Day 1: International Coffee Day – Intro to Law School

First, a brief introduction. I had originally intended to play all month using only Barrister and Mann products while explaining various aspects of the (mostly) U.S. legal system. Why? Because I am a Barrister, and a man, and I think it is funny to inflict the trauma of law school and my job on others. Upon seeing the calendar, however, I decided to engage fully with the themes while still using B&M where I could, and still explaining legal concepts.

You're welcome.

Kicking off with coffee is a good place to start because it lets us start with law school. Like pretty much all college and especially all grad school programs, law school is fueled pretty exclusively by caffeine. What else is it fueled by? Suffering.

Law school in the U.S. is a three year graduate program culminating in a Juris Doctor degree—a professional doctorate. Yes, it is a doctorate. No, lawyers shouldn't insist on being called doctors unless they want to be known as gigantic tools.

The first year has a pretty set curriculum no matter where you go. There is some variation, but not much. You will take classes on Property, Torts, Contracts, Criminal Law, Civil Procedure, Constitutional Law, and Legal Writing at the very least. Some of these will be one semester, many will be a full year. At a number of schools you don't get to even pick an elective your first year.

Which is the worst class? Property. Which is the most confusingly taught? Contracts, where you don't ever actually look at a contract.

Confusingly, once you've graduated law school, you can actually go get further degrees if you want. There is the LLM, or Masters in Law, and the SJD or JSD, or Doctor in the Science of Law. Hardly anyone gets these, because you don't need them to practice. The LLM is most commonly sought by foreign lawyers who want to practice law in NY or CA (or other jurisdictions that allow this route), or by people who really want to specialize in Tax law. SJDs are sought by big old nerds and the law professor I hated the most.

Once you have obtained a JD, you can sit for the bar! Unless you're in California, where there are other routes for Kim Kardashian and non-Kardashians alike. The bar exam is similarly fueled by caffeine, and was the worst three months of my life both times I had to take it. I passed both times, because that's a point of pride among lawyers, and I felt like I wanted to sell all my possessions and throw myself into the sun both times.

Tomorrow: The Laws of War!

Day 2 – International Day of Non-Violence – History of the Laws of War and the Birth of International Law

Le Grande Chypre does a very good job of making me feel at peace. It is a very soothing scent to me, and I utilize it for those mornings where I need a little bit of a moment and a little bit of peace. But it is also not a fragrance which puts me to sleep—it is meditative but not passive, leaving me in a position to face my day in a settled but active way.

For a good portion of early human history there was really nothing external which constricted a nation or people's ability to pursue war. There were internal factors, of course, such as culture and religion. But the first restraints on what constitutes acceptable conduct during war weren't really seen until the development of large, multi-national religions.

In the West, Christianity served as a check on actions during war, at least in theory—and at least against other Christians. The rules, as they often are, are a little bit less enforced when it comes to non-believers. One of the first discussions of war from a practical, rather than theological, background came from St. Augustine of Hippo and his discussion of a "just war." The evils of war to St. Augustine were *nocendi cupiditas* (love of violence), *ulciscendi crudelitas* (revengeful cruelty, "fierce and implacable enmity, wild resistance," and *libidio dominandi* (the lust for power), among others. Augistinian philosophy on the matter weas later solidified by St. Thomas Aquinas, who gave three specific criteria for just wars.

But the laws of war, and the development of the whole concept of international law, were in large part the creation of Duch philosopher and lawyer Hugo Grotius, who would serve as an official historiographer, Attorney General, governor, and ambassador. Grotius was the first to emphasize the rights of the individual during war, and the right of those effected by war to the basic necessities of life; about the legality and ethics of humanitarian intervention; and freedom of the seas. These discussions lead very directly to the Fourth Geneva Convention, the creation of the United Nations, and the 1982 UN Convention on the Law of the Sea.

By laying these foundations, Grotius created a paradigm where it was acceptable to restrain the powers of Kings and Emperors by more than religion. He viewed war and international relations as being based on a rational and humanistic understanding of the world, rather than a theological one; rational restrains would, therefore, apply to every country. In this fashion he also lays the groundwork for the later concept of *ius cogens*, or those peremptory norms of international behavior from which no nation can derogate.

Day 3 – New Year New You – Contract Requirements and Terms

Until this very day, I had never used Wholly Kaw. I had never even used Partially Kaw. I was not even slightly Kaw. Ba-dum-tiss.

In order to purchase the sample of Wholly Kaw I used, I entered into a sales contract with the retailer. Contracts are one of the fundamental ways in which people interact in a civil, capitalistic society. But what constitutes a contract causes much confusion and takes up an entire year of law school (three semesters if you view Secured Transactions as just being Contracts 3, which I do).

At the most basic level, a contract is a simple. All that is required is an Offer, Acceptance of that offer, and consideration. Consideration is not thinking about it but is defined in the law as "something of value for something of value, bargained for." A contract, therefore, requires that there be things of value on each side being voluntarily exchanged based on the agreed upon offer. Without consideration, what you have isn't a contract but a promise. Without acceptance and consideration, you're just trying to throw a widget at someone in the hope that someone will pay you for it. Without offer, acceptance, or consideration, you're just two people in a room staring at one another.

There are, of course, wrinkles. What happens if, for example, I offer to pay $2000 for my non-existent niece's lifestyle so she now longer has to work, and she quits her job, and then I try to get out of it? Well, in that case we have a promissory estoppel, and I can be forced to pay. Ricketts v. Scothorn, N7 Neb. 51 (1898). Same if I promise my nephew $5000 if he doesn't drink or smoke until he turns 21 and he refrains from doing either of those things for that time, but I've died and my estate refuses to pay. Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891).

Some contracts can be oral, but some have to be in writing per a doctrine known as the Statute of Frauds. These include any real estate transactions, contracts which will take longer than one year to execute, consideration of marriage, sale of goods over a certain threshold, and promises by an executor of an estate to pay debts, as well as others.

Day 4 – Bilingual Day – U.S./English Law vs. European Law

Le Grand Chypre, or as it would be in English, the Big Chypre. 3/3 words in French, which would actually mean The Big Cyprus. Gosh, I wonder if there is another day where this might come back up.

Fragrance for the day is Terre d'Hermes, playing off of the warm and earthy notes in the base of both scents, as well as being wholly in another language as well.

Discussing non-English soaps allows us to also speak about non-English law. But wait, Mpark, you might say—you were talking about American law, what do you mean you're talking about non-English law?

Despite having many significant differences, the U.S. fundamentally practices a form of law which is derived from and largely compatible with English law. This makes sense, because American law ultimately was English law until we had a fun party in 1776. There was even a moment early in the country where we had to officially say "We accept English precedent until this point, and after we only accept U.S. precedent."

Both the U.S. (with one exception, remember this for later) and the U.K. legal systems are what's referred to as "common law" legal systems. Common law legal systems recognize that there is both law created by the constitution/statutes/regulations, and legally enforceable interpretations of those laws which have been put in place by the justice system itself. One criticism, in fact, of common law is to call it "judge created." Thus, we have the principle of *stare decisis*, or "let the decision stand." This is fundamentally the whole point of precedent and the common law, that different judges interpreting the same law should come to fundamentally the same decision—and by requiring judges to use interpretations given to them by higher courts, you are requiring them to come to the same outcome.

Europe, for the most part, practices what is referred to as "civil law" instead. This system puts no stock in precedent and only relies on the constitutional or statutory source. As a result of this, their legal codes tend to be much more comprehensively written, because they must be able to include wide ranging scenarios. This view is rooted, ultimately, in the Roman source of the legal codes on the continent, while common law evolved more from the native legal systems of the U.K.

Another major difference between the two is the role of judges. In common law systems the judge is seen as a neutral arbiter, attempting to interpret the facts and the arguments presented by the parties in court. In civil law systems, the judge is seen as a much more active participant in what is sometimes referred to as an "inquisitorial system." They are expected to actively seek to establish the facts of a case, even while they are only strictly

applying the laws. Ironically, common law judges are less active participants in court even as they have a much greater role in establishing the corpus of precedent.

Tomorrow: Sporting law/monopolies!

$Discord

$ROTY

$FOF

Day 5 – World Cup Day – Sporting Law and Monopolies

Soap is Cella Red, an Italian shaving soap made in Milan. Italy has won the World Cup four times, most recently in 2006. I've paired it with Proraso Green aftershave splash, which is also Italian and therefore shares in its glories.

To take this even further, I've also paired it with Versace Eros for my fragrance. I do think Versace Eros is a versatile fragrance, powerful in the EdP form but still usable with a variety of different accompaniments. And it is similarly Italian, giving me almost as many Italian products as they have World Cup wins.

Sports are a funny thing. Even ignoring current trends, the U.S. does have protections against monopolization in industry. The Sherman Antitrust Act of 1890 protects consumers against unreasonable restraints on trade and prohibits price fixing, the Clayton Antitrust Act of 1914 prohibits price discrimination and tying arrangements (where a business prohibits you from buying product A unless you also buy product B), and the FTC was created in 1914 to ban unfair competitive practices and investigate violations.

And yet the U.S. functionally has monopolies in multiple sports, which also exercise monopolistic control in multiple ways. So how does that work exactly?

Well, for one league, the Supreme Court just explicitly said "You're good, homies." Major League Baseball has its own bespoke exemption from the case *Federal Baseball Club v. National League*, 259 U.S. 200 (1922). Finding, somehow, that while Baseball leagues necessarily involved multiple cities and states, because each Baseball team was essentially operating in one state the business of Baseball was not a matter of interstate commerce and thus not subject to the antitrust provisions of the Sherman Act. Congress, as has not been explained in this imperfect and topical rendering of U.S. law, only has authority to regulate interstate commerce (between multiple states) rather than intrastate commerce (which only happens in one state).

The other leagues do not have this SCOTUS exemption, and their practices are reviewed under the "Rule of Reason" analysis. This analysis essentially allows courts to consider the reasons for anti-competitive practices, and to permit them in some circumstances where the harm doesn't exceed the benefit of the reason given. For sports leagues, the reason for many practices is that sports teams cannot exist in a vacuum—no one would go see the Nebraska Cornhuskers playing themselves, and very few people would go see the Colorado Rockies for any reason. (I love my Rockies. They are historically terrible). Similarly, they have to be allowed to negotiate their own television deals, because they couldn't have every team have a different media deal or else no one would be able to watch.

So there are benefits to allowing the kinds of cartel-like behavior that sports leagues exhibit. Without them the leagues as we know them couldn't exist, and the economic impact of removing them would be profound. But that also doesn't mean that it is universally agreed that they're not illegal cartels. *See*, e.g., Nathaniel Grow, *Regulating Professional Sports Leagues*, 72 Wash. & Lee L. Rev. 573 (2015); Stephen F. Ross, *Monopoly Sports Leagues*, 73 Minn. L. Rev. 643 (1989).

Coming up tomorrow: Intro to Intellectual Property!

$Discord

$FOF

$ROTY

Day 6 – Shave and a Haircut – Intro to Intellectual Property

Returning to Barrister & Mann, we have Seville, the flagship B&M barbershop scent. It actually took me a little bit to warm up to, because of the prominence of the citrus notes. But over time I did, and it was my gateway to the whole B&M Shavematic Universe, which also ultimately leads to this whole law school exploration. I paired it with Pinaud Clubman for a classic barbershop finish.

For a fragrance, I wanted to go as classic and old school as a good Barbershop shave. While it isn't a barbershop itself, it is hard to imagine a more old school American scent than Ralph Lauren Polo. Also called Polo Green, it was introduced in 1978, and has been a defining masculine scent ever since. The fresh and spicy fragrance does go well with a barbershop, and this is a very common combo for me.

How are there so many barbershop scents? Why is there not just one called 'Barbershop' that blocked the market? Well, that brings us into the wonderful world of Intellectual Property.

For a brief overview, here is how to stop annoying your lawyer friends by using the wrong words. Copyright is for creative works, Trademark is for advertising, and Patents are for inventions. There are things that can cross boundaries—Percy Jackson, for example, is copyrighted in terms of the books and trademarked as a brand—but each has its own lane. And the words themselves give you some hints—copyright is to protect against copying creative works, and trademarks are to protect trade products.

But there are also consumer protections baked into the system. In the world of copyright, this is the fact that you cannot copyright ideas only their specific expressions; and in the world of trademark, the more generic your brand name the less protection you get. A brand name which is purely descriptive cannot be trademarked; you cannot have Apple brand Apples. But the more fanciful or creative it is, the more it can be protected—hence Apple brand computers is fine, because that's just silly enough to work.

(For Patents the protection is that they are time limited—while there is a renewal available, you run into a brick wall at the end of your patent term. That's why generic drugs can be developed after the patent is finished)

So B&M tragically cannot just corner the marker on Barbershop, and why you see different brands using more fanciful names for it (Seville, Ghosttown Barber, Tonsorial Parlour, etc.).

Intellectual Property is one of my passions, even if it doesn't make up my day-to-day practice, so we will be returning to this multiple times. We'll go deeper into Copyright,

specifically look at the concept of Consumer Confusion in Trademark, discuss Fair Use and Transformation, and then explore the Public Domain. But that is all for later.

Coming tomorrow: Sex discrimination!

$Discord

$FOF

$ROTY

Day 7 – Breast Cancer Awareness – Sex Discrimination

Soap of the day is Witchy Woman, a Stirling soap specifically marketed toward women and inspired by Love Spell by Victoria's Secret.

Continuing the theme, fragrance is Gucci Flora Gorgeous Magnolia. This is fruity and floral scent which should work well with Witchy Woman and hopefully develop together over the day. But I'll admit that I don't know how it will work, since I've never used either.

It is of no surprise to anyone who lives in America, or indeed the world, that sex discrimination was pretty much the rule for much of human history. In much of Western culture, women were barred from participating in society on the same terms as men, even when these restrictions were presented as being for their benefit or protection. Under the rule of coverture, for example, a married woman didn't have an independent legal identity from her husband. This is why one of the earliest cases defining assault in the common law is styled *I de S et Uxor v W de S*, Assizes (1348). The '*et Uxor*' is referring the fact that I de S is bringing the suit on behalf of his wife, who is the one who was actually assaulted (in the common law sense where she was threatened and made afraid, but not physically struck); she could not sue on her own, and her husband had to press the suit on her behalf.

