Jan 3 , 2017 **LECTURE #1**

IMAGINE A WORLD WITHOUT LAWS.

WHY HAVE LAWS?

"***State of nature***" is a term in political philosophy used in social contract theories to describe the hypothetical condition of humanity before the state's foundation and its monopoly on the legitimate use of physical force. A state of nature is the condition before the rule of positive law comes into being, thus being a synonym of anarchy.

In some versions of social contract theory, there are no rights in the state of nature, only freedoms, and it is the contract that creates rights and obligations. (Even today, many people consider laws and regulations as being improper limits on their ability to act any way they see fit.)

In other versions of the state of nature, the opposite occurs: the contract imposes restrictions upon individuals that curtail their natural rights.

The concept of a state of nature was first posited by the 17th century English philosopher Thomas Hobbes in Leviathan. Hobbes described the concept as "the war of all against all." In this state any person has a natural right to do anything to preserve their own liberty or safety.

https://www.youtube.com/watch?v=UtdO665FxQA

Many high schools assign what book that reflects this idea?

Why are laws important in a business context?

Consider what the following movie is actually about?

http://www.youtube.com/watch?v=lB95KLmpLR4

Mark Zuckerberg
Eduardo Saverin

Cameron Winklevoss
Tyler Winglevoss
Larry Summers

While this story is obviously about personalities, and conflict, on a macro-scale is a story about the law. It is a cautionary story; a story about how laws apply to those involved in "business."

If you do not know the law, you're likely to be taken advantage of by those who do. The law is both a shield, as well as a sword, in your interactions with others – but only for those who understand it.

Husky Stadium Case

AMENDMENT 4
U.S. CONSTITUTION
(Applies to Federal and State Actions)

THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SEIZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSON OR THINGS TO BE SEIZED.

What does this mean?

Who decides what it means?

Who are "people"? (Answer: They include businesses and corporations, which also have the right to be free from warrantless searches UNLESS they are a "closely regulated" business which, in exchange for being licensed, will be subject to warrantless searches. Example: auto junkyards, pawn shops, restaurants…. Why?

<u>LAWYERS REASON BY ANALOGY</u> – When lawyers, courts and judges try to answer a new question, or solve a new problem, they look for similar cases with similar facts, to see how a prior cases was decided. Thus it's always important to research how past, similar cases were decided and what rules and laws were applied in the old case, to predict how they will be applied in the new case.

Jacobsen v. Seattle, 98 Wn.2d 668 (1983)
"As a general rule, warrantless searches and seizures are per se unreasonable. Nonetheless, there are a few 'jealously and carefully drawn exceptions' to the warrant requirement which 'provide for those cases where societal costs of obtaining a warrant, such as danger to law enforcement officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate.'" The narrow exceptions to the warrant requirement are:

(1) Consensual searches
(2) Stop and frisk searches (supported by "reasonable suspicion")
(3) Border searches
(4) Hot pursuit
(5) **Airport and courthouses searches**

(1) Consensual searches

(2) Stop and frisk searches (supported by "reasonable suspicion")

(3) Border searches

(4) Hot pursuit

A doctrine that provides that the police may enter the premises where they suspect a crime has been committed without a warrant when delay would endanger their lives or the lives of others and lead to the escape of the alleged perpetrator; also sometimes called fresh pursuit.

Hot pursuit is one such exigent circumstance. It usually applies when the police are pursuing a suspected felon into private premises or have probable cause to believe that a crime has been committed on private premises.

(5) **Airport and courthouses searches**

2 Shot Dead In Courthouse -- One Victim Was Pregnant; Gunman Quickly Subdued

By Richard Seven, Peyton Whitely, Duff Wilson, Dee Norton, Katherine Long, Diedtra Henderson, Jack Broom, Susan Byrnes, Himanee Gupta March 23, 1995

Two women, including one who was 7 months pregnant, are dead after being shot inside the King County Courthouse shortly after 9 a.m. today. A third victim, also a woman, was in surgery and in critical condition at Harborview Medical Center. The gunman, identified as Timothy C. Blackwell, 47, was quickly subdued by jail corrections officers who were nearby. Police removed a semi-automatic handgun from him.

King County Executive Gary Locke today announced that security screening devices would be installed at one entrance of the courthouse, and perhaps two more, by tomorrow. If the devices are not at the other two entrances by morning, they could be closed temporarily, Locke said.

"STANDING" TO SUE & THE "CASE OR CONTROVERSY" RULE

Standing

Standing, sometimes referred to as standing to sue, is the name of the legal doctrine that focuses on whether a prospective plaintiff can show that some personal legal interest has been invaded by the defendant. It is not enough that a person is merely interested as a member of the general public in the resolution of the dispute. The person must have a personal stake in the outcome of the controversy.

"CASE OR CONTROVERY" RULE

Courts do not simply give advisory opinions; you can't just wander down to a judge and ask "What do think if I did this?" Courts resolve real disputes between parties. For a Court to become involved, there must be an actual case or controversy, not something hypothetical or speculative.

Current Policy

WAC 478-136-030

Limitations on use.

(d) All persons entering events in Husky Stadium or other athletic venues or events in other university auditoria or facilities shall be subject to having all containers, bags, backpacks, coolers, or similar items visually inspected. Security personnel shall first ask permission to visually inspect the item and advise the person that he/she may refuse.

Persons who refuse to allow inspection shall be allowed to return the item to a vehicle or otherwise dispose of it, after which admission shall be allowed. Persons who refuse the visual inspection and refuse to dispose of the item shall be denied entry.

What's changed? What happened to my big victory?

UNITED STATES V. SKIPWORTH (1973)

Defendant was stopped at an airport boarding gate, by security, because he fit the profile of a potential skyjacker. A warrantless search of the defendant produced cocaine. At trial, Skipworth argued that the drugs should be suppressed, because the search violated his 4th Amendment right to be free of unreasonable searches. The question presented to the Court was whether pre-boarding searches, at airports, violated the 4th Amendment….

THE THREE-PART TEST (PAGE 1275):

1. **"Reasonableness requires that the courts must weigh more than the necessity of the search in terms of possible harm to the public. PUBLIC NECESSITY**
2. **The equation must also take into account the likelihood that the search procedure will be effective in averting the potential harm. EFFICACY OF THE SEARCH**
3. **On the opposite balance we must evaluate the degree and nature of intrusion into the privacy of the person and effects of the citizen which the search entails." DEGREE OF INTRUSION**

PUBLIC NECESSITY. "Bitter experience has taught us that the physical dangers of mass kidnappings and extortion posed by air piracy are even greater than the dangers against which the usual border search is directed…suffice it to say that there is a judicially-recognized necessity to insure that the potential harms of air piracy are foiled…"

EFFICACY OF THE SEARCH. "The search procedures have every indicia of being the most efficacious that could be used. The group being screened is limited to persons with the immediate intention of boarding the aircraft. Metal detectors, visual inspections, and rare but potential physical searches appear to this court to provide as much efficiency to process as it could have."

INTRUSION. "…the intrusion which the airport search imposes on the public is not insubstantial. It is inconvenient and annoying, in some cases it may be embarrassing, and at times it can be incriminating. There are several factors, whoever, which make this search less offensive to the searched person than similar

searches in other contexts. One such factor is the almost complete absence of any stigma attached to being subjected to search at a known, designated airport search point… [the searched person] voluntarily must come to and enter the search area [and finally] unlike searches conducted on dark and lonely streets at night where frequently the officer and the subject are the only witnesses, these searches are made under supervision and not far from the scrutiny of the traveling public."

SKIPWORTH COURT "…we hold that those who actually present themselves for boarding on an air carrier, like those seeking entrance into the country, are subject to search based upon mere or unsupported suspicion…

QUOTING JUDGE FRIENDLY
"Determination of what is reasonable requires a weighing of the harm against the need. When the object of the search is simply the detection of past crime, probable cause to arrest is generally the appropriate test… WHEN THE RISK IS THE JEOPARDY TO HUNDREDS OF HUMAN LIVES AND MILLIONS OF DOLLARS OF PROPERTY INHERENT IN THE PIRATING OR BLOWING UP OF A LARGE AIRPLANE, THE DANGER ALONE MEETS THE TEST OF REASONABLENESS, SO LONG AS THE SEARCH IS CONDUCTED IN GOOD FAITH FOR THE PURPOSE OF PREVENTING HIJACKING OR LIKE DAMAGE AND WITH REASONABLE SCOPE AND THE PASSENGER HAS BEEN GIVEN ADVANCE NOTICE OF HIS LIABILITY TO SUCH A SEARCH SO THAT HE CAN AVOID IT BY CHOOSING NOT TO TRAVEL BY AIR."

As you do the readings for the next class, ask:

"How do you win an election?" Discussion….

January 5, 2017 **LECTURE 2**

ORGANIZATION OF THE GOVERNMENT

CONSTITUTIONALISM (IN THE US)
THERE IS A FUNDAMENTAL SET OF RULES AND PRINCIPLES AMERICANS GENERALLY BELIEVE IN.

- The Framers of the US Constitution had a particular view: NATURAL LAW = A higher and eternal law, e.g. (life, liberty & property rights)

- POSITIVE LAW; those laws necessary to regulate an ordered society.

- Gov't should generally not interfere with the PRIVATE DOMAINE of the individual; and in those cases where government does interfere, it should only be when positive law affirmatively allows/directs it.

- No person is above the law.

- The Constitution is the highest law in the land. The Constitution is a written document, which can be changed by amending it (a very hard process).

AMERICAN GOVERNMENT – MAJOR IDEAS

THE PEOPLE AND THE STATES RETAIN SIGNIFICANT POWERS UNDER THE US CONSTITUTION

The People – And voting:

Who gets to participate by voting? See the 15th, 19th and 26th Amendments affecting voting.

You win an election by getting more votes than your opponent.

That can be accomplished in one of two ways: getting MORE of your supporters to vote for you, or doing things that result in FEWER of your opponent's voters actually voting.

This country has an awful history of manipulating voters.

Poll taxes and literacy tests are the best examples of how votes were suppressed.

It took Federal legislation – the Voting Rights Act – to end these practices.

But several years ago the Supreme Court ruled that parts (not all) of the VRS were unconstitutional UNLESS (and this did not happen) Congress took a very close look at them, and reauthorized the law.

The result was that many jurisdictions that had been subject to preclearance (e.g., any changes in their laws regulating voting had to be approved by the Federal government before they went into effect) were free to do what they wanted.

Repeatedly in the past several years, States have passed laws that make voting more difficult (not easier), arguing these laws are necessary to prevent "voter fraud".

The assigned reading, which describes a Court of Appeals ruling this past summer, discloses the shameful truth behind some of these laws – and strikes them down as being unconstitutional.

VOTING ON CONSTITUTIONAL AMENDMENTS: Article 5 – How do you amend the Constitution? * You need to know this: Congress does not simply pass a bill by majority vote; the President does not simply sign an Executive order; and the Supreme Court does not "amend" it (the Court "interprets" it).**

Two-thirds of both the House and Senate have to vote for an Amendment, then THAT decision needs to be "ratified" (agreed to) by three-quarters (3/4) of the States. (There is an alternative route involving a "convention" but that's unlikely to happen.)

See the 9th Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

In Washington State, in particular, the People have significant power to pass laws directly, bypassing the state legislature and governor (though the laws passed by people still need to comply with the State Constitution and Federal Constitution.)

VOTING ON INITIATIVES

VOTING ON REFERENDUMS

FEDERALISM

FEDERALISM IS ON THE VERTICAL AXIS

SEPARATION OF POWERS, AMONG THE THREE BRANCHES OF GOVERNMENT, IS ON THE HORIZONTAL AXIS.

	Legislative	Executive	Judicial
Federal Government	Congress	President	S.Court
State Government	St. Legis.	Gov	State Sup. Court
County Government	County Coun.	County Ex.	Superior Ct.
City Government	City Council	Mayor	Muni. Court

Federalism may be defined as the political arrangement in which two or more *levels* of government provide a variety of services to a given number of citizens in a specified area, and *how governmental power is shared* among Federal, State and local governments.

Consider the following hierarchical depiction of governments, in the typical state:

Federal	**All of the United States**
State	**A single State (like California, Washington)**
County	**Each State is divided into Counties**
City	**Within each County there are cities, and areas that Are "unincorporated" e.g, areas not within a city.**

This division of power is very complex, and involves the intersection of all of these levels. Directly related to FEDERALISM is the concept of

the Supremacy Clause, which essentially establishes a ranking of the relative power of one level of government over lower levels of government.

Federal law refers to laws of the national government, which has authority over ALL 50 states….

Each State has the authority to makes laws within its borders, provided that those laws do not conflict with Federal Law (or the Federal Constitution). Each State has its own State constitution, which sets up its own rules (these rules cannot conflict with the Federal Constitution)

Each State is divided into a number of Counties. We are in "King County", which has a number of cities (like Seattle, and Bellevue), and also areas that are not in cities (these areas are "unincorporated", meaning they are not in a formal city.

Cities are allowed to make rules/laws within their borders.

King County is allowed to make certain rules/laws for all King County; and for those areas of King County that are not part of a city, the County may make more rules (if there is a city, then the County's ability to make rules/laws is more limited).

The rules made by cities and the county cannot conflict with State law, or Federal law.

So, for example, in Washington State there is an explicit State law that says that the state "occupies the field" of firearms regulations … and the result is that cities cannot pass their own laws in this area. This is an example of state specifically preempting a "field of regulation."

But if there are no Federal of State laws on a particular subject, the County and cities are allowed to make laws provided they don't violate the State or Federal constitutions.

In recent years, cities like Seattle have made MORE laws that affect more people than Federal laws, because the federal government is so divided among Republicans and Democrats that passing federal laws is difficult.

Vaping
Uber
But we have also seen examples where, when cities do certain things (in the absence of State laws), that states respond by passing additional laws that "preempt" the city law, in effect cancelling it out.

The best example of this is North Carolina.

Charlotte – a relatively liberal city – came along and passed a local ordinance telling merchants "you cannot discriminate against the LGBT community." There was not State laws on the subject, so they were free to do this.

The law did not sit well with the North Carolina state legislature, and it responded – by preempting the field, and essentially erasing the city law.

This had had consequences, and we'll talk about it more in the course later.

SUPREMACY CLAUSE

WHEN FEDERAL AND STATE LAWS OVERLAP IN A SPECIFIC SUBJECT MATTER, FEDERAL LAW PREEMPTS (WINS OVER) STATE AND LOCAL LAW.

The U.S. Constitution states "This Constitution…shall be the Supreme Law of the Land, and the judges in every state shall be bound by it."

In other words, the Constitution AND ANY FEDERAL LAWS MADE UNDER IT, AS WELL AS DECISIONS OF THE SUPREME COURT INTERPRETING THOSE LAWS, are all parts of the Supreme law of the land.

This area is very complex, but some general rules are clear:

1. Ordinarily, the highest government (on the Federalism chart) that passes a law wins, if there is a conflict between the Federal law, and the law passed by a lower level of government.

2. States may add their own, stricter rules to strengthen existing federal rules if the state rule does not conflict with the intent of the federal law and does not impede (or hinder) commerce.

3. Lower levels of government may not pass rules or laws which are less strict that a higher level of government unless the higher level of government specifically allows for it. (Ex. California emissions; Example: minimum wages.)

4. States cannot pass laws that restrict interstate commerce. (Example: State's cannot pass laws that favor their own businesses.)

5. In the absence of a higher government regulating an area, a lower level of government may do so.

   Ex: There is no Washington State law in regulating, or otherwise imposing fees for the use of bags, or a State rule saying no plastic bags, so the City of Seattle can pass its own law banning plastic bags.

THE PEOPLE AND THE STATES RETAIN SIGNIFICANT POWERS UNDER THE US CONSTITUTION TO ENACT LOCAL LAWS – THE POLICE POWER

See the 10th Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." This Amendment is sometimes referred to as THE POLICE POWER, and has been interpreted by the courts to authorize the States to create laws for the prevention of crime, and to promote public safety, PROVIDED that those laws do not violate other principles in the US Constitution, or State Constitutions.

State laws may not contravene either the FEDERAL or STATE CONSTITUTIONS.

CITY OF BELLEVUE – COUCH DANCING
Bellevue tried to outlaw all nude dancing, even in businesses that sold no alcohol. This violated the Free Speech clause of the 1st Amendment. After this loss, Bellevue tried again. This time it enacted an ordinance that required that nude dancers had to be at least 4 feet away from patrons. This was held to be constitutional.

Friday, January 19, 1996 - Page updated at 12:00 A

4-Foot Rule Stripping Cash From Adult Clubs

By Nancy Bartley
Seattle Times South Bureau

FEDERAL WAY - The dancer stepped onto the stage, slithered out of her dress and doffed the remainder of her clothing to the accompaniment of flashing lights, the encouraging patter of a disc jockey.

At the strip club Deja Vu, when 5 o'clock used to bring a bustling after-work crowd, two men hunched over soft drinks, and six dancers wandered through the otherwise empty room.

This is life, the dancers say, after the 4-foot rule. The ordinance that requires patrons and exotic dancers to stay at least four feet apart is considered a victory for community standards - and might be the worst thing that could have happened to adult-entertainment businesses.

The 4-foot rule, city officials say, is not so restrictive that it clashes with the First Amendment guarantee of freedom of expression. And yet, by keeping patrons and dancers apart, it is viewed as the most enforceable means to date of curbing lewd conduct and prostitution.

The 4-foot rule started locally in Bellevue in 1994, as a means of preventing sexual contact between dancers and patrons at three planned strip clubs.

"It's killing the industry, and the people who are the sponsors of the legislation know that," Levy said.

U.S. District Judge Thomas Zilly recently upheld Federal Way's 4-foot rule.

Profit came from contact

"We're not trying to run them out of town," said Bellevue City Attorney Richard Andrews. "We're trying to make sure we don't have any illegal conduct going on, and we think it's a very effective tool."

Dancers, however, concede the profit came from the contact.

Deja Vu dancer Keri Clemon said at least 19 dancers left the club after the rule went into effect. A plaintiff in the suit against Federal Way who alleged her constitutional rights were violated by the 4-foot rule, Clemon said customers, too, were upset when the rule went into effect.

"They were very rude and started yelling at us," she said.

The customers "want contact," said Deja Vu dancer Cody, who would not give her full name. During the couch dances, "the guys want you to sit on them," she said.

SEPARATION OF POWERS

The relationship among the various (3) *branches* (Executive, Judicial and Legislative) of the Federal (or State or local) government. (*Not* Federalism) Checks and balances are utilized to avoid one branch taking too much power.

EX. - Congress (= *both* House and Senate) passes a law.
President vetoes it.
Congress (=*both* House and Senate) over-ride veto (by 2/3 vote)

Supreme Court *majority* declares the law unconstitutional via JUDICIAL REVIEW.
People (or States plus people) pass an Amendment to the US Constitution, thus overturning the decision of the S. Ct.
President may appoint new members to the S. Ct. (who may vote to overturn a prior decision of the Supreme Court).

EXECUTIVE BRANCH

State	**Governor**
County	**County Executive**
City	**Mayor**

Federal: President

The oath of office of the President of the United States is an oath or affirmation required by the United States Constitution before the President begins the execution of the office.

The wording is specified in Article Two, Section One, and Clause Eight:

Before he enter on the Execution of his Office, he *shall* take the following Oath or Affirmation:—

> **"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."**

http://www.youtube.com/watch?v=274_VdeckAU

On First Day, Obama Quickly Sets a New Tone 2009
The New York Times
By SHERYL GAY STOLBERG

WASHINGTON — President Obama moved swiftly on Wednesday to impose new rules on government transparency and ethics, using his first full day in office to freeze the salaries of his senior aides, mandate new

limits on lobbyists and demand that the government disclose more information.

http://www.youtube.com/watch?v=1gpeoZDmOgU

1. **Electoral College (See 12th Amendment): How DO we elect Presidents in this country?**

   http://www.270towin.com/

   50 Different Elections – winner of each election (with two small exceptions not relevant in this class) takes ALL electoral college votes which that State has.

   How do you determine how many Electoral College votes a State gets?

   435 is the number of distinct Congressional Districts in the US. The number of Congressional District is divided among the 50 states, apportioned by population. Total US Pop divided by 435 gives you the ideal size of each district, X. You then look at each state's population, and divide that number by X and that number gives you the number of Congressional districts the State is allowed. (Because the number often has remainders, the State with the highest remainder number gets the "extra" districts.)

ARE YOU SMARTER THAN A 12 YEAR OLD?

States have a value (electoral college votes) based upon a two-part formula: # of congressional districts the state has + 2 (1 for each of the two Senators, regardless of State population).

2. **Veto**

3. **Terms (See 22nd Amendment)**

4. **Select Federal Judges, including members of the Supreme Court, w/"consent" of Senate (by majority vote). NOTE: The Senate and House do not "select" of choose judges; and only the Senate gets to vote to "approve" the person chosen by the President for a judicial position.**

5. **Executive Orders (Ex. Obama's recent order re not deporting certain non-citizens; held unconstitutional by a Federal Appellate Court and Supreme Court split 4-4). *** Executive Orders are a source of law, just like legislation passed by Congress, and interpretations of the Constitution by the Supreme Court. ASSIGNED READING: NYT**

6. **Appoints members/directors of Administrative Agencies (Ex. – FTC, FDA, etc., with Senate confirmation.**

7. **Commander In Chief of Military**
8. **Cabinet (Secretary of ….)**

9. Presidential Pardons: The Executive Branch Check on Judicial Branch Abuse of Power

Article II: Section I:

"The President shall…have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

Reprieve = suspension of the penalties associated with a conviction.

Pardon = May be absolute or conditional, and "erases" the conviction.
= May be given to an individual or a class of people.

January 10, 2017 Lecture 3

ORGANIZATION OF THE GOVERNMENT DAY 2 Oct 6, 2016

THE LEGISLATIVE BRANCH

City **City Council**

County **County Council**

State **Senate / House (Some States and municipalities have term limits for State legislators)**

Federal: **Congress (= House of Representatives AND the Senate; though these are two distinct bodies)**

No Term Limits (Why have State attempts to set term limits not worked?)

Make Laws

Federal and State = "statutes"
Counties an Cities = "ordinances"

HOUSE OF REPRESENTATIVES:	**2 yr. Terms / Census**
435 Districts (# set by…?	**Gerrymandering / race**
Formula for how many Districts each State gets?	**1 person = 1 vote**

The politics of "drawing" Congressional districts:

The earmuff shape of Illinois's 4th congressional district packs two Hispanic areas while retaining narrow contiguity along Interstate 294.

POWERS OF THE HOUSE OF REPRESENTATIVES:

Declare War (last time was?) / Recent Example?

Establish Courts (e.g. create courts)

Override Presidential veto of legislation.

Impeachment (more later on this)

Spending bills (deciding what to spend $ on)

SENATE

6 yr. Terms / 2 SENATORS PER STATE, regardless of population. (Amendment: Direct Election)
Declare War
Confirm all Federal Judges, including Supreme Court Justices
Confirm President's Cabinet (and high-ranking Executive branch officials as well as directors of Administrative agencies).

Filibuster = unlimited debate (to slow up, or stop legislation) / Cloture (Senate rules: 60 votes needed for cloture, E.G. to stop unlimited debate).

Over-ride Presidential Veto of legislation

IMPEACHMENT TRIALS (WE MAY RETURN TO THIS LATER)

Specific Powers of Congress:

<u>THE</u> <u>COMMERCE</u> <u>CLAUSE</u> Article 1, section 8 of the U.S. Constitution gives the Federal Government power to "REGULATE COMMERCE… AMONG THE SEVERAL STATES." COMMERCE includes BUYING, SELLING AND TRANSPORTING THINGS. The Supreme Court has held that Congress has the power to regulate any activity that AFFECTS interstate commence. In practice, this gives the Federal government the power to make many types of laws.

THE POWER TO TAX
"The Congress shall have the power to lay and collect taxes…" Article I, Section 8 of the US Constitution. (Recently, the US Supreme Court found that this power allowed Congress to pass the new Affordable Health Care law, and that the "penalty" for not obtaining health insurance was a "tax".

The federal government imposes an INCOME TAX, but there is nothing in the constitution that prevents the federal government from imposing a sales tax, too.

<u>JUDICIAL BRANCH</u>

POWERS OF THE JUDICIAL BRANCH (GENERALIZED)

- **<u>JUDICIAL REVIEW</u>: The power of the Supreme Court and the inferior courts to declare an act of Congress, State or local government unconstitutional, and thus void, if it violates the Federal Constitution. THIS IS ONE OF THE MAJOR POWERS OF THE COURT, AND IT WAS ANNOUNCED/ARTICULATED BY THE COURT EARLY ON IN OUR HISTORY. ****

  Example: Brown v. Board of Education +
  Plessy v. Ferguson

  Assigned: What were they about? And what rules do they demonstrate?

  Trial courts decide facts, and then apply the law. **Case in controversy rule / no advisory opinions (there must be a real dispute).**

Appellate courts decide if trial courts applied the correct law, and determine if a significant error occurred in the trial (appellate courts can affirm, or reverse the result in a trial court, depending upon whether an error did or did not occur.)

COURTS MAY *MAKE* <u>COMMON LAW</u>
<u>Appellate courts interpret the law, if it is unclear, and thereby develop principles of law</u>: Burglary example.

RCW 9A.52.030
Burglary in the second degree.

(1) A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building other than a vehicle or a dwelling.

Once a case has been decided on appeal, and is published, the rule announced in the published case is binding upon all similar cases that jurisdiction (e.g., the jurisdiction where the appellate court supervises, or has power over, trial courts.)

Precedent = the specific decision of an appellate court that is binding upon lower courts in its jurisdiction.

Stare decisis = the doctrine that once a precedent is created, it should be followed unless extraordinary circumstances exist which call for it to be changed.

CONSTRUCTION OF THE JUDICIAL BRANCH

Federal
Supreme Court (9 Justices)...number set by....
Federal Courts of Appeals (13 circuit courts; 179 judges)
Federal District Courts (100s)

- *Lifetime Appointment*

- **App. By Pres. / Confirmed by majority of Senate**

- **Most cases are mundane, but *politically charged cases get all the attention*: Guns; Abortion; Property rights; Gay Rights (including marriage); Affirmative Action; Capital Punishment**

- **DO judicial philosophies play a role in judges' decisions?**

Right now the Supreme Court has 4 "conservative" Justices, all appointed by Republican Presidents, and 4 "liberal" Justices, all appointed by Democrat Presidents. There is a vacancy – and Obama has nominated a person to fill the position, but the Republican Senate has refused to act.

There is often a 5-4 split.

In those 5-4 cases, how often have the "conservative" Justices voted with the liberal judges in the past 10 years?

New York Times Graph:
http://www.nytimes.com/interactive/2012/06/28/us/supreme-court-liberal-wing-5-4-decisions.html?ref=supremecourt

Graph of Which Justices Agree with Each Other
http://www.nytimes.com/interactive/2013/07/01/us/the-courts-most-cohesive-wing.html?ref=supremecourt

Justice Breyer (living constitution / judicial activist)
http://www.youtube.com/watch?v=DH3hpzFr65s
20:00 – 24:00

The late Justice Scalia (originalist / strict constructionist)
http://www.cbsnews.com/video/watch/?id=4448191n&tag=related;photovideo

Justice Roberts "calling balls and strikes…"

During his confirmation hearings, Justice Roberts said that he did not have a comprehensive jurisprudential philosophy, and he did

"not think beginning with an all-encompassing approach to constitutional interpretation is the best way to faithfully construe the document".

Roberts analogized judges to baseball umpires: "[I]t's my job to call balls and strikes, and not to pitch or bat."

Let's return to two famous court cases:

Plessey v. Furguson (1896)
What's it about?
What legal rules came out of it?

Brown v. Board of Education (1954)
What's it about?
What's the difference between it, and Plessy? What accounts for the change?
What legal rules came out of it.

Retired Justice Souter: "…. The hard questions are those that pit various parts of the Constitution against other parts of the same document…" and the difficulty comes in deciding which part has the better claim on the question at hand.

Justice David Souter (Ret) : Harvard Commencement (listen beginning at the 2:10 (two hour 10 minute mark) to the end of his speech.
http://www.youtube.com/watch?v=uArYe4mN1Ko

- **Politics plays a huge role in selection of all Federal judges, and Supreme Court judges in particular: filibuster no longer applicable to lower Federal judges' vote in the Senate.**

  Current Topic

  Trump's view: https://www.youtube.com/watch?v=4OCZCLfqrTw

- **Subject to Impeachment**

- **The Federal judicial branch hears and decides Federal Cases, e.g. cases involving (1) the U.S. Constitution, or (2) Federal laws, rules,**

agencies; but (3) NOT legal controversies involving just State laws -- these are governed by individual state constitutions and decided by State courts.

STATE JUDICIAL BRANCH **(Using Washington State as an example)**

Washington State Supreme Court (9 Justices; 6 year terms)
Court of Appeals (3 divisions; multiple judges / 6 year tersm)
Superior Court (100s)(Trial courts) 4 year terms.

NOTE: If a Court cases ONLY involves a question of Washington State law (the State Constitution, or State statutes) the final authority on what the Washington State Constitution means is the Washington STATE Supreme Court. It is NOT the US Supreme Court because there is no Federal Constitutional issue at stake. This is a key part of how Federalism works.

- **State Judges (Superior and appellate judges) are initially appointed by the Governor if there is a vacancy OR VOTED on by the citizens if there is an open seat. Thereafter, the people vote.**
  http://www.votingforjudges.org/

  DOES VOTING FOR JUDGES MAKE SENSE

  What do YOU know about who you are voting for? How?
  Hypothetical: Who would you vote for, Keith Callow v. Charles Johnson…

  What about campaign contributions for judicial candidates?
  Caperton v. A.T. Massey Coal Co.

O'Connor interview at 4:30
https://www.youtube.com/watch?v=iY2n7PoU_8Q

The O'Connor Judicial

Selection Plan

This four-part model includes:

1) Screening and nomination of applicants from an open field by a commission that is politically balanced and that includes a majority of non-attorneys;
2) Appointment from among those nominees by the sitting governor of the state;

3) Robust evaluation of the judge by individuals who appear before him or her and circulation of that information to voters; and

4) Retention election on a regular basis in which all voters may cast an informed vote for or against the judge, with the benefit of the evaluation data.

- State judges decide legal controversies involving State laws but also apply Federal Constitutional rules, and sometimes apply other Federal laws and interpret Federal statutes. Example: 4th Amendment Search and Seizure law applied by State judges in State criminal cases.

- Broad Subject Matter Jurisdiction

King County District Court:
Misdemeanors in unincorporated King County

Municipal Courts:
Municipal laws (Misdemeanors)

King County Superior Court:
All felonies occurring in King County

JANUARY 12, 2017

CONSTITUTIONAL LAW DAY 1

THE BILL OF RIGHTS & THE INCORPORATION DOCTRINE

1. **THE BILL OF RIGHTS - SHORTHAND FOR THE FIRST 10 AMENDMENTS TO THE FEDERAL CONSTITUTION**.

    1. The Bill of rights IDENTIFIES SPECIFIC RIGHTS THAT AMERICANS HAVE, and also contains specific LIMITS on the power of the FEDERAL GOVERNMENT.

    2. The Bill of rights was originally meant to apply only to the Federal government, not to the States.

First Amendment (Religion, speech and the press)

CONGRESS SHALL MAKE NO LAW respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Second Amendment (GUNS)

A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Fourth Amendment – (Protection from unreasonable search and seizure).

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Corporations also have the right to be free from warrantless searches UNLESS they are a "closely regulated" business which, in exchange for being licensed, will be subject to warrantless searches. Example: auto junkyards, pawn shops, restaurants…. Why?

Fifth Amendment – Due process, double jeopardy, (self-incrimination, private property).

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

NOTE: "LIBERTY" IN THE SECOND TO THE LAST LINE.

NOTE: CORPORATIONS DO NOT HAVE A 5TH AMENDMENT RIGHT TO REMAIN SILENT (SUPREME COURT)

Sixth Amendment (speedy, public trials)

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed... , and to have the Assistance of Counsel for his defense.

Can Courts close the proceedings in a rape case, to spare the victim embarrassment? Or keep out college students writing term papers?

Eighth Amendment (cruel and unusual punishment). Can people under 18 be sentenced to life imprisonment for crimes that do not include murder?

http://www.npr.org/templates/story/story.php?storyId=126890162

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

THE BILL OF RIGHTS DOE NOT INCLUDE THINGS SUCH AS YOUR RIGHT TO THE PURSUIT OF HAPPINESS….

POST CIVIL WAR AMENDMENTS

Following the CIVIL WAR, and DURING RECONSTRUCTION, the North found the defeated South was not acting like it suffered a defeat. Although freed, the former slaves continued to be oppressed politically. They couldn't vote or hold property, for instance. The North responded by passing

The 14th Amendment

"…**NO STATE SHALL** make or enforce any law which [shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws…"

which tells State governments that they could not DENY ANY CITIZEN DUE PROCESS OF LAW, and the States must give citizens EQUAL PROTECTION:

EQUAL PROTECTION = THE LAW MUST TREAT PEOPLE THE SAME
The "Equal Protection" clause was used by the Supreme Court to (1) decide Brown v. Board of Education (no "separate but equal schools for black and white students", and overruling Plessy v. Ferguson).

DUE PROCESS OF LAW = Fundamental Fairness

So what does "fundamental fairness" mean? It's a fluid concept that takes different forms depending on the context and the alleged right that has been violated – and can change over the course of time depending upon the views of the Justices on the Court.

Caperton v. West Virginia (discussed previously – campaign contributions to judges). How do you think the court should have ruled?

http://www.npr.org/templates/story/story.php?storyId=105143851

Due process of law is NOT specifically defined in the Constitution, and does NOT give people specific, defined rights to anything.

THE INCORPORATION DOCTRINE

Since 1925, the Supreme Court has been systematically imposing upon the States the guarantees granted in the Bill of Rights (the first 10 Amendments). The court has stated that the right of LIBERTY and DUE PROCESS is so expansive, that the BILL OF RIGHTS binds both Federal and State governments.

So, for example: The First Amendment was originally only applied to limit the actions of the Federal Government, but (as we all know) individual states (like Washington) can't decide that they want to make X religion the "Official" religion of Washington because that would violate the Constitution.

The Supreme Court has still not incorporated (applied to the States) every one of the first 10 Amendments.

As we move forward, keep in mind the most recent example of an Amendment that has been "incorporated" on the States.

The Fourth Amendment and Businesses

Businesses have 4th Amendment rights to be free from unreasonable searches without warrants.

But note: in closely regulated businesses, discussed on the first day of class, a warrant is not required.

The Fifth Amendment and Businesses

Corporations do not have a 5th Amendment right to remain silent.

The First Amendment and Business (Free speech)

The First Amendment:

"Congress shall make no law ….. abridging the freedom of speech…."

We know that this has been incorporated, and applies to the States.

DOES THE 1ST AMENDMENT PROTECT YOU FROM BEING FIRED, OR OTHEWISE DISCINPLINED, BY YOUR BOSS, IF YOU WORK FOR A PRIVATE (NON-GOVERNMENT) EMPLOYER?

Don't people have a First-Amendment right to say what they want, when they want?

Consider Hope Solo…

The First Amendment by its very terms, only protects you from the government passing laws regulating speech; it does not preclude private parties (particularly in the employer-employee setting) from making rules relating to free expression. (Though there may be Federal, State or local laws that afford you protection.)

For First Amendment purposes, there are many WAYS that we communicate, and are therefore many types of protected "speech" –

1. Spoken or written words; songs, movies, tv, radio…

2. Expressive communication (conduct that the sender intended to be a message, and was reasonably received as a message) Texas v. Johnson (flag burning);

Texas v. Johnson (Burning Flags)

Facts: A Texas law made it illegal to "desecrate a venerated object" i.e., a flag. Johnson, while protesting at the 1984 Republican National convention in Texas, burns an American flag in protest. He is arrested, charged with breaking the law, and convicted. He appeals to the U.S. Supreme Court, arguing that the law was unconstitutional.

While the First Amendment speaks only to "speech", the Supreme Court has long recognized that its protection does not end with the spoken word because "conduct may be sufficiently imbued with elements of communication to fall within the scope of the First Amendment."

In deciding whether particular conduct possesses sufficient communicative elements to bring it within the First Amendment, the Court asks whether there was an "intent to communicate a particular message, and whether the message was likely to be understood by those who view it". Under the First Amendment, "expressive conduct" is given the same protection as speech. The Court looks to the context in which the flag was used. In this case the State of Texas conceded that Johnson was engaged in expressive conduct.

If the speech at issue is "expressive conduct", then the Court will next consider whether the government regulation or law was in any way related to the suppression of free speech. The State may not proscribe particular conduct because it has expressive

elements. The burden is on the State to show that there was a government interest unrelated to the suppression of expression.

Texas argued that there were two legitimate reasons for its statute:

1. It prevented a breach of the peace. (But no evidence of this was given.)
2. Preserving the flag as a symbol of nationhood. (But this is the same as endorsing an "idea". And, Texas was inconsistent on this point: It didn't punish the Boy Scouts.

Justice Brennan: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." P. 2545 "...no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that the cherished symbol represents."

Justice Kennedy: "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express our distaste for the result, perhaps for fear of undermining a valued principal that dictates the decision. This is one of those rare cases..."

OTHER TYPES OF SPEECH

3. books, tv, radio, mp3, youtube, plays, and films/recordings (<u>both the final product as well as the production of visual recordings are protected – so, for instance, you have a First Amendment right to film your friend being arrested by the police, provided you don't interfere with the police</u>);

4. Expressive Association (if you form a private group, you get to make the rules about who can join IF you are intending to "send a message"). **This is Boy Scouts v. Dale**. Boy Scouts had a viewpoint (a messaged) they said was not compatible with allowing gay members; Supreme Court said that they did not have to take a person who undermined their viewpoint.

