁷ and distributed the scoring sheets that we would be using to illustrate the differences between our process and that which we had just viewed.¹⁸ In the future, as we change the cases utilized, we can use video from our prior classes, with permission of course, so the students can see both the legal and ethical issues presented as opposed to only the ethical discussion. The preparation required also depends on the level of the class. There is no need to inform MBA students regarding the basics of communication. They know that while they may use notes, they need to be familiar enough with the material to make the argument without reading it. Sophomores may need to be told. Younger students also need to understand what constitutes an effective commentary on the other team's case, which can include recognizing the legal errors in the argument and inquiring whether the other team has considered a certain alternative or theory of ethics that was not discussed.

In addition, students need to be prepared for discussion of the ethical theories since they may not have studied any ethics or enrolled in a philosophy of ethics course. So I prepared a glossary of various ethical theories found in Appendix 1, which is probably an abomination to philosophers. The theories that are summarized are those included in most business law textbooks and/or those which students suggest, based on their interest in ethics or their past philosophy courses. In addition, depending on the class, they were asked to read Book 2 of

Aristotle’s *Nicomachean Ethics*¹⁹ and/or a chapter from *After Virtue*, by Alasdair MacIntyre, entitled “Justice as a Changing Virtue”²⁰ Students are then instructed that they must actually utilize at least one ethical theory to support a position that they take in the employment context.

They are permitted to argue profit maximization, but only if they also can rely on an additional argument to reach that same conclusion. They may argue other theorists not included in the summary, but the citation must be included in their written summaries of the legal or ethical analysis. They are also not permitted to argue that one party is forcing his or her ethical point of view on the other party described in the case because that argument can work for either party, and the weaknesses of such an argument were articulated long ago by Justice Oliver Wendell Holmes in his dissent in *Lochner v. United States*, 198 U.S. 45 at page 75, (1905) “the liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.”

Part II: The Assignment and Cases

Ethics and Employment Law Challenge

The case work should be divided equally, if possible, *e.g.*, two students should be assigned to discuss the ethical issues, and two to discuss the legal issues. The written summary of the argument must be written in complete sentences and paragraphs which must be specific as to legal and ethical theories, and must be submitted after your team presents. You should also be prepared to critique the other side’s argument even if you agree with it. That means you need to consider viewpoints other than your own. Forty percent of the grade is the team presentation.

The other sixty percent is the outline of the ethical and legal arguments that is designed to provide the framework for the presentation. Those should be submitted to the instructor at the time of the presentation with the names of the students and how they divided the work clearly identified.

The criteria for evaluating the outline are:

Articulation of ethical theory	15
Reasoning to conclusion	10
Articulation of Principles of law	15
Application of the law to the case	10
Explanation of how the law and ethics converge or diverge	<u>10</u>

Typically, in the ethics bowl competition, one has read the cases, but one does not know the question that will be asked. For example, in 2011 in an estate tax case, the question that was asked was whether it was inherently unethical to inherit money not subject to tax. There are several questions that could have been asked. Is it ethical for the government to have a role in redistributing wealth through the estate tax? If there is an estate tax, should there be a restriction on the way that government may spend the money, so that it actually benefits society as a whole? Is it inherently unethical for people to benefit from the estate of a person instead of the heirs of the deceased person when the beneficiaries of the tax may have had no one in their families working for the money? Is it unethical for the heirs to inherit the estate free of tax when they worked in a business that produced the wealth? Why is it ethical for a person to waste money during his lifetime, but unethical to pass it on to his or her children? However, since we would like to have high quality presentations, both the ethical question to be asked and the legal issue to be addressed are stated. You should prepare your commentary depending on the various approaches the other team could take. You are permitted to use profit maximization as one of your theories, but only when it is accompanied by another ethical theory.

So on the date agreed upon, Cases 1 & 2 will be discussed during the first hour, and Cases 3&4 for the second hour. A coin toss will be decided which team goes first. That team then will choose one of the two cases to present, and those assigned to the case on the other team must be prepared to comment on both the legal and ethical arguments. The remaining case will be presented by the other team. Do not read your outline. Be prepared with points to make, and do not spend a great deal of time on the facts except to support your position. You will have 5 minutes to present the legal points, 5 minutes for ethical points, 5 minutes for commentary (opposing team), 5 minutes response to the commentary (presenting team), and 5 minutes for judge's questions.

