CONSUMER EMPOWERMENT

Spring 2009
Service Learning Seminar: LAWS 8021
3 credits
Wed. 4-6:00 P.M.
Room 330

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SYLLABUS AND POLICIES

What Is This Course About?

This seminar is unique on many levels. It is different than other seminars, courses or clinics currently taught at the law school. First, it is a Service Learning Course, connected with the University of Colorado’s Institute for Ethical and Civic Engagement (IECE). There are only a limited number of such service learning courses across campus, and there have been very few at the Law School. I am happy that we can be a part of CU’s movement to strengthen commitment to civic engagement through this new seminar.

The seminar is also unique in that it seeks to provide a journey through theory and practice in contracts, an area that students traditionally learn in a more doctrinal manner. The quest is to provide you with opportunity to expand your understanding and analysis of contracts beyond the basic concepts you learn in your first-year Contracts course. Through class readings and discussion, we will consider contract theories and principles emanating from classical and neoclassical law, legal realism, law and economics, and critical legal studies. We also will explore and question tensions among theories, focusing on how they interact with norms, goals, and functions of contract and consumer protection law.

We also will observe these tensions “in action” through volunteer work with the Boulder County Housing Authority, who assists people throughout Boulder County with finding affordable housing and facing consumer and financial issues. Specifically, we
will create a consumer seminar for clients of the BCHA to inform them regarding contract and consumer issues they are facing or will face as young adults. Through this work, we will “empower” consumers by helping to provide them with the information they need to protect themselves. We also will be “humanizing contracts” by considering how legal concepts and theories apply in very human consumer contexts.

Accordingly, the course weaves in-class academic analysis and discussion with out-of-class outreach aimed to broaden your understanding and analysis of contract and consumer protection issues. This means you should continually consider the functions and policies contract and consumer law should promote, and whether that law accomplishes such promotion. Should the law treat all contracts alike? What reforms are necessary to protect public policies? What are the costs and benefits of these reforms? When do these protections become too paternalistic, or improperly impede freedom of contract?

Again, please be aware that there will be time spent outside of the classroom working on the BCHA project. Aside from actually presenting the consumer classes, we also may have to meet with coordinators from these groups in order to plan and prepare our program. We also will do a practice session for the seminar, which gives you more presentation experience and helps ensure a great final product. The goal is to provide a learning experience for you while imparting information to consumers that will help empower them to protect themselves from common pitfalls. This means each student will be responsible for creating a presentation and useful materials (concise/understandable to adults of all education levels) on his or her assigned topic. We also must be prepared for problems and “glitches” that always arise with outreach projects!

Outside of the consumer skills course materials, each student also must complete an academic seminar paper. Students will select topics toward the beginning of the semester, discuss drafts with me and an assigned “paper buddy,” and prepare class presentations on their selected topics. These topics should relate to or overlap with students’ consumer skills presentation topics. The final papers, however, must go beyond the presentations in exploring contract theories as applied to students’ topics. The papers also should incorporate students’ reflections regarding their experiences working on our outreach project. We will do paper presentations during the final weeks of class, and the final papers will not be due until the end of the semester.

I am enthusiastic about this Consumer Empowerment seminar! We will work as a team and learn together along the way. Indeed, I warmly welcome your comments and insights throughout the year. I hope this seminar will prove to be worthwhile for all involved.

**Required Materials:**

Originally, you were going to have to purchase an initial course packet at the UMC, since we do not officially have in-house copy services for these materials. However, in an effort to save you hefty materials costs, most of the materials are accessible on-line and the rest of the materials are in the course packet (“Pack”) for you to pick up on the 4th floor in the faculty assistants’ office (see Cara Paddle for the packet). These materials are referenced as “Pack” in the syllabus assignments below. This means
some course materials will be in the “Pack” course packet, but other materials you will need to obtain on your own through on-line sources (i.e., Westlaw, Lexis, and other on-line sources). Note also that I have created a Consumer Empowerment course page on TWEN. All students in this course must register on TWEN, and check it periodically. The TWEN course page will post announcements, assignments, class materials, etc. The TWEN site will be important in this class, especially with respect to our BCHA project.

