**Class was only 3 credits when I took it, but I got an A! When I pasted the index lists, the numbering got messed up and I can’t figure out how to fix it. It’s all in the same order so it shouldn’t be too confusing.**

Business Crimes Outline:

Overview Index:

1. Corporate Criminal Law Enforcement
2. Introduction to Corporate Criminal Enforcement
3. Purposes and Optimal Structure of Corporate Liability
4. De Jure Corporate Liability: Criminal Respondeat Superior
5. Corporate Criminal Sentencing
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Detailed Index:

1. Corporate Criminal Law Enforcement
2. Introduction to Corporate Criminal Enforcement
3. Purposes and Optimal Structure of Corporate Liability:

* L&E of Deterrence
  + Individual v. Corporate Liability
  + Optimal Deterrence
    - Unique challenges of business crimes
    - Framework for solutions (reduce benefit, increase risk of conviction)
  + Strict Liability issues:
    - Cover-up incentive
    - Commitment problem
  + Duty-based mitigation/aggravation scheme in fact

1. De Jure Corporate Liability: Criminal Respondeat Superior

* Scope of employment requirement:
  + NY Central & Hudson RR
  + Extension (any time “person” used in statutory offense)
  + Seniority of offending employee
  + Subsidiary imputation to parent (piercing)
* Intention to benefit corporation requirement
  + Derives from frolic & detour
  + Sun-Diamond:
    - Partial motive to benefit corp counts.
    - Only subjective intent of agent relevant
  + Ex of exclusions: embezzlement, insider trading…
* Liability where crim act contrary to corp policy/orders
  + Hilton Hotels: only agent’s subjective intent relevant
  + Policy: cosmetic compliance problem
* Difficulties where responsibility is confused
  + Collective mens rea: Bank of New England

1. Corporate Criminal Sentencing

* Restitution: in addition and superior to fines
* Fines:
  + Limitations: Booker, no environmental or FDA offenses, hardship exceptions, hard cap (usually twice gross gain or loss), org. death sentence
  + Steps:
    - Base fine (usually pecuniary loss)
    - Culpability score: with aggravation/mitig factors
    - Apply multiplier (refer table p. 145)
    - Set sanction within range (consult factors)
  + Probation:
    - Mandatory Conditions: enjoined form future violations…
    - Recommended Conditions: compliance program
  + Problems that arise under guidelines:
    - Compliance program requirements underinclusive of genuine efforts…

1. Federal Corporate Enforcement Practice: Deferred and Non-Prosecution Agreements

* Factors to be considered
* Meaning of cooperation:
  + Turn over all info
  + Waiver of atty-client priv.
    - DOJ policy limits pros request
    - Still implicit pressure
  + Overseas employees
  + Reticent employees: firm must force cooperation under threat of termination, including 5th amend rights.
  + Employees’ legal fees (Stein)
* True benefits of NPA/DPA
* Scope of allowable penalties: no Chris Christie
* Probation:
  + Still hard core
  + Required abandonment of business practice in KPMG
  + Outside Monitor

1. Individual Liability In an Organizational Setting: Mens Rea and Scope of Responsibility
2. Men Rea
3. Intent/Knowledge

* Gypsum:
  + Intent assumed absent statement to contrary
  + Here requires intent to act plus knowledge that effect of act is criminalized
* Environmental law: public welfare interest creates legality by exception, putting people on notice as to regulation.
  + Weitzenhoff: also suggests permits are manifestations of law, ignorance no defense.

1. Willfulness (& advice of counsel) & Other Doctrines

* Cheeck:
  + Knowledge of violation required (willfulness plus)
  + Advice of counsel defense
* Bank Secrecy Act: Willfulness plus
* Anti-Structuring Provision: regular willfulness (implying knowledge of bank secrecy act)
* Ratzlaf
* Specific v. General Intent: Bryan
  + General Intent requires knowledge that behavior “generally unlawful.”
  + Willful violation of *a* law can, depending on facts, provide sufficient mens rea for willful violation of *this* law, even if malum prohibitum.
* Willful Blindness: usually counts as knowledge.

1. Actus Rea: acting in an organizational setting
2. Liability for Acts Done to Benefit firm

* Wise:
  + Person includes natural person by default
  + Agent acting in agency capacity personally liable
* Following orders defense:
  + Only to the extent it negates mens rea (Gold)
  + Right to rely can count as mistake of fact (accts)
  + SOX reporting up/out requirements

1. Responsible Corporate Officer Doctrine

* Allows for conviction of CO with **no actus reas** (aiding and abetting wouldn’t work)
* Powerlessness defense: negates causation requiring impossibility of prevention, not merely reasonable attempt.
* Policy:
  + Avoid deterrence distortions of limited liability
  + Incentivize good corporate culture on structural level
* Dotterweich
  + Responsible relation to crime (duty to monitor) OR
  + Responsible Share in causing crime (but-for omission)
* Park: delegation to “dependable subordinates” not sufficient to avoid duty to ensure preventative policies in place.
* Macdonald: mens rea req. ports to CO theory charges as well (though you can use willful blindness)
* Hong: de facto control trumps formalism

1. Mail Fraud and Wire Fraud
2. Statutes and Jurisdiction

* Elements:

1. Engage in “scheme to defraud”
   1. Materiality
   2. Scienter
2. Using or causing to be used, a mail or (interstate) wire communication “in furtherance” of scheme
   1. “in furtherance” interpreted so broadly as to reduce mail/wire element to jurisdictional hook (see Smuck exploration)
3. Scheme resulted, would have resulted upon completion, or was intended to result in either
   1. Loss of propety or
   2. Loss of intangible right to honest services

* Mailing/wiring in furtherance element
  + Schmuk:
    - Foreseeable that actions will but-for cause mail/wire
    - In furtherance not essential, but incidental:
      * Ongoing scheme, lulling
  + NCAA: mailing not foreseeable.
* Scheme to defraud element:
  + Inchoate offense counts
  + Neder:
    - Materiality necessary:
      * Reas man would attach import in decide or
      * Knowledge of idiosyncratic import
    - Omission: half truth doesn’t cut it if overall statmnt
    - Reliance and harm not necessary
  + Scienter/intent to defraud
    - 1st cir. Requires only intent to secure ill-gotten gains
    - Intent to injure generally required
      * Regent:
        + a harm must be “contemplated”
        + deception must be material to terms of bargain
  + Permissible objects of scheme to defraud:
    - Includes tangible property, intangible property (confidential nature of business information), intangible non-property rights (honest services)
    - Three categories of victim: public, employer as private victim, 3rd party as private victim

1. Scope: Types of Fraud

* Siegal: employer as private victim
  + “Something more” necessary to elevate breach of fid duty to **deceit**: here, duty to disclose use of corp. property.
  + Actus reas is mere silence in fid duty breach
* Mcnally: public as victim
  + Public fiduciary
  + Constructive public fiduciary:
    - Others’ reliance on special relation in gov’t and
    - In fact having made gov’t decisions
  + Deceit: non-disclosure of financial conflict of interest
    - Excluded in Skilling.
  + Court rejects honest services fraud, overruled by 1346
* Carpenter: employer as victim of intangible prop fraud
  + Deceit: breach of duty to disclose profits arising out
  + Harm: misappropriation of confidential info
  + Nods to money fraud theory for depriving employer of profits they would have had through the trades
* Further contours:
  + Pasquantino: deprivation of right to collect taxes harm.
  + Cleveland: fraud on licensing app deprived only of regulatory inrerest, and not property interest.
* Skilling:
  + Limits deprivation of honest services fraud to bribes and kickbacks
  + Notably, excludes failure to disclose conflict of interest.
* Weyerauch: federal standard of bribe/kickback controls.
* Rybicki