Case 1

A candy manufacturer earned a \$500 million profit in 2009, and its stock price was about \$40 a share. However, in 2010, the company became concerned over the rising price of chocolate and sugar in the future as well as concern over the increased emphasis on health foods. It regarded the profit margin as unsustainable, and when the three year contract, which had provided for salary increases for 2007, 2008, and 2009, expired, management offered the union a three year wage freeze. When the union rejected that offer, management declared an impasse and offered a \$1.50 an hour wage reduction, an end to company provided pensions, instituting 401 K plans instead, and an increase in the payment of health care payments by the workers to 20%. The position of management was that the reduction in wages would bring the workers' wages closer to the prevailing wage in the community. The average food worker at the candy plant was earning \$21 an hour while the average food industry worker in the area was earning \$14 an hour. The union went on strike.

Ethics Question:

Was it ethical for the management to ask for a \$1.50 an hour reduction in wages when the company had earned \$500 million in profit the year before? State the ethical theory on which you rely and support your premise.

Legal Question:

Which employment law or laws apply to the negotiation described above? What proof would be necessary for the union to obtain any leverage with management by using the law?

Case 1 Judge's Summary Sheet

This is the Mott's (Dr. Pepper/Snapple) strike in Rochester, New York in 2010, disguised as a candy company. The students may argue the following.

1. The applicable law is the National Labor Relations Act, also known as the Wagner Act.²¹
2. They may mention that pay rates, insurance plans, and retirement plans are mandatory subjects for collective bargaining.²²
3. While the law imposes a duty to bargain in good faith, the law specifically states that "such obligation does not compel either party to agree to a proposal or require the making of a concession."²³
4. The union at Motts filed a complaint alleging an unfair labor practice for failure to bargain in good faith, and the NLRB ruled in management's favor after they reached settlement with the union.²⁴ This may have been politically astute.
5. In the actual scenario, DPS and the union reached a settlement that ended a 16 week strike. Wages were frozen but not cut as the company demanded. The company also dropped its demand to freeze pensions for current workers, but newly hired workers will have 401 (k) plans rather than defined benefit plans. The company also decreased its contribution to the retirement plans, and increased worker health care contributions to 20%.²⁵

Case 2

Suzanne Summer was the only female working in the kitchen of an executive company restaurant with 15 or more employees, in Kansas City, Kansas. She had begun work as a part-time assistant and over a period of years, she had gained expertise as a baker. However, when she applied for a full time assistant position in 2009, her duties changed. She received a modest increase in salary, and an increase in benefits. Her duties included dinners for formal events, boxed lunches, and the preparation of side dishes and salads. The promotion in Suzanne's view was not a real promotion because she was assigned tasks such as cutting vegetables, washing fruit, and refilling condiment trays even though her skills could be better utilized by baking or cooking complete meals. The promotion also came after a period of five years of Suzanne's complaints about various incidents of sexual harassment, and during the period of time that her case against her employer was pending in the court.

When Suzanne met her supervisor, John Smith, in 2003, he refused to shake her hand. He routinely gave her the cold shoulder, and treated other employees, all male, to lunch when she was not around.

In addition, in 2005, Randy Jones, an employee who had been transferred after actually hit her in the head with a tray as he was passing by, after she turned her back on him in the middle of an argument, was reassigned to the executive company restaurant. He once stood in her way as she tried to exit an elevator, and said, "I'll do it again."

Furthermore, Suzanne overheard another male employee, Karl Kingsford, refer to Suzanne and the female executives as b----- who want to wear boxer shorts, and brag about how he was a member of an all-male organization that knew how to keep women in their place. Suzanne complained to her supervisor, John Smith, in August, 2008, and when he took no action, she submitted a written complaint to human resources. During this time, her fellow workers would stare at her without speaking for long periods of time, and would intimidatingly bang pots and pans. Once Jones complained about Suzanne's statements to him.