Class Schedule:

Class will meet from 4-6:00 P.M. on Wednesdays. Please note that this seminar also requires additional time outside of class meetings, including Saturday, April 4 for the actual BCHA presentation.

Office Hours:

My designated office hours this semester will be Wednesdays, 2-3:30 or by appointment. Of course, please feel free to talk to me after class or stop by my office. I am in my office most days.

Class Attendance, Preparation (including Short Reflection/Writing Assignments) & Participation:

This Attendance, Preparation and Participation will account for 25 percent of your final grade. Your class attendance, preparation and participation are essential to everyone’s course experience. In addition, you must participate in the BCHA project as part of the Service Learning experience. This is an interactive and experiential seminar, and you are expected to actively contribute to class discussion, as well as the BCHA project. Furthermore, part of class preparation is your timely completion of very short reflection/writing assignments (as noted on the syllabus and TWEN). These assignments are due at the start of the class for which they are assigned.

You should make every effort to attend and participate in every class. Moreover, Service Learning Seminars are especially dependant on your attendance and participation in both class and the volunteer project (even more so than regular seminars, which already expect full attendance). I understand there may be illnesses and unavoidable conflicts, but ask that you talk to me about any such absences or conflicts.

Consumer Skills Presentations and Program Materials:

Set aside Saturday, April 4, for the actual BCHA consumer skills course. Your presentations and program materials for the consumer skills program will account for 25 percent of your final grade. Students will review drafts of each other’s materials, and provide feedback. In addition, students will provide feedback to their classmates regarding their presentations. Of course, I expect everyone to exert effort in creating and presenting program materials, not simply to achieve high grades, but to provide a
beneficial experience for the BCHA consumers and any other attendees for the presentations. Due dates for drafts and final materials will be announced after we have set timing with BCHA (as of the date of this syllabus, BCHA staff has not provided such information because it depends on copying/publication needs).

Seminar Paper (50 percent):

You also will be required to write an academic seminar paper ranging from 20-25 pages. Rough drafts outlining selected topics, research, and “paper plans” will be due in Week 6 (Wed. 2/18/09) of this class (as designated below in the Assignments). More detailed drafts will be due in Week 10 (Wed. 3/18/09). Each student will be paired with a “paper buddy” in order to facilitate mutual written feedback among students in the course. The final papers will be due at the end of the semester at a date to be determined. This paper will account for 50 percent of your final grade.

As is true with all your courses, you are subject to the Honor Code. This, of course, includes all the applicable rules on plagiarism, digital sources, etc.

Assignments: 14 weeks

* Set aside Saturday, April 4, for the actual BCHA consumer skills course.
* Reading assignments are subject to change.
* Complete reflection/writing assignments before the class for which they are assigned.
* Some materials are in what is noted as the “Pack” and others are available on-line (i.e., Westlaw, Lexis, Hein, SSRN, etc.). Assume they are available on-line unless indicated otherwise (i.e., “Pack”).
* Please note that reading assignments are shorter than they appear. With respect to review and journal articles, the assignments list page numbers that correspond to the hard copies. However, this translates to far fewer Westlaw or Lexis pages of text (these WL estimations below exclude footnotes, which you only need to read to the extent necessary for your understanding of the article).
* Check TWEN for changes, additional materials, etc.

WEEK 1

- Please read the following:
  - This Syllabus and the attached Overview of Contract Theories
  - BCHA, IECE and Service Learning information (Pack)

*Reflection/writing Assignment:* Consider how consumers have been impacted by the current financial crisis. Write a few short paragraphs about how you view the current “consumer crisis” and what that means for you and your family. Also, explain why/how this does or does not impact your reasons and goals for taking this service learning class.
Be prepared to more fully discuss these reflection papers in class, especially in light of the reading assignment.