   Other examples of how this rule works? College Republicans? Democrats?

5. Myriad other forms of communication are protected (recall that even couch dancing was a form of protected speech)

There are three major categories of speech that are relevant to businesses:

1. Political speech
2. Commercial Speech
3. Ordinary speech

There are also two categories of speech, one of which is far larger than the other:

1. Almost all speech is PROTECTED SPEECH, meaning that the government is generally forbidden from outright banning or regulating it.

2. The second category is UNPROTECTED SPEECH, meaning that the US Supreme Court has said – clearly – that these types of speech do not have any First Amendment protection. A quick example of this is TRUE THREATS; you cannot threaten to kill somebody, in a way that reasonably frightens them, and then hide behind the First Amendment. That is speech unprotected by the First Amendment.

Major Types of Speech:

1. Corporate Political Speech: Citizens United

Political speech is afforded an extremely high level of protection.

Corporations are People! (Kind of….) http://www.youtube.com/watch?v=KlPQkd_AA6c

In thinking about how businesses are involved in politics, it's important to keep in mind and distinguish between political donations corporations might want to make directly to candidates for federal office, and expenditures and donations corporations want to make on behalf of candidates (but not directly to them).

Corporations may NOT (YET) make direct campaign contributions to candidates for federal office.

Rules for corporations giving money directly to state and local candidates are governed by state and local laws.

CITIZENS UNITED (Supreme Court case)
Corporations are free to spend as much money as they want to get their views across, and support the candidates of their choice. Landmark case, reversing multiple precedents. 5-4 decision.

After Citizens United corporations (and any of us) may either:

1. Spend money buying adds in a local paper recommending that people vote for, or against, a candidate, provided it is not coordinated with that candidate (in which case its considered a contribution).

2. Give unlimited money to third parties that will then buy adds for/against a candidates (again, assuming no coordination), thus keeping the identify of the corporation secret.

Colbert Superpack

Colbert formed his Super Pack (Americans for a Better Tomorrow, Tomorrow), then made some adds with the money his fans sent in:

Mitt the Ripper
http://thecolbertreport.cc.com/videos/motygy/colbert-super-pac-ad---attack-in-b-minor-for-strings

2. Business and Commercial Speech

A few general rules apply:

1. Advertisements for legal services are protected by the 1st Amendment. This applies however tasteless the ads happen to be.

   Consider Viagra.
   http://www.nytimes.com/2012/08/07/business/media/trojan-vibrations-giveaways-in-manhattan-via-hot-dog-carts.html

2. The following test is used when deciding if the government can regulate commercial speech:

   a) Is the speech protected commercial speech? It is, if it concerns a lawful activity and is not misleading (NOTE that this part of the test is different than the standard test set out below, for ordinary speech). (Misleading speech may be regulated.) Even if the speech is protected commercial speech, the government might still be able to regulated it depending upon how the next set of questions is answered:
   b) Is there a substantial government interest; (if "no" then no regulation), but
   c) If "yes" to (a) and (b) then: Then: does the regulation advance an important governmental interest? If "no", then no regulation. But if "yes, the regulation advances the important governmental interest, then:
   d) And even if so, is the regulation or law overly extensive? (Does it go too far?) If "Yes," then its not lawful. If "no" then it is OK.

   Consider regulating tobacco advertising --

2. Untruthful commercial speech may be regulated.

3. Ordinary Speech

When it comes to government regulating speech, we begin with a simple rule:

"The most basic principle is this: As a general matter… government has no power to restrict expression ***because of its message, its ideas, its subject matter or its content***."

In America, you will not be arrested for commenting on political matters: http://www.nytimes.com/video/us/politics/100000004533191/unfiltered-voices-from-donald-trumps-crowds.html?action=click&contentCollection=us&module=lede&region=caption&pgtype=article

Supreme Court test to determine if speech is being regulated based upon its content:

> CONTENT = The message or ideas being communicated.
>
> In contrast to regulating content, "content neutral" regulations or "CONDUCT regulations," are subject to a different, easier test:
>
> TEST: Content-neutral restrictions on speech are subject to intermediate scrutiny, meaning the government may impose reasonable time, place and manner restrictions on protected speech, so long as they are narrowly tailored to serve a significant governmental interest, and they leave open ample alternative channels for communication of the idea.
>
> EX. A regulation that says abortion protesters cannot come within 5 feet of the entrance of an abortion clinic, where women entering the facility…. regulates WHERE, not WHAT, can be said by the speaker.)
>
> EX. A city regulation on NOISE after 12:00 midnight would likely be lawful, even if it shut down a Donald Trump or Hillary Clinton political rally.
>
> TIME/PLACE/MANNER regulations can be unconstitutional if they are overly restrictive and serve to silence speech; to be legal they must be reasonable.
>
> Thus, it's important to know if a regulation is a "content based" (and likely not legal). Regulations are content based if any of the following apply:

(1) the underlying purpose of the law is to suppress particular ideas (motive of lawmakers)

Example:

The First Amendment also acts to curb Federal rules, even rules relating to intellectual property.

Until recently, the rule was that there are limits to what you can trademark:

Section 2(a) of the Lanham Act prohibits registration of marks or names that are "scandalous" or "immoral". The Patent Office uses a two-part test to determine if the mark is disparaging:

(1) what is the likely meaning of the mark or words;
(2) if that meaning refers to an identifiable group, is the meaning disparaging to a substantial composite of that group?

This is Portland band, the Slants, challenged the law won:

http://www.theslants.com/media/music/

The problem – according to the Patent office – is their name: The Slants.

But the Court considered this content-based regulation.

or

(2) if the regulation singles out and treats one type of particular content differently than other , similar content.

EX: A law that singled out and forbid sound trucks advertising a "going out of business" sale, but exempted political candidates' sound trucks, would treat content differently, and be unlawful.

Or

(3) singles out and treats different speakers, who essentially want to say the same thing, differently.

Current issue: The FDA.
When the FDA approves drugs, they do so only if the drug is both safe, and effective (meaning it's proven to work in a particular way, fighting a

particular disease). Once approved, the FDA allows the pharmaceutical company to ONLY advertise the drug for the "approved" use. The FDA, however, does not tell doctors that they cannot prescribe a drug to a patient for a non-approved illness (and many doctors do). Thus, the government appears to tell one speaker (drug companies) they cannot engage in certain type of commercial speech, but does not tell another group (doctors) that they cannot do this.

One Court has found that by violates the First Amendment.

> June, 2015: The New York Times
> Judge Paul A. Engelmayer of the Federal District Court in Manhattan [found] that the First Amendment protects drug companies that want to make truthful statements about their drugs, even if it is for an unapproved use. His decision sets up a likely appeal to determine just how far the government can go to punish speech that is truthful.

If a statute imposes restriction on the content of protected speech it is invalid unless the government can demonstrate it is passes **THE "STRICT SCRUTINY" TEST** – that is, unless the government can prove that the law is needed because of

(1) a compelling government interest (Tod's note: an actual, very, very, very important problem that needs to be solved)

and

(2) the regulation is narrowly drawn to serve that interest (Tod's note: it cannot be too broad, or too narrow, e.g. AND it must be the least restrictive means among available, effective alternatives.

This test may seem easy to meet, but **it is a very, very high standard to meet**, which is rarely met. Indeed, the Supreme Court ruled that "It is rare that a regulation restricting speech because of its content will ever be permissible."

Another commentator described the test like this: You can stare at those words as long as you like, but here is what you need to know: Strict scrutiny, like a civil war gunshot wound to your stomach, is almost always fatal.

Examples of laws that ARE content based, and have NOT passed the strict scrutiny test:

(1) Municipal laws that forbid panhandling (singling out a particular type of speech) while allowing Donald Trump and Bernie Sanders to approach you on the street, seeking your vote.

(2) A South Carolina law that banned robocalls for political purposes (this time, think Donald Trump's voice on a recorded message, sent to your home) while continuing to allow commercial robocalls for the local car dealership.

Given how very difficult this test is to meet, the Supreme Court has interpreted the First Amendment as permitting restrictions on the content of speech in a tiny number of areas (these are the unprotected categories of speech):

Incitement/Fighting words - the speaker must be shown to be "directed to inciting or producing imminent lawless action."

OBSCENITY – UNPROTECTED SPEECH

Miller v. California (1973)

Miller sent some brochures through the mail advertising four erotic books. The ads included photos of men and women having sex. The recipient complained. Miller was charged with violating a California law. The case wound its way to the Supreme Court, where the **TEST was articulated**:

1. An average person, applying contemporary local community standards, find that the work, taken as a whole, appeals to the prurient interest.
2. The work depicts in a patently offensive way sexual conduct specifically defined by applicable state law.
3. The work in question lacks serious literary, artistic, political, or scientific value.

CHILD PORNOGRAPHY - special category

In New York v. Ferber (1982) S.Ct. said State's may criminalize the publication, possession or distribution of child pornography. It is unprotected speech subject to content-based regulation. The state has a strong interest in protecting children.

TRUE THREATS - UNPROTECTED SPEECH

VIRGINIA V. BLACK (Cross Burning)

(5 Justices agreed that...)
State of Virginia made it illegal for any person "with the intent of intimidating any person or group...to burn...a cross on the property of another, a highway or other public place," and "any such burning shall be prima facie [it speaks for itself] evidence of an intent to intimidate a person or group."

"True threats" are an area of communication that is exempt from the general rule the expressive communication is protected by the First Amendment. "The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation." Therefore "a ban on cross burning carried out with the intent to intimidate is" lawful.

HOWEVER - Four Justices found that the Virginia statute, which stated that the mere burning of a cross is prima facie evidence of an intent to intimidate, was unconstitutional. The rule "would create an unacceptable risk of the suppression of ideas". "That act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation, or it may mean only that the person is engaged in core political speech. The prima facie evidence provision blurs the line between these meanings, ignoring all of the contextual factors that are necessary to decide whether a particular cross burning is intended to intimidate."

Libel (written), slander (spoken) – Unprotected Speech

In the business world, this often comes up when references are too honest in expressing the opinions about former (poor) employees. This is the reason why many businesses do not allow information beyond the "fact of" employment to be provided to potential new employers.

Note that when the party being sued is the press, the First Amendment is triggered as an additional, Constitutional protection given to the defendant, and requires that the plaintiff prove elements not necessary when a non-press party is the defendant.

LIBEL = Plaintiff bears the burden of proving by a preponderance of the evidence:

1. That the libel was communicated to a third person (or, the press is the defendant, it must be "published")
2. That the plaintiff was identified (this is an element, even though the text only implies as much)
3. That the words were defamatory***, e.g. it causes harm to the plaintiff

4. That the defamatory statement was false (this is sometimes considered a "defense" to the tort).

***Defamation per se
Some statements are presumed defamatory, and the plaintiff need not prove that they were injured. Allegations of criminal conduct, or criminal business dealings would fit this test. This would fulfill part 3 of the test above. Note the formulation of this test is a bit different than the test in the book.

CONSTITUTIONAL PRIVILEGE

PROVING "FAULT"

Recall the First Amendment, and that it protects the Press (Congress – and the States, because it has been incorporated, cannot make any law infringing upon a free press).

The Supreme Court has ruled that when the press publishes things, and is sued on a libel theory, that depending upon whether the person suing is a public figure or private figure, different degrees of "fault" must be proven.

In other words, the press has a "Constitutional" privilege (or protection) that you and I don't have if we were simply talking, or writing something.

a. Public Figures - or those who Hold Office

Publication must be knowingly false or published with reckless disregard as to whether it was true or false (ACTUAL MALICE TEST)

Note that the fact finder (jury) makes the decision about whether or not a person is or is not a public figure. Public figures may be "limited", or general.

b. Non-public figures
the publication was negligent

New categories of unprotected speech may not simply be added to this list by a legislature that concludes certain speech is too harmful to be tolerated. To be constitutional, the Court must agree that the expansion is consistent with the First Amendment, e.g, that it meets the test outlined herein.

Consider California's attempt to regulate the sales of violent video games to children…

California:

California's legislature became concerned that violent video games were causing children who watched them to act in violent ways.

To encourage stores to NOT sell certain "violent" games to children, California passed a law that imposed a criminal penalty on a store if it sold certain games to minors. The law was only aimed at certain content – not all video games; and the law did not make selling to adults a crime.

The industry sued to block the law. The industry made two arguments: (1) First Amendment forbids this and (2) We can self-regulate.

The case went to the Supreme Court. The law was found unconstitutional.
Video games = protected speech
The regulation was directed at specific content
Test: Strict scrutiny – the Supreme Court found

(1) the government had not shown it was an important interest, in part b/c there was no clear link between these games and kids becoming more violent; and

(2) the law treated different types of "speech" differently (for instance, the Grimms' Fairly tales, a series of scary books kids have read for centuries) has lots of blood and gore, but these were not regulated by the statute.

Can the Industry "self regulated"?
http://www.youtube.com/watch?v=J1uu9l6_sgI

FREEDOM OF THE PRESS – SUPPOSE YOUR BUSINESS WAS MEDIA

1ST AMENDMENT: "**CONGRESS** SHALL MAKE NO LAW ABRIDGING THE FREEDOM OF THE PRESS."

Idea: The Philosopher John Milton believed that "there is simply no point in trying to stop the free flow of ideas and information through the suppression of the free press."

This has been imposed upon the States via the INCORPORATION DOCTRINE.

(1) PRIOR RESTRAINT: -- ONLY RARELY ALLOWED

The concept that government may not tell the press it may NOT publish something PRIOR TO THE PUBLICATION. This is the most insidious type of censorship, because it would allow the government to STOP speakers or publishers BEFORE they could air

their views. Society would be denied the free flow of ideas, and the MARKETPLACE would not exist.

(2) LIBEL AND SLANDER LAWSUITS AGAINST THE MEDIA PUNISH POST PUBLICATION – TEST IS SET OUT ABOVE AS UNPROTECTED SPEECH

If you publish something saying I'm a liar and a cheater, and it's not true, the 1st amendment does not protect you from being sued, by me, for damaging my reputation. Provided what you say is not true.

PRIOR RESTRAINT CASES:

NEAR V. MINNESOTA (1931)

Near published a paper in Minneapolis that attacked the local government for its failure to aggressively fight crime. It lambasted local officials, mocking them repeatedly, in highly inflammatory ways.

A Minn. Statute allowed local courts to declare published material "scandalous or defamatory". In 1927 the City attorney took Near to Court, and the Judge found his paper a PUBLIC NUISANCE under the MN statute. The Court forbid Near from further publication.

The Supreme Court declared the MN statute unconstitutional, finding that it operated to CENSOR Near's paper ...that it was prior restraint, inconsistent with the 1st Amendment. The Court went on to say, however, that "THE PROTECTION EVEN AS TO PRIOR RESTRAIN IS NOT ABSOLUTELY UNLIMITED. NO ONE WOULD QUESTION BUT THAT A GOVERNMENT MIGHT PREVENT ACTUAL OBSTRUCTION TO ITS RECRUITING SERVICE OR PUBLICATION OF THE SAILING DATES OF TRANSPORTS OR THE NUMBER OR LOCATION OF TROOPS"

PENTAGON PAPERS CASE - DEALT WITH HISTORY OF VIETNAM WAR

The Pentagon Papers Case. Daniel Ellsberg, a high-ranking official in the armed forces, became disillusioned with not only the War in Vietnam, but with the government misleading the American people with how the war was going. Ellsberg had access to a cache of secret pentagon papers which, if distributed to the American people, would go a long way to proving that the government had not been honest, and had misrepresented how the war was going. Ellsberg stole a copy of these papers, and delivered the papers to the New York Times, who began publishing the story.

The government sued the Times to ENJOIN, or stop further publication. The Washington Post also began publishing; the government sued the Post. A Temporary Restraining Order was granted, until the case could be heard by the Supreme Court.

GOVT: Argued that publication of the papers would harm the war effort.

TIMES Classified information was a sham, used for political purposes
Injunction violated first amendment

6 - 3 VOTE: RULE: Govt may not restrain the press **TEST** UNLESS IT CAN PROVE THAT PUBLICATION MUST INEVITABLY, DIRECTLY, AND IMMEDIATELY CAUSE THE OCCURANCE OF AN EVENT KINDRED TO IMPERILING THE SAFETY OF A TRANSPORT ALREADY AT SEA."

JUST COMPENSATION AND THE TAKINGS CLAUSE

Eminent Domain = the idea that the government can take your property, even against your will, if it is needed for a government purpose. Example: 520 expansion.

But, whenever this happens, the government has to fairly compensate you ("just compensation").

In a now famous case (as much for its facts as for the backlash it prompted), the Supreme Court allowed a local government to exercise its right of eminent domain to allow for economic expansion (Kelo v. Connecticut). The public reaction was overwhelming….

REGULATORY TAKINGS

This occurs when a new local rule limits your right to do what you previously could, with your property.

Example: Consider a town that had no height restrictions on how tall buildings could be. Assume you were in negotiations with a buyer, who wanted to buy your property to build a skyscraper (1,000 feet high). Assume the town passes a rule saying "No buildings more than 200 feet." Your property is now worth less because it can only support a building 200 feet tall.

Yet, you are likely not due money because your property still have substantial value. Even if your property value is substantially reduced, you're unlikely to be owned money.

January 17, 2017 Lecture 5

CONSTITUTIONAL LAW DAY II

THE FIRST AMENDMENT, RELIGIOUS FREEDOM, GUNS & BUSINESS

THE FIRST AMENDMENT: (Note the first five words, and what they apply to….)

"***Congress shall make no law*** respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

FOCUS ON RELIGION:

1. The Establishment Clause – What does this mean?
2. The Free Exercise Clause – What does this mean?

The Establishment Clause has little to do with businesses, but you still need to understand how it works.

STUDENT PRAYERS (6-3 majority)
Students decide to engage in voluntary prayer prior the start of high school football games at a public high school (note: not a private school). Students "elect" one person to lead the "invocation" (which is always a Christian prayer), and the school provides a microphone.

Plaintiffs proceed "anonymously" because of fear of retribution.

In this manner, the act is "officially sanctioned" by the school.

"The religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular practice of prayer."

"The delivery of the pre-game prayer has the improper effect of coercing those present to participate in an act of religious worship."

School District said: This is the "private" actions of students.

Court said: This is NOT private speech; nor is it a "forum" for competing views. It is authorized by government policy, and takes place on government-owned property, at school-sponsored events. The PERCEPTION would be that the government endorses this.

School District: If you stop them, you're disallowing their First Amendment right To free exercise of religion.

THE FREE EXERCISE CLAUSE

Until recently, the "Free exercise" clause of the First Amendment had virtually nothing to do with business.

Since June 2015 when the US Supreme Court said that there was a Constitutional right to same sex marriage -- the "free exercise" clause has taken center stage.

The textbook, which was published several years ago, doesn't mention it; that will change in the next edition.

But we don't have time to wait.

The Court's decision simply moves the controversy into another field, one that pits some people's rights against other people's rights.

Reduced to its essence, the current issue, and the one that your generation will have to work through in the next 10 years (or more) in business, and personally, is this:

1. Can the Government force a person who has sincere, strongly held religious views, to do business with other people, whose actions (same sex marriage) runs absolutely contrary to the believer's view? Does that violate the believer's right to "free exercise of religion"?

2. Will the government allow some businesses to openly discriminate against other people, by refusing to do business with them, solely on the basis of sexual orientation? Should American laws allow this type of discrimination in the marketplace?

3. Are people who exercise their Constitutional right to same sex marriage, and who seek to purchase things in public marketplaces, entitled to be protected against discrimination?

As former Justice Souter said, this is a case where a choice needs to be made between two goals, both of which have a claim on us. There is the right to "free exercise" of religion. And there is the right not to be discriminated against.

This is an issue for businesses. Indiana's experience made that clear.

When major companies, the NCAA, and other States all tell a State like Indiana "We intent to economically boycott your state," that's significant. That affects businesses people.

So, what's the law say, and what's going on in this area? It's complicated….

First Amendment to the US Constitution

"Congress shall make no law … prohibiting the free exercise [of religion]…. "

Applies to the States via the Incorporation Doctrine

There has always been conflict between certain government regulations, and religious freedom. As a result, the Supreme Court had to figure out which regulations were appropriate, and which were not. As always, the Supreme Court decided the case at hand, but did so in a way in which it set out some "rules" that lower courts would have to follow.

So, for example, the Court ruled that:

Quakers and Mennonites in the 18th century won the right not to join state militias – even though draft laws meant "everyone" would serve in the military. Their strong religious objection to fighting in wars made them the first conscientious objectors.

More recently:

It was an Amish father who first got the Supreme Court's permission to take his children out of school in 1972, based on his religious commitment to ''life aloof from the world,'' as the justices respectfully put it. That was Wisconsin v. Yoder, the case I assigned.

Wisconsin v. Yoder, and Sherbert, allowed the Court to create a clear rule, or test, that is used to assess whether a state or federal rule improperly interferes with a person's right to free exercise of their religion.

To pass the "strict scrutiny" test (recall this test, and how incredibly difficult it is to pass, from our discussion of regulations limiting speech), and be legal, any law that:

1. Substantially burdens a person's free exercise of religion, must

2. Have a compelling government interest (e.g., the government must have a very very good reason for the law) and

3. The law must be narrowly tailored (not too broad) to achieve that substantial interest (it has to work).

This rule worked well.

But what about those cases where the religious believers CHOSE to deal directly with non-believers by entering into commerce, by selling things to all customers? What then?

This was not a new issue. In the 1960s America passed The Civil Rights Act of 1864, which told merchants, who did business with the public, that they could not close their doors to black Americans; that they could not segregate people at lunch counters based upon race. In passing this legislation, Congress discussed – and rejected – the idea that certain religious people operating businesses could be exempted from this Act.

There are examples, from the 1960s, of devout Christian businessmen who argued in Court that "my religious views don't allow me to serve blacks."

Those arguments did not win the day.

The Courts all ruled against the merchants.

Does that make sense? Why?

In 1982 the Supreme Court modified Sherbert/Yoder rule, if just a bit, for those cases in which religious believers chose to engage in commerce in the open, public marketplace.

United States v. Lee, 455 U.S. 252 (1982)

Citing sincere religious objections, an Amish farmer failed to withhold social security taxes from his employees or to pay the employer's share of such taxes

Ruling:
When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes that are binding on others in that activity.

Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress explicitly provides otherwise. **Granting an exemption ... operates to impose [follower's] religious faith on the [the person sought to be protected by the law] ...**

Consider why this makes sense…
Consider how things would look if the farmer had won the day…
Consider how we decide what a religion is….

John Oliver and the church of Perpetual Exemption

So the Sherbert test was modified for those cases where the person claiming a religious right is voluntarily engaged in business --

Rule: Religious believers who voluntarily operate in a public setting are not exempt from following generally applicable laws if that law operates to impose the believers' faith (principles) on the other person, who the law is designed to protect.

In 1989 the Supreme Court made another significant adjustment:

Employment Division v. Smith (1989)

Facts of the Case

Two Native Americans who worked as counselors for a private drug rehabilitation organization, ingested peyote -- a powerful hallucinogen -- as part of their religious ceremonies as members of the Native American Church. As a result of this conduct, the rehabilitation organization fired the counselors. The counselors filed a claim for unemployment compensation. The government denied them benefits because the reason for their dismissal was considered work-related "misconduct." The counselors lost their battle in state court.

Question

Can a state deny unemployment benefits to a worker fired for using illegal drugs for religious purposes?

Yes.

The rules that come out of this are significant:

An person's religious beliefs do not excuse him from compliance with an otherwise valid law prohibiting conduct that government is free to regulate.

In other words, you cannot use your religion to avoid the consequences of a generally applicable law (that applies to everyone).

Allowing exceptions to every state law or regulation affecting religion "would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind."

The Court cited as examples compulsory military service, payment of taxes, vaccination requirements, and child-neglect laws.

"It is a permissible reading of the [free exercise clause]...to say that if prohibiting the exercise of religion is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended....

To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling' - permitting him, by virtue of his beliefs, 'to become a law unto himself,' contradicts both constitutional tradition and common sense.' To adopt a true 'compelling interest' requirement for laws that affect religious practice would lead towards anarchy."

TEST: If a law is (1) religiously neutral and (2) generally applicable, and (3) only incidentally burden religious exercise, it does not violate the First Amendment.

Virtually all organized religious groups in America were unhappy with Smith, believing that the Supreme Court took away their rights. As a result, Congress and then-President Clinton, decided to act TO RESTORE THE SHERBERT/YODER TEST.

1993 –

Congress passed a STATUTE that afforded MORE protection to individuals (remember: Congress can pass laws that are more protective of individual rights than the Constitution

requires; it just can't pass laws that are less friendly to individuals than what the Constitution requires).

The Federal **Religious Freedom Restoration Act** was designed to codify, and restore, the pre-Smith "compelling interest" test created in Sherbert.

(b) **Purposes The purposes of this chapter are—**

(2) to provide a claim or defense to persons whose religious exercise is substantially **burdened by government.**

(C)(a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (c)(b) of this section.
(C)(b) Exception Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
(1) is in furtherance of a compelling governmental interest; and
(2) is the least restrictive means of furthering that compelling governmental interest.

(d) Judicial relief
A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and **obtain appropriate relief against a government**.

As used in this chapter—
(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

TOD'S NOTE: THERE IS NO DEFINITION OF WHO A "PERSON" IS, INCLUDED IN THIS STATUTE.

THE FEDERAL RFRA ONLY APPLIES TO ACTIONS/LAWS OF THE FEDERAL GOVERNMENT.

In 1993, when the Federal FRRA was created, we lived in a different world:

There were no same sex marriages, nor were there "civil unions".

There were no Federal laws, or executive orders that protected people from discrimination based upon sexual orientation.

Only a tiny number of States and cities had laws barring discrimination based upon sexual orientation.

The legislators who voted on RFRA were protecting the rights of religious minorities – a small group of Native Americans, who smoked Peyote as part of their long religious tradition – from being told "no" by the Supreme Court.

The legislators who voted for RFRA could not have conceived of how it would become part of a debate, 20+ years later, after the Supreme Court said "yes" to same sex marriages.

It was simply a law created in another era, for another set of circumstances.

BUT THE WORLD CHANGED AFTER 1993 -

Some states, like New Mexico, and Washington, passed laws forbidding discrimination based upon sexual orientation, and those laws led to some interesting results. Two cases illustrate this point:

ELANE PHOTOGRAPHY / State of New Mexico

New Mexico had two laws that affected this case:

First, it had a state-wide non-discrimination act, that forbid private parties, engaged in business and open to the public, from discriminating on the basis of sexual orientation. This was the NMHRH.

Second, New Mexico has its own STATE version of the Religious Freedom Restoration Act. The pertinent parts are excerpted:

"government agency" means the state or any of its political subdivisions, institutions, departments, agencies, commissions, committees, boards, councils, bureaus or authorities.

A government agency shall not restrict a person's free exercise of religion unless:

the restriction is in the form of a rule of general applicability and does not directly discriminate against religion or among religions; and

the application of the restriction to the person is essential to further a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.

The New Mexico statute also described the relief available to private parties.

A person whose free exercise of religion has been restricted by a violation of the New Mexico Religious Freedom Restoration Act may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief ***against a government agency***

CHÁVEZ, Justice.

"We hold that the NMHRA is a neutral law of general applicability, and as such, it does not violate the Free Exercise Clause of the First Amendment." (Tod's note: Court applies Smith test to the State law, and finds the State law constitutional.)

Finally, Elane Photography argues that the Commission's enforcement of the NMHRA against it violates the New Mexico Religious Freedom Restoration Act. The NMRFRA provides:

"…[T]he statute is violated only if a "government agency" restricts a person's free exercise of religion.

The list of government agencies does not include the Legislature or the courts.

Moreover, the structure of the NMRFRA as a whole suggests that the Legislature contemplated that the statute would apply only to legal actions in which the government was a party. The only relief authorized by the statute is "injunctive or declaratory relief against a government agency…"

Nowhere does the NMRFRA authorize damages or injunctive relief against a non-governmental party.

Key Take-away:

The Court found that the New Mexico RFRA did not apply in this case because a "government agency" was not a party to the dispute between the two parties. In other words, New Mexico's RFFA was not a law that one private party, person or business could use against another private party, person or business. Instead, it could only be used as a defense or shield against the government.

New Mexico has comprehensive state laws that forbid discrimination on the basis of sexual orientation.

The New Mexico State Supreme Court applied the US Supreme Court's test from Smith, to resolve this case, e.g, a "neutral law of general applicability" is lawful, even if it impinges on some religious acts.

ARLENE'S FLOWERS – WASHINGTON STATE / 2013-2015

The Washington State Constitution addresses Religious Freedom:

SECTION 11 RELIGIOUS FREEDOM. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.

Washington State does NOT have a State version of the Religious Freedom Restoration Act.

Washington has a "Human Rights" law….

Freedom from discrimination —

(1) The right to be free from discrimination because of ….. sexual orientation…. This right shall include -

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

The Washington Court applied the Supreme Court's test from Smith, to resolve this case, e.g, a "neutral law of general applicability" is lawful, even if it impinges on some religious acts.

The 9th Circuit Court of Appeals affirmed this; and the US Supreme Court declined to take it. Thus, this case is final.

The next major development in this area came via the US Supreme Court.

In Hobby Lobby, the Supreme Court expanded the definition of who the Federal RFRA applied to. Up until Hobby Lobby, it was clear persons (human people) could use the law.

After Hobby Lobby, is was clear that (at a minimum) close corporations would be treated as a "person" for purposes of using the Federal RFRA to protect them. If a small company/corporation had a clearly defined and sincere religious belief or view, it could use RFRA as a shield against the Federal Government enforcing the law against it.

This was a bold, new idea; the authors of the original Federal statute, including President Clinton who signed it, all essentially said the same thing: we never intended that the Federal RFRA apply to anyone other than persons.

It did not matter – by a 5-4 majority the Court said some small corporations were also protected by the law.

Jon Oliver / Hobby Lobby

https://www.youtube.com/watch?v=zSQCH1qyIDo

Start at 3:40

Hobby Lobby's central holding – that non-people could have religious views, and that those views could be protected by statute (remember, Hobby Lobby was not a case involving the Free Exercise clause, it was just a case involving the interpretation of the Federal RFRA, a statute) – was novel.

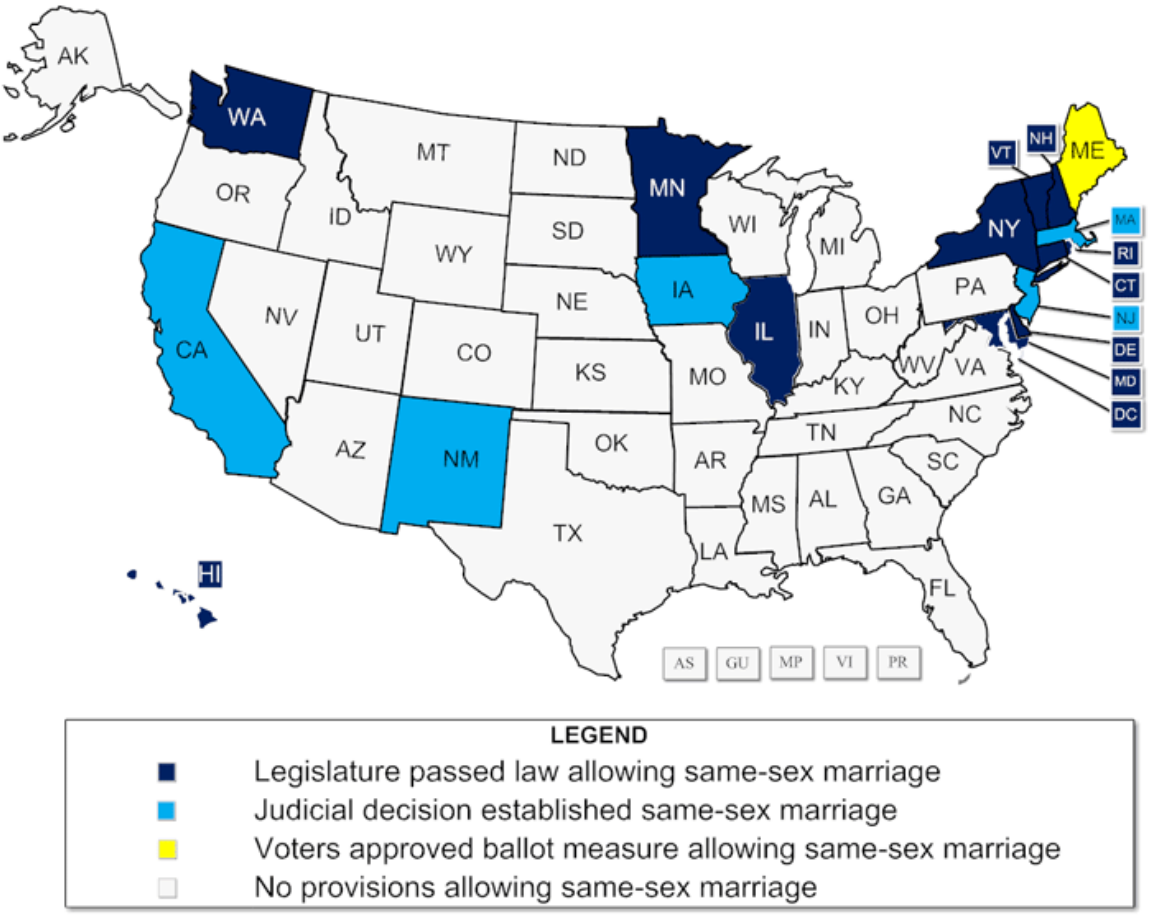
Some people read it and had ideas:

Between 2007 – 2014 two related trends evident in the United States:

Trend 1:

Same sex marriage was expanding in the United States (LA Times Timeline)

2008 – Map of States allowing / not allowing same sex marriage.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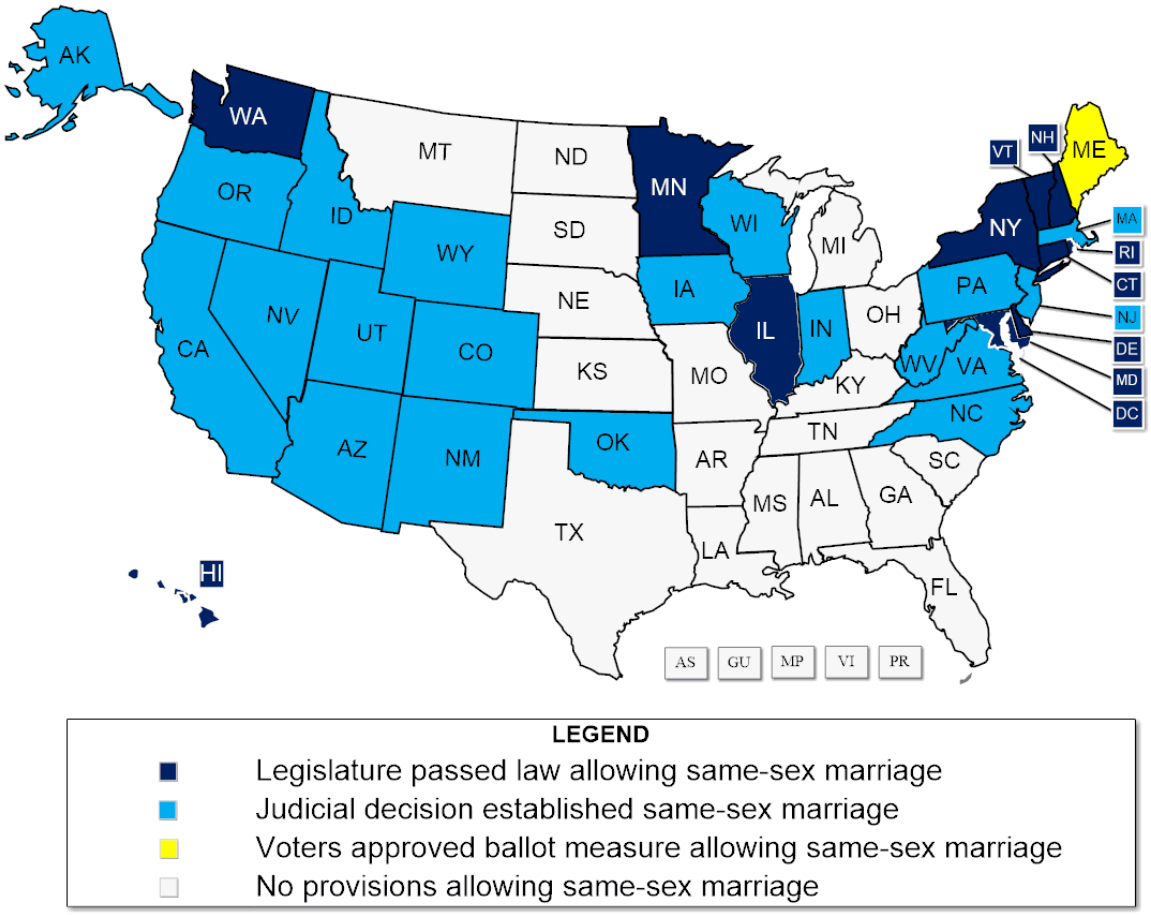
LEGEND
Legislature passed law allowing same-sex marriage
Judicial decision established same-sex marriage
Voters approved ballot measure allowing same-sex marriage
No provisions allowing same-sex marriage

2014 – Map of states allowing / not allowing same sex marriage.



http://graphics.latimes.com/usmap-gay-marriage-chronology/

2008 – Map of States allowing / not allowing same sex marriage.