The employee relations department investigated the complaints, and sent her a letter to that effect. The typical progression for discipline was a verbal warning for the first infraction and a written warning for the second. Smith was told to give Jones a written warning to make a statement that this behavior must stop now, or he would run the risk of discharge. Smith gave Jones a warning for "conduct inconsistent with proper behavior," and employee relations met with Jones suggesting that he transfer to another department. Jones told Suzanne that "payback was hell."

Ethical Question:

Was the behavior of the employer in providing Suzanne a promotion during the pendency of the law suit ethical behavior? State the ethical theory or theories on which you are relying and support your premise.

Legal Issue:

Which law governs and has the employee relations office and the executive restaurant management complied with the law? Could Jones be considered a supervisor making the company liable because he occasionally had the authority to direct her daily activities? If so, are there any legal duties imposed on the supervisor to prevent this type of behavior?

Case 2 Judge's Legal Summary Sheet

1. The case actually involved a racial harassment lawsuit, *Vance v. Ball State University*, 646 F.3d 461 (7th Cir 2011) on appeal to the Supreme Court of the United States which I have changed to a sexual harassment lawsuit, both of which would be brought under Title VII of the Civil Rights Act. Even though racial harassment and sexual harassment are two different experiences, the precedents of the Supreme Court which determine who is a supervisor and when the employer can be held liable were established in two sexual harassment suits, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 745 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998).
2. In prior cases, the court held, "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."²⁶
3. The court also held that when no tangible employment action has been taken, i.e., one in which the supervisor brings the official power of the enterprise to bear on subordinates, the employer may raise an affirmative defense to liability or damages by proving: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer, or to avoid harm otherwise.²⁷
4. The students may suggest that the promotion is retaliation, a difficult argument.
5. The students might also consider state tort actions, although there are procedural reasons that an attorney would probably not choose to bring such a case.

Case 3

Shareholders of Magnum Manufacturing Company were given an advisory vote on executive compensation at a shareholder meeting. The company had a stated policy of linking executive pay to the financial performance of the company and shareholder returns. In the wake of the recession, the board of directors of Magnum decided to increase executive compensation despite declining profits and stock prices. When the executive compensation package was presented at the Magnum Shareholder Meeting, the shareholders voted against the compensation package. However, the board of directors of Magnum took no action to modify or rescind the executive compensation packages, despite the vote of the shareholders. The shareholders brought a derivative action on behalf of the company.

Ethical Question:

Was it ethical for the board of directors to grant increased pay to the executives, regardless of performance and the shareholder advisory vote? State your ethical theory on which you base your argument, and support your premise.

Legal Issue:

Does any law grant the shareholders a vote on executive compensation? What are its restrictions? Are any duties imposed on the members of board of directors? Which legal duty or duties could the shareholders argue is being violated here?

Case 3 Judge's Legal Summary Sheet.

1. This case is the thinly disguised Cincinnati Bell case. There are actually two actions; one brought in state court,²⁸ and one brought in federal court²⁹ which have now been settled.³⁰
2. Dodd- Frank³¹ does grant an advisory vote on executive compensation. However, the act clearly states:

SEC. 951. SHAREHOLDER VOTE ON EXECUTIVE COMPENSATION DISCLOSURES SEPARATE RESOLUTION REQUIRED.—

(1) IN GENERAL.—Not less frequently than once every 3 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to approve the compensation of executives, as disclosed pursuant to section 229.402 of title 17, Code of Federal Regulations, or any successor thereto....

RULE OF CONSTRUCTION.—The shareholder vote referred to in subsections (a) and (b) shall not be binding on the issuer or the board of directors of an issuer, and may not be construed—

- (1) as overruling a decision by such issuer or board of directors;
- (2) to create or imply any change to the fiduciary duties of such issuer or board of directors;
- (3) to create or imply any additional fiduciary duties for such issuer or board of directors; or
- (4) to restrict or limit the ability of shareholders to make proposals for inclusion in proxy materials related to executive compensation.

