

## TOPIC 5: CRIMINAL LAW & PROCEDURE

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### Overview

The chapter introduces the concept of criminal law and the procedures for enforcing those laws. It will explore the Constitutional authority of the government to pass criminal laws, the enforcement methods, and identifies specific types of criminal laws. It breaks down criminal conduct into the basic elements necessary to demonstrate criminal liability. It explores the process and procedure for enforcing criminal laws and the Constitutional limitations on the government that serve to protect individual rights. Lastly, it explores numerous federal and state criminal statutes that routinely affect business practices.

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### VIDEO LESSON - INTRODUCTION



### VOCABULARY & CONCEPTS

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| <ul style="list-style-type: none"><li>• <a href="#">Criminal Law</a></li><li>• <a href="#">Elements of a Crime</a><ul style="list-style-type: none"><li>- <a href="#">Actus Reus</a></li><li>- <a href="#">Mens Rea</a></li><li>- <a href="#">Strict Liability</a></li></ul></li><li>• <a href="#">Felony &amp; Misdemeanor</a></li><li>• <a href="#">Processing Criminal Charges</a></li><li>• <a href="#">Arrest</a></li><li>• <a href="#">Miranda Rights</a></li><li>• <a href="#">Initiating Criminal Charge</a></li><li>• <a href="#">Initial Appearance &amp; Arraignment</a></li><li>• <a href="#">4<sup>th</sup> Amendment</a> (Due Process)</li><li>• <a href="#">5<sup>th</sup> Amendment</a><ul style="list-style-type: none"><li>- Grand Jury</li><li>- Double Jeopardy</li></ul></li></ul> | <ul style="list-style-type: none"><li>• <a href="#">6<sup>th</sup> Amendment</a></li><li>• <a href="#">Crimes Against Property</a></li><li>• <a href="#">Fraud</a></li><li>• <a href="#">Business Fraud</a></li><li>• <a href="#">Fraud - Good Faith</a></li><li>• <a href="#">Conspiracy</a></li><li>• <a href="#">Obstruction of Justice</a></li><li>• <a href="#">False Statement</a></li><li>• <a href="#">Aiding and Abetting</a></li><li>• <a href="#">White-Collar Crime</a></li><li>• <a href="#">Worker Endangerment</a></li><li>• <a href="#">Foreign Corrupt Practices Act (FCPA)</a><ul style="list-style-type: none"><li>- <a href="#">Bribes &amp; Kickbacks</a></li></ul></li></ul> | <ul style="list-style-type: none"><li>• <a href="#">False Claims Act</a></li><li>• <a href="#">Racketeering Influence &amp; Corrupt Organizations Act (RICO)</a></li><li>• <a href="#">Sarbanes-Oxley</a></li><li>• <a href="#">Cyber Crime</a></li><li>• <a href="#">Defenses to Crimes</a></li><li>• <a href="#">Criminal Punishment- Types</a></li><li>• <a href="#">Criminal Punishment - Theories</a></li><li>• <a href="#">Federal Sentencing Guidelines</a></li></ul> |
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## TOPIC 5: CRIMINAL LAW & PROCEDURE - QUESTIONS & ANSWERS

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### 1. What is “criminal law”?

Criminal law is public law passed by the federal, state, or local government. It restricts or requires affirmative conduct of its citizens under the threat of prosecution. These prohibitions may be in the form of a statute, common law rule, regulatory rule or decision, or local ordinance. Criminal laws prohibit conduct that is either considered, “*malum in se*” or “*malum prohibitum*”.

- *Malum in se* - means that conduct is inherently wrong without regard to a statute proscribing the conduct.
  - *Example:* Most people consider murder and theft to be innately wrong or evil without regard to a government’s prohibition of the conduct.
- *Malum prohibitum* - means that conduct is not necessarily wrong or evil, but it is made illegal based upon a law.
  - *Example:* A public company’s failure to adequately disclose corporate information to the public is made illegal by statute. Without such a statute, it may not be considered inherently wrong.

The authority for each type of law may differ, but generally criminal laws are enforced by the government and exist to protect the health, safety, and welfare of citizens. This includes protecting the property and rights of those citizens. Failing to comply with criminal laws can result in fines or imprisonment.

- **Discussion:** Do you generally believe that criminal laws are effective at curbing prohibited conduct? Do they effectively protect the health, safety, and welfare of citizens? Does a criminal penalty ever violate the purpose of protecting citizens? With the prison population at record levels in the US, is there a need to reform the criminal punishment system? If so, what are some alternatives that may achieve a similar purpose to the penalty of imprisonment?
- **Practice Question:** Explain the primary differences between criminal law and civil law?
- **Resource Video:** <http://thebusinessprofessor.com/what-is-criminal-law/>

### 2. What are the elements of a crime?

Every crime is composed of certain elements. Common among all crimes are the physical and mental characteristic of the defendant in failing to comply with the criminal law.

- *Actus Reus* - *Actus Reus* is a latin phrase meaning, “guilty act”. This element simply means that the individual committed the act proscribed by the statute. In some cases a threat to act or a failure to act constitutes the crime. In any event, the defendant must be responsible for that action or inaction.

- *Example:* If an individual is involuntarily intoxicated, this may negate the *actus reus*. If someone slips drugs in a person's drink unknowingly, it may excuse the voluntary act required to find a person guilty of a criminal offense. That is, she may not have the control over her physical actions necessary to satisfy the *actus reus*. The act of voluntary intoxication, however, will not excuse the *actus reus*. Voluntarily drinking or taking medications is a sufficient act.
- *Mens Rea* - *Mens rea* is a latin phrase meaning a "guilty mind". This generally means that there must be some mental intent to commit the act that is wrongful under the law.
  - "General intent" crimes simply require that the individual intend to do the act that constitutes a crime, without specific intent as to the results of the harmful action.
    - *Criminal Negligence* - If an actor intends a physical act that is negligent under the circumstances, she may be criminally liable for the harm resulting from the action. Generally, the action must pose a foreseeable risk of harm and the actor's failure to observe due care brings about that harm.
      - *Example:* Bob is driving while texting on his phone. He takes his eyes off of the road and accidentally strikes a pedestrian who is killed. In this instance, he may be criminally negligent.
    - *Strict Liability Crimes* - This type of crime does not require a defendant's *mens rea*. That is, if an individual undertakes an action, regardless of whether there was intent, she is criminally liable.
      - *Example:* An individual who has sexual intercourse with someone under the legal age of consent may be convicted of statutory rape. It does not matter if the defendant believed that the other person was above the legal age of consent. A strict liability crime looks solely at the action and not the intent of the parties.
  - "Specific intent" crimes require that the individual have the intent to achieve that harmful result or be indifferent or reckless with regard to the probable results of her conduct. The specific intent requirement is generally satisfied if the defendant acts recklessly with regard to the potential harm that could result from her actions or inactions.
    - *Intentional Crime* - The actor intends the physical act and the likely result of that act constituting a crime.
      - *Example:* Tom intentionally provides false information to a bank when applying for a line of credit. When the bank learns of the false information, it presses charges against Tom for fraud. If Tom is able to demonstrate that he did not know that the information was false, it will negate the specific intent required for a charge of fraud.
    - *Criminal Recklessness* - An actor may be criminally liable for undertaking an action without regard for the potential harm to persons or property. Generally, the actor must understand the substantial risk and consciously disregard it.
      - *Example:* Merrick is anxious to try out his new bow and arrow. He walks outside and

fires an arrow straight up into the air. Merrick lives in the city and the area is densely populated. He knows that it is a substantial risk that the arrow will strike someone, but he disregards this risk. He will likely be criminally reckless if that arrow strikes someone.

