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# Proceedings

A monthly newsletter from McGraw-Hill

**March 2015** Volume 6, Issue 8

**Contents**



## *Dear Professor,*

Spring is near, but for many of us, not near enough! Welcome to McGraw-Hill's March 2015 issue of Proceedings, a newsletter designed specifically with you, the Business Law educator, in mind. Volume 6, Issue 8 of Proceedings incorporates "hot topics" in business law, video suggestions, an ethical dilemma, teaching tips, and a "chapter key" cross-referencing the March 2015 newsletter topics with the various McGraw-Hill business law textbooks.

You will find a wide range of topics/issues in this publication, including:

1. An intellectually disabled man's execution in Georgia;

2. The "deferred prosecution" of corporations;

3. A potential class action lawsuit against Apple, Inc. because its iPhone does not really have 16 GB of storage space;

4. Videos related to a) the United States Supreme Court's fair housing case and b) the death penalty in America;

5. An "ethical dilemma" related to government regulation of the health and sanitation practices of businesses; and

6. "Teaching tips" related to Article 2 ("Justice Deferred Is Justice Denied") and Video 1 ("Implications of SCOTUS Fair Housing Case") of the newsletter.

Let the snow and ice melt, and let the sunshine in!

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**Of Special Interest**

This section of the newsletter covers three (3) topics:

1) An intellectually disabled man's execution in Georgia;

2) The "deferred prosecution" of corporations; and

3) A potential class action lawsuit against Apple, Inc. because its iPhone does not really have 16 GB of storage space.

# Hot Topics in Business Law

**Article 1: "'Intellectually Disabled' Man Set for Execution"**

**http://www.cnn.com/2015/01/26/us/georgia-inmate-tuesday-execution/**

According to the article, twice-convicted murderer Warren Lee Hill is set to be executed in Georgia despite pleas from human rights groups and legal representatives who say his intellectual disability should make him ineligible for the death penalty.

Hill has an IQ of approximately 70 and the "emotional capacity of a young boy," said his attorney, Brian Kammer.

Federal law stemming from a 2002 Virginia case that went to the U.S. Supreme Court says executing intellectually disabled individuals violates the Eighth Amendment's ban on cruel and unusual punishment. But the case also allows states to define intellectual disability. In Georgia, that means attorneys for death row inmates have to prove mental impairment "beyond a reasonable doubt."

"This is the strictest standard in any jurisdiction in the nation," Kammer said. Hill's execution would come two weeks after the state executed Andrew Brannan, a Vietnam War veteran suffering from post-traumatic stress disorder who killed Laurens County Deputy Kyle Dinkheller in 1998. Kammer also was Brannan's counsel.

Kammer, who has represented Hill for 20 years, said in any other state, Hill would be serving a life sentence. Hill was sentenced to death in 1990 for killing fellow prison inmate Joseph Handspike, beating him to death with a nail-studded board. At the time, Hill had been serving a life sentence for the 1985 shooting death of his girlfriend Myra Wright.

"We acknowledge that Mr. Hill should be held accountable for his actions and behavior," Torin Togut, president of the Arc of Georgia, said in a letter written on Hill's behalf. "However, it is our contention that Mr. Hill, who has an intellectual disability, should not be subject to capital punishment."

The Arc is a nonprofit organization that advocates for and serves people with intellectual and developmental disabilities.

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Hill also has the support of the American Association on Intellectual and Developmental Disabilities, the Georgia NAACP and former President Jimmy Carter and his wife, Rosalynn Carter.
The victim's family and former jurors have also expressed support for mercy in Hill's case, saying they weren't given the option of life without parole when sentencing him to death.

Kammer said seven doctors agree that his client is intellectually disabled, including three doctors for the state who initially evaluated Hill and said he didn't meet Georgia's standard. Kammer said those doctors have since signed an affidavit admitting they felt rushed during Hill's examination and now believe he does meet the standard for "intellectually disabled."

In previous clemency hearings, attorneys for the state have argued that Hill served in the Navy, held a job and managed his money before killing his girlfriend -- signs that he didn't necessarily meet the legal standard for intellectually disabled, even though he has a low IQ.

But Kammer said examples of Hill achieving "self-sufficiency" don't make a strong case for his execution.

Several of the letters supporting Hill's clemency cite last year's Supreme Court decision that struck down a Florida law that used "unscientific standards for determining intellectual disability" for death row inmates.

Attorneys tried to use the Hall v. Florida decision as grounds to spare the life of Georgia inmate Robert Wayne Holsey, who was sentenced to death for the murder of a local sheriff's deputy. Holsey, who also had an IQ of 70, was executed in December.

Hill's case was presented recently before the Georgia State Board of Pardons and Paroles. A statement from the board said it "will make a decision prior to the scheduled execution."

## Discussion Questions

1. Discuss the Eighth Amendment to the United States Constitution. How, if at all, does the Eighth Amendment apply to the death penalty? How, if at all, does it apply to the execution of an individual with an IQ of 70? Explain your responses.

*The Eighth Amendment to the United States Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed,* ***nor cruel and unusual punishments inflicted.*** *" (Emphasis added) Although some have argued that the Eighth Amendment prohibits the death penalty, the United States Supreme Court has not ruled that the death penalty itself constitutes cruel and unusual punishment. The Supreme Court has reserved the right to review particular methods of carrying out the death penalty, and in its current session, the Supreme Court is reviewing lethal injection. If the Eighth Amendment language applies to the execution of an individual with an IQ of 70, it would be based on the argument that the execution of an individual with such a low IQ would constitute cruel and unusual punishment.*

2. Comment on the state of Georgia's requirement that an attorney for a death row inmate prove mental impairment "beyond a reasonable doubt."

*This is an unusual standard in the sense that it requires the defendant, not the prosecution, to address the issue of mental capacity. In criminal procedure, it is usually the prosecution's burden to address mental capacity, proving that: 1) the defendant had the appropriate mental state (usually intent) at the time of the commission of the crime; 2) the defendant has the present mental capability to withstand trail and participate in his defense at trial: and 3) the defendant has the present mental capability to understand he is about to be put to death (if the case involves application of the death penalty.) Georgia has shifted the burden of proof to the defendant in order to avoid imposition of the death penalty, and it is a high burden, since the defendant must prove mental impairment "beyond a reasonable doubt."*

3. As the article indicates, the victim's family and former jurors have expressed support for mercy in Warren Lee Hill's case, saying they were not given the option of life without parole when sentencing him to death. Comment on whether this should be relevant in Georgia's decision to execute Mr. Hill.