This began to change in the 19th and 20th Century. One of the major milestones was the passage of the 19th Amendment in 1920 (an easy mnemonic to remember is that the 19th amendment was submitted to the states in 1919) which guaranteed (white) women the right to vote. Another earlier one whose impact would not be felt until the 20th century was the passage of the 14th Amendment in in 1868, which guaranteed equal protection under the law and due process for all Americans.

In the 1970s, Ruth Bader Ginsburg co-founded the ACLU's Women's Rights Project, which targeted laws which kept women in second class status. In a brilliant strategy, they actually began by targeting laws which discriminated against men based on sex. In *Charles E. Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466 (1972), they argued on behalf of Mr. Moritz that his ineligibility to receive a tax credit for caring for his mother because the law specified the deduction was only for women and formerly married men was sex discrimination against a never-married man. In *Weinberger v. Wiesenfeld*, 420 US 636 (1975), Ginsburg successfully argued survivor benefits for a man whose wife died in childbirth. And in a series of other cases throughout the 70s which were ultimately a major part of the reason she ended up on the as a Judge, RBG systematically dismantled sex discrimination in the country.

The major civil rights acts of the 1960s and 1970s also dealt with gender discrimination. The Civil Rights Act of 1964 included Title VII banning employment discrimination, and in

1972 Title IX of the Education Amendments of 1972 was passed banning sex discrimination in any school or education program receiving federal funding.

Sex discrimination in the U.S. is reviewed by courts at what is called “intermediate scrutiny.” This is, as one might expect, higher than the lowest level of review (rational basis) but lower than the highest level of review (strict scrutiny). This puts sex in a “quasi-suspect” classification, where there are reasons why the law might be discriminatory that are legitimate but also a strong possibility that they will be unnecessarily discriminatory. This classification is not seen as being either the guaranteed death sentence of strict scrutiny, or almost guaranteed to be OK like rational basis.

Tomorrow: Legal Fictions!

$Discord

$FOF

$ROTY

Day 8 - Throwback Thursday and Legal Fictions

The first soap I ever purchased in my pursuit of wetshaving glory was Taylor of Old Bond Street – Tobacco. But that was my second tub kill. The second tub I ever purchased was TOBS Eton. But that was my first tub kill. So, the oldest tub I actually still have was also the first real "croap" that I bought, and the first artisan that our community regularly recommends (since TOBS can be controversial): Noble Otter BarrBarr. Which will probably be my fourth tub kill (I might try to knock of Seville first).

To pair with, I went with the first fragrance I ever purchased: Versace Blue Jeans. I bought my first bottle when I was in high school and working at a men's clothing store, so I got an employee discount. It got me through pretty much every date in High School and College, not that there were a huge amount of those. While this isn't the same bottle, as it got a little too alcohol heavy with age, it is incredibly nostalgic for me on a throwback Thursday.

There were a couple of directions I could have gone with today's law school lecture. I was tempted by elder law, but I went in a more fun direction instead: Legal fictions. The reason why will become clear when we discuss the first one.

What is a legal fiction? Well, sometimes the law doesn't line up with reality, because something needs to be considered legally possible even if it isn't necessarily physically possible. One of the most famous of these is the Fertile Octogenarian. This legal fiction states that regardless of biological impossibility, as long as a person is alive they are capable of having a child. This is mostly relevant in terms of estate planning and what's called the Rule Against Perpetuities, which is a rule which keeps individuals from tying up land by giving interest in it to an ever expanding group of people; the RAP states that an interest must vest, if at all, within 21 years of the life of a person in being at the time of creating the interest. Hence, because a woman is legally capable of having children for her entire life, you cannot say "within 21 years of the life of the last child of Mrs. X."

No, I will not talk about anything else regarding the RAP, and I'm not entirely sure that I'm even discussing it correctly above. The RAP sucks. All my homies hate the RAP.

The myth of the Fertile Octogenarian also had a direct impact in the life of Queen Elizabeth II. She was the eldest child of her father, King George VI, who had two daughters. But she could never be heiress apparent (and thus Princess of Wales and Duchess of Rothesay) because under English law at the time the birth of any brother would displace her from the line of succession—and her mother was legally capable of having a son of George VI until his death (and up to nine months later, technically), even if that had long since stopped being biologically possible.

Other legal fictions include the Doctrine of Survival, the Reasonable Person, and the Client Who Is Just Doing This As A Matter of Principle Not For The Money But Is Still Totally Normal And Won't Make You Regret Being A Lawyer.

Tomorrow: Marriage Law!

$Discord

$ROTY

$FOF

Day 9 – Friday I'm in Love, and Marriage Law

One of my issues is that I fundamentally love most soaps that I use on the regular. Even those soaps that I have chosen to try to kill off because I'm not thrilled with them to start with, such as Hamam, I end up loving by the end. But there is one that I have turned to every time I have needed a soap that I love—I, Rich Moose. The first complete set that I bought, the first r/wetshaving exclusive I ever bought, and the first expanded set that I ever bought—I own the soap, splash, balm, frag, bath soap, and deodorant.

The fragrance choice here was easy, and while I think it will get me good theme points I don't think it will get me many for creativity—it is, indeed, I, Rich Moose. What could go better with one Rich Moose than two, after all? Richer Moose. Richer Meese.

Today is all about love, which means we're going to talk about marriage. Of course, these two were not always one and the same—no matter what the troubadours sing, marriage for a long time was as much a commercial and economical proposition as a romantic one. As mentioned previously, for much of western legal history the theory of coverture meant that a married woman's legal identity was subsumed into that of her husband. Her husband's legal identity covered here, making her a femme covert; and unmarried woman remained on her own, a femme sole. This changed through legal reforms of the 19th and 20th centuries, giving us a much more equal society—now a woman menaced with an axe can sue in her own right.

Marriage itself has led to a variety of interesting legal questions, including that of the dissolution of a marriage. But starting from the beginning—traditionally a marriage proposal involved a man giving a woman a pricey piece of jewelry. What happens if the engagement is broken off? Does the woman owe her former betrothed the ring back? In most states, the answer is yes. A wedding ring is considered a "conditional gift", which must be returned if the condition is not met. Some states, however, consider fault: If the ring giver breaks off the engagement they are not entitled to get it back, and the ring bearer is free to keep it (or throw it in the fires of Mt. Doom). Massachusetts apparently just settled this in state law after a six-decade disagreement. See, e.g., Johnson v. Settino, SJC-13555 (Mass. 2016) (Holding that under Massachusetts law, an engagement ring is a conditional gift with no fault analysis used).

Race relations and racism also played a major part in marriage law, in the U.S. as well as other countries. For a very long time many states had laws against miscegenation, which is inter-marriage between races. This was overturned in the United States in the famous case of Loving v. Virginia, 388 U.S. 1 (1967). In Loving, the Warren court found that the right to marry is a fundamental right essential to the pursuit of happiness. This explanation later

greatly influenced the holding in Obergefell v. Hodges, 576 U.S. 644 (2015), which overturned laws against gay marriage.

So, what about the end of a marriage, when things are no longer so loving (har har har)? Well, then we enter the realm of divorce. Once again, for a long time divorce was not permissible in the country without going through significant legal hurdles. Until 1969, U.S. states required a finding of some misconduct in order to dissolve a marriage; these included adultery, cruelty, and desertion. In 1969, California became the first state to allow for what is called "No-Fault Divorce." This allows a couple to say that there has been an irretrievable breakdown of the marriage, and for the dissolution to be granted on those grounds; interestingly, 18 states have completely removed "At Fault" divorces, meaning a petitioner is banned from raising a fault in seeking a dissolution. The last U.S. state to allow no-fault divorce was New York, which made the change in 2010.

Marriages are one of the areas which raise interesting interstate issues. In a later post we'll discuss the concept of full faith and credit, which is a constitutional requirement on states to recognize legal actions of other states. This was one major issue with gay marriage when it was legal in some states but not others.

Pics:

Coming up tomorrow: Genetic patents!

$Discord

$ROTY

$FOF

Day 10 – Non-Citrus Fruit Day – Genetic Patents

Lather to qualify for today is House of Mammoth Smash. Peach, cane sugar, bourbon, tobacco, and hedione. Not a citrus fruit to be seen. Paired with the Steady splash by Summer Break Soaps to continue the Peach theme.

For fragrance, I also broke out the SBS Steady. We're going peachy, focusing on pretty much my only fruit but not-citrus scent. I adore Steady, with its bright peach note and the darker undertones that come with it.

Smash is named after a cocktail where one takes disparate elements and literally smashes them together with muddling. What else do we smash together? The building blocks of life to form new genes, which we can then of course patent for profit! (What else do we smash together without heed for any kind of sense or reason? This transition!)

Going back to our introduction to Intellectual Property and you might remember the basic classification of IP: Copyright is for creative works, Trademark is for protecting brands and brand symbols, and Patent is for inventions. That might bring you to ask, reasonably…what do you mean, gene patents? How can you patent something like a gene?

Patent covers any kind of invention, subject to certain limitations. This can include design patents and method patents, where you are creating a particular visual appearance and ornamentation or how something is created/done rather than the end product itself. So it is not just creating a new widget, and theoretically this would include designing new genes or biological processes within the human body.

But there are restrictions. A patent cannot be granted for something that isn't novel, and it cannot be granted for something that is obvious. Obviousness is measured using my favorite acronym in the law: PHOSITA. If it is obvious to a Person Holding Ordinary Skill In The Art, it cannot be patented.

Another limitation is that you cannot patent something which is naturally occurring. And this was how the United States Patent and Trademark Office issued its first official guidance in regarding genetic patents: "Like other chemical compounds, DNA molecules are eligible for patents when isolated from their natural state and purified or when synthesized in a laboratory from chemical starting materials. A patent on a gene covers the isolated and purified gene but does not cover the gene as it occurs in nature." Utility Examination Guidelines, 66 Fed. Reg. 1092, 1093 (Jan. 5, 2001). This is similar, for example, to other hormones or chemicals which are naturally occurring in the body but which are isolated, purified, and modified to bring them to market to treat conditions such as hypothyroidism or diabetes.

The landmark case in the field is Association for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576 (2013). This case held that merely isolating DNA, even "purifying" them by removing the introns, does not render DNA patentable. But it also held that complementary DNA is eligible for patents because it is not naturally occurring, despite the fact that cDNA has "virtually identical information content to naturally occurring mRNA."

That leaves the circumstances somewhat muddled, as there is a good argument that there is not a significant difference between cDNA and other forms of genetic information. There is also still room for a biotech company to patent the method used for isolating and modifying specific genetic information: "It is important to note what is *not* implicated by this decision. First, there are no method claims before this Court. Had Myriad created an innovative method of manipulating genes while searching for the BRCA1 and BRCA2 genes, it could possibly have sought a method patent." Molecular Pathology, supra., at 595.

As we develop more methods of manipulating genetic information, the possibility of patents for method, application, and the genes themselves will only increase. The use of CRISPR (Clustered Regularly Interspaced Short Palindromic Repeats) and other developing technologies such as the research allowing for the use of mRNA in vaccines present some of the most interesting ways in which we will see this issue continue in the future.

Next up: Interstate Commerce! (as Merikus runs for the hills)!

Pic:

$Discord

$FOF

$ROTY

Day 11 – Canned Shave Goop and Interstate Commerce

Shave for the day is Edge shaving gel by Schick. This is a travel size which was purchased from a Walmart, and was used in a Holiday Inn thus fulfilling the promise of its travel size. It is widely available across the USA, and is one of the most commonly available canned shave gels.

I've paired it with Ralph Lauren Polo 67 EDT. Like Edge it is widely available, fresh and refreshing, and I have a travel size of it. It, unlike Edge, is one of my favorite fragrances and one of my most widely used.

I don't actually hate Edge or Gillette, and in fact this would have been an incredibly familiar shave for me until 2025. I switched to using the very Henson AL13 I now use as a travel razor in 2024 but didn't switch to artisan shave soap until 2025; so for my first year in this community I was using a safety razor but also canned goop.

I mentioned that Edge is widely available, and that means that it is shipped across the country and indeed the world. This means that it triggers one of the most important provisions of the United States Constitution, the Interstate Commerce Clause.

When the Constitution was being written, the framers had just dealt with an economy where Parliament could exercise significant control. Various taxes without representation had, after all, been one of the motivating factors of the Revolutionary War. As such, they were leery of allowing the newly remodeled federal government to exercise too much control over the internal economies of the colonies, which were theoretically independent and sovereign in any area which was not explicitly ceded to the feds. They therefore wrote that Congress could only exercise control over interstate commerce, as opposed to intrastate commerce. That is to say that Congress cannot, under that original view, do anything to regulate an Idaho potato farmer growing an Idaho potato and then selling them to a hungry Idahoan.

But wait, you might say if you were prone to arguing out loud with a Reddit post, how can you say that when Congress clearly regulates so many different things? Well, that's why I carefully phrased it as "under the original view." That view has, obviously, changed over time.

Two early cases which defined the view of interstate commerce are Gibbons v. Ogden, 22 U.S. 1 (1824), and Wilson v. Black Bird Creek Marsh Co, 27 US 245 (1829). The first established the view that commerce was quite broad in definition, and can include things such as the regulation of navigation by steamboat operators for the purpose of conducting interstate commerce. The second formulated what is referred to as the "dormant" commerce clause—that Congress can pass laws effecting intra-state commerce if they are doing so to protect interstate commerce, and that the courts can strike down state laws regulating commerce if they do the same.

The active use of the Commerce Clause by Congress grew in the 19th century as the country became more connected. Railroads especially allowed the country to ship goods more easily between states, and required a more active federal role for regulation. This led to the passage of the Interstate Commerce Act of 1887, which first worked to regulate interstate commerce actively. The Great Depression and the New Deal era also saw a huge expansion of the Commerce Clause being used to regulate even intra-state commerce. In Wickard v. Filburn, 317 U.S. 111 (1942), the New Deal court held that “The Court reasoned that Congress could regulate activity within a single state under the Commerce Clause, even if each individual activity had a trivial effect on interstate commerce, as long as the intrastate activity viewed in the aggregate would have a substantial effect on interstate commerce.” (https://www.oyez.org/cases/1940-1955/317us111).