In some instances, a guilty act may constitute more than one crime. This may be the case when one crime is a “lesser-included offense” of another crime. That is, less than all of the elements required for one crime may meet all of the elements of another crime. For example, theft may be a lesser-included crime of burglary. A general intent crime may be a lesser-included offense of a specific intent crime.

- **Discussion:** Do you think the mental element of a crime is important? If a person causes harm without intent, is there less reason to subject that individual to criminal punishment?
- **Practice Question:** Donald is driving down the road listening to his favorite heavy metal songs. He gets so excited that he does not realize that he is traveling 20 mph over the speed limit. A police officer witnesses the speeding, stops Donald’s car, and issues him a citation. Donald goes home and looks up the citation under state law. The statute indicates that speeding is a strict liability crime. What does this mean for Donald? Does it matter that Donald’s excessive speed was accidental? Would it matter if Donald were temporarily disoriented when driving due to a carbon monoxide leak in his car that caused him to lose the ability to effectively control his automobile?
- **Resource Video:** <http://thebusinessprofessor.com/what-is-criminal-intent/>

### 3. What are the classifications of criminal conduct?

Criminal conduct is generally classified by the level of severity and the potential punishment from breaking the law. The two primary classifications of crimes are as follow:

- **Misdemeanor** - A misdemeanor is crime of lesser significance that is punishable by a fine or a joint sentence of less than one year.
- **Felonies** - Felonies are more serious crimes that are punishable by fine or imprisonment in a penitentiary for a period of one year or more.

Historically, the common law identified “treason” as a class of serious offense that was separate from a felony. Also, today, many jurisdictions identify a less severe form of criminal act, known as an “infraction”. The infraction is generally a minor violation of an ordinance or regulation.

- **Discussion:** Do you believe that laws are always classified appropriately? Do you believe that criminal conduct is generally classified too leniently or too harshly? Do you believe that the misclassification of crimes has a negative impact on society?
- **Practice Question:** Clark is a college student at City College. He is at a house party drinking alcohol when the police arrive to break up the party. Clark is cited for underage drinking. Angry at the occurrence, Clark gets into an argument with a police officer and punches him. Clark is arrested and taken to jail. What is the likely classification of each of Clark’s criminal acts? Why?

- **Resource Video:** <http://thebusinessprofessor.com/misdemeanor-vs-felony-criminal-charges/>

## CRIMINAL LAW PROCESS

### 4. What is the process for initiating and processing criminal charges against a defendant?

The general process for initiating criminal charges against an accused is as follows:

- *Arrest* - An arrest is the first step of the prosecutorial process. It involves the physical detention of an individual. If the defendant is an organization, the arrest may be carried out through injunctions against continued business operations. The arrest takes place pursuant to some form of legal authority. This may include the arresting individual witnessing criminal activity or pursuant to an arrest warrant.
- *Initial Appearance* - Once an individual is arrested, she has a right to be informed of the charges against her. As such, the defendant must go before a judicial officer within a statutory period (generally 72 hours) to receive notice of the charges.
- *Bringing Charges* - To bring formal charges against someone, the case is handed over to the prosecuting officer of the court. The prosecuting attorney may have any number of titles (solicitor, district attorney, etc.). This prosecuting officer orchestrates the process for bringing charges against a defendant in the name of the people of that jurisdiction. For example, the charges may read, “US v. John Smith” or “State of Georgia v. John Smith”. Who has the decision-making authority to bringing charges against the defendant depends upon the classification of the alleged criminal conduct. A prosecutor must file an “information” with the court to begin prosecution of a misdemeanor. The prosecutor must submit the matter to a grand jury to bring felony charges against a defendant. The grand jury decides to bring felony charges against a defendant, this is known as handing down an “indictment.”
- *Arraignment* - The arraignment is the first appearance by the defendant before the court to answer the criminal charges. At the arraignment, the court will review the defendant’s rights and accept the defendant’s plea. The plea will either be guilty, not guilty, or *nolo contendere* (no contest). If the defendant pleads guilty (or no contest), the court will set a trial date for sentencing. If the defendant pleads not guilty, the court will set the matter for trial.
- *Trial Burden* - To convict a defendant of a crime, the Government bears the burden of proof and the burden of persuasion. Burden of proof means that the Government must demonstrate sufficient evidence to demonstrate each element of the charged offense. The burden of persuasion means that evidence must be sufficient to convince a jury that the defendant is guilty beyond a reasonable doubt.

Each step of the criminal process may vary slightly among jurisdictions. Prosecution of a violation of a criminal law is carried out in an Article III court (judicial branch court). Article I courts (administrative courts) do not prosecute violations of criminal law.

- *Note:* States establish a special court, “juvenile court”, to handle criminal infractions by adolescents.

- **Discussion:** Of the major steps in the criminal process, do you think any procedural step is more important in

terms of observing a defendant's due process rights? Can you think of situations or examples of how a defendant's rights could be infringed upon in each of the steps?

- **Practice Question:** Laura receives notice from the state's criminal law division that she has been indicted for illegally trading in corporate securities. The criminal detective advises Laura to report to the local police station where she will be processed for arrest and detention. On the way to the police station, Laura calls her attorney and asks about the process that she will face if the government continues with the charges against her. If you are Laura's attorney, explain to Laura the process that she can expect.
- **Resource Video:** <http://thebusinessprofessor.com/process-for-bringing-criminal-charges/>

## 5. What is the process for executing an arrest?

Law enforcement officers generally carry out arrests. There must be "probable cause" for a government official to make an arrest. This may include observance of the criminal activity or based upon reliable evidence. If an officer does not witness the illegal conduct or have immediate evidence in her possession regarding the commission of the crime, she must generally seek an arrest warrant prior to arresting a suspect. A judicial officer (generally a magistrate judge) must hear evidence and make a determination as to whether probable cause exists to arrest someone. If the magistrate determines that probable cause exists, she will issue an arrest warrant that empowers the police to arrest the individual. The police must execute the arrest warrant within the terms of the authority granted by the judicial officer.

- **Discussion:** Why do you think a judicially issued warrant is required to make an arrest if the officer does not witness the criminal conduct? Why is a warrant not required when the officer witnesses the criminal conduct? Do officers ever make arrests without personally witnessing criminal conduct? How close in time must the criminal conduct be to the arrest to justify an arrest without a warrant? Do officers ever exceed their authority when making an arrest? What should be the repercussions of making an arrest without a warrant when a valid warrant should be required?
- **Practice Question:** Jane witnesses Frederick committing a crime. She chases after Frederick, but he is too fast and escapes. What process must Jane follow in order to effectuate an arrest of Frederick?
- **Resource Video:** <http://thebusinessprofessor.com/process-for-arresting-a-suspect/>

Once an individual is under arrest, the government agent (collectively referred to as "police officer" or "officer") will generally make the individual aware of her constitutional rights against self-incrimination. A "*Miranda* warning" is a written or verbal statement to the arrested individual substantially as follows, "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be provided to you at no cost." Once the police officer delivers the *Miranda* warning, anything that the defendant says in response to questions from the officer may be used in court. If the officer fails to advise the defendant of her rights, any statements made by the defendant pursuant to interrogation are not admissible at trial. There are, however, a number of exceptions to this rule:

- **Unsolicited Statements** - If a defendant makes unsolicited statements to the officer, those are admissible at trial. This means that the defendant made statements voluntarily and without being interrogated.