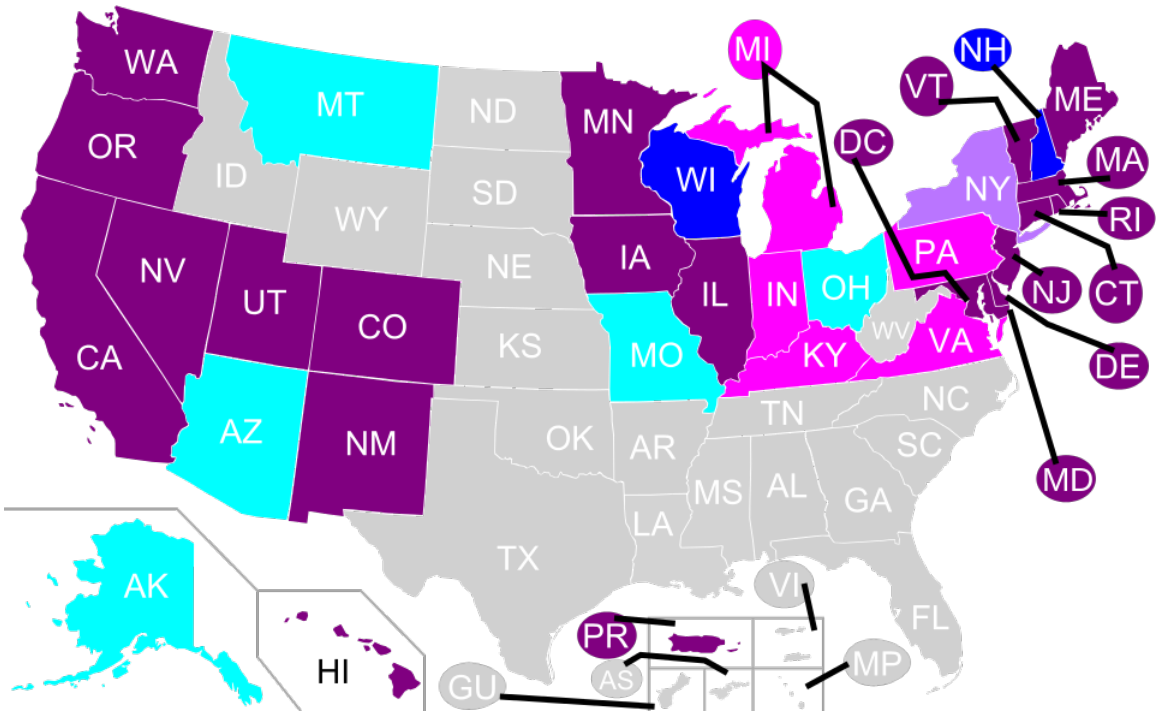
2014 – Map of states allowing / not allowing same sex marriage.

Trend 2:

There was a clear division between states that banned discrimination in employment and public accommodations based upon sexual orientation, or transsexual status – and those States that had no such laws (thus, essentially, allowing private employers to discriminate if they chose to)

http://www.npr.org/templates/story/story.php?storyId=7648733

The gray states offer no protection, meaning that there is no State law telling an employer that the employer may not fire an employee because of the employee's sexual orientation.



NOTE – Indiana ONLY protects against discrimination based upon sexual orientation in State (not private) employment; e.g., the State as an employer cannot discriminate.

Some States (like Washington, and New Mexico) banned discrimination based upon sexual orientation, in "public accommodations" – in these states merchants with strongly held religious views were required, by law, to do business with same sex couples, even though they did not want to. That's Elane Photograph, the photographer in New Mexico, and the Washington State florist.

These trends were of particular concern to politicians and the public in conservative states. They not only wanted to avoid passing outlawing discrimination, but more importantly they wanted to pass laws protecting religious merchants from having to do business with anyone they may objected to, based upon their religious views.

Hobby Lobby --- which said that small, closely held corporations could be treated just like people, with religious vies -- offered these states a solution.

In 2015 the State of Indiana passed its own version of a state RFRA.

The Indiana law looked similar to the Federal version, and other state RFRAs: It Adopted the Sherbert test.

BUT in certain important ways, the Indiana law was different: It learned from Hobby Lobby that it could apply RFRA concepts to entities beyond simply people.

The Indiana's legislature also learned from Elane Photography that they needed to clearly allow their act to be used by a private party against another private party, not just the government.

TEXT OF THE ORIGINAL INDIANA Religious Freedom Restoration Act

Sec. 7. As used in this chapter, "person" includes the following:

(3) A partnership, a limited liability company, a corporation, a company, a firm, a society, a joint-stock company, an unincorporated association, or another entity: (Tod's note: This expands upon Hobby Lobby, which only spoke to "close corporations".)

(A) may sue and be sued; and (B) exercises or practices that are compelled or limited by a system of religious belief held by: (i) an individual; ***or (ii) the individuals; who have control and substantial ownership of the entity, regardless of whether the entity is organized and operated for profit or nonprofit purposes***. (Tod: This appears to give the person who owns the majority control in partnerships the right to use the Indiana RFRA.)

Sec. 9. ***A person whose exercise of religion has been substantially burdened, or is likely to be substantially burdened, by a violation of this chapter may assert the violation or impending violation as a claim or defense in a judicial or administrative proceeding, regardless of whether the state or any other governmental entity is a party to the proceeding.***

(This is fixes the problem in Elane Photography, where the NM Court said the statute could only be used against State actions.)

THE BACKLASH WAS IMMEDIATE, AND CAUSTIC / Discussion in class.

Of particular note was the business backlash.

With Companies like Yelp, Salesforce, and Angie's List – not to mention entire States threating to boycott you, that got Indiana's attention.

Does anyone know Mark Emmert is? He has a strong relationship to the UW, among other things….

I searched, and I could not find a single large business that spoke up in favor of the Indiana law – there was, as far as I could tell, absolute unanimity: it was a terrible idea.

http://www.bloomberg.com/news/videos/2015-03-30/why-tech-companies-are-against-indiana-s-rfra-law

This became a national issue.

Before I show the following clip, I want to tell you all that I gave this lecture for the first time in the fall of 2015 – you can ask friends who took the class then. I included the following clip then, and will continue to do so. It was not chosen to attack Mr. Pence in his current campaign, but rather – and I'll freely tell you this – to show his hypocrisy last year in defending the Indiana law.

The Governor of Indiana, who signed the law, appeared on one of the Sunday mornings news shows last year, This Week (ABC).

As you watch Gov. Pence, listen carefully to whether, when he was asked whether his bill would allow a florist, or photographer to discriminate, how clearly he answered the question:

https://www.youtube.com/watch?v=Gy8OmKzLoZE

He cited Illinois, and Barrack Obama voting for the same RFRA.

I was curious, so I looked – the two laws are only the same insofar as they adopt the Sherbert test.

The Indiana law expanded the definition of "person" way beyond Hobby Lobby, and way beyond Illinois.

The Indiana law also gave a private right of action to aggrieved businesses, something Illinois – nor any other state, does.

The business backlash was incredible.
Threats of boycotts.
Threats to pull business from the State.
Washington's Governor banned all state-paid for travel to Indiana.

And Indiana caved.

THE FIX

Lawmakers meeting in Indianapolis on Thursday approved changes to the law to prohibit service providers "from using the law as a legal defense for refusing to provide services, goods, facilities or accommodations. It also bars discrimination based on factors that include race, religion, disability, sexual orientation, gender identity or United States military service," according to The Associated Press.

It is the first time the Hoosier state has defined either sexual orientation or gender identity a protected category.

I don't believe that things would have ended this way except for businesses taking a strong position.

Two months later, in June 2015 – The Supreme Court ruled on the same sex marriage case….

Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide

Where does this leave us?

1. The Federal Constitution -- on its face -- does not require businesses to sell to same sex couples, nor does it make it illegal for businesses to refuse to employ people, or sell things to same sex couples or LGBT.

2. Title II of the Civil Rights Act of 1964 does not include sexual orientation in the list of protected classes, and there are no other Federal laws specifically banning discrimination on the basis of sexual orientation; as a result, there does not appear to be any Federal law making it illegal for small busineses to discriminate on the basis of sexual orientation.

3. It is unclear if the EEOC's ruling, which is directed toward discrimination in employment, will be upheld, and even if it is, whether it has a broader application to public accomodations.

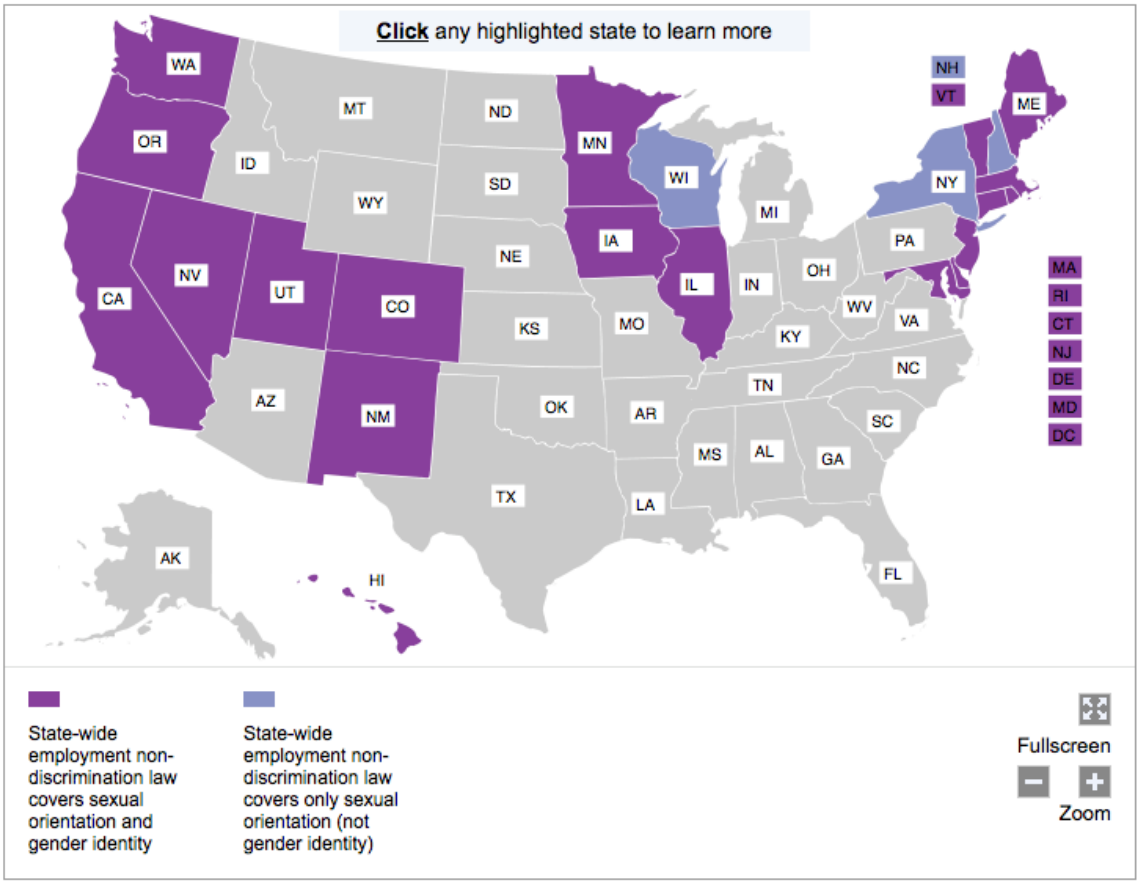
4. The Federal Religious Freedom Restoration Act protects small businesses (post Hobby Lobby) that have sincere religious views, against Federal laws that impinge upon them. It's unclear (yet) whether this will be expanded to include other forms of business.

5. There are no Federal laws stopping the States from passing either (1) their own versions of RFRA or (2) their own laws forbidding discrimination on the basis of sexual orientation, or (3) both.

6. RESULT – Key legal developments likely at the State level

    1. Most states do not forbid discrimination in public accomodations based upon sexual orientation, and as a result, merchants can do business with whoever they like; ***unless*** there is a county or city regulation in place, banning such discrimination (and there are a lot).

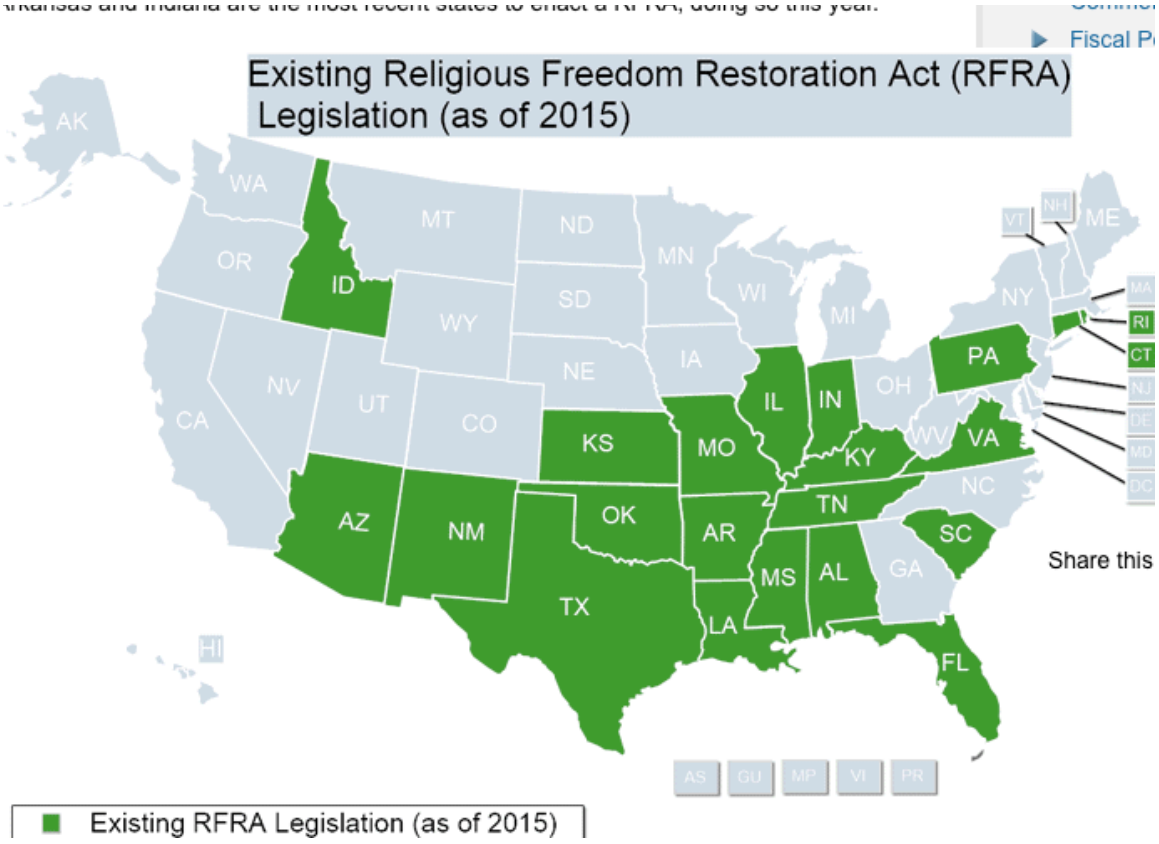
        The PURPLE and Blue States DO forbid discrimination:



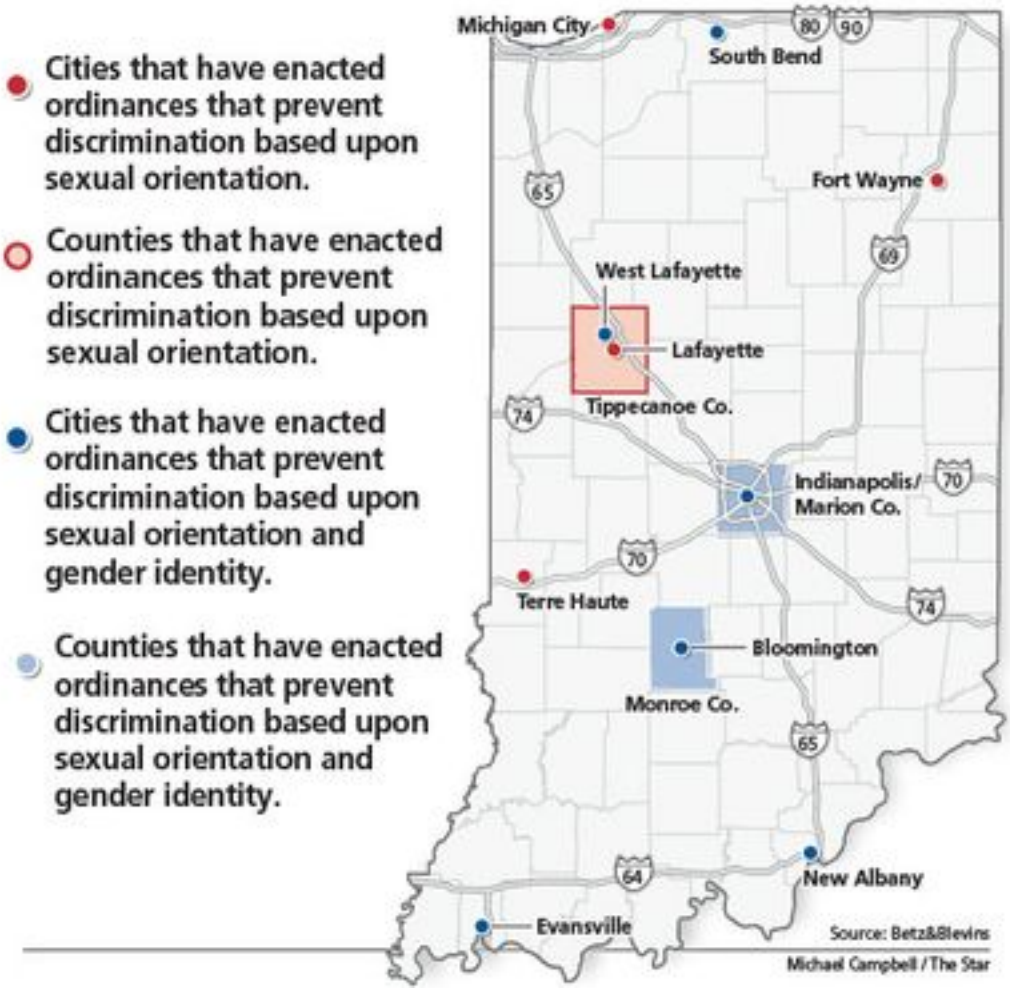
Display a table of the map data.

2. In the 19 States with RFRA (as of early 2015) you need to look closely at (a) the definition of who a person is; and (b) whether there is a right to sue anyone other than the government.

BLUE STATES HAVE RFRA – Green States do not.



But even Indiana has cut-outs – areas within the State where cities have laws banning discrimination:



Buy Photo

3. You also need to know if there is ALSO a state non-discrimination law fobidding discrimination on the basis of sexual orientation in public accomodations (see first map).

   New Mexico (Elain Photopgraphy) has both: and the Court found (recall) that it was not a private right that belonged to a business.

4. In States (like Washington) with clear laws against discrimiation based upon sexual orientation, small businesses are very unlikely to be able to discriminate if there is no State FRRA. Even with a State RFFA (like New Mexico) it will be different.

Going forward – businesses will need to take a close look at where they are locating, and if that location matches their core beliefs.

Additionally… the overwhelming number of Fortune 500 companies have policies in place in which they indicate that they do not discriminate based upon sexual orientation, or same sex marriage.

Fortune magazine's 500 largest publicly traded companies, which collectively employ nearly 25 million people.

The vast majority (89 percent) prohibit discrimination on the basis of sexual orientation.

American Businesses cannot escape the so-called culture wars.

NPR story comparing the two cities
http://www.npr.org/2016/08/24/491170157/nba-moves-all-star-game-to-new-orleans-which-had-its-own-controversy-in-1965

SEPARATION OF POWERS (AGAIN)
The relationship among the various (3) *branches* (Executive, Judicial and Legislative) of the Federal (or State or local) government. (*Not* Federalism) Checks and balances are utilized to avoid one branch taking too much power. Recent example: Congress suing Obama over his use of Executive Orders.

Peculiarly American belief: No person is above the law.

Impeachment: The Legislative Check on Executive and Judicial Branch Abuse of Power

Article I, Section II, paragraph 5:

"The House of Representatives…shall have the sole power of impeachment [by a majority vote]."

Article I, Section III, paragraph 6:

"The Senate shall have the sole power to try all impeachment…When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present."

Article II, Section IV:

"Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust and profit under the United States; the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to the law."

PRESIDENT CLINTON, PAULA AND MONICA

1. Governor Clinton allegedly propositions Paula Jones.

2. Paula Jones sues President Clinton, alleging sexual harassment under a Federal statute. She sues him for $ damages.

3. President argues, "I'm too busy to be sued now…"

4. Supreme Court rules that case can proceed. Why should Paula have to wait?

5. Discovery phase: Trial court allows Paula Jones' lawyers to question the President about whether he had ever had consensual sexual relations with other State or Federal employees. Why? (Note that the court did not need, at this phase, to determine whether this information would be admissible at trial.)

6. Problem for President. He had been hooking up with Monica Lewinsky, a White House intern, but the President did not think that anybody knew about it. He did not want to admit this, so he chose to deny having sex with other Federal employees.

7. President answers written interrogatory, on December 17, 1997, stating he had not had sexual relations with other Federal employees.

8. Note: this was a Civil Case….but…

9. Special Prosecutor Kenneth Starr had been appointment, years earlier, to look into a land deal called "Whitewater" that Clinton had been involved in. Starr's "jurisdiction" only included this financial investigation.

10. President was wrong – above – when he thought nobody knew that he was hooking up with Monica. Monica had told her "friend", Linda Tripp, all about her affair with the President.

11. Tripp hated Clinton, and knew Starr was investigating him.

12. Tripp secretly tape recorded Monica talking about sex with the President. Tripp delivered the tapes to Starr and Paula's civil lawyer. Thus, although Clinton thought the affair was a secret, both Starr and Paula's lawyers knew about it.

13. Starr asks that his jurisdiction be expanded, to include investigating Clinton for making a false statement to Paula Jones' lawyers. Granted.

14. January 19, 1998: At a deposition, Jones' lawyers specifically ask Clinton about sex with Monica. *Where did that come from???* Clinton denies it, under oath.

15. Monica interviewed by FBI: Denied sex with President. Federal crime to lie to the FBI. Monica now at risk to be prosecuted.

16. Days later, story breaks, as a result of a leak.

17. Clinton:
http://www.youtube.com/watch?v=KiIP_KDQmXs

18. Federal Judge rules that Lewinsky evidence not admissible in Paula Jones' lawsuit.

19. Judge then dismisses the lawsuit, finding Paula Jones had produced no evidence that she suffered any economic harm, even if allegation was true.

20. Clinton then settles the lawsuit, to avoid an appeal, for $850,000.

21. Monica – who had lied when first interviewed by the FBI – agrees to cooperate with Starr, and confirms sex with the President.

22. Monica has no proof….

23. President gives blood sample.

24. August 5, 1999: Big choice for President. President admits to Grand Jury that he had sex with Monica. Does not take the 5th.

25. Stage set for impeachment.

26. House (Republican) votes to impeach Clinton:
    a. Clinton "willfully provided perjurious, false and misleading testimony"
    b. Clinton "prevented, obstructed, and impeded the administration of justice".

27. Senate (where 2/3 of members present must vote to convict):
    a. Perjury charges 55-45, not guilty.
    b. Obstruction charges 50-50, not guilty.

January 19, 2017 Lecture 6

THE ATTORNEY CLIENT RELATIONSHIP

THE ATTORNEY CLIENT RELATIONSHIP

THE ADVERSARY SYSTEM
Each side tries to WIN – each side tries to bring forward the points that support his view, and undermine the points made by the opposing party. Each side is responsible for bringing forward information that helps it, but also must inform court of contrary legal authorities (e.g. lawyers may not mislead the court, or hide controlling case law that goes against them). Thus, the better your lawyer, the better chance you have of winning.

Our system is not a pure truth finding system, where neutral magistrate tries to find the truth. In some countries, this is the "inquisitorial" judicial model….

Anyone from…. Japan?

LAWYERS – College degree + law school* (3 years) + Pass Bar Exam (Each state will have its own, though some states use the "multi-state" bar exam, which means that if you pass you are admitted to more than one state). The Federal "bar" (e.g., courts) also admit lawyers, but only after they have passed a state bar exam.

* It actually is possible in Washington to become a lawyer without going to law school, though you still need to pass the bar.

Licensing is required because of the fiduciary relationship: attorneys hold money for clients. Fiduciary relationship = absolute duty of honestly, trust, good faith, and best efforts on behalf of the client.

Authorized by law to give legal advice; prepare legal documents & litigate.

Lawyers "sort through complicated facts to determine what is relevant, then apply the appropriate legal rules".

The law is a vast filed of separate areas of substantive practice. While it's uncommon to specialize in too specific a field in law school, once lawyers enter practice they typically become specialized in a area of the law.

Lawyers are encouraged (and in some cases required) to provide their service pro bono (e.g.) free, to worthy causes and parties. The rules differ among states.

PRO SE

Nobody is required to obtain the services of an attorney; you can represent yourself – though this is risky.

Still, there are many things that you can do without a lawyer:

- Simple divorces
- Small claims Court (UW soccer players and the leaky apartment)
- Adam Reid keeps getting hit while riding his bike
- Simple wills (easy, all you need is a couple witnesses who are not inheriting anything

UNAUTHORIZED PRACTICE OF LAW
It is a crime – and we do prosecute it – to practice law without a license.
Why?

What are the arguments that non-lawyers ought to be able to do more than they currently do?

LAW AS A BUSINESS
Lawyers, like all professionals, make their living practicing law.
In the US, only lawyers are allowed to be equity owners/partners in law firms.
Firms (and even solo practitioners will be LLC or LLP, for purposes of liability (though statutes in some states make it impossible to shield all assets.

Large "law firms."
Some law firms are huge, employing thousands of lawyers, whose specialties cover many different topics. What are the advantages and disadvantages of this? In general, these mega-firms have stable, corporate clients. These firms also attract law students with the best academic credentials, in part because the pay – and prestige – is so attractive.

Small to Medium Sized Partnerships
These firm typically specialize in a few subject. Benefits/Costs?

Individual practitioners

In House Counsel – representing corporations.

Public Interest Firms (firms with a mission, or cause).

Government Attorneys
This group includes prosecutors, government attorneys that provide civil advice, and public defenders (at the local and federal level).

Public Prosecutors (or District Attorneys)
Bound by Professional Code

- Prosecutors (Criminal + Civil)
- U.S. Attorneys
- Both owe higher duty than ordinary lawyers, because as "officers of court" and government agents, their duty is to do justice, not simply win a case.
  Examples from criminal law….

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends
to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

Public Defenders
There is a Constitutional right to free legal representation to those charged with crimes (assuming they meet the income eligibility requirements) and face the prospect of jail/prison time. (There is no Constitutional right to free legal representation is you are poor, and involved in civil case.)

WHY? The adversarial system: Without an attorney, an innocent man may be convicted because he doesn't know he has a defense.

- Right is via the 6th Amendment right to counsel (Gideon v. Wainright)
- Public Defenders are frequently excellent attorneys,
- But often overworked. (Yakima Example).

Criminal Defense Attorneys in General

- Must zealously represent a client even if he knows he's guilty (duty is not to "do justice" but to their client. Duty is to represent client even if the client has confessed to the lawyer.

- OJ Simpson's lawyer, Johnny Cochran… "A search for the truth…" Not.

ETHICS

The legal profession is self-regulating, with the State Supreme Court (of each state) supervising the state Bar Association, which enforces the rules. The rules are codified, carrying the force of law.

These are written rules of prohibited conduct that are adopted and binding upon members of the bar. A breach of these rules may lead to an attorney being disciplined: (1) disbarment; (2) suspension of practice; (3) probation; or (4) censure.

Conduct that is outside the actual practice of law, but that involves a crime of "moral turpitude" (conduct contrary to justice, honesty, and good morals) can also lead to discipline. Former prosecutor Will….

Examples of violations of the Rules of Professional Conduct:

1. Charging too high of fees (Some states limit contingency fees)

2. Soliciting clients after mass disasters (Bophal), or using "cappers" and "runners" at local hospitals to find clients (often using nurses, etc.)

3. Representing clients with diverse interest (conflicts).

4. No communication directly or indirectly with the opposing party if represented by counsel; all communications via the attorney.

5. Having a sexual relationship with your client (how'd that happen….?)
The Theresa Olson/Sebastian Burns saga.
http://community.seattletimes.nwsource.com/archive/?date=20040915&slug=olson15m

6. Criminal conduct unrelated to the practice of law.

7. Not reporting another attorney's unethical behavior when observed.

8. A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. RPC 3.3 CANDOR (HONESTY) TOWARD THE TRIBUNAL (COURT)

THE ATTORNEY CLIENT PRIVILEGE (RULE 1.6) and CONFIDENTIALITY

These related rules were designed to instill absolute trust between the lawyer and client.

The Attorney-client privilege:
All communications made to an attorney must remain confidential. The privilege belongs to the CLIENT (not to the lawyer).

- Privilege does not apply to threat to do future harm;
- Privilege SURVIVES THE DEATH OF THE CLIENT -- Policy Reason? Consider Michael Jackson….and how his former attorneys might have profited after his death…
- Privilege does not exist if others are present. Policy implications?
- If client discloses to attorney, I DID IT, Attorney cannot then put the client on the witness stand to lie.

Prosecutors are not the "attorney" for the victim of a crime; thus, if the victim discloses something to the prosecutor that might bear on the innocence of the accused, the prosecutor must turn this information over to the attorney for the accused.

Duty of Confidentiality
This duty is broader, and protects any/all information that the lawyer learns from or about his client, during representation, even if not from the client. Example: Mental health evals in anticipation for insanity… Polygraph results… This rule does not apply if there is a dispute with the lawyer re fees, or a claim of negligent representation.

Lawyer Is Fined for Revealing Rowling as Author of Detective Novel

By ALLAN KOZINN JANUARY 2, 2014 2:39 PM
January 2, 2014 2:39 pm


J.K. Rowling

Chris Gossage, the lawyer whose indiscreet chatter led to the public unmasking of J. K. Rowling as the author of "The Cuckoo's Calling" — the detective novel that she published under the pseudonym Robert Galbraith — has been fined £1,000 (about $1,645) by the Solicitors Regulation Authority for breaking the authority's client confidentiality rules. Mr. Gossage, a partner at Russells Solicitors, also received a written rebuke. The ruling was issued by the authority on Nov. 26, but was not made public until this week.

A famous recent case shows how seriously attorneys take this rule.
ATTORNEY CLIENT PRIV
60 MINUTES
http://www.cbsnews.com/video/watch/?id=3920205n&tag=mncol;lst;6

CONFLICTS
We start from the presumption that an attorney owes a fiduciary obligation to his/her client, and that obligation continues post-representation.

Any circumstances that might cause a lawyer to give his/her client his/her best representation, and loyalty, is a potential conflict of interest.

We can see how problems might occur if an attorney represented client A two years ago, and now wants to represent client B, if they are suing each other. In most cases it's not possible to do both.

Attorneys must be careful not to do anything that would imperil previous clients, or serve to undermine their secrets.

> Example: Tod represented YOU in your drunk driving case four years ago. Tod now wants to represent Ben, who you hit with your car as you were leaving a bar…

This is a conflict of interest.

Attempting to represent multiple clients charged with the same criminal offense presents similar problems. Example: JHB

When lawyers change jobs this may also create conflicts.

When lawyers agree to "advance" litigation costs to the client (e.g., the lawyer loans the client money to pay for the costs associated with pursuing a lawsuit unrelated to paying the attorney, who is likely on a contingency fee.)

FEDERAL RULE OF CIVIL PROCEDURE 11
This rule is designed to bar frivolous lawsuits by awarding attorney fees to the prevailing party if the lawsuit is shown to be meritless (this is different that simply filing a lawsuit and losing; a court would need to make a special finding that the lawsuit lacked legal justification and/or was designed to retaliate or punish another party).

The rule also includes writing demand letters that are frivolous (Adam Reid keeps getting hit while riding his bike…)

HOW GOOD OF AN ATTORNEY DO YOU GET?

In criminal cases, defendants have the Constitutional right is to "effective" counsel. The Supreme Court has recently said that this applies to trial AND during the plea negotiation state of the proceedings.

Supreme Court - Strickland v. Washington

John Henry Brown and Darryl Cloud – "The Rock says 95%!"

Ineffective assistance of counsel in CRIMINAL CASES =

A. Specific acts or omissions that were outside the bounds of professionally competent assistance (in other words, "negligent conduct");

AND

B. Counsel's errors actually prejudiced the defendant to the point where he was denied a fair trial.

Did trial counsel's conduct so undermine the proper functioning of the adversarial system that the trial cannot be relied upon as having produced a fair result.

This same standard applies in CIVIL CASES where it is a tort called MALPRACTICE, where a civil litigant's (somebody wanting money) lawyer has committed significant errors.

Test is very similar – part A, above, PLUS needs to show that the result, but for the errors earlier, would have been more favorable to the party alleging negligence.

HOW DO YOU FIND AN ATTORNEY (or… how do they find you…)?

LOTS OF ADVERTISING (TV + Yellow pages)

New York Times:

Until the 1970s lawyers were barred from advertising – in 1977 the Supreme Court held that they had a 1st Amendment right (free speech) to advertise their services.

The result – lots of late night ads on TV
Jacoby & Meyers
http://www.youtube.com/watch?v=2MOo-Qu-4b4
http://www.youtube.com/watch?v=eP3vFoplb6U

But who really advertises? Really successful attorneys? Firms?

What type of questions should you ask your attorney?
Public defender or private attorney? Let's do the analysis…

Direct solicitation is considered unethical (post Bophal)

PAYING FOR YOUR LAWYER

In the American system, the ordinary rule is that everyone pays for their own lawyers unless…

1. A contract dictates that the prevailing party's fees are paid by the losing party;
2. A statute states that if the plaintiff wins, the defendant pays his lawyer's fees.

Contingency fees
The lawyer gets a percentage of the recovery if the lawyer wins.
There are limits, and lawyers can run afoul of the RPCs for taking advantage of clients.
The is virtually always used in personal injury tort cases… but ask yourself whether you might be better off with an alternative fee structure (like hourly), and why?

Flat Rate
This is essentially an hourly rate, where the lawyer will be paid for each hour worked.
Downsides?

Retainers
Simply $ the client pays the lawyer, who "holds" it in his/her account and only draws the money out in proportion the time spent working on the case. Also used to "tie up" lawyers that you don't want working for the opposing party (strategic).

FEE SHIFTING
When the government creates a law that provides for the government to pay the plaintiff's attorney's fees if the plaintiff wins the case. This encourages lawyers to take cases of poor people b/c there is the possibility of a good pay day.

Class Action Cases
Lawyers are paid by the court, from the proceeds of the settlement. Some firms have carved out very lucrative/profitable practices once they get appointed lead counsel in a class action case.

JANUARY 24, 2017 LECTURE 7

Civil Procedure: COURTS AND LAWSUITS Day 1 of 2

Courts are public facilities, available to private parties, businesses, organizations, and government agencies, where legal disputes are heard and decided. Courts are essentially free (there is a small "filing fee" which ma be waived, and after that you do not pay for the time of the judge, etc – though you do pay for your own lawyer. They are independent of (though they are funded by) the other branches of government, and rely upon the other branches of government to carry out their mandates or orders.

Courts are expected to apply the "rule of law".

Courts do not control the police, and have to occasionally rely upon the other branches to carry out their orders. (School desegregation.)

There are two types of courts: (1) Trial Courts and (2) Appellate Courts.

Trial Courts

Conduct initial proceedings.

Once the Trial begins

1. The Judge will determine what evidence is admissible, by applying the rules of evidence;
2. If the court is hearing the case without a jury, the judge will decide the disputed facts;
3. If a jury is deciding the case, the court will instruct the jury to decide the disputed facts, and the jury will be the "fact finder" and decide what facts have been proven ("questions of fact")
4. The judge will determine what the appropriate law is ("questions of law"), and if a jury is deciding the case, the court will instruct the jury on the law.
5. Once the "facts" are determined, the law will be applied to the facts to reach a verdict.
6. In criminal cases, the judge will impose punishment, except in death penalty cases.

State trial court are most often called Superior Court (this is case in Washington). Federal trial courts are called Federal District Courts (or simply District Courts)

Appellate Courts

These courts* do not take any new evidence, or hear witnesses; appellate courts rely upon transcripts from the trial court. (* The US Supreme Court has jurisdiction to be the trial court in certain exceptionally rare cases.)

Appellate courts' duties are limited to deciding whether or not the evidence produced in the trial court was sufficient to have allowed the result; **and determine whether or not the trial judge, or lawyers, made any error of law serious enough to require that the result of the trial should be changed**.

Only appellate courts can make common law: Burglary example.

Appellate courts may reverse a trial court, affirm it, or remand (send the case back, with instructions to do something different in the future).

Civil Suit	People asking for $ (DAMAGES) Burden of proof = Preponderance of the evidence; more likely than not.
Criminal	Prosecuting somebody for a crime; this type of case may only be initiated by some level of government. Burden of proof: Beyond a reasonable doubt.
Actions in Equity	This type of case does NOT involved the right to a jury trial. Asking the court, in a civil case, to order the defendant to do something, e.g. ("specific performance"). Recent SPD settlement with DOJ re police conduct, ordering SPD to implement policy changes.
	Asking a court annul a contract (erase it, and return the parties to their original position, e.g. Divorce proceedings. Often referred to as "rescission".
	Asking a court to tell the other party to STOP doing something, e.g., issue an "injunction" (Microsoft)
	NOTE: Juvenile criminal cases are considered "equitable", and therefore there is no jury trial available to juveniles charged with crimes.

JURISDICTION

A court may only decide a legal dispute if the court has jurisdiction over the subject matter and the parties. This is a key concept.

The term jurisdiction, when applied to courts, refers to the power of the court to do what you want done. Each state has its own court system, and the federal government has a court system. Within each of these systems, there are various levels of courts. The trick – at the beginning of a lawsuit – is to find the right court to hear and decide your case. If you choose wrong, you will waste your time.