There has recently been push back against the use of the Commerce Clause by the Roberts court, which is generally suspicious of anything expanding federal power which was created by judges rather than by Congress itself (and is also clearly interested in limiting Congress own power if it violates other doctrines they hold quite dear, but that is an entirely different conversation).

Obviously, interstate commerce and the Commerce Clause is a huge area of law and cannot be contained in a single Reddit post. If you’re interested in more information, much ink has been spilled on the subject.

Next up: Animus/Hatred/Prejudice

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Day 12 – A Case of the Mondays and Animus/Hatred/Prejudice

Here is a deep, dark secret. I was so excited to order Dranks, because it was the first limited or sub-exclusive soap that I was aware of since I joined the community. And then I got it, and I…didn't really like it. My father lists as one of his two failings as a parent that I don't like coffee, and that prejudices me here. Some coffee scented things I like, but generally if the coffee note is less present; and it is quite present in Dranks. I love everything else about it, but the reason I have used it so sparingly and even thought about PIF'ing it is because of that powerful coffee note.

For the fragrance, I paired it with Obsession EDP, which is a fragrance I also don't like. I don't know why, because Obsession EDT is one of my favorites; but something in the EDP formulation just doesn't work for me. So, this is going to be a fun day, for sure.

Hatred under the law is a funny thing. Under American law, you are absolutely allowed to hate people. You are absolutely allowed to avoid interacting with people you don't like, avoid buying things from their companies, or even try to put their companies out of business. You can even, in many states, fire someone from their job simply because you don't like them, their face, or the cut of their jib.

But there are also some areas where you absolutely cannot do so. One of those areas is when you are acting on behalf of a state or the federal government. Laws cannot generally be put in place based on animus for a particular group, whether it is racial or gender or religious animus. There are a variety of cases on the subject, but for a very long time the general rule was that even if there are other legitimate outcomes a law cannot be upheld if the motivating factor behind it was animus against a group of people.

This is largely rooted in the 14th Amendment. One of the Civil War amendments, the 14th Amendment especially represents a significant change in how the federal government viewed its relationship to its people. So significant, in fact, that a number of scholars have begun discussing the concept of a "Second Founding" and Second Founding originalism—that is, an ongoing obligation for courts to stay true to the vision of America outlined in this Second Founding, as opposed to the First. One of the major proponents of this view is Justice Ketanji Brown Jackson of the Supreme Court of the United States (SCOTUS), who writes quite persuasively on the subject.

The 14th Amendment guarantees equal protection under the law to all persons in the United States. Not just citizens, note, as is important in the ongoing discussions regarding citizenship and the rights of immigrants. Because of this, animus by the government in passing a law has historically been seen as fatal. As with many things, the later stage Roberts court has undermined this somewhat in recent cases, which makes it yet another area of law under significant review currently.

The Government is so banned from acting on prejudicial grounds that it can even be banned from doing things which are not motivated by animus but which nonetheless have a prejudicial impact. This is called “disparate impact” and can result in laws which are on their surface neutral but which otherwise disparately impact individual groups.

As discussed previously, there are generally speaking three levels of review SCOTUS has articulated when reviewing laws. These standards of review are Rational Basis review, which applies for all laws which are not brought into one of the higher categories; Intermediate Review, which is triggered when “semi-suspect” classifications are involved such as gender/sex or commercial speech; and Strict Scrutiny which is triggered when a law involves fundamental constitutional rights or suspect classifications such as race, religion, or national origin. From reviewing the standards of review, one can see how SCOTUS has traditionally applied much greater scrutiny to those classifications which are traditionally subject to animus and prejudice.

Next up: Disability law!

Pic:

$Discord

$ROTY

$FOF

LG Day 13 – Blind Date and Disability Law

Random smush is from u/solongamerica. I am not a super smeller by any means, so this is going to be an exciting opportunity to try to figure it out.

The fragrance I paired with it is:

For the daily challenge, I tried to think hard about my favorite scents. My favorite frags include Polo 67, Polo Green, Blue de Chanel, Cool Water/Green Irish Tweed, and Irisch Moos/I, Rich Moose. So I really like both woody and lightly spicy scents, as well as blue/aquatic frags. So, my pitch is essentially take Stirling Scots Pine Sheep and Davidoff Cool water and smash them together. Imagine a redolent pine forest right at the edge of an expansive lake. You lie down on the shore, and both fragrances wash over you at the same time; woodsy, spicy, cool, and fresh. You fall asleep, and then a bear eats you. But you die in fragrance heaven, and I win an Oscar for your sacrifice.

Disability law in the U.S. has an interesting history, and because it is such a wide subject it is difficult to talk about all of it in a Reddit post. We''re going to do our best to talk about it, and look at a couple relevant laws and cases.

For a long time in the United States there really was no protection for disability except under certain circumstances. Caring for the disabled or sick was left to their families and private institutions, such as churches. There was no conception hat anything should be done for them except to basically house them somewhere. Formal deaf education in the U.S. begins in 1815 with the first permanent school for the deaf in America, the Connecticut Asylum for the Education and Instruction of Deaf and Dumb Persons. The Braille alphabet, allowing greater communication and literacy for the blind, is developed in 1829.

The law did, however, attempt to control or remove disabled individuals at multiple points as well. In 1907, Indiana passed perhaps the world's first sterilization law, literally referred to as the 1907 Indiana Eugenics Law. It mandated sterilization for certain individuals in state custody, although it was overturned by the Indiana Supreme Court in 1921. But it was not the only one, and the 20th Century in the US has a lot of shameful sterilization of minorities and individuals with disabilities. Notwithstanding this, SCOTUS ruled in Buck v. Bell, 274 U.S. 200 (1927) that state-enforced sterilization didn't violate the 14th Amendment. It has never expressly been overturned.

Where they weren't being sterilized, much of the 20th Century was marked by institutionalization of individuals with disabilities. This is the system of asylums and institutionalization that 20th Century Americans will be more familiar with, and would not change until there was a drastic change in thinking among policy makers.

This began with the passage of two laws: The Rehabiliation Act of 1973 (29 USC 701 et seq.), and the Americans with Disabilities Act of 1990 (42 USC 12101 et seq.). The Rehabilitation Act was primarily aimed at employment discrimination against individuals with disabilities by federal agencies and entities receiving federal funding. The ADA expanded this by applying broadly to businesses, public and private spaces, and anything offering public accommodation. The ADA does not require entities to receive any federal funding, but does have some limitations that only apply to businesses with more than 15 employees.

The ADA covers most of what people think of as disability accommodations in modern America, requiring businesses to provide accommodations to both employees (so long as they don't violate the essential functions of the job/business) and the public (requiring businesses over a certain size to be physically accessible). Anyone who has had to request a stool because they could not stand, or a carpal tunnel mouse/keyboard, has done so under the ADA. Interestingly, the ADA does not just prohibit discrimination based on a disability, it also prohibits discrimination based on your assumption that someone has a disability—if you treat someone like they have a disability and discriminate against them, then you have violated the ADA.

The ADA was also the basis for the landmark case Olmstead v. L.C., 527 U.S. 589 (1999). In Olmstead, SCOTUS ruled that individuals with mental disabilities have a right to live in the community rather than in institutions if it is appropriate for them to be placed there, they are not opposed to it, and it can be reasonably accommodated. This was a huge change in how the law viewed the housing of individuals with disabilities. While default institutionalization had been in decline, this positively recognized a right to community placement that had not existed before.

In June 2026, the Trump Administration released an opinion against the integration mandate of Olmstead. So, we will have to see where that ends up going forward.

Coming up tomorrow: Patent Law!

$Discord

$ROTY

$FOF

LG Day 14 – Accountabilibuddies and Patent Law (First to File/First to Invent)

Soap for the day is Steady, the excellent soap from Summer Break Soaps which was originally made to raise money for the Shave Against Suicide. It is an entirely fitting soap that a number of us chose to use today. Checking in on your buddies is one way to help keep everyone safe, and there could not be a more appropriate soap to use today.

Fragrance for the day Is also Steady, because I want to be steady and checked in all day. The fragrance will remind me of the accountability we all have for one another.

Lots of people are using the same soap today, and in the soap world that is a good thing. But in the legal world, it isn't always. One area where a rush to the courthouse, so to speak, can cause issues is the world of patent law!

As we've discussed previously—so please review your notes from previous classes, because this will be on the exam—patents are for inventions. They have to be novel, which means they cannot be novel to a Person Holding Ordinary Skill In The Art (PHOSITA). But what happens when multiple people rush to the courthouse with their papers in hand? What happens when someone has seen the notes of esteemed mathematician Nikolai Ivanovich Lobachevsky and claims to have simultaneously discovered non-Euclidean geometry? (See, e.g., Tom Leherer, Lobachevsky, Lehrer Records [1951]).

Every patent system must answer this question, and they have generally done it in one of two ways. The two systems are First to File, and First to Invent. Under a First to File system, the first person to make it to the courthouse and files the paperwork (or the first person to click 'submit' and have it received by the US Patent and Trademark Office) is the winner. Under a First to Invent system, it doesn't matter who gets to the courthouse first, but rather who can demonstrate that they were the first to invent the invention once someone has filed.

First to Invent, needless to say, can get pretty messy. As part of it, an inventor generally has to participate in a process where the public is notified of a proposed patent and is given an opportunity to show that they actually invented the thing first. This could be a lengthy and expensive process where the US PTO had to act as a referee and make determinations not just on when each person conceived of the idea, but also when they reduced it to practice. The filer had a prima facie right to the patent unless a challenger could overcome that right, and the diligence in doing so could be part of that.

From the way I've described the U.S. in regards to First to File, you would be correct in assuming this was the system in the U.S.; but if you've noticed I used the past tense, you would also be correct in assuming that we changed at some point. In 2013, the U.S. moved from a First to Invent system to what has been called a modified First to File, or First Inventor to File system; this is a First to File system with some extra steps.

Fun story, I was in law school from 2010 to 2013, and was taking my Introduction to Intellectual Property class in fall of 2011. We had just finished studying patents when President Obama signed the America Invents Act on September 16, 2011. My professor walked into class the next day and said "You remember everything I told you about first to file? Throw it out, Congress just changed it."

$Discord

$FOF

$ROTY

LG Day 15 – Leathursday and Animal Cruelty Laws

Soap today is Leather from the old Spearhead Shaving Co. I don't know if it is going to count as a sponsor soap, given the new Seaforth is owned by House of Mammoth, but I suspect not. I was originally going to use B&M Full Measure of Man, until I realized…it doesn't have leather. So that would have sucked. I'll lose the sponsor point, but it is hard to argue that Leather is not a Leather scent, with its notes of Leather, Cedar, Bergamot, Coriander, West Indies Bay, and Musk.

I also could have gone with Black Watch, which according to the website has Leather as a note. But as I still have the original formulation, I didn't think it would get the sponsor point either. For fragrance I did go with Black Watch, complimenting two different suites of supporting notes around the leather and keeping it OG Seaforth.

Where do we get leather from? Animals. Or complex suites of chemicals, if we're talking pleather. But for the real stuff you need a real animal, who we hope was treated in a humane fashion. Thus, we turn to animal cruelty laws.

This is another area where U.S. law has an interesting and varied history. For a long time there was not really an independent conception that animals had rights against humans, only that humans had a right in animals they owned. As a result, the earliest legal "protections" for animal were in tort law.

A brief digression about tort law. Torts are infractions committed by one person against another; they are called torts because they cause pain to another person, and tort is derived from the same root as torture. The two which are relevant to property law are both Trespass to Chattel, and Conversion. Both involve a taking of property, but a TpC suit is to return the taken goods while a suit for Conversion is to force a sale for the value of the taken thing. Taken here can mean either literally stolen, or (mostly for conversion) changed in such a way as to render it no longer usable.

In 1641, Massachusetts included in its colonial legal code a prohibition against animal cruelty, and Ireland had done the same in 1635. The first state law to prohibit animal cruelty was passed in New York in 1828. This was part of a general increase in the feeling that there were inherent rights held by animals to avoid cruel conditions or torture, as well as an increase in understanding that better conditions for animals tends to result in better conditions for the food supply as well.

By 1907, every state in the Union had passed animal cruelty laws. Federal legislation would follow in 1958.

One of the most interesting recent cases in the U.S. regarding animals was the so-called Monkey Selfie Case. This case involved a monkey which allegedly activated a camera placed by a photographer and which resulted in a selfie. The case is Naruto, a Crested Macaque, v. David John Slater, 16-15469 (9th Cir. 2018), ruled that while PETA could sue on behalf of Naruto under the holding of Cetacean Community v. Bush, 386 F.3d 1169 (wherein a community sued the Bush administration on behalf of a whole bunch of whales), the Copyright Act does not specifically allow for animals to file copyright lawsuits.

Sometimes the law is very funny.

Next up: Copyright. Just the whole thing. Let's see if we can keep it from taking fifty pages.

$Discord

$FOF

$ROTY

LG Day 16 – Dictionary Day and Copyright Part I

Lather of the Day is Stirling Baker Street. Baker Street is, of course, the famous location of detective Sherlock Holmes. It is hard to get much more literary than this. I was going to go with Lorekeeper from NO, but I'd already ordered this sample before NO got added as a sample.

To keep the literary theme, however, I have used the Lorekeeper splash. And to continue the theme, I went with Terre d'Hermes. Hermes is, of course, a mythological figure. Especially because in his syncretic form as Hermes Trismegistus he was the inspiration and purported author of the Hermetica, a series of ancient writings on alchemy and philosophy that inspired Hermeticism. Also, it's one of my favorites and smells super nice.

As we've discussed previously—again, I cannot stress enough to read your notes or at least get an outline from PAD or another student—any kind of creative work is protected by copyright. The best way to remember this is literally to look at the name—if your concern is about your work being copied, you want a copyright.

Important to know off the bat is that in the United States, as with every country which signed on to the Berne Convention for the Protection of Literary and Artistic Works, a copyright is granted the moment a creative or artistic work is fixed in a tangible medium of expression. This means that you do not need to do anything which used to be common wisdom to protect your copyright, such as putting the title of your book in an envelope and mailing it to yourself.

But also it's important to note that while the Berne Convention was penned in 1886, the U.S.A. only approved signing onto it in 1988. Some of the common wisdom you may have been told (or which my dad told me) likely comes from the pre-Berne times, where things were slightly different.