- *Public Safety Exception* - If there are exigent circumstances where public safety is at risk, this can justify government questioning prior to reading the *Miranda* warning. In such a situation, any statements made by the individual could be used against her in court.
- *Other Evidence Sufficient of Conviction Rule* - If there is sufficient evidence to convict an individual without the use of the individual's statements in violation of the *Miranda* rights, failing to appropriately deliver the *Miranda* warning and using subsequent statements in court will not disrupt the conviction.
- *Unequivocally and Assertively Request Counsel* - If an individual does not request the presence of an attorney during interrogation, the Government does not have to immediately supply the individual with counsel. The request for counsel must be unequivocal.

The limited exceptions to the requirement to inform an accused of her *Miranda* rights are subject to some degree of controversy.

- **Discussion:** What purpose do you think reading the *Miranda* rights serves? How effective is reading the *Miranda* rights in achieving this purpose? Do officers often fail to read an individual her *Miranda* rights following arrest? Can you think of a situation in which it may be a good tactic for the officer to not read the *Miranda* rights?
- **Practice Question:** Gwen is a police officer. She receives a call that there is a violent crime in process and that an individual is injured. The only other information she receives is the address of the alleged incident. Gwen arrives on the scene and notices Thomas sitting on the curb with his head hung down. Gwen jumps out of the car and yells to Thomas, "There has been a violent crime reported. Have you seen anything suspicious?" Thomas looks up and say, "I'm sorry. I didn't mean to hurt her." Gwen, realizing that Thomas is the alleged perpetrator replies, "Where is she?" Thomas replies, "I left her in the kitchen." Gwen immediately handcuffs Thomas and radios in for assistance. She then rushes into the house and finds the victim on the floor. When the ambulance arrives, Gwen drives Thomas to the police station. She does not inform him of his *Miranda* rights. During the drive Thomas laments out loud about having hit the victim with a frying pan. Will Thomas' statement made while sitting on the curb be used against him? What about the statements made while riding in the police car?
- **Resource Video:** <http://thebusinessprofessor.com/exceptions-to-reading-miranda-rights/>

## 6. How does the government initiate criminal charges?

If criminal conduct constitutes a misdemeanor, the prosecutor will file a document called an "information" with the court. This document attests that there is sufficient evidence to bring charges against the defendant. If the alleged criminal conduct constitutes a felony, the prosecutor must submit the case to a "grand jury" to seek an indictment. A grand jury is a group of citizens chosen at random to serve this judicial function. The grand jury must consist of at least 16 citizens who live in the court's jurisdiction. The grand jury will hear evidence and vote on whether to send a case to trial. To issue an indictment, a majority of the grand jury must vote that a crime has been committed and that there is sufficient evidence to warrant the accused standing trial. The grand jury does not determine guilty or innocence; rather, it determines whether probable cause exists to believe the accused committed the alleged crime. The grand jury has broad investigatory power, such as the authority to subpoena business records or witnesses to testify. Grand jury proceedings are kept confidential to protect the accused. To issue an indictment, the court will issue a "true bill". If the grand jury declines to indict, it will

issue a “no true bill”. If an indictment is issued, the indicted person is still presumed to be innocent until convicted by a court of law.

- **Discussion:** Should a grand jury be the final decision maker in determining whether to initiate a prosecution? Should public sentiment or a prosecutor’s sentiment about an accused have any bearing on whether the grand jury hands down an indictment? Why do you think grand jury proceedings are closed to the public and confidential? How do you feel about that fact that the grand jury is often used as an investigatory tool for its ability to solicit testimony and subpoena witnesses and information?
- **Practice Question:** Darla calls the police and reports that a suspicious man is outside of her house and trespassing on her property. She provides a description of the individual. Justin, a police officer, arrives and detains Bill for trespass. The Officer Justin is aware of several burglaries in the neighborhood and has suspicions about Bill. He takes Bill to the police station. Justin then calls witnesses to the prior burglaries who pick Bill out of a suspect line up as the perpetrator. What would be the process for initiating misdemeanor charges against Bill for trespass? What would be the process for initiating felony charges for burglary?
- **Resource Video:** <http://thebusinessprofessor.com/initiating-criminal-charges/>

## 7. What is the “initial appearance” and the “arraignment”?

### *Initial Appearance*

The initial appearance is the first court proceeding for a defendant. Generally, the first appearance will take place within 24-72 hours of arrest. The judge will review whether probable cause exists to detain the individual on the subject charges. During the initial appearance, the judge will review the defendant’s rights. It is a restatement of the *Miranda* warning as well as reassurance of other certain constitutional rights afforded the defendant, including:

- the right to remain silent
- the right to be represented by counsel (and appointment of counsel if indigent);
- the right to know all charges against her;
- the right to a preliminary hearing;
- the right to seek pre-trial release (if the Judge so grants);

This process helps ensure that the defendant’s 5<sup>th</sup> Amendment right against self-incrimination is preserved.

### *Arraignment*

The arraignment is the judicial proceeding that officially starts the trial process. At the arraignment the court will officially inform the defendant of the charges against her. She will be asked to respond to the charges in the form of a plea of guilty, not guilty, or no contest. In some cases, the initial appearance and arraignment will take place at the same time. This is particularly true when there is no formal arrest. Often, white-collar crimes do not involve a traditional arrest. If the grand jury hands down an indictment, the defendant will voluntarily appear before the court for a combined initial appearance and arraignment.

- **Discussion:** Why do you think the arraignment is necessary? Should a defendant be informed of the charges against her at the initial appearance, rather than at the arraignment? Should a party be able to forgo arraignment by entering in a plea by other methods?
- **Practice Question:** On Friday night, Charles was arrested on Friday night for assault after getting into a fight at a bar. At what point is Charles first informed of the charges against him? When is Charles first required to respond to those charges against him?
- **Resource Video:** <http://thebusinessprofessor.com/arraignment-and-initial-appearance/>

## CONSTITUTIONAL PROTECTIONS IN CRIMINAL LAW PROCESS

As previously discussed, the Constitution establishes individual rights and serves to protect those rights against intrusion by the government. Below are numerous specific protections afforded individuals as part of the criminal law process.

### 8. What protections does the 4<sup>th</sup> Amendment provide to individuals subject to criminal charges?

#### *Protection of Individual Rights*

The 4<sup>th</sup> Amendment protects individuals against “unreasonable search and seizure”. More specifically, the police must obtain a court order before searching the individual’s body or any physical location where the defendant has an expectation of privacy. To obtain a search order, the government must demonstrate to a judicial official (generally a magistrate judge) that there is probable cause to believe that the suspect or private location contains evidence of a crime. There are certain limitations to the requirement that the government secure a search warrant before searching private property. The most common exceptions include:

- “*Exigent circumstances*” - This doctrine allows the government to proceed with a search of premises if there is a risk of harm to individuals or the destruction of evidence.
- “*Grab area*” - Officers may search any place that is in the immediate grab area of a suspect at the time of arrest. The grab area can be interpreted very broadly to include any place in the reach of a suspect at any point during the arrest.
- “*US Entry/Exit*” - The Federal Government also allows for warrantless searches at the border for individuals entering the United States. As such, there is no expectation of privacy for vehicles entering and leaving the country.

Special rules apply to electronic forms of surveillance, such as audio and visual recordings. Electronic surveillance generally requires a search warrant if surveilling a space where an expectation of privacy exists.

#### *Protection of Businesses*

The expectation of privacy applies to businesses as well as individuals. That is, the government must obtain a search warrant prior to searching business premises. This extends to administrative and civil enforcement actions as well. The more heavily regulated the business industry, the less it is afforded privacy protections against search. Many businesses have no expectation of privacy when the business is heavily regulated or closely connected to receipt of government funds

for operation.

- *Example:* If the owner objects, a building inspector may need a warrant to inspect whether a building meets code. A public university, government funded research laboratory, or public utility may have limited rights to privacy.

