

Introduction

Definitions

- Style
 - Name of a case
- Case
 - Judge's finding (published) including all facts and evidence from the trial
- Stare decisis
 - Latin "to stand by decisions"
 - Practice of courts adhering to past decisions
- Statutory laws
 - Prescribe rules for conduct
 - Enacted by legislators
- Common law
 - Most law has at least its birth here
 - Based on right thing to do and justice
 - Based on prevailing attitudes of the day
 - Refined throughout time
- Civil law
 - Mainly common law
- Criminal law
 - Statutory laws but also some common law

Regina v. Dudley & Stevens

- England
- 1884
- Regina is Queen Elizabeth
 - Acting as the state essentially
 - Criminal trial
- Case revolves around Australian who purchased boat
 - Boat sank off the coast of Africa and left sailors stranded
- Some sailors killed and ate another member of the crew
 - Charged with murder back in England
- Defense lawyers offer defense of necessity
- State was concerned about new precedent creating more chaos
- Also worried about necessity being used to justify all types of unbridled passion and violent murder
- Court rules necessity was not a defense and named men guilty
 - Sentenced to death by hanging
 - Sentence later gets commuted to 6 months

Moral vs. Legal

- Something can be ethically right, but still illegal
- Moral and legal obligations are not always the same thing

Nature and Sources of Law

Civil vs. Criminal Law

- Civil laws
 - Rules governing conduct of independent parties in interactions with each other
 - Contracts and torts
 - Torts are civil wrongs that are not a breach of contract
- Criminal laws
 - Government imposes fines or prison terms for violations of rules of conduct
 - Only government can bring a criminal prosecution
- Civil terms
 - "Sue"
 - "Lawsuit"
 - Plaintiff has the burden of proof
 - Standard of proof
 - Preponderance of the evidence
 - Judgement
 - Damages or injunctive relief
 - Court order to do something or stop doing something
 - Prima facie case
 - Case made by plaintiff against defendant
- Criminal terms
 - "Prosecute"
 - "Case"
 - Burden of proof
 - Prosecution
 - Standard of proof
 - Beyond a reasonable doubt
 - Decision
 - Conviction
 - Acquittal

Common Law vs. Statutes

- Statutes
 - Laws a legislature (state or federal) has enacted
- Common law
 - Law developed by courts' judicial decisions where legislature has not enacted a statute
 - Most of civil law

Federal vs. State Law

- States regulate most things that affect us
- Differences among states
 - Activities regulated
 - Extent regulated to
 - Terminology
 - Punishments/consequences (damages)

- Federal law is the law of the US government
 - Exclusively regulates immigration and labor and employment relations

Values/Objectives

- Prosperity
- Security
- Order
- Justice

Legal vs. Moral

- Legal but not moral
 - Jim Crow Laws
 - WW2 Internment Camps
- Moral but not legal
 - Civil disobedience
 - Speeding during an emergency

Criminal Law Construction

Texas Penal Code

- Promises some type of punishment for infractions
- Every state has its own statutes
- Culpability generally
 - Requirement of voluntary act or omission
 - Requirement of culpability

Voluntary Act or Omissions

- Voluntarily engages in conduct, including an act, an omission, or possession
- Possession is a voluntary act if the possessor knowingly obtains or received the thing and is aware of his control of the thing for a sufficient time to permit him to terminate his control
- A person who omits to perform an act does not commit an offense unless a law provides that the omission is an offense or otherwise provides that he has a duty to perform the act
 - Generally, we have no obligation towards helping anyone else legally in Texas

Culpability

- Culpable mental states are classified according to relative degrees, from highest to lowest
 - Intentional
 - A person acts intentionally, or with intent, with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result
 - Knowing
 - A person acts knowingly when he is aware of the nature of his conduct or that the circumstances exist
 - Aware that his conduct is reasonably certain to cause the result
 - Reckless

- A person acts recklessly when he is aware of, but consciously disregards, a substantial and unjustifiable risks that the circumstances exist or the result will occur
- Criminal negligence
 - A person acts with criminal negligence when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur
 - Risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances

White Collar Crime

Who can be punished?