1. Insider Trading:

* Securities Fraud (10b-5 and 14a-9, plus VA Bankshares)
* Policy of insider trading:
  + Investor and Market Place Impact
    - No transaction causation
    - Brings accurate info to bear on stock price
  + Impact on Company and operations: Form of mgmt. comp?
    - Unpredictable renders inefficient
    - Stock options suffice
    - Distracts mgmt. from duties
    - Perverse incentive to short
  + Effects on disclosure
  + Fairness
  + Market integrity
  + Political reality
* 10b5-1 Elements:
  1. trading
  2. on the basis of
  3. material, non-public into
  4. in breach of a duty of trust/confidence owed to SH or source
  5. willfully (for criminal conviction)
* 14e-3 tender offer misappropriation:

1. substantial steps have been taken to commence tender offer
2. in possession of mat non-pub info relating to tender offer
3. which D knows or has reason to know
4. comes from offering person or target, and all their agents
5. to purchase or sell, or cause to be purchased or sold any sec.

* Chiarella: no breach of fid duty found
* Tipper/tippee Liability:
  + Dirks:
    - Chain of fid duty to disclose/abstain
      * Fiduciary discloses mat non-pub info to 3d party
      * In violation of fid duty w/intent for personal benefit
        + Tipper liable at this point.
      * Tippee knows or HRTK disclosure in breach
    - FN 14 Constructive insider: if info disclosed for legit business reason under “relationship of trust and confidence” established either through explicit confidence or nature of rel
    - Gifts still constitute personal benefit.
  + O’Hagan: Misappropriation theory
    - Misappropriation of confidential info in breach of fid
      * No monetary harm needed
    - Disclosure under rel of trust and confidence created duty
* Reg FD: no selective disclosure
* Willfulness:
  + For crim conviction: intention to act plus general awareness acts are wrongful, though not illegal (Tarallo)
  + For imprisonment:general knowledge that securities fraud is unlawful (even if good faith belief that what you do doesn’t qualify) Lilley
* 1348 SoX Securities Fraud offense:
  + Knowingly instead of willfully
  + Defraud any person in connection with “security of an issuer”
    - Not in connection with purchase/sale, so broader
  + Not explicit duty requirement but “defraud” implies silence not wrong w/o duty
  + No mail/wire jurisdictional hook required, instead jurisdiction conferred via national security listing affecting interstate commerce.

1. False Statements, False Claims
2. False Statements

* 18 USC 1001 elements: but go look in outline
  + D either
    - Made (objectively) false statement/represent or
    - Affirmatively concealed fact D had duty to disclose
  + Materiality
  + Within qualified juris of exec, jud or leg branches of gov
  + In doing so, acted knowingly and willfully
* Herring: cir split on whether 1001 reaches state unemp. Ins. Forms
* Brogan: no exculpatory no defense.

1. False Claims: two statutes

* False Claims Statute (criminal)
  + Presented a claim against gov’t (list of permutations)
  + Claim was false, fictitious or fraudulent
  + D knew claim was FFF
* False Claims Act (civil)
  + Drastically expanded act
  + Treble damages and attys fees available
  + Mens rea
    - Knowledge (or conscious avoid) of falsity
    - No specific intent to defraud
  + Patient protection/affordable care act
    - AKS violation auto FCA violation
    - AKS: crim offense to engage in remuneration scheme for patient referrals.
    - AKS men rea not specific intent, so when paired with FCA lack of intent: double inadvertent liability

1. Qui Tam & Health Care Fraud

* Process:
  + Filed under seal (60 days)
  + DOJ determines course of action:
    - Intervene in one or more counts
    - Decline to intervene (relator may prosecute)
    - Move to dismiss (no case or conflicts with state int.)
    - Settle
    - Advise the relator DOJ intends to decline (usually resulting in dismissal)
* Who can file?
  + First to file.
  + Suits based on public info barred.
    - Originator of public info exception
* Constitutionality:
  + Gov’t retains sufficient control to avoid running afoul of Take Care Clause (Riley)
  + Private individual may not bring suit against state gov’t (Vermont)
* Gov’t Procurement Fraud: specific offense for gov’t K fraud in excess of $1,000,000
* Policy:
  + Information seeking incentive.
  + Frivolous claims
  + Perverse incentive to delay reporting (bigger payout)
  + Discourage internal self-reporting
* Practical concerns for defense counsel:
  + Effectively criminal proceeding so assert 5th where necessary.
  + Remove relator from stream of info (risk anti-retaliation)
  + Persuade DOJ not to intervene (risk committing to facts)
  + Seek to conform to damages reduction requirements

1. Foreign Corrupt Practices Act & UK Bribery Act
2. Overview

* Accounting/Record-keeping provision:
  + All US Issuers must devise accounting controls to provide “reasonable assurances” that all transactions are recorded in “reasonable detail” and in accordance with GAAP.
  + Crim violations must be willful
  + Extends to subsidiaries in which you have > 50%
* Antibribery elements:
  + Give thing of value
  + To foreign official
  + For the purpose of both
    - Influencing official decision AND
    - For assisting in obtaining/retaining business
  + Corruptly
* Jurisdiction (consult flow chart)
  + For all jurisdictional theories, “agent” meant to extend beyond vicarious liability.
* Policy

1. Knowledge/Conscious Awareness

* “Corruptly:”
  + Some disagreement: easiest to apply “deviate from normal duties”
  + Specific intent not required (prob just general awareness acts unlawful)
* Use of 3rd Parties/willful blindness:
  + Intermediaries: if give them money “knowing” they will
  + Def of “knowing” includes:
    - Actual or subjective belief in substantial certainty of current or future fact
    - Willful blindness: awareness of “high probability” unless subjective belief to the contrary.
* Bourke: circumstantial evidence of conscious avoidance

1. Foreign Official

* Qualifying recipients of bribe: FO, employee of state-owned enterprise, NGOs, anyone else knowing they will give to above
  + In some countries, all doctors are FO.
* Lindsey: factors for showing FO status of company.
* Mens rea as to FO status of recipient? Unclear.
* Policy: why extend to state-owned enterprise?
  + No market discipline
  + Special integrity interest from monopoly power over utilities
* Passive bribery? Nope.

1. Defenses

* Grease Payment for facilitating “routine gov’t actions”
* Payment was lawful under written laws of country
* Reasonable/bona fide expenditure in promotion of products or execution of K with foreign gov’t (see factors)
* Kay:
  + Grease payment can’t influence decision-making process
  + Lawful defense limited to express, written permissions
  + Business nexus element extends to “assistance” in “obtaining business” via lowering costs, to allow lower price, to allow increased sales.
* Friedman: extortion defense?
  + 2d Cir. Test in state bribery law
    - Bribe for service to which D is legally entitled and
    - Defendant faced with sever econ loss otherwise
  + Not likely to extend to FCPA because beyond the scope of grease payment exception (insufficiently routine if severe economic loss)
* Bona fide expenditure: corrupt intent v. relationship building
  + Hinges on specificity of expectations plus other factors
  + Bribe v. campaign contribution: unlikely Congress sought to criminalize political contributions, even to foreigners.