The first copyright law in the U.S. legal tradition was, as with many things, an English law. The Statute of Anne was passed in 1710, and established a 14 year term of protection which could be renewed once for a further 14 years. The Statute of Anne was a major change from the previous legal schemes which had all been in the favor of publishers and royal monopolies.

Notably, this is also where we see the development of the public domain. Once a copyright term had expired, whether the initial or the renewal period, the work entered

the public domain and could be reprinted or utilized by anyone. That concept remains to this day, even with the greatly expanded copyright terms that we now have.

The development of copyright since then in the US has largely been in expanding copyright terms and delaying the entrance into the public domain. The fundamental kinds of work covered haven't really changed, and as we've come up with new things like comic books and movies/television we've easily slotted them into the copyright world. The most recent expansion to copyright terms in the U.S. was the Sonny Bono Copyright Term Extension Act of 1998. Signed by President Bill Clinton and named after Cher's singing partner, it was also colloquially known as the Mickey Mouse Protection Act due to it being passed just in time to keep Steamboat Willy from entering the public domain. It set copyright terms at the life of the author plus 75 years, which is where they remain to this day.

But while those seem too long to many people, myself included, it is not iron-clad. The longer the protection time we give you, the less set in stone that protection is. With trademarks, which can theoretically last for as long as they're being used and the paperwork is being filed, it is very loose protection—generally being limited only to specific streams of commerce. With copyright there are multiple ways copyrighted material can still be used, the most well-known of which is Fair Use.

Fair Use states there are certain circumstances in which your copyrighted material is more beneficial if we let people have access to it. There is a four-factor test, because judges love multi-factor tests, to determine it:

1. The purpose and character of the use;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion taken; and
4. The effect of the use on the potential market.

The first factor is also known as transformation, and it is something of a nebulous concept. It is also one that has been turned into almost the most important of the factors by cases such as Cariou v. Prince, 714 F.3d 694 (2d Cir. 2013). This was later somewhat pulled back by Andy Warhol Foundation v. Goldsmith, 598 U.S. 508 (2023). In the interest of full disclosure, I was co-author of an amicus brief in Warhol v. Goldsmith.

The four factors above are a balancing test, unless everyone is going full Cariou, which means that each of the factors weighs in when considering if something is fair use. Thus,

for example, you might get away with a greater amount and substantiality of the work used if there is less impact on the market for the work.

Also falling under fair use are parody and satire. Generally speaking, parody has a greater protection under copyright as compared to satire. From the controlling case law on the subject: “Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.” Campbell v. Acuff-Rose Music, 510 U.S. 569, at 580-581. In other words, parody only works when it is specific, whereas satire can work more generally, and therefore parody has greater protection.

The public domain is the final thing we’ll discuss a little more specifically here. Once something is in the public domain, it is in the public domain—nothing in the law would currently allow for something to be removed from the public domain. But there are two important notes. First is that a new work utilizing something from the public domain still receives copyright protection for those new elements it introduces. If I write a Sherlock Holmes story where he discovers he secretly has a third brother named Better Holmes (and gardens, presumably), I don’t have the copyright to Sherlock but I do to his new brother.

And second, just because one part of a character or series has entered the public domain does not mean that every part of him has. Consider, if you will, the Mickey Mouse. Steamboat Willie entered public domain in 2024, but that does not mean that Mickey Mouse has; you can only use the character as he existed in Steamboat Willie.

That is enough of a lesson for day one. Tomorrow we will go into some limitations on Copyright—not just what is copyrighted but permitted, but which categorically cannot be copyrighted. Which also includes explaining a burning question on the internet: Why are recipes online Like That?

Pic:

$Discord

$ROTY

$FOF

LG Day 17 – Sweetest Day and Copyright Part II

Soap today is Dinosmores from the House of Mammoth, which is named after Smores. Chocolate, marshmallow, and graham cracker, it is hard to argue this is not a "sweet, dessert, etc."

I have paired it with Maison Alhambra Hercules, one of my favorite go-tos. I refer to Massacre of the Innocents as the Forbidden Chocolate Milk, and Hercules takes that to fragrance form. To me it is very chocolate-y and sweet, bringing the gourmand spirit of the theme throughout the day.

We return to our second lecture on copyright, because I really didn't want the first to actually end up the length of a real law journal article. So yesterday we talked about what actually can be copyrighted, and how you can sometimes use copyrighted material if it is fair use. Today we're going to turn to the edge of copyright, things that don't quite fall into those protections even if it might seem like they should. We're also going to finally explain to everyone why online recipes are Like That, because the reason is copyright.

Fundamentally, copyright is for creative works; so the first threshold barrier is whether what we're talking about is a creative work. Creative work here doesn't require thst it be fiction, mind you, as documentaries and non-fiction books are equally covered because there are still creative choices involved (and because they're not really covered by any other kind of IP, except their titles and branding).

But there must actually be creative choices involved. Mere listing of facts cannot be copyrighted because there is nothing creative involved. The most exemplary case in this matter is Feist Publications, Inc. v. Rural Tel. Sev. Co., 499 US 340 (1991). In this case, Feist basically copied the white pages from Rural when Rural wouldn't license the information to them. While a lower court ruled telephone directories as copyrightable, the Supreme Court disagreed.

"Article I, § 8, cl. 8, of the Constitution mandates originality as a prerequisite for copyright protection. The constitutional requirement necessitates independent creation plus a modicum of creativity. Since facts do not owe their origin to an act of authorship, they are not original, and thus are not copyrightable. Although a compilation of facts may possess the requisite originality because the author typically chooses which facts to include, in what order to place them, and how to

arrange the data so that readers may use them effectively, copyright protection extends only to those components of the work that are original to the author, not to the facts themselves." Id.

This holding stays true today—facts are not copyrightable. The order you choose to put them in, the categories you use to arrange them, and the other graphic design or layout choices you make can all be copyrighted, but you cannot stop anyone from taking the actual facts and using them.

This goes far beyond telephone directories, which is why Feist is relevant today. The same ruling, for example, applies to game mechanics. Dungeons & Dragons cannot trademark D20s, or rolling a D20 and adding a trait modifier. It can also not trademark the use of any of the six core stats by themselves, and I'm not 100% sure how a suit would go against someone even if they used all six core stats. But D&D (or the Wizards of a particular Coast) can definitely trademark their layout, artwork, the names of their gods, etc.

The stats, as well as class names and the like, are almost certainly covered under the idea side of the idea/expression dichotomy discussed in Feist. The law will protect the expression of an idea, but it will not allow you to copyright an idea itself. There is a concept, for example, of Mise-en-scène—those elements which are used as stage dressing to make the feeling of a scene or story. You can copyright Hercule Poirot, but you cannot copyright dark and stormy nights or parlor scenes.

This is what explains online recipes and cookbooks, incidentally. A recipe is a mere recitation of facts—ingredients, and the techniques needed to turn them into a finished dish. Those elements of a recipe cannot be copyrighted. But the story of how your grandmother took you to rural France and taught you to pick morel mushrooms and catch oysters with your bare hands? Totally copyrightable, even if totally made up. So, recipe authors are almost incentivized to add elaborate stories that they can protect if someone else copies them wholesale. Remembering our previous discussion that the purpose of a system is what it does, copyright is thus a system for encouraging ridiculous stories about grandmothers.

Another thing which cannot generally be copyrighted is a useful article. Again, the law is not interested in allowing you to copyright a shirt. As a result, for a very long-time fashion had little copyright protection in the United States. Louis Vitton could

trademark the LV logo, but not the bag; Chanel could trademark No. 5 (and perhaps have a patent on the formula) but not copyright a little black dress. This is how the knock off industry in fashion was so prevalent.

For years the law talked around how to distinguish, settling on a variety of separability tests. Those elements which could be copyrighted on a useful article were only those which could be separated from the function of the item. This was further elucidated and explained in Star Athletica, LLC v. Varsity Brands, Inc., 580 U.S. 405 (2017), a case involving the copyrightability of cheerleading uniforms. In Star Athletica the court definitively held that clothing designs, the aesthetic elements of the garments based on underlying design sketches, could be copyrighted.

(Once again in the interest of full disclosure, I was co-author of an amicus brief in Star Athletica. Brief can be provided on request).

Thus, we have explored some of the limitations of copyright and what doesn't fall under protection, as well as how the SCOTUS has split hairs on the subject. And like all annoying law professors, I have once again cited my own work.

Tomorrow: A special edition on defamation law! I was going to do smoking bans, but I got a special request so how could I not.

$Discord

$FOF

$ROTY

Day 18 – AQI Awareness Day and Defamation

Lather for the day is Texas on Fire by Stirling. Scent notes: Leather, smoky, cedar. It is described as "The scent of a forest fire in Texas," so it is directly on theme. Splash is Lorekeeper to keep the leather going.

Rather than turn to Opulence Leather for my fragrance and just focus on those notes, I've gone to the one fragrance I have which features really prominent smoke, birch tar, and leather notes. I just hope it plays nicely with others, because I've released…the Stag. Smoke, oil, leather…now a motorcycle has crashed into the Texas forest fire.

As previously mentioned, I had a special request to cover defamation today, and who am I to turn down my "adoring" fans. If I don't give them what they want, the judges might stop reading my already way too long posts, and then I'm screwed.

A note to start us off. I'm going to be referring to defamation throughout this discussion, except where I am quoting or where I need to draw a distinction between the two previously used forms of libel and slander. Modern law puts both of them under the same header, defamation, rather than there being significant meaningful distinction between the two. This makes sense, as the purpose behind the distinctions has largely disappeared in the modern age.

Defamation is, without being hyperbolic, one of the foundational issues of the United States. Under previous understandings of English law, criticism against the powerful was criminal even if it was shown to be true. The Star Chamber, once actually viewed as a court of particular justice before it became primarily a secret tool of the powerful, created the concept of defamation law as a form of societal control. As one scholar put it, this was "an effect of overwhelming importance in an age when the peace and security of the state was manifestly precarious and when printing and the great intellectual movement of which it was one symptom had made political writings take on a new and vital importance."

The theory was that defamation caused someone's family to seek revenge for the harm done, and thus defamation was a societal harm. But that logic doesn't just apply to spreading false truths, it also obviously applies to telling the truth about

powerful people. Thus the saying of the Star Chamber was “the greater the truth, the greater the libel.”

America is responsible for the idea that the truth is an absolute defense against defamation. In the trial of Crown v. John Peter Zenger (1735), a newspaper owner was prosecuted for seditious libel, and his attorneys presented the argument that printing the truth should not be found to be libel. It was also a case of essentially jury nullification, because the judge in question had directed the jury to only decide whether Zenger had published the newspapers in question or not; instead, they found Zenger not guilty. While it would take many decades and the formation of a new country to enshrine it in law, the Zenger case laid out the fundamentals of how we view defamation today.

Modernly, a lawsuit for defamation must as a threshold matter show four things:

1. **A false statement purporting to be a fact;**
2. **Publication or communication of that statement to a third party;**
3. **The requisite level of fault by the defendant; and**
4. **Reputational harm or legally cognizable damage.**

One of the interesting things about defamation, then, is that the analysis in part depends on the status of the individual alleging it as well as the topic discussed. A public figure requires a much higher level of fault on behalf of the defendant to be defamation than if you’re just talking nonsense about a neighbor.

For private individuals, the standard is generally negligence—you can be held liable for defamation if you negligently communicated information about another person. Note that this could be negligence in knowing what you were saying might be false, or in not even bothering to look.

For public figures, even what are called “limited purpose public figures”, the standard is much higher. The controlling case here is *New York Times Co v. Sullivan*, 376 U.S. 254 (1964). In this case, the Court held “A State cannot, under the First and Fourteenth Amendments, award damages to a public official for defamatory falsehood relating to his official conduct unless he proves "actual malice" -- that the statement was made with knowledge of its falsity or with reckless disregard of whether it was true or false.” Id. Sullivan specifically dealt with public officials, and

this was later extended to all public figures in Curtis Publishing v. Butts, 388 U.S. 30 (1967). And in Gertz v. Robert Welch, Inc., 418 U.S. 323, SCOTUS also created the concept of a "limited purpose public figure," an individual who is not generally public but has "thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved." Id.

Note that while truth is an absolute defense to defamation, opinion is not. "However, merely characterizing a statement as an "opinion" does not automatically protect it from a defamation claim. In the case Milkovich v. Lorain Journal Co., the U.S. Supreme Court rejected a broad constitutional rule that all statements of opinion are categorically protected. Instead, the relevant inquiry includes whether the statement can be reasonably understood as asserting an actual, objectively verifiable fact. Thus, a statement presented as an opinion may still be actionable if it implies or asserts undisclosed defamatory facts that are capable of being proven false." https://www.law.cornell.edu/wex/defamation.

Defamation is largely a state specific claim, so it is important if you are looking at defamation suits to consult with your local laws and an attorney licensed in your jurisdiction. You cannot simply tell someone it can't be defamatory because Mpark6288 said so.

One of the more recent developments in defamation law is the promulgation of anti-SLAPP statutes. A SLAPP is a Strategic Lawsuit Against Public Participation; in other words, a lawsuit that is filed against an individual to intimidate them into being quiet even if the plaintiff knows they will not win in the long run. This is in part because under the American Rule, except under certain circumstances both parties in a lawsuit bear the cost for the suit. So, a wealthy corporation or individual can target a critic and sue them, causing them to have to spend a significant amount of money defending themselves and leaving them in much less of a position to continue their criticism in the future—even if they win.

Anti-SLAPP statutes are designed to limit this by creating circumstances where cost shifting can occur. In most Anti-SLAPP statutes, a defendant of a SLAPP is allowed to file a specific motion to strike alleging that the lawsuit is a SLAPP. If they can show that the lawsuit is arising from their legitimate criticism connected to a public issue, the Plaintiff is then required to show a probability of prevailing. If they cannot show

this, the lawsuit is struck and the Plaintiff may be required to cover attorney's fees for the defendant.

Coming up tomorrow: Int'l Talk Like a Pirate Day...in October! And Letters of Marque.