Note that a representative from the BCHA will stop by at the start of class to explain what the BCHA does. Accordingly, be prepared to ask her questions about the BCHA.

Also consider generally (for Week 1 and throughout the year): What policies and norms should contract law promote? How should courts carry out this promotion? Should “fairness” matter in contract law?

In addition, what are your thoughts, hopes, and expectations regarding the Service Learning component of this course? How do the readings define or describe “Service Learning”? Does this comport with notions of this course you had when you registered? Why are you taking this class?

WEEK 2

The “Theory Overview” materials in the Pack are quite rudimentary, meant to provide general descriptions of various theories. Each theory, however, is highly textured, and subject to clarifications and provisos. The Atiyah essay introduces you to the liberal theory of contract at the heart of contract law and doctrine. This theory is at the base of classical and neoclassical focus on freedom of contract, which dominates contract and consumer protection law.

Please read the following:

- Theory Overview materials in the Pack (all the readings under this general heading in the Pack).

Please consider the following as you prepare the readings for class:

- How would you describe these various theories?
- What are your initial views of these theories, and what do you see as their respective strengths and weaknesses?
- What is Atiyah’s “liberal theory of contract?” What are its strengths and weaknesses?
- What functions and values do these different theories seek to promote? Are they successful? If so, how do they accomplish such promotion?

*Reflection/writing assignment: Based solely on these readings, please explain in a short paragraph which general theory of contract you find most compelling and why you chose that theory.

WEEK 3

Please read the following:

- Henry Mather, CONTRACT LAW AND MORALITY 15-44 (1999) – This is Chapter 2 of the book, and it is shorter than it appears due to the endnotes. (Pack.)
Consider the following as you prepare for class:

- What are “Aristotelian notions of justice”?
- What are the different views of Mather, Gordley and Benson? How do these views differ? How are they alike?
- Should “justice” and/or morality be relevant in contract law? If so, what role or “place” should each have in a contract regime?
- Is there a universal morality that contract law should promote? Why or why not? Where would a “universal morality” come from, and what would it entail?

*Reflection/writing assignment*: Please explain in 3 sentences or less, how you would define “justice” in contract law.

### WEEK 4

This course pays special attention to the “human” side of contract law, theory and practice. A strong proponent of a human view of contractual exchanges is Professor Ian Macneil, often deemed the “father” of relational contract theory. Professor Macneil has been very prolific in his writings, and it was very difficult for me to choose only a few of his writings for this class. Indeed, I could devote an entire course to Macneil’s relational contract theory. Nonetheless, I chose only a couple article excerpts because Macneil wrote these articles during the same general period and they are fairly readable and accessible.

At the same time, commentators have praised and criticized Macneil’s writings and theories. Professor Randy Barnett wrote one such critique in 1992, which highlights arguable shortcomings of Macneil’s views of consent in contract law. I hope that discussion of relational theory continues throughout this course.

Please read the following:

- Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 Wis. L. REV. 483, 483-493 (thus excluding Part III). (This merely summarizes some of Macneil’s ideas in roughly only 5 pages of body text per Westlaw prints.)

Please consider the following as you prepare for class:
• What are Macneil’s criticisms of efficient breach theory? Are these criticisms compelling?
• How would you describe Macneil’s Relational Contract Theory? Is the theory useful, and for what purposes?
• How would you explain, and perhaps use, Macneil’s categorization and description of Common Contract Norms?
• What are Barnett’s criticisms of Macneil’s relational theory, and are they compelling?

*Reflection/writing assignment: Please state in two paragraphs your views regarding the strengths and weaknesses of Macneil’s relational contract theory (i.e., one paragraph for strengths and one for weaknesses).