*This is an opinion question, so student responses will likely vary. Usually, the criminal justice system considers the wishes of the victim's family and the jurors in terms of how to proceed against the defendant. Some may argue that the jury should have at least been given the option to recommend a sentence of life without parole for Warren Lee Hill.*

## Article 2: "Justice Deferred is Justice Denied"

**http://www.nybooks.com/articles/archives/2015/feb/19/justice-deferred-justice-denied/**

*Note: This is a book review by Jed S. Rakoff of author Brandon L. Garrett's Too Big to Jail: How Prosecutors Compromise with Corporations.*

So-called "deferred prosecutions" were developed in the 1930s as a way of helping juvenile offenders. A juvenile who had been charged with a crime would agree with the prosecutor to have his prosecution deferred while he entered a program designed to rehabilitate such offenders. If he successfully completed the program and committed no other crime over the course of a year, the charge would then be dropped.

The analogy of a Fortune 500 company to a juvenile delinquent is, perhaps, less than obvious. Nonetheless, beginning in the early 1990s and with increasing frequency thereafter, federal prosecutors began entering into "deferred prosecution" agreements with major corporations and large financial institutions. In the typical arrangement, the government agreed to defer prosecuting the company for various federal felonies if the company, in addition to paying a financial penalty, agreed to introduce various "prophylactic" measures designed to prevent future such crimes and to

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"rehabilitate" the company's "culture." The crimes for which prosecution was thus deferred included felony violations of the securities laws, banking laws, antitrust laws, anti-money-laundering laws, food and drug laws, foreign corrupt practices laws, and numerous provisions of the general federal criminal code.

The intellectual origins of this approach to corporate crime can be traced back at least to the 1980s, when various academics suggested that the best way to deter "crime in the suites" was to foster a culture within companies of acting ethically and responsibly. In practice, this meant encouraging companies not only to provide in-house ethical training but also to enlarge their internal compliance programs, so that responsible behavior would be praised and misconduct policed. The approach found favor not just with some corporations (notably General Electric under the guidance of its then general counsel, Ben Heineman), but also with the US Sentencing Commission, which, in promulgating the Corporate Sentencing Guidelines in 1991, made the overall adequacy of a company's prior internal compliance programs the most important factor in reducing (by as much as 60 percent) the size of the fine to be imposed on a company found guilty of a federal criminal violation.

The Department of Justice then went a step further and, in a series of memoranda issued over the succeeding two decades, made the existence or absence of a meaningful internal compliance program an important consideration in determining whether or not to prosecute a company for crimes committed by its employees—the theory being that, if a company had a good compliance program already in place, its employees' crimes were "aberrational" and not reflective of corporate irresponsibility, whereas the absence of a good compliance program indicated a lax corporate attitude toward crime.

But the department did not stop there. In the same memoranda (variously known as the "Thompson Memorandum," the "McCallum Memorandum," and the "McNulty Memorandum" after the various deputy attorney generals in charge), the department stated that another important factor to be considered in deciding whether to criminally charge a company was any effort taken after the crime was uncovered "to implement an effective corporate compliance program or to improve an existing one." This led counsel for companies that were otherwise unsuccessful in avoiding prosecution to argue, with ever greater success, that the best response to their alleged misconduct was not to punish them (and their innocent shareholders and employees) but to rehabilitate them by deferring prosecution while they instituted a more rigorous compliance program, upon the successful completion of which the charges would be dropped.

It took a while for this to catch on, but in recent years deferred prosecution agreements have become commonplace, so that, between 2007 and 2012 (the last year for which data are available), an average of thirty-five deferred prosecution agreements (including so-called "non-prosecution" agreements) were entered into each year. The three common features of most (though not all) of these agreements were the payment of a fine, the introduction of ethical training for employees, and the implementation of new or improved compliance programs, usually described in general terms such as "effective compliance" or "appropriate due diligence." Going one step further, these three

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features increasingly became the hallmark of the written plea agreements that the department reached with even those companies that did not receive a deferred prosecution but instead agreed to plead guilty outright.

In *Too Big to Jail*, Brandon Garrett, a highly regarded law professor at the University of Virginia, presents for a lay readership a detailed and comprehensive examination of deferred corporate prosecutions, and corporate criminal prosecutions generally, and concludes that they have been, on the whole, ineffective. According to Garrett, "the big story of the twenty-first century" in corporate prosecutions is that "prosecutors now try to rehabilitate a company by helping it to put systems in place to detect and prevent crime among its employees and, more broadly, to foster a culture of ethics and integrity inside the company."

But Garrett—on the basis of his own painstaking gathering of evidence (for neither the Department of Justice nor any other governmental entity keeps detailed and complete records of how such agreements are implemented over time)—finds that many, perhaps most such agreements, while often obscuring who was personally responsible for the company's misconduct, fail to achieve meaningful structural or ethical reform within the company itself (a good example being the Pfizer cases described below). Nonetheless, Garrett does not urge the abandonment of deferred prosecution agreements, or of comparable non-prosecution agreements and corporate guilty plea agreements, but recommends instead that various steps be taken to improve their efficacy, including greater judicial oversight, greater use of court-appointed monitors, and greater attention to breaches of the agreements.

The breadth of Garrett's investigation, the wealth of detail he uses to support his conclusions, and the clarity of his prose make this an important book for laymen and experts alike. But no book can be all things to all readers, and some of the book's basic assumptions deserve further scrutiny.

To begin with, there is the assumption that criminal prosecution of corporations makes sense as a general matter. Garrett does point out in passing that "few foreign countries have anything like the broad standard for corporate criminal liability that the United States has long had in federal courts." One might ask why this is so. Ultimately, it rests on the recognition that companies can act only through their employees, and therefore, as most nations believe, it is more appropriate to prosecute the responsible employees than the entity that employed them.