### *Exclusion of Unlawfully Obtained Evidence*

The 4<sup>th</sup> Amendment protection against warrantless searches is enforced through criminal procedural law. If the government violates an individual's 4<sup>th</sup> Amendment rights by conducting an unlawful search and seizure, the evidence uncovered in the search is not admissible at trial against the accused. This is known as the "exclusionary rule". This rule exists to prevent the government, which has an interest in using seized evidence for prosecution of criminal law offenders, from infringing upon a defendant's constitutional rights in pursuit of criminal law enforcement. There are exceptions to the exclusionary rule for unlawful searches. For example, if the government relied in good faith on a search warrant from the court that was later deemed invalid, the evidence uncovered in the search may still be used in a prosecution. This is known as the "good faith exception". Further, if evidence is uncovered in an unlawful search that would have been inevitably discovered without the unlawful search, it may be used in a prosecution. This is known as the "inevitable discovery exception".

- *Note:* If the government searches beyond the authorization of the search warrant, any evidence uncovered in the search may be excluded.

- ***Discussion:*** Do you think the 4<sup>th</sup> Amendment protects individual rights or is a hindrance on maintaining law and order? Why do you think that there is less 4<sup>th</sup> Amendment protection for businesses than individuals? Is the exclusionary rule sufficient repercussion to dissuade conduct by officials that violates an individual's 4<sup>th</sup> Amendment rights?

- ***Practice Question:*** Perry is suspected of dealing illegal narcotics from his home. A private informant testifies to a magistrate that he witnessed Perry selling drugs from his home. The magistrate issues a search warrant for the home, but does not include the automobile on the premises. The police raid and search Perry's home but do not find any narcotics. One of the officers finds the keys to Perry's car and searches the trunk. Below the spare tire is a large amount of illegal narcotics. Perry is charged with possession of the narcotics with intent to distribute. At trial, what defense will Perry likely raise to introduction of the drugs as evidence?

- ***Resource Video:*** <http://thebusinessprofessor.com/4th-amendment-search-and-seizure-protections/>

## **9. What protections does the 5<sup>th</sup> Amendment provide to individuals subject to criminal charges?**

The 5<sup>th</sup> Amendment provides several procedural, due process rights to citizens. In addition to the right to due process of law, the 5<sup>th</sup> Amendment includes the following notable protections.

- *Right to Grand Jury* - The 5<sup>th</sup> Amendment provides that anyone tried of a capital or infamous crime must receive a presentment or indictment by a grand jury.
- *Protection Against Self-incrimination* - The 5<sup>th</sup> Amendment protects against compulsory self incrimination. It protects the accused from being compelled to testify against herself. It does not protect against being compelled to

produce evidence. For example, a business executive can be made to produce documents. It only protects testimony that is related to an assertion of fact or the disclosure of information. The protection against compulsory self-incrimination does not apply to business entities. The only entity (quasi-entity) protected is the sole proprietorship, because the entity and individual are one in the same.

- *Protection Against Double jeopardy* - No “person shall be subject for the same offense to be twice put in jeopardy of life or limb.” If an illegal activity violates both federal and state laws, double jeopardy does not prohibit two trials, one in federal court and the other in the state court system.

Procedural due process rights apply to civil, administrative, and criminal proceedings. The basic premise is that individuals enjoy 5<sup>th</sup> Amendment protections from government infringement of their rights (including rights to property).

- **Discussion:** Why do you think the 5<sup>th</sup> Amendment includes a right to a grand jury? Do you think that an individual accused of a crime should have to testify? Do you think that this protection should apply to the criminal investigation stage as well as during formal trial? How do you feel about the fact that the 5<sup>th</sup> Amendment does not prohibit the Federal Government and a state government from prosecuting an individual for committing a single crime?
- **Practice Question:** Donna is charged with participating in a bank robbery orchestrated by Alice. Eric, the prosecutor, decides to pursue separate trials against Donna and Alice. Eric wants to call Alice as a witness to testify against Donna and vice versa. Can Donna be compelled to testify in trial against Alice?
- **Resource Video:** <http://thebusinessprofessor.com/5th-amendment-criminal-law-protections/>

### 10. What protections does the 6<sup>th</sup> Amendment provide to individuals subject to criminal charges?

The 6<sup>th</sup> Amendment provides numerous procedural protections for someone who is subject to the prosecutorial process. These protections include:

- *Speedy and Public Trial* - An individual, upon being charged with a crime, may request an expedited trial before a jury of her peers. This right prevents unduly long detention without proceeding with prosecution.
- *Trial by Jury* - The 6<sup>th</sup> and 7<sup>th</sup> Amendments to the US Constitution allow for trial by jury. This right does not extend to administrative hearings, certain Article I hearings, juvenile proceedings, and certain misdemeanor cases.
- *Informed of Charges* - The 6<sup>th</sup> Amendment ensures that individuals will be fully informed of the nature and extent of charges brought against them. If the Government fails to give notice of charges arising out of the same allegedly criminal conduct, the right to later bring those charges may be forfeited.
- *Confront One's Accuser* - Anyone accused of a crime has a right to confront (and cross-examine in court) anyone accusing her of the charged criminal activity.
- *Right of Subpoena* - The court provides any defendant with the opportunity to subpoena witnesses to give testimony or evidence at trial if those witnesses or evidence are relevant to the charged criminal conduct.

- *Right to Counsel* - Defendants have the right to be represented by a licensed attorney in any case that has the possibility of imprisonment. If an individual cannot afford an attorney, the government will provide the defendant with a free public attorney.

The rights afforded under the 6<sup>th</sup> Amendment have been interpreted broadly to ensure adequate protection of a criminal defendant's rights.

- **Discussion:** Do you believe that all of the above protections are warranted for individuals accused of crimes? Why is it important to allow a defendant the option of electing to have a speedy trial? Is there any justification for denying the right to jury trial in certain administrative and juvenile cases? How does the right to be informed of charges against a defendant have the effect of protecting against multiple prosecutions for a single course of conduct? Do you believe that a defendant should always have the right to confront her accuser (such as in rape or molestation cases)? How broad should the right of subpoena be and should it balance the rights of those subpoenaed against those of the defendant? Is it, and if so, why is it important to afford a defendant the right to legal counsel throughout the prosecution process (beginning at the point of arrest)?
- **Practice Question:** Bernard was arrested on charges of conspiracy to commit murder. His accomplice, Abby, was also arrested but skipped bail and left the country. Without Abby, the prosecution will have a difficult time proving conspiracy against Bernard. The prosecution seeks to delay Bernard's trial until international police are able to locate and detain Alice. What 6<sup>th</sup> Amendment rights can Bernard assert to aid in his defense?
- **Resource Video:** <http://thebusinessprofessor.com/6th-amendment-protections-criminal-law/>

### 11. What protections does the 8<sup>th</sup> Amendment provide to individuals subject to criminal charges?

The 8<sup>th</sup> Amendment prohibits the Federal Government from imposing "excessive bail, excessive fines, and cruel and unusual punishment" on individuals pursuant to criminal prosecution. These protections have been extended to state governments as well. The prohibition against cruel and unusual punishment has been the subject to extensive interpretation over the years. This has particularly been the case with regard to capital punishment. Generally, the standard for what constitutes cruel and unusual punishment has become increasingly broad.