Pic:

$Discord

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LG Day 19 – Talk Like a Pirate Day…in October and Letters of Marque

Lather for the day is Lime by Captain's Choice. I debated a number of different soaps for today. Seville has a notable note of orange, and SBS Daydream has two different citruses; but the primary note of Seville is the barbershop, and for Daydream is the Passionfruit. So, despite not getting a sponsor point, I decided to go with something that is uncontrovertibly citrus. Lime. Primary note? Lime. And the whole brand has a nautical theme. It only has a hint of clove, and it isn't noticeable in the scent.

Splash is Pinaud Bay Rum, because I did want to hit some pirate stuff.

For the fragrance, I went with Versace Eros Energy, which is a wild citrus blast. Top notes are lemon, lime, grapefruit, blood orange, Sicilian bergamot, and mandarin orange. Citrus!

For the daily contest: Yar, mateys. Tis I, the Pirate lawyer. Be that we be discussing maritime law, 'tis our (arr) view that every bit of this counts as technically being pirate speak. Under the code, savvy? And if not, we'll make you walk the plank! Yarr. And to make it even more pirate-y, I'll give you the T-L-D-Arr. Letters of Marque arr what separate a true, freedom loving pirate from a privateer. Yar, they were commonplace in ye olde times, but be less common now, landlubber! But the U.S. Congress (Cong-arr-ess?) has the power to grant them at any time, yoho, they just choose not to since 1812. And not many people arrrrgue for them to come back, but some scholarrrs do. Yarr. What's a pirate's favorite letter? Tis not R, for it is the Sea! Yarr.

Did you know that if Congress chose to it could, right now (or not, since it is a Saturday when I am writing this, but the next time they're working), make you a privateer? And that it would be totally legal, allowing you to take your yacht, dinghy, or rowboat and sail the high seas looking to take out enemy craft for plunder?

This is because the Constitution was written in 1787, when the idea of privateers taking to the high seas was still at least a little reasonable. As a result, Article I, Section 8, Clause 11 explicitly authorizes Congress "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."

Despite this power, of course, Congress has never seen fit to grant anyone, even me, a letter of marque since the War of 1812.

Historically speaking, Letters of Marque and Reprisal were originally conceived of as separate things. A Letter of Marque was to authorize a ship to sail beyond the boundaries of the issuing nation, while a Letter of Reprisal was to use force to redress a previous wrong. But "claimants usually sought both, the terms became synonymous, and these authorizations were generally combined into a single instrument." https://www.congress.gov/crs-product/LSB11272.

The most important thing about having a letter of marque was that it meant your actions on the ocean were at least theoretically authorized, even though the issuing nation could still burn you if it was convenient; but as long as you were following them, you could not be accused of piracy and would likely be treated more as an enemy combatant. And they were financially beneficial to encourage people to comply with them—if you followed the rules and gave the ships/booty you captured (the prizes) back to the government, they would give you a percentage of them.

Of course, there were numerous individuals who flitted in and out of privacy when it was convenient, using their marque to give them legitimacy when it was useful and then hoisting the black flag when it was more lucrative.

No nations have really issued letters of marque in the modern era, and it would be an interesting endeavor for them to do so. Much has changed in the arena of war since they were primarily used. These include the *jus cogens* (peremptory norm) which has developed against piracy, and which might be considered to include the semi-legitimate state sanctioned piracy of the letter of marque, and the development of the Geneva Conventions. With formal rules in place about who can legitimately act as a combatant. Rule 106 of the Geneva Conventions requires the combatants be strictly distinguished from civilian populations when engaged in military operations, or else they will not be eligible for prisoner of war status and could simply be tried and executed as terrorists.

This has not stopped some from proposing we bring back privateers, however. See, e.g., Zac Morgan and Ian A. Merritt, Reviving Letters of Marque, Center for Maritime Strategy (October 29, 2024). https://centerformaritimestrategy.org/publications/reviving-letters-of-marque/.

Pic:

Coming up tomorrow: The legal requirements of gifts!

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LG Day 20 – PIF Day and Gifts

Lather for the day is Barrister and Mann “The Full Measure of Man.” It was a gift from u/hugbckt, who is my rock star for helping me with smushes during the games. First time using it, as it is now unobtanium.

Because it features tobacco, sandalwood, and Mousse de Saxe, I wanted to pair it with something that complimented the old school wood study feeling of the lather. So Pinaud Whiskey Woods seemed like a great match with its tobacco, bergamot, whiskey, and smoky notes.

For my fragrance, I once again turned to Maison Alhambra Opulence Leather to compliment. Spicy, leathery, and ending with wood and earthiness, it is a great pair.

What is the difference between a contract and a gift? Remembering back to our day discussing contracts, and you will recall that a contract requires an offer, acceptance, and consideration. It is consideration—something of value for something of value, bargained for—that makes a difference between a contract and a gift.

(Quick note: Grantor is the one who grants, grantee is the one who receives)

The elements of a gift, instead, are offer, acceptance, and delivery. The important difference here is that there is no reciprocal benefit to the grantor or required action on behalf of the grantee, only a gain to the grantee; and that there cannot be a gift without some form of delivery.

When we looked at Hamer v. Sidway in contracts, we noted that it was the forebearance of otherwise legal actions that caused it to be a contract; because the individual refrained from doing something, it counted as consideration for them, and there had been an apparent benefit to the contractor when they made the agreement. Courts will generally not question whether or not it was reasonable for one party to value something, only that they apparently did.

A gift lacks that element of action or restraint by the grantee, and lacks any kind of return benefit to the grantor. But in return, there is a much greater opportunity for the grantor to change their mind, which is why some form of delivery is required. Until the grantor has actually taken a step to deliver the object to the grantee, they

can still change their mind; because there has not been any consideration, no one has any kind of claim against the other to have suffered a loss if they do not fulfil the contract.

But delivery does not need to be full, physical, or complete. The law recognizes both constructive delivery and symbolic delivery. Constructive delivery is some form of acknowledgment of transfer, such as signing over a deed. Symbolic delivery uses a token or representation of the whole, or a synecdoche, to show that the transfer has been made—such as handing over the keys to the car or house.

So when the estimable hugbckt put the smush in the mail, he had taken the step needed to deliver it to me; he could not have attempted to get it back against my right to come in to possession of it (although the USPS probably would have given it back before it was on the truck).

Tomorrow: I shave with Olive Oil and discuss Roman Law/Civil Law/Canon Law.

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LG Day 21 – Wild Thing Wednesday and Roman Law/Civil Law/Canon Law

Lather today is…well, not really a lather. Olive Oil. Not exactly what I ever figured I would be shaving with, but here we are. It's Olive Oil. I don't know what you want me to say about it. I used a different razor just in case it sticks around too much.

For the fragrance…uh…what goes well with Olive Oil? I had no idea, so I went with Polo Green. Olive oil is green and earthy, Polo Green is earthy and named green and comes in a green bottle. It's Mana toast. It restores your mana. I got nothing.

So what exactly do we mean by Roman law? Well, it is a long and complicated subject. The Romans, unsurprisingly, had laws; they weren't necessarily the most fair and just by modern standards, but in some ways they were very well developed compared to some of the other cultures at the time. But the question you might ask is what this has to do with an American lawyer talking broadly about American law?

Well, first off, I have depth. I am like an onion or an ogre, and I have layers. I can talk about what I want. But also, it is relevant because Roman law forms the basis of civil law as it is practiced in Europe, which means that we have to interact with it fairly regularly; and because Louisiana still largely follows it, we even have it in these United States of ours.

One of the most important parts of Roman law came from the Byzantine Empire, which considered themselves to simply be the ongoing Roman empire.

The Corpus Juris Civilis was issued by the Eastern (Byzantine) Roman Emperor Justinian in the year 533. It consists of four sections: The Codex (the section known as the Codex Justinianeus), the Digest, the Institutiones Justiniani, and the Novellae Constitutiones. The first section is considered useful but not groundbreaking itself in anything but speed considering several previous Imperial codices had been published. It serves as both a collection of law and a practical manual for the legal profession. The second section is more groundbreaking--the Digest is called such because it represents the concentration of centuries of legal writing in to one place, not unlike modern compilations of commentaries on the law.

The CJC influenced the entirety of the Roman Empire, but as East and West drifted it was largely lost to the West; Roman law mutated in various places for centuries while the formality of the CJC went unknown to them. This is important, as some of

the legal concepts that were born in places like Germany would become a part of the later English Common Law. But as Europe moved from what is popularly called the “Dark Ages” and in to the medieval period, they rediscovered some of the things they lost--one of which was the rediscovery of the CJC in the 11th Century by Italian legal scholars.

From this rediscovery the CJC quickly regained its position of vital importance. The Italian scholars began writing commentaries on it, and it became central to the teaching of Law at the University of Bologna; from there it spread to the other medieval universities, and then to the courts (both royal and judicial).

Civil Law also formed the bedrock of what became known as Canon Law, or the law of the Church. Until the teaching was outlawed in England, Canon Law was the other kind of law which was taught at Oxford and Cambridge. And it was common enough to receive a doctorate in both fields that there was a specific designation for it--iuris utriusque doctor, or doctor of both laws. Civil law was the main beneficiary from the destruction of Canon law by Henry VIII, and they furthermore had the benefit of international reciprocity; because the Civil law curriculum was shared throughout the world of medieval and Renaissance universities, with some notable exceptions a doctoral degree (and the attached licentia docendi) would be recognized at any other university. Thus, an Oxford or Cambridge Doctor of Civil Law (DCL) could find royal patronage, work in profitable and exclusive courts, and even international travel and work due to this early reciprocity. They purchased well-furnished grounds in London for their professional society, the Doctors’ Commons, and occupied a precedence even above Knights.

Canon law jurists began, in fact, as Roman law jurists at the University of Bologna, such as Pepo and Irnerius. A successor to these scholars was Gratian, who compiled a list of canons known as the Concordia discordantium canonum (also known as the Decretum), which became the foundational text for Canon law from its publication in the mid 12th century (estimated as the 1130s or 1140s) until it was finally replaced in the 20th Century.

The Decretum “introduced jurisprudence into canonical thought”, not only collecting decree and precedent but also providing insight into the reasoning behind the rules and further hypotheticals to simulate thought, as well as giving his

own considerations: “When the text of the canon did not answer the question without interpretation or when two canons seemed in conflict, Gratian provided a solution in his dicta.”

England was, in many ways, no different than the rest of Western Christendom in how it viewed Canon law and its applicability to English subjects. “The answer is, that the English ecclesiastical courts possessed no such power as that of accepting or rejecting the Canon law--they acknowledged its binding authority on them.” The Clergy were given all of the ecclesiastical benefits, including the specifically named Benefit of Clergy--the powerful dual benefit of being immune from trial or punishment in secular courts and not being subject to the death penalty, part of what made the murder of Thomas Becket so controversial.

We circle back, then, to the question previously asked—what does this have to do with modern law? The answer is that it matters, as mentioned, because much of European law is still working in a system still heavily influenced by civil law and the developments of canon law, both of which can trace their heritage back to the CJC and Roman Law.

I also mentioned Louisiana, so let’s return to that briefly. Louisiana, of course, was not originally American or even English, but was a French colony. So the legal codes which were introduced in the colony of Louisiana were based on the civil law, and especially the Napoleonic Code. When it became part of the U.S., it kept these legal underpinnings, which is why Louisiana has Prescriptions instead of Statutes of Limitations, Successions and Donations instead of Trusts and Estates, and Parishes instead of Counties.

Tomorrow: Some topics on agricultural law!

Pic:

$Discord

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LG DAY 22 – SHEEP-RUH SHURSDAY AND AGRICULTURAL LAW (AG GAG)

LATHER FOR THE DAY IS LE GRAND CHYPRE BY BARRISTER AND MANN. I MEAN COME ON GUYS, IT IS RIGHT THERE IN THE NAME. “INSPIRED BY SMELLS INDIGENOUS TO THE ISLAND NATION OF CYPRUS, LE GRAND CHYPRE ("LEH GROND SHEEP-RUH") COMBINES NOTES OF BERGAMOT, LIME, LABDANUM, OAKMOSS, AND A TOUCH OF PATCHOULI TO PRODUCE AN ELEGANT, CITRUSY HEART.” IT CAN’T BE A GRAND CHYPRE WITHOUT BEING A CHYPRE, RIGHT? THE FIRST RULE OF TAUTOLOGY CLUB IS THE FIRST RULE OF TAUTOLOGY CLUB.

THE FRAGRANCE FOR THE DAY IS POLO GREEN, LISTED BY ESQUIRE MAGAZINE AS THE BEST SPICY CHYPRE COLOGNE. HERBAL, EARTHY, AND SPICY, IT IS ONE OF MY FAVORITE FRAGRANCES, AS YOU CAN TELL FROM ITS FREQUENT APPEARANCE IN MY DAILY ROTATION.

DAILY CHALLENGE IS KIND OF SELF-DEMONSTRATING, IF WE’RE HONEST.

IF WE’RE TALKING ABOUT SHEEP, WE SHOULD TALK ABOUT AGRICULTURE. BUT THAT’S A PRETTY BIG TOPIC, RIGHT? WE COULD TALK ABOUT PROPERTY RIGHTS, ENVIRONMENTAL LAW, OR EVEN CONCEPTS SUCH AS CAPTURE OR NUISANCE LAW. WE HAVE ALREADY TALKED ABOUT ANIMAL CRUELTY LAWS, SO WE CAN’T NECESSARILY GO BACK TO THAT WELL. SO HOW DO WE NARROW THIS DOWN MEANINGFULLY?

WELL, LIKE ALL GREAT LAW PROFESSORS, I JUST WANT TO TALK ABOUT THE STUFF I THINK IS INTERESTING. SO, BUCKLE UP, WE’RE GOING TO TALK ABOUT AG GAG LAWS.

AGRICULTURAL GAG LAWS ARE PROTECTIONIST LAWS DESIGNED TO PROTECT PRIMARILY THE MEAT INDUSTRY FROM PEOPLE TALKING **** ABOUT THEM; AND BY TALKING ****, WE ALSO MEAN “DISCUSSING ABSOLUTELY TRUE THINGS ABOUT THEM IN A WAY THAT DAMAGES THEIR SALES.” THESE ARE LAWS ORIGINALLY DESIGNED TO PROSECUTE PROTESTORS OR ACTIVISTS WHO USED UNDERCOVER FOOTAGE TO EXPOSE THE PRACTICES OF THE MEAT INDUSTRY. “THE TERM ‘AG-GAG’ REFERS TO STATE LAWS THAT INTENTIONALLY LIMIT PUBLIC ACCESS TO INFORMATION ABOUT AGRICULTURAL PRODUCTION PRACTICES, PARTICULARLY LIVESTOCK PRODUCTION.” CAITLIN A. CERYES AND CHRISTOPHER D. HEANEY, “AG-

GAG" LAWS: EVOLUTION, RESURGENCE, AND PUBLIC HEALTH IMPLICATIONS, 28 NEW SOLUT. 4, 664-682 (FEBRUARY 2019) (HEREINAFTER "CERYES").