1. Parent Liability and Dodd-Frank Whistleblower

* Parent Liability:
  + Statutory Intermediary: agency + mens rea
  + Common law doctrines: piercing, vicarious
  + Successor liability (acquisitions)
  + Aiding & Abetting (see elements)
  + Conspiracy
  + Policy:
    - Parent indirect primary violator
    - Parent can deter through compliance program
    - Optimal deterrence when thinly capitalized foreign subsidiaries difficult to get to.
* Miscellaneous: DOJ opinion procedure
* Dodd-Frank Whistle-Blower Program:
  + Elements
  + Excluded parties
  + Anti-retaliation
  + Policy
* Commercial Bribery:
  + No federal statute but Travel act often federalizes state laws
  + Elements:
    - Jurisdiction: using “facility of foreign/interstate commerce” (including personal travel)
    - Distribute the proceeds of unlawful activity
      * Includes state crimes, but see list
    - Commit any crime of violence to further unlaw act
    - Otherwise promote/establish/carryon/facilitate unlaw act
  + Carson: some portion of acts must happen in state of law.

1. UK Anti-Bribery Act

* Active and passive commercial and state bribery
* Merely intent to “influence” recipient
* Strict corporate liability (subject only to compliance program defense)
* Jurisdiction: “do business” in UK
* Sadly, the UK speaks loudly but carries a twig.

1. Money Laundering: three offenses

* 1956(a)(1) Domestic Money Laundering:
  + MR 1: knowing property represents the proceeds of unlawful activity
  + AR: conducts financial transaction which in fact involves proceeds of specified unlawful activity
  + MR2 either
    - Intent to promote specified or tax fraud or
    - Knowing transaction designed to conceal source of proceeds or transaction reporting requirements.
  + Notes:
    - “financial transation” jurisdictional hook
    - No merger w/underlying offense AR
    - “specified unlawful activity” everything we’ve studied
    - Willful blindness suffices for knowledge, but need affirmative act showing avoidance.
    - Extraterritorial jurisdiction: by US citizen, partly in US or involving funds/monetary instr > $10,000.
* 1956(a)(2): International Money Laundering
  + Did or attempted to transport/transmit/transfer “monetary instrument” or funds
  + Into or out of US (must cross border)
  + MR either
    - Intent to promote specified unlawful activity or
    - Knowing that
      * Prop represented the proceeds of some form of unlawful activity constituting felony and
      * Movement designed to conceal source of avoid transaction reporting requirements
    - Notes:
      * “Monetary instrument” narrower: coin/currency, checks, money orders, securities.
      * “Funds:” money held in bank account.
      * Ceullar: transport must be for purpose of concea
      * Merger w/underlying offense AR OK
* 1956(a)(3): Undercover Investigations.
* 1957 Tainted Money Spending:
  + Engages in monetary transaction
    - Deposit/withdrawal/transfer/exchange affecting interstate/foreign commerce
    - Of funds or monetary instruments
    - By, through or to financial institution
  + Knowing proceeds obtained from some form of crim act
  + Value greater than $10,000 and
  + Proceeds have in fact been obtained from specified unlaw act
  + Notes:
    - NO merger w/underlying offense AR
    - Extraterritorial jurisdiction if D is US person or acts took place in US.
* Policy: why in addition to underlying offense?
  + Difficulty in conviction
  + Target profiteering
  + Gatekeeping function (punishing others for crimes of associates?)
* Campbell: conscious avoidance
* Tencer: “open and notorious” defense can negate intent
* Piervinanzi: simultaneous commission of underlying offense
  + 1956(a)(1) not ok
  + 1956(a)(2) here, because there is separation of crimes, even if not intervening possession of proceeds, in that 1 happened when funds exited bank, 2 happened when they arrived at Cayman Islands.
  + 1957 not ok
  + Begs the “clean money” Q: DOJ asserts that for 1956a2, commission of underlying offense can be truly simultaneous.
* Promote the carrying on of past offenses? Circuit split.

1. Criminal Procedure Relating to Corporate Criminal Investigations
2. Grand Juries: Investigative Function

* Grand Juries Generally:
  + GJ indictment required for federal felonies.
  + No defense counsel (can pause to talk outside)
  + Cloak of secrecy (witness can discuss own testimony)
  + 5th amend waiver (talk on subject, imply waiver)
  + Immunity
* Evidentiary rules:
  + No hearsay rule (though DOJ policy instructs to warn jury)
  + No exclusionary rule (DOJ policy against evidence that “clearly violates Constitutional rights”)
  + Prejudicial Evidence:
    - Harmful error standard: “grave doubt” that decision to indict was free from “substantial influence of such violations” Bank of nova scotia
    - Fundamental error: when “core constitutional right” violated, prejudice presumed.
  + Violation of secrecy: assessed by grave doubt standard.
  + Perjured Testimony:
    - If prosecutors knew, then dismissal if no other inculpatory evidence.
    - If pros did not know, harmful error standard.
  + Exculpatory Evidence: no duty to present at GJ (Williams)
* Conviction cures harmful error at GJ.
* Judiciary cannot develop procedural rules for GJ (Williams)
* 4th Amend:
  + Two protections: facial and rule 17
  + No 4th for verbal testimony (not a search)
  + Yes 4th for document subpoenas (Boyd)
  + Agents can assert on behalf of firm, but weak (overbroad)
  + Standard” only 4th amend violation if “**no reasonable possibility**” that it will “**produce evidence** that is relevant.”
  + Policy the protection of trial

1. Grand Juries and the 5th Amendment: Firms and Documents
2. Firms and the 5th Amendment

* Elements: 5th protects
  + Natural persons (and sole proprietorships) from
  + Being compelled
  + To make testimonial communication
    - And when the testimonial fact is implicitly communicated through an “act of production,” that fact is not a “foregone conclusion.”
  + That incriminates themselves
  + Absent a grant of governmental immunity
* Basic Rules:
  + Can only assert on your own behalf (Hale)
  + No entity 5th amend right
  + No Privacy Interest
  + Private v. corporate records

1. Documents and Tangible Objects
   1. Individuals and 5th Amendment

* Elements of 5th amend for doc subpoena
  + Compulsion
  + Testimonial
  + Incriminating
* Act of production testimony:
  + Testimonial aspects of production
    - Existence
    - Possession
    - Authencity
  + Foregone conclusion exception
* Atty-client priv. imputation; atty asserts on own behalf
* Fisher: tax docs
* US v. doe: subpoena requesting consent in the hypothetical
  1. Firms/Officers and 5th Amendment Revisited
* Braswell: still no act of production immunity for firms, but can’t use the fact of your production against you.
* Hubbell: Act of production immunity against derivative use of document identification testimony compelled over 5th by grant of 6002 immunity.