- **Discussion:** Why do you think the trend toward what constitutes cruel and unusual punishment is toward greater protection of defendants? What do you think is the justification behind prohibiting excessive bail for defendants? What about excessive fines?
- **Practice Question:** Nancy is convicted of check fraud. The judge sentences Nancy to 100 hours of hard labor to be carried out during the hottest hours of the day. Are there any arguments against the constitutionality of this sentence?
- **Resource Video:** <http://thebusinessprofessor.com/criminal-law-protections-of-the-8th-amendment/>

### 12. What are some common crimes involving the property of others?

Each state adopts its own criminal statutes. Some of the more common types of named criminal offenses against someone else's property include:

- *Larceny* - Larceny is the unlawful taking (theft) of personal property with the intent to permanently deprive the rightful owner of it.
- *Robbery* - Robbery is theft through violence or threat.
- *Burglary* - Burglary is theft by breaking into a building (sometimes at night) with intent to commit a felony therein.
- *Extortion* - This is the unlawful obtaining of another's property through coercion, such as the threat of violence.
- *Embezzlement* - This is the theft of money by an individual entrusted to hold it.
- *Fraud, False Pretenses, and Theft by Deception* - Fraud, False Pretenses, and Theft by Deception involve deceiving someone to unlawfully take possession of her property. While fraud generally involves deception, false pretenses and theft by deception requires a knowingly false representation.

There are many statutory and common-law charges involving the property of others. These above-mentioned examples, however, are generally uniform across jurisdictions.

- **Discussion:** How do you feel about the premise of revoking an individual's liberty for actions that harm the possessions or property of others? Does the individual's intent when carrying out these actions influence your opinion?
- **Practice Question:** What is the difference between larceny, robbery and burglary? What is the difference between extortion and embezzlement? What is the difference between fraud and theft by deception?
- **Resource Video:** <http://thebusinessprofessor.com/crimes-against-property-of-others/>

### 13. What type of activity constitutes fraud?

The elements of the crime of fraud vary between jurisdictions. Consistent with the federal fraud statute, fraud is the unlawful taking of another's property through the following types of knowing and willful conduct:

- falsifying, concealing, or covering up any trick, scheme, or device;
- making any material false fictitious, or fraudulent statement or representation about a material fact; or
- making or using any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.

Related charges, commonly known as "false pretenses" and "theft by deception" generally constitute the following types of conduct:

- intentionally creating or reinforcing an impression that is false;
- failing to correct an impression that is false and that the person does not believe to be true if there is a confidential or fiduciary relationship between the parties;
- preventing another from acquiring information that is relevant to a transaction; and
- failing to disclose a known lien or other legal impediment to property being transferred.

*Note:* The elements of the above charges are generally common among most jurisdictions, with slight variations in the language or wording.

- **Discussion:** Fraud generally entails wrongfully obtaining resources or benefits from another person by deceptive means. In your opinion, does the fact that the individual voluntarily provides the resources or benefits to the fraudster in any way mitigate or lessen the reprehensible nature of the actions?
- **Practice Question:** Doreen is seeking to borrow funds to run her business. She approaches several wealthy individuals in town and pitches the virtues of her business. She goes further than over representing the strength of her business. She lies about the incomes generated over the past several months. Convinced by her presentation and the business's strong performance, several individuals make loans to the business of \$10,000 or more. Doreen continues operations and uses the funds to pay herself a substantial salary. Ultimately, the business fails and shuts down. Has Doreen committed a crime? If so, what?
- **Resource Video:** <http://thebusinessprofessor.com/activity-constituting-fraud/>

#### 14. How does “good faith” affect fraud?

Fraud requires knowing and willful conduct carried out with the intent to defraud someone. As such, good faith in one's actions is a defense to the allegations. The defense is that the defendant acted in good faith and did not have the necessary intent to defraud anyone. It does not matter that a person's statement or belief is wrong, there is no action for fraud unless intent to deceive is present. Further, an individual's lack of due care in making a statement is not relevant in determining fraud.

- **Discussion:** How do you feel about the mental intent requirement for a charge of fraud? Do you think a person should be able to escape a criminal fraud charge if she is reckless in her actions? What if she recognizes that her assertions are extremely unlikely, but she leads a customer or client to believe that the unlikely result is reasonably certain?
- **Practice Question:** Mitchell owns a baseball card of Mickey Mantle. He believes that the card is an original rookie card. He offers to sell the card to Amy for \$1,500. Amy buys the card. No long afterward, she has the card inspected and learns that it is simply a reproduction of the original card and is not worth any money. She is angry at Mitchell and asks your opinion on whether she should report the incident to the police. Has Mitchell committed fraud? Why or why not?

- **Resource Video:** <http://thebusinessprofessor.com/good-faith-as-a-defense-to-fraud-charge/>

### 15. What are some common types of business fraud?

Many examples of business fraud include a scheme or plan designed to take from a person the tangible right of honest services. Below are some common examples of fraud in the business context:

- *Mail or Wire Fraud* - It is illegal to use the US postal service or electronic means of interstate communication to carry out a scheme to defraud. This is a very broad statute, as it includes any fraudulent conduct employing mail or wire transmission. “To mail” means a communication is sent or received through use of the US Postal Service or any interstate carrier. “Wire transmission” includes the use of radio, television, telephone, Internet, or other wired form of communication.
- *Securities Fraud* - Federal laws defining securities fraud are the Securities Acts of 1933 and the Securities Exchange Act of 1934. Section 17 of the 1933 Act covers fraudulent activity in the issuance of securities. Section 10 and Rule 10(b)(5) of the 1934 Act cover fraud in the purchase or sale of a security.
- *Insurance Fraud* - This is a common state-law crime in which an insured makes a fraudulent claim for benefits under an insurance policy. For example, intentionally setting fire to the building of a failing business to collect the insurance proceeds is insurance fraud.
- *Healthcare Fraud* - Healthcare fraud generally involves making fraudulent claims for payment or reimbursement of healthcare expenses. The common offenders are healthcare providers who make fraudulent claims for reimbursement for services never performed or unnecessary. The prosecution usually falls under the False Claims Act.
- *Tax Fraud* - Tax fraud is the knowing concealment of transactions or property ownership in an attempt to illegally avoid paying federal, state, or local taxes.

- **Discussion:** Do you think there should be varying degrees of fraud? When does an individual’s conscious decision to do a poor job or cut corners amount to a plan or scheme to defraud the individual paying for the services? Could an intentional misstatement amount to a plan or scheme to defraud the individual paying for the services? Could it be fraud if an individual misrepresents (or lies about) a work process in order to get hired or win a contract?

- **Practice Question:** Javier opens a personal wealth investment business. He represents to clients that he can generate above-average returns on their investment with minimal risk. He claims to have insider information on many new business ventures that makes them a certain success. He makes up fake disclosure documents for business that do not exist or have no connection with Javier. In reality, Javier is running a *Ponzi* scheme in which he takes money from investors and uses the funds to pay returns to other investors. He also spends much of the remaining funds soliciting new investors through email and direct-mail advertisements. What crimes, if any, has Javier committed? Why?

- **Resource Video:** <http://thebusinessprofessor.com/common-types-of-business-fraud/>

## 16. What is the crime of “Conspiracy”?

Conspiracy involves an agreement between individuals to commit a crime. Conspiracy is a separate charge or crime than the crime agreed to by the parties. In a conspiracy, each member becomes the agent of the other member(s). Each person in the conspiracy does not have to know all of the details. Each person simply needs to understand that the plan is illegal and knowingly and willfully join in that plan on one occasion. The conspiracy or conspired act does not have to be successful. The formal elements of a conspiracy charge are as follows:

- *Multiple People* - There must be 2 or more persons.
- *Mutual Understanding* - In some way or manner, these people must come to a mutual understanding to try to accomplish a common and unlawful plan.
- *Willfulness* - The defendant must willfully become a member of the conspiracy.
- *Overt Act* - During the existence of the conspiracy, one of the conspirators must knowingly commit at least one of the “overt acts” described in the indictment (formal charge).
- *Purposeful Act* - The overt act was knowingly committed in an effort to carry out or accomplish some objective of the conspiracy.