1. Political/Geographic Jurisdiction.
This refers to selecting the right geographic area to file your lawsuit. If you and the defendant both live in Washington, it would make no sense to file your lawsuit in California. Similarly, you need to know whether to file in State or Federal Court. Sometimes there is concurrent jurisdiction between multiple states or a state and the federal government, e.g., it would be ok for various court systems to take and decide the case. At other times there will be exclusive jurisdiction (e.g., only one court system can hear the particular type of case.)

2. Subject Matter Jurisdiction.
Once you locate the correct geographic area, you still need to know which court within that area you need to file your lawsuit. Trial or appellate court? Superior or Municipal Court?

Washington has 4 levels of courts:	Supreme Court (appellate) Court of Appeals (3) - appellate Superior Court (trial – felonies, any$) Distinct/Municipal Court Small Claims Courts (relaxed rules, low limits, and generally rules the prevent lawyers from appearing.

Sometimes there is concurrent subject matter jurisdiction between multiple states or a state and the federal government, e.g., it would be ok for various court systems to take and decide the case based upon the subject. At other times there will be exclusive subject matter jurisdiction (e.g., only one court system can hear the particular type of case. Patents in Federal Court. Purely State questions in State courts.)

Two assigned stories on this:
Austrian Train accident.
Terrorism.

3. Jurisdiction of the Person or Property.
A court only has jurisdiction over the particular party being sued after that person has been served with a summons and complaint (discussed below). In other words, you must be informed that there is a court proceeding against you, and given an opportunity to respond, before the court can "do" anything to do. This is referred to as ***in personam jurisdiction***.

A court always has jurisdiction over property within its geographic boundaries; this is referred to as ***in rem jurisdiction***.

Long Arm Statues (laws that exist in most states) allow you to be sued by someone in another state if your conduct (either personally, or having done something in this state that affected somebody else in the other state) injured another person. Because traveling to another state is expensive there is a test courts continue to use to determine whether long-arm jurisdiction is proper:

(1) the defendant must have sufficient "minimum contacts" with the other state;
(2) the plaintiff's claim must be based upon or arise from those contacts
(3) the exercise of jurisdiction must be reasonable.

Jurisdiction over a foreign company or person + the concept of sovereign immunity.

Ms. Sachs purchased a Eurail Pass through an American internet company, then while travelling in Austria suffered a catastrophic accident on an Austrian train (resulting in both of her legs being amputated). She could have sued there, but preferred to sue in the United States, where the tort laws were more favorable, and she was likely to receive a far larger award for pain and suffering. Can she?

The precise legal question in the case was whether the railroad, which is owned by the Austrian government, was entitled to sovereign immunity. Foreign states are generally protected by the Foreign Sovereign Immunities Act, but that law makes an exception for claims "based upon a commercial activity carried on in the United States."

What mattered, Chief Justice Roberts wrote, was the core, or gravamen, of the lawsuit.

"Under this analysis," he wrote, "the conduct constituting the gravamen of Sachs's suit plainly occurred abroad. All of her claims turn on the same tragic episode in Austria, allegedly caused by wrongful conduct and dangerous conditions in Austria, which led to injuries suffered in Austria."

Diversity Jurisdiction

This allows a case to be filed in Federal Court. Rule: Parties must be from different states (or one party must be a US citizen, and the other party a non-US citizen) AND the amount "in controversy" must be more than $75,000.

If a plaintiff and defendant live in different states, and the plaintiff starts the case in State court, the defendant may "move" the case to federal court, provided that the amount in controversy exceeds $75,000.

If "diversity jurisdiction" results in a case being in Federal Court, the Federal Court will apply the substantive law of the state where the lawsuit was properly initiated, but will use the Federal Court's procedural law.

> Substantive Law = the elements of the lawsuit
> Procedural Law = the rules of how the "game" of lawsuits are played

Jurisdiction and the Internet
First, this is complicated…
Second, the Court, in determining whether the entity operating a cyber-space may be brought into a particular court, applies the "minimum contacts" test, e.g., the Court will assess how significant the entity's contacts are with a particular state (this does not lead to a black/white bright-line rule, which will be easy to apply).

> In general…
> 1. A passive website is insufficient to confer jurisdiction;
> 2. Interactive websites… courts will look to the level of interaction and whether there is a commercial quality to the communications… jurisdiction is decided on a case-by-case basis;
> 3. Commercial websites that involve the sharing of data (think Itunes) is sufficient to confer jurisdiction.

VENUE – Once the Court has jurisdiction, the next question is (rarely) where we should actually have the trial. Timothy McVeigh, Kevin Coe.

Parties to a lawsuit (names remain the same whether civil or criminal).

Plaintiff – The person who is seeking something.
Defendant – The person responding to the plaintiff.
Appellant – The person, on appeal, seeks something.
Respondent – The person, on appeal, responds.

The Beginning…

A lawsuit commences (begins) when the COMPLAINT is filed in the trial Court.

COMPLAINT - A brief declarative statement of the allegations, and request for relief (typically $, but may be injunctive or equitable relief).

* Supreme Court has said that in Federal cases, the plaintiff must allege "concrete facts" which appear "plausible"– after which a judge will scrutinize the allegations using their "judicial experience and common sense", and dismiss cases which are meritless (Iqbal v. Ashcroft). Washington State has a similar standard.

Immediately after, a PROCESS SERVER gives the defendant a copy of the Complaint, and a SUMMONS. The individual must be personally served. If the defendant is a business, whom do you serve?

Can't find the Defendant: Service by Mail; Service by Publication.

SUMMONS – The invitation to the lawsuit: Greetings! You're being sued! Don't forget to RSVP The summons is generated by the Court.

ANSWER – The defendant must respond to the summons and complaint by filing an answer, which is a point by point "answer", e.g., "admitted", "denied". Each court has its own rules on how quickly you must file your answer with the court, so it's important to find out if you're sued.

DEFAULT JUDGMENT -- If you don't file your answer within the appropriate time, you will automatically lose by "default", and the court will enter a "judgment" (verdict) for the other side, assuming that you're just giving up. If you ignore the summons, procrastinate, or just forget about it…. you lose after a short ex parte (you and the judge) hearing, in which the Judge will swear you in and ask whether your allegations are true….and the defendant will then come after your money.

PLEADINGS – All documents that are filed with the court are, collectively, referred to as the pleadings (which are public records, available for your inspection). When you visit the court, obtain the case number (for a criminal case, it will look like this: 06-1-98098-3

SEA) and use the computers in the Clerk's office, on the 6th floor, to look up records relating to the case.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM / DEMURRER
A defendant may, after being sued and answering, request that the court throw out the case because the plaintiff's allegations, even if true, would not entitle him to win under the law. Policy Reason: To save costly judicial resources and not waste time.

This type of a motion generally does not require facts to be decided (because that's the function of a jury, if facts are in dispute). These motions generally assume the truth of the factual allegations made by the plaintiff.

EX. Statute of limitations.
Ex. Failure to State a claim.

PRETRIAL DISCOVERY

Motion to Produce – A demand to see, or have produced, documents, objects, reports, medical charts, etc.

Interrogatory – A set of written questions, prepared by the opposing side, which must be answered under oath, and in writing.

Deposition – Opposing attorney asks you questions, under oath, face-to-face, with a court reporter present.

Policy Goal: To facilitate the exchange of information so that everyone will know what the facts are. This should promote a pretrial settlement, thus avoiding the expenditure of costly judicial resources.

A subpoena is use to get a person to appear in court.
A subpoena duces tecum is a device used to get people to produce something for court.

SUMMARY JUDGMENT

After the discovery process is complete, there may be no disputes concerning that the facts are. If this is the case, then there is no need (in a civil case) for a jury (because the first job of the jury is to decide disputed facts) and the judge can simply apply the law to the facts and declare a winner. Policy goal: save costly judicial resources.

In criminal law, the defendant may make a similar pre-trial motion (request to the court) to dismiss the charges, by saying, "Judge, look at the facts the State says it will prove at trial, and assume they do prove them; even if they do, I should win." Occasionally, defendants do win. (Guy charged with voyeurism, who was taking photos of nude kids on a public beach.)

JURORS / JURIES AND THEIR DUTIES

Not all trials and judicial proceedings get juries.

Why? The function of the jury is to determine what the facts are. Jurors listen to testimony and decide what facts have been proven. Jurors do NOT research and decide what the law is; they don't question witnesses (that's done by lawyers).

Whether a case gets a jury is determined by Federal and State laws.

CIVIL CASES for money damages get juries if the amount in controversy is significant enough. In Federal Court the amount is $20 or more. In State Courts the amounts vary, and there is no FEDERAL Constitutional RIGHT to a jury trial in State court cases; that is controlled by individual State constitutions.

No juries are allowed in family law cases (divorce, child custody, etc.). There is no Federal statutory or Constitutional right to a jury in a state civil case; state law determines it. In most civil cases ¾ of the jurors must agree that the plaintiff has met their burden (preponderance of the evidence).

There is a Constitutional right to a jury in all CRIMINAL CASES, e.g., there is the potential for jail time. However, the Federal Constitutional right to a jury in a criminal case does not require that the jury be unanimous.

Washington = unanimous verdicts to convict in criminal cases.
Oregon = 10-2 to convict in a criminal cases. The Supreme Court affirmed this practice in (2009).
Burden of proof = beyond a reasonable doubt

Jurors are chosen at random from the community, based upon voter lists, driver's licenses, and state ID cards. Once jurors are assembled, they are again chosen at random and sent to a courtroom where jury selection (VOIR DIRE) takes place. Each attorney has the right to question prospective jurors.

Attorneys may excuse a juror (CHALLENGED FOR CAUSE) if the juror has a bias or cannot otherwise be fair and impartial. There are no limits to the number of challenges for cause.

Each attorney, in a superior court case, may excuse up to 6 jurors for any reason; this is called a PEREMTORY CHALLENGE. Attorneys may not excuse a juror based upon race or sex (Batson v. Kentucky).

The jurors' job is to decide disputed facts, and then to apply the law, as the judge gives it to the jury, to those facts, and reach a verdict.

Juries are sworn to follow the law, though they occasionally do not, and NULLIFY.

It is important to keep in mind that when there is a jury trial, it is the jury that gets to determine what FACTS have been proven; the judge does not do this.

The judge decides of what evidence is admitted (sometime after hearing arguments by the lawyers outside the presence of the jury). The judge regulates the admission of evidence, but the judge will never tell the jury "that fact was proven" or otherwise comment on the evidence.
Finally, the judge decides "questions of law", e.g., and give the jury "instructions" or "jury instructions" which are a summary or statement of what the law that they should apply to the case.

January 26, 2017 Lecture 8

CIVIL PROCEDURE DAY 2: THE TRIAL + Alternative Dispute Resolution

The Trial:

Whether it is a criminal case or civil case, **the plaintiff has the burden of proof**, e.g., the plaintiff has to prove the elements of the lawsuit by some quantum of evidence**. In civil cases the burden is a preponderance of the evidence** (more likely than not, and in criminal cases the burden is beyond a reasonable doubt.

Elements = the things that the law says must be proven…for a criminal case, for instance….

Review: Burden of proof…. Civil and Criminal cases.

OPENING STATEMENTS – Summary of what the evidence will be.

Plaintiff calls his witnesses first, because it's his burden. Plaintiff's lawyer will question these witnesses; this is Direct Examination.

Relevant Evidence = The Court will regulate what evidence the attorneys may present to the jury, and only allow relevant evidence, pursuant to the rules of evidence. Many of these decisions are made prior to the trial beginning. If there is a dispute concerning the presentation of evidence during the trial, the attorney may make an…

Objection = A dispute concerning the presentation of evidence. The judge will either say "sustained", meaning s/he agrees with the objection, or "overruled", meaning that the judge disagrees with the objection.

Cross Examination. The opposing party will then question the witness. The goal is to demonstrate that the witness has either a faulty memory, is biased in some way, or should not be believed because he or she has made contrary statements. There are some limitations on cross-examination.

Motion to Dismiss for Failure to make a Prima Facie Case
At the end of the plaintiff's case (civil or criminal) the defendant may ask the court to dismiss, arguing that even if all the plaintiff's evidence were believed by the jury or judge, and the law were properly applied, the plaintiff should not win either because the

plaintiff failed to prove a fact, or the facts proven were not proven by a sufficient degree to meet the burden of proof, or that the law, as applied to the facts, would require the plaintiff to lose. Policy reason for this rule: to save time and judicial resources.

The Defendant then calls his witnesses, and asks them questions. Plaintiff's attorney will then cross-examine them

At the end of the defendant's case, the defendant can again ask the judge to dismiss the case via a MOTION FOR A DIRECTED VERDICT. The same standard for a Motion to Dismiss (see, above) is used. Same policy reason applies.

Jury Instructions
The Court will provide the jury with jury instructions, which are the rules of law that the jury should apply in the case. Jurors are sworn to follow the law.

JURY INSTRUCTIONS.

WPIC 1.02A (Excerpts)

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial.

It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be.

You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses [, stipulations][, and the exhibits that I have admitted,] during the trial.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process.

You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Closing Argument / Summation
Lawyers have the opportunity to argue their cases before the jury. Comments on the "facts" and the law can be made.

Verdict
The jury will then deliberate. Ideally, the jury will reach a verdict. If they don't, it will be a "hung jury" and the court will declare a mistrial and the plaintiff will then have to decide whether to have the trial again.

Double Jeopardy
This concept only applies in criminal cases (not civil), and also does not apply to successive criminal-civil or civil-criminal cases concerning the same subject, nor does it apply to successive Federal-State or State-Federal criminal matters (because each is considered to be a separate "sovereign"). It only applies to successive criminal matters in the same system.

> Example: Def tried for murder and found NG. Later, lots more evidence is found, and defendant confesses to his friends while drunk at a bar. Cannot be tried again.
>
> Example: OJ Simpson. Criminal then civil ok (why that result? One answer is difference burdens of proof).

Collections – Show me the Money
Assuming that the plaintiff wins, he still has to collect money. While the court will enter an order, directing the defendant to pay, sometimes defendants are reluctant and the plaintiff will need to obtain:

Garnishment = taking money from the defendant's paycheck, or attaching property.

Order of Examination = under oath, deposing the defendant about where his assets are located (Cayman Islands, Swiss banks).

Bankruptcy (We will address this topic in greater detail later in the quarter)
Sometimes losing defendants will declare bankruptcy to discharge debts, including judgments. Often defendants try to shield assets by moving to favorable states like Florida or Texas.

Appeals
Court of appeals has multiple options, including "affirming", "reversing", "modifying" , "remanding with instructions".

ALTERNATIVE DISPUTE RESOLUTION

Trials are expensive and time consuming (often the result of procedural rules), and uncertain (do you really want a bunch of high-school graduates deciding complex anti-trust or intellectual property disputes? Wouldn't it be better if the parties agreed on a neutral and educated fact finder?.

But note: Sometimes consumers (i.e., you) unwittingly agree to ADR in lieu of traditional lawsuits. Consider… agreements you have already entered into.

ADR Methods:

1. Negotiation and settlement (frequently required, even if a lawsuit is initiated).

2. Mediation: A neutral third-party assists the litigants in reaching a resolution. Mediation is frequently required in contracts, if a dispute arises concerning the contract. Mediation is NON-ADVERSARIAL.

3. Arbitration: Binding (when the parties agree, usually ahead of time, to abide by the decision of an arbitrator), or Voluntary (parties agree to the procedure once a dispute arises.)
   A mini-trial (with our without lawyers) to a neutral "judge" whose decision is (for the most part) binding upon the parties. The result is more often (when compared to a trial) a compromise (because the arbitrator want to remain friends with everyone); and the result can seldom be appealed. Significantly (and in part because so many contracts included binding arbitration clauses) the Federal government has provided some possibly relief to aggrieved parties if:

a. The award was the result of corruption or fraud;
b. The judge was biased, or corrupt;

c. The actions of the judge prejudiced a party (refusing to hear evidence, for instance);
d. The arbitrator exceeded his/her authority.

The US Supreme Court has reiterated its desire for arbitration to continue; thus, in most cases the decision of the arbitrator is legally binding, and contracts calling for arbitration apply in both Federal and State proceedings. ALWAYS LOOK AT CONTRACTS TO DETERMINE IF SUCH A CLAUSE EXISTS; IF IT DOES, YOU WILL BE BOUND BY IT (though occasionally the terms of the agreement are so one-sided, courts will not enforce them – see the Hooters case, in the text).

NOTE: Arbitration involves giving up procedural "rights", e.g. the right you might have, for instance, to a jury trial. Arbitration does NOT give up substantive rights, e.g., your right not to be sexually harassed at work.

Arbitrators: Usually lawyers who are experts in the field, and who have a reputation for being neutral. Though non judges may be arbitrators.

Court-annexed arbitration is frequently required by court systems, prior to trial – but is not binding.

Use of Arbitration: Employment (union) contracts; consumer contracts; any other mutually agreed upon contract.

Arbitration has been criticized because the process often offers parties fewer protections than traditional litigation – but it is significantly less expensive.

First, agreements to resolve matters by arbitration will be responded by the courts – and treated as contractual obligations.

An arbitrators award, if not honored by the losing party, may be taken to an actual court and converted into a final judgment that carries the same weight at a jury verdict, or verdict by a judge. Thus, the winning party has essentially the same ability to "collect" damages in via arbitration as s/he would in litigation.

4. Neutral case evaluation: A knowledgeable third-party assesses the case, for the parties, and offers an opinion.

5. Minitrials: Non-binding "trial" before a neutral party, which issues an advisory decision which the parties then use to fashion, or reject, a resolution to their problem. The is helpful in complex cases (where a jury would be difficult), where

there is a core factual dispute (who, or what, is believable) and where there is a significant sum of money on the table.

6. Private trials: Similar to arbitration, but the "referees" report goes to the court, and either party can, essentially, tell the court "I'm not happy with this result, and I want a full trial."

7. Summary jury trials: Short trials (which focus on the key factual dispute), with a purely advisory "verdict" that is not binding on anyone. Helpful to the parties insofar as it provides a real-world assessment of the credibility of the parties' key fact witnesses (e.g., it tell the parties who, in the view of the jury, was believable – thus helping the parties assess their relative liklihood of prevailing in a real trial.)

8. Court annexed ADR – Mandated ADR by local court rule or statute, prior to trial. Only if the parties cannot solve their issue through this procedure are they allowed to take valuable trial time.

January 31, 2017 Lecture 9

Contracts

SHORT DEFINITION:

A contract is a voluntary agreement, supported by consideration, that demonstrates the intent of the parties to be bound by the agreement.

Contracts can be enforced by a court, the breach of which gives may give rise to money damages.

The non-performing party is:

(1) usually required to pay money damages

(2) but in some situations, where money damages are inadequate or cannot "make the victim whole", the court can require that the non-performing party perform the promised act.

WHY MAKE CONTRACTS?

Parties can create a greater degree of certainly within a relationship.

Without contracts, commerce would collapse.

Contracts provide the basis for individuals to sell or transfer property, services, or other rights. The purchase of goods is controlled by contracts.

WHO MAKES CONTACTS:

Private parties, governments, businesses.

WHAT ARE THE RULES OF MAKING CONTRACTS:

The terms of a contract become "private law" between the parties; court's must "enforce" these "private laws" to the extent that they do not violate public policy.

1. Public Policy: You can't make a contract to do something against public policy.

2. Contracts can include their own rules for enforcement, i.e., mediation, attorney fees.

3. THE UCC.

The Uniform Commercial Code.

Adopted, in all or part, by all 50 states.

The idea behind the UCC is to make things more consistent among the 50 states.

Where people are engaged in INTERSTATE COMMERCE, you don't want 50 different sets of rules.

Consider how difficult it would be for Boeing, which may buy parts from 30-40 states, to have to be familiar with 30-40 different state laws concerning contracts. Boeing would pay huge sums just to employ lawyers in these states to make sure it was acting within the law, thus making it less competitive.

Uniformity gives rise to greater certainty among contracting parties, for far less money.

The UCC covers a variety of topics.

A. The UCC covers SALES (the transfer of ownership of goods in exchange for $)
B. Leases
C. Commercial Paper
D. Securities

WHAT FORM MUST A CONTACT TAKE?

(The following examples occasionally can overlap)

1. ORAL (except for contracts required to be in writing pursuant to the Statute of Frauds)

2. WRITTEN (certain contracts must always be in writing pursuant to the Statute of Frauds

Examples include: employment contracts that cannot be completed within a year; the sales or real property.)

3. IMPLIED (from conduct, tradition, and customs: Ex. The delivery of grains, etc.)

4. EXPRESS – Spoken or written words to acknowledge a contract.

5. IMPLIED IN FACT – Raising your arm for peanuts at a ball game; peanut man throws them;
(Do NOT confuse a contract "implied in fact" with the non-existent "implied in law" contract; there is no such thing as a contract "implied in law".

6. FORMAL CONTRACTS – How a check must be filled out, pursuant to law.
Other areas that fall within the ambit of "formal contracts" include letters of credit (an agreement to pay a sum of $ upon the receipt of a bill of lading).

7. QUASI-CONTRACTS. This is an equitable doctrine whereby a court may award monetary damages to a plaintiff for providing work or services to a defendant even though no actual contract existed.

The doctrine is intended to avoid "unjust enrichment" or "unjust detriment".

http://www.bing.com/videos/search?q=quasi+contract&FORM=HDRSC3#view=detail&mid=41B4EEF39D150596E23A41B4EEF39D150596E23A

WHO ARE THE PARTIES TO A CONTACT?

Every contract involves at least two parties: the offeror and the offeree.

1. OFFEROR (The person making the offer: “I’ll pay you $1,000 to paint my garage”.)

2. OFFEREE (The person receiving the offer).

TYPES OF CONTACTS: BILATERAL AND UNILATERAL

Contracts are either bilateral or unilateral, depending upon what the offeree must do to accept the offeror’s offer.

1. BILATERAL CONTRACT: Both parties exchange legally binding promises to the other.

EX. I agree to help you find your dog for 4 hours, in exchange for $20. If we agree to this, and I help you look for the dog, you owe me the money. Note that no act of performance is necessary to create a bilateral contract.

UNILATERAL CONTRACT:
A contract is unilateral if the offeror’s offer can be accepted only by the performance of an act by the offeree. There is no contact until the offeree performs the requested act. It is, in essence, a “promise for an act”. Bilateral contracts are really only “potential agreements”. EX. “Ill give $20 to whoever finds my dog in the next 4 hours.” I only have to pay if somebody finds my dog in the next 4 hours. (Unilateral contracts cannot be revoked once the offeree has undertaken “substantial performance” of the contract. Ex: If I promise you $1,000 if you “complete” the Boston marathon, I cannot revoke the offer when you are halfway through the race.)

1. HOW DO YOU MAKE A VALID CONTRACT?

There are SIX requisites for a valid contract:

- Competent parties

- Mutual Agreement

- Genuine Assent

- Reciprocal consideration

- In form prescribed by law

- Legal formation and execution

COMPETENT PARTIES –

Each party must have the legal capacity to enter a contract.

If an incompetent person enters into a contract, the contract is VOIDABLE at the discretion of that person, or that person's guardian, etc.

A. Minors (those under 18)(these contracts are voidable at the discretion of the minor)

1. Competent party has duty of "restitution" to minor, e.g. putting the minor back in the same position as before the contract;
2. Minor also has duty to return property, etc., even if it has depreciated;
3. Some States require minor to also make restitution, to make the other party "whole".
4. Minor may ratify the contract by NOT trying to disavow it, and accepting its terms and consequences.

EXCEPT: Necessities of Life: medical, educational loans, military contracts, food, shelter, etc.

Also: Emancipated minors are able to contract for food/shelter, etc.

B. Mentally incompetent (schizophrenic, senile people, etc.) are not held to contracts. Test: objective ognitive "understanding" test – the person's mental incapacity must render that person incapable of understanding or comprehending the nature of the transaction. Mere stupidity does not meet this test.

Local car dealership….

C. Drunk/High – but only if "incapable of understanding the nature of the transaction at the time." The person NOT drunk must be returned to the status quo ante.

POLICY CONSIDERATIONS: Protect those who are not capable of making rational, intelligent decisions. The BURDEN is shifted to those who SHOULD KNOW that they

are dealing with someone unable to make an informed, rational (though sometimes dumb) decision. The more intelligent person is left with the risks that the contract is voidable.

MUTUAL AGREEMENT

The parties must come to a mutual agreement by OFFER and ACCEPTANCE (they must agree to THE SAME THING – and come to a MEETING OF THE MINDS). Contracts are judge by OBJECTIVE FACTS (what is SAID and WRITTEN, not what the party SUBJECTIVELY THINKS

EX. You have an expensive painting, and you tell me it was painted by a little know Spanish painter named Ricasso. The painting is signed by Ricasso. I think the painting was actually painted by Picasso, but don't tell you. I agree to your price, which is quite high for a Ricasso. I have the painting inspected. It's not a Picasso, but a Ricasso. My subjective believe, that I'm buying a Picasso, does not matter. Objectively, you agreed to sell, and I ageed to buy, a Ricasso. That's what I got. End of story.

THE OFFER:

A. An offer is "the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." Section 24 of the Restatement (Second) of Contracts. The following three elements are required for an offer to be effective:

1. The offeror must objectively intend to be bound by the offer;

2. The terms of the offer must be definite or reasonably certain;

3. The offer must be communicated to the offeree.

B. The offeror must objectively intend to be bound by the offer.

The intent to enter into a contract is determined using the objective theory of contracts: whether a reasonable person viewing the circumstances would conclude that the parties intended to be legally bound. Subjective intent is irrelevant. Therefore, no valid contract results from preliminary negotiations (Ex. "Are you interested in selling your car for $5?"), offers that are an expression of opinion, or offers made in jest are not reasonable.

Example: Drink Pepsi, Earn Points, Get Cool Things

http://www.youtube.com/watch?v=Ln0VSA9UJ-w&NR=1

The terms of the offer must be definite or reasonably certain

1. Identification of the parties;

2. Identification of the subject matter and quantity;

3. Consideration to be paid (See below);

4. Time of performance (painting house: how long is unknown);

5. Price (though this is sometimes unclear; lawyers services)

Occasionally, the Court may "imply" missing terms, but only if there is a reasonably certain means of ascertaining the missing term.

For instance, the "price" of a stock listed on the New York Stock Exchange may be "implied" if the contract includes a provision that the stock be sold at mid-day, according to the current "price".

The offer must be communicated to

the offeree.

Example: suppose Bill Gates, on behalf of Microsoft, was thinking about buying your startup company, and Bill had the papers drawn up, offering you a million bucks, and the offer was sitting on Bill's desk – but had not been sent. While visiting Bill, at his office, you see the contract on his desk…and immediately state "I accept the offer". Sorry, Bill never made the offer.

ADVERTISEMENTS

…are not offers, but "invitations to make an offer" Policy rational: to protect advertiser-sellers from the unwarranted breach of contract suits if the seller ran out of goods.

Exception: when car dealers advertise specific cars, with VIN numbers, at specific prices…but the dealership will always not "subject to prior sale", protecting them once the car listed is sold.

REWARDS
are offers to form unilateral contract. Offeree must have knowledge of the offer, and perform as required. Example: Good citizen who finds briefcase, with name of person who lost it, calls owner to return it, then does so. Because citizen not aware that there was a reward associated with the return, not entitled to reward.

THE ACCEPTANCE --

A positive response of a mirror image of the offer. Any material deviation does not constitute acceptance.

EX: "I'll pay you $50 to paint my garage."

You respond by saying "I'll do it for $75".

No contract yet; just a counteroffer.

However, if you respond with "OK, I'll do it", a contract is created.

ONLY OFFEREE MAY ACCEPT THE OFFER. Policy rational: quality of work.

SILENCE usually does not operate as acceptance. There are some exceptions to this rule. Think of "CD Clubs" that you sign up to get 10 free, then buy 10 over the next year. They will often send you CDs, which you may return. By NOT returning them, you "accept them".

LIMITATIONS ON THE OFFER:

TIME. Offers are generally open for a reasonable amount of time, but the offeror may indicate that the offer terminates at a set time.

EX. OPTION CONTRACTS

A separate "contract" to keep the "option" to buy, open for a set period of time. The death of either offeror or offeree will not terminate the subject of the option during the time period.

OFFER MAY BE REVOKED ANY TIME PRIOR TO ACCEPTANCE.

This is true even if the offeror initially promised to keep the offer open for a set period of time, and decides to revoke it prior to the time running. Revocation may be accomplished by either telling the other party "the offer is revoked."

REJECTION of the offer terminates the offer. Ex. If I offer you my car for $5,000, and you decline it, then change your mind a week later, and call me to say you will accept the deal, it's too late. There is no offer on the table at this point.

COUNTEROFFERS
Terminate the initial offer.

DESTRUCTION of the item, through no fault of the offeror, terminates the offer. Ex. If the building, which is the subject of the sales contract, burns down, the offer to sell it ends.

DEATH of either offeror or offeree terminates the offer.

SUPERVENING ILLEGALITY
This will also terminate offer.

Ex. If legislature bars interest rates of more than 18% (called "usury") any outstanding "offers" to loan money for 21% would be terminated.

GENUINE ASSENT – both parties have to voluntarily enter into the contract.

A. No undue influence (taking advantage of someone b/c of relationship –

Client consults attorney about valuing his business, to sell it. Attorney places a low value on it, then arranges the sale of the business to the attorney's son. Undue influence.

B. Duress: I won't let you go until you sign the contract. Think of Tony Soprano making somebody "an offer he can't refuse".

C. FRAUD: (The essential elements of which are)

1. False representation (lie), involving a material fact (something that is important);

2. Wrongdoer intended to deceive the other party;

3. Innocent party relied upon the misrepresentation

4. Innocent party was injured.

DAMAGES: Rescind the contract, sue for compensatory damages, some states have CONSUMER PROTECTION LAWS W/TREBLE DAM.

Innocent misrepresentations are not fraud.

D. MUTUAL MISTAKE

If both parties are wrong about a central assumption, that is a mutual mistake.

EX. Bilateral mistake (both are thinking about something different): Two ships with the same name – both parties think of a different ship: Peerless.

BUT: Unilateral mistake: not grounds to void a contract.

RECIPROCAL CONSIDERATION

That which induces both parties to contract.

Each party gives something, and each party receives something / or /

OR

A contract is considered supported by legal value if

(1) the promisee suffers a legal detriment, or

(2) the promisor receives a legal benefit.

Examples:

(1) a return promise to pay money or give a service

(2) a forbearance (not doing something you have a right to do) THE CASE WHERE THE UNCLE PROMISED $ TO NOT SMOKE

(3) the creation or destruction of a relationship (divorce, partnership)

By this test, a promise to make a gift is not legally binding UNLESS it is a pledge, AND the person getting the gift/pledge has relied upon it.

Example: Pledge money for the construction of the new Business School. Relying upon the pledge, the UW starts construction. I am bound to give the money. This is based upon a policy.

This is the doctrine of "Detrimental reliance or Promissory Estoppel" to avoid unjust enrichment of one party, in injury to the other.

Mom says "I'll give you $100".

Not a contract or enforceable.

BUT

Mom says "I'll give you $100 if you get a 4.0 in MGMT200".

You get the 4.0.

You get $.

While $ is typically the "consideration" on one side or the other of a contract (and is therefore the most common form of "consideration," it's entirely possible for a valid contracts to exist where consideration is entirely free of money.

Suppose you enter a contest by creating and submitting a video, and the sponsor promises a prize to the winning entry, on condition that you give the sponsor all rights to your video (it's the "price" of entering the contest).

Is that "consideration"? Sure.
What would the agreement look like?

One student in class entered this contest… and won…

https://www.teamtransamerica.com/promotions/trickshot/gallery/bangers

But by entering, he lost control of his video, forever….

LEGAL FORMATION AND EXECUTION

The contract must be LEGAL in its form and proposed execution.

Illegally formed contracts WILL NOT BE ENFORCED BY COURTS.

Contracts – MAY NOT BE CONTRARY TO A STATUTE, OR PUBLIC POLICY.
Can't contract to "break the law"

EXAMPLES:

Usury (can't charge illegally high interest rate).

Can't contract to lie in court, not show up

INSURABLE INTERESTS…

what does that mean?

Essentially, that the party purchasing the insurance will lose something if the person insured dies or becomes incapacitated and unable to work. If this test is met, the contract meets the "legal formation" test.

LICENSING…

if the State (legitimately) requires a person be licensed to do a job, and person is not licensed, the contract made by the unlicensed person is invalid (UNLESS the true purpose of the license was to simply raise money by the government).

Usury – Charging too high interest rate. Loan sharks can't go to court to get relief.

Hold Harmless (or, ski at your own risk clauses; look at your ticket this winter).

These are generally enforceable absent gross negligence. BUT if these are part of an ADHESION CONTRACT (clearly one-sided, with a dominant party with vastly superior bargaining power, typically offered as a "take it or leave it" proposition) – courts may find this agreement "shocks the conscience" and not enforce it.

IN FORM PRESCRIBED BY LAW –

Not all contracts need to be in writing, but certain statues and laws require that certain types of contracts be in a specific form. Unless the contract is in this form, the contract is not valid. The major rule is the

STATUTE OF FRAUDS –

Requires that contracts for

SALE OF LAND, OR INTEREST THEREIN;

IN SOME STATES, INCLUDING WASHINGTON, A LEASE OF MORE THAN ONE YEAR;

SALE OF TANGIBLE GOODS WORTH $500;

CONTRACT THAT CANNOT BE PERFORMED W/IN ONE YEAR

1. BE IN WRITING

2. SIGNED BY THE PARTY AGAINS WHOM ENFORCEMENT IS SOUGHT

PAROLE EVIDENCE RULE
If the contract is in writing, the Court will not look beyond the contract, e.g, it will not consider testimony concerning oral side-agreements or understandings, or oral agreements that terms will be construed differently than what is in the written agreement.

ENFORCEABILITY OF CONTRACTS

CONTRACTS ARE DESCRIBED AS BEING EITHER ENFORCEABLE OR VOID.

1. ENFORCEABLE CONTACT (or a "valid contract"). This is a contract that meets all of the essential elements to establish a contract.

2. VOID AGREEMENT OR CONTRACT—A failed attempt to make a contract. A void agreement has no legal effect. It is as if no contract had ever been created. For example, a "contract" to commit a crime is void; neither party is obligated to perform.

3. VOIDABLE AGREEMENT – A voidable contract is one where at least one party has the option to avoid his or her contractual obligations. If the contract is avoided, both sides are released from their obligations under the contract. Ex. A minor, under 18, may void a contract even if the contract is otherwise valid, because minors are not allowed to contract. However, if the minor voids the contract, then the other side is also released from it, but the minor will have to pay restitution.

4. UNENFORCEABLE AGREEMENT – Occurs where there is some legal defense to the enforcement of the contract. Ex. The statute of limitations may forbid enforcement: Most states allow merchants to sue to enforce a credit agreement only w/in 4 years. If I don't pay my credit card bill for 5 years, and VISA hasn't sued me yet, they may not be able to, because too much time has passed.

THE RIGHTS AND DUTIES OF EACH PARTY TO A VALID CONTRACT

"Privity of contract" – refers to the relationship of those parties within a contract.

There may be "third party" beneficiaries to contracts – life insurance proceeds, for instance.

Each party to a contract ordinarily has the right to ASSIGN the contract to another person, who will then be responsible for performing the contract.

EX. I want a home build on my property:
I hire a general contractor, who then goes about hiring subcontractors. The general is responsible to me, but the sub-contractors (electrician, plumber, etc.) are responsible to the general contractor.

Rule: Make sure your general contractor is bonded, e.g., has money in an escrow account in case he is sued.

HOW DO YOU CLASSIFY OR DEFINE WHETHER A CONTRACT HAS BEEN PERFORMED

1. EXECUTED – After a contract has been performed, it is said to have been EXECUTED.

2. EXECUTORY CONTRACT – If something remains to be done by one of the parties, the contract is said to be an executory contract.

DISCHARGING A CONTRACT

A contract is discharged when it is PERFORMED. The rights and duties of each party to the contract are terminated upon discharge.

If a contract isn't fulfilled as originally promised, the details may be changed and the contract still discharged by ACCORD AND SATISFACTION.

This means that there is another agreement between the parties, which satisfies both.

OTHER MEANS OF ENDING A CONTRACT INCLUDE

Subsequent illegality

Bankruptcy (this will be/bas been discussed)

Impossibility (personal service contract where one party dies)

Commercial impracticability: Finding solid granite where you need to pour the foundation for your new home

BREACH OF CONTRACT

This occurs when one party cannot/does not perform, in which case a LAWSUIT may be filed; the victim may then CANCEL the contract w/no liability.

Breach of contract is not a crime, and USUALLY not a tort.

COMPENSATION

1. Defaulting party usually required to pay COMPENSATORY DAMAGES to Put the other party in THE SAME POSITION THAT HE WOULD HAVE BEEN IN HAD THE CONTRACT BEEN PERFORMED.

2. Punitive damages if a TORT corrupted the contract. THE INSIDER

3. ATTORNEY FEES generally not awarded for breach of contract, but the contract itself may make provision for these to be paid.

LIQUIDATED DAMAGE CLAUSE. Some contracts will contain a clause that sets for the damages.

If I promise to build your home by Dec. 1, fine; if I go beyond that date, I owe you $75/day (for hotel expenses.)

EQUITABLE RELIEF. The Court may order a party to fulfill a contract, or deliver something unique that was the subject of a bargain (Picasso painting).

http://www.nytimes.com/2013/11/13/business/starbucks-to-pay-kraft-2-75-billion-ending-broken-deal-dispute.html?module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A9%22%7D&_r=0

Feb 7, 2017 Lecture 11

TORTS – DAY I

A **private wrong** (other than breach of a contract), by **either intentional or unintentional conduct**, committed by one person, corporation, business entity, or association (the tortfeasor) **that injures another person**, business entity, corporation, or association or their property, for which the law allows the legal remedy of monetary damages. **Torts, alone, do NOT lead to jail**.