Relatedly, criminal prosecution of corporations inevitably engenders collateral consequences that often seem at odds with the purposes of the criminal law. Since a corporation cannot be put in jail, the primary penalty is usually a monetary penalty, which is ultimately borne by the usually innocent shareholders. In addition, the greater the monetary penalty, the more likely the company will have to discharge many likewise innocent employees. Why should the criminal law be used to punish the innocent?

It might be argued that even innocent shareholders are often beneficiaries of the misconduct, for example, when their shares increase in value as a result of a corporate fraud. But their shares will

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typically fall when the fraud is exposed; and even when that is not the case, the company will usually be sued civilly, thus further reducing any benefit the shareholders might derive from the fraud. As for the argument that prosecuting the company will lead the shareholders to demand new management, in this writer's experience this has rarely been the case, except when the managers are themselves prosecuted.

There may be cases in which, in addition to prosecuting the responsible individuals, it makes sense to prosecute the company because (as in the case of some family-owned or closely held companies) the company was no more than a cover for the fraud and deserves to be dissolved. One might even argue (though I would not) that prosecution of a company is warranted when the crime was committed for the benefit of the company by its high managerial agents, who are also being prosecuted. This possibility is recognized by the state laws of most of the fifty states, which restrict the criminal prosecution of companies to cases where, in the words of the Model Penal Code adopted by many of these states, the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

But the federal law of corporate criminal liability is far more sweeping. Under federal law, corporations can be held criminally liable if even a low-level employee, in the course of his or her employment, commits a criminal act that benefits the corporation. One might think, therefore, that federal corporate prosecutions, whether deferred or otherwise, would typically be accompanied by prosecution of the responsible individuals. But more often than not, this has not been the case, especially when large companies are involved. Rather, as Garrett and many others (including this writer) have pointed out, in recent years the federal government has brought many corporate prosecutions in which no employee has been prosecuted or even identified as criminally responsible. This is especially true in the case of deferred prosecutions. According to Garrett, "in about two thirds of the cases involving deferred prosecution or non-prosecution agreements and public corporations, the company was punished but no employees were prosecuted." This suggests that the Department of Justice has been persuaded by its own rhetoric that the main point of these agreements is to change corporate culture, so that company employees of all levels will be dissuaded in the future from committing company-related crimes.

But this raises a host of questions, including what is meant by "corporate culture," how can it be altered, and, if it can, can deferred prosecutions do the trick? Garrett, as noted, largely focuses on the latter question, arguing that most corporate prosecution agreements are not adequately enforced and that, perhaps as a result, there is much recidivism on the part of the companies. But we first need to be clear on what we mean by "corporate culture" and what we know, if anything, about how it can be changed.

The term "corporate culture" is quite vague, and the sociological studies about it are inconsistent and often wrapped in impenetrable jargon. No major company fails to tell its employees that irresponsible conduct will not be tolerated, and very few lack a substantial compliance program.

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What then is the basis for the assumption—at the heart of the Corporate Sentencing Guidelines and of almost all deferred prosecution agreements—that even though a substantial compliance program failed to prevent the wrongdoing at issue, an even more costly program will do so in the future? Speaking of corporate culture in an even broader way, it is worth remembering that any reasonable shareholder wants his or her company's executives to be highly energetic, characterized by initiative, competitiveness, innovativeness, and even aggressiveness, all in a quest for profitability. It may be that these lauded qualities, essential to success in any competitive company, may in some cases encourage questionable behavior. For example, Enron, before exposure of its fraud, was for six consecutive years named by *Fortune* magazine as one of America's "most admired" companies mainly because of its highly innovative business practices. Unfortunately, such "innovation" extended to structuring its transactions in ways that made them appear far more profitable than they actually were. But does that mean that we want to use the criminal law to discourage innovation per se?

At bottom, corporate fraud amounts to little more than executives lying for business purposes, and prosecution depends on proving that the lies were intentional. Are the changes forced upon companies by deferred prosecution agreements—chiefly, more ethical training programs and greater oversight by more compliance officers—likely to materially change the decision of these individuals to lie when it suits their goals? The theory of the federal Corporate Sentencing Guidelines and most deferred prosecution agreements is that they will; but as Garrett documents, the data thus far fail to support this claim (assuming, which may be doubtful, that it can ever really be measured).

Take the case of the huge pharmaceutical company Pfizer, Inc. In 2002, Pfizer—having been threatened with prosecution for one of its subsidiaries' paying large bribes to a managed care company to give preferred status to one of Pfizer's drugs—entered into a deferred prosecution agreement that required it, among other things, to create and implement a compliance mechanism that would uncover illegal marketing activities and bring them to the attention of its board. None of the employees who paid the bribes, approved their payment, or concealed their true purpose was prosecuted.

Two years later, however, the company was again facing prosecution for similar illegal marketing activities that had continued at the same subsidiary. Still, no individuals were prosecuted. Instead, the subsidiary entered a corporate plea, and Pfizer itself entered into a second deferred prosecution agreement that required even more extensive steps to uncover illegal activities, stop them from being carried out, and bring them to the attention of its board.

Yet notwithstanding this second agreement, in 2007 still further criminal marketing activities by another of Pfizer's subsidiaries—which had illegally promoted off-label marketing of a human growth hormone with dangerous side effects—led to another corporate guilty plea by a Pfizer subsidiary and still another agreement by Pfizer to increase its requirements that its employees comply with the law. Once again, no individuals were prosecuted.

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Despite these three consecutive deferred prosecution agreements requiring enhanced compliance, in 2009 Pfizer, the parent company, was detected engaging in the same lucrative but flagrantly illegal marketing activities, including bribes to doctors to promote off-label uses of Pfizer's drugs, bribes to medical journals to publish articles promoting such uses, and much more. And how did the Department of Justice deal with the fact that, despite all the prior deferred prosecution agreements and promises of enhanced compliance, the same illegal marketing activities had now come to pervade the parent corporation itself?

The government did not prosecute the senior executives who were alleged to have known of, in some cases orchestrated, and in other cases covered up these illegal activities. Instead, the Department of Justice entered into still another deferred prosecution agreement with Pfizer by which it paid penalties of $2.3 billion—which the government trumpeted as the largest criminal fine ever imposed to that date, but which analysts suggested was a small fraction of the profits derived from the illegal activity—and by requiring still further compliance improvements. As the Department of Justice stated in announcing this "historic" settlement:

Pfizer has agreed to enter into an expansive corporate integrity agreement… (that) provides for procedures and reviews to be put in place to avoid and promptly detect conduct similar to that which gave rise to this matter.