1. Attorney Client Privilege and Attorney Work Product
2. Scope of Privilege

* Elements:
* The asserted holder of the privilege is or sought to become a client;
* The person to whom the communication was made
  + Is a member of the bar of a court, or his subordinate and
  + In connection with this communication is acting as an attorney;
* The communication relates to a fact of which the atty was informed
  + By his client
  + In confidence (without the presence of strangers)
  + For the purpose of securing primarily either
    - An opinion of law
    - Legal services or
    - Assistance in some legal proceeding AND
    - NOT for the purpose of committing a crime or tort AND
* The privilege has been
  + claimed AND
  + not waived by the client
* Basics:
  + “interpreters” do not break confidence
  + Business advice v. legal advice
  + Selective waivers not generally allowed
  + Crime/fraud exception
* Work product: Documents prepared by atty “in anticipation of litigation” absent a showing of “substantial need.”
* Upjohn: scope of client? Just try to replicate UpJohn facts:
  + Told employees conversations were confidential
  + Made clear to employees that these communications were with the firm’s lawyer speaking to the firm (so it’s the firm’s privilege)
  + Concerned matter within the scope of employees’ corporate duties
  + The firm needed to talk to low level people in order to make legal decisions
* Policy

1. Waiver:

* It’s the firm’s privilege:
  + CEO can’t prevent waiver
  + Employees who interviewed can’t prevent waiver (which is why you have to make it clear that they are talking to corporate counsel and not their own counsel).
  + Board of directors would make the decision.

Outline:

1. Corporate Criminal Law Enforcement
2. Introduction to Corporate Criminal Enforcement
3. Purposes and Optimal Structure of Corporate Liability

Law and Economics of deterrence business crimes:

* **A self-interested criminal impetus**: Ignoring strict liability crimes (no mens rea), people commit corporate crimes when it will benefit them.
  + Closely-held firm: When the firm is owned by the manager, there is a readily perceivable benefit to violating the law on the firms behalf since they benefit from the firm’s benefit more directly,
  + But what about publicly held firms? Evidence shows that even in the context of publicly held firms, managers are still motivated by self-interest.
    - Ex: Securities Fraud:
      * Senior management hides losses (securities fraud), not to protect SH from market fluctuations, but **to avoid getting fired**.
      * Reputational hit: because the market loses faith in company, the long-term loss drastically outsizes any short-term gain, so healthy firms really do not want their employees committing securities fraud, rendering the crime one of individual interest.
  + **Individual liability**? So perhaps because the source of the motivation is indeed self-interest, deterrence is best served by targeting/mitigating/eliminating that incentive, suggesting individual liability is the right approach (these actors are more often rational than in your typical crime).
* **Firm liability**? Creating an **incentive for the firm to efficiently sanction its employees**? Two arguments in favor:
  + 1. closely held firms, obviously eliminating financial incentive for corporation eliminates incentive for owners, who are the managers in closely-held firms and
    2. **Crime as agency cost**: to the extent corporate crime is an agency cost, the firm has incentive to sanction its own employees.
* Rebuttal in favor of individual liability:
  + **Judgment insulated civil defendant**: Employees may have their incentives skewed by the protection of insolvency from corporate sanctions (especially where the harm is a multi-million dollar one), whereas the government can hit you with hard time. IN addition, we don’t always trust the firm to sanction, especially when high-level individuals are implicated.
  + **Misplaced Liability**: can strategically dodge corporate liability by thinly capitalizing subsidiaries, inter alia.

**Optimal deterrence**:

* In theory we could hand formula this shit, but similar to the discussion of punitive damages in the tort context, the **incentives on firms are misbalanced due to recurring misses** on the compensation side (lack of detection/prosecution), whereas the firm more likely reaps the full benefit and the harm is fully felt.
* So you have to **discount for the probability of sanction**: F = H/P optimal deterrence = harm/probability of sanction.
* Special Challenges of corporate crime compared to average street crime:
  + **Huge magnitude of harm**, benefit can be enormous and
  + Probability of detection is small: the act constituting the **crime looks so much like a legal act that it doesn’t announce itself the way a corpse does**.
* Remember, our two solutions, both of which corporations can help with given the right incentives, are
  + 1. **Reduce the benefit** of crime and
    2. **Increase the risk of conviction**.
  + Policing mechanism: anything that enhances the probability of detection.
    - Corporations can institute **compliance programs** if given incentive to do so.
    - **Informational Advantage**: Corporations can more efficiently investigate themselves than can the FBI because of greater familiarity with operations, **especially when access to documents located in a firm’s foreign offices** are necessary and US would have difficulty obtaining them.
  + Reducing benefit: organizational structure can be set up to reduce incentive to commit crimes (such as appreciating employees for more than their bottom line).
* Conserve Government Resources: An additional advantage of corporate liability is that it is a comparatively cost-effective enforcement mechanism.
* Notice that corporate liability does not serve a retributive role since it **falls on innocent SH**, but serves exclusively a deterrence function.

**Strict Vicarious Liability De Jure, but Duty-Based mitigation/aggravation scheme in fact.**

* Strict liability:
  + Old view was that strict liability would effectively incentivize corporations to take measures to prevent harm whenever the harm is greater than the cost of doing so.
  + **Cover-up incentive**: But the other half of avoiding strict vicarious liability is preventing detection, or at least failing to take affirmative steps to assist in detection, since it will be strictly liable for any crimes after they’ve missed their opportunity to prevent.
  + Perhaps there is some long-term benefit prevention benefit to the corporation for their establishing a culture of cooperation with investigation in that the perception may deter future crimes, but surely this is not optimal deterrence because its mitigated by a cover-up incentive.
* **Commitment problem**: In general, firms would be better advised to **threaten reporting out internal crimes to reap the deterrence benefits** (to some extent, though employees in a position to commit business crime may recognize incentives) ra**ther than actually following through (so as to avoid increased likelihood of liability)**.
  + **Informational advantage eliminated**: And this decision would likely be made strategically on a case by case basis, so **those crimes least likely to be detected would be most likely to go unreported**, eliminating much of the advantage of corporate liability.
* These considerations led the government to adopt a “**duty-based mitigation/aggravation regime**:”
  + Aggravation: Liability is enhanced for firms with no compliance program or who do not report wrong/otherwise cooperate (aggravation)
  + Mitigation: Corporation absolved of some liability if cooperate/have compliance program/otherwise cooperate
  + **Some lingering strict liability**: Ideally, still want some monetary damages even with full ex-post cooperation and ex-ante compliance program in order to retain benefits of strict liability in incentivizing intangible ex ante prevention measures (such as structuring compensation intelligently).

1. De Jure Corporate Liability: Criminal Respondeat Superior

1. Scope of Employment Requirement:

New York Central & Hudson R.R. (1909):

* Facts:
  + R.R. employees (who were responsible for pricing and had discretion) convicted of violating the Elkins act, which expressly provides for corporate liability, for providing kickback rebates to certain customers, despite express orders of the firm not to do so.
  + Corporation convicted via vicarious liability. Appeals the corporate conviction as unconstitutional.
* Shareholders as defendants argument:
  + The ultimate burden of the punishment falls on the shareholders, so defense argues that shareholders should have at least been entitled to due process, and here they are not even in court.
  + But corporations are persons unto themselves and a core tenet of limited liability is asset partitioning, so legally the SH’s assets are severed from the firm’s, whether that works to the benefit of SH (as it does when firms go bankrupt) or to their detriment (as it might here in the SH denial of due process).
* Vicarious liability argument:
  + What separates tort liability from criminal liability? Tort law is not really about blame, whereas **criminal conviction is supposed to communicate moral condemnation** of the defendant’s actions. In addition, the deterrent effect of the threat of imprisonment is not dependent on the defendant’s solvency, so the underdeterrence threat of judgment proof employees is mitigated.
  + **A firm is nothing more than its agents**: Here, the court extends the analogy that the firm is simply the aggregation of its agent’s actions, so if an agent can bind the firm to a contract, then it can impute criminal liability.
  + If we are hesitant to impute criminal liability because the deprivation of liberty via imprisonment is different in kind from monetary sanctions, that consideration is absent here because corporations can’t be imprisoned.
  + Another argument (not in case) is that criminal sanctions carry ancillary monetary penalties such as bars to government contracts for some period after a criminal conviction, which can shut certain firms down completely.
  + **Special evidentiary challenges of corporate crimes**: Deterrent benefits may be even greater in the corporate context because corporate crimes, such as antitrust violations, tend to require more cooperative efforts which may be difficult to ferret out on an individual basis and which prevention is more vulnerable to institutional liability (since it requires a greater portion of the institution to commit). But this still doesn’t separate it from tort law so much
  + **Congressional intent**: Whether or not similar goals could be achieved through tort law, guess what? Congress decided they wanted to do it through criminal liability and that’s within their authority.