FYI in case you would like to read further regarding Macneil’s work (ie: not required due to limited time in the class and much to cover): In 2000, Northwestern University Law School held a symposium in honor of Professor Macneil. Although there were a variety of commentators, the comments by Professor Eric Posner (Professor at University of Chicago, and son of Judge Richard Posner) were particularly poignant. Professor Macneil responded to many commentators’ queries, and devoted special attention to Professor Posner’s remarks.


WEEK 5

As may already be transparent from the readings to date, it is essentially impossible to clearly define and differentiate the various ideas and so-called “schools” of legal thought. Nonetheless, some have labeled the movement away from formulaic classical doctrine, in favor of more contextual and flexible analysis, as “Legal Realism.” In addition, some have viewed “Critical Legal Studies” (CLS) as a “critique built on” the early work of the Realists. CLS has been described as a movement exposing “the oppressiveness of legal ideology” and the law’s maintenance of a status quo skewed against less powerful groups (i.e., with respect to race and gender).

Please read the following:
Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 Harv. L. Rev. 985, 985-1012 (1990). (This is the Introduction and Part I, and constitutes roughly 10 text pages per Lexis prints.)


Blake D. Morant, *The Teachings of Dr. Martin Luther King, Jr. and Contract Theory: An Intriguing Comparison*, 50 ALA. L. REV. 63, 99-113 (1998). (This includes only Part III and the Conclusion, and constitutes only 5 pages of body text per Westlaw prints.)

Please consider the following as you prepare the readings:

- How does Cook characterize CLS, and what are his criticisms of the movement?
- How does Chase characterize the influences of race on contract law? How do these influences impact contract doctrines and decisions?
- How do the views of Cook and Chase differ and relate? What ideas and arguments do you find most compelling?
- How should contract law ultimately respond to racial concerns? What are the pros and cons of these suggested changes in the law of contracts?
- How does Morant characterize the contract theory of Dr. Martin Luther King, Jr.? Do you believe this is accurate? Would you characterize Dr. King as a “critical theorist” or as a “relationalist” (in the Macneil sense)?

*Reflection/writing assignment*: Please explain in a page or less how you would describe the “contract theory” of a famous person of your choosing (ie: it can be any famous person, but not a contracts scholar). Be creative and have fun with this!

**WEEK 6 -- Paper Plans are due this week!**

Contract defenses such as unconscionability and legislative consumer protection regulations are some means for policing the fairness of businesses’ transactions with consumers. However, they raise tensions among contract theories and often collide with classical and neoclassical focus on freedom of contract and the “rational actor” assumptions of law and economics. Please read the following articles from a recent symposium on the law and economics of consumer choice:


Please consider the following as you prepare for class:

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* I did not assign the full article due to time constraints, as the article does not directly address contract law. Nonetheless, the article is quite interesting in that the author offers a different account from that of Morant regarding the theories of Dr. Martin Luther King, Jr.
• What is the “rational choice model” of consumer contracting and how do the authors use that model in their analyses and arguments? Do you find it useful and understandable?
• What new ideas or insights did you gain from these articles after reading the Mann article on Tuesday? What article did you find most compelling and why?
• How would you explain the “myopia” argument? What are Brown and Plache’s views regarding this and other theories? How does the data support or not support these views?
• How does Epstein view rational actor assumptions regarding human behavior? What sort of mistakes do we make and why do these “mistakes” matter in contract law? How does this apply with respect to credit card contracts?
• What is TILA and does it adequately protect people from pitfalls of credit card contracts?

*Reflection/writing assignment: Please find the most recent credit card agreement you have agreed to, highlight any terms you find problematic. Be prepared to discuss in class your views regarding the various articles’ proposals in light of this contract. If you have no credit cards ( . . . I must say that is impressive!), then find a form agreement on the Internet. **No written explanation is due— simply bring the credit card agreement with your highlighting and notations.** However, Paper Plans are due this week!