OF COURSE, AGRICULTURAL EXPOSES HAVE A LONG HISTORY IN THE UNITED STATES, AND HAVE FREQUENTLY GONE HAND-IN-HAND WITH REFORMS IN THE INDUSTRY. THE MOST FAMOUS OF THESE IS THE JUNGLE BY UPTON SINCLAIR, WHICH RESULTED IN SIGNIFICANT CHANGES AND ALSO FRUSTRATION FROM OWNERS. SO IT IS NOT NECESSARILY SURPRISING THAT THERE WOULD BE PUSH BACKS AS THESE BECAME COMMON AGAIN IN THE 90S WITH THE ADVENT OF RECORDING TECHNOLOGY.

"THE FIRST AG-GAG LAWS WERE PASSED BETWEEN 1990 AND 1991 IN KANSAS, MONTANA, AND NORTH DAKOTA. THESE LAWS INCLUDED LANGUAGE SPECIFICALLY PROTECTING AGRICULTURAL SITES FROM SECRETIVE SURVEILLANCE AND SUBJECTED THE VIOLATOR TO CRIMINAL AND CIVIL PENALTIES, FINES, AND/OR DAMAGES." CERYES, SUPRA. EXCEPT FOR SOME SPECIFIC FLARE-UPS IN THE MIDDLE OF THE DECADE THESE LAWS LARGELY WENT UNNOTICED BY THE PUBLIC AND BY OTHER STATE LEGISLATURES.

THE MOST FAMOUS FLARE-UP CAME IN 1997, WHEN A COTERIE OF TEXAS CATTLE RANCHERS/PRODUCERS SUED OPRAH WINFREY OVER AN EPISODE OF HER SHOW ABOUT THE "MAD COW" (BOVINE SPONGIFORM ENCEPHALOPATHY) OUTBREAK OF THE TIME. "WINFREY'S TEXAS BEEF BEGAN IN APRIL 1996, WHEN HER TALK SHOW AIRED AN EPISODE ON FOOD SAFETY. A SEGMENT INCLUDED DISCUSSION OF BOVINE SPONGIFORM ENCEPHALOPATHY, COMMONLY KNOWN AS MAD COW DISEASE, WHICH HAD RECENTLY KILLED CATTLE IN ENGLAND. HOWARD LYMAN, A VEGETARIAN AND ANIMAL RIGHTS ACTIVIST, PREDICTED ON THE SHOW THAT THE DISEASE WOULD EVENTUALLY PLAGUE THE U.S. BEEF INDUSTRY. WINFREY DECLARED THAT THE DISCUSSION 'HAS JUST STOPPED ME COLD FROM EATING ANOTHER BURGER. I'M STOPPED.'" AMAN BATHEJA, THE TIME OPRAH WINFREY BEEFED WITH THE TEXAS CATTLE INDUSTRY, THE TEXAS TRIBUNE (JAN. 10, 2018). ONE OF THE INDIVIDUALS URGING THE CATTLE PRODUCERS TO SUE, AS WELL AS URGING THE TEXAS ATTORNEY GENERAL TO TAKE LEGAL ACTION UNDER THE SO-CALLED VEGGIE LIBEL LAWS, WAS THEN TEXAS AGRICULTURAL COMMISSIONER AND FUTURE GOVERNOR AND U.S. SECRETARY OF ENERGY JAMES RICHARD "RICK" PERRY.

IN THE END OPRAH WON THE LAWSUIT, AND A COURT OF APPEALS UPHELD THE DISMISSAL. BUT EVEN IN VICTORY IT SERVED THE EFFECT OF ALL SUCH LAWS IN CHILLING SPEECH—WHILE OPRAH COULD AFFORD TO FIGHT A WEALTHY INDUSTRY TO VICTORY, THE AVERAGE ENVIRONMENTAL OR ANIMAL CRUELTY PROTESTOR LIKELY COULDN'T. SO OTHER ACTIVISTS LIKELY FELT SILENCED BY THE OUTCOME EVEN THOUGH OPRAH WON. AND IN AN EVEN WORSE BLOW TO OUR NATIONAL INTEGRITY, THE LAWSUIT BROUGHT OPRAH INTO CONTACT WITH DR. PHIL, PUSHING US FIRMLY INTO THE WORST TIMELINE.

WE HAVE MODERNLY SEEN A RESURGENCE OF THESE KINDS OF LAWS, WHICH IS WORTH KEEPING AN EYE ON. FOR EXAMPLE: "NEWER AG-GAG LAWS, ENACTED SINCE 2011, CONTAIN HEIGHTENED CRIMINAL AND CIVIL PENALTIES, INCLUDING DAILY FINES AND JAIL TIME. ADDITIONALLY, THESE NEWER LAWS INTRODUCE TACTICS WHICH APPEAR DESIGNED TO PREVENT INDIVIDUALS FROM DOCUMENTING A PATTERN OF BEHAVIOR IN ORDER TO BUILD A CASE OF MISCONDUCT AGAINST A FACILITY. FOR EXAMPLE, MISSOURI'S STATUTE ALLOWS CAPTURE OF VIDEO FOOTAGE OR PHOTOGRAPHS, BUT REQUIRES THAT IT BE TURNED OVER TO LAW ENFORCEMENT WITHIN 24 H OF CAPTURE. THESE LAWS MAY PREVENT CONCERNED INDIVIDUALS, INCLUDING WORKERS OR COMMUNITY HEALTH ADVOCATES, FROM BUILDING A CASE BY DOCUMENTING ONGOING PATTERNS OF ABUSE, MISCONDUCT, OR ILLEGAL ACTIVITY OVER TIME." CERYES, SUPRA.

TOMORROW: CONSUMER CONFUSION (TRADEMARK LAW)

PIC:

$DISCORD

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LG Day 23 – Fougere Friday and Consumer Confusion

Lather of the day is Crangere, by Catie's Bubbles. Straight from the source: "The result is a sophisticated fruit-accented woody fougere that stands confidently on its own." Boom.

I do not currently have the Crangere EdT, so I have gone with another Fougere: Azzarro Most Wanted Parfum. Red ginger, woodsy notes, and bourbon vanilla will bring a boozy Fougere compliment to the sweeter notes of the Crangere lather and splash.

Today we're returning to the world of Trademark, specifically to go into the realm of what constitutes trademark infringement. Because just like it can be hard to keep straight what is a Chypre, Fougere, or gourmand, it can sometimes be too confusing to keep straight different companies with similar names. Am I buying from Apple Records, Apple Computers, or Apple Brand Apples? Who knows!

One of the fundamental protections of Trademark law is protection against exactly that, that someone else will come in to your field with a similar enough name that people think they are buying your product when they are buying your competitor's. This standard is called the Likelihood of Consumer Confusion, and if your product is found to violate it, you can be forced to change your name or disgorge profits.

Note that in the UK one of the phrases used for the same thing is "a moron in a hurry," which apart from its ableist language (moron has a difficult history, shall we say) is a pretty perfect encapsulation of the concept. Could a not particularly sophisticated consumer in a bit of a rush be confused and think that they are buying from company A when it is instead company B? Boom goes the dynamite.

Of course, because this is Intellectual Property specifically and even just the law in general, we can't just have a standard. No, we have to deal with balancing tests and factors. As laid out by Polaroid Corp v. Polarad Elecs. Corp., 287 F.2d 492 (2d Cir. 1961), the factors are: "(1) the strength of the plaintiff's mark; (2) the degree of similarity between the two marks; (3) the proximity of the products; (4) the likelihood that the owner will bridge the gap; (5) evidence of actual confusion; (6) defendant's good faith in adopting the mark; (7) the quality of defendant's product; and (8) the sophistication of the consumers. will likely cause confusion with plaintiff's mark." Importantly, there is not a single nationwide standard, so while these factors will be broadly similar in each circuit, they will not be exactly the same.

The USPTO (U.S. Patent and Trademark Office), for example, has thirteen factors:

1. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

2. The similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use.

3. The similarity or dissimilarity of established, likely-to-continue trade channels.

4. The conditions under which and buyers to whom sales are made, *i.e.,*"impulse" versus careful, sophisticated purchasing.

5. The fame of the prior mark (sales, advertising, length of use).

6. The number and nature of similar marks in use on similar goods.

7. The nature and extent of any actual confusion.

8. The length of time during and conditions under which there has been concurrent use without evidence of actual confusion.

9. The variety of goods on which a mark is or is not used (house mark, "family" mark, product mark).

10. The market interface between applicant and the owner of a prior mark:

a. a mere "consent" to register or use.

b. agreement provisions designed to preclude confusion, *i.e.,* limitations on continued use of the marks by each party.

c. assignment of mark, application, registration and goodwill of the related business.

d. laches and estoppel attributable to owner of prior mark and indicative of lack of confusion.

11. The extent to which applicant has a right to exclude others from use of its mark on its goods.

12. The extent of potential confusion, *i.e.,* whether *de minimis* or substantial.

13. Any other established fact probative of the effect of use.

In re E.I. DuPont De Nemours & Co., 476 F.2d 1357 (C.C.P.A. 1973).

You will also notice that a consumer being actually confused is not one of the Polaroid or DuPont factors above; this is common throughout the circuits. It can be helpful, but is not required: “Thus, a successful showing of actual consumer confusion gets a plaintiff much of the way to success in an infringement case. Surveys conducted using social science techniques are one commonly employed approach in getting there.” https://courses2.cit.cornell.edu/sociallaw/topics/Trademarks-confusion.htm.

Coming up tomorrow: Monstrous behavior (murder!)

Pic:

$Discord

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LG Day 24 – Monstermash and Monstrous Behavior (Homicide)

Lather for the day is Dewey, Shavem, and Howe “The Depraved Heart.” The marketing copy I have here says that it is “A bespoke blend of B&M Diamond with Southern Witchcraft Samhain, mixed with an extreme and shocking indifference to human life.” These are classic October scents, of course, for that famous autumnal festival, and Diamond is a baseball themed release from B&M. While the MLB season begins earlier in the year, the World Series—happening right now between the Milwaukee Brewers and the Tampa Rays—is synonymous with October. The term Fall Classic or October Classic is synonymous with the World Series, and it is hard to argue it is not a fall scent when the championship of the sport is happening on the day of this challenge.

Did I name my fictional soap company after a very old and well-known lawyer joke, which appears to date back to the Three Stooges and was widely popularized by Car Talk? Yes, I sure did. Description is on the logo, and reproduced above. And now for the rest of the Saturday challenge.

Special Challenge:

Have you been turned into a vampire on the job? Been stalked by a demented clown marionette with strange ideas of karma and a shocking indifference to human life? Have slightly more beard than you would like, and want enough soap for like two shaves at the most? You don’t have to wait for justice, or the barber. At the law firm and soap factory of Dewey, Shavem, and Howe, we’re here to fight for you and your skin. Call 1-555-SHVE-NOW, and talk to one of our qualified attorney cosmetologists today.

(Not licensed in any jurisdiction, not a real law firm, not qualified cosmetoligsts, Dewey Shavem and Howe is not a real thing and cannot hurt you [or can it?]. DSH logo created using AI-free templates, no AI tools were used. If symptoms persist for more than four hours, contact your doctor or call a friend and brag.)

The fragrance for today is similarly mixed. I decided to go with two fragrances that are, to me, very autumnal as well. CK Obsession is a spicy, “oriental” fragrance which reviewers say is perfect for the fall. And Burberry Hero is a warm, resinous scent which is also rated as great for the fall. Together they end up spicy, warm, cozy, and perfect for a cool front.

But we’re not here to talk about the cold. We’re here to talk about Monstrous things. So let us turn our attention to homicide.

Most Americans are aware that there are multiple kinds of murder or homicide, because as a society we see a difference between a premeditated killing, an

intentional but heat of passion killing, and an unintentional killing or death. So we have developed different crimes to fit those differing circumstances.

As always, please note that what we're talking about here is the so-called "black letter" law, which is broadly correct everywhere and specifically correct nowhere. It is also based on the federal definitions. Your jurisdiction may use different language.

One of the important distinguishing characteristics between the grades is a form of intent often referred to as "malice aforethought", and the other is pre-meditation. Broadly speaking, a killing without malice aforethought—when a defendant "harbored before the killing a conscious intention to kill"—is not murder, but manslaughter.

First-degree murder is a killing with both malice aforethought and pre-meditation. You meant to kill that dirty rotten scoundrel, and you had time to think about it and plan it. It is important to note, however, that pre-meditation does not mean you were spending months in the basement with a cork board and red string. If you pause for any time amount of time to consider what you're doing, or to go get a weapon from another room, you have demonstrated pre-meditation.

First-degree murder can also encompass a couple different scenarios. Killing someone by poison or after lying in wait to ambush are guilty of first-degree murder, as is someone who murders by transferred intent—if I pull an "anyway I started blasting" to take someone out and my bullets hit other people due to appalling marksmanship, I have still committed first degree murder even if my intended target is missed entirely. I intended to kill someone, and someone died, so the elements are still there.

Finally, there is also "felony murder," which is sometimes controversial. This is the legal doctrine which says that if you committing a felony and commit an unintended homicide, it is still first-degree murder because you intended to commit the felony during which someone died. This can even be assisting another in their felony, such as a getaway driver.

Second-degree murder is murder with malice aforethought, but without pre-meditation. You intended to kill that rotten so and so (or at least do serious harm to them), but you didn't plan it in advance. This can come up, for example, when two people are fighting; since you intended to beat the hell out of one another, but not necessarily kill, it can be second-degree under the theory of intent to cause serious bodily harm.

There is also a second-degree version of felony murder. First-degree felony murder requires, at the federal level, the felony involved to be an enumerated

(listed) felony. Second-degree is for those situations where it is an unenumerated felony.