Subsequent Developments:

* **Extension**:
  + courts have subsequently extended vicarious liability in the criminal context beyond explicit Congressional mandates (as in the above case) to **anytime a “person” is mentioned, since corporations are people, unless the statute states otherwise**. Indeed, firms can even be liable for manslaughter.
  + Even heightened mens rea crimes can be attributed to corporations via both **vicarious mens rea** (corporation inherits employee’s mens rea) and collective mens rea (seen in New England Bank).
* **Seniority of offending employee** (relevant at sentencing)**:** 
  + Most other jurisdictions limit strict criminal liability imputation to the firm to senior management’s actus/mens reas only. Here, it’s any employee acting in the scope of their employment.
  + However, the lower level status of an employee can be relevant at sentencing (especially at large firms, fines are adjusted dramatically via “points of aggregation” enhancement based on seniority of offender).
  + And on an unofficial level, the seniority of the employee will often be relevant to the government’s exercise of **prosecutorial discretion**.
* **Subsidiary imputation to parent corp**: limited to agency/principal relationships between firms.
  + By default, subsidiaries are separate corporate persons from their parents, same as shareholders who own stock in a company.
  + Instead, you would have to find an agency relationship looking to traditional facts such as day-to-day control, **the sub acting in a way that benefits parent outside traditional equity relationship** (piercing).

2. Intention To Benefit the Corporation Requirement

* Disgruntled employee attempting to subject the firm to criminal liability?
* Would fail because the employee must intend, at least partially, to benefit the firm in committing the crime.
* The benefit of the corporation requirement **derives from the basic agency law** principle that one is only an agent to the extent they act on behalf of the employer, so **analogous to the frolic and detour exception** to vicarious liability in tort, criminal vicarious liability is limited to acts taken on behalf of the firm as the principal.
* From a **policy perspective**, the firm has **no incentive to tacitly encourage** (or omit to prevent) criminal behavior not taken on their behalf and pragmatically, may have **less ability to control that behavior** because the incentive is externally sourced (self-interest).

Sun-Diamond (DC 1998):

* Facts:
  + Douglas handles Sun-Diamond’s (agricultural company) lobbying in conjunction with lobbying firm they contract with.
  + Secretary of agriculture, and old friend of Douglas’, has a brother who is in debt from his failed senate campaign.
  + Douglas recruits contact at their lobbying firm (RLSM) to make 5 $1000 (maximum allowed under campaign finance laws) contributions through separate employees at RLSM, subsequently reimbursed through **sham fundraising dinner ticket purchase**, then charged back to Sun-Diamond.
  + So ultimately, the **illegal campaign contributions come out of sun diamond’s pocke**t.
* Sun-Diamond as victim or culpable beneficiary?
  + Sun-diamond argues that it was actually a victim of the fraud and arguably, Douglas’ primary purpose was to benefit his old college friend, independent of the firms’ interest.
  + Court rejects this on the grounds that Douglas’ corporate capacity clearly extends to currying favor with the agriculture secretary.
  + **Only partial firm-regarding motivation necessary**: And even if this was only a subsidiary purpose to his personal interest in helping his friend, there need be only some intention to act on behalf of the firm.
* Notice: we look to the **subjective intent of the agent**, irrelevant of whether or not Sun-Diamond would have approved of this action on their behalf.
* **Examples of crimes that might actually be excluded** under intended benefit requirement include **embezzlement** of the firm’s money, **insider trading**…
* **Merely ancillary purpose sufficient**: even if employee acted for primary purpose of preserving his employment, the fact that he had an ancillary purpose of avoiding corporate liability for the violation, he still acts on behalf of the corp. sufficient to meet the intent to benefit the corp. requirement.

3. Liability where Criminal Action is Contrary to Corporate Policy/Orders

Hilton Hotels (9th Cir. 1972):

* Fact: Hotel employee responsible for procuring supplies participates in illegal cartel boycott in direct contradiction to explicit corporate policy.
* Court finds liability anyways because he was still within the scope of employment in that there was **at least an ancillary purpose to benefit the firm.**.
  + And remember, **notwithstanding the firm’s opinion of the advisability of the criminal behavior, the analysis focuses on the agent’s mens rea** (which is the one imputed to the firm, after all) and the agent, however wrongheadedly, had at least an ancillary purpose to benefit the firm.
* Personal Emotion?
  + Strangely, the court notes employee’s testimony that he acted out of personal resentment towards the particular supplier due to their refusal to cede to the cartel agreement.
  + But **even this anger was ultimately experienced out of a loyalty to the firm** (or so one could infer).

Policy: Weisman advocates for change to respondeat superior doctrine that allows the corp off the hook if they have an effective compliance program. Arguments against:

* Firms already have an incentive to implement compliance programs because they want to avoid liability.
* **Cosmetic Compliance Problem**: In addition, no matter how specific the government requirements for “effectiveness” in a compliance program, corporations will always figure out a way to comply with the letter of the law and not the spirit (“cosmetic compliance”), and the government is in a much worse position to assess what will actually be effective for any given corporation than the corporation itself given the incentive of actual prevention, rather than the appearance of the intention of prevention.
* For these reasons, **courts have consistently followed Hilton**, **leaving any leniency on the point to sentencing and prosecutorial discretion**.

4. Difficulties Where Responsibility is Confused

Three possibilities for vicarious liability mens rea:

* 1. **Inherit mens rea of known, convicted employee**,
  2. **Inherit mens rea from unknown employee**, but when the nature of the crime implies that there must have been some employee with the requisite mens rea, but evidentiary limitations frustrate pin-pointing which particular one sufficient to convict an individual and
  3. **Collective mens rea** (Bank of New England)

Bank of New England (1st Cir. 1987):

* Facts: Bank secrecy act case. Teller consistently failed to report cash transactions of $10,000 or more in a single day (particular offender would come into bank and make several $9,999 transactions in a single day, aggregating to an excess of $10,000, eliciting a reporting requirement).
* **There is a willfulness requirement**: requiring both an awareness of transactions totaling over $10,000 and an awareness of the obligation to report.
* Count one established via inherited mens rea: First, one of the tellers knows about the obligation and knowingly failed to fulfill it, establishing sufficient mens rea in her as an individual for the corp to inherit the mens rea vicariously *on her specific count only*.
* **Collective mens rea**:
  + However, some of the tellers on the ground do not know of the reporting requirement, so a different theory of vicarious liability is required to establish the mens rea to convict the corp. on the counts for which they provided the actus reas.
  + Court finds that corp is liable for the violations of these tellers via **collective knowledge**
  + **0 + 0 not 1**: Not in that one person had the legal knowledge and another person had knowledge of the act,
  + **Reckless Indifference**: But that the educated teller knew of widespread violations, yet failed to spread knowledge of the requirement, amounting to reckless indifference sufficient to rise to collective willfulness.