In view of Pfizer's record, this seemed an astonishing act of faith.

Given such patent ineffectiveness when it comes to deferred prosecutions, it is somewhat surprising that Garrett argues that tighter enforcement of deferred prosecution agreements can still make them effective. Perhaps. But one also wonders whether the impact of sending a few guilty executives to prison for orchestrating corporate crimes might have a far greater effect than any compliance program in discouraging misconduct, at far less expense and without the unwanted collateral consequences of punishing innocent employees and shareholders.

None of this should detract from the many great merits of Garrett's book. I know of no other book written for the general public that gets so deeply "into the weeds" of corporate criminal prosecutions. For example, Garrett describes with considerable insight the many factors that lead the government to prefer a deferred prosecution over an actual one (and that give rise to his title *Too Big to Jail*). These include legitimate concerns, such as avoiding the collateral consequences to employees and shareholders, as well conserving scarce prosecutorial resources, both at the investigative stage (by relying on the internal investigation that a company will undertake in the hope of receiving a deferred prosecution) and at the compliance stage (by increased self-policing within the company).

However, the preference for deferred prosecutions also reflects some less laudable motives, such as the political advantages of a settlement that makes for a good press release, the avoidance of unpredictable courtroom battles with skilled, highly paid adversaries, and even the dubious benefit to the Department of Justice and the defendant of crafting a settlement that limits, or eliminates entirely, judicial oversight of implementation of the agreement.

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Garrett's book is also sufficiently current that it takes account of many of the large monetary settlements recently entered into between the government and various banks (largely, it would seem, in response to public pressure), and questions whether even these very large amounts remotely compare to the billions of dollars the banks and others realized through their alleged misconduct.

In the end, Garrett concludes that, when it comes to criminal violations involving corporations, "neither individuals nor corporations should be left off the hook." One might argue that the two should not be equated and that the prosecution of high-level individuals for high-level crimes is a far more appropriate use of the criminal law than prosecution of the companies that served as their fields of operation. But the broader point, which Garrett argues eloquently, is that for the past decade or more, as a result of the shift from prosecuting high-level individuals to entering into "cosmetic" prosecution agreements with their companies, the punishment and deterrence of corporate crime has, for all the government's rhetoric, effectively been reduced.

## Discussion Questions

1. Describe the concept of "deferred prosecution" as it relates to corporate criminal liability.

*As the article indicates, beginning in the early 1990s and with increasing frequency thereafter, federal prosecutors began entering into "deferred prosecution" agreements with major corporations and large financial institutions. In the typical arrangement, the government agrees to defer prosecuting the company for various federal felonies if the company, in addition to paying a financial penalty, agrees to introduce various "prophylactic" measures designed to prevent future such crimes and to "rehabilitate" the company's "culture." The crimes for which prosecution is deferred includes felony violations of the securities laws, banking laws, antitrust laws, anti-money-laundering laws, food and drug laws, foreign corrupt practices laws, and numerous provisions of the general federal criminal code.*

*As the article also indicates, the three common features of most deferred prosecution agreements are the payment of a fine, the introduction of ethical training for employees, and the implementation of new or improved compliance programs, usually described in general terms such as "effective compliance" or "appropriate due diligence."*

2. Comment on Brandon L. Garrett's recommendations that various steps be taken to improve the efficacy of deferred prosecution agreements, including greater judicial oversight, greater use of court-appointed monitors, and greater attention to breaches of the agreements. Do you agree that such steps should be undertaken to improve the effectiveness of deferred prosecution agreements? Why or why not?

*If deferred prosecutions of corporations continue, Garrett's recommendations to improve the efficacy of such arrangements appear sound, including greater judicial oversight, greater use of court-appointed monitors, and greater attention to breaches of agreements. Increased regulation of*

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*deferred prosecution agreements should improve their overall effectiveness. Increased regulation, however, does not address the fundamental question related to deferred prosecutions; namely, are such agreements too 'light' on corporate criminality?*

3. In your reasoned opinion, are deferred prosecutions are good idea? Why or why not?
*This is an opinion question, so student opinions will likely vary. Some may perceive such arrangements as too "light" on corporate criminality.*

**Article 3: "Apple Sued Because iPhone Isn't Really 16GB"**

**http://money.cnn.com/2015/01/02/technology/mobile/apple-iphone-lawsuit/**

According to the article, if you have a 16 GB iPhone, you have probably noticed that you don't *really* have 16 GB of storage space -- some of that space is taken up by Apple's iOS software. But you probably have not thought to sue Apple over it.

That is the difference between you and two Apple customers in Miami who sued Apple for their incredible shrinking storage.

The plaintiffs filed their lawsuit in a California federal court recently, and they are seeking permission to make their complaint a class action suit. They are seeking more than $5 million in damages for what they say is Apple's false advertising.

Apple's new iOS 8 software takes up 3 GB of storage on an iPhone 6. That's 19% of the phone's 16 GB of advertised storage. The iOS 8 software takes up 20% of an iPhone 6 Plus' storage and 21% of an iPad's free space.

"Apple's misrepresentations and omissions are deceptive and misleading because they omit material facts that an average consumer would consider in deciding whether to purchase its products," the plaintiffs say in their complaint.

Rather than try to cram everything into what little space they have on their smartphones, many people choose to back up their photos, videos and other content on cloud services, such as Apple's iCloud. But the plaintiffs say that's all part of Apple's game.

"Apple exploits the discrepancy between represented and available capacity for its own gain by offering to sell, and by selling, cloud storage capacity to purchasers whose internal storage capacity is at or near exhaustion," the complaint says.

This is not the first time Apple has been sued for misleading customers about storage space. In 2007, angry iPod Nano customers filed a lawsuit against Apple for only providing 7.45 GB of storage in their 8 GB iPods (less than 7% for those scoring at home). That case was ultimately dismissed.