WEEK 7

Consumer protections also generate debate among scholars with neoclassical versus behavioral economic views. Please read the following article which is presented as a debate between two leading law and economic scholars holding these different economic views:


As you prepare the reading, please focus on the following:

• How would you summarize the opposing views of Bar-Gill and Epstein with respect to law and economics theory? How do their differences apply with respect to their views of consumer protection law?
• What are the points that Bar-Gill challenges in his article? Do you find his challenges compelling? Why or why not?
• What is “Theory of Consumer Misperceptions”? Does this make sense? Why or why not? Have you experienced this or seen this in action?
• Should the law of consumer contracts ignore consumer mistakes? What does Epstein say? What does Bar-Gill believe?

*Reflection/writing assignment: Please make a list of the “Top 10” consumer protections you would propose if you were in Congress. Consider pros and cons of these
protections and whether these proposals should be encapsulated in legislation. Be ready to discuss your Top 10 in class.

WEEK 8

This week we further explore Professor Bar-Gill’s research and analysis (with Elizabeth Warren this time) in a very important consumer context at the vortex of the current financial crises: credit. Please read the following:


Please consider the following as you prepare for class:
- How do these professors describe the “Problem” as such and applicable theories? Do you agree? Why or why not? What other arguments do you see?
- What did their research entail and what are the limits of this research? Are you left with further inquiries? Is this “evidence” persuasive?
- What are the pros and cons of current credit regulation?
- What do the authors propose regarding “safer” credit? Do you find this proposal compelling? Why or why not?

*Reflection/writing assignment:* Please explain in less than one page what you would propose to “make credit safer.”

WEEK 9

We now consider e-contracts and explore their unique contracting culture. Please read the following short article:


Please consider the following as you prepare for class:
- What does Hillman view as the advantages and disadvantages of E-Standard forms? Do you agree? Why or why not? What other arguments do you see?
- How does the Market succeed and/or fail in regulating e-contracts?
- What does Hillman propose regarding disclosure? Do you find his proposal compelling? Why or why not?
- How could disclosure backfire?

*Reflection/writing assignment:* Please explain in less than one page your views regarding current common law’s ability to adequately deal with e-contracts.
WEEK 10 -- Paper Drafts are due today!

What about consumer law in other countries? What initiatives are they taking abroad to protect consumers from the perils of the marketplace? Indeed, other nations are more progressive than the United States in this area, especially with respect to cross-border disputes. In addition, how can consumers protect themselves in on-line transactions, especially considering that many of these are cross-border transactions? Often consumers do not even realize that the party on the other end of an on-line sale or other contract is in another country. Please read the following:


As you prepare these readings, consider the following:

- What sorts of scams are out there and what do we need to do to protect ourselves?
- How much responsibility should government take on to protect consumers? Does this give consumers freedom to be foolish on-line?
- How can financial literacy projects help consumers?
- What initiatives have been made with respect to financial literacy education in the UK and Canada? Does this empower consumers, or will the “lazy” consumers simply not take advantage of what they learn in such programs?

*NO Reflection/writing assignment: Paper Drafts are Due today!

WEEK 11 – NO Reading or Reflection/writing assignment:

***April 1/Today is the Presentation Practice with BCHA!***

***April 4/This Saturday is the BCHA Seminar!***

WEEK 12

Presentations – NO Reflection/writing assignment.

WEEK 13

Presentations – NO Reflection/writing assignment.
WEEK 14

Today we will have a guest speaker, Paul Chessin. Mr. Chessin is an Assistant Attorney General in the Colorado Attorney General's Office. He joined the office in 1998, and is the sole litigation attorney in the Consumer Credit Unit of the Consumer Protection Section. He prosecutes cases under Colorado's Uniform Consumer Credit Code, Fair Debt Collection Practices Act, and Consumer Protection Act. His cases include challenges to so-called "rent-a-bank" payday lending, *Colorado ex rel. Salazar v. ACE Cash Express, Inc.*, 188 F.Supp.2d 1282 (D. Colo. 2002), in which the defendant ultimately agreed to a consent decree and refunded $1.3 million in unlawful finance charges to over 10,000 consumers, and a disguised loan usury case against a "purchaser" of consumers' anticipated income tax refunds, *Colorado ex rel. Salazar v. Cash Now Store, Inc.*, 31 P.3d 161 (Colo. 2001), where he obtained a judgment of nearly $50 million on behalf of over 20,000 consumers.