The essence of a conspiracy offense is the making of an agreement followed by the commission of any overt act in furtherance of that agreement. While direct evidence is preferable, circumstantial evidence may be used to prove a conspiracy.

- **Discussion:** Do you think a person should be liable for conspiracy to commit a crime if they were not involved in the planning of the crime? What if conspirators solicit a third party to commit an illegal act that is part of the conspiracy, but the third party does not know about or agree upon the conspired scheme? How much evidence do you think must be present to demonstrate alleged conspirators have arrived at a mutual understanding?
- **Practice Question:** Sarah, Jane, and Tommy need money to support their drug habits. They devise a plan to break into April’s house and rob her. As soon as they begin planning, Sarah realizes that this is a very bad idea. She tells Tommy and Jane that she made a mistake and she wants no part of the plan. Tommy and Jane, undeterred by Sarah backing out, go to April’s house to determine the best way to break in. A neighbor notices them creeping around the house and calls the police. The police arrest Tommy, Jane, and Sarah and charge them all with conspiracy. Will Sarah, Jane, and Tommy be found guilty of conspiracy? Why or why not?
- **Resource Video:** <http://thebusinessprofessor.com/conspiracy-as-a-criminal-charge/>

## 17. What is the crime of “Obstruction of Justice”?

Obstruction of justice is an intentional act carried out with the intent to obstruct the legislative or judicial process. This charge seeks to protect legislative, judicial, and administrative proceedings.

- **Discussion:** How do you feel about charging a friend or family member of an accused individual for harboring (hiding) that individual to prevent her arrest? What if a friend or family member withholds or fails to give to authorities any information that implicates a family member in a crime? What if a friend or family member specifically lies when questioned by authorities to prevent an arrest?
- **Practice Question:** Barry witnesses a masked individual pull a pistol on two unsuspecting tourists and demand their valuables. He then watches the perpetrator run away down the street. At the end of the street, the perpetrator throws his weapon in the trashcan and continues to flee. Barry walks to the end of the street and removes the robber's weapon from the trashcan. He likes the gun and decides to keep it for himself. When the police arrive on the scene, they question everyone in the area, including Barry. Barry refuses to answer the police questions and does not mention the weapon he found. Has Barry committed a crime?
- **Resource Video:** <http://thebusinessprofessor.com/obstruction-of-justice-as-a-criminal-charge/>

## 18. What is the crime of providing a “False Statement”?

### *False Statement to a Bank*

This involves presenting financial information to a bank when requesting a loan. It is a federal crime for anyone to willfully make a false statement to a federally insured financial institution. Lending institutions rely upon a company's financial statements in extending credit or granting a loan. An individual must intentionally make the false statement to the financial institution in order to secure some form of financial rights (such as a loan or guarantee). The statement must relate to a material fact or consideration that the individual knows to be false. A fact is material if it is an important consideration in the determination of whether or not to extend a financial benefit.

### *False Statement to a Federal Agency*

The US Code makes it a federal crime for an individual to willfully and knowingly make a false or fraudulent statement to a department or agency of the United States. The false statement must be material in nature. Making a materially false statement to another person with knowledge that it will be transmitted to a federal agency is also a crime.

- **Note:** Federal appellate courts recognize the “exculpatory no” exception for simple denials made in response to government questioning as part of a criminal investigation. This type of reaction to government questioning will not lead to charges of making a false statement.
- **Discussion:** How does a false statement to a financial institution compare to a false statement to a governmental agency? Does criminal liability for a false statement to a governmental agency implicate the 1<sup>st</sup> Amendment?
- **Practice Question:** Donnie needs capital to run his business. He goes to the local bank and talks with a loan officer. As part of the loan application process, Donnie must submit his business's financial history. Donnie makes up some financial statements with false information about the business's operations and sales. The bank relies on these statements in loaning \$30,000 to Donnie's business. Donnie's business takes off and is successful. He is easily able to repay the loan. Has Donnie committed a crime?

- **Resource Video:** <http://thebusinessprofessor.com/false-statement-as-a-criminal-charge/>

### 19. What is “Aiding and Abetting” criminal activity?

Aiding and abetting involves providing assistance to someone accused of a crime. The assistance must relate to the criminal activity, such as assistance preparing to commit the crime, covering up the criminal activity, or evading law enforcement. This charge can be very similar to conspiracy. Under state law, the crime of aiding and abetting is often referred to as “accessory”. An individual can be an accessory before or after the commission of the crime. “Accessory before the fact” means that the individual helps in preparation of the criminal activity. “Accessory after the fact” means that the individual helps conceal or cover up the crime.

- **Discussion:** When should offering general support to an individual who commits a crime constitute accessory? Is a person an accessory if she knowingly provides the accused with a weapon or tools to commit a crime? What if the third party simply provides information to the accused that is useful in committing the crime? What if a person allows the accused to stay with them after learning that there is a warrant for the accused’s arrest?
- **Practice Question:** Hank commits a violent crime and is on the run from the police. Prior to committing the crime, he expressed to his friend, Joanna, that he needed a handgun to rob someone. Joanna, ever the loyal friend, helps him acquire the gun. After the crime is committed, Hank flees and asks his mother Edith for help in leaving the state. Edith allows Hank to take her vehicle and flee the state. Has Joanna or Edith committed crimes?
- **Resource Video:** <http://thebusinessprofessor.com/aiding-and-abetting-or-conspiracy-to-a-crime/>

## WHITE COLLAR AND BUSINESS CRIMES

### 20. What is a “White-collar Crime”?

White-collar crime characterizes crimes by criminals of high socioeconomic status or individuals who hold high-ranking, professional positions, such as corporate executives. More broadly, it includes any offense that occurs in a business or professional setting. These crimes can either be for personal gain or with the purpose of harming or benefiting the business.

- **Note:** Unlike individuals, corporations cannot be put into jail. Corporations can, however, be fined and face other criminal penalties, such as involuntary dissolution.
- **Example:** White-collar crimes includes: embezzling money, making electronic advances to fictitious employee, and accepting kickbacks from suppliers.
- **Discussion:** Do you feel like white-collar crimes are punished as regularly or severely as non-white-collar crimes? How do you feel about the inability to incarcerate a business entity, when these entities receive many of the same rights and procedural protections of human beings?

- **Practice Question:** Gina is the Chief Financial Officer of ABC, Inc. In her role, she approves all major expenditures of corporate funds. She authorizes the use of corporate funds to pay for her vacation to the Bahamas with her family. She uses the funds for travel, lodging, gambling, and dining. She is able to conceal the expenditures by acting as disbursing and approval authority. Do Gina's actions constitute white-collar crime?
- **Resource Video:** <http://thebusinessprofessor.com/what-is-white-collar-crime/>

## 21. What are crimes directed at conduct endangering workers?

In some instances, a corporate official may be charged with a crime for conduct committed in furtherance of her job duties. Particularly, conduct by business officials that endanger workers may be criminal in nature.

- **Note:** The Occupational Safety and Health Administration (OSHA) or equivalent state agencies may investigate businesses for violation of health and safety standards. If an agency uncovers potentially criminal conduct, it can turn the investigation over to state or federal authorities for investigation and potential prosecution.
- **Example:** Examples of such criminal actions include when a business official: commits an assault and battery of an employee or makes decisions that recklessly endanger or company workers. If a company official orders extremely dangerous process, such as handling dangerous chemicals, or fails to institute adequate safety precautions, she may face criminal liability if a worker is injured or killed.