- Not just individuals
 - Businesses can be found guilty also

Story of Wellserv Co. and Tim Sales

- Players
 - Wellserv Co.
 - Big Oil Co. (BOC)
 - Bob Wellserv
 - Tim Sales
 - Bob's good friend at BOC
 - In charge of hiring contractors for BOC
- Story
 - Bob gives Tim a 10% stake in his new company
 - Tim unable to sign Bob to any contracts due to changes at BOC
 - Tim gives Bob back his shares and they part ways
- Bob is sole shareholder of Wellserv Co.
 - Company is used as a liability shield for shareholders
- Tim (an employee) is an **agent** working for the **principal** (BOC)
 - The principal is liable for the actions of the agent
 - "Respondeat superior" refers to responsibility of the principal for the actions of its agents
- Officers, directors, and employees have fiduciary responsibilities to a corporation
 - Must put interests of beneficiary (company) before their own as a fiduciary (employee)
 - Bob manages the beneficiary and is the fiduciary
- Tim is a fiduciary for BOC
- Fallout
 - BOC would fire Tim before suing him

Commercial Bribery (Penal Code Sec 32.43)

- A
 - Beneficiary means a person for whom a fiduciary is acting

- Fiduciary means an agent or employee
- B
 - No consent of beneficiary
 - Intentionally or knowingly accepts or solicits, or agrees to accept benefit
 - Agreement that benefit will influence conduct of fiduciary in relation to affairs of beneficiary
- C
 - Offers, confers, or agrees to confer any benefit the acceptance of which is an offense under subsection B
- D
 - An offense under this is a state jail felony

State Jail Felony Punishment

- No more than 2 years or less than 180 days
- Fine not to exceed \$10,000

1934 Insider Trading Act

- Manipulative or deceptive device or contrivance
- Purchase or sale of any security
- Had to update information in 10Q reports if offering shares to the public

What actually is insider trading?

- Obligations to employers, clients, and our markets

Why are people not so bothered by insider trading?

- Seems distant
- Also anonymous victims
- Hurts the integrity of the stock market more than any one individual
- Some academics argue we should not punish insider trading at all

1934 Act Insider Trading Application

- Courts, DOJ, and SEC worked together to find ways to apply language to insider trading
- Rule 10b5
 - Makes it illegal to employ any device, scheme, or artifice to defraud
 - Makes it illegal to make any untrue statement of a material fact or to omit a material fact
 - Makes it illegal to engage in any act which operates as a deceit upon any person
- **Not trading** on superior information is **not punished**
 - Because a purchase of stocks or securities is required
- Some sort of "guilty mind" (wickedness) is required
 - Known as "mensrae" in Latin

Rule 10b5-1

- Prohibits:
 - The purchase or sale of a security
 - On the basis of material nonpublic information about that security or issuer
 - In breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively to the issuer or shareholders of that issuer, or to any other person who is the source of the material information
 - Material means relevant to the decision to buy or sell shares

- Possession is not the same as acting on the basis

Categories of Defendants

- Company insiders
 - “Traditional insiders”
 - Employees
 - Officers
 - Directors
 - Ex. US v. Shrivastava
 - Bought own company’s stock because of a contract
 - Guilty as a company insider
 - “Constructive insiders”
 - Temporary insiders
 - Given confidential information on the expectation they will keep it private (PR people, accountants)
 - Ex. SEC v. Herbst
 - Traded on info she was hired to announce to public
 - Liable as temporary insider
 - Not prosecuted because she only made \$16,000
 - Missappropriator
 - US v. O’Hagen
 - Lawyer at Dorsey in Minneapolis
 - Dorsey hired by Grand Mtt to make tender offer to Pillsbury (hostile takeover)
 - Material nonpublic information about Pillsbury that Pillsbury did not even know
 - Acquitted at a lower court
 - Supreme court found him guilty on the basis of his duty to Dorsey as the source of the information