3. Despite this language, Judge Black denied a motion to dismiss on the basis of the duties of the directors. "Normally, a board of directors is protected by the 'business judgment rule' when making decision about executive compensation," ... "These factual allegations raise a plausible claim that the multimillion dollar bonuses approved by the directors in a time of the company's declining financial performance violated Cincinnati Bell's pay-for-performance compensation policy and were not in the best interests of Cincinnati Bell's shareholders and therefore constituted an abuse of discretion and/or bad faith."³²

4. Usually a shareholder must make a demand on the board unless it would be futile which Judge Black held that it was. "plaintiff has demonstrated sufficient facts to show that there is reason to doubt these same directors could exercise their independent business judgment over whether to bring suit against themselves for breach of fiduciary duty."³³

5. The students may present prior law regarding the duties and rights of the board to set corporate policy and executive compensation. They may also discuss the duties of care, loyalty, making an informed decision, and to act in the best interests of the corporation.

6. The CEO stepped down after the state case was settled, but before the settlement in the federal case.³⁴

Case 4

A state government has a general freedom of conscience act which prohibits employers from discriminating against health care workers who refuse to provide any type of health care because of conscience. However, the state government through its rule making procedure promulgated a regulation requiring that a pharmacy must stock if requested by a patient and dispense "contraceptives including emergency contraception" which includes not only the usual methods of contraception, but also Plan B, also known as the "morning after pill." Plan B prevents the implantation of a fertilized egg, unlike some methods of contraception that prevent fertilization from taking place. After the rule was promulgated, Main Street Pharmacy changed its policy which permitted an exception for conscience, requiring all of its pharmacists to sign a pledge to

fill prescriptions for Plan B. If the pharmacist refused, Main Street fired them. Seven licensed pharmacists were fired when they stated that they would not sign the pledge because Plan B can work as an abortifacient mechanism, in other words, it ultimately could result in the destruction of the fertilized egg which constituted abortion according to the religious beliefs of the pharmacists. Prior to the rule, Main Street Pharmacy allowed its pharmacist to decline to fill a prescription based on moral or religious grounds so long as a prescription could be filled by another pharmacist at the store or a nearby pharmacy. The governor of the state interpreted the health care worker in the right of conscience act to apply only to physicians, and stated that pharmacists who did not follow the rule, which did not apply to hospitals and emergency rooms, should find another profession other than the one in which they were licensed.

Ethical Question:

Was it ethical for Main Street Pharmacy to fire the pharmacists who refused to sign the pledge because of their religious beliefs? To whom does the freedom of conscience belong? State your ethical theory and support your premise.

Legal Issue:

Other than the state freedom of conscience law, are there any other legal or constitutional protections which support the position of the fired pharmacists, which Main Street Pharmacy referred to as “indefinite, unpaid suspension”. Is the protection absolute, or may the state government prevail if it can meet certain tests?

Case 4 Judge’s Legal Summary Sheet

This is also a thinly disguised case. The law is being challenged on several fronts, but this case involved Walgreens. The case was settled by having another pharmacist who had no objection, perhaps at a different Walgreens, electronically approve the prescription.³⁵ That case was *Menges v. Blagojevich*, 451 F. Supp. 2d 992 (2006), an interesting example of a governor as an ethicist. There were other challenges from independent pharmacists.

1. In *Morr-Fitz, Inc. v. Pat Quinn*, 2012 IL App 4th 110398, the court held that the pharmacist was protected not only by the Illinois freedom of conscience law, but also by the First Amendment protection of Freedom of Religion. The Illinois Attorney General has apparently decided not to file an appeal in the case.³⁶
2. The students may also argue that Title VII prohibits religious discrimination on the basis of disparate treatment. An employer must make reasonable accommodation for the religious practices of an employee so long as those activities do not create undue hardship by disruption of the work environment and cause the employer to sustain real costs.³⁷