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Other companies have faced similar lawsuits. Microsoft was sued in 2012 for falsely advertising the amount of storage available to Surface tablet customers. But those tablets, which run the much more data-intensive Windows operating system, actually have less than half their 32 GB of advertised storage available for customers' use.

## Discussion Questions

1. What is a class action?

*A "class action" lawsuit combines the efforts of many (hundreds, perhaps even thousands) of plaintiffs in a single lawsuit against a defendant, usually a corporation that has engaged in some alleged wrongdoing causing harm to all plaintiffs involved in the litigation. In order to participate in a class action, a plaintiff must have "standing to sue," meaning that he or she must have an interest in the outcome of the case. Usually, that interest is the recovery of damages to account for the defendant's wrongful actions and the resulting injury to the plaintiff.*

2. In your opinion, is a class action appropriate in this case?

*A class action is appropriate if all of the plaintiffs in the case have sufficient "commonality of interest." In the Apple case, if all of the plaintiffs are claiming injury due to Apple's alleged misrepresentation of storage capacity on its iPhone, they do have sufficient commonality of interest, and the class action is appropriate.*

3. Is this case "much ado about nothing," or do you believe that the plaintiff's claim (that Apple's misrepresentations and omissions regarding its 16 GB iPhone are substantive, deceptive and misleading) has merit? Explain your response.

*This is an opinion question, so student responses will likely vary. In your author's opinion, the most interesting aspect of this case will be that of damages. Even if the plaintiffs are successfully able to prove that Apple misrepresented the storage capacity on its iPhone, what damages would be appropriate? In your author's estimation, the damage recovery will likely be minimal for individuals participating in the class action, especially when taking into consideration the costs of litigation (including attorneys' fees) and the number of participants in the class action. If the damage award is $50 million and 1 million plaintiffs participate, their individual recovery would be $50, less attorneys' fees and other associated costs of litigation!*

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# Video Suggestions

**Video 1: "Implications of SCOTUS Fair Housing Case"**

**http://www.msnbc.com/melissa-harris-perry/watch/implications-of-scotus-fair-housing-case-388871747990**

**Discussion Questions**

1. As the video indicates, the Fair Housing Act prohibits housing discrimination on the basis of race, color, national origin, religion, sex, disability, and familial status. Comment on the importance of prohibiting these types of discrimination in housing.

*In your author's opinion, non-discrimination in housing is just as important as non-discrimination in employment. Notice how similar the non-discrimination provisions of the Fair Housing Act are to the Civil Rights Act of 1964 and other laws prohibiting discrimination in employment.*

2. Define "disparate impact" discrimination.

*Disparate impact discrimination is a type of discrimination for which the plaintiff can recover even if she cannot show direct evidence of intentional discrimination (Intentional discrimination is also known as "disparate treatment" discrimination). With the disparate impact discrimination theory, the plaintiff can recover if she can demonstrate that a policy, practice or procedure of the defendant resulted in discrimination. Statistics do matter in terms of disparate impact theory. For example, if statistics indicate that a housing contractor only sells to Caucasian buyers, even if the contractor never expressly says "I refuse to sell to African-Americans," the numbers demonstrate that the contractor's practices have the effect of discrimination, thereby establishing a prima facie case of disparate impact discrimination.*

3. In your reasoned opinion, should the United States Supreme Court eliminate the "disparate impact" theory of housing discrimination? Why or why not?

*This is an opinion question, so student responses may vary. Arguably, disparate impact theory should only be eliminated if discrimination has been eradicated, that people are evaluated based on the content of their character and not the color of their skin (Dr. Martin Luther King, Jr.'s "Dream.") If discrimination still exists, the need for disparate impact theory still exists.*

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**Video 2: "The Death Penalty in America"**

**http://www.cnn.com/2015/01/27/us/georgia-inmate-warren-hill-tuesday-execution/**

*Note: This video is a follow-up to Article 1 of the newsletter. In addition to watching the video "The Death Penalty in America," please also read the article "Georgia Executes Man Despite Disability Claim," included below and also available at the above-referenced internet address.*

**"Georgia Executes Man Despite Disability Claim"**

According to the article, twice-convicted murderer Warren Lee Hill was executed on Tuesday, January 27, 2015.

Despite pleas by human rights groups and legal representatives who have argued that Hill's intellectual disability should have made him ineligible for the death penalty, Hill died by injection at the prison in Jackson, Georgia.

His time of death was 7:55 p.m. ET, said spokeswoman Gwendolyn Hogan. Hill declined to make a final statement, but requested a final prayer, Hogan said.

Hill's attorney slammed the U.S. Supreme Court, which declined to step in and grant a stay of execution.

"Today, the court has unconscionably allowed a grotesque miscarriage of justice to occur in Georgia," said Brian Kammer, Hill's lawyer.

"The intellectual disability community, which has strongly supported Mr. Hill's case for many years, joined his legal team in the belief that the Supreme Court would step in and prevent Georgia's flagrant disregard of the Constitution on behalf of the rights of people with disabilities," said Kammer.

He described the execution as "an abomination."

The Georgia State Board of Pardons and Paroles similarly voted to deny clemency.
The board said in a release that its members "thoroughly reviewed the parole case file on the inmate, which includes the circumstances of the death penalty case, the inmate's criminal history, and a comprehensive history of the inmate's life" to reach their decision.

In a joint statement, the NAACP, the Georgia Council on Developmental Disabilities, and Georgians for Alternatives to the Death Penalty called the board's decision to deny clemency, "an embarrassment to our state."

They condemned the legal system for "failing to protect those who are most vulnerable."

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The groups invited "those concerned about Georgia's criminal justice practices," to join them at vigils in several cities around the state before Hill's scheduled execution.

Federal law -- stemming from a 2002 Virginia case that went to the U.S. Supreme Court -- says executing intellectually disabled individuals violates the Eighth Amendment's ban on cruel and unusual punishment. But the ruling also allows states to define intellectual disability. In Georgia, that means attorneys for death row inmates have to prove mental impairment "beyond a reasonable doubt."

"This is the strictest standard in any jurisdiction in the nation," Kammer said.

Hill's execution comes two weeks after the state executed Andrew Brannan, a Vietnam War veteran suffering from post-traumatic stress disorder who killed Laurens County Deputy Kyle Dinkheller in 1998. Kammer also was Brannan's counsel.