The goals of tort law are:

(1) to compensate the innocent party and
(2) to a lesser extent, deter similar conduct by the same defendant or others.

THREE TYPES OF TORTS

Intentional Torts
Where one person intentionally injures another (occasionally, but not always, a crime).

Torts based upon Negligence
Most torts occur when one person acts in a negligent manner, i.e., a careless manner, inadvertently causing an injury to another person. A person is negligent is he or she breaches a duty of care that results in harm to another person.

Strict Liability Torts:
Certain torts where the fact of injury means that somebody has done something wrong

(Ex. Surgeon leaving a medical instrument inside the belly of a patient during surgery – yea, it's happened.)

(Ex. The producer of a product will be held strictly liable for harm sustained by a purchaser's use of the product as long as the purchaser used the product as intended.

MULTIPLE VICTIMS AND TORTFEASORS
Tortfeasors – There can be more than one tortfeasor/defendants (joint tortfeasors). They can be brought into the lawsuit by the plaintiff -victim or the defendant.

Example: Plaintiff-victim can file a case against multiple defendants.

Example: Plaintiff-victim files a case against one defendant, and then that defendant joins/sues other defendants, claiming they contributed to the problem.

MULTIPLE VICTIMS = CLASS ACTIONS
Large groups of injured persons, who are similarly situated, can obtain redress in a single lawsuit, rather than filing hundreds or even thousands of separate suits.

Wal-Mart (2011)

The rule announced by the Supreme Court requires that the class members share the same legal theory. Wal-Mart case involved many women claiming Wal-Mart had a policy of not advancing women. Court said that was too broad, and that each women had unique facts.

The tobacco lawsuits.

Many small problems (long distance companies that round up).

A few large problems (Georgia-Pacific siding).

TORTS BY NEGLIGENCE

1. Violation of a statute (NEGLIGENCE PER SE) / criminal or civil / is proof of negligence. Often, the government will place affirmative requirements on the producers of products (flame-retardant materials on mattresses, and pajamas, for instance), the failure to comply with such requirements = negligence per se.

   Example: Car accidents, tickets, and a judicial finding of liability.
   Only question is damages.

2. What happens when there's no statute…

THE ELEMENTS OF A LAWSUIT BASED UPON NEGLIGENCE:

The Plaintiff must prove, by a preponderance of evidence:

1. That the Defendant owed a duty of care (ordinary care) to the person injured (plaintiff); Courts apply the "reasonable person" standard.

2. That the Defendant breached the duty of care through his or her unreasonable conduct, e.g., an act or omission.

3. That the Defendant's breach of duty of care was both the ACTUAL AND PROXIMATE CAUSE of the victim's injury, e.g, there is a causal connection between the improper conduct and the harm resulting to the injured party;

4. That the injury justifies an award of damages (in other words, the victim has demonstrated some real economic loss, or damage, that might include pain and suffering), and that there is no social policy that should result in the defendant not being liable.

NOTE: "intent" to harm is not required for a tort based upon negligence.

A. THE DUTY OF CARE.

1. Every person must operate as a "reasonable person", and use ordinary care in how we interact with others.

> Statutory Duty of Care. In some cases, an affirmative "duty of care" is provided for by law, and this duty of care provide for a different and usually higher standard of care.
>
> Example: Stockbrokers' – "Suitable investments" standard.

2. FORESEEABILITY.
Without foreseeability, there is no duty of care, and thus no tort. We only owe a duty of care to those people / things that a reasonably prudent person would foresee as potentially injuring others through negligent acts or omissions.

Social Policy: We don't hold people liable for unpredictable and unexpected consequences of their actions.

Example: Should we blame President Eisenhower for global warming.

B. DID THE DEFENDANT BREACH THE DUTY OF CARE?

THIS PART OF THE TEST REQUIRES A "FACT" TO BE PROVEN BY A PREPONDERANCE OF THE EVIDENCE

The failure to act as a reasonable person may result from ACTS / OMISSIONS / CARELESSNESS / RISKY ACTIVITY W/OUT CAUTION

Test: Did the defendant either

(1) do the act that was unreasonable,
under the circumstances; or

(2) not do an act which a reasonable
person should have done under the circumstances.

C. CAUSATION:

The defendant's conduct must be both the actual and proximate cause of the victim's injuries.

A. Actual Cause Test:
Would the injury have occurred "BUT FOR" the defendant's conduct.
"**Sin qua non**" rule, latin for "most important element"

B. Proximate Cause Test:
Did the act actually cause the injury?
Proximate cause = the true cause which, in a natural and continuous sequence, caused the injuries. Proximate cause will be found if there is the ability to see or know, in advance, that the harm or injury is a likely result of the acts or omissions.

Social Policy – how far back to we go. To be the proximate cause, it must appear to just and fair, to hold the defendant liable the injury that resulted.

C. Some States, like California, use an alternative test to the traditional proximate cause test: they use the "substantial factor test," e.g., would a reasonable person believe that the defendant's negligent conduct was the cause of the injury?"

D. INTERVENING AND SUPERSEDING CAUSES MAY AFFECT THE DEFENDANT'S LIABILTY

If an independent force happens AFTER the Defendant's negligent conduct begins, and an injury results that could not have been foreseen, the original wrongdoer is not liable for the entire result.

EX. I'm driving drunk and hit you, while you're riding a bike, causing minor injuries. A man stops, offering medical aid, but his negligent treatment causes much worse injury. This is an intervening cause.

Good Samaritans must use reasonable care under the circumstances. They are generally shielded by state laws…from being sued if they injure somebody while acting as a reasonable person would act.

E. Res Ipsa Loquitur ("the thing speaks for itself") – Special Rule.

This doctrine permits the jury to find the defendant liable in a tort case provided that:

1. The event at issue doesn't usually happen without somebody being negligent;

2. Parties other than the defendants have been ruled out as being negligent;

3. The negligence at issue is within the scope of defendants' duty of care to the plaintiff.

Under these circumstances, either the defendant is liable, or in the case of multiple defendants, they can argue among themselves who is liable. Example: An airplane crash.

D. THE INJURY REQUIREMENT:

No injury = no tort = no recovery (remember Paula Jones….)

To recover damages, the person injured must have suffered some loss, harm, or invasion of a protected interest.

Why? Purpose of tort law is to compensate people for their injuries. If there is no injury, then there is no tort.

Also, there must not be a social policy (public policy) that says that the plaintiff is not entitled to damages.

Example: workers compensation programs, discussed below, which provides for a comprehensive scheme to compensate injured workers, and in return they may not sue the employer if they are injured on the job.

DEFENSES TO NEGLIGENCE

ASSUMPTION OF RISK.
If you voluntarily put yourself in a dangerous situation, and are injured, you can't sue to recover damages.

Example:
Sports: A boxer who is injured.
A fan is hit by a Barry Bonds, steroid-fueled home run.

Up until the summer of 2014, I used the following example to illustrate the point that:

But now…
http://www.tmz.com/videos/0_iw7mvdgm/

COMPARATIVE AND CONTRIBUTORY NEGLIGENCE

Contributory negligence rules often made/make it impossible for plaintiff's to recover anything if they were even minimally at fault. Still, some states continue to operate under this regime.

Comparative Negligence is the rule in most states. If can be broken down further, into "pure comparative negligence" (damages split by % each party is found to be at fault) and "modified comparative negligence", where the rules is the defendant be MORE negligent than the plaintiff, or the plaintiff recovers nothing.

Example: Walking home from Finns at 2:10 a.m…. and cross the Ave in a place where there is no crosswalk…and…

See Damages, below.

LIABILITY WAIVERS

People can waive rights… to a limit. You can't waive rights that are established via public policy. Example: Rental agreements and landlord negligence.

A sound waiver should include the following:

1. Disclaimer in a prominent place;
2. Standard print size;

EXAMPLES OF SPECIFIC TORTS BASED UPON NEGLIGENCE.

1. PROFESSIONAL LIABILITY / ALSO KNOWN AS "SERVICES LIABILITY" OR MALPRACTICE LIABILITY

The same general test for negligence is used, but the part of the test that establishes the "duty of care" is modified as follows:

> "The failure to use that degree of care, learning, and skill ordinarily possessed and applied by the average prudent member of the profession (and sometimes "in the same locality").
>
> Why sometimes "in the same locality"?
>
> Accountants
>
> Test at issue is modified by statutory requirements defining standard of care.
>
> 1. How does the accounting business work?
>
> 2. What is a "conflict of interest"? And how might conflicts of interest lead to either negligent, reckless or intentional misconduct of accountants?
>
> 3. Should accountants be liable to third parties in such cases?
>
> Third party liability:
>
> In accounting cases, the big question is who the duty of owed to, because that will establish who is able to bring a lawsuit in the event of an error. (The legal doctrine at issue is called "standing".)
>
> The accountant's employer is always able to sue the accountant because of "privity" (the contractual relationship); this is known as the "ultramares doctrine".
>
> But what if you read a prospectus that relied upon negligent accounting, invested in the company (Enron…) and lost everything? Shouldn't you be able to sue the accountant too?
>
> Some states allow you to, because you are the "intended user" of the information prepared by the accounting firm. NOTE: this may or may not include a possible investor in the company.

A minority of states find "standing" (allowing YOU to bring a lawsuit against an accounting firm for negligence) if it was reasonably foreseeable (general tort rule) that you would use the information.

4. Doctors: Policy Implications:

Defensive Medicine: Doctors do more tests than are necessary. Certain OBGYNs w/not deliver "high risk" babies. Fear of being sued by trial attys. Who pays?

2. PREMISES LIABILITY

The duty of care we owe, as landowners, renters, and merchants, is determined by how our guests are classified:

Trespassers (uninvited, unwanted)
- no spring guns
- no duty to warn of dangerous natural conditions
- if you know trespassers come, duty to warn of man-made risks

Guests of home / apartment occupants.

People who are present at your invitation, or with your permission are known as licensees. The home or apartment owner owes these people a DUTY OF REASONABLE CARE, e.g. such things as cleaning the snow off the steps to the front porch, if you're having people over. However, it doesn't include an obligation to check for dangerous hidden problems.

Customers in Business Premises.
The people are known as INVITEES. Owner owes these people a high degree of care: owners must inspect for any dangerous conditions, even if they are not obvious, and correct them or warn patrons.

Safeway patrons slipping on water, etc.

TORTS BY INTENTIONAL CONDUCT

Deliberate, intentional conduct by one person, that injures another person, is an intentional tort.

The defendant's action must be intentional, and voluntary (motive does not matter).

Defendants must also be shown to have known, or should have known, about the consequences.

This differs from either negligence or strict liability torts.

Examples are:

1. Assault (and, by extension, the entire gamut of intentional crimes).

   EXAMPLE: TOD WAS BURGLARIZED!

Note that "assault" is both a crime, as well as a tort, and the offending party can face both a civil lawsuit, as well as criminal prosecution. Assault = apprehension or fear; battery = actual harmful or offensive contact. In Washington State the two concepts are merged and the law speaks only of "assault".

The burden of proof is different depending upon civil/criminal.
Recall the only the government can start a criminal case, and only criminal cases can lead to a loss of liberty

   OJ Simpson. Enough said.

2. INTENTIONAL TORTS AGAINST PROPERTY

A. Trespass to Realty / Trespass to real property. Using another's land without permission.

B. Trespass to personality (using or interfering with another person's property for a short period of time).

C. Conversion (More commonly thought of as Theft). Includes the theft of tangible and intangible property, e.g., taking your classmate's laptop or Ipad, AND the re-recoding of music, and distribution of it to friends.

February 28, 2006
RIAA Announces New Round Of Music Theft Lawsuits
WASHINGTON, DC – Continuing its ongoing efforts to protect the recording industry's ability to invest in new music and further the success of legal online services, the Recording Industry Association of America (RIAA), on behalf of its member companies, today announced a new round of copyright infringement lawsuits against 750 individuals. The "John Doe" lawsuits filed today cite individuals for illegally distributing copyrighted music on the Internet via unauthorized peer-to-peer services such as LimeWire and

Kazaa. In addition to the new "John Doe" litigations, the major music companies filed lawsuits earlier this month against 210 named defendants in Arizona, California, Georgia, Illinois, Michigan, New Jersey, New York, Pennsylvania, Texas, Virginia, Washington, and Wisconsin.

3. False Imprisonment / Wrongful Arrest.

This is unusually by physical force, but it's not required (coercion will suffice).

Merchants stop shoplifters, provided they act reasonably (e.g, reasonable basis to stop; stop is for a reasonable time; and detention must be reasonable).

But what if the merchant is wrong, or acts unreasonably? Lawsuits.

Example:
WASHINGTON
Clothing retailer Eddie Bauer last week dropped its appeal of a $1 million award to three black teenagers who had charged the company with defamation, racism, and false imprisonment after an Eddie Bauer security guard detained them for suspected shoplifting in October 1995.
The company settled with the youths for an undisclosed sum, according to the Reuters news agency.
The teens, one of whom was forced to remove an Eddie Bauer shirt he had purchased previously until he could return with a receipt, originally sued the company for $85 million, saying the incident was racially motivated.

4. Intentional Infliction of mental / emotional Distress.

Example:

Creditors harassing you to pay bills. This also violates Federal law.

5. Invasion of privacy (four separate torts)

A. Appropriation: Using a person's likeness without permission (usually in a business context).

Let's say you wanted to start a lecture note service, taking notes in Steve Sefcek's accounting class, and you did so without getting his permission AND you

included a photo of Steve on cover, with him making a big thumbs-up sign. The inference is that he endorses it, but that's not true. You've improperly appropriated his likeness for commercial purposes.

This happens a lot with celebrities (and using look-alike imposters)

B. Intrusion into solitude

Example:
Washington State's one-party wiretap statute. Compare with Linda Tripp, of Monica Lewinsky fame.

Ralph Nader and GM

C. False light.

Publishing something with significant misinformation.

D. Public disclosure of private facts;
In almost all cases the privacy interest is statutory, e.g., there is a law that provides for a civil (and possibly criminal) cause of action for the disclosure of private information.

Example: Disclosing "arrest data" in Washington State.

Example: Suicide of college student who was secretly filmed by roommates, in a same-sex encounter, which was posted on YouTube.

6. Defamation

Libel (written), slander (spoken) and the related idea of DISPARAGEMENT

In the business world, this often comes up when references are too honest in expressing the opinions about former (poor) employees. This is the reason why many businesses do not allow information beyond the "fact of" employment to be provided to potential new employers.

REVIEW FROM FIRST HALF OF CLASS: *** FAIR GAME FOR EXAM

LIBEL = Plaintiff bears the burden of proving by a preponderance of the evidence:

1. That the libel was communicated to a third person (or, the press is the defendant, it must be "published")

2. That the plaintiff was identified (this is an element, even though the text only implies as much)
3. That the words were defamatory***, e.g. it causes harm to the plaintiff
4. That the defamatory statement was false (this is sometimes considered a "defense" to the tort.

***Defamation per se
Some statements are presumed defamatory, and the plaintiff need not prove that they were injured. Allegations of criminal conduct, or criminal business dealings would fit this test.

Note that when the party being sued is the PRESS, the First Amendment is triggered as an additional, Constitutional protection given to the defendant, and requires that the plaintiff prove elements not necessary when a non-press party is the defendant.

PROVING "FAULT"

a. Public Figures - or those who Hold Office

Publication must be knowingly false or published with reckless disregard as to whether it was true or false (ACTUAL MALICE TEST)

Note that the fact finder (jury) makes the decision about whether or not a person is or is not a public figure. Public figures may be "limited", or general.

b. Non-public figures
the publication was negligent

The related tort of DISPARAGMENT occurs within the economic or business setting, usually when companies are competing against each other for market share, and often when they are engaged in comparison "testing". Think: Coke v. Pepsi. More recently, the battle between Progresso and Campbells soups over which was healthier and had a lower overall sodium content.

The elements of this intentional tort include:

1. Knowingly false statement of material fact about the business (typically the statement relates to quality, honestly, or reputation of the business;
2. Publication
3. Resulting HARM to the business;
4. And actual economic loss that results from 1-3 above.

For next class: What are your thoughts on the woman who won 2.8 millions dollars from McDonalds after spilling coffee on herself, and getting burned?

END OF LECTURE NOTE FOR FEB 7

Feb 9, 2017 Lecture 12 TORTS DAY 2

FRAUD (which we will also discuss in the section on contracts)

Elements of Fraud:

1. Knowing, False statement
2. Which is intended to deceive the other party;
3. about a material fact (a fact that matters)
4. Which induces reliance
5. And causes damage
6. That are causally related to the misstatement
7. there are damages.
8. There is privity (a relationship that created legal obligation) between the parties.

INTENTIONAL INTERFERENCE WITH A CONTRACTUAL RELATIONSHIP.

Example: The Insider (Dr. Jeffrey Wiegand + 60 Minutes + Tabacco)

http://www.youtube.com/watch?v=6wwJp8VDGzE

Example: Luring an employee from a competitor, if the employee has an employment contract. Think NBA/NFL, or lesser companies.

Note: Same concept applies to prospective advantage, e.g. interfering with another business in an unreasonable way. Example: Book posits idea of stationing your sales force outside a competitors' front door….

Example: Your sales force works on commissions paid at time contract is signed. Your top sales agent brings in a big client, ready to sign. You fire the agent 5 minutes before the signing – so that the agent doesn't get the commission, you do.

STRICT LIABILITY TORTS

In some circumstances, as a matter of public policy, certain people and businesses MUST compensate persons who are injured by their products, services or activities. The victim need not prove an intentional tort, or even a tort based upon negligence.

Animals:
Wild animals = strict liability.
Domestic animals only if known to be vicious (one free bite rule).

Recent News Stories: Attempts to ban breeds; hold owners criminally liable.

PRODUCT AND SERVICE LIABILITY LAW

Mattel and lead paint / quality control issue NPR
http://www.npr.org/templates/story/story.php?storyId=14176496

OLD DAYS….

Privity protected manufacturers… with unfair results.

The rule of "caveat emptor" further aided manufacturers.. and was endorsed by the Courts.

SIDE NOTE: Does "caveat emptor" continue to be a rule we live with today?

Who has been parasailing? Where?

http://www.nytimes.com/2012/08/23/us/parasailing-death-in-florida-renews-a-push-for-regulation.html?_r=1&ref=todayspaper

MODERN RULES… Protect consumers.

Privity is no longer required: "The manufacturer of a product is liable in the production and sale of a product for negligence, if the product may reasonably be expected to inflict harm on the user if the product is defective." McPherson.

PRODUCT LIABILITY TORTS

Product liability law is a sub-set of torts; it is not a separate area of the law. As a result, everything we've learned about the subject of torts applies to "product liability" law.

Product liability law embraces traditional principles of tort law, like "negligence,"

e.g., a manufacture must use reasonable care in:

1. Designing
2. Manufacturing
3. Inspecting for defects
4. Alerting buyers if defects are discovered after sale
5. Presenting or advertising the product
6. Warning of dangers

But this area of the law also introduces new and unique principles, such as "breach of warranty" and "strict product liability" law.

Negligence – and the test (outlined above) apply.

STRICT LIABILITY TORTS – Focus on Restatement 3rd (page 335)

The focus is on the product at issue, and the rule applies to product INJURY cases, where a person using a product is hurt.

The (1) manufacturer AND (2) distributor AND (3) seller of a product may be held **STRICTLY LIABLE** if the product…

TEST:

1. Is defective when, at the time of sale or distribution, it

   a. contains a **manufacturing defect**, e.g, it departs from its intended design

   b. is defective in **design**

      // A product is defective in design when the foreseeable risks of harm posted by the product could have been avoided by the adoption of a reasonable alternative design, AND the omission of the alternative design renders the product not reasonably safe.

c. or is defective because of

1. **inadequate instructions** or

// A product is defective when the foreseeable risks of harm could have been reduced or avoided by the provision of reasonable instructions or warnings, AND the omission of the instructions or warnings renders the product not reasonably safe.

2. warnings.

// if the manufacturer knows of a danger caused by the products use that cannot be prevented entirely, but which users should be warned against, AND failures to warn about problems that become known after the product has been in use for some time.

http://www.bing.com/search?q=mr+yuck&src=ie9tr

"Mr. Yuck

NOTE: Emphasis is on the risk-utility balancing, e.g., utilitarianism

THE PRODUCER OF A PRODUCT WILL BE HELD STRICTLY LIABLE FOR HARM SUSTAINED BY A PURCHASER'S USE OF THE PRODUCT AS LONG AS THE PURCHASER USED THE PRODUCT AS INTENDED.

Market Share Liability / or Joint and Several Liability

What if multiple defendants manufacture a fungible (e.g., asbestos) product that is later shown to be dangerous, but it's impossible to demonstrate which manufacturer made the product that the plaintiff was exposed to? Does the inability to demonstrate who the true guilty party was preclude recovery? No. We look to the share of market that each major manufacture controlled at the time. Before this applies, a test is used:

1. All defendants must be tortfeasors.
2. The harmful products are identical.
3. Plaintiff, through no fault, cannot establish exact tortfeasor.
4. All manufacturers sold product in same geographic area at same time.

DEFENSES TO PRODUCT LIABILITY LAWSUITS

1. Product Misuse
   If a product is misused, or used in an improper or unforeseen manner, or not maintained properly, the plaintiff may lose.

2. Assumption of risk (consent).
   The tobacco litigation…

3. Sophisticated Users (experience v. inexperienced users of product)

4. Federal Preemption.
   The idea here is that if a product is regulated by the government, and the government has to approve the item (for instance, drugs must be approved by the FDA) and the government does approve the item – but the item is later shown to be unsafe, does the government's imprimatur of safety (that it meets government regulations) absolve the company from liability in manufacturing an unsafe product?
   The Supreme Court has been skeptical:
   http://www.npr.org/templates/story/story.php?storyId=101465350

   But note that the area is very complex, and if there is a specific federal law requiring companies to make a specific warning, and the companies follow it, there cannot be a claim of an improper failure to warn.

5. Statute of Repose
   Time limit on products (no airbags in old cars)
   This limits the time period for which a tort can be brought by looking back to when the product was purchased by the consumer.

6. State of the Art Defense
   Manufacturer may show that, at the time it produced the product, the product was reasonable given the available scientific evidence.

"Social Policy" Exceptions To Certain Torts:
WORKERS COMPENSATION -
Injured workers receive (1) all medical for injuries suffered on the job; temporary disability; vocational training; legal assistance. These claims are handled by an administrative hearing.
Injured employee can't sue for damages; workers compensation is the only remedy available to the employee.

But because these programs are run by states, the pay outs vary widely:

http://projects.propublica.org/graphics/workers-compensation-benefits-by-limb#

CHILDHOOD VACCINATIONS –
Cannot directly sue vaccine manufacturers…
http://www.npr.org/sections/health-shots/2015/06/02/411243242/vaccine-court-aims-to-protect-patients-and-vaccines

WRONGFUL DEATH STATUTES

Allow family members who are depend on the income of the deceased to sue for loss of companionship and lost future
income.

SURVIVOR STATUTE = allow the decedent's claim to flow to his estate, and the estate to sue, then distribute the money to the heirs.

Example: If I died on the Alaska Airlines flight, leaving no children or dependants, my estate could still sue the airline for my "pain and suffering" and the award would go to my heirs (whoever I designate in my will).

BARRIERS TO THE COLLECTION OF DAMAGES:

Statute of limitations.

Judgment Proof Creditors.

DAMAGES:

COMPENSATORY DAMAGES are also called ACTUAL DAMAGES because they consist of money damages awarded to the plaintiff for real (actual) loss or injury. They may be broken down to:

A. SPECIAL DAMAGES = Out of pocket damages that can be specified: Lost wages, medical bills, lost income, cost of repairing a car. Cost of future lost wages (w/discount rate).

B. GENERAL DAMAGES = Other than out-of-pocket expenses. These include PAIN AND SUFFERING, MENTAL DISTRESS, LOSS OF CONSORTIUM (not available unless married).

NOMINAL DAMAGES
Unusually very small, token damages – but this is a necessary predicate to punitive damages and (occasionally) statutory, or contractual, attorney fees.

PUNITIVE DAMAGES
This is the case where the civil law PUNISHES the tortfeasor by allowing extra damages where the tortfeasor is particularly blameworthy (that is, the conduct at issue was flagrant, unconscionable egregious). The purpose is not to enrich the plaintiff, but punish the defendant. Can't get punitive damages w/out first getting some general damages (though these may be "nominal" damages.

Available in limited cases: product liability where the wrongdoer acted with willful disregard of the rights and safety of others.

Policy Debate: Should this money go to the victim, or to the State?

Policy debate: The Supreme Court has set limits on punitive damages; they generally cannot exceed 10x compensatory damages. See the test set forth in the BMW case:

1. The reprehensibility of the conduct at issue;

2. The ratio of punitive damages to compensatory damages;

3. Comparable civil and criminal penalties for the same conduct (in employment discrimination cases, this standard has been used to curb punitive damages)

Punitive damages are never awarded in contract cases.

RCW 4.22.070

Percentage of fault — Determination — Exception — Limitations.

In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title **51** RCW.

The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent. The entities whose fault shall be determined include the claimant or person suffering personal injury or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title **51** RCW.

Judgment shall be entered against each defendant except those who have been released by the claimant or are immune from liability to the claimant or have prevailed on any other individual defense against the claimant in an amount which represents that party's proportionate share of the claimant's total damages.

The liability of each defendant shall be several only and shall not be joint except:

> (a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.
>
> (b) If the trier of fact determines that the claimant or party suffering bodily injury or incurring property damages was not at fault, the defendants against whom judgment is entered shall be jointly and severally liable for the sum of their proportionate shares of the claimants [claimant's] total damages.

Feb 14, 2017 Lecture 13

REAL AND INTELLECTUAL PROPERTY

Property can be divided into two distinct types:

(1) Real Property = things like land, buildings and tangible/intangible things
(2) Intellectual Property = things created by mental processes

Real Property

Land + everything permanently attached to it, e.g. permanent fixtures vs. trade fixtures. Thus, if you lease space for your business and make improvements by installing new walls, when the lease expires these improvements revert to the owner. However, removable shelves would stay with you.

Airspace
Mineral rights + Even the right to the rain that falls from the skies (in Colorado).
Tidal lands (especially important in areas like Puget Sound / affected by Indian treaty rights). Who owns the clams?

Interests in real property may take a variety of forms:

1. I own my house (legal term = "fee simple").

2. I can rent my house to you (legal term = "conditional estate", or "lease")

3. When my grandmother died, she gave my mother a "life-estate" (use of her house, for my mother's life) but when my mother dies, the house goes to my siblings and I. Thus, my mother has a "life interest" in the home, and I have a "future interest". What if my mother lets the roof go, damaging the value of the house? Who is responsible for upkeep?

4. If somebody wants to run a power cable under my property, I might sell them an "easement", which is the permanent (or for a set duration of time) right to do this.

5. The government has the right to take your property, via "eminent domain" but has to give you fair compensation for it:

   http://www.npr.org/templates/story/story.php?storyId=4716834

Is it really true that "A man's home is his castle?"
This area has been the subject of a great deal of litigation. The chief argument is what happens when a well-meaning government regulation, like zoning, interferes with your property rights, making them less valuable?

If somebody were to openly use your property for a long time, and you didn't complain about it, they would eventually get a legal, permanent right to continue doing this. Legal term = prescriptive easement (don't let this happen!). If things get really bad, your property can actually be taken by the other person via "adverse possession". Some people have a warped idea of what this means.

http://seattletimes.nwsource.com/html/dannywestneat/2012101648_danny13.html

6. Restrictive Covenants. Rules saying residents must be 55… OK (why would you do this?) But rules saying "Nobody except Caucasians" are contrary to public policy, e.g., laws saying no discrimination in public accommodations.

7. But what about the August National Golf Course, home of The Masters? Is there a difference when a private club is involved?

8. What happens when multiple people own, or lease, property (some of you have, or will, sign
leases with friends, boyfriends/girlfriends…. Things don't always work out…sometimes we break up…

INTELLECTUAL PROPERTY

Intellectual property refers to things created by people. The law is designed to protect those who create new and useful things, so that they can profit from their creations. This incentivizes people to create new things (and is, by extension, good for them and the larger economy). Because people can rely upon the government protecting their creations, they are spurred on to create new things.

Intellectual property is any property that results from intellectual, creative processes – that is, the product of one's mind.

Intellectual property is protected in a variety of ways, depending upon the nature of the property. If you unlawfully use, or take advantage of another person's intellectual property, you are said to have infringed on that person's rights.

COUNTERFEIT GOODS

My favorite recent story:

https://www.youtube.com/watch?v=LLXJBYbuV8w

http://behindthewall.msnbc.msn.com/_news/2011/07/20/7116890-entire-fake-apple-shop-found-in-china

Counterfeit goods, bearing fake trademarks, enter the US economy with great frequency. Some estimates are that 7% of the goods imported into the US are counterfeit.

It is a Federal crime to traffic intentionally in counterfeit good or services. The act also provides for the goods to be forfeited.

Fake Gucci bags, NFL jerseys and Rolex watches….who has been to Italy? Or China?

TRADEMARKS.

These are distinctive marks, words, designs, pictures, or arrangements used by the producer of a product to allow consumers to identify and link the product with the producer. The mark allows consumers to readily identify the origins of the product. Trademarks are often brand names, but an also be the titles of movies or comic books, and fictional characters like Spiderman. Even Ferrari's car designed can be trademarked.

For a business, a trademark is exceedingly important, because it allows consumers to "find" the product they are looking for. Businesses expend significant sums of money to promote their products via trademarks. This type of intellectual property has significant value, which we call Goodwill: it is the benefit and advantage a company has based upon its brand value and trust consumers have in it.

Conversely, a company the users another company's trademark is getting a free ride. And they will likely be sued.

Don't confuse Trademark with Trade Names. Trade Names are the names that companies use when doing business with the world.

COMMON LAW (Judge made law) , but this protection is much less comprehensive than the statutory protections.

Coca-Cola vs. Koke (1920 – preceded the Lanham Act of 1946)

The US Supreme Court decides that…. Both trademarks and trade names (even nicknames, like "Coke" that are in everyday use are protected by common law (e.g. judge-made law).

The common law continues to protect trademarks.

STATUTORY LAW

Since 1946 the Federal Lanham Act, which allows for private enforcement, has protected businesses that hold trademarks from competing businesses with confusingly similar names; the act also provides for remedies. The Lanham act was limited to the unlawful USE of another's trademark on competing, or non-competing goods that could confuse the consumer.

Trademarks should be registered. The first person who registers the trademark is protected.

Trademarks are valid in perpetuity provided the owner continues to use and protect them.

In1995 the Federal Trademark Dilution Act strengthened Federal protections, to include the concept of "dilution"* (think of dilution of putting a mixer in your hard alcohol; it dilutes the alcohol) when another business does something that dilutes (lessons) the value of a similar trademark.

The Act (1) created a Federal cause-of-action for violation of the statute,

(2) regardless of whether the products competed with each other and

(3) eliminated the requirement that "confusion" be demonstrated.

(4) But (the Supreme Court has held) there sill must be some evidence that the infringing mark lessons the value of the famous mark, e.g. "dilution"

(5) injunctive relief is allowed.

To be protected by a trademark, the trademark must be registered with the State or Federal government (US Patent Office) by submitting a drawing. Only distinctive trademarks will be registered.

The types of marks protected by Federal trademark law include:

1. Product Trademark. The symbol for BMW, or Mercedes' circle with three points within it.
2. Service Marks. Any mark used in association with a service rather than a product).

3. Collective Mark. Identifies the product as part of a larger group. (Made in the USA; or a symbol denoting made by a union.

4. Certification marks. "UL Tested" "Good Housekeeping"

Occasionally, phrases can be trademarked, too. What do the following phrases have in common? *

"This sick beat"
"Nice to meet you where you been."
"Party like its 1989"
"'Cus we never go out of style"
"Speak now."

http://www.npr.org/2015/02/22/388187291/taylor-swift-savvytrademark-titan

The Anticybersquatting law provides an additional level of protection for trademarked names, if those names are used by another party in a domain name on the web. This was the result of the Wild West period of the internet, when people rushed to acquire domain names of major companies.

Example:

The take away:

"The trademark office is designed to protect things that have been used as brand names. So you can protect a word you've made up - Coke for a soda for instance - or even a word that you haven't made up that you've adopted for something arbitrary like Apple for

computers. But you do so only if you can show that nobody is going to associate the word with anything related to what you sell until you start selling a product that uses that word."

Marks can be registered if they are currently being used in commerce OR if the applicant intends to put the mark into commerce within 6 months

Business Hint: Register your trademark before producing and selling your widgets.

Once registered, the trademark holder may use the well-known symbol:

To show the world that the trademark has been registered.

There is a great deal of litigation relating to trademarks.

Once registered, the holder of the trademark is entitled to damages, or injunctive relief for violations.

If a dispute arises, the courts will apply a multi-part, non-dispositive test (meaning no single part of the test is likely to control the outcome) that considers a variety of factors, the most important of which (and which spans several sub-topics) is the potential for the consumer to confuse the two groups:

1. Strength of the senior users mark. (How much is the design associated with a particular producer? The more generic, the less protection. Trademarks getting the highest level of protection are those that are

   In making this assessment, courts will first evaluate where the terms fits:

   A. Arbitrary and Fanciful, e.g., invented words like Xerox, or Kodak These have no connection to the product, but have taken on a connection in public's mind: English Leather
   B. Suggestive – Dairy Queen (implies great ice cream!) / is more difficult to obtain complete protection that Arbitrary/Fanciful. The public has grown to associate this term with the product.
   C. Descriptive. Not favored by courts; plaintiff must show that the term has acquired customer recognition to obtain protection.
   D. Generic. Not protected. Any company can use "Kleenex" to describe their products.

2. Degree of similarity between the two marks (the key is whether or not the similarity will cause confusion among the public).

3. Proximity of Products (are they in the same market? Compete for the same customers?)

4. Bridging the gap. Is there evidence the senior user intends, or might later, enter into the same business?

5. Evidence of actual confusion.

6. Junior users good faith and goodwill (has the junior user acted properly?)

7. Quality of junior users product (the lower the quality, the greater the potential damage to the senior user, is the minds of the public that purchase form the junior user.)

8. Sophistication of consumers (are they smart enough to tell the difference?).

A couple of examples of litigation in this area:

ESPN X GAMES QUICKSILVER STYLIZED "X"

Dispute was settled by agreement of the parties.

What about these? What are we looking at here?

Converse All Stars Fila Bobs

NPR / 4 Minutes
http://www.npr.org/2014/10/19/357356041/bucking-the-fashion-trend-converse-kicks-up-a-fuss-about-knockoffs

What about these shoes?

NPR Story
http://www.npr.org/2015/08/16/430998321/the-trademark-woes-of-michael-jordan-and-many-others-in-china

MORE SHOES….

NEW YORK – The distinctive red soles of Christian Louboutin shoes are entitled to trademark protection, even if the company can't exactly call the color its own, a U.S. appeals court said Wednesday.

The 2nd U.S. Circuit Court of Appeals reversed a lower court judge who had ruled against the French maker of luxury shoes worn by stars such as Sarah Jessica Parker, Scarlett Johansson and Halle Berry. The shoes sell for up to $1,000 a pair.

HOW ABOUT THEM APPLES….

Where is this one from? This one you know….

http://www.npr.org/templates/story/story.php?storyId=5306792

HOW ABOUT THIS?

Creator of How

Chobani "How Matters."

* Taylor Swift

Trade Dress is a distinctive, nonfunctional feature, which distinguishes a merchant's, or manufacturer's goods or services from those of another. Another way of thinking of this is that trade dress is the overall appearance of a product. The Trade Dress of a product involves the "total image" and can include the color of the packaging, the configuration of goods, etc.

There are two basic requirements that must be met for trade dress law protection. (1) The first is that the protectable features must be capable of functioning as a source indicator—identifying a particular product and its maker to consumers. In the United States, package design and building facades can be considered inherently distinctive. However, product design can never be inherently distinctive.

Secondly, under the functionality doctrine, trade dress must also be nonfunctional in order to be protected. If the element is functional, protection should be sought under patent law.
Such a broad and ambiguous definition makes Trade Dress very easy to manipulate. Seeking protection against Trade Dress infringements can be vital to the survival of a business.

TRADE SECRETS

Trade secrets are: A process, product, method of operation, or compilation of information used in business that is not known to the public and that may bestow a competitive advantage on the business. A trade secret could be a formula, computer program, process, method, device, technique, pricing information, customer lists or other non-public information.
To qualify as a trade secret, or continue to be a trade secret, the information that allows you to make money must not be generally known. If the economic value of a piece of

information relies on it being kept private, it could be a trade secret. The owner also must take steps to protect the information.

Trade secrets are very different from patents, copyrights and trademarks. While patents and copyrights require you to disclose your information in the application process (information that eventually becomes public), trade secrets require you to actively keep the information secret. Trade-secret protection can potentially last longer than that of patents.

To maintain the status of a "trade secret" a business should:

* Restrict access to the information (lock it away in a secure place, such as a bank vault).
* Limit the number of people who know the information.
* Have the people who know the trade secret agree in writing not to disclose the information (sign non-disclosure agreements).
* Have anyone that comes in contact with the trade secret, directly or indirectly, sign non-disclosure agreements.
* Mark any written material pertaining to the trade secret as proprietary.

Trade secrets remain valid only as long as no one else has discovered the information independently; the information has not been made public (by employees or published literature) nor discovered by working backward from the original product/process or publicly observing the product/process.

If the trade secret is revealed in violation of a non-disclosure agreement, you can sue for damages. However, once the secret is revealed, it is hard to get the trade-secret status resumed. Trade secrets are protected under many state laws, Federal statutes and some international laws.