3. Walgreens had argued that it might have only one pharmacist on duty, but it would be difficult for them to argue that the settlement offered was not a reasonable accommodation.
4. There is also not a strong argument for Walgreens in terms of religious discrimination. They fired only those who had religious beliefs that prevented their participating in what they regarded as an action that might result in what they considered to be an abortion.
5. There may be some arguments about the first command in medicine is “First, do no harm.”³⁸
6. The judges should anticipate that a wide variety of sources will be utilized for the ethical arguments. Students most often argue Kant and the principle of universalizability usually phrased as “Do we really want only pharmacists who are willing to dispense Plan B be permitted to practice, when the primary purpose of pharmacy is to dispense healing medication? Do we want all physicians to be required to swear that they will perform abortions on demand? Students may also advance religious arguments, and even talk about the right of conscience of Sir Thomas More.³⁹ I typically advise students that they are free to make a religious argument, but they should use an additional theory in order to persuade those who are not open to any argument that is faith based.

Part III. Evaluation and Results

After the presentations, I average the judge’s scores on the score sheets which follow in Appendix 2, and provide the score, curved if necessary,⁴⁰ to the students, along with comments on their written summaries of legal and ethical arguments. The score sheet is a modification of the one utilized in the Association of Practical and Professional Ethics.⁴¹ While the students requested that we not display the scores immediately as is done in the ethics bowl, most of them are fairly astute judges of the quality of the discussion. One group of sophomores was so excited that they had broken through to the next level of analysis that they were spontaneously applauding each team’s efforts.

During the class immediately following our employment and ethics challenge, I distribute actual opinions or results of settlements. The students, who are typically employee oriented, are often surprised by the actual outcomes, but as Justice Holmes observed “General propositions do not decide cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.”⁴²

Appendix 1

An Ethics Glossary

As you can tell from the other readings, ethical philosophers deserve more time. I would encourage you to study philosophy while you are here at the university. In light of the reality of time constraints, and with apologies to the philosophers, I have epitomized some of their writings below. Students may contribute additional philosophers.

St. Thomas Aquinas: Aquinas was a natural law theorist who argued that in order for a law to be binding on a human conscience, it must also be just. To be just a human law must be:

- 1) Consistent with a reasoned determination of the universal good, 2) within the power of individuals to perform, 3) clearly expressed by legitimate authority, 4) approved by custom, 5) widely promulgated.

Frederic Bastiat: Bastiat was a free market theorist, and warned of the danger of unintended consequences from a failure to take a long term view. Here is an excerpt from his statement regarding the law from *The Bastiat Collection*. (Contributed by a student.)

When, from the seclusion of his office, a politician takes a view of society, he is struck with the spectacle of inequality that presents itself. He mourns over the sufferings that are the lot of so many of our brethren, sufferings whose aspect is rendered yet more sorrowful by the contrast of luxury and wealth. He ought, perhaps, to ask himself whether such a social state has not been caused by the plunder of ancient times, exercised in the way of conquests; and by plunder of more recent times, effected through the medium of the laws? He ought to ask himself whether, granting the aspiration of all men to well-being and improvement, the reign of justice would not suffice to realize the greatest activity of progress, and the greatest amount of equality compatible with that individual responsibility that God has awarded as a just retribution of virtue and vice? He never gives this a thought. His mind turns toward combinations, arrangements, legal or factitious organizations. He seeks the remedy in perpetuating and exaggerating what has produced the evil. ...You say, "There are men who have no money," and you apply to the law. But the law is not a self-supplied fountain, whence every stream may obtain supplies independently of society. Nothing can enter the public treasury, in favor of one citizen or one class, but what other citizens and other classes have been forced to send to it. If everyone draws from it only the equivalent of what he has contributed to it, your law, it is true, is no plunderer, but it does nothing for men who want money—it does not promote equality. It can only be an instrument of equalization as far as it takes from one party to give to another, and then it is an instrument of plunder. ..

Jeremy Bentham (modified by John Stuart Mill): These philosophers took a teleological approach, focusing on the consequences of an action as opposed to the nature of the action or moral values or religious beliefs. Utilitarianism requires 1) a determination of which individuals will be affected by the action in question, 2) a cost-benefit analysis which involves an assessment of the negative and positive effects of alternative actions on these individuals, and 3) a choice among

alternative actions that will produce maximum societal utility, the greatest positive net benefits for the greatest number of individuals.