Kammer, who has represented Hill for 20 years, said in any other state, Hill would have served a life sentence. Hill was sentenced to death in 1990 for killing fellow prison inmate Joseph Handspike, beating him to death with a nail-studded board. At the time, Hill had been serving a life sentence for the 1985 shooting death of his girlfriend Myra Wright.

"We acknowledge that Mr. Hill should be held accountable for his actions and behavior," Torin Togut, president of the Arc of Georgia, said in a letter written on Hill's behalf. "However, it is our contention that Mr. Hill, who has an intellectual disability, should not be subject to capital punishment."

The Arc is a nonprofit organization that advocates for and serves people with intellectual and developmental disabilities.

Hill had the support of the American Association on Intellectual and Developmental Disabilities, the Georgia NAACP, and former President Jimmy Carter and his wife, Rosalynn Carter.
The victim's family and former jurors had also expressed support for mercy in Hill's case, saying they weren't given the option of life without parole when sentencing him to death.

Kammer had said seven doctors agreed that his client was intellectually disabled -- including three doctors for the state who initially evaluated Hill and said he didn't meet Georgia's standard. Kammer said those doctors have since signed an affidavit admitting they felt rushed during Hill's examination and now believe he does meet the standard for "intellectually disabled."

In previous clemency hearings, attorneys for the state have argued that Hill served in the Navy, held a job and managed his money before killing his girlfriend -- signs that he didn't necessarily meet the legal standard to be considered intellectually disabled, even though he has a low IQ.

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But Kammer said examples of Hill achieving "self-sufficiency" don't make a strong case for his execution. Hill has an IQ of approximately 70, and "the emotional and cognitive ability of a young boy," according to his attorney.

Several of the letters supporting Hill's clemency cited last year's Supreme Court decision that struck down a Florida law that used "unscientific standards for determining intellectual disability" for death row inmates.

Attorneys tried to use the Hall v. Florida decision as grounds to spare the life of Georgia inmate Robert Wayne Holsey, who was sentenced to death for the murder of a local sheriff's deputy. Holsey, who also had an IQ of 70, was executed in December.

Hill declined to request a special last meal, the Department of Corrections said. He was offered the institutional meal tray, consisting of shepherd's pie, mashed potatoes, red beans, cabbage relish salad, cornbread, sugar cookies and fruit punch.

*Note: The following Discussion Questions specifically relate to the video, "The Death Penalty in America," included at the above-referenced internet address.*

**Discussion Questions**

1. As the video indicates, there are currently approximately 3,000 death row inmates in the United States. Does this number surprise you? Did you expect more or less death row inmates in the United States? Explain your responses.

*These are opinion questions, so student responses may vary. The number did seem surprising to your author, since it represents only an average of about 60 death row inmates per state. Obviously, a great deal of attention, media and otherwise, is devoted to the death penalty, death row, and death row inmates, and such focus may affect student perception of the number of death row inmates. The attention is warranted, however, since the "stakes" are so high.*

2. As the video indicates, death by lethal injection is the primary method of execution in the United States. Why do you believe death by lethal injection is the primary method of execution? The video also notes that electrocution, gassing, hanging, and the firing squad are still legal methods of execution in some states. Should they be? Why or why not?

*As mentioned in response to Article 1, Discussion Question Number 1 earlier in the newsletter, the United States Supreme Court is currently reviewing Oklahoma's lethal injection protocol to determine whether it is in violation of the Eighth Amendment to the United States Constitution's prohibition against "cruel and unusual" punishment. For further information regarding the current Supreme Court case, see the following internet address:*

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***http://www.propublica.org/article/will-the-supreme-courts-lethal-injection-review-kill-the-death-penalty***

*Death by lethal injection is the primary method of execution in the United States since it is perceived as the most "humane" form of execution, especially compared to other forms of execution recognized in the United States (electrocution, gassing, hanging, and the firing squad). Even though the other forms of execution are viewed as less humane methods compared to lethal injection, they are all political "lightning rods" in the sense that if a politician should seek to eliminate one or more of these methods of execution, he or she will be "branded" as "soft on crime."*

3. As the video indicates, besides the United States, Japan is the only other industrial democracy in the world that has the death penalty (In 2013, there were 38 executions in the United States, while there were only 8 executions in Japan). Should that fact matter in terms of whether the United States should continue to administer the death penalty? Why or why not?

*Even adjusted for relative population (the United States has a total population of 319 million people, while Japan has a total population of 127 million people), the rate and number of executions in the United States still exceed the rate and number of executions in Japan. Student opinions will likely vary in terms of whether it even matters what Japan, other industrial democracies or the rest of the world does in terms of executions. Some students may even take pride in the fact that the United States "charts its own path" in terms of the death penalty. It does appear that for the rest of the industrial democracies in the world, their collective belief is that there is a better way to punish those who have committed the most serious crimes.*

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**Of Special Interest**

This section of the newsletter addresses government regulation of the health and sanitation practices of businesses.

# Ethical Dilemma

**"Senator Suggests Restaurant Employees Shouldn't Have to Wash Hands"**

**http://abcnews.go.com/Politics/senator-restaurant-employees-wash-hands/story?id=28701837**

According to the article, you can walk into almost any restaurant bathroom and see a health-code mandated sign that reads "Employees must wash hands before returning to work." But one senator is suggesting that businesses should be free to ditch that regulation.

In a question-and-answer session recently at the Bipartisan Policy Center, Senator Thom Tillis argued that restaurants should be allowed to "opt out" of certain regulations - such as employees washing their hands. Such a rule, he says, is an example of how America is "one of the most regulated nations in the history of the planet."

According to Roll Call, the senator was recalling a time in 2010 when he had a chat with a woman on Starbucks' health regulations.

"I said that I don't have any problem with Starbucks if they choose to opt out of this policy as long as they post a sign that says, 'We don't require our employees to wash their hands after leaving the restroom.' The market will take care of that," Tillis said.

"If you let a business or industry opt out as long as they indicate through proper disclosure, through advertising, through employee literature, there's this level of regulations that maybe they're on the books," Tillis said. "But maybe you can make a market based decision as to whether or not they should apply to you."

The Republican senator from North Carolina went on to say that a move like that by a restaurant would probably result in it going out of business.