To enjoin (sue the other party, asking the judge to order the other party to stop doing something) a competitor from continuing to use trades secrets, a plaintiff must prove that:

1. A trade secret actually exists; and
2. The defendant acquired it through unlawful means; and
3. The defendant used it without the plaintiff's permission

Coke vs. Pepsi

One of the most famous examples of a trade secret is the formula for Coca-Cola. The formula, also referred to by the code name "Merchandise 7X," is known to only a few Coke employees and kept in the vault of a bank in Atlanta, Georgia. The individuals who know the secret formula have signed non-disclosure agreements.

Three men arrested trying to sell trade secrets:
http://www.npr.org/templates/story/story.php?storyId=5537560

PATENTS

Patents protect (1) novel + (2) useful + (3) non-obvious products, processes, inventions, machines, or asexually reproducing plants.
Thus, the galaxy of patentable products is wide, and includes artistic methods, certain works of art, the structure of storylines, provided they are novel and not obvious. Additionally, genetically modified plants (including pest-resistant ones) and cloned animals are patentable. Computer programs are also patentable (since the early 1980s.)

The first to file for a patent ordinarily get the patent, which is good for 20 years from the date of application. The process of obtaining a patent is expensive and time consuming, but once you have it, it will receive significant legal protection.

The downside of patents is that once filed, the whole world knows your design, and in 20 years everyone can copy your work. Generic Drugs take this route.

Generic drugs are usually sold for significantly lower prices than their branded equivalents. One reason for the relatively low price of generic medicines is that competition increases among producers when drugs no longer are protected by patents.

http://www.youtube.com/watch?v=ntgq6qy1hyA

Start at 6:40 (Michael Jackson

Business processes may be patented. For instance, Priceline patented its process whereby consumers "bid" or "name their own price" for hotel rooms and airline tickets.
Things that cannot be patented include: (1) the laws of nature; (2) natural phenomenon; (3) and abstract ideas.

(Business Law Question: Which is better, a patent or trade-secret?)

A patent-holder, because it controls the product (e.g., it essentially has a monopoly on the product) may not illegally tie it to another product.
Example: Microsoft owns the patent to Windows, the world's best selling computer operating system. As we will see later, Microsoft got in trouble (violating anti-trust laws) when it tied (required original equipment manufacturers purchasing Windows to ALSO take its internet browser) the two products together. The end-result was that people were forced to take a browser that may not have been the best, or first choice of the OEM or consumer. NOTE; COMPARE WITH COPYRIGHT BELOW

A patent-holder may license the product to others. Consider Toyota's Hybrid technology:
Forbes (Oct, 2010)
Toyota Motor Corp. said today that it will license the hybrid technologies used in its flagship Prius car to Mazda Motor Co. in an encouraging move for the world's leading hybrid carmaker, which is still reeling from global recall issues.
Under the latest agreement, Mazda will procure key hybrid components developed by Toyota such as the electronic control unit and inverter to develop its own hybrid system. Underscoring its leading position in hybrid technology, this is the third time that Toyota has struck a deal on its hybrid business. It is supplying complete hybrid systems to Nissan Motor Co. and has a technology license agreement with Ford.

LAWSUITS ARE QUITE COMMON CONCERNING WHO OWNS THE PATENT FOR SOMETHING.
http://www.youtube.com/watch?v=CSd1BS8E3RE

"Flash of Genius" Trailer

Monsanto, the huge agricultural corporation, has patented strains of seeds that are genetically altered to resist Monsanto's weed killers (like Roundup). Farmers love the seeds. But when Monsanto sells them, they are only sold for a single use, for one season. Farmers are forbidden, by the contract they agree to when they purchase the seeds, from reusing the strains (why?)

Supreme Court Supports Monsanto in Seed-Replication Case

By ADAM LIPTAK MAY 13, 2013

Vernon Hugh Bowman, an Indiana farmer, ran afoul of patent law. Aaron P. Bernstein for The New York Times

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WASHINGTON — The Supreme Court ruled unanimously on Monday that farmers could not use Monsanto's patented genetically altered soybeans to create new seeds without paying the company a fee.

The ruling has implications for many aspects of modern agriculture and for businesses based on vaccines, cell lines and software. But Justice Elena Kagan, writing for the court, emphasized that the decision was narrow.

Copyrights

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A copyright is "the exclusive legal right to reproduce, publish, and sell the fixed form of expression or an original creative idea."
Copyrights apply to books, periodicals, musical compositions, plays, movies, ballets, architectural works, sound recordings, lecture (like mine!), works of art, and computer programs.

To obtain a copyright, and successfully sue anyone who infringes on it, the applicant must meet three criteria:

1. The idea must be fixed – e.g., set out in a tangible medium or expression;
2. It must be original;
3. It must be creative;
4. It must carry the appropriate notice, e.g.

5. And be registered (with the Register of Copyright").

Ordinarily, this procedure protects the holder for his/her life + 70 years before the item falls into the public domain (everyone can use it for free). (For work done for you, by an employee, it's 95 years after publication).
Compare: Charles Dickens' "Great Expectations" vs. JK Rawlings' "Harry Potter":
http://www.planetebook.com/Great-Expectations.asp
http://answers.yahoo.com/question/index?qid=20061217045646AAcwqGA

If you hold a copyright you have:

The right to reproduce it;
Publish and distribute it;
Display it
Perform it
Prepare derivative works based upon it.

DIGITAL MILLENNIUM COPYRIGHT ACT (1988)
This act gave significant new protections to the owners of copyrights in digital information, including both civil and criminal sanctions for anyone who circumvents encryption software or other anti-piracy protections. The act also forbids the manufacture, import, sale or distribution of devices or services for circumvention.

The Act has caused students significant distress in copying friends' music:

Example: Napster's MP3 file sharing, via peer-to-peer networking, was determined to be illegal.
Example: Grokster suffered a similar fate (because it's software facilitated the transfer of MP3 music) at the hands of the US Supreme Court, and is now extinct.
Example: Limewire: Gone, too:
On October 26, 2010, US federal court Judge Kimba Wood issued an injunction forcing LimeWire to prevent "the searching, downloading, uploading, file trading and/or file distribution functionality, and/or all functionality" of its software in Arista Records LLC v. Lime Group LLC.[

Bit-Torrent: A Federal judge has ordered it to pay $111 million in damages.
The industry has also aggressively gone after individuals, including college students (here at the UW!).

Things we might not even assume are copyrighted are…
http://www.npr.org/2015/07/12/422327673/happy-birthday-hits-sour-notes-when-it-comes-to-songs-free-use

FAIR USE DOCTRINE
This provides that portion of a copyrighted work may be reproduced for purposes of "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship and research.
Courts, in deciding whether of not the boundaries have been crossed, will consider:

1. The purpose and character of the use (including whether there was a commercial, for-profit motive)

2. The nature of the copyrighted work;

3. The amount of the work that has been used (the larger the volume, the great the likelihood of infringement);

4. Whether the amount used has had an affect on the commercial value of the copyrighted work.

This is one of the most famous images of President Obama, dating from the 2008 campaign. It is owned by the Smithsonian, in Washington D.C., where I ran into it.

The problem was that the artist who painted it got an assist from an AP photographer.

AP photo of Senator Obama at National Press Club	Iconic campaign poster from 2008 campaign, of Obama, by artist Shepard Fairey

After nearly two years battling it out in court, the Associated Press and street artist Shepard Fairey have agreed to settle their main copyright infringement lawsuit over rights in the "Obama Hope poster" and related merchandise. Neither side had to concede

their point, though Fairey has promised that he will not use another AP photo in his work without first receiving a license from the news organization.
The two sides will share the rights to make and sell the Obama Hope posters, which Fairey created during the presidential campaign by stenciling an AP photograph of the candidate.

DIGITAL SAMPLING: What is it? Is it legit, or does it violate copyright laws?
A: Anyone…..
http://www.youtube.com/watch?v=P2buaOnQ6dc

The most recent significant copyright case involving sampling held that even sampling three notes could constitute copyright infringement. The case centered on N.W.A.'s song "100 Miles and Runnin'" and Funkadelic's "Get Off Your Ass and Jam." Essentially, N.W.A. sampled a two-second-guitar chord from Funkadelic's tune, lowered the pitch and looped it five times in their song. This was all done without Funkadelic's permission and with no compensation paid to Bridgeport Music, which claims to own the rights to Funkadelic's music.

The U.S. Court of Appeals for the Sixth Circuit reversed ruled that the sampling was in violation of copyright law. Bridgeport Music Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005).

Feb 16, 2017 Lecture 14

EMPLOYMENT LAW DAY 1

There are 3 broad ways to characterize employment:

1. **Principal – Agent (Agency Relationship)**
2. **Employer – Employee**
3. **Contractor – Contractee**

Why is it important to know what the relationship is?

1. **Liability (in case the "employee" does something wrong).**
2. **Employment Security.**
3. **Benefits.**

EMPLOYER – ORDINARY EMPLOYEE

Ordinary employees are AT WILL, meaning that they can quit, or be fired, at any time, for any legal reason.

(Employers cannot, for instance, fire an employee because of race or sex, but the employer may fire the employee if she/he doesn't shower, or come to work too tired to do the job.)

An ordinary employee is a person hired to perform services for another, an employer. The employee's physical conduct is controlled by the employer.

Employees usually do not have independent business discretion.
However, some employees who transact business with a third-party are also agents.

Ordinary employers are also liable, via *respondeat superior*, for the negligent, or reckless conduct of employees.

Policy Reasons for the Respondeat Superior Doctrine

A. **Employer / Principal controls the employee / Agent**
B. **Employer / Principal benefits from the acts of the employee / agent**
C. **Employer / Principal has deep pockets ($ to pay damages)**

There are some limitations, and the ultimate question usually is:

WAS THE EMPLOYEE / AGENT ACTING WITHIN THE SCOPE OF EMPLOYMENT?

The following factors will be considered:

1. **Did the employer authorize the act? This often ends the inquiry.**

2. **What was the time, place and purpose of the act?**

3. **Was the act commonly done by employees?**

4. **To what extent was the employer's interests advanced by the act?**

5. **To what extent were the private interests of the employee advanced?**

6. **Did the employer furnish the means or instrumentality? (a car) that was responsible for the act?**

7. **Did the employer expect that the employee would do the act?**

8. **Did the act involve the commission of a serious, intentional act? If so, then the doctrine usually does not apply.**

EX. Employee making deliveries hits YOU. You can sue both the Employee and Employer. But can only collect one time.

THE PRINCIPAL – AGENT RELATIONSHIP

The principal hires the agent to work on his/her behalf.

The relationship is often contractual, and always consensual.

The agent must always work in the best interest of the principal; this is often referred to as the "*fiduciary obligation*".

The agent must place the principal's interest above his own.

Example: Real Estate sales.

Agents may bind the principal, provided that the agent is acting within his authority.

Even if the agent's act was foolish, the principal is bound by it provided the agent acted within his/her authority.

If an agent acts outside his authority, he is said to be acting "*ultra vires*", and cannot bind the principal (though 3rd parties can sue the agent, not the principal).

The law presumes that if YOU are doing business with an agent that YOU will verify that the agent has the necessary authority to act on behalf of the principal, by checking with the principal.

The principal is liable for the actions (torts) of the agent if the agent was acting within the scope of employment AND in the course of employment.

RESPONDEAT SUPERIOR applies to this relationship.

CONTRACTING EMPLOYER – INDEPENDENT CONTRACTOR

Independent contractors are not ordinary employees; they are engaged to accomplish a task/job.

The party who contracts for their services usually has little control over how the job is performed. (You hire somebody to do a specific job for you, e.g., paint your house, etc. This is an independent contractor).

In hiring an independent contractor, certain employment laws (interview questions) do not apply, including major Civil Rights laws.

Employee or Independent Contractor?

Why does it make a difference?

Who cares?

Significant benefits accrue to employers (whether they are traditional employers, or principals) if they can *misclassify* employees/agents into independent contractors. Indeed, it's one the major games/scams employers play.

A person who employs an independent contractor is relieved from having to:

1. **Keep time records;**
2. **Withhold taxes, and remit taxes to government.**
3. **Pay workers compensation insurance, or overtime.**
4. **Fringe benefits, including medical, vacation, stock options.**
5. **Respondeat superior does not apply.**

Additionally, the employer has much more flexibility in controlling the size of its workforce. How the "law" characterizes the relationship between two parties, one paying the other to do something, is based upon the "relationship" between the parties, NOT HOW THE PARTIES DESCRIBE THE RELATIONSHIP.

THUS, IF THE EMPLOYER TELLS AN EMPLOYEE "I'LL HIRE YOU, BUT ONLY IF YOU AGREE YOU'RE AN INDEPENDENT CONTRACTOR, NOT AN EMPLOYEE," AND THE EMPLOYEE AGREES, BUT THEN ACTS LIKE AN EMPLOYEE, IT'S THE ACTIONS THAT THE COURT WILL LOOK TO IN DEFINING THE RELATIONSHIP.

Dog or Cat?

EX. Truck drivers who own their rigs, and agree to deliver products for a price, are also independent contractors.

EX. BUT if the driver is driving the company truck, he's an employee.

QUESTION: INDEPENDENT CONTRACTOR OR EMPLOYEE? THE KEY PART OF THIS TEST IS CONTOL

1. **What control does employer have over details of work?**

2. **Does the employed person work in a distinct business? If the answer is "yes," it typically means that the second party is an independent contractor, though it's possible to rig this system, too.**

3. **Is the work usually supervised, or independent? The less supervision, the more likely the person is an independent contractor.**

4. **Does the employer supply tools or equipment? (If so, more likely employee).**

5. **How long is the period of employment? (Shorter = Independent)**

6. **What is the method of payment: hourly / by the job? (By job suggests independent contractor)**

7. **What degree of skill is required? The higher the skill, the more likely the person is an independent contractor.**

Microsoft and the perma-temps…

Microsoft Corporation (NASDAQ:MSFT) Settles A 'Permatemp' Class Action Lawsuit

Microsoft Corporation (NASDAQ:MSFT) has reached a settlement in a 'permatemp 'class action lawsuit involving more than 8,000 people. The settlement is for an 8-year lawsuit where the company is alleged to have denied temporary staff, benefits similar to those accorded to permanent staff. As a result, a US District court has fined the company $97 million to settle the matter.

August 2015

NLRB ISSUES NEW TEST TO DETERMINE IF EMPLOYEES OF ONE COMPANY ARE ACTUALLY "JOINTLY" EMPLOYEES OF A SECOND, CONTRACTING COMPANY

Under the new test, a company can be considered a *joint employer* even if it has only indirect control over working conditions — say, by requiring the use of certain scheduling software that locks in the timing and length of workers' shifts — or if it has the right to control certain conditions even if it doesn't exercise that right.

This is a significant decision:
http://www.npr.org/2015/08/28/435415990/nlrb-ruling-could-pave-the-way-for-fast-food-union

LAWS AGAINST DISCRIMINATION
Civil Rights Act of 1964 /
TITLE VII (7)

"Unlawful for any employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual, with respect to compensation, terms, conditions, or privileges of employment because of such individuals' race, color, religion, sex, or national origin."

The groups of protected peopled are referred to as "protected classes" – but note which groups are, and are not, within those groups…

Can other groups be protected by States or local governments? Yes

Charges must be brought w/in 180 days of an alleged discriminatory act.

Applies to ALL employers affecting interstate commerce w/15 or more employees.

States are free to pass laws extending rule to employers w/less than 15.

July 16, 2015

WASHINGTON — The United States Equal Employment Opportunity Commission has ruled that workplace discrimination on the basis of sexual orientation is illegal under federal law, setting the stage for litigation aimed at striking down such practices.

This will be challenged in Federal Court, and likely go to the US Supreme Court (though it will take 3-4 years to get there.)

Two types of discrimination:

1. **DISPARATE TREATMENT = Intentional Discrimination**

   Intentionally treating employees differently because of race (all the white employees get off at 3:30, while the non-white employees work to 4:30.)

2. **DISPARATE IMPACT**
   Facially neutral policy that results in people of different races/ sexes being treated differently. Question is whether the policy/rule had a legitimate business justification, e.g.

If improper discrimination appears to be occurring, it may be lawful if the employment practice conforms to a bona fide (real! Not made up) --

- **A. pre-act seniority system (ok to pay them more b/c of their seniority; or**
- **B. MERIT SYSTEM (those who produce more get paid more, even if the produces happen to be all of one race); or**
- **C. System that measures results of a professionally developed ability test NOT designed to discriminate; AND provided that the test is related to the job (don't need to test for calculus if you want to be a waiter...)**
- **D. A system that measures earnings by quality or quantity of production.**

Lawsuit unfolds as follows:

Note that plaintiffs must generally start by going to the EEOC, within 180 days of discrimination.

Government must to given the first chance at starting the lawsuit; but if the government declines, plaintiffs are free to sue alone.

Cases can be brought by individual and by the EEOC:

1. **Plaintiff makes a showing of discrimination;**

2. **Burden shifts to employer to show legitimate reason for the practice**

3. **Plaintiff has the chance to show the reason is not legitimate, but pretextual (e.g. a made up / false explanation).**

If the plaintiff wins, attorney fees are paid by losing party.

GENERAL DEFENSE TO CHARGES OF DISCRIMINATION

Note that in every case of alleged discrimination – except race or color -- an employer has a defense that the unequal treatment of employees, even if members of a "protected class" was justified because the job classification has a "*bona fide occupational qualification*".

BFOQ essentially means that the selection criteria serves a legitimate business interest, which is justified although it may also have a disparate impact.

BFOQ is an available defense for gender, age, religion and national origin discrimination, but NEVER for discrimination based upon race or color.

EQUAL PAY FOR EQUAL WORK /

Women make $.82 to every $1.00 that men earn. (2013)

Equal Pay Act (1963) / Enforced by EEOC (1972) (Equal Employment Opportunity Commission – which investigates complaints and has the authority to institute Civil Actions to eliminate violations of the law).

Prohibits wage discrimination of the basis of gender.

Unequal pay *is* allowed on the basis of

(1) seniority;

(2) merit;

(3) quality or quantity; or

(4) any other factor other than gender, e.g., working the less desirable night-shift, etc.

RACE / COLOR DISCRIMINATION

Employers may not discriminate based upon race/color.

NATIONAL ORIGIN

Also unlawful to discriminate based upon national origin.

In other words, an employer may not discriminate based upon:

Ancestry
Are your parents Norwegian? Polish? Chinese?

Where you born. (Mexico?) Provided you are legally entitled to obtain the job. Illegal immigrants, who do not hold Green cards, are not on the same footing as American citizens and those who do hold Green Cards.)

Culture.

Linguistics (accent ordinarily is not a basis not to hire… though some of you may have met graduate students who cannot be easily understood.)

Flip Side: To get a job in the United States the employee can/will/should insure you are entitled to work in the US, and therefore will check documents. It is illegal for a US business to knowingly hire/employ aliens not entitled to work in the US.
RELIGION

It is also unlawful to discriminate based upon religion. But there is a test:

Employers must make "reasonable accommodations" for religious beliefs, unless such accommodations create an "undue hardship" for the business.

This is a balancing test.

Five part test:

1. **Member of a protected class, e.g., has religious beliefs**

2. **Qualified to do the job**

3. **Suffered some adverse employment action**

4. **Somebody outside the protected class was treated differently**

5. **Employer failed to make a reasonable accommodation that was not an undue hardship.**

These disputes often concern what accommodations are "reasonable".

Former Hertz drivers at Sea-Tac sue for discrimination

KING 5 News, KING5.com 2:28 p.m. PST December 7, 2011
CONNECTTWEETLINKEDINCOMMENTEMAILMORE

SEATTLE -- Twenty-five former employees of The Hertz Corp. have filed a lawsuit claiming the company terminated them from their jobs at Seattle-Tacoma International Airport on the basis of their race, religion and nationality. The former employers are Muslims who were born in Somalia.

Jury trial / Employees lost.

NPR / Abercrombie

http://www.bing.com/videos/search?q=supreme+Court+abercrombie&FORM=HDRSC3#view=detail&mid=48C1983D8846172310C048C1983D8846172310C0

GENDER DISCRIMINATION

Employers may not classify jobs and being for men / women – unless there is a BFOQ, e.g a job requirement that, although discriminatory, is essential to the job in question.

IMA locker room

Some courts have held that the BFOQ can include the idea BFOQ can include hiring that goes to the "essence of the business".

Suppose your business model includes:

> **we have a pretty face. And sex appeal is part of our thing, but it's not the only thing … There will always be those out there looking to take a shot at us, or have the government dictate what we can or can't do, but we'll just take it in stride and continue our quest to provide a fun, enlightened atmosphere where you can enjoy the finer things in life**

They have been sued twice, and settled, but they continue to hire only woman as waitresses / servers.

A corporate statement:

> **"While we offer world famous wings and burgers, the essence of our business is the Hooters Girl and the experience she provides to our customers. Hooters Girls are entertainers. They audition for their roles and, once hired, they must maintain a glamorous appearance, and sing, dance and engage the customers to provide a unique Hooters experience."**

Consider whether hiring men would undermine the "essence of the business" in Hooter's case:

SEXUAL HARASSMENT / A TYPE OF TITLE VII VIOLATION

Earlier in the quarter we read the complaint in Gretchen Carlson's lawsuit against Roger Ailes. To remind you:

ABC NEWS VIDEO – In class

http://abcnews.go.com/Entertainment/gretchen-carlson-files-sexual-harassment-lawsuit-fox-news/story?id=40389126

Applies in same sex situations.

QUID PRO QUO

This typically occurs in a supervisor / supervisee situation.

This occurs when job opportunities, promotions are given/denied on the basis of sexual favors. "You can have the job…if you hook up with me."

This applies in hiring, promotion, or potential continuing employment.

HOSTILE ENVIRONMENT:

This occurs when an employee must put up with a work environment where sexual jokes, comments are pervasive / or unreasonably interferes with a person's work performance:

Multi-part non-dispositive test that assesses:

1. **Verbal/physical**
2. **Frequency**
3. **Hostile or patently offensive**
4. **Co-worker or supervisor**
5. **Did others join in, participating in the objectionable conduct?**
6. **Was the conduct directed at more than one person.**

EX: Seattle longshoremen case (Seattle Times 1999)

U.S. longshoremen earn three times average national wage

PORTS:

The unionized American longshoremen earn significantly more than the average worker in the U.S., writes SeaIntel in an analysis.

BY JAKOB VESTERAGER
Published 29.07.13 at 14:58

American longshoremen, who are members of a union, earn far more than the average worker in the U.S. In this week's SeaIntel Sunday Spotlight, SeaIntel is putting focus on the issue.

The analyst firm has compared salary data from Pacific Maritime Association's (PMA) homepage with the average salary in the U.S. According to the website, the longshoremen on the U.S. West Coast earn an average of 98,603 USD a year including two and a half weeks of vacation on average. The earnings are about six times as much as the minimum wage in California and more than double the 42,000 USD including bonuses, which is the average salary for all Americans, according to Silicon Valley Index.

Jennifer Murray won a $750,000 verdict in a sexual-harassment and discrimination lawsuit against the two Longshoremen's unions at Seattle's docks.

The verdict in Murray's case is the sixth brought against three union locals and the Pacific Maritime Association (PMA) in the past three years. Damages amounting to more than $4 million have been awarded over allegations of gender, age and racial discrimination. At least one other lawsuit is pending.

The harassment, according to Murray, continues unabated.

Murray was a casual longshore worker attached to Local 19 in July 1996.

She claimed she was repeatedly molested by a fellow worker in the hold of a cargo ship at Terminal 37.

She protested each time

Before that, she said she had been subjected to unsolicited sexual comments and harassment that included being stalked by a co-worker.

He left offensive notes on her car, threatening messages on her phone and once rammed his semi-truck into her truck while she was hauling a container in the yard. She was pregnant at the time.

Protecting the Business:

This type of conduct presents issues for businesses, which SHOULD respond by taking steps to prevent this from happening.

(1) Clear standards, which all employees should sign; and

(2) A complaint system that allows employees to file grievances + prompt follow-up will limit liability (or potentially end it).

FEB 21 LECTURE 15

EMPLOYMENT LAW 2 + BANKRUPTCY

EMPLOYMENT LAW / CONTINUED

AGE DISCRIMINATION

Age Discrimination In Employment Act of 1967.

Outlaws "arbitrary age discrimination in employment" of persons over 40. Applies to business w/20 or more employees, engaged in interstate commerce (plus min hours worked requirement.)

Certain employees must retire at age 65 in certain conditions.

Exceptions are made based upon BFOQ.

MINIMUM WAGE LAWS / OVERTIME / FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act

Sets maximum workweek; overtime rules; breaks.

But it does not apply to every employee:

COMMONLY USED EXEMPTIONS

Commissioned sales employees

Computer professionals: certain computer professionals paid at least $27.63 per hour are exempt from the overtime provisions of the FLSA (explains why Microsoft and Amazon employees are typically leaving the office late)

Drivers, driver's helpers, loaders and mechanics are exempt from the overtime pay provisions of the FLSA if employed by a motor carrier, and if the employee's duties affect the safety of operation of the vehicles in transportation of passengers or property in interstate or foreign commerce.

Farmworkers employed on small farms are exempt from both the minimum wage and overtime pay provisions of the FLSA.

Executive, administrative, professional and outside sales employees: (as defined in Department of Labor regulations) and who are paid on a salary basis are exempt from both the minimum wage and overtime provisions of the FLSA.

Minimum wages may be raised by Congress (recent adjustment); but States AND (if State constitutions are silent, and if there is no state pre-emption in this area) are free to set their own minimum wage higher than the Federal minimum wage

Washington does, and currently has the highest minimum wage of ….

But consider the City of Seatac, and Seattle .

Seattle Mayor Details Plan for $15 Minimum Wage

By KIRK JOHNSONMAY 1, 2014

SEATTLE — Mayor Ed Murray presented on Thursday what he described as an imperfect but workable plan to increase the city's minimum wage to $15 an hour, more than twice the federal minimum wage and one of the highest anywhere in the nation, through a series of complex and phased-in stages.

OVERTIME RULES –

WHO GETS IT?

AND WHEN?

Obama Seeks Overtime Rules Revamp That Could Help 5 Million Workers

By REUTERSJUNE 30, 2015, 12:20 P.M. E.D.T.

(Reuters) - The Obama administration on Tuesday unveiled details of a long-awaited proposal that would make nearly 5 million more U.S. workers eligible for overtime pay, but many businesses say it would force them to cut hours and wages.

Under the proposal, the maximum income a salaried worker could earn and still be eligible for mandatory overtime pay would rise to $50,440 from $23,660, the first significant change in four decades.

WSJ Video / Smartphones + Email = overtime?
http://www.wsj.com/articles/can-you-sue-the-boss-for-making-you-answer-late-night-email-1432144188

SICK LEAVE –

POLICY IMPLICATION

Obama Drafts Order on Paid Sick Leave for Federal Contractors

By JONATHAN WEISMANAUG. 5, 2015

President Obama has drafted an executive order to force any company that contracts with the federal government to issue paid leave to employees who are sick, are seeking medical attention or need to care for a sick relative.

SOME LARGE FIRMS REQUIRE THAT COMPANIES DOING BUSINESS WITH IT TREAT THEIR EMPLOYEES IN A PARTICULAR WAY -

Microsoft tells vendors to give contract workers basic benefits

During the next 12 months, the company will require its U.S. suppliers — which provide workers who do everything from serving food and driving buses to testing software — to give 15 days paid leave a year to their employees who work on Microsoft projects.

Facebook Tells Vendors to Pay Workers

at Least $15/Hour (May 2015)

AFFIRMATIVE ACTION IN EMPLOYMENT PRACTICES

A "fix" for past discrimination? Or simply reverse discrimination?

This is NOT required by Title 7 (the statute only says you can't discriminate; it does not address remedial measures for past discrimination, which is what affirmative action is designed to do.)

Many programs by private businesses are voluntary; Supreme Court has approved of these models.

Many programs have resulted from court rulings, or rules made by the EEOC.

EXAMPLES:

Government, in giving contracts to private businesses, requires those businesses to set up voluntary programs to hire minority employees / and a % of total to go to subcontractors (set-asides).

S. Ct. has approved of PRIVATE affirmative action programs (thus, business and corporations may set up their own programs to address racial imbalances). In other words, businesses DO NOT have to hire the most qualified person; they CAN take into account race as A FACTOR (but not the only factor).

S. Ct has also approved of government programs to address disparities, through voluntary affirmative action programs.

Washington State: Initiative I-200.

Text of measure

The language appeared on the ballot as:[1]

" Shall government be prohibited from discriminating or granting preferential treatment based

on race, sex, color, ethnicity or national origin in public employment, education, and contracting?[2]

AMERICANS WITH DISABILITIES ACT (1990)

Applies to public + private sector employers.

The disabled person must alert the employer, and seek reasonable accommodations.

43 Million Disabled Americans (sight, sound, mental health…etc.)

Business must improve access to handicapped if "readily achievable".

Applies to businesses with more than 15 or more employees.

Applies to "public accommodations" (What does that term mean? And where did we hear it previously in this class?)

> **General test: Businesses must improve access to the disabled if "readily achievable" without "undue hardship". This is a balancing test.**

In general, covered employers may not discriminate against disabled people who are capable of performing the essential functions of the job and are expected to make reasonable accommodations if necessary to allow them to do so.

Employers need not suffer "undue hardships" in complying with this law.

Lots of questions:

WHAT IS A DISABILITY?

Person has a physical or mental impairment (regardless of whether it is being treated) that substantially limits one or more major life activities OR

has a record of such impairment OR

is regarded of having such an impairment.

Major life activity? Things an average person can do, but this person cannot do with little or no trouble (walking, reading breathing, speaking…)

WHAT IS A REASONABLE ACCOMMODATION?

AN "UNDUE HARDSHIP"?

Essentially, this is a comprehensive cost/benefit analysis that asks:

"How easily can the employer make things work for the disabled person, and at what cost to the company?

This area of the law is being supplemented by the common law.

If there is a lawsuit, plaintiff must prove s/he is disabled and that a reasonable accommodation is possible, then the burden shifts to the employer to show that the accommodation is unreasonable, or would create an undue hardship.

Additional defense: Employees need not place a disabled person in a position where that person could endanger that person or others in the workplace.

The narcoleptic lifeguard.

Ex. From Text: Not hiring a person with Hep C for a job that the person's condition would likely get worse.

BASIC DUTIES OF EMPLOYEES

Must do work that is reasonable and customary for the job.

Need not do work that is illegal, contrary to public policy, or "immoral" (this last exception is so vague that is subject to litigation….

If under an employment contract, don't have to do work outside the contract.

Must use reasonable skill in performing job… (can't loaf or spend all your time Facebooking your girlfriend/boyfriend). This is referred to as the "duty of loyalty".

Employees must act for the benefit of the employer, not to benefit themselves. It would be fair to characterize this relationship as fiduciary in nature.

Also includes confidential information. Frequently, employers will require employees to sign non-disclosure or non-compete agreements as a condition of employment.

Can quit at any time (AT WILL), except if quitting breaches an employment contract or union agreement.

Can be fired at any time, for any reason that is not illegal (e.g. can't discriminate), and cannot fire for a reason contrary to public policy.

Examples: Jury duty; military deployment, whistle-blowers.

S.Ct.: Workers may refuse to do jobs that appear "unreasonably dangerous".

Mr. Burns: "Homer, could you climb into the core of that nuclear reactor and check it out?"

Employees cannot be FORCED to work if they quit an employment contract, BUT the Court may ENJOIN them from working elsewhere (for a competitor, for instance)

Seahawks don't plan on sweetening Chancellor's deal as holdout lingers
September 13, 2015 9:13 am ET

RIGHTS OF EMPLOYEES

GETTING PAID FOR WORK
Employees get paid for their work (employers will with-hold taxes), and this includes minimum wages = to the higher of the State or Federal minimum wage.

Some employees are exempt (meaning the min wage rules do not apply to them) pursuant to the FSLA: lawyers, and other professionals.

Do employers ever NOT pay employees for their work? Ask Walmart…

Wal-Mart to pay $4.8 million in unpaid overtime

Wal-Mart Stores Inc (WMT.N) agreed to pay $4.8 million in back wages and damages to thousands of employees for unpaid overtime after a probe by the U.S. Department of Labor found that the retailer had violated a federal law governing overtime pay.

Employees have a right to SAFE WORKING ENVIRONMENT (Occupational Safety and Health Act OSHA) monitors work places.

> **Worker injury and death rates are problematic, and often politics get in the way of things. NPR and Fishing.**

DUTY TO WARN OF LAYOFFS (Statutory right

60-Day advance Notice of large scale layoffs. BOEING does this.

Policy Reason?

FRINGE BENEFITS

(No Constitutional Right to these).

Compare other industrialized nations, where there is a statutory right to vacation, etc., to the U.S.

Indeed, there is no Constitutional, or (in most case) state laws that require health care be included in employment packages.

It's also generally legal for an employer to fire an employee who will not quit smoking (unprotected conduct, which adds significantly to health care costs).

Video:
http://www.cbsnews.com/news/whose-life-is-it-anyway/

FAMILY AND MEDICAL LEAVE ACT (1993).

Employers w/50+ employees.

Permits unpaid time off (up to 12 weeks) to tend to self or immediate family members or parents; includes new children.

Employee must get same (or similar) position back.

PRIVACY RIGHTS

USING A COMPUTER AT WORK…

You have essentially no privacy rights when using a computer at work, and the employer can monitor everything you do, and use this as a basis to discharge you.

Depending upon which state you live in, you may have some protections.

JOB INTERVIEWS

Suppose that you are interviewing for a job, and the person says "I'm ready to offer you the job, provided you allow me to review your Facebook page after you give me your password…" Is this legal?

by Associated Press

Posted on May 22, 2013 at 6:07 AM

SEATTLE -- Washington has become the fifth state this year to sign into law protections of social media passwords at the workplace and job interviews

DRUG TESTING IN THE WORKPLACE

Government: Only allowed if "reasonable suspicion" OR "threat to public safety" (pilots, bus drivers, etc)

Private Industry: No Constitutional restriction; but state laws may restrict. In the absence of a State law, private employers are essentially free to adopt whatever polices they desire in this area.

LIE DETECTORS – Congress restricted this, except for Government employees

FIRED FOR SMOKING POT? EVEN IF LEGAL…

Yes. Still illegal under Federal Law.

NON COMPETE CLAUSES.

Employees may sign "non-compete" clauses (this is also discussed in Contract and Anti-trust law) for several years, if they terminate relationship.

This is because certain professions rely upon goodwill.

Customers may follow the employee, rather than stay with the company.

EX. PR firm hires X to work w/a company. X develops a relationship with the company officials. X can't leave my company, and take my client. // Broadcasters // Baristas

BANKRUPTCY

Hostess Products / Twinkies -- Why?

The Bankruptcy Act and Its Goals

There are two main goals of bankruptcy:

1. Protecting creditors (people and business owed money)

2. Opportunity for debtors to get a fresh start.

Multiple studies show that the #1 reason for personal bankruptcy is…

While bankruptcy is almost exclusively governed by Federal law, individual State laws are important because States can decide what property **cannot** be taken by creditors (this usually means how much equity in a principle home):

Example:

http://www.legalconsumer.com/bankruptcy/laws/

http://www.alperlaw.com/asset-protection/florida-asset-protection/homestead-protection/

OJ Simpson

Found civilly liable…$38 Million judgment… in California (where he had lived a long time…)

where do you suppose he had moved prior to that happening?

There are three types of bankruptcy we're concerned with:

Chapter 11	Reorganization of Businesses
Chapter 7	Liquidation: Persons, partnerships or corporations
Chapter 13	Personal Bankruptcy / Reorganization

Chapter 11 bankruptcy allows certain business – whose debts exceed their assets -- to re-organize, shed some or all of their debts, and proceed forward if they have a viable business strategy.

Many businesses are worth more if they continue to operate, rather than be liquidated (Why? **Goodwill**. Brand recognition.) This is one reason for Chapter 11.

It's a great way to keep businesses going, and employees on the job. We want American businesses to succeed in a competitive world economy. We want employees to keep their job.

But can Chapter 11 also be used a business tool?

Something to use to gain a competitive advantage within your industry?

Consider the commercial airline industry, where the product (seats on planes, to destinations) are fungible (and customers have little loyalty).

How do you decide which airline to fly?

What if one airline was 25% more expensive, but not necessarily any better?

American Airlines files for bankruptcy
http://www.npr.org/2011/11/29/142911221/american-airlines-files-for-bankruptcy

During reorganizations, some key stakeholders may be at risk:

There are, of course, some losers:

Creditors may not get all that they are owed. The reorganization allows the company to walk away from certain liabilities. The business may sever relationships with counterparties. The "old business" is left behind.

The NEW business is NOT responsible for the old debts.

As a matter of policy, what do you think of this?

New GM vs. Old GM

In June, 2009, America's largest auto manufacturer, GM, declared bankruptcy, and sought reorganization pursuant to Chapter 11.

Its liabilities totaled 172 billion, and its assets equaled $82 billion.

40 days later, a "New GM" emerged, post-bankruptcy:
http://www.npr.org/templates/story/story.php?storyId=106459662

If you listened carefully to that story, there were references to discontinued GM brands, like Saturn.

GM had a number of brands, including Saturn and Pontiac, that the company **discontinued manufacturing**. They stopped making those cars.

Recall from our discussion on businesses, earlier in the quarter, what a "franchise" is. The car industry operates on this model. GM makes the cars, and then sells the cars to franchisees – independent business that then re-sell the cars to the public. All car companies (other than Tesla) operate on this model. Franchisees put a LOT of money into building out their showrooms and equipping them.

Video:
http://search.autonews.com/v/35965787/1-124-gm-stores-dying-5-15-09.htm

Suppose you were a Saturn franchisee (like the one that existed in Bellevue) an invested your family's life savings in a $2,000,000 building (secured with a loan from a bank) then, suddenly, GM stopped making the product you sold?