Manslaughter is a killing without malice aforethought, and there are two types. Voluntary manslaughter, and involuntary manslaughter. For voluntary manslaughter, the most classic form of this is the “caught your spouse in bed with someone else, so anyway you just started blasting” heat of the moment type murder. You don’t even take time to run to another room and grab a weapon, you just take your piece or your briefcase or your hands and kill the offender. You haven’t even necessarily intended to kill, you’re just not even thinking about it.

Note that there is some overlap in how second-degree and voluntary manslaughter are described. Both can be heat in the moment, but it depends on what evidence there is of the state of mind of the individual; if it can be shown they had malice aforethought, it is second degree.

Involuntary manslaughter is commonly two circumstances. The first is the misdemeanor version of the felony murder rule, where instead of a felony being committed it is a misdemeanor. And the second is essentially negligent manslaughter, where a lawful act is committed in such a way that causes death and the defendant acted without due caution or circumspection. Gross negligence or wanton or reckless disregard for human life are also often elements of involuntary manslaughter.

To go back to second-degree murder for a moment, it also contains my favorite kind of murder and the kind which gave its name to my custom shave soap: The depraved heart murder. If a defendant kills another with “extreme recklessness evincing disregard for human life,” as it is stated in one place, they have committed a depraved heart murder. It is also described as a “depraved indifference” to human life. Classic examples include randomly shooting a firearm into a crowd, playing Russian roulette, or driving in the wrong lane of traffic at high speed while significantly impaired. The difference between a depraved heart murder and involuntary manslaughter is that the depraved heart requires awareness of the grave, life-threatening risk, and a conscious disregard for it.

Tomorrow: Federal preemption!

SOTD and Daily Challenge Pic:

$Discord

$FOF

$ROTY

LG Day 25 – Reckoning Day and State Sovereignty/Federal Preemption

Lather for the day is Ogallala Bay Rum, founded in 2006 in Ogallala, Nebraska. Less well known than Summer Break Soaps, it is Nebraska's other small business shave soap. And I figured it was a safer bet than any of my other soaps, which tend to be from major manufacturers. If you would like to check them out, visit https://ogallalabayrum.com/about/

Splash is also Ogallala Bay Rum, their Bay Rum & Sandalwood splash.

(And yes, the Native American tribe is spelled Oglala. The city in Nebraska is spelled Ogallala. No, there are no real bays in Ogallala, or Nebraska; we're triply landlocked)

I don't actually have a Bay Rum fragrance, so I went with another artisan fragrance house. Seaforth! Black Watch plays with some similar notes to Bay Rum in the incense and sandalwood realm, which also ties in more with the splash. It is a nice compliment!

For the daily challenge: I once again taped up my Meyer Square (see the blindfold day) and ran through cuts with it between each pass with the razor. Picture is in the SOTD pic below.

Today's challenge is that if someone uses a product, they preempt everyone else from doing so. If you think about it, and by think about it I mean if you want to stretch it to the breaking point, this is similar to federal preemption. How is it similar? Well, I'm glad you asked.

The United States has, famously, a federal system with what's referred to as dual sovereignty. That means that both the federal government and the individual state governments are both sovereign governments in their own spheres. This came up, for example, in the discussion of the Interstate Commerce Clause, where state governments are sovereign in matters of commerce which is wholly within their state, but the federal government can intrude when the commerce passes between states (and, of course, interstate has an increasingly broad definition in an increasingly interconnected world).

One of the important protections for state sovereignty in this system is the 10th Amendment to the Constitution, which states that all powers not delegated to the federal government by the Constitution, nor prohibited by it to the states, are reserved to the states and to the people. The federal government is really, even with all of its expanded powers in the modern era, an entity limited to those things which are expressly given to it.

That is why there are a number of programs where Congress offers a huge pile of money to states that they can take, but if they want to take it they have to accept certain conditions. These programs exist in areas where the federal government doesn't feel like it can infringe on state authority to regulate, but where they do think it would be beneficial for these things to exist; so they work out a compromise involving a dump truck of money with some requirements. Many education programs fall under this, for example, as does Medicaid. The drinking age being 21 is a similar carrot and stick situation, where the feds offered a great deal of transportation/road funding in return for states agreeing to make the drinking age be 21.

But there are also those areas where the federal government is absolutely in control. To quote from the greatest U.S. President, President Josiah "Jed" Bartlett of New Hampshire: "There are times when we're 50 states and there are times when we're one country, and have national needs."

There are broadly two kinds of federal preemption, which is what we're talking about here. There are express preemptions, and implied preemptions. Express preemption can either be from the Constitution or created by Congress. In the Constitution, for example, the power to declare war and set foreign policy is expressly given to the federal government rather than the states—the Bartlett quote above also mentions Florida not fighting World War II, which goes to that. Congress has also expressly taken the right to regulate certain industries such as aviation, even though this is not (as one would expect, given the linear nature of time) in the Constitution.

Implied preemption comes in two large categories: Field preemption, and conflict preemption. Field preemption is similar to express preemption, but a little more wibbly wobbly. "The Supreme Court has held that federal law preempts state law where Congress has manifested an intention that the federal government occupy an entire field of regulation." (https://www.congress.gov/crs-product/R45825)

Areas where Congress has "occupied the whole field" include alien registration/immigration and nuclear safety regulation. (Id.)

Conflict preemption includes two further sub-fields, Impossibility Preemption and Obstacle Preemption. For the first: "The Supreme Court has held that federal law preempts state law when it is impossible to comply with both sets of laws. To illustrate this principle, the Court has explained that a hypothetical federal law forbidding the sale of avocados with more than 7% oil content would preempt a state law forbidding the sale of avocados with less than 8% oil content, because avocado sellers could not sell their products and comply with both laws." And for the second: "Federal law also impliedly preempts state laws that pose an

‘obstacle’ to the ‘full purposes and objectives’ of Congress. In its obstacle preemption cases, the Supreme Court has held that state law can interfere with federal goals by frustrating Congress's intent to adopt a uniform system of federal regulation; conflicting with Congress's goal of establishing a regulatory ‘ceiling’ for certain products or activities; or by impeding the vindication of a federal right.” (Id.)

Tomorrow: Elder law!

Pic:

$Discord

$FOF

$ROTY

LG Day 26 – The Time Warp and Elder Law

Lather of the day is B&M Spice, which is the Old Spice dupe by B&M. It is covered by the "…any Old Spice dupe" in the description. The reserve version of this soap received a 21 on the inestimable Great Spice Off by u/cowzilla3 and while this isn't the reserve version, it is still clearly an Old Spice Dupe.

Splash is…Old Spice. I haven't bought the B&M Spice splash because I have a bottle of Old Spice.

For fragrance I've gone back to an old reliable. Not only does the spicy, woody nature of Polo Green pair well with Old Spice and its many dupes, it is also a fragrance from before I was born—having been released in 1978. It is the oldest fragrance that I own.

(We're talking about real stuff today, so let me put out there again: This is all offered for educational purposes, and does not constitute legal advice. You are not my client, and I am not your lawyer. Talk to an attorney in your jurisdiction before making any major life decisions)

Elder law is another very broad and complicated topic, so we're going to have to narrow it down a little bit. This is going to be a little bit of a grab bag of things I know enough to talk about, and also want to discuss. Some common issues in elder law involve inheritance and property rights, healthcare and advance directives, competence and guardianships, and employment/retirement/social security.

First off, let's briefly tall about the most common healthcare program in the country: Medicare. But even more first, let's make a distinction and define some terms, because this touches on my actual practice area and annoys me all the time. Medicare is the federal program providing health insurance for the aged (65 and older, as of writing), while Medicaid is a state run program providing health insurance for the impoverished or disabled. Most people will only have one or the other, although there is a category of dual enrollees.

One of the most important things to know about elder law is that it is all improved by beginning to think about it before you are in a position where you can't. This is broadly true of pretty much everything, but especially in anything touching healthcare and advance planning. Think about whether you want a Do Not Resuscitate (DNR) now, rather than when you need it; think about if you want to be an organ donor now, rather than after you can't; and think about how you want your stuff to be divvied up now, rather than after you can't say anything.

This also extends to one thing that lawyers are famously bad at: get a will done. You don't even necessarily need a lawyer if you use online services, although if you have anything out of the ordinary or need to deal with where children or resources go, you might want to reach out to an attorney licensed in your jurisdiction. If you care about what happens to your stuff, your money, or your body after you die, getting a will made is one of the best ways to put your mind at ease in this regard.

On a personal note, it is also not a bad thing to actually go through your collections before you pass. My roommate's father died with a hoarder's collection of railroad China (the plates and dishes used by railroads), and we gave spent the six years since he passed cataloguing, researching, and selling it. If he had dealt with that in advance, or at least left us some kind of inventory, it would have saved us a lot of time and effort.

It is also important to start looking at competence as we, or our relatives, get older. Competence here means the mental capacity to decide what is best for us, our health, and our finances, and if we recognize that ourselves or others are beginning to slip in this regard there are a variety of options. Someone can designate a medical power of attorney without giving up all of their other rights, and your state may have forms or self-help available for you to use or consider before speaking to an attorney.

If someone has completely lost their ability to make medical or financial decisions for themselves, most states that I am aware of have processes for becoming a guardian for that individual. A guardian has certain rights assigned to them by a court in order to ensure that another person is cared for, subject to court oversight and periodic check ins.

Note that estate planning is also important for how you receive benefits. Medicare has income limits, while Medicaid has both resource and income limits to consider—Medicaid also has a look back period for transferring assets where they can still be counted against you. Again, talk to an attorney in your jurisdiction for specifics.

There are no nation-wide standards regarding aging and loss of privileges such as driving, although these are proposed from time to time. Some states require age-based testing for driving, and many allow for family members to report to the state that an individual has become unsafe, but these are on a state-by-state basis.

Tomorrow: The Haunted Woods and TREE LAW. THE BEST TOPIC IN THE LAW, CALL YOUR FRIENDS AND EVERYONE ON REDDIT AND TELL THEM IT IS TREE LAW DAY.

Pic:

$Discord

$FOF

$ROTY

LG Day 27 – The Haunted Woods and TREE LAW

Lather of the day is Stirling Scots Pine Sheep. “Made with mutton tallow and lanolin, it has a calm and pleasing pine scent that is nothing like a pine oil used in cleaning products, as it has a touch of oakmoss to round out the blend.” The primary, overwhelming note here is Pine. This is wood to the max, baby.

Fragrance of the day is Polo Green. Again, an old favorite, but we’re returning to a spicy, woody chypre fragrance here, so it is hard to argue it is not on theme. Go ahead, try to argue. I won’t hear it, because I’m off smelling like a beautiful, spicy pine forest all day.

I’ve been looking forward to this day all month, because it sits at the intersection of law, Reddit, and pop-culture. Tree Law is a phenomenon, a force; it is the moment, and it is what will bring thousands of lawyers coming out of the woodwork to excitedly discuss what some dumb **** neighbor has done this time.

At its heart, Tree Law has to do with trees. Done, right? Wrong, because it turns out that trees are a little bit unusual in the law in several ways.

Trees occupy a special place in the law because it is recognized that a tree takes a very long time to grow, and that especially a large old tree can be an integral and unique part of a landscape. Accordingly, removing them without permission can expose you in ways that you might not expect. This comes up, especially in r/treelaw, most often when an adjoining property owner has decided that a tree on an OP’s property is bothering them and decides to take matters into their own hands.

The issue is that when sued, courts tend to not just view all trees as being fungible. Illegally removing a newly planted tree might result in a relatively quick and easy fix, but if it is not newly planted the offender is going to have a bad time. Courts take into account the age and type of tree, and have frequently required an offender to pay for a replacement of similar size and age, turning the anger of a moment into a very expensive proposition.

For example, this post:
https://www.reddit.com/r/BestofRedditorUpdates/comments/u9xpsj/neighbor_cut_down_several_trees_on_my_property/

A neighbor illegally removes 15 trees from a poster’s property, and the end result is damages worth roughly $650,000 where the neighbor had to pay for the replacement trees and then sold his house.

Similarly, in this post a house is abandoned because the owner cut down a neighbor’s tree and was the cost to replace was astronomical.

https://www.reddit.com/r/abandoned/comments/191p5wx/the_owner_of_this_house_messed_with_tree_law_mid/

Additionally, it is of course illegal to go on to a neighbor's property and cut down their trees, so it can result in criminal prosecution as well as civil litigation.

Reddit lawyers—real ones, that is—love tree law, because it is an unusual area of law with clear villains and a clear resolution. To the point where when the first major Reddit tree law case popped up, a new subreddit was born: r/treelaw.

So what are our takeaways? Don't cut down your neighbor's trees. If someone cut's down your trees, talk to a lawyer. And if you want to summon lawyers on Reddit for a gleeful time, talk about Treelaw. Some highlights: https://www.reddit.com/r/treelaw/comments/8jvjfx/popular_examples_of_tree_law_from_rlegaladvice/

Tomorrow: We go from the earthy world of Tree Law to the expanses of Space Law!

Pic:

$Discord

$FOF

$ROTY

LG Day 28 – You Start to Freeze and Space Law

Lather of the day is Margaritas in the Arctic by Stirling. Ingredients: Beef Tallow, Stearic Acid, Distilled Water, Castor Oil, Potassium Hydroxide, Vegetable Glycerin, Essential Oil, Almond Oil, Shea Butter, Coconut Milk, Lanolin, Fragrance Oil, Sodium Hydroxide, Menthol, Sodium Lactate. Note the presence of Menthol, which satisfies the requirement.

I also could have used my Orbit by Noble Otter, but I ordered this sample before NO was added to the sponsor list, so might as well use it. Also a first time, so I'm excited to try it. Splash is Orbit, to keep the cool going.

I don't have any cooling fragrances, but I do have some chilled liquid…or rather, some Cool Water by Davidoff. And it is a good accent here, with its cool and watery notes leading into some light spice and citrus (neroli). It goes together well and keeps the cool vibes going all day.