R. Edward Freeman: Author of the Stakeholder Theory of the Modern Corporation.

Stakeholders are people who are vital to the survival and success of the corporation, and their relationship with the corporation enables them to be benefited or harmed, including in the sense of violating their rights, by the corporation's actions. Stakeholders include: the shareholders, the managers, the community which can be local or national or global, the customers, the employees or suppliers.

Immanuel Kant: Kant focuses more on the motivation and principle behind an action than on the consequences, an approach characterized as deontological. His famous categorical imperative looks to the form of the action in terms of universalizability, i.e., whether one would want everyone to act in this manner, and reversibility, whether one would want such a rule applied to oneself.

John Rawls: In A Theory of Justice, Rawls argues that in determining what is just, everyone should begin in the original position behind a veil of ignorance as to his position in society. His theory is that then one would develop principles that were fair to all rather than develop privileged classes. He believes they would be principles of justice that would maximize the potential of those who are not so well off. He expounds two basic principles of justice. The first is that *each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others*. The second is: *Social and economic inequalities are to be arranged so that:*

(a) they are to be of the greatest benefit to the least-advantaged members of society (the difference principle).

(b) offices and positions must be open to everyone under conditions of fair equality of opportunity.

The criticism of Rawls is that his theory fails to account for whether the person in the disadvantageous position did anything to put himself or herself there.

Amartya Sen, Professor of Economics and Philosophy at Harvard: In The Idea of Justice, Sen distinguishes between the *niti*, organizational propriety and the *nyaya*, the realization of justice. The example that is most often quoted is the parable of the flute. Three children are quarreling over a flute. One child can play the flute, and argues that she should receive the flute. Another says that he has no toys with which to play so he should at least have the flute to play with. Finally, the third argues that she spent months making the flute, so she should get to keep it. How one decides the case of the flute indicates whether one's concept of justice values the pursuit of human fulfillment, the removal of poverty, or the right to enjoy the fruits of one's own labor more, assuming of course, that possession of the flute can lift one out of poverty. The use of income as an indication of well being is flawed because there are differences in the rates at which people can convert wealth to other things. He argues that one must focus on the lives that people actually live in determining what is just.

Appendix 2

Presentation Score Sheet Team's Name _____ Judge's Name _____

Part 1: Presenting Team's initial presentation (25 total points)

1. Was the presentation's legal argument clear and systematic? Regardless of whether or not you agree with the conclusion, did the team give a coherent legal argument supported by appropriate authority?

1-10
Points

1-2 = Serious problems in the legal argument (poor)
3-4 = Hard to follow the argument (passable)
5-6 = Reasonably clear and systematic
7-8 = Crystal clear presentation of applicable laws
9-10 = Outstanding application of legal authority

2. Did the team's presentation clearly identify and thoroughly discuss the central moral dimensions of the case?

1-10
Points

1-2 = Serious missing or underdeveloped dimensions (poor)
3-4 = Some significant dimensions are missing or poorly covered (passable)
5-6 = Most dimensions are present and well developed
7-8 = All dimensions present and clarified appropriately
9-10 = Clearly identified and supported with appropriate ethical theory

3. Did the team's presentation indicate both awareness and thoughtful consideration of different legal and ethical viewpoints?

1-10
Points

1-2 = Minimal consideration of different viewpoints.... (poor)
3-4 = Underdeveloped discussion of different viewpoints.... (passable)
5-6 = Solid analysis and discussion of different viewpoints, including careful attention to those that are significant....
7-8 = Insightful analysis and discussion of different viewpoints, including full and careful attention to those that are significant....
9-10 = Outstanding analysis, and the ability to draw distinctions.

Part 3: Team One's Response to Commentary and Judges (5 total points)

How did the team respond to the opposing team's commentary and the judges' questions?