Before joining the AG's office, Mr. Chessin clerked for a Colorado appellate judge, worked as a professional ski patroller for a major Colorado ski resort, and practiced corporate/commercial litigation with several private law firms in New York and Colorado. A graduate of Harvard College and Harvard Law School, Mr. Chessin is admitted to the bar in New York and Colorado. He also is a volunteer firefighter.

Please read, consider, and be prepared to ask Mr. Chessin questions regarding:


*Reflection/writing assignment:* Please make a list of questions for Mr. Chessin and be prepared to discuss these issues with Mr. Chessin and the class.

**Final Papers Due at a Date to be Determined**
General Overview of Contract Theories:

Prior to the 19th Century, contract and tort were not separate common law doctrines. What we now deem common contract law is the result of academics’ efforts to describe and rationalize judicial decisions. Nineteenth-century lawyers sought to rationalize enforcement of exchange based on “will theories,” which defined contracts “in terms of the express will of the parties.” Classical doctrine, therefore, sought to foster parties’ rights to freely contract as they choose. This doctrine, reflected in Professor Williston’s original Restatement of Contracts, also is quite rigid, and strictly focuses contract analysis on the time of contract formation. It effectively limits the sources and factors that may be considered in determining meaning and substantive content of transactions.

Classical contract doctrine also focuses on enforcement as means to protect individualism and economic efficiency. This comports with the traditional law and economics assumption that presumed enforcement of contracts is efficient because it fosters economic planning and optimal distribution of resources in terms of relative preferences. Classical and economic theorists propose that enforcement leads to optimal distribution of resources based on additional assumptions that transactions are products of fully informed strangers’ economically rational bargaining in a perfect market, and involve clear quantities and little complexity or party interaction.

Neoclassical contract law emerged as a modified legal regime within the classical structure. It provided the underlying principles for the Restatement (Second) of Contracts and Article 2 of the Uniform Commercial Code governing sale of goods. The neoclassical system seeks to accommodate some of the realists’ concerns regarding the rigidity of classical doctrine. Therefore, neoclassical law eases classical rules by preferring application of standards that allow for more flexibility and permit some gap–filling. Nonetheless, it continues to embrace classical bedrock principles such as offer, acceptance, consideration, and general performance duties. The neoclassical view,

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2 *Id.* at 1817-20 (proposing that we now should “weed out the relics of the older common law” in order to complete the task begun by early treatise writers: “to give a systematic and sensible account of our law”).

3 *Id.* at 1849.


6 *Id.* at 855-65. For example, classical doctrine directed courts to interpret contracts based on writings and formal contract communications, and not parties’ identity or other circumstances outside of the formal “agreement.” *Id.*

however, generally broadens classical analysis by allowing for contextual contract interpretation, and careful consideration of applicable trade custom and social values. Several theories have developed that push and question contract law built on these classical and neoclassical constructs. For example, critical legal scholars question how the law marginalizes less powerful groups and individuals. In addition, Professor Ian Macneil proposed relational contract theory as an open, inductive, and individualized approach for analyzing and enforcing relations that do not fit classical or neoclassical paradigms. His proposal has sparked consideration of transactions’ “relational webs,” including their durations, complicated personal interrelations, unclear quantities and qualities, anticipation of future disputes, expectation of cooperative behaviors, and interwoven strings of friendship, reputation, interdependence, morality, and altruistic desires.

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