We are turning from the earth to the stars as we go into some discussion of space law. Are you aware, to begin, that there are Space Law programs at law schools? One of the best in the nation is at the University of Nebraska – Lincoln College of Law, which offers an LLM in Space, Cyber, and National Security Law, as well as a concentration for a J.D. It used to offer an SJD in it, but they don't seem to advertise that on their website any longer, so they might not have had enough interest. For more information see this article https://www.sirotinintelligence.com/space-is-absolutely-contested-interim-director-of-the-space-cyber-and-national-security-law-program-at-the-university-of-nebraska-college-of-law-erik-mudrinich-on-legal-convergence-attr/ and the UNL website https://law.unl.edu/spacecyberlaw/.

It might seem odd at first blush for there to be a separate field of "space law." Tech law, cyber law, national security law, etc., all make sense, but why wouldn't space simply be an extension of national law? And the answer is that it is different because we didn't want people necessarily actually claiming big chunks of outer space and the moon, no matter how much Eddie Izzard might joke about it.

To this end and in an impressive feat for the Cold War, the Outer Space Treaty was signed in Washington, London, and Moscow on 1/27/1967 and went into force on 10/10/1067. (Dates using the US system of MM/DD/YYYY). This is essentially a non-armament treaty, which declares outer space to be free for all

nations to explore without claims of sovereignty. It also contains two important provisions:

First, it contains an undertaking not to place in orbit around the Earth, install on the moon or any other celestial body, or otherwise station in outer space, nuclear or any other weapons of mass destruction.

Second, it limits the use of the moon and other celestial bodies exclusively to peaceful purposes and expressly prohibits their use for establishing military bases, installation, or fortifications; testing weapons of any kind; or conducting military maneuvers. (https://2009-2017.state.gov/t/isn/5181.htm)

It was the existence of this treaty and its optimistic goals of interstellar exploration that allowed the U.S. and the USSR to enter into joint space programs, and eventually programs like the International Space Station (ISS). It also drew heavily from the Antarctic Treaty which similarly allows for international cooperation in Antarctica, and which was ratified in 1961.

Four additional agreements followed the OST regarding the safe return of astronauts who land in a foreign country, liability for damages caused by spacecraft, the registration of space vehicles, and rules for activities on the moon. This last one is interesting because it is basically irrelevant as it has been signed by 17 states, none of which engage in their own space program.

Questions of space jurisdiction are governed in part by the UN Committee on the Peaceful Use of Outer Space (COPUOS), assisted by the UN Office for Outer Space Affairs. (https://en.wikipedia.org/wiki/Outer_Space_Treaty#Influence_on_space_law).

I really think that the OST is a fascinating piece of law, because it represents such a utopian ideal for the world. At one point, even in the middle of the Cold War, we came together as a world and declared that outer space is part of the common heritage and future of humanity and should not be subject to the petty squabbles of the land. In this we truly looked up to the ideals of Carl Sagan's famous "Blue Dot" speech, and shared a hope for a better future.

Tomorrow: Graveyard Day and Laws Regarding the Dead, Burial, etc.

Pic:

$Discord

$FOF

$ROTY

LG Day 29 – Graveyard Day and Laws of Dying, Death, and Burial

Lather for the day is Samhain by Southern Witchcraft. I previously used it to make The Depraved Heart, but am using it here on its own. To the best of my knowledge, Southern Witchcraft was not purchased, re-branded, merged, or acquired, they just closed. And while the website might say they are coming back May 8, u/Phteven_j himself said this is just a cached page. They're done.

Samhain is a very pumpkin-y scent, and I don't really have anything with pumpkin in it in terms of cologne. So I went with those things which would make a good compliment, and I was torn between Hercules and Obsession. I ultimately went with Hercules because it seemed like it would make a better pumpkin pie with its cinnamon notes.

We've talked a little bit about dying before, when we were talking about elder law. Which is the problem with trying to write these sequentially, sometimes you end up talking about things earlier than you wanted. This whole day was originally going to be about the public domain too, which I discussed fairly well earlier. So we're going to talk about some miscellaneous topics related to death, dying, and burials.

One of the big issues in the U.S. right now are so-called "dying with dignity" or assisted suicide laws. These are laws which allow an individual some control over when they pass, normally in the face of terminal illnesses. This is an interesting area where individuals don't have full bodily control and largely for religious/moral reasons—we have not traditionally allowed people to end their own lives. People who have attempted have been subject to involuntary commitment, or in the past even criminal charges. But recently there has been a sense that under certain circumstances, people should have the bodily autonomy to decide when to pass.

We are not going to talk about other issues of bodily autonomy which are currently under discussion in the U.S., but you can imagine what we're eliding here.

Laws around dying and bodies are almost always religiously or morally motivated, concerned with the dignity of human life or the dignity of dead bodies. For a long time, for example, cremation was not allowed in the United States or the UK, and this was largely based on Christian views of the treatment of dead bodies.

The change began with an eye toward sanitation: "The modern Cremation movement in America sprang from a sanitary necessity, but as the embalming

process evolved and with the advent of medicine, the need for cremation as a means of purification after death dwindled.

Modern cremation, as we know it, actually began just over 150 years ago, after years of experimentation into the development of a dependable cremation chamber. When Professor Ludovico Brunetti of Italy finally perfected his model and displayed it at the 1873 Vienna Exposition, the cremation movement started almost simultaneously on both sides of the Atlantic."
https://www.cremationassociation.org/historyofcremation.html

The first modern, purposeful cremation in the United States was of Baron Joseph Henry Louis Charles de Palm, a member of the Theosophist movement, which could be its own fun discussion. (Maybe for next LG, I'll do a different secret society or fraternal order every day?) Caitlin Doughty, aka Ask a Mortician, has a great video (with some content warnings) here:
https://youtu.be/5pdq_4FJuR8?si=X1D34571wFtKlpWn

One of the other areas that dead bodies run into is zoning. Most cities and states have fairly strict laws regarding where a body can actually be buried, so please make sure to check with a lawyer or mortician or both before telling your grandpa that you really will bury him in the back 40, or your aunt that you will sneak her ashes into Disney World. Yes, that really happens, and yes, you will get banned.
https://www.thrillist.com/travel/nation/people-who-spread-ashes-at-disney-world-and-disneyland

Tomorrow: Not Guilty by Reason of Insanity (NGRI)!

Pic:

$Discord

$FOF

$ROTY

LG Day 30 – Mischief Night and NGRI

Soap for the Day is Stirling's Executive Man. But wait, you ask, how does this evoke a scent of debauchery for you?

When you get into fragrances, whether soap or cologne, you will hear stories of people wearing fragrances that cause members of the opposite gender—or the same, depending on their preferences—to stop in their tracks and tell them how amazing they smell.

I have had that happen exactly once. I was in the hallway of a medieval event, wearing Club de Nuit Intense Man, which is a Creed Aventus dupe, when a woman stopped me in passing to say "You smell good. You smell really good. You smell too good. Get away from me, you smell too good."

So this family of fragrances—and Executive Man is also an Aventus dupe—always makes me think of the one time I smelled so irresistible that a woman told me I had to leave because I smelled too good. What could be more debauched than that?

Splash is Sellout by Declaration Grooming, another Aventus dupe. And fragrance is, unsurprisingly, CDNIM. Debauched for the day, baby.

It's actually quite a damning statement on me that we've gone this far without talking about some of the basic elements of crimes. Or maybe it is a damning indictment of the Games themselves that they did not give me a calendar where the themes naturally progressed through the 1L curriculum. Yes, in the truest tradition of the legal system, I'll finally realize there is a problem and then completely ignore my own part in it.

Looking at you, Chief Justice Roberts.

Generally speaking there are two required, threshold elements of any crime: An actus reus, and a mens rea. An actus reus is simply the guilty act—a crime consists of a thing you did. Thinking about it is not enough. Doing something which kind of looks like an illegal thing isn't enough; you actually have to have done a guilty thing.

Mens rea is the mental counterpart. Except for strict liability crimes, you also need to have intent; mens rea simply means "a guilty mind." Note that you do not need to think to yourself "And now I am going to do something illegal," but you must have intended to do the thing that you did. And if you didn't intend to do it, then you generally cannot be charged with the crime.

(The category of crimes which don't require intent are called strict liability crimes, and won't be discussed here)

There are several ways in which you can show that you didn't intend to do the thing. Involuntary intoxication is one—if you were drugged against your will, you will generally not be held liable for the crimes you commit; but note that voluntary intoxication is not a defense, as by intending to become intoxicated your intent transfers to what you did. Force is another excuse, where you can show that if someone held a gun to your head you will not be held liable for some crimes.

But another way of not having mens rea is by legal insanity. Not Guilty by Reason of Insanity (NGRI) or Not Responsible by Reason of Insanity (NRRI), or a variety of other things which this can be called in different jurisdictions, is simply the proposition that if you are suffering from mental illness to the extent that you don't understand what you're doing, you should not be held criminally liable.

The two formulations for this under our black letter, broadly true everywhere and specifically true nowhere, understanding are the M'Naghten Rule and the Model Penal Code (MPC) Rule. They basically say the same thing. As stated by the M'Naghten Rule and individual is not guilty by reason of insanity if: "the defendant's state of mind caused them to (1) not know what they were doing when they committed said act, or (2) that they knew what they were doing, but did not know that it was wrong." Under the MPC rule it is stated as:

"1. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

2. As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."

In the popular understanding, an insanity defense is a get out of jail free card that someone plays before they walk out the door back into the world as a free person. In reality this has never been the case, and especially not since there were major reforms to the process after the attempted assassination of Ronald Reagan. First off, many states require attempts at competency restoration if they could be tried for their offenses but for the fact that they were currently legally incompetent.

And even if competency restoration doesn't apply, it is not necessarily a better option to be found guilty by reason of insanity. The result is not an unconditional

release, but commitment to an institution for treatment. And this treatment can last longer than the sentence for the crime they were charged with would have been, as Michael Jones found out in 1975. Jones was found NGRI in regard to a larceny charge with a maximum sentence of one year in jail, and after he had been hospitalized for two years, appealed. In the end the Supreme Court ruled than someone committed for treatment in lieu of incarceration due to NGRI can be held indefinitely, essentially, until they are treated and can return to society, no matter how long the underlying sentence would have been. Jones v. United States, 463 U.S. 354 (1983).

Tomorrow: Full Faith and Credit!

Pic:

$Discord

$FOF

$ROTY

LG Day 31 – Halloween and Full Faith and Credit

Lather for the day is Stirling Ozark Mountain. It is described as "A drive through the Ozark Mountains in fall is the best way to describe this scent." This means it is explicitly marketed as an autumn scent, and meets the requirements.

Fragrance for the day is Ralph Lauren Polo Red. While it starts off with red fruit, it settles into cedar, saffron, sage, and spice. A perfect accompaniment to the autumnal drive of Ozark Mountain.

And for the daily challenge I could not be more excited to reveal the very first shave brush I have ever made: The Dewey Shavem and Howe Chief Justice, item number GVL-01. Straight from the halls of justice and the hands of judges themselves (although this one was purchased from Amazon, not stolen from a judge), the Chief Justice brings the feeling of power and authority these blacked robed deciders of law wield directly to your face. Surprisingly ergonomic and fitted with a 26mm synthetic knot for maximum lather creation, the Chief Justice is a limited run piece which has already sold out because I'm only making one of these unless u/merikus asks really nicely and pays for the materials. Pics in their own gallery below.

You might be looking at the topic for the day and asking yourself if mpark6288 has lost his wooly mind. What, exactly, does Full Faith and Credit have to do with Halloween or Autumn? And you're right, I have lost my mind, because this is currently PAGE 72 of this effort. But it ties into the description Stirling offers of Ozark Mountain: A drive through the Ozark Mountains in the fall. The Ozark Mountains cover parts of the states of Arkansas, Missouri, Oklahoma, and Kansas. And the reason why you can drive through the Ozarks and across these fine Midwestern/Semi-Southern/Whateverthehell states is because of the Full Faith and Credit Clause.

Article IV Section I of the U.S. Constitution states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

This is why when I drove to St. Louis, Missouri for this weekend (because I am a gamer and a masochist), I did not need to do anything to convince the states of Kansas and Missouri to let me drive across their fair highways, byways, and

interstates—my Nebraska license sufficed. Similarly, it is why my friends who were married in Wichita, KS are still married in St. Louis, MO, even if they moved here permanently. The acts, records, and judicial proceedings of our home states—such as my driver's license—are all required to be recognized in the other states we visits or move to.

This was one of the major issues during the debates about gay marriage. The Defense of Marriage Act (DOMA) of 1996 allowed states to bypass full faith and credit in regard to gay marriage, meaning that even as some states recognized other states were not required to. The federal prohibition section of DOMA was struck down in United States v. Windsor, 570 U.S. 744, and gay marriage fully legalized in Obergefell v. Hodges, 576 U.S. 644. Additionally, Congress later passed the Respect for Marriage Act in 2022, which flips DOMA and requires states to recognize valid gay marriages from other states even if illegal in their own state (if Obergefell were ever to be repealed).

There are two main exceptions to the Full Faith and Credit clause: Penal/Criminal laws, and lack of jurisdiction. The first says that states are not required to enforce criminal laws from sister states, and the second that a state is not obligated to respect a judgment in another state if the original court lacked jurisdiction to enter it. Additionally, the Supreme Court has recognized a public policy exception for the enforcement of sister state laws that violate another state's public policy: "The full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though that statute is of controlling force in the courts of the state of its enactment with respect to the same persons and events."

Finally, we come to the end. If you have read all of these entries, please find in its own Imgur gallery below a certificate suitable for framing, with of course some legal restrictions and hedging. It has been a genuine pleasure to write all of these for you, and to see the positive feedback from so many people as to the educational content. Despite all its frustrations, I do love the law, and I do love teaching people about the law. I don't know if next year's LG will be 2L year or something else like secret societies, but I have thoroughly enjoyed this year.

To end with, I want to share a quotation that I love about my profession, which sums up one reason why I love my profession. It is a poem attributed to John W. Davis, a prominent U.S. Lawyer, United States Solicitor General, and Ambassador

to the Court of St. James (UK): “True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures—unless as amateurs for our own principal amusement. There is little of all that we do which the eye of man can see. But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men's burdens and by our efforts we make possible the peaceful life of men in a peaceful state.”

Tomorrow: Schools out for summer, baby. Shave with SBS or something, I’m not your professor right now, class is adjourned.

Shaving pic:

GVL Pic:

Certificate Pic:

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