1. Corporate Criminal Sentencing

Three Key Stages of Elements of Sentencing:

1. Part B – Restitution
2. Part C – Fines
3. Part D – Probation

Part B Restitution:

* For felonies and class A misdemeanors, convicted corporations generally required to make full restitution to victims, regardless of their perceived culpability **in addition to fines**
* Order of restitution not appropriate when full restitution has been made, the number of identifiable victims so large as to make it impracticable, or complex issues of fact relating to the cause and amount of victims’ losses would unduly prolong sentencing.

Part C – Fines:

* Initial limitations:
  + Post-Booker, these are all advisory, but most courts will follow.
  + **Only specified offenses covered**, notable excluding environmental, food and drug, export control and RICO offenses.
  + Hardship exceptions:
    - If it is clear that company will not be able to pay restitution, then no fines inquiry need be made because **restitution obligations trump punitive fines**.
    - If it is clear that a company will not be able to pay even the minimum fine, then a separate set of fine reduction guidelines apply.
  + **Hard Cap Statutory Maximum**: fines may not exceed the greatest of:
    - Amount specified in the offense
    - $500,000
    - Twice gross gain or loss (**usually the applicable figure**)
  + Organizational Death Sentence: if the organization “operated primarily for a criminal purpose or primarily by criminal means” then judge can order a fine large enough to divest the company of net assets.
* Steps:

1. Base Fine Reflecting the Seriousness of the Offense: greatest of:
   1. Number in Table from Individual guidelines
   2. Pecuniary gain
   3. Pecuniary loss (usually the applicable figure).
2. Culpability Score:
   1. Begin with score of 5
   2. Involvement/Tolerance of Criminal Activity:
      1. If org./unit had > 5000 employees and either
         1. High level personnel participated in, condoned, or was willfully ignorant of offense OR
         2. Tolerance of the offense by substantial authority personnel was pervasive then **add 5 points**.
      2. If org./unit had > 1000 employees and either
         1. High level personnel participated in, condoned, or was willfully ignorant of offense OR
         2. Tolerance of the offense by substantial authority personnel was pervasive then **add 4 points**.
      3. If org./unit had > 500 employees and either
         1. High level personnel participated in, condoned, or was willfully ignorant of offense OR
         2. Tolerance of the offense by substantial authority personnel was pervasive then **add 3 points**.
      4. If org. had 50 or more employees and high level personnel participated in, condoned, or was willfully ignorant of offense, **add 2 points**.
      5. If org. had 10 or more employees and high level personnel participated in, condoned, or was willfully ignorant of offense, **add 1 points**.
   3. Prior History: if more than one applies, use the greater:
      1. If the org committed any part of the instant offense **fewer than 10 years** after
         1. Criminal adjudication arising out of similar misconduct or
         2. Civil/administrative adjudication arising out of **2 or more instances** of similar misconduct, **add 1 point**.
      2. If the org committed any part of the instant offense **fewer than 5 years** after
         1. Criminal adjudication arising out of similar misconduct or
         2. Civil/administrative adjudication arising out of **2 or more instances** of similar misconduct, **add 2 points**.
   4. Violation of an Order: if more than one applies, use the greater
      1. 2 points if the commission of the offense
         1. violated a judicial order/injunction other than a condition of probation or
         2. Violated a condition of probation for behavior similar to that for which they were initially place on probation
      2. 1 point if the commission of the instant offense violated probation.
   5. Obstruction of justice: if the org obstructed justice during the investigation or with knowledge of obstruction of justice failed to take reasonable steps to prevent it, **add 3 points**.
   6. Effective Compliance and Ethics Program
      1. If the offense occurred despite the presence of an effective compliance program, **subtract 3 points**.
      2. Limitations:
         1. Does not apply if company discovered the offense and then **unreasonably delayed in reporting** it.
         2. Rebuttable presumption that compliance program was effective if org of > 200 employees if HLP of small org or substantial authority personnel of any size org. participated in, condoned or was willfully ignorant of offense.
         3. Presumption can be rebutted if:
            1. Compliance program officials have direct reporting requirements to geoverning authority within org
            2. Compliance program detected offense before outside discovery was reasonably likely
            3. The organization promptly reported the offense AND
            4. No compliance program personnel participated, condoned or were willfully ignorant to offense.
      3. Components of effective compliance program:

* Adopt effective program: HLP responsible
  + Communicate program to employees
  + CO should be able to report directly to board
* On-going monitoring for compliance
* Corporation should have (& publicize) system for confidential internal whistleblowing about wrongs
* Promote CP including appropriate incentives to comply with law
* Firm must respond effectively to detected wrongs
  1. Self-Reporting, Cooperation and Acceptance of responsibility: use the greater of
     1. Subtract 5 points if the org
        1. Prior to imminent threat of disclosure or gov’t investigation and
        2. Within reasonably prompt time after becoming aware of offense,
           1. Report to gov’t auth.
           2. Fully cooperate in investigation AND
           3. Make affirmative acceptance of responsibility for conduct (usually means pleading guilty)
     2. Subtract 2 if
        1. Fully cooperate with investigation AND
        2. Clearly demonstrate recognition and affirmative acceptance of responsibility
     3. Subtract 1 if clearly demonstrate recognition and affirmative acceptance of responsibility.

1. Apply relevant multiplier (p. 145) to arrive at fine range.
2. Determine where within the fine range to set the sanction, applying factors notably including:
   1. Whether the offense involved a vulnerable victim.
   2. Partial satisfaction of mitigation/aggravation factors (can limit our discontent with formalisms of factors)
   3. **Collateral consequences**: although no official offset mechanism, fines may be adjusted to account for this.

Part D – Probation

* Automatic if the firm did not have compliance program in place.
* Monitoring is often disruptive and expensive.
* Importantly, these enhance the sanctions of future violations.
* **Mandatory Conditions of probation**:
* Must include a **requirement that the organization not commit another** federal, state , or local crime during the period of probation
* Should the firm do so, the Guidelines provide for an aggravated sentence if probation is violated.
* Felonies: Probation generally shall include at least one of the following:  – **Fine; Restitution; Community Service**
* Court may impose other conditions that are
* reasonably related to the offense or the firm
* involve only such deprivations of liberty or property as necessary to effect the purposes of sentencing

- **Recommended conditions of probation**:

* Require firm to publicize the offense; conviction; and nature of the punishment at its own expense
* Require the firm to design and implement a program designed to prevent and detect violations of the law  – Notify employees and SHs of its conviction and about the program in a form provided by the court
* Firm shall make periodic reports to the court regarding its progress. Disclose: civil, criminal, administrative proceedings or investigations.
* Firm must submit to periodic examinations of its books and records and interrogation of personnel at its own expense.

- **Violation of probation**:

* Upon a finding of a violation of probation, the court may
  + extend the term of probation,
  + impose more restrictive conditions of probation, or
  + revoke probation and resentence the organization.