Dirks v. SEC (1983)

- Dirks works for a company that does deep dives into insurance companies
- A friend, Secrist, comes to him
 - Is an executive at one of the insurance companies
 - Blows the whistle on a former company, saying equity contracts are a sham
- Dirks tries to find out info on equity funding
 - Realizes it is a sham
- Tries to tell media outlets but no one will listen to him
- Tells all his clients to stay out of the equity funding stock
- SEC accuses him of tipping
 - Even though he was trying to do a good thing

Elements for Tippee/Tippee Liability

- Insider breaches duty to company or other person (misappropriator) breaches duty to the source of information by disclosing material nonpublic information to tippee in exchange for personal benefit

- A “personal benefit” exists when the insider receives “a pecuniary gain or a reputational benefit that will translate to future earnings”
- A personal benefit may be “inferred” when “an insider makes a gift of confidential information to a trading relative or friend”
- Tippee knows or should know of the tipper’s breach of his duty (that the tipped information was confidential and divulged for a personal benefit)
- Tippee uses the tipped information to trade, or tips another person and receives a personal benefit
- If any of these elements is not present, no liability

Analysis

- Was there an insider who had confidential information?
 - Yes, Secrist
- Did information get passed on?
 - Yes
- Was the tipper motivated by personal gain?
 - No, he was just whistleblowing
 - Secrist wanted to expose fraud, not personally gain
 - Therefore, Secrist did not breach duty to shareholders
 - Thus, Dirks cannot be liable if Secrist did not breach his duty
 - If Dirks is not liable, neither are his clients

Salman v. US (2016)

- Long string of tips
 - People did not know original information came from a breach of duty
 - However, nature of information was that of inside information
- Actors
 - Maher Kara
 - CitiBank
 - Michael Kara
 - Chemist
 - Bassam Salman
 - Maher starts tipping Michael
 - Salman marries into family, finds out about the tips, and demands them from Michael
 - Court cites finding in Dirks case about trading to relatives and finds Salman guilty

Matter of Dr. Michael Macknin (1997)

- Centers around cold medicine Cold-Eeze
- Makers hire Cleveland Clinic to study the new drug
 - Macknin thought it worked, and he wanted stock
- Asked Cleveland Clinic for the OK, and then bought stock from Cold-Eeze maker Quigley not on the market
- Not insider trading, but definitely unethical

Fraud

Fraud

- Can give rise to
 - Criminal prosecution by the government
 - Civil suit by the damaged party

Federal Criminal Fraud

- Statutes apply common law definition of civil fraud
- Statutes require proof of each element of fraud except reliance and damages beyond a reasonable doubt
- Statutes impose criminal penalties if defendant found guilty beyond reasonable doubt

18 U.S.C. 1343

- Scheme or artifice to defraud...transmits...by means of wire, radio, or television communication in interstate or foreign communication

Fraudulent Inducement

- D induces P to enter into a contract **with** the intention of breaching the contract once entered into

US v. Countrywide Financial (2016)

- Countrywide ran out of investment-grade mortgages they had promised the government in a contract
- So, they started selling them risky mortgages and claiming they were "investment grade"
- However, because they intended to sell investment-grade at the time of the contract, not fraud

Fraud Requirements

- D made material representation to a person
- Material representation was false
- When D made the material representation
 - They knew it was false or...
 - Made it recklessly without any knowledge of its truth as a positive assertion
- D made material representation with the intent it should be acted upon by the person to whom D made the representation
- Person to whom the material representation was made acted in reliance upon the representation
- The person to whom the material representation was made suffered injury or damage
- Statute of limitation for fraud lasts two years from the date you knew or should have known

Litigation and Alternative Methods of Dispute Resolution

Organization of Texas and Federal Courts