At the end of the discussion, Bipartisan Policy Center President Jason Grumet joked to Tillis, "I'm not sure if I'm going to shake your hand," MSNBC reports.

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In recent interview, Tillis denied making those remarks. "I didn't say that," Tillis said. "I think I had a blogger follow that was without a sense of humor. Obviously, I think that's important."

But he also defended his position in an interview with the Associated Press the same day, "Sometimes there are regulations that maybe we want to set a direction, but then let those who are regulated decide whether or not it makes sense."

Tillis' remarks come during a week when health issues, like child vaccinations, are being debated by politicians and the public.

## Discussion Questions

1. This article is less about washing hands, and more about the issue of government regulation of business. Is government regulation of business inherently "bad?" Why or why not?

*This is an opinion question, so student opinions may vary. In your author's opinion, "smart" government regulation is actually beneficial in the sense that it requires necessary corporate action that might not occur without government mandate.*

2. As the article indicates, Senator Tillis proposes that a company like Starbucks should be able to opt out of government-mandated employee hand-washing by posting a sign in their bathrooms stating "We don't require our employees to wash their hands after leaving the restroom." Comment on Senator Tillis' proposal.

*Even Senator Tillis' proposal is a form of government regulation, since it would require a company like Starbucks to post a sign!*

3. As the article indicates, Senator Tillis also seems to propose that "the market" will take care of health and sanitation-related business practices. In your opinion, is Tillis correct or incorrect in his assumption that "the market" will regulate business? Does "the market" do a better job of regulating business than government? Explain your response.

*These are opinion questions, so student responses may vary. In your author's opinion, if the market is driven purely by profit, it may not adequately address health and sanitation-related business practices, since improved health and sanitation may come with additional costs viewed by business owners as interfering with profitability. Remember, the government represents the people. Government regulation represents the will of the people.*

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**Of Special Interest**

This section of the newsletter will assist you in addressing Article 2 ("Justice Deferred Is Justice Denied") and Video 1 ("Implications of SCOTUS Fair Housing Case") of the newsletter.

## Teaching Tips

**Teaching Tip 1 (Related to Article 2—"Justice Deferred Is Justice Denied):**

**"Prosecution Deferred, Justice Denied"**

**http://www.nytimes.com/2013/12/14/opinion/prosecution-deferred-justice-denied.html?_r=0**

According to the article, the Justice Department is about to enter into a $2 billion deferred prosecution agreement with JPMorgan Chase over its role in Bernard L. Madoff's Ponzi scandal, the latest example of the government's troubling reluctance to bring criminal charges against major corporations.

The use of deferred prosecution and non-prosecution agreements, which began during the George W. Bush administration and has increased under President Obama, allows companies to avoid criminal charges if they pay substantial penalties, improve their compliance programs and cooperate with authorities. The companies do not plead guilty. They are not convicted of any crimes. They do not receive criminal sentences.

From 2004 through 2012, the Justice Department entered into 242 deferred prosecution and nonprosecution agreements with corporations; there had been just 26 in the preceding 12 years. The department's criminal division now uses "noncriminal alternatives" in most of its settlements with corporations.

From 2010 to 2012, the division reached twice as many deferred prosecution and nonprosecution agreements with corporations as there were plea agreements.

We are not talking about small cases involving technical violations of the law. Prosecutors agreed to a deferred prosecution with HSBC in 2012 even though the bank was involved in nearly a trillion dollars' worth of money laundering, much of it from drug trafficking. In another recent case, the department struck a nonprosecution agreement in the Upper Big Branch mine disaster of 2010 that left 29 miners dead in West Virginia. Massey, the mine owner, had concealed over 300 safety law violations from government inspectors.

The failure to prosecute the likes of JPMorgan, HSBC and Massey minimizes their culpability and raises doubts about the government's commitment to fighting corporate crime. The Justice Department would never allow

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individuals who committed such serious crimes to escape prosecution. Why is there a double standard for corporate defendants? And why has the Obama administration continued the questionable corporate crime policies of the Bush administration?

The government has offered various explanations for this lenient approach. In the case of JPMorgan, prosecutors reportedly were worried that a prosecution could imperil the company and its employees, just as charges against the accounting firm Arthur Andersen in 2002 for its role in the Enron scandal led to the collapse of the company, and thousands of job losses. But Andersen was exceptional; it could not survive as an accounting firm after its conviction for accounting fraud. Studies have shown that criminal prosecution is rarely a death penalty for a corporation.

Defenders of deferred prosecution agreements call them a middle ground. But there is already a middle ground — civil enforcement — in areas like antitrust, environmental crimes, securities fraud and tax evasion, as exemplified by the $13 billion civil settlement reached last month with JPMorgan over its role in the mortgage crisis.

The government still brings criminal charges in some high-profile cases, notably against BP and Transocean for the 2010 oil spill in the Gulf of Mexico and the current case against SAC Capital Advisors for insider trading.

But these examples are increasingly rare. Perhaps the government believes that corporate prosecution serves little purpose because companies cannot go to jail. The better view is that criminal prosecution holds companies responsible and expresses societal condemnation in ways that lesser sanctions cannot.

Prosecutors have an obligation to make principled decisions. If corporations commit serious crimes, they should be prosecuted; they should not be allowed to buy their way out of criminal liability. On the other hand, if criminal charges are not warranted, the government should not threaten prosecution as a way to pressure companies to accept these "noncriminal alternatives."

Deferred prosecution and non-prosecution agreements, if they occur at all, should be limited to first-time corporate offenders and relatively minor cases where civil or administrative enforcement options are not available — or perhaps in exceptional cases like Andersen, in which innocent employees would suffer. Noncriminal alternatives should never be allowed in egregious cases like those of JPMorgan, HSBC or Massey.

The Justice Department must develop policies to limit the use of these agreements. Doing so will ensure a principled and consistent approach, uphold the rule of law and restore confidence in the government's efforts to combat corporate crime.