1-5
Points

- 1 = Weak or irrelevant response (poor)
- 2 = Some points are made (passable)
- 3 = Solid response to commenting team's and judge's points
- 4 = Key points zeroed in on (crystal clear)
- 5 = Exceptionally composed response to commentary

_____ Total (40 possible) Team One Presentation Score, response to commentary, and commentary on opposing team's presentation (below).

Team One Commentary Score Sheet on Opposing Team's Presentation

Team's Name _____ Judge's Name _____

Part 2: Team One's Commentary 5 total points)

To what extent has the team effectively dealt with the presenting team's arguments?

- 1 = Weak or irrelevant response (poor)
- 2 = Some points are made (passable)
- 3 = Solid response to presenting team's points
- 4 = Key points zeroed in on (crystal clear)
- 5 = Exceptionally composed commentary

1-5 Points

Endnotes

¹Louis Brandeis, Brown University Commencement Address: Business—A Profession, (June 19, 1912) available at <http://www.law.louisville.edu/library/collections/brandeis/node/203>

² E.g., Lucien J. Dhooge, *Creating a Course in Global Business Ethics: A Modest Proposal*, 28(2) J. LEGAL STUD. EDUC. 207 (2011); Murray S. Levin, *Reflections on Enhancing the Understanding of Law Through Ethical Analysis*, 27(2) J. LEGAL STUD. EDUC. 247 (2010); Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 AM. BUS. L. J. 417 (2003); Lorrie Willey & Debra D. Burke, *A Constructivist Approach to Business Ethics: Developing a Student Code of Professional Conduct*, 28 (1) J. LEGAL STUD. EDUC. 1 (2011); Susan L. Willey, Nancy Reeves Mansfield, & Margaret B. Sherman, *Integrating Ethics Across the Curriculum: A Pilot Study to Assess Students' Ethical Reasoning*, 29(2) J. LEGAL STUD. EDUC. 263 (2012).

³ CONSTANCE A. BAGLEY & DIANE W. SAVAGE, *MANAGERS AND THE LEGAL ENVIRONMENT: STRATEGIES FOR THE 21ST CENTURY* (6th ed. 2010); MARIANNE M. JENNINGS, *BUSINESS: ITS LEGAL, ETHICAL, AND GLOBAL ENVIRONMENT* (9th ed. 2010); ROGER LEROY MILLER & FRANK B. CROSS, *THE LEGAL ENVIRONMENT TODAY: BUSINESS IN ITS ETHICAL, REGULATORY, E-COMMERCE AND GLOBAL SETTING*, (7th ed. 2013); MALLOR, BARNES, BOWERS, & LANGVARDT, *BUSINESS LAW: THE ETHICAL GLOBAL, AND E-COMMERCE ENVIRONMENT* (15th ed. 2013).

⁴ Mary C. Gentile, *Business Schools: A Failing Grade on Ethics*, BUS.WK., February 5, 2009, http://www.businessweek.com/bschools/content/feb2009/bs2009025_129477.htm.

⁵ Sam Goodner, *Hiring and firing are delicate arts*, AUSTIN BUS. J., April 6, 2011, http://www.bizjournals.com/Austin/blog/adjc_columns/2010/09/hiring_and_firing_are_delicate_arts.html.

⁶ Willey, et al., *supra* note 2 at 282; Levin, *supra* note 2 at 256-271.

⁷ Prentice, *supra* note 2, at 423

⁸ Gentile, *supra* note 4

⁹ *Id.*

¹⁰ Additional information regarding the Association for Practical and Professional Ethics and the ethics bowl is available at <http://appe.iu.edu>.

¹¹ *Mott's Strike Illustrates Labor Union Dilemma*, (PBS NEWSHOUR Broadcast Sept. 6, 2010), available at http://www.pbs.org/newshour/bb/business/july-dec10/mott_09-06.html?

¹² *Vance v. Ball State University*, 646 F.3d 461 (7th Cir. 2011), *cert. granted*, (U.S. June 25, 2012) (No. 11-556).