Problems that arise under guidelines:

* Compliance requirements when HLP involved arguably underinclusive of genuine efforts.
* Self-reporting requirement for both self-reporting mitigation and compliance program mitigation denies mitigation to cases where legality of conduct was ambiguous, so corp didn’t report but not with a guilty mind (fails to aim incentives for compliance program). But Caremark obligations create additional incentives.
* The gradations of fine multipliers pegged to culpability points means that incremental nature of decreases in fines creates situations where increasing the probability of detection might not be worth say a 10-30% mitigation in fine from conviction of which you could potentially have avoided altogether if not for self-reporting/compliance program (especially given risk you may not comply with technical requirements of guidelines in some arbitrary way).

1. Federal Corporate Enforcement Practice: Deferred and Non-Prosecution Agreements

Deferred prosecution agreement:

* doj files a criminal case but agrees to defer prosecution as long as firm fulfills conditions specified in agreement.
* As Thompson memo suggests, may be preferable to permanent amnesty in order to ensure cooperation and oversee specific performance (such as implementation of effective compliance program).

Non-prosecution agreement:

* DOJ agrees not to even file initial charging documents.
* NPA expressed in letter which is not filed in court.
* Notably, NPAs generally require the company to **waive the statute of limitations and right to a speedy trial on all charges** that the prosecutor could have filed as of the date of the agreement.

Factors to be considered:

* Pervasiveness/Seniority – Isolated, low level, good compliance + cooperate: may get full leniency
* Cooperation with Investigation – Cooperation and value of cooperation most important (see below)
* Collateral consequences + harm innocent SH/Ee – Different for CH firms with wrongful managers and Public firms
* Corp’ timely/voluntary disclosure of wrong
* Corporations remedial actions including efforts to replace responsible management
* Existence of Adequate Compliance program – In practice not determinative
* Nature/Seriousness offense – AT own policies
* Past history ; may get D/NPA if collateral con & cooperate
* Adequacy of individual prosecutions

Cooperation:

* Full cooperation means you **gotta lay out everything you know**, and in addition, you had **better know something to turn over to the government**.
  + This usually requires that you have conducted an **internal investigation**.
* Does this mean they have to **waive atty-client privilege?**
  + Prosecutors used to demand this for DPA agreements, but under the current guidelines the prosecutor may not explicitly request a waiver (changed under growing commentary that this eroded institution of atty-client privilege within the corp due to fear that it may be turned over to government as part of DPA).
    - However, corps can still offer to waive of their own volition, so there **may still be significant implicit pressure**.
  + Instead, 9-28.710 **limits prosecutorial requests for fruits of internal investigations** to the bald facts of the crimes, which are excluded from privilege anyways since atty-client privilege limited to conversations with clients, impressions of attys, work product, etc.
  + But **you have to provide the government with the facts; the firm has to tell us what it did even if it learned it in an attorney-client context** (which WOULD normally be protected by atty alient privilege).
  + Policy: The reason that privilege is somewhat more limited in this context is that the atty really acts as an agent for the firm to learn something about itself via internal investigation, so the facts derived from that conversation simply become part of the firm’s knowledge, and the firm has no 5th amendment right not to self incriminate.
  + Example: remember that any use of the atty’s services to help effectuate a crime in a way that avoids detection would be a separate fact of the crime and excluded from privilege and even confidentiality anyways.
* **Overseas employees**:
  + as is often the case with FCPA investigations, many of the key players are beyond American subpoena power.
  + To remedy, the fillip memo **expands the scope of expected disclosure** of the facts sufficient to qualify as full cooperation to **include internal investigations of foreign employe**es.
* **Reticent employees**
  + Furthermore, employees are much more reticent with government investigators than they are with the company’s general counsel.
  + **Filip memo changed guidelines to require companies to force cooperation with the government of its employees under the threat of termination**.
    - **Includes not asserting the 5th**.
* Employees’ legal fees:
  + Can prosecutors pressure corporations into cutting off their paying the legal fees of their employees for independent counsel?
  + Nope. US v. Stein struck this down as **undermining the adversary system**, and the DOJ adjusted their rules accordingly.
* Corporate v. employee atty-client privilege: as long as general counsel has made clear that she acts as the firm’s atty and not as the employee’s, the privilege of any disclosures belong to the corporation, rather than the employee, and the corporation can waive it at the decision of the board, which is often given up in DPA/NPA **whether or not prosecutors can ask for it explicitly**.

Benefits of NPA:

* Note: the memos pretty strongly suggest that **individuals, especially higher ups at the corporation, should not avoid conviction at the expense of the corporation (in NPA/DPA)**, so these agreements should not extend to individuals (though they sometimes do).
* Relevance to civil suits:
  + this ain’t an SEC-style don’t admit or deny wrongdoing type of agreement.
  + Instead, the **firm has to stipulate every fact which would be necessary to obtain a conviction and agrees not to deny any of these facts in subsequent civil suits**.
* Fines: You do avoid criminal fines, but the NPA/DPA agreements themselves involve very significant penalties of their own.
* Reputational value: perhaps, though mitigated by the fact that they don’t deny wrongdoing (securities markets could figure this shit out if you committed fraud).

The scope of allowable penalties:

* Chris Christie pulled that bullshit in which he required a defendant to endow a chair at Seton Hall as part of NPA.
* DOJ has since passed explicit rule disallowing this type of “extraordinary restitution” since it was insufficiently related to recompensing the victims of the crime
  + “Plea agreements, deferred prosecution agreements and non-prosecution agreements **should not include terms requiring the defendant to pay funds to a charitable**, educational, community, or other organization or individual that is **not a victim of the criminal activity or is not providing services to redress the harm caused** by the defendant's criminal conduct. “
* in contrast, with stuff like environmental harms you could still require donations to environmental cleanup groups or other *community service related to the harm*
  + “Neither does this section restrict the use of community service provisions in plea agreements, [D/NPA agreements resolving environmental matters.”

Corporate probation:

* Perhaps you avoid technical probation as outlined in sentencing guideline, but as a practical matter, as the KPMG case shows, DPA/NPAs can include probation-like requirements that are **even more strict than sentencing-guideline probation**. This is a large part of the controversy surrounding the agreements and there are no explicit limitations in the rules.

Examples:

* Compliance Program: Explicit – **Required phone/email whistleblowing**
* Chairman, CEO, GC monitor calls to analysts – Chrman attend prep meetings with CEO
* Reporting (internal) –
  + CFO, GC, CCO report directly to Chairman of the board –
  + Chr + Exec Comm establish CEO comp guidelines –
  + CEO/CFO give detailed reports to Chair, CCO, monitor
* Reporting (external): –
  + Added disclosure to SHs –
  + Must report credible evidence criminal conduct
* Training of Employees – Mandatory
* Separate Chairman/CEO: Non-executive Chairman
* Appoint **DOJ-approved Outside Director to Board**
* **Require firm to abandon an entire business practice**  -KPMG tax practice for private clients.
* BMS Retain and Pay for **Outside Monitor** –
  + Determined by DOJ
  + Monitor can hire people he needs
  + Duties –
    - Oversee compliance D/NPA –
    - Review reforms & other functions as advisor –
    - Report to USAO quarterly –
    - Monitor compliance with federal laws –
    - Monitor in-house hotline
  + CEO, Chair, GC, meet quarterly w/ monitor

1. Individual Liability In an Organizational Setting: Mens Rea and Scope of Responsibility
2. Men Rea
3. Intent/Knowledge

Overview:

* Overarching concept: ignorance or mistake of fact or law is a defense to the extent it negates the necessary mens rea for the particular offense.
* When statutes are silent, court will tend to read intent in to them absent clear congressional intent to the contrary.
* However, this plain vanilla implied intent does not require intent to violate the law, but only intent to commit the acts and **general knowledge that you’re on the wrong side of the law** (malum in se), except in the rare “willfulness plus” scenarios, of which the tax code is most significant.
* Knowledge requires only intent to commit the actus reas.
* In the environmental context, scope of permit treated as knowledge of the law, rather than a mistake of fact.