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**Teaching Tip 2 (Related to Video 1—"Implications of SCOTUS Fair Housing Case"):**

**"Fair Housing on the Ropes: The U.S. Supreme Court Hears Housing Discrimination Case"**

**http://www.huffingtonpost.com/bernice-a-king/fair-housing--supreme-court_b_6623624.html**

*Note: This is an opinion-editorial by Dr. Bernice A. King, Chief Executive Officer of The King Center*

Forty nine years ago, my father gave a powerful address to the Chicago Freedom Movement Rally at Soldier Field in Chicago, Illinois. There, he emphasized that Black and Brown families were living in "rat-infested slums." Worse, minorities were paying a higher rent for less space while Whites, paying less in rent, were enjoying higher-quality housing, with more square footage. He said that the time had come for the nation to end the "long and desolate night of slumism."

Dr. King was primarily speaking to the powerful businessmen, politicians and judges, who had their vision, in his words, "blurred by political expedience rather than commitment" to improve the living conditions by failing to address the dehumanizing housing conditions that characterized Chicago's West Side. There were many "West Sides" in the United States in 1966. In spite of the implementation of the Fair Housing Act, unfortunately, there are still numerous communities throughout the United States that are similar to those my father described almost fifty years ago.

And, due to recent events, the progress that has been made to ensure stronger policies to prevent this type of housing discrimination is being threatened.

Late last month, The United States Supreme Court heard oral arguments in the case of Texas Department of Housing and Community Affairs v. The Inclusive Communities Project. The Roberts Court will rule on whether or not the Fair Housing Act's doctrine of "disparate impact" should be preserved, or rule that this tool for evaluating covert housing discrimination should be eliminated.

Many who are well-versed on this issue believe that the Court will nullify this Act since, historically, the nine justices have not routinely intervened in cases when the lower appellate courts have been in agreement. Since there has not been a question of the law, I fear that the outcome of the case will be a blow to yet another progressive measure that the United States Congress passed shortly after the assassination of my father, Dr. Martin Luther King, Jr., in 1968.

Long gone are the days of the liberal consensus that characterized the United States from Franklin Roosevelt's New Deal, to Harry Truman's Fair Deal, to John F. Kennedy's New Frontier, and finally, to, perhaps the most liberal reforms of them all -- Lyndon Johnson's Great Society. Johnson, a principal champion of liberal government, signed the landmark legislative acts that characterized the Second Reconstruction, a period from the middle 1950s to 1970 of steadily progressive measures to address centuries of inequities suffered by blacks. President Johnson understood that America could

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not continue to compete with the world with blacks and minorities as members of a permanent underclass.

Unlike President Johnson, this current United States Supreme Court appears to be adopting a strategy of Deconstruction similar to its Nineteenth-Century predecessors. Those predecessors struck down the Civil Rights Act of 1875, which declared that all citizens, regardless of color, were "entitled to the full and equal enjoyment" of public accommodations. This decision cleared the way for widespread legal segregation as states began to immediately redraft their constitutions to legalize the discriminatory practices against African-Americans.

Shamefully, the Court's systematic dismantling of Section 5 of the Voting Rights Act and the Court's anticipated modification of the Fair Housing Act may cause it to be remembered by history as a strict constructionist Court with neither heart nor soul. Within five years, it has erased the gains of almost 60 years of progressive reform that sought to foster a spirit of what my father called "interconnectedness." This is extremely detrimental to our nation, to our global citizenry and to the realization of the "Beloved Community."

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## Chapter Key for McGraw-Hill/Irwin Business Law Texts:

| | Hot Topics | Video Suggestions | Ethical Dilemma | Teaching Tips |
|---|---|---|---|---|
| **Kubasek et al., Dynamic Business Law** | Chapters 7 and 45 | Chapters 7, 49 and 50 | Chapter 2 | Chapters 7, 49 and 50 |
| **Kubasek et al., Dynamic Business Law: Summarized Cases** | Chapters 7 and 45 | Chapters 7, 49 and 50 | Chapter 2 | Chapters 7, 49 and 50 |
| **Kubasek et al., Dynamic Business Law: The Essentials** | Chapters 5 and 25 | Chapters 5 and 7 | Chapter 1 | Chapters 5 and 7 |
| **Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment** | Chapters 5 and 48 | Chapters 5, 24 and 25 | Chapter 4 | Chapters 5, 24 and 25 |
| **Barnes et al., Law for Business** | Chapters 5 and 46 | Chapters 5, 34 and 35 | Chapter 3 | Chapters 5, 34 and 35 |
| **Brown et al., Business Law with UCC Applications** | Chapters 5 and 15 | Chapters 5 and 30 | Chapter 1 | Chapters 5 and 30 |
| **Reed et al., The Legal and Regulatory Environment of Business** | Chapters 13 and 18 | Chapters 7 and 13 | Chapter 2 | Chapters 7 and 13 |
| **McAdams et al., Law, Business & Society** | Chapters 4 and 15 | Chapter 4 | Chapters 1, 2 and 8 | Chapter 4 |
| **Melvin, The Legal Environment of Business: A Managerial Approach** | Chapters 22 and 23 | Chapters 23 and 24 | Chapter 5 | Chapters 23 and 24 |
| **Bennett-Alexander & Harrison, The Legal, Ethical, and Regulatory Environment of Business in a Diverse Society** | Chapter 8 | Chapters 7 and 8 | Chapter 1 | Chapters 7 and 8 |

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## This Newsletter Supports the Following Business Law Texts:

Barnes et al., Law for Business, 12th Edition 2015© (0078023815)
Bennett-Alexander et al., The Legal Environment of Business in A Diverse Society, 1st Edition 2012© (0073524921)
Brown et al., Business Law with UCC Applications Student Edition, 13th Edition 2013© (0073524956)
Kubasek et al., Dynamic Business Law, 3rd Edition 2015© (0078023785)
Kubasek et al., Dynamic Business Law: The Essentials, 2nd Edition 2013© (0073524972)
Kubasek et al., Dynamic Business Law: Summarized Cases, 1st Edition 2013© (0078023777)
Mallor et al., Business Law: The Ethical, Global, and E-Commerce Environment, 15th Edition 2013© (0073377643)
Melvin, The Legal Environment of Business: A Managerial Approach, 2nd edition 2015© (0078023807)
McAdams et al., Law, Business & Society, 10th Edition 2012© (0073525006)
Reed et al., The Legal and Regulatory Environment of Business, 16th Edition 2013© (0073524999)