In addition – while it was not known publically at the time of the 2009 bankruptcy – **faulty ignition switches** in many GM cars led to deaths, and many accidents.

Reorganization allows a company to walk away from all liabilities that occurred prior to bankruptcy.

Does that mean that GM is, or is not, responsible for paying money to the victims of the ignition switch problems?

Can GM legally walk away, if it chooses?

Would the company really make that argument?

G.M.'s Bankruptcy Will Probably Shield It From Most New Claims

By
Stephen J. Lubben

April 23, 2014 3:43 pm April 23, 2014 3:43 pm 7 Comments

http://dealbook.nytimes.com/2014/04/23/g-m-s-bankruptcy-will-probably-shield-it-from-most-new-claims/?module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A5%22%7D

this is unresolved, but up to this point GM is winning….

Chapter 7: Liquidation

Applies to individuals, partnerships and corporations.

For individuals, there is always a choice between liquidation (Chapter 7) or reorganization (Chapter 13) depending upon their income (the higher the income, the less

likely it is that their debts will be wiped out/liquidated b/c they have the present ability to pay off creditors).

At least 180 days before filing bankruptcy paperwork, individuals MUST receive credit counseling. The goal is to have a professional work with the person to determine if there is viable plan other than bankruptcy.

(After a person goes through bankruptcy, the person must engage in "Debtor Education".)

Chapter 7 applies to partnerships and corporations, too.

The idea is that ALL the assets are turned over to a trustee (an independent person who has a fiduciary obligation to do what is legally in the best interests of the creditors, consistent with the law) who then sells the NON-EXEMPT assets and distributes the proceeds to the creditors in order of PRIORITY (e.g. there is a list of who gets paid first, second, and third, just like there is a list of who gets to register for course at the UW first, second and third).

If the company proceeds to file for Chapter 7 bankruptcy, the company's creditors are paid in a specific order. Generally, investors or creditors are paid in the following order:

1) Secured creditors
2) Unsecured creditors
3) Shareholders

Usually, little to nothing is leftover for shareholders after the more senior creditors are paid.

It is illegal to conceal assets in bankruptcy.

People going through bankruptcy frequently play games to avoid having property seized, and liquidated.

Washington State is a **community property** state, which means property acquired during a marriage is owned equally by both parties, and can be used to satisfy the debts of either part to the marriage.

In this story, some huge diamonds were bought during the marriage. The couple filed for bankruptcy, and the wife claimed the rings were not community property. She lost:

http://seattletimes.com/html/businesstechnology/2020386705_mastroappealxml.html

Linda Mastro loses appeal on diamond rings worth $1.4 million

At 15.93 carats, this diamond ring is the smaller of the two rings.

By Eric Pryne

A federal judge has dismissed Linda Mastro's appeal of a bankruptcy court's ruling that two giant diamond rings belong to her husband's numerous creditors.

Liquidation can be voluntary or involuntary (e.g., forced by creditors).
Voluntary liquidation is obvious.

Involuntary liquidation can be triggered when a debtor is not paying his bills, and creditors initiate the procedure, which forces the debtor to surrender his assets so the proceeds can be liquidated and distributed to creditors.

A dollar figure (currently $14,425) owed to one or more creditors, is needed to trigger involuntary liquidation proceedings.

Certain people (farmers, ranchers and non-profit orgs) cannot be forced into involuntary liquidation.

What's the policy reason for this?

The filing of the bankruptcy petition operates to "**stay**" (which is the lawyers' word for "hold everything") all creditors from proceeding against the party in bankruptcy.

In other words, creditors cannot continue their individual lawsuits, or seize or repossess property, while the petition is pending.

What is the policy reason for this?

As set out in the text, Chapter 7 bankruptcies for individuals require:

- A list of creditors
- The source, amount and frequency of income
- A list of the debtors property (frequently hidden/obscured to shield it
- A list of monthly expenses

CHAPER 13 REORGANIZATION BANKRUPCTY –

For Individuals / sole proprietorships.

Debtor files a "plan" to pay creditors back over 5 years. A trustee is appointed to insure that the plan is followed, and that creditors are treated fairly.

CREDITORS
Bankruptcy law defines the **priority that various creditors have, relative to each other**. Everyone in one class must be paid off before moving to the next class; as a result, where you stand is very important.

It is also important to remember that a debtor cannot favor a particular creditor (say, your Aunt, who you borrowed money from). Nor can a creditor do anything to better his/her position (for instance, repossessing property on a self-help basis).

List of priority:

1. Secured creditors (collateral)
2. Costs of preserving and administering the estate (the lawyers get paid! Ever wonder why lawyers made a good living helping POOR people with their bankruptcies… well, the lawyers are second in line to be paid. Nice job!)
3. Unpaid wage claims (you need to pay your employees!)
4. Refund and security deposits
5. Alimony and child support
6. Taxes

7. General (unsecured creditors)

Feb 23, 2017 Lecture 16

Business Organizations and Entities

Consider the following new legal terms and phrases:

Taxes. The decision about how to form your business often has significant tax implications to both the firm, and its owners.

Liability. Personal liability can be problematic depending upon (1) present and (2) future assets (if you have nothing now, you have nothing to lose; however, if you have a lot now, you potentially have a lot to lose if you are personally liable). Also consider what type of business you're in, and the particular types of possible liability you might have if things were to go wrong, e.g. opening a hair salon carries different risks than a restaurant, or a law office.

Respondeat superior. Applies to employees, but not to independent and sub-contractors. May apply to franchisors that exercise too much control.

Fiduciary. (Fiduciary duty = one of absolute loyalty to the master or employer. Both corporate directors and officers owe a "fiduciary duty" to shareholders. Agents owe the same legal obligation to principals.

1. Specific Forms of business:

A. Sole proprietorship. This exists whenever one person owns a business and there is no separate business entity (2/3 of all businesses in America are sole proprietorships). All profits go directly to the owner, and the owner directly pays

taxes (advantage: no double taxation). Disadvantages: Unlimited personal liability risk; difficulty raising capital. Very easy to set up.

B. Partnerships (no federal taxes – it's a "pass through"). Partnerships are distinct legal entities. In the absence of a written agreement, the Uniform Partnership Act fills in the gaps.

B (1) General Partnership. Joint control; share profits; can agree to almost any terms. Partnership does not pay federal income taxes – it's a "pass through". But personal liability extends to the debts of the partnership, including torts committed during the partnership.

Can be formed orally, or implied by conduct (be careful – because in the absence of agreement things are 50/50). It's safer to do it in writing.

Difficulty when there is not a management partnership agreement setting out roles and responsibilities; without one, control is equal.

Partners owe a fiduciary duty to the partnership

B (2) Limited Partnership. General partner makes decisions, and is liable; limited partners = no decision making and management of the business, and no personal liability.

Must be in writing. Why? To put third parties on notice that certain partners are not personally liable and cannot bind the partnership.

C. Limited Liability Company (LLC) --- this is "company" not a "corporation" For 2+ person businesses. Taxed like partnership, e.g., no federal taxes unless partners prefer to be taxed as a corporation. Liability limited to investment. Must have an operating agreement, and be registered with the state, and business MUST lay LLC in its name so the public is on notice of its status.

Every member has the ability to bind the company.

"Members" have a "membership interest" (similar to stock, not identical).

No restrictions on the number of members.

Member Managed. All members participate. Majority members owe a fiduciary obligation to minority members.

Manager-Managed. Managers appointed; owing a fiduciary obligation to members.

D. Franchise.

Nomenclature: Franchisee / Franchisor; each is dependent upon the other. WHY? This is contractual, but also the subject of both federal and state laws.

The owner of a trademark or trade name authorizes the use to another.

The relationship is symbiotic – Why? Consider things from the perspective of the franchisor and franchisee… including quality control and the ability of the franchisor to dictate terms to the franchisee (and if the control is too much, liability may flow).

There is also a fair amount of government regulation (Federal and State) in this area, in part to protect franchisees who may (1) invest a lot of money; and (2) once invested, have a significant capital investment that could be destroyed if the franshisor ends the relationship.

Indeed, it's difficult to end some franchises…
http://www.npr.org/sections/money/2013/02/19/172402376/why-buying-a-car-never-changes

The business model has multiple variations =

(1) Product Distributorships (GM, Ford) Franchisee has the right to sell in a specified geographic area. These territorial rights are very important to the franchisee. Why?

Distributorships will fight back at any attempt to change the business model:

TESLA
http://www.npr.org/2012/11/09/164736569/car-dealers-sue-tesla-citing-state-franchise-laws

(2) Business Format / Chain-style businesses (McDonalds) that must be set up an run based upon rules established by the franchisor.

(3) Trademark or Trade Naem Licensing / Manufacturing or processing arrangements (Coca-Cola)

Current issues:

Minimum Wages – Is a franchise a “big company” or a “small business”? Seattle….

There is also an open question as to whether employees of franchises are part of a small business, or a large business. In Seattle this is a significant issue: http://www.kirotv.com/news/news/tale-two-pizza-joints-seattles-minimum-wage-franch/nnC3W/

E. CORPORATIONS

Most business (by dollar volume) in America is conducted by (for profit) corporations.

The institutions most often referenced by the word "corporation" are publicly traded corporations, the shares of which are traded on a public stock exchange (for example, the New York Stock Exchange or Nasdaq in the United States) where shares of stock of corporations are bought and sold by and to the general public.

Public corporations – in part because of a history of fraudulent activities – are regulated by the government to insure that their accounting is proper, and properly reported to the SHAREHOLDERS that own the corporation.

Many of you will end up working for firms that exist because publicly held corporations exist.

However, the majority (in terms of numbers) of corporations are described as being to be close corporations, meaning that the number of shareholders is small (usually less than 50) and the shares of these corporations are not traded on a market (and meaning that these corporations do not have the onerous reporting requirements that you learn about in accounting).

Many such corporations are owned and managed by a small group of businesspeople or companies, although the size of such a corporation can be as vast as the largest public corporations. FACEBOOK was an example of a close corporation, until it “went public” two years ago. So was Alibaba.

Close corporations have some advantages over publicly traded corporations. A small, close corporation can often make company-changing decisions much more rapidly than a publicly traded company. A publicly traded company is also at the mercy of the market,

having capital flow in and out based not only on what the company is doing but the market and even what the competitors are doing.

Publicly traded companies also have advantages over their closely held counterparts. Publicly traded companies often have more working capital – in part because there are Federal and State laws designed to protect investors.

Equity financing (issuing more stock)
Debt financing (issuing bonds)

Publicly traded companies though suffer from this exact advantage. A closely held corporation can often voluntarily take a hit to profit with little to no repercussions (as long as it is not a sustained loss). A publicly traded company though often comes under extreme scrutiny if profit and growth are not evident to stock holders, thus stock holders may sell, further damaging the company. Often this blow is enough to make a small public company fail.

The final type of corporation that bears mentioning, but is not discussed in the text, is a non-profit corporation.

A nonprofit corporation is any legal entity which has been incorporated under the law of its jurisdiction for purposes other than making profits for its owners or shareholders. Depending on the laws of the jurisdiction, a nonprofit corporation may seek official recognition as such, and may be taxed differently from for-profit corporations, and treated differently in other ways.

A CORPORATION IS:

1. An "artificial person"; the law recognizes it as a "person". Mitt Romney knows this… http://www.youtube.com/watch?v=E2h8ujX6T0A

2. It is owned by its stockholders (one share of stock = 1 vote).
3. It has rights and responsibilities.
4. It substitutes itself for its shareholders when "doing business".
5. It is liable for its actions, but (significantly) shareholders are not personally liable, except insofar as the value of their equity decreases in response to corporate malfeasance. KEY FACTOR: OWNERS HAVE NO PERSONAL LIABILITY, except in limited circumstances where "the corporate veil" is pierced, because of fraud, illegal acts, or circumventing the law. Fraud, in which a corporation is created with highly paid insiders, is a re-occurring problem.
6. Board of directors, elected by shareholders, is responsible for corporate policy.
7. Board of directors hires officers, who run day-to-day operations.
8. Fundamental duty is to make money for stockholder/owners.

Corporations enjoy many of the same rights that people have, including:

Equal Protection of the laws;

Access to courts;

Due process of law;

Freedom against unreasonable searches (but no freedom "to remain silent"… yet).

Freedom of speech, including political speech, which includes making campaign contributions.

What about "Religious Freedom"? We've already spent time on this complex issue.

As we will see, the Title VII of the Civil Rights Act of 1964 forbids employers from using religious tests in hiring, e.g., if you see a "help wanted" sign on the Ave., and turn your application in, the owner cannot say "I don't hire Muslims," or "I don't hire Christians". That's illegal.

"Corporate governance" is the term used to describe the overall control of a corporation. BYLAWS are the specific rules that regulate and govern the internal operations of corporations.

Corporate governance is the overall control over activities of the corporation. On paper, the flow of power looks like this:

Shareholders (those who own stock)
Board of Directors
Company Executives

Many experts, however, believe that the power structure looks like this:

Company Executives
Board of Directors
Shareholders

Entities and groups beyond these three may be STAKEHOLDERS (example: Employees).

1. CORPORATION CHARTERS

A corporation is a legal entity created and recognized by the state. It usually has perpetual existence. While a company may be created in any state, when the INCORPORATORS file ARTICLES OF INCORPORATION with the State (Amazon – Todd Tarbert was incorporated here), the choice is usually Delaware because of its highly evolved law on corporations, and the fact that Delaware law is business-friendly.

The Charter specifies the rights and responsibilities of stockholders, directors, and officers. The Charter also provides detailed provisions on annual meetings, the method of choosing directors, and the authority of directors to issue stock.

2. SHAREHOLDERS / STOCKHOLDERS

Shareholders own the corporation but, ironically, have no role in the day-to-day management of the corporation.

This "ownership" interest in the company is based upon a belief that the company will makes profits and, as a result, become more valuable (its share price will increase) and/or it will pay dividends (money representing the profits earned by the company) to stockholders. Some companies offer steady dividends (utilities), while others don't pay dividends at all, but expect to become more valuable over time (start-ups) as their stock price rises.

Shareholder Rights
By law, shareholders have certain rights

Shareholders have a meeting once a year, where major decisions are made by taking a vote. One share = 1 vote. Management (the President of the company) will solicit proxies (your votes) to vote as management wants. A quorum must be present (50%), to pass a resolution.

The major rights shareholders have include:

1. The right to receive dividends, if declared (illegal dividends occur when distributions are made while the company is insolvent; when and why might this happen?)

2. The right to vote (directly, or via PROXY) on:

Members of the Board of directors;
Major mergers and acquisitions;
Charter and byelaw changes
Proposals by stockholders

3. To receive annual reports, and an annual meeting.

4. To bring shareholder lawsuits against the company officers or members of the Board, OR to bring a suit against a third party – this is referred to as a "shareholders' derivative suit" (damages go to the corporation, which is owned by the shareholders, not the individual plaintiffs). Often useful if the Board or Management won't sue, in part because they are the ones who created the problem which (in the eyes of some shareholders, cost the shareholders money.)

5. To sell their shares of stock to others

6. Dodd-Frank: Say on Pay (non binding, periodic vote).

7. Shareholders also are OWED a fiduciary obligation from BOTH the Board of Directors, as well as the management of corporation.

From assigned readings on new Justice Department Guidelines. How do these new standards relate to the ideas of fiduciary obligations? Do they create any potential conflicts of interest that might give rise to a shareholders derivative lawsuit?

1. To be eligible for <u>any</u> cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.

In order for a company to receive <u>any</u> consideration for cooperation under the Principles of Federal Prosecution of Business Organizations, the company must completely disclose to the Department all relevant facts about individual misconduct. Companies cannot pick and choose what facts to disclose. That is, to be eligible for any credit for cooperation, the company must identify all individuals involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about individual wrongdoers, its cooperation will not be considered a mitigating factor pursuant to USAM 9-28.700 *et seq.*[2] Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible for consideration for cooperation credit. The extent of that cooperation credit will depend on all the various factors that have traditionally applied in making this assessment (*e.g.*, the timeliness of the cooperation, the diligence, thoroughness, and speed of the internal investigation, the proactive nature of the cooperation, etc.).

8. Duties of Majority Shareholders / Rights of Minority Shareholders
Where a single (or few) shareholders control the company, they owe a fiduciary obligation to minority shareholders. A breach of this duty may lead to "oppressive conduct". Consider how a small, closely held corporation could get into trouble here.

9. Limited ability to force the company to hold a vote/resolution on topics.

Wal-Mart shareholders fail to force company to send ballot initiative to shareholders re WM policy on selling assault weapons in stores.

MANAGEMENT : THE CEO

The Board of Directors has the responsibility of hiring the managers. This includes setting the salary of the CEO. But in practice, the CEO is often the Chairman of the Board (think Microsoft in the early days); furthermore, the same person may be the single largest stockholder (with the most votes).

Obviously, the CEO of a corporation has ultimate responsibility for running the business – though the Board has the ultimate responsibility for making the major decisions.

Managers (who are employees) are expected to exercise sound judgment, and provided that there is a "reasonable basis" for a business decision, they cannot be personally liable even if it turns out to be disastrous. Managers owe a fiduciary duty to the shareholders.

Managers often work under contract.

In recent years, one of the most troubling trends is the lack of correlation between pay and performance for top CEOs.

Buffett Calls CEO Pay 'Ridiculously Out of Line'

By WRITER MARCH 6, 2006 7:45 AM
March 6, 2006 7:45 am

In his annual letter to **Berkshire Hathaway** shareholders, Warren Buffett had harsh words for overpaid chief executives, and again sounded a warning about the risks of derivatives.

"Too often," Mr. Buffett wrote, "executive compensation is ridiculously out of line with performance. That won't change, moreover, because the deck is stacked against investors when it comes to the C.E.O.'s pay. The upshot is that a mediocre-or-worse C.E.O. — aided by his handpicked V.P. of Human Resources and a consultant from the ever-

accommodating firm of Ratchet, Ratchet and Bingo — all too often receives gobs of pay from an ill-designed compensation arrangement."

http://graphics.wsj.com/ceopay-2015/

Finding the right mix of compensation for managers is difficult. It frequently includes several moving parts, each with strengths and weaknesses.

Typically, executive pay consists of a combination of:

1. Salary.
   The base salary is set, usually by contact.
   How is the CEO's salary determined? The Board of Directors often turns to consulting firms to do this.

2. Annual bonuses
   Based upon the company's annual performance, typically measured by year end profits, increase in market shares, new products brought to market, etc.

3. Long term bonuses
   These are contingent on the long-term success of the company.
   How should these be measured? Over what period of time? How do decisions now, on R&D for future products, play into this? Is this good or bad?

4. Restricted Stock
   Start-ups, to attract well-qualified managers, use these "special" stock grants that are given to executives. These stocks do not vest, or mature, until a set time passes, and the recipient can only sell a set number of shares at a time. The idea is to motivate the manager to do a good job, thus increasing the value of his/her stock.

5. Stock options
   These are approved by the Board, and designed to keep employees and managers loyal, because they can vest over a period of time. They work by giving employees, today, the right to purchase stock at today's price, any time on or after a certain date.

THE BOARD OF DIRECTORS

The Board of Directors governs the corporation.

After the original Board is appointed, usually by the incorporators, subsequent directors must be elected by a majority of the shareholders.

The recent trend has been toward "outside" directors, e.g., directors who are not also management. The typical ratio is about 4 to 1.

The board of directors acts by majority rule; individual members cannot do much. In 2004, the average Board had 11 members. Compensation is set forth in the corporate byelaws.

Responsibilities:

1. The appointment, supervision, and removal of corporate officers, and setting their compensation.

2. Major financial decisions, like setting dividends, the issuance of new shares of stock, or stock buy-backs (what's that?) (any "illegal" dividends authorized by Directors may lead to personal liability for Directors)

3. Authorize major corporate policy decisions (who should we take over next?) or (should we agree to be bought out?)

4. Like management, Directors owe a fiduciary duty to stockholders. To do this effectively, Board members must be informed, and willing to exercise independent judgment. But Board Members often feel there is a conflict between the short-term desires of stockholders (higher share prices, based upon higher earnings), and long term spending on research and development.

THE BUSINESS JUDGMENT RULE
Suppose that either/both Directors and Management makes a disastrous decision, on behalf of the company, and significant losses are incurred. Can the shareholders successfully sue either/both the managers and directors for negligence?

Honest mistakes, or poor guesses will not lead to liability. In other words, as long as there was a reasonable basis for the business decision at the time, they are in the clear. The decision must be made in good faith, and without any conflict of interest.

THE CORPORATE VEIL
Recall that one of the major advantages of forming a corporation is that it allows the investors to only risk their investment, and generally shield their personal assets from creditors… this advantage is occasionally exploited by unscrupulous investors. When this happens, creditors seek to "pierce the corporate veil" and get to the assets of the shareholders.

TEST:

1. Shareholder must completely control/dominate the business in terms of policy and business practices; this is sometimes referred to as the "unity of interest and ownership" rule;
2. This control was used to perpetrate a fraud or other serious wrong / the "wrongful conduct" test
3. The control and act (#2, above) was the proximate cause of the injury

Court will sometimes consider whether a corporation is undercapitalized and ignoring regulatory rules – simply to "save money" but not have funds available if a disaster should strike.

Example: Todco corp leases (does not own) an indoor pool from TodcoParentsCorp (Tod's parents' corporation) Tod is the only shareholder of Todco, which has no actual assets. Bellevue requires lifeguards (which Tod does not have) and insurance (which Tod does not have) – thus saving money and allowing Tod to profit. A drowning occurs. Todco is undercapitized.

Example: story from text – shell game where roofer sold assets to the next corp he formed.

S Corp

Limited number of shareholders (less than 100).
Must be a natural (real) person, and US citizen or legal resident.
Tax Plus: Pass through.
No individual liaibility.

Professional Corporations (PC)
Previously, groups of doctors formed partnership; modern trend is Professional Corporation.
Liability is limited to investment, so each MD is not personally liable for the errors of OTHER physicians, though does continue to have liability for his/her own negligence.

Benefit Corporation
Recall that traditional, for profit companies have an imperative: make money for shareholders.
Benefit Corporations may write into their charter goals in additional to maximizing profits, e.g., consider the environment, etc.
http://www.npr.org/2014/06/18/316349988/benefit-corporations-look-beyond-the-profit-motive

Feb. 28, 2017 Lecture 17

ETHICS + CRIM LAW DAY 1

ETHICS = DETERMINING THE "RIGHT" THING TO DO, VIA MORAL REASONING.

READINGS:

The article I gave you on cheating on Wall Street is concerning. The business community – at least there – has a significant problem.

The problem is compounded because of the perception that others are cheating, and that to stay competitive, you need to cheat, too.

We need a reset.

ETHICAL RELATIVISM

What is proper/ethical in one country may not be proper in another country.

Ethical principles are partly the result of history and culture, and are further defined by various periods of time in history, a society's traditions, the special circumstances of the moment, and personal opinion.

Under this theory, there are no universal ethical standards on which people around the world could agree.

AS WE EXAMINE VARIOUS ETHICS MODELS KEEP IN MIND HOW SEVERAL OF THESE CORE IDEAS MIGHT CONFLICT WITH EACH OTHER

Freedom	To make your own decisions, free from (particularly) government rules. This is a core belief of "libertarians".
Virtue	To do what your conscience dictates.
Welfare	(We will use "welfare" as a corollary the common good). This is a key belief of so-called utilitarians.

Examples of tensions between these core values:

Libertarians v. utilitarians

Tragedy of the commons (fishing)

Let's start with considering something simple:

Who agrees with the following statement, and is willing to defend it:

Now, consider this statement, and whether you agree with it:

Different Models Lead to Different Results and Actions.

The Runaway Trolley

This case study tends to separate people into the two groups that we are most concerned with today….

Two Major Schools of Thought –

1. **<u>Duty-Based Ethics</u>**

   Considers whether pre-existing rules are followed, rather than the specific result, in determining whether the conduct or action was/is ethically appropriate. It is not the consequence of an act, but the nature of the act itself, that determines if it is ethical.

2. **Utilitarianism (or result-oriented models)**

   Considers the "results" of the action in determining if action was/is ethically appropriate.

   Utilitarians are concerned with finding the course of action that provides the greatest good to the greatest number of people.

This is not to imply that there are not other ethics models – because there are:

The Disclosure Rule

The idea here is quite simple, and is parallel with the idea of transparency.
To test whether something is ethical or not, imagine how you would feel about your action being published on the front page of the Seattle Times.

DUTY BASED ETHICS

Frequently based upon religious principles (which have often been made into laws):

Thou shall not steal.

Thou shall not kill.

Do unto others….

Kant / Philosophic approach to Duty Based Ethics

Categorical Imperative:
A person should not act unless he or she is willing to have the rule or conduct on which one acts become universal law. The rational person would consider the consequences of this, and then act accordingly, based on how society (not just the individual) would be affected.

A little inappropriate, but it's straight from U-Tube
http://www.youtube.com/watch?v=FBNX6pp5efA

Think back to what you know about contracts.

A contract is an agreement (a promise, really) between two parties, the breach of which gives rise to damages.

How would Kant evaluate whether a person should breach a contract?

PROCEDURAL JUSTICE focuses on whether the procedures, laws, or system is applied fairly, regardless of the end result. It is a type of duty-based ethic.

Problems with Duty Based Ethics –
They are rigid, and that occasionally leads to result you may not be comfortable with.

Examples:

Thou shall not steal. Post Katrina New Orleans.

Thou shall not kill. Self-defense?

Would you kill a madman?

Procedural Justice Problems –
it places form (the procedure) over substance (the result) and can lead to unjust results.

Lilly Ledbetter & the Supreme Court.

Goodyear had been paying her less than her male co-workers for decades, and kept it secret. When she found out, and sued, the Supreme Court said that under the rules, she could only sue for improper pay in the previous 180 days… she was past the statutory period to recoup money for the decades she had been paid less than she should have been.

Utilitarianism (and result-oriented models)

UTILITARIANISM
JEREMY BENTHAM AND JOHN STUART MILL

John Stuart Mill + Jeremy Bentham, contributed a great deal to this philosophic model, when they refined the idea of "utilitarianism" =

the ethically correct course of action is to do what gives the greatest number of people the greatest good.

What are the problems, or difficulties with utilitarianism?

What things are difficult to place a value on?

Utilitarianism is **outcome determinative** (in contrast to procedural justice, for instance, which does not really care what the outcome is, provided that the procedures that got you there was fair);

results matter, and suggest the behavior that leads to the end result is ethical, if the result was positive for the greatest number of people.

How does utilitarianism factor in things like "liberty"?

Or "the Golden rule"? (If at all?)

How many of you have been to Rome? And seen the Roman Coliseum?

It would likely accept violation of basic human rights in the service of the greater good.

During WWII America – without really saying that it was using utilitarianism, but using it nonetheless – used this model with terrible consequences.

In modern America, businesses and governments call utilitarianism cost-benefit analysis (CBA).

It also often requires the businessperson to assess how various stakeholders (with competing interests) might be affected by a decision the business takes.

Applying utilitarianism requires:

1. Knowing who will be affected -

2. **As assessment of the positive/negative impacts on these people, by cost-benefit analysis (What is the metric for this? And what are the problems with this metric?)**

3. **A choice to pursue the greatest good, for the greatest number.**

THE FOR PINTO (and associated Ford truck) CASE

Design and sales goal: $2,000 / 2,000 pounds = Great Cost and gas mileage.

http://www.bing.com/videos/search?q=ford+pinto+advertisement&FORM=HDRSC3#view=detail&mid=8B6C137A0BDD1094A72F8B6C137A0BDD1094A72F

Gas tank design and flaw.

DISTRIBUTIVE JUSTICE --

A second type of result-oriented model.

Many political debates focus on what is just, or fair.

This is a normative inquiry (meaning, you have to define what is "fair").

Distributive justice **focuses on the end result**.

Examples:

Is it just, or unjust, that tax increases/cuts hit the rich/poor harder/softer?

Is it just, or fair, that somebody working full time, at a minimum wage job, takes home so little money that they would qualify for government welfare benefits?

Is it just, or fair, that income is distributed so unevenly in the United States?

John Rawls and his "veil of ignorance" – Applied.

http://economy.money.cnn.com/2013/03/08/wealth-video/

THE ENDS JUSTIFY THE MEANS MODEL

Can easily be perverted to justify virtually any conduct.

http://www.bing.com/videos/search?q=breaking+bad+trailer&FORM=HDRSC3#view=detail&mid=A3A1AC1F76B6AAED4B2FA3A1AC1F76B6AAED4B2F

CIVIL AND CRIMINAL REGULATION OF BUSINESS

WHAT IS A CRIME?

A "CRIME" IS A WRONG AGAINST SOCIETY (THE VICTIM DOES NOT GET TO "DROP THE CHARGES")

ONCE CONVICTED OF A CRIME, A WIDE VARIETY OF PUNISHMENTS ARE AVAILABLE: JAIL/PRISON, FINES, RESTITUTION, REGISTRATION AS A CONVICTED SEXUAL OFFENDER, LOSS OF RIGHT TO VOTE, OWN A FIREARM, DEATH.
WHERE A CORPORATION IS THE DEFENDANT, THERE IS THE POTENTIAL TO LOSE A BUSINESS LICENSE.

MOST CRIMES ARE ALSO CIVIL WRONGS – OJ SIMPSON.

CORPORATIONS CAN ALSO BE SUED IN COURT, AND PROSECUTED IN A CRIMINAL COURT.

NUMBER OR PRISONERS IN THE UNITED STATES (2013)

- **ABOUT 2.4 MILLION**
- **743 PER 100,000 PEOPLE (WE'RE NUMBER ONE! (IN THE WORLD).**
- **Most prisoners are held at the State, not Federal level.**

95% OF CRIMES ARE PROSECUTED AT THE STATE AND LOCAL LEVEL

5% OF CRIMES ARE PROSECUTED AT THE FEDERAL LEVEL.

ALTHOUGH ONE ACT MAY BE BOTH A FEDERAL CRIME AND A STATE CRIME, AND MAY BE PROSECUTED BY BOTH BECAUSE THEY ARE SAID TO BE SEPARATE SOVEREIGNS, THIS IS A RARE EVENT. (RODNEY KING)

CRIMINAL STATUTES

- **MUST DESCRIBE THE FORBIDDEN CONDUCT CLEARLY, SO THAT PEOPLE CAN CONFORM THEIR CONDUCT TO ACT WITHIN THE STATUTE. IF A CRIME IS NOT CLEARLY DEFINED, IT IS VOID FOR BEING VAGUE.**

- IGNORANCE OF THE LAW IS NOT AN EXCUSE.

STATUTE OF LIMITATIONS – WHY?

MURDER – NO TIME LIMIT

MOST SEX CRIMES IF VICTIM WAS UNDER 18 / UNTIL VICTIM IS 30 YEARS OLD

MOST FELONIES = 3 YEARS

MOST MISDEMEANORS = 1 OR 2 YEARS

A CRIME OCCURS WHEN A PROHIBITORY STATUTE IS VIOLATED AND THAT INDIVIDUAL ACTS WITH MENS REA (a particular "state of mind," usually "intentionally or, in some cases, recklessly or negligently).

ACT + STATE OF MIND both must be established.

THIS IS DIFFERENT FROM MOTIVE.

MOTIVE = WHY SOMEBODY DOES AN ACT (TO TAKE THE MONEY) PROOF OF MOTIVE IS ONLY RARELY NECESSARY TO CONVICT SOMEONE OF A CRIME (HATE CRIMES, CALLED "MALICIOUS HARASSMENT" IN WASHINGTON, IS ONE EXAMPLE)

SPECIFIC INTENT =

DESIRE TO ACTUALLY WANT TO HARM SOMEBODY, OR TO DO THE ACT THAT IS A CRIME.

RECKLESSNESS =

NO INTENT, BUT RECKLESS CONDUCT / MAN. 1

RECKLESS ENDANGERMENT

EXAMPLE: RECKLESS DRIVING

NEGLIGENCE =

NO INTENT, BUT NEGLIGENT CONDUCT = MANSLAUGHTER 2

EXAMPLE: NEGLIGENT DRIVING

STRICT LIABILITY = JUST DOING THE ACT (RESTAURANT QUALITY)

BURDEN OF PROOF **BEYOND REASONABLE DOUBT.**

INCOMPLETE CRIMES = ATTEMPTS

ATTEMPT: TAKING A SUBSTANTIAL STEP TOWARD THE COMPLETION OF THE CRIME, WITH THE INTENT TO COMPLETE THE CRIME (AARON LORD)
IN WASHINGTON, ATTEMPTS ARE PUNISHED AT 75% OF THE COMPLETED CRIME.

PARTIES TO A CRIME:

1. PRINCIPALS = THEY OFTEN "RUN THE SHOW" AND ARE THOUGHT TO BE MOST RESPONSIBLE, OR CULPABLE.

2. ACCOMPLICES = HELPERS ("In for a dime; in for a dollar")

LEVELS OF CRIMES

FELONIES = CRIMES PUNISHABLE BY MORE THAN A YEAR IN PRISON (STATE/FED). CAPITAL CRIMES = ELIGIBLE FOR THE DEATH PENLTY

MISDEMEANORS = CRIMES PUNISHABLE BY UP TO A YEAR IN JAIL (Note that this is NOT prison)

PROSECUTORIAL DISCRETION: THE PROSECUTOR DOES NOT HAVE TO FILE CHARGES, AND CAN CHOOSE THE CRIME HE WANTS TO PURSUE. WHAT IS THE POLITICAL CHECK AND BALANCE TO THIS?

FIFTH AMENDMENT
This allows for any person to "**remain silent**" at all points during an investigation as well as a prosecution. The government (police, prosecutors and the Court) cannot compel (require) a person to answer questions, and a person's silence in the face of questions cannot be used as evidence against them at trial.

Further, the Supreme Court has held the people arrested must be advised of their right to remain silent, as well as their right to counsel (and that if they cannot afford an attorney, one will be appointed for them).

NOTE: The US Supreme Court has ruled that **Corporations do NOT have the same 5th Amendment rights that people do**. So, for instance, a corporation may be required to surrender to the government documents that might incriminate it, while a person cannot be forced to surrender the same type of documents.

FOURTH AMENDMENT (and the "exclusionary rule")
Evidence derived from an improper search, by the police, will not be admitted at trial (it will be "excluded").

Why?

Physical evidence derived from a search….

Statement derived in violation of Miranda…

Warrants: Recall the first day of class… and the case we discussed, Jacobson v. City of Seattle….

- WHO MAY COMMIT A CRIME: Persons AND Corporations

CHILDREN UNDER 8: NO (in Washington)

CHILDREN OVER 8 AND LESS THAN 12, PRESUMED NO, BUT STATE MAY SHOW THEY UNDERSTAND RIGHT/WRONG

12+ TO 18 JUVY (CAN MAINTAIN JURISDICTION until age 18)

16+ DECLINE HEARINGS (in some circumstances)

16+ AND CERTAIN CRIMES: AUTO DECLINE

Corporations: (Massachusetts test is used everywhere)

1. That an individual committed a criminal offense; and

2. That at the time the individual committed the offense the individual was engage in a particular corporate business or project; and

3. That the individual had been vested by the corporation with the authority to act for it, and on its behalf, in carrying out the particular corporate business.

ARRAIGNMENT
This is when a person is told, in Court, what the charges are. You must be told so that you have a chance to prepare a response. At arraignment people typically plead "not guilty".

PLEA BARGAIN
The vast majority of criminal cases (80+%) are resolved by way of a plea bargain, rather than a trial.

Why? (What does risk analysis have to do with it?)
Pros?
Cons?

Discovery in Criminal Cases

While the text makes a number of points that are valid for Federal criminal prosecutions, as well as criminal prosecutions in OTHER states, the text is incorrect on some major matters regarding what the rules are in Washington State.

Washington has reciprocal discovery in State criminal proceedings; the prosecution must provide the defense with all material in its possession that is inculpatory (makes the defendant look guilty) as well as exculpatory (would be helpful to the defendant).

Similarly, the defense has to provide the state prosecutors will summaries of what its witnesses (other than the def) will testify to, and make those witnesses available for pretrial interviews. Like in civil cases, the goal in Washington's criminal courts is to avoid surprises. NOTE: The government, even in State Court, can never compel a criminal defendant to answer questions prior to, or during, trial.

March 2, 2017 Lecture 18

BUSINESS AND CRIMES DAY 2

TAX EVASION

It is a crime not to pay your taxes in the US. It's a separate crime to lie about your taxes. Many people cheat, and some go to prison.

In recent years, the government has focused on Americans who stash their money in secret, overseas accounts (where they shield their income and don't pay taxes on it). The US view is that foreign businesses have been complicit (accomplices) to this tax evasion.

http://www.cbs.com/shows/60_minutes/video/rhjO_c9SQotRvqB6b2uzduU5aPc3Lr1U/the-swiss-leaks/

60 MINUTES

ANTITRUST LAW

WHAT ARE ANTI-TRUST LAWS

1. The rules of the game of capitalism, designed to preserve the competitive process.

2. The engine of free enterprise is competition. When it works, the market economy usually functions well – numerous sellers vie (by producing good products at reasonable prices) for numerous buyers, and those who produce the best products at the best prices win.

3. But competition sometimes fails because private participants in the market subvert competition.

4. Historical perspective: Anti-Trust (No Trusts). Trusts worked in a pernicious ways to stifle competition, allowing a small group of people to control entire industries (Standard Oil). The first Anti-Trust law was designed to combat this.

You may think that businesses don't really collude to fix prices, but it really happens.

ANTI-TRUST LAWS APPLY TO ALL BUSINESSES…

…Unless there is a specific statutory exception.

Congress has shielded the following from anti-trust enforcement:

Baseball (Go figure…)

Labor Unions (Why? Collective bargaining)

Agricultural co-ops (Why? Producers pool products)

Insurance businesses regulated by States (why? B/C states limit pricing)

Anti-Trust laws can be enforced in four different ways:

1. The Justice Department can file a civil case (to prohibit conduct) or a criminal case (that can result in fines for the company, and fines/jail for individuals).