¹³ NECA-IBEW Pension Fund, *Derivatively on Behalf of Cincinnati Bell, Inc. v. Cox*, (TSB), No. 1:11-cv-00451, (S.D. Ohio Sept. 20, 2011), *available at* <http://www.law.du.edu/documents/corporate-governance/say-on-pay/neca-ibew>, *hereinafter*, *Cincinnati Bell*

¹⁴ *Menges v. Blagojevich*, 451 F.Supp. 992 (C.D. Ill. 2006).

¹⁵ *University of Notre Dame v. Sebelius*, No3:2012cv00253(RLM), PACER (N.D. Ind., Dec. 31, 2012), *appeal filed* (7th Cir. Mar. 1, 2013).

¹⁶ Karen Swallow Prior, *The Pill: Contraceptive or Abortifacient?* THE ATLANTIC, Dec. 31, 2012, www.theatlantic.com explaining the difficulty with the terminology used in news analysis.

¹⁷ <http://appe.iu.edu>

¹⁸ *Infra*, Appendix 2

¹⁹ ARISTOTLE, NICOMACHEAN ETHICS, BOOK II, (W.D. Ross trans.) *available at* <http://classics.mit.edu/Aristotle.nicomachean.2.ii.html>.

²⁰ ALASDAIR MACINTRYE, AFTER VIRTUE (3rd ed. 2007).

²¹ 29 U.S.C. §§ 151-169

²² *Allied Chemical & Alkali Workers of America, Local Union #1 v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971).

²³ 29 U.S.C. § 157 (d)

²⁴ *DPS Bargained in Good Faith*, PR NEWSWIRE, (September 14, 2010) *available at* <http://www.thestreet.com>. The NLRB did not list its unpublished decisions, *i.e.*, those that are binding only on the parties involved, until 2011.

²⁵ Steven Greenhouse, *Ending Strike, Mott's Plant Union Accepts Deal*, N.Y. TIMES, (Sept. 13, 2010) <http://www.nytimes.com/2010.09/14/business/14mott.html>?

²⁶ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 745, 765 (1998), *Faragher v. Boca Raton*, 524 U.S. 775, 807-808 (1998)

²⁷ *Id.*

²⁸ *In re Cincinnati Bell Derivative Litigation*, No. A1105305 (Court of Common Pleas, Hamilton County, Ohio, Dec. 20, 2011).

²⁹ *Cincinnati Bell*, *supra*, note 13

³⁰ *In re Cincinnati Bell*, *supra*, note 28, NECA-IBEW Pension Fund *Derivatively on Behalf of Cincinnati Bell, Inc. v. Cox*, No. 1:11-cv-00451 (S.D. Ohio Sept. 20, 2011) available at <http://www.pacer.gov>., hereinafter, Cincinnati Bell

³¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5301 (2010).

³² Cincinnati Bell, *supra*, note 13

³³ *Id.*

³⁴ Jack Cassidy Steps Down as CEO of Cincinnati Bell, Business Courier, (Jan. 31, 2013), <http://www.bizjournals.com/cincinnati/news>

³⁵ Judy Peres, 'Morning-after' pill deal reached, CHI. TRIB. (October 11, 2007) <http://articles.chicagotribune.com>

³⁶ Steven Ertelt, *Pharmacists in Illinois Won't be Forced to Dispense Plan B. Drug*, available at <http://www.lifenews.com>

³⁷ Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986).

³⁸ TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS, (7th ed. 2012).

³⁹ In his introduction to, SIR THOMAS MORE, UTOPIA (trans. Ralph Robinson), Professor Wayne Rebhorn notes that Sir Thomas More, who dies for his freedom of conscience, did not always accord that freedom to other in contrast to the movie portrayal in *A Man for All Seasons*.

⁴⁰ Occasionally, judges will not really be thinking of the final outcome in terms of grades as they judge. In that event, I curve up to a midlevel A for the one that they ranked the highest, and add the same number of points to all other presentations. If that does not solve the problem in a particular case, I simply call the professor to ask if the resulting score reflected his judgment of the performance.

⁴¹ Cincinnati Bell, *supra*, note 17

⁴² *Lochner v. New York* 198 U.S. 45, 75 (1906).