- **Discussion:** If you have read the famous book by Upton Sinclair, "The Jungle", you are aware of the harsh working conditions that workers in the United States faced at the turn of the 20<sup>th</sup> Century. Do you think that criminalizing decision making by corporate executives helped to curb these harsh employer practices? Do you think the criminal penalties against businesses are sufficient to deter these practices?
- **Practice Question:** Earl is a movie director. He is known for the action sequences in his documentary films. He hires, Faith, a recent film graduate to work on his movie set. As part of a film, Earl wants to film a chase sequence on a railroad track. Earl mounts a camera on the bumper of a vehicle and instructs Faith to maneuver it during the action scene. During the scene, Faith is bounced from the vehicle and severely injured. Has Earl committed a crime against Faith?
- **Resource Video:** <http://thebusinessprofessor.com/crimes-for-conduct-endangering-workers/>

## 22. What is bribery and other illegal payments (kickbacks)?

Offering, receiving, or soliciting something of value for the purpose of influencing the action of an official in the discharge of her public or legal duties is illegal in both the domestic and international contexts. Under federal law, this sort of activity is prohibited by the *Foreign Corrupt Practices Act*, which specifically serves to prevent kickbacks to facilitate business transactions.

- **Note:** There is an exception under the FCPA that allows payment to individuals to undertake their procedural or routine tasks when such payments are customary in a country.

- **Discussion:** Do you think businesses should be prevented from paying government officials for official action that helps or favors the business? Should these prohibitions apply outside of the United States as well? Does it change your opinion if the act of paying officials in a particular foreign country is so common that it is expected? Should there be an exception when bidding for contracts against foreign companies that are openly paying officials?
- **Practice Question:** Sean owns a company and seeks to sell goods to the Brazilian government, specifically the development department. Sean knows that the Brazilian market is difficult to break into for foreigners. Sean, with the purpose of improving his chances of winning the contract, buys very lavish gifts and has them delivered to the home of the director of the development department. Has Sean committed a crime?
- **Resource Video:** <http://thebusinessprofessor.com/bribery-or-illegal-kickbacks-as-a-crime/>

### 23. What is the “Racketeer Influenced and Corrupt Organizations Act” (RICO)?

This law imposes criminal and civil liability upon those businesspersons who engage in certain prohibited activities that directly affect interstate commerce. The law is commonly used to impose criminal sanctions and forfeiture of resources used in furtherance of the criminal enterprise. Elements of a RICO action include:

- **Involvement in an Enterprise** - This may include using or investing income from prohibited activities to acquire an interest in or to operate an enterprise; acquiring or maintaining an interest in or control of an enterprise; or conducting or participating in the conduct of an enterprise while being employed by or associated with it.
- **Pattern of Racketeering** - Racketeering is defined as “any act or threat” involving a specified state crime or any “act” subject to indictment under various federal statutes. There must be some pattern of or recurring activity constituting racketeering.

The law makes it unlawful for any person employed by or associated with any enterprise to conduct or participate in a violation of the law. The law foresees two separate entities — person and the enterprise. Generally, employment alone is insufficient to hold someone liable under RICO.

- **Discussion:** Do you think this statute goes to far by allowing the government to charge individuals who are not directly involved in the criminal activity? Is the ability to reach those facilitating a criminal activity (and their assets) necessary to the administration of justice?
- **Practice Question:** Gloria makes a living by illegally importing cocaine into Florida from Colombia, SA. She does not have any hands on the process. Rather, she hires every part of the activity. Once the drugs arrive, she hires Terry to pack them in the trunk of a car and sends them to a distributor in New York. She hires Robert to drive the vehicle carrying the drugs. On the way, Robert is stopped and arrested by North Carolina police officers. The Federal Bureau of Investigation gets involved and traces the scheme back to Gloria. How can the FBI potentially charge Gloria for her involvement in drug trafficking?
- **Resource Video:** <http://thebusinessprofessor.com/racketeer-influenced-and-corrupt-organization-act-rico/>

## 24. What is the “False Claims Act”?

The False Claims Act (FCA) is a federal law that provides criminal and civil sanctions for those who commit fraud against the US Government. It is well known for authorizing a special type of civil action, “Qui Tam” or “Whistleblowing”, which allows a civil plaintiff to bring an action against a company on behalf of the Federal Government. The criminal and civil provisions of the FCA prohibit the following conduct:

- Knowingly presenting, or causing to be presented a false claim for payment or approval;
- Knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim;
- Conspiring to commit any violation of the False Claims Act;
- Falsely certifying the type or amount of property to be used by the Government;
- Certifying receipt of property on a document without completely knowing that the information is true;
- Knowingly buying Government property from an unauthorized officer of the Government, and;
- Knowingly making, using, or causing to be made or used a false record to avoid, or decrease an obligation to pay or transmit property to the Government; and
- Retaliation based upon reporting any of the above infractions.

The unique aspect of the FCA is that it allows individuals reporting criminal fraud against the government and those bringing Qui Tam actions to receive a portion of the proceeds recovered by the government.

- **Discussion:** What do you think is the justification for allowing civilians to bring an action on behalf of the government? What do you think about awarding a whistleblowing civilian a portion of the civil damages recovered against a company? What is the reasoning behind allowing these types of actions?
- **Practice Question:** Ron works in the manufacturing services unit for ABC, Inc. ABC has a large contract with the Federal Government to manufacture steel storage containers. The contract allows ABC to charge the government for all materials used in manufacturing and for the labor costs. Ron noticed that ABC was routinely ordering shipments of steel fittings at \$25,000 each as part of the materials order for the government contract. In reality, ABC was only using a small portion of the fittings on the contract, and was selling the remaining units to third parties. Ron decides to inform the government that it is being routinely over charged by ABC. Has ABC committed a crime? What rights and protections does Ron have in reporting ABC’s conduct?
- **Resource Video:** <http://thebusinessprofessor.com/the-false-claims-act/>

## 25. What is the “Sarbanes-Oxley Act”?

The Sarbanes-Oxley Act (SOX) is a set of federal laws addressing criminal and unethical conduct of public company

boards and management. It also addresses the accounting and auditing practice of firms servicing these public companies. The criminal sanctions under the statute are as follows:

- *Title VIII & XI* - This portion of SOX contains the "*Corporate and Criminal Fraud Accountability Act of 2002*". It provides criminal charges for the creation or destruction of fraudulent corporate records. It generally addresses fraud through the uses of corporate records and provides established ranges of criminal penalty. It also establishes protections against retaliation for those reporting such activity.
- *Title IX* - This portion of SOX is called the "*White Collar Crime Penalty Enhancement Act of 2002*". It provides criminal charges for illegal and unethical conduct by officers and managers that harms the public. It specifically requires corporate managers to certify that records are true and accurate.

SOX was passed in the wake of numerous corporate scandals that rocked the financial markets, such as World Com, TyCo, Enron & Arthur Andersen.

- **Discussion:** Do you think that additional government regulation of corporate practices in the form of criminal penalties helps to curve unethical conduct? Do any positive effects outweigh the negative consequences to the business (such as increased costs, bureaucracy, etc.)?
- **Practice Question:** Derek is CFO of ABC, Inc. After years of declining profits, Derek devises a method for improving the appearance of ABC's balance sheet. Derek creates a group of limited liability companies that are owned by ABC. ABC transfers corporate debt to these entities, which is reported off of the main balance sheet and in the footnotes of the financial statements. Derek knows that this form of disclosure is likely to convince investors that ABC has a strong financial position. Has Derek committed a crime?
- **Resource Video:** <http://thebusinessprofessor.com/sarbanes-oxley-act/>

## 26. What is a "Cyber Crime"?

Federal law provides that a person who intentionally accesses a computer without authorization or exceeds authorized access to obtain classified, restricted, or protected data, or attempts to do so, is subject to criminal prosecution.