   Because the Executive Branch is "political", whether anti-trust laws are vigorously enforced, or ignored, is often a function of the particular view of the President. Democrats tend to more vigorously enforce these laws than Republicans, who view mergers, in particular, and benefiting companies through economies of scale.

   Settlements often result when the Government files civil/criminal cases.

2. The Federal Trade Commission has the right to enforce, on behalf of the government, the Anti-Trust Laws (through investigation); but can only file civil suits (no criminal penalties). Settlements – often result when the Government files civil/criminal cases.

3. State attorney generals, provided their states have anti-trust laws, can file cases (think of Elliot Spitzer, former Attorney General of New York – who has been the most active).

4. Private parties can sue in Federal Court for injunctive relief and treble damages.

   In the case of individuals (or, more likely, competing corporations), the courts have held that the party wishing to sue must establish STANDING, e.g. –

   1) That the antitrust action caused, or was a substantial factor in causing, the injury that was suffered;

   2) That the unlawful actions of the accused affected business activities of the plaintiff that were protected by the antitrust laws.

ANTI-TRUST: HISTORY 1, 2, 3

FROM PBS / THE ROOSEVELTS
http://www.pbs.org/kenburns/the-roosevelts/classroom/lesson-plans/

The policy reason for antitrust legislation is the desire to maintain (and foster) competition. Anti-trust laws are a set of rules designed to preserve the competitive process, and enable markets to direct resources to the uses that will best satisfy consumers.

Thesis: Adam Smith's (and Milton Friedman's) ideal of enfettered competition among businesses, as the recipe for best serving the consumer, is undermined to the extent that competition is diminished.

But competition sometimes fails because private participants in the market subvert competition. If the competitors get together, and rig the game, consumers lose.

The Standard Oil trust of the 1890s, and the so-called Robber Barons, were the catalyst for reform.

THE SHERMAN ACT (1890) / SECTION I

1. Section I: "every contract, combination in the form of trust otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is…declared to be illegal."

   The restraint on trade must be unreasonable (See Rule of Reason, below)

   The trigger is "contract", "combination" or "conspiracy". Without one of these, there can be no violation. The key here is that two actors must be acting in conscious concert (ex: ever notice how airfares always seem the same among multiple airlines…not illegal if one is simply the "price leader" and others follow. Only illegal if they get together and "set" prices.)

   The Rule of Reason
   The Court had to develop at workable test, lest any communications between competing firms might have been deemed illegal under the anti-trust laws. The Rule of Reason holds that only ***unreasonable*** restraints of trade violate Section 1. Courts examine the following factors in applying the rule of reason:

   1. The pro- and anticompetitive effects of the restraint;
   2. The competitive structure of the industry
   3. The firm's market share or power;
   4. The history and duration of the restraint;
   5. Any other relevant factors.

The Per Se Rules
These actions are inherently illegal under the antitrust laws; the court won't apply the rule of reason because the violations are so obvious.

Think of restraints of trade as being either:

Horizontal --- Agreements between competing firms.

Vertical ------ One firm controls all aspects of the product, from design and production, to retail sales; OR multiple firms, each involved in some aspect of design and production, to wholesale and retail distribution, involved in a conspiracy.

1. **Horizontal Restraints of Trade that are per se violations include**

   Bid Rigging

   Market Divisions
   Sotheby/Christie

   Group boycotts
   Any agreement by two or more sellers to refuse to deal with, or boycott, a particular person or firm, is prohibited.

COVENANTS NOT TO COMPETE

Generally illegal, as restraints on trade.

Example:
Taco Bell promises Taco Time $100,000 if Taco Time doesn't locate any Restaurants within 10 miles of any Taco Bell in WA.

BUT – Two major exceptions:

Sale of business. Owner may agree not to
Compete in geographic area for several years; this is via the "goodwill" part of sale

Employees may sign "non-compete" clauses (discussed in Employment Law)

TYING ARRANGEMENTS

A tying arrangement is defined as the conditioning of the sale of one product on the buyer's purchase of another product. Tying arrangements can be challenged under S/1of the Sherman Act, S/5 of the Clayton Act.

1. Most common form – occurs where a seller has market power with respect to the tying product and can use this to leverage increased sales of the tied product. (This results in economies of scale for the tied product, and cost savings to the manufacturer.)

2. There is a three-part test for unlawful tying (if met, the conduct is ordinarily a per se unlawful). But note: even if a tying arrangement is not per se unlawful, the court may apply the "rule of reason" test and still find it unlawful.

i. Two ***separate*** products must be involved (think of Xerox copiers, spare parts, and the technicians who services are required to fix them: these are different products…which might be illegally tied.) Note: Integrated products may be examined under the "rule of reason" rather than per se test. What is an integrated product? (Consider "clock-radios")

ii. The seller must have sufficient market power in the tying product to force the sale of the tied product. If the seller has a monopoly in the tying product…the test is usually met.

iii. There must be an impact on commerce.

Microsoft: Internet Explorer illegally tied to Window operating sytem.

MONOPOLIES

Monopoly Power – The ability to control, or set the price, or to prevent others from entering the business.

Having a monopoly itself is not necessarily illegal, because the monopoly may be the result of:

1. Historic accident

2. Natural monopoly
   One company expands quickly, realizing economies of scale which reduce per-unit costs, which attract more consumers.

3. Business acumen
   Example: Patenting a product / Drugs are a good example.

4. Superior product
   Example: Ipod & Itunes (dominant in the MP3 and online music markets)

PROBLEMATIC MONOPOLIZATION

The Sherman Act / Section II

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or person, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."

To be problematic, a two-part test for monopolization must be met:

1. The possession of monopoly power in the relevant market; and

   (Begs the questions: "What IS monopoly power?"
   "What is RELEVANT MARKET?"

2. The willful acquisition or ***maintenance*** of that power .
   (as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident).

   How does a court determine whether a company is intentionally using its monopoly power to maintain its monopoly

   KEY:
   Must Define the Relevant Market (Product Market and Geographic Market) to determine = Market Power

   The point of "defining the relevant market" is to determine the geographic, as well as product "market" in which competition is taking place. This is done to assess whether a firm has "Market Power", e.g., the ability of one firm, or combination of firms, to set the market price or exclude competitors.

A. The "Product" Market

1. Realistic substitutes, which consumers may choose, are included.

   Example:
   Flying between Washington D.C. and NYC, might be compared with all modes of transportation (boats, trains, cars). A rise in plane fares may get people to change their transportation method of choice. At what price point will consumers switch?

   Example: Dupont Case
   Cellophane is interchangeable with other plastic wraps, so even though it had a monopoly in cellophane, it does not have a monopoly in "wrappers."

2. The Geographic Market: Is the market local? National? International? (Baked goods vs. jumbo jets)

3. The Existing and Potential Competitors

This includes hypothetical competitors that could enter the market, if prices rise too much. ***But consider: barriers to entry***.

B. **The Market Share**

1. The next step is to determine what market share the suspect firm(s) have, in the relevant market. Market share is the firm's fractional share of the total relevant product and geographic market: mergers that allow the surviving company 20%+ are viewed skeptically. Older cases found "market power" with firms controlling 75-80%.

Attempted Monopolization

A. Intent is key: What was the suspect firm trying to do?

B. Inferences: Did the firm's actions make economic sense?

Example: selling below cost in only one geographic market, to drive out competitors, but keeping costs for the same item higher in other areas, is illegal.

Example: a railroad that owns the only bridge in the area, and which excludes competitors or charges a ridiculously high price, could force this competitor out of business.

Monopolization

What about the company that becomes a monopoly through fair competition? Once it obtains this position, it must not do anything unlawful to maintain its monopoly position.

a. The local phone company (a government-endorsed monopoly) cannot require customers to purchase phones from it, or cease service.

PREDATORY PRICING (A sign of monopolistic power)

Pricing a product below cost is problematic because:

1. It can lead to monopoly power by driving competitors out, and barring new entrants to the field;

2. The danger is that eventually a company will achieve a monopoly, and then raise prices for all consumers

CLAYTON ACT

The Clayton Act looks to potential problems in the future, and tries to curb them now.

1. **Section 3** makes "tying" or "exclusive dealing" illegal (e.g., A manufacturer will only sell products to a retailer if the retailer refuses to carry one of the manufacturer's competitor's products.

2. **Section 7** prohibits certain acquisitions (for example, one company purchasing a rival company) if the result will be a significant decrease in competition. (Consider the likely result if Exxon were allowed to purchase all the BP, Arco, and Chevron gas stations within a 30 mile radius.)

   The objective of antitrust law is to maintain competition. If a merger threatens competition, the government can block the merger, or order the two companies to take steps (usually divestiture) before the merger is allowed to go through.

   Pursuant to this provision, the Government may bring an action to stop a proposed merger.

   Section 7 was last amended in 1980, and now prohibits any ***merger "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly***."

NPR 4 Min
How anti-trust regulators decide whether to block a merger
http://www.npr.org/blogs/money/2013/02/15/171955074/mavericks-hot-documents-and-beer

A. It makes no difference whether it is a stock or asset acquisition;

B. Nor does it matter whether the target business is a corporation, partnership, or stand-alone business (law firms or accounting firms);

C. Merging companies must first notify the government (FTC); if the gov't objects, it may sue to prevent the merger (relying upon Market Power analysis, infra, where concentrations of more than 25% are problematic.

D. The statute applies to both horizontal (between competing companies that both produce the same product) and vertical mergers (between suppliers and customers).

HORIZONTAL = Company A makes widgets, and has a 30% market share. Company A then buys Company B, which also makes widgets, and controls 25% of the market for widgets. Now company A controls 55% of the total market (and may control a far higher % in specific geographic areas, especially if the delivery costs of widgets is high).

In determining whether or not to challenge a horizontal merger, the Justice Department uses a formula to assess the combined market share/concentration of the merging firms (don't ask me why they use such complex exponents, I was a history major), and then makes a decision about whether to allow the merger or challenge it.

VERTICAL MERGERS = Company A (still making widgets) buys Company B (which makes the metal used in the production of widgets); this is a backward merger. If Company A purchased company C (which had retail stores that sold Company A's widgets) this would be a forward horizontal merger. Section 7 of the Clayton Act forbids mergers IF the merger would have substantially lesson competition, or would tend to create a monopoly.

US ANTITRUST LAWS REACH FOREIGN COUNTRIES.

A combination to fix prices, even if hatched on foreign soil, may be prosecuted in the United States, per the Sherman Act, if the affect of the combination is to raise prices in the United States.

United States v. Nippon Paper Industries. The touchstone is whether the conduct that takes place abroad significantly affects either consumers in the United States or American export opportunities to foreign countries. The Antitrust Division of the Justice Department expends considerable resources each year dealing with foreign matters.

Archer-Daniels-Midland and foreign competitors…

Nine Japanese Auto Parts Makers Plead Guilty To Price Fixing NPE 3 Min
http://www.npr.org/templates/story/story.php?storyId=226552996

INTERNATIONAL ANTITRUST ENFORECMENT

Three factors have changed antitrust enforcement into a global, rather than a strictly national matter:

1. Companies have become international, either selling goods around the globe, or buying raw materials or labor around the world; international mergers also contribute to this;

2. Foreign countries have realized that competition rather than state monopolies adds wealth to countries;

3. The deregulation of former natural monopolies (telecommunications, power, etc) have caused regulators to become concerned about anticompetitive practices, especially when mergers occur.

EU Antitrust Enforcement

From a policy standpoint, there few substantive differences between American and EU practices. But the policy goals, including how vigorously the of antitrust laws are enforced, especially in international contexts, are quite different.

The US model is more focused on stopping practices that harm competition (in a belief that the more competition, the better, for the public.)

EU competition policy developed as an outgrowth of the desire for increased economic integration among EU member states. EU antitrust policy is designed to achieve the goals of the EC Treaty, including the growth of a single market. This view has significant implications (and the contrasts between the US system should be apparent).

The dilemma EU and US officials face – when deciding how vigorously to enforce their antitrust laws -- is between preserving competition in the marketplace and promoting European champions that could compete on a more global scale.

Price Fixing

EU Fines LCD Panel Makers $857 Million For Cartel

by THE ASSOCIATED PRESS

BRUSSELS December 8, 2010, 09:37 am ET

The EU competition watchdog fined five Taiwanese and South Korean electronics companies euro649 million ($857 million) Wednesday for fixing prices on LCD panels between 2001 and 2006.

A sixth company, Samsung Electronics Co., also participated in the price fixing but escaped a fine because it blew the whistle on the cartel, the European Commission said.

EU Fines Microsoft 700 Million NPR
http://www.npr.org/2013/03/06/173605317/e-u-hits-microsoft-with-a-732-million-fine

INSIDER TRADING

In the past 5 years the Federal government has adopted a much more aggressive stance toward the prosecution of insider trading cases, winning convictions in more than 80 cases and sending many people to prison.

TEST

A person violates the insider trading laws if the person:

Has possesses material information (information that would be significant to an investor in the stock; information that would move the market)

That is non-public

And knowingly trades (or cause others to trade on) based upon this material information before the public is aware of it.

(Trading may be buying, or shorting.)

Example:
You buy and sell stock in Todco, knowing that non-public information, once it is made public, will affect the price of Todco stock. You can either buy low, and sell high, or buy and short the stock.

Example:
The U.S. Supreme Court has ruled that investors can be prosecuted for using inside information, even if they don't work for the company whose stock they are buying or selling.

> Front running (3:30)
> http://www.npr.org/templates/story/story.php?storyId=7244110

Rajaratnam Network
http://www.nytimes.com/interactive/2011/03/08/business/galleon-graphic.html?ref=insidertrading

http://dealbook.nytimes.com/2013/03/15/sac-settles-insider-trading-cases-for-616-million/

My favorite story of the past year involved two young men who both graduated from Duke University the same year. Ajai Thomas and Matthew Martoma

AJAI THOMAS was admitted to Harvard Law School, but did not graduate. In December 1998, he used computer software to change several grades on his Harvard Law School transcript from B to A, as part of his clerkship applications to 23 federal judges. Harvard soon discovered the doctored transcripts and confronted Thomas, who first claimed "it was all a joke," then changed his story and said he had actually been trying to impress his parents.

Thomas asserted that the altered transcript had been sent to the judges due to an error made by his brother, who had assembled his clerkship application materials.
He then claimed that after he discovered the error, he had sent withdrawal letters to the judges before being confronted by Harvard officials.

That was also a lie.

In truth, Thomas had sent the withdrawal letters only after being confronted, and had tried to cover up that fact by pre-dating emails that he submitted in his defense.
On May 12, 1999, the university's administrative board recommended that Thomas be expelled. Even then, he continued his deceptions. In response to the expulsion recommendation, Thomas and a friend created a phony computer forensics company, which provided "evidence" to Harvard disciplinary officials filled with "impressive sounding techno-jargon" in an attempt to explain away the discrepancies in his earlier emails.

The expulsion stood.

MATHEW MARTOMA – graduated from Duke the same year as Martoma, went on to graduate from Stanford's #1-rated MBA program, and then went on to work for a huge hedge fund called SAC Capital Management.

He made millions every year, and is only in his 30s.

The problem is that was cheating, using inside information in "the most lucrative insider-trading scheme in history", netting more than $250 million in illegal profits. He was convicted several months ago, and faces a decade in prison.

Frontline: Go to 39:44
http://www.pbs.org/wgbh/pages/frontline/to-catch-a-trader/

http://dealbook.nytimes.com/2014/09/08/hours-before-sentencing-u-s-judge-says-cohen-trades-should-count-against-martoma/?module=Search&mabReward=relbias%3Ar%2C%7B%221%22%3A%22RI%3A7%22%7D

Besides the obvious – Duke, and they both got into trouble – does anyone know the most stunning thing about these two guys?

Here is a photo of Martoma

Do you see any resemblance to Ajai Thomas?

MONEY LAUNDERING
Hiding the truth (usually "the origins") of money is a crime in the United States. Why?

Because criminals need to hide exactly how they got their money.

Money laundering laws also apply in US foreign policy settings. For instance, US laws forbid US banks (or foreign banks doing business with US counterparties, or foreign banks with office in the US) from doing business with certain foreign countries (Iran, Syria, North Korea, Cuba). If a bank wants to play in the US's neighborhood, it has to play by its rules. So, the US has had to prosecute US and foreign banks for violating these laws.

Anyone seen Showtime's "Weeds"? How did Nancy originally intend to hide the proceeds from her marijuana business?

While originally designed to combat drug dealers, money laundering laws are increasingly used in foreign policy. Some major banks have recently been implicated in profiting through their banking business with rogue countries, in violation of the United States money laundering laws.

HSBC to Pay $1.92 Billion to Settle Charges of Money Laundering

State and federal authorities decided against indicting HSBC in a money-laundering case over concerns that criminal charges could jeopardize one of the world's largest banks and ultimately destabilize the global financial system.
Instead, HSBC announced on Tuesday that it had agreed to a record $1.92 billion settlement with authorities. The bank, which is based in Britain, faces accusations that it transferred billions of dollars for nations like Iran and enabled Mexican drug cartels to move money illegally through its American subsidiaries.

FOREIGN CORRUPT PRACTICES ACT

As a result of U.S. Securities and Exchange Commission investigations in the mid-1970s, over 400 U.S. companies admitted making questionable or illegal payments in excess of $300 million to foreign government officials, politicians, and political parties.

The abuses ran the gamut from bribery of high foreign officials to secure some type of favorable action by a foreign government to so-called facilitating payments that were made to ensure that government functionaries discharged certain ministerial or clerical duties.

One major example was the Lockheed (a major commercial airplane manufacturer) bribery scandals, in which officials of aerospace company Lockheed paid foreign officials to favor their company's products.

Congress enacted the FCPA to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system.

The FCPA prohibits
(1) US business and their agents (important: you are responsible for the actions of those who you hire to represent you!)
(2) from bribing (what's a bribe?)
(3) foreign OFFICIALS (e.g., the person bribed must work for the government)
(4) to influence an official act (e.g., to do something on behalf of the government)
(5) to gain or retain business.

So, is this law actually used?

Largest Settlements Under the Foreign Corrupt Practices Act

The law designed to prohibit the payment of bribes to foreign officials by United States businesses has produced more than $3 billion in settlements from a list of companies that is notable for its lack of American names. As of 2012, this list shows the highest fines.

The firm at the top of the list if Siemans:

According to the New York Times:

WASHINGTON — Shell companies, Swiss bank accounts, double-crossing middlemen and cash being smuggled across borders were all part of a decade-long bribery scheme aimed at helping Siemens, the German industrial giant, secure a $1 billion contract to produce national identity cards for Argentina, the Justice Department said Tuesday.

As a matter of public policy (the reasons for laws), what are the
Pros?
Cons?

Exactly How Widespread is Corruption
http://ipaidabribe.com/

NPR – Transparency International
http://www.npr.org/templates/story/story.php?storyId=1457593

Wal-Mart in Mexico (6 minutes)
The New York Times (The series of reports by the New York Times won journalism's highest award, the Pulitzer Prize).

http://www.nytimes.com/2012/12/18/business/walmart-bribes-teotihuacan.html

NPR 6 minutes
http://www.npr.org/2012/04/23/151231567/mexican-bribery-allegations-put-wal-mart-on-defense

All US companies, and their employees, are forbidden to pay brides to obtain business.

So, it's clear American businesses cannot bribe foreign official…

New Question:
Who is this man?

WHAT ABOUT THIS COMPANY…..

JPMorgan Chase & Company

JPMorgan Chase & Co. is an American multinational banking and financial services holding company. It is the largest bank in the United States, with total assets of US$2.515 trillion. It is a major provider of financial services, and according to *Forbes* magazine is the world's third largest public company based on a composite ranking.[4] The hedge fund unit of JPMorgan Chase is the second largest hedge fund in the United States.[5] The company was formed in 2000, when Chase Manhattan Corporation merged with J.P. Morgan & Co.[6]

To promote its standing in China, JPMorgan Chase turned to a consulting firm run by a 32-year-old executive named Lily Chang.

Ms. Chang's firm, which received a $75,000-a-month contract from JPMorgan, appeared to have only two employees. And on the surface, Ms. Chang lacked the influence and public name recognition needed to unlock business for the bank.

Lilly Chang (Anyone recognize her?)

Scan below

GOVERNMENT FRAUD – QUI TAM

What happens if you work for a business that is ripping off the United States government by charging too high of fees, or providing shoddy products? Is there any mechanism that will reward you for stepping forward (knowing that if you do, you might lose your job)?

The Whistle Blower Glaxo Smith-Kline – time permitting (unlikely)
http://www.cbsnews.com/video/watch/?id=7206290n

THE REST OF THE STORY / FOREIGN CORRUPT PRACTICES ACT

But what was known to JPMorgan executives in Hong Kong, and some executives at other major companies, was that "Lily Chang" was not her real name. It was an alias for Wen Ruchun, the only daughter of Wen Jiabao, who at the time was China's prime minister, with oversight of the economy and its financial institutions.

Graph of Family Dynamics
http://www.nytimes.com/interactive/2013/11/14/business/dealbook/JPMorgan-and-the-Wen-Family.html

Is it illegal?

Or, as Fortune Magazine asked:

FORTUNE — Does it pass the smell test?

So you can see, this presents some difficulties for American Businesses.

SOX (SARBANES-OXLEY)

LIST OF MAJOR ACCOUNTING SCANDALS
http://en.wikipedia.org/wiki/Accounting_scandals

Major Elements: Sarbanes Oxley (SOX)

Public Company Accounting Oversight Board (PCAOB) Title I Establishes the Public Company Accounting Oversight Board, to provide independent oversight of public accounting firms providing audit services ("auditors").

Auditor Independence Establishes standards for external auditor independence, to limit conflicts of interest. It also addresses **audit partner rotation**, and It restricts auditing companies from providing non-audit services (e.g., consulting) for the same clients.

Corporate Responsibility Title III consists of eight sections and mandates that senior executives take **individual responsibility** for the accuracy and completeness of corporate financial reports.

Corporate and Criminal Fraud Accountability Title VIII consists of seven sections and is also referred to as the *"Corporate and Criminal Fraud Accountability Act of 2002*". It describes specific criminal penalties for manipulation, destruction or alteration of financial records or other interference with investigations, while providing certain protections for whistle-blowers.

White Collar Crime Penalty Enhancement Increases the criminal penalties associated with white-collar crimes and conspiracies. It recommends stronger sentencing guidelines and specifically adds failure to certify corporate financial reports as a criminal offense.

Corporate Tax Returns Title X consists of one section. Section 1001 states that the Chief Executive Officer should sign the company tax return.

Corporate Fraud Accountability It revises sentencing guidelines and strengthens their penalties. This enables the SEC to resort to

temporarily freezing transactions or payments that have been deemed "large" or "unusual".

How Sarbanes-Oxley Has Affected Corporate Culture NPR
http://www.npr.org/templates/story/story.php?storyId=4673074

LECTURE NOTES FOR March 7, 2017

OPTIONAL CRIMINAL LAW LECTURE TIME PERMITTING

1. CRIMES AGAINST PERSONS

A. MURDER. THE TAKING OF ANOTHER HUMAN LIFE (MUST BE BORN, IN WASHINGTON)

AGGRAVATED MURDER = (DEATH PENALTY OR LIFE W/OUT PAROLE)

THERE ARE THREE ELEMENTS TO THIS CRIME. AN ELEMENT IS A WORD FOR ONE OF THE THINGS THAT THE STATE MUST PROVE TO THE JURY. ADDITIONALLY, THE ELECTED PROSECUTOR MUST EXERCISE HIS/HER DISCRETION TO SEEK THE DEATH PENALTY.

1. INTENTIONAL MURDER +
2. PREMEDITATED MURDER +
3. SPECIAL CIRCUMSTANCES +

4, PROSECUTORIAL DISCRETION TO SEEK DEATH

(JURY HAS FINAL DECISION FOR DEATH OR LIFE IMPRISONMENT)

PREMEDITATED = THINKING ABOUT DOING THE ACT FOR MORE THAN A MOMENT IN TIME

SPECIAL CIRCUMSTANCES = MULTIPLE VICTIMS, TORTURE, LAW OFFICER, HATE CRIME.

MURDER 1 = 1. PREMEDITATED
+
2. INTENTIONAL

OR

1. INTENTIONAL FELONY
+
2. W/DEATH RESULTING, EVEN THOUGH NOT INTENTIONAL

MURDER 2 = INTENTIONAL MURDER

MANSLAUGHTER 1 =

RECKLESS KILLING /
NO INENT TO KILL (FRIENDS WITH GUN CASE)

MANSLAUGHTER 2 =

NEGLIGENT KILLING /
NO INTENT TO KILL (SLED CASE)

VEHICULAR HOMICIDE = DRUNK DRIVING (OVER .08 OR AFFECTED BY ALCOHOL)
+
CAUSING ACCIDENT, CAUSING DEATH.

RAPE = SEXUAL INTERCOURSE +
BY FORCE (RAPE 1, 2)

OR

SEXUAL INTERCOURSE WITHOUT CONSENT (RAPE 3)

INTERCOUSE (BROADLY DEFINED) = OBJECT (FINGER, PENIS, ETC.) PENETRATING ANUS / VAGINA. MAY BE APPLIED IN SAME SEX SITUATIONS.

FORCE = PHYSICAL FORCE THAT OVERCOMES RESISTANCE

OR
MORE FORCE THAN NECESSARY TO ACCOMPLISH THE SEX ACT.

THREE DEGREES IN WASHINGTON

RAPE 1 = INTERCOURSE +
FORCE +
WEAPON OR KIDNAP OR
BURGLARY OR SERIOUS PHYSCIAL INJURY.
MAY BE HUSBAND / WIFE

RAPE 2 = INTERCOURSE +
FORCE
OR
INTERCOUSE +VICTIM COULD NOT CONSENT (DRUNK)
MAY BE HUSBAND / WIFE

RAPE 3 = NO CONSENT

CONSENT: VICTIM MUST CLEARLY INDICATE LACK OF CONSENT BY WORDS OR CONDUCT.

PROBLEM: VICTIM THINKING “NO”, BUT NOT CLEARLY STATING “NO”.

RAPE SHIELD LAW:

VICTIM’S SEXUAL HISTORY NOT ADMISSIBLE AT TRIAL.

SPECIAL CATEGORIES FOR CHILDREN:

RAPE OF A CHILD (SOMETIMES CALLED STATUTORY RAPE)
CHILDREN UNDER 16 CANNOT CONSENT.

INTERCOURSE W/ADULT IS ILLEGAL.

AGE SEPARATION BETWEEN OLDER/YOUNGER PARTIES DETERMINES THE DEGREE OF CRIME.

RAPE OF A CHILD
ROC 1: V LESS THAN 12 AND DEFENDANT > 24 MONTHS OLDER
ROC 2: V 12 AND < 14 + DEFENDANT MORE THAN 36 MONTHS
ROC 3 V>14 AND DEFENANT MORE THAN 48 MONTHS OLDER

TO CATCH A PREDATOR (NBC)
http://www.youtube.com/watch?v=qVLT26CMzk4

ATTEMPTED ROC:
Larry Corrigan, a well-known activist in local Republican politics as a backer of U.S. Rep. Dave Reichert and King County Prosecuting Attorney Norm Maleng, was arrested Wednesday in an Internet sting for allegedly trying to arrange sex with a 13-year-old girl.

According to the Seattle Police Department, Corrigan, 54, of Seattle, was chatting online with an undercover police officer who was posing as a 13-year-old girl when he agreed to meet the minor at a Capitol Hill video store on Broadway for sex.

He was booked into King County Jail around 1:30 p.m. Wednesday for investigation of the attempted rape of a child and communicating with a minor for immoral purposes.

ASSAULT (NOT BATTERY IN WASHINGTON)

ASSAULT 1: GREAT BODILY INJURY
OR WITH A FIREARM
OR BY POISON

ASSAULT 2: SERIOUS BODILY INJURY
OR W/INTENT TO COMMIT A FELONY
OR WITH A DEADLY WEAPON (KNIFE / CAR)

ASSAULT 3: ASSAULT OF POLICE OFFICER; OR, BUS DRIVER, ETC.;
WITH CRIMINAL NEG. CAUSES BODILY HARM

ASSAULT 4: HARMFUL OR OFFENSIVE TOUCHING = MISD
HATE CRIMES

MALICIOUS HARASSMENT = ASSAULTING SOMEBODY B/C OF RACE, ETHNICITY, OR SEXUAL ORIENTATION. REQUIRES PROOF OF MOTIVE.

STALKING = REPEATEDLY FOLLOWING SOMEONE

DV: CLASS OF CRIMES. MARRIED, HOUSEHOLD MEMBERS, DATING (ONCE) OR PREVIOUSLY DATED. GIVES THE COURT MORE SENTENCING OPTIONS,
NO FIREARMS; DV TX; NCO

CRIMES AGAINST PUBLIC HEALTH, SAFETY, WELFARE – VICTIMLESS(?) CRIMES.

VUCSA: POSSESSION (EVERYTHING EXCEPT <40 GRAMS WEED IS A FELONY. STUDENT LOANS AT RISK.

POSSESSION W/INTENT. DELIVERY.

DELIVERY (NOT LIMITED TO SALES)

METHAMPHETAMINE LABS / CONSEQUENCES

PROSTITUTION

AGREEING TO SELL SEX FOR $

PATRONIZING/SOLICITING
OFFER AND ACCEPTANCE

IF BOTH AGREE, SHOULD IT BE CRIMINAL?

IDENTITY THEFT

PROTECTING YOURSELF

REVIEW FROM FIRST PART OF QUARTER (FAIR GAME ON EXAMS…)

DEFENSES TO CRIME

SELF DEFENSE (Review your notes from Intentional Torts/defenses from first part of quarter – fair game on an exam)

SELF-DEFENSE = VIOLENT CONDUCT, WHICH WOULD OTHERWISE BE CRIMINAL BEHAVIOR, IS JUSTIFIED WHEN USED IN DEFENSE OF YOURSELF OR CERTAIN OTHER PERSONS.

THE DEFENDANT HAS THE BURDEN OF PRODUCING EVIDENCE OF SELF DEFENSE (in other words, there must be some evidence produced at trial).

THE STATE HAS THE BURDEN OF PROVING THAT THE DEFENDANT DID NOT ACT IN SELF DEFENSE

THE JURY WILL EVALUATE SELF DEFENSE BY APPLYING A COMBINATION OF "SUBJECTIVE" AND "OBJECTIVE" CRITERIA.

SEE BELOW – ALL REVIEW FROM FIRST PART OF CLASS

JUSTIFIED WHEN

- GENUINE AND REASONABLE FEAR (SUBJECTIVE – FROM THE DEFENDANT'S PONIT OF VIEW, BASED UPON WHAT HE KNEW AT THE TIME OF THE EVENT)

+

- OF IMMINENT DANGER (ONCE DANGER PASSES, CAN'T ACT; CAN'T RETALIATE.)

+

- OF GREAT BODILY HARM

MAY ONLY USE PROPORTIONATE FORCE (CAN'T USE MORE THAN NECESSARY) (OBJECTIVE STANDARD)

ADDITIONAL RULES:

NO OBLIGATION TO RETREAT AT HOME

> "Stand your ground" laws are far more complicated than the text implies… Travon Martin…Florida teen shot. Significant criticism of the Florida law.

NO DEADLY FORCE MAY BE USED TO PROTECT PROPERTY

SOME STATES CHANGING RULES TO ALLOW DEADLY FORCE AGAINST ANYONE UNLAWFULLY ENTERING YOUR HOME

EXAMPLE: JAPANESE EXCHANGE STUDENT.

"MENTAL DEFENSES"
THE FOLLOWING DEFENSES, WHICH ARE RAISED BY THE DEFENDANT, AND WHICH THEY MUST PROVE TO THE JURY, GO TO THE STATE'S ABILITY TO PROVE THAT THE DEFENDANT WAS ACTING INTENTIONALLY (RECALL THE "SPECIFIC INTENT" REQUIREMENT OUTLINED ABOVE).

INSANITY

INSANITY: NOT GUILTY BY REASON OF INSANITY

TEST: A DEFENDANT IS NOT CRIMINALLY LIABLE IF, BECAUSE OF A MENTAL DISEASE OR DEFECT, THE DEFENDANT LACKED THE CAPACITY TO KNOW OR APPRECIATE:

THE NATURE AND CONSEQUENCES OF HIS ACT OR
THAT HE WAS UNABLE TO TELL RIGHT FROM WRONG

JOHN HINCKLEY – SHOT REAGAN.

DIMINISHED CAPACITY
CAN'T FORM THE REQUIRED MENTAL INTENT TO BE FOUND CULPABLE FOR THE CRIME.

DELUSIONS, DRUGS OR ALCOHOL ALL MAY AFFECT SOMEONE, AND MAKE IT DIFFICULT TO ACT INTENTIONALLY.

BEING DRUNK IS NOT A DEFENSE UNLESS YOU CAN SHOW IT MEETS BURDEN OF DIMINISHED CAPACITY

ENTRAPMENT =
IT IS A DEFENSE IF THE CRIMINAL ACT ORIGINATED IN THE MIND OF THE POLICE AND THE ACTOR WAS LURED OR INDUCED TO COMMIT THE CRIME THAT THE ACTOR HAD NOT OTHERWISE INTENDED TO COMMIT.

DEFENDANT HAS THE BURDEN OF PROVING THIS AFFIRMATIVE DEFENSE BY A PREPONDERANCE OF THE EVIDENCE.

DURESS =

FORCED PARTICIPATION IN A CRIME (THE PATTY HEARST) THIS MAY NEGATE THE INTENT INHERENT IN CRIMINAL ACTS.
IT IS A QUESTION FOR THE JURY.

NECESSITY =
NATURAL FORCE CAUSES YOU TO COMMIT CRIME THAT IS LESSER OF TWO EVILS. THINK ABOUT SURVIVORS OF HURRICAN KATRINA AND THE CHOICES THAT THEY FACED.

ARREST: MAY OCCUR IN A VARITY OF SITUATIONS:

1. FELONY COMMITTED IN PRESENCE OF OFFICER;
2. SOME MISD. COMMITTED IN PRESENCE OF OFFICER;
3. ANY DV CRIME (MANDATORY) IF CONTACT W/DEF. W/IN 4 HOURS OF EVENT;
4. ANY ACCUSATION BY A PRIVATE PERSON THAT D COM. A FEL (W/PC);
5. ANY FILED CHARGED W/ AN ARREST WARRANT (I.E. BAIL)

CITIZENS ARREST: DON'T TRY IT, YOU'LL JUST GET HURT.
HOW LONG WILL I SPEND IN JAIL?

WASHINGTON'S SENTENCING GRID
THERE IS NO "PAROLE". THIS IS KNOWN AS DETERMINATE SENTENCING.

WHY = TREAT PEOPLE THE SAME LESS DISCRETION FOR THE COURTS

3 STRIKES LAW IN WASHINGTON.
2 STRIKE LAW IN WASHINGTON.

CIVIL COMMITMENT LAW IN WASHINGTON.

THE SECOND AMENDMENT

The First Amendment begins with the language "Congress shall make no law…."

This is a clear limitation on the ability of the Federal government to make laws in this area, and has nothing to do with limiting the ability of states to enact laws. Only after the Supreme Court incorporated the First Amendment did it apply to the State and local actions.

The Second Amendment states: "A well regulated militia, being necessary to the security of a free State, the rights of the people to keep and bear arms, shall not be infringed."

Since 2008, when the Supreme Court began considering the 2nd Amendment, two questions were obvious:

First: Does the 2nd Amendment create an individual right?
Or a right to carry guns if you are part of a militia?

Second: Does the 2nd Amendment apply to Federal Legislation (like the other amendments in the Bill of Rights AND State Legislation?

Until recently – indeed, from 2000 through Spring quarter, 2008, when I taught this course, courts had overwhelmingly sided with the "Individual Rights" interpretation of the Second Amendment.

In June, 2008, the Supreme Court answered the first of the two questions noted above, finding that the Second Amendment created an individual right to bear arms for self-defense.

D.C.v. Heller

Washington D.C. argued that the term/phrase "bear arms" was related to the militia or "military service", not to private persons.

Scalia, however, won the day (or, more accurately, the 4 votes he needed for a majority) and drafted an opinion that reflected his textualist/originialist views.

The Court included a caveat:

"Like most rights, the right secured by the Second Amendment is not unlimited… the right [is] not a right to keep and carry weapons whatsoever in any manner whatsoever and for whatever purpose… Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on long standing prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

Ruling: Federal Legislation (or laws in Federal enclaves like Washington D.C., regulating guns, must comply with the Second Amendment, and cannot ban guns from individuals.

What about State Legislation?

The 2nd Amendment was originally thought to limit the ability of the Federal Government, e.g. Congress and the President, to pass laws limiting your right to guns – and it still does act as a limitation on the power of ***Congress*** to legislate in this area.

But what about limiting States' ability to pass gun control laws? Does the 2nd Amendment apply to State legislation, and thereby limit their power to pass gun control laws?

McDonald v. Chicago (5-4) 2010

The justices in the majority said that history supported both finding a fundamental individual right and applying it to state and local laws.

The dissenters drew different conclusions from the historical evidence. Breyer said that history did not provide clear answers and that the empirical evidence about the consequences of gun control laws are mixed. But there was evidence, he said, that firearms caused 60,000 deaths and injuries in the United States each year and that Chicago's handgun ban had saved many hundreds of lives since it was enacted in 1983. All of that, Justice Breyer wrote, counseled in favor of deference to local elected officials in deciding how to regulate guns.

Justice Alito responded that many constitutional rights entail public safety costs, including ones limiting the use of reliable evidence obtained through police misconduct. He also acknowledged that the majority decision limited the ability of states to address local issues with tailored gun regulations. "But this is always true," he said, "when a Bill of Rights provision is incorporated.