- *Example:* Types of cybercriminal conduct include: hacking, cyber terrorism, destruction of data, unlawful appropriation of data or services.
- **Discussion:** Do you think it should be a crime for individuals like Edward Snowden to disclose governmental data? Do you think it should be a crime to access the back-end database on someone's private website? At the opposite end of the spectrum, if someone walks away from a public computer and fails to log out of her email account, do you think it should be criminal to read that person's emails? What if you were to send an email (even as a joke) from that person's email account?
- **Practice Question:** Clarence has his own business website that he hosts on a personal server. He manages the site personally with Wordpress. Alice is aware of Clarence's website setup and wants to play a joke on him. She guesses his password and logs into his website server. She then changes the title to read, "Alice is Amazing".

Clarence is outraged by Alice's joke. Has Alice committed a crime?

- **Resource Video:** <http://thebusinessprofessor.com/what-is-a-cyber-crime/>

## DEFENSES TO CHARGES OF CRIMINAL CONDUCT

### 27. What defenses exist to criminal conduct?

Common defenses to criminal conduct include:

- *Negating Mental Capacity* - Certain conditions of the defendant may negate the mental capacity to commit a crime.
  - *Examples:* Defenses commonly negating capacity include mental incompetence, insanity, involuntary intoxication, and infancy.
- *Negating Intent* - Certain conditions may negate the requisite intent (*men rea*) required by a particular crime.
  - *Example:* A mistake of fact or voluntary intoxication may negate the mental intent required to find guilt for a particular crime.
- *Other General Defenses* - These defenses constitute defenses to certain criminal charges. Common examples include:
  - *Duress* - This means applying undue pressure (often pursuant to a position of power or authority over an individual) to coerce activity deemed to be criminal conduct.
    - *Example:* Holding a gun to someone to make them steal would be an example of duress.
  - *Necessity* - Necessity is when an individual had no choice but to break the law in order to avoid significant harm. There must not be another reasonable manner of avoiding the harm and the harm avoided must be greater than the harm caused by breaking the law.
    - *Example:* Hank sees an individual planting a bomb in a public park. The individual runs off. Hank pulls out his concealed weapon and fires it into the air multiple times. This act causes all the bystanders to flee running. His act of firing the weapon was criminal, but it was done out of necessity.
  - *Entrapment* - This involves the wrongful solicitation and inducement to commit criminal activity by a government official (particularly the police).
    - *Example:* I am a police officer. I tell Adam that he can make some extra money by helping me transport drugs from Florida to New York. I provide Adam with a vehicle loaded with illegal drugs. I then arrest Adam for carrying out the plan. I have entrapped him.

- *Justifiable Use of Force* - Individuals may generally use a certain level of force to protect themselves and their property. The use of force is generally limited to the ability to respond with a reasonable amount of force given the situation.
  - *Example:* Thomas is walking down the street when he is attacked by two men. Fearing for his physical safety, Thomas uses a can of mace to spray and disorient his attackers. Thomas has not battered his assailants, as his use of force was justified in defense of his safety.

The availability or applicability of any defense depends upon the type and nature of the criminal charges.

- **Discussion:** What is your impression of defenses to criminal activity? Do you believe most defenses posed in criminal actions are valid or are they overused hindrances to the execution of justice? Can you think of any famous criminal cases where one of the defenses earned an acquittal for a defendant?
- **Practice Question:** Geoffrey is walking home from a party and is stopped by the police. The police are concerned that Geoffrey is intoxicated and administer a field sobriety test, which Geoffrey fails. The police charge Geoffrey for public intoxication. Geoffrey contends that he did not drink or take drugs that night. A blood test shows that Geoffrey has alcohol in his system. Unbeknownst to Geoffrey, someone at the party had spiked the punch bowl from which Geoffrey was drinking. What defenses might Geoffrey employ at trial?
- **Resource Video:** <http://thebusinessprofessor.com/common-defenses-to-criminal-conduct/>

## THEORIES OF CRIMINAL PUNISHMENT

### 28. What types of punishment exist for criminal activity?

Criminal statutes carry numerous forms of punishment or sanction for criminal conduct including:

- *Fines* - These are monetary penalties placed on someone convicted of criminal activity.
- *Incarceration* - This includes the physical detention of an individual.
- *Other Loss of Rights or Privileges* - Other losses of rights or privileges pursuant to criminal conduct include:
  - the right to vote,
  - the right to own a firearm, and
  - the privilege of driving.

These punishments are not exclusive. Criminal conduct may carry multiple punishments.

- **Discussion:** Do you believe that criminal punishments are fair across all crimes in the United States? More

specifically, are the criminal sanctions for white-collar crimes just in comparison to criminal sanctions for the sale for illegal drugs?

- **Practice Question:** Victor is charged with domestic abuse of his wife. The police have evidence that Victor physically attacked his wife on multiple occasions. The charges are a felony in Victor's state. If convicted, what are the possible penalties Victor could face for this illegal conduct?
- **Resource Video:** <http://thebusinessprofessor.com/types-of-punishment-for-criminal-activity/>

## 29. What are the theories for criminal punishment?

Numerous theories or philosophies exist for imposing some form of sanction upon criminal conduct, including:

- **Retribution** – Retribution theory states that an individual should suffer or incur some harm for her conduct.
- **Deterrence** – Deterrence theory states that imposing sanctions on conduct will prohibit that type of conduct. Individual deterrence says that imposing sanctions will prevent an individual from undertaking that conduct. General deterrence focuses on the signaling effect that punishing a criminal has on the population. Those who are aware of the sanctions inflicted upon an individual will be less likely to undertake that conduct.
- **Incapacitation** – Incapacitation theory says that society should be protected against individuals who commit a crime for a specific period of time.
- **Rehabilitation** – This theory states that an individual receives sanctions with the purpose of allowing the individual time to mentally process her actions. This may include training to help the individual understand the wrongfulness of the conduct and, hopefully, reform and refrain from committing further criminal conduct.
- **Restoration** – This theory states that the victim deserves to be made whole (or as close as possible) from the criminal activity. The cost of making the victim whole should be borne by the criminal. This may include providing the victim with the sanctity of mind that this type of conduct will not happen again.

Legislators and judicial figures do not have to state their reasoning when passing criminal statutes or handing down criminal sentences.

- **Discussion:** Which, if any, of these philosophical justifications for criminal punishment convince you? Why or why not?
- **Practice Question:** The Oregon legislature is revisiting the state statutes concerning penalties for specific crimes. The legislature has asked you to testify as an expert regarding theories of criminal punishment. In a concise paragraph, provide an explanation of the primary theories supporting punishment for criminal infractions.
- **Resource Video:** <http://thebusinessprofessor.com/theories-behind-criminal-punishment/>

## 30. What are the “Federal Sentencing Guidelines”?

In 1980, a federal sentencing commission developed sentencing guidelines for federal crimes. Initially they were mandatory for federal courts, but later became discretionary. The federal guidelines are still very influential in the sentencing process. Some states have model guidelines for use in state-law, criminal cases.

- Note: Business entities are subject to punishment under the federal sentencing guidelines as well.
- **Discussion:** Do you believe courts should employ standard sentencing guidelines? Why or why not?
- **Practice Question:** Tommy is convicted under a federal money-laundering statute. He is awaiting sentencing. What role does the Federal Sentencing Guidelines play in the court sentencing Tommy for his illegal conduct?
- **Resource Video:** <http://thebusinessprofessor.com/federal-sentencing-guidelines/>