Gypsum (1978):

* Two regulations at issue:
  + Sherman act: prohibiting the sharing of information between competitors
  + Robinson-Patterson act: which requires some equality of pricing stuff, the implementation of which may necessitate some communication between competitors that in this case constituted a Sherman act violation…well fuck.
* **Jury instructions** focus only on whether or not their actions had the ***effect*** of reducing competition, completely **independent of the mens rea** of the defendants.
* Is Intent required?
  + Sherman act is silent on whether or not a mens rea is required, so **Court interpolates intent** because
  + that’s the default mens rea when statute silent or ambiguous (often cited for this proposition.
  + it’s compelled by lenity.
  + the Sherman act is a particularly bad candidate for strict liability because **antitrust law regulates societally productive economic behavior**, which you don’t want to overdeter.
* But how does intent manifest here?
  + **Intent to act plus knowledge of effect**: They have to
    1. intend to complete the act and
    2. have knowledge effect criminalized in Sherman act (reduction of competition) is “**necessary and direct consequence**” of act
  + **Not specific intent to violate statute**: rather than that the act is a violation of the Sherman act.
  + **Not knowledge that you violate statute**: don’t have to know that you’re breaking the law, but merely that your act results in the criminalized effect.
    - This is the court’s best attempt to approximate **ignorance of the law is no defense**.
    - And remember, of course a conscious desire to bring about the criminalized effect would also suffice, whether or not it was the necessary and direct consequence (deliberately creating 1/3 chance of death out of malice still counts even though death is not “necessary” consequence of act)
* Jury instructions rejected:
  + Although specific intent to effect is not required, jury instructions did not even require knowledge that criminalized effect would be necessary consequence of acts, but simply that the acts happened to result in the effect, which offends justice.
* What if retrial? Here, the defendants would probably still guilty because

1. the Robinson-Patterson act doesn’t actually necessitate this behavior and
2. **sharing of information pretty obviously has an anticompetitive effect**
   * **Intent to act**: they intended to share information and
   * **Knowledge of effect**: they knew it would have an anticompetitive effect as necessary and direct consequence of act, so they have sufficient mens rea;

* Merely malum prohibitum? To my mind, knowledge that you’re reducing competition is pretty malum in se.

Environmental law: creates some unique mens rea due to “**public welfare interest**” in regulation of activity of this nature

* **Legality by exception**: Very **broad prohibition with operations made legal by exception** to the broad prohibition, rather than the normal (behavior being criminalized by exception to the general presumption of liberty to do what the fuck you want).
* **Notice of regulation**: This puts motherfuckers on notice that they had better ensure their behavior is legal since this is a highly regulated area, informing view of mens rea.
  + Query whether this really just brings you back to malum in se territory.

Weitzenhoff (9th Cir. 1993):

* Basics:
  + Waste water treatment plant has permit to dump some waste, but they exceed their permitted dumping by 6% over several months and end up charged with 31 counts of Clean Water Act violations.
  + Statute requires a “knowing” mens rea. Here, they know they’re dumping and that they were dumping waste, but they don’t know (or so they allege) that they exceeded their permit (they said they misread their permit), resulting in a violation.
  + Court says “knowingly” modifies only “dumping” and “pollutants” but not “violate,” meaning “**knowing conduct, that is violative of the law**.” But why?
* **Mere mistake of fact?** Staples Court allowed mistake of fact defense to guy who didn’t know his gun had been modified into an illegal semi-automatic. **Can be distinguished** in two ways:

1. Knowing at least required knowledge of the nature of the gun possessed, not that possession of the gun violated the regulation
   * analogous situation here would be I know I’m dumping but I thought it was water rather than pollutants; a true mistake of fact.
2. **Public welfare interest in regulating activity of this nature gives notice of strict regulation**: As the court says, the Staples Court was persuaded by the fact that gun ownership has such a rich cultural history that it is not the type of behavior to put someone on notice that they may be in violation of regulations, and explicitly contrasted this with environmental violations in which the “**dumping of obnoxious waste materials” “places the defendant on notice that they are in a position of responsible relation to public danger.”**

* **Precedent requiring knowledge of violation**: Liparota:
  + Facts:
    - Guy was purchasing food stamps from recipients at partial value and then redeeming them at face value.
    - **Statutory provision very similar in construction** to one at issue here in that debate about whether “knowingly” extended to the facts of the violation alone or all the way to the fact that the acts violate the law.
    - Court went with the latter in that case, which **could not be distinguished as a mistake of fact** as in Staples.
  + But two things can distinguish Liparota:
    1. Nature of conduct: Don’t want to criminalize everyday activities like purchasing groceries, especially since those using food stamps are less likely to be sophisticated parties aware of regulations and
    2. **Legality by exception = Notice of strict regulation**: The activity at issue here is **presumptively prohibited unless permitted by exception**, which serves to put mofos on notice about possible illegality because they know it’s a heavily regulated industry.
* Legislative History: To corroborate this construction of the statute, the court notes that Congress had amended the statute to lower the mens rea from willfully to knowingly, and although that could be viewed as an attempt to eliminate ignorance of law defenses and not ignorance of fact defenses, Congress was clearly trying to get at people like these defendants.
* But isn’t this just mistake of fact? **Defendants misread the permit rather than misreading the law**.
  + It could be argued that this is a mistake of fact (more similar to the staples failure to recognize that gun had been modified) rather than a mistake of law.
  + Incentive of ignorance: But if we allowed such an excuse it would create an incentive to be ignorant to one’s permits and although willful ignorance may be able to form a knowing mens rea, this creates serious evidentiary difficulties.
  + **Permits are manifestations of law**: In addition, the court characterizes the permits themselves as manifestations of law, rather than fact, so misinterpretation of this “law” is no defense, whereas ignorance of a true fact of the act (thought you were dumping water) would still be a defense.
    - Indeed, our concern about an incentive to be ignorant is precisely that which compels the “ignorance of the law is no defense” policy.
* This ruling is representative of how courts have ruled in similar cases of public welfare regulations, especially environmental regulations.

1. Willfulness (& Advice of Counsel) & Other Doctrines

* “**Willfulness plus:**” when not within the scope of the public welfare doctrine, malum prohibitum crimes can require knowledge not just of illegal conduct, but that such conduct is illegal.

Cheek (1991):

* Facts: Cheek was airline pilot who stopped filing his tax returns on the “advice” of his atty that the income tax is unconstitutional.
* **Knowledge of violation required:** Court determines that the “willfully” requirement in statute criminalizing failure to pay taxes requires that defendant knew they were violating tax code because
  + tax code is extremely complex and
  + there’s **no public safety interest that should put people on notice that there might be strict liability** for failure to comply with specifics of code.
* So does this guy get off?
  + Even if he had a good faith belief that the income tax code was unconstitutional, it was **not the product of innocent mistake as to the prevailing interpretation of the law**.
  + Rather, this guy clearly had extensive knowledge of the tax code and intended to pursue a tax protester activist position.
* Advice of counsel defense: After previous case, appeals on defense of advice of counsel.
  + Elements of advice of counsel defense:

1. Before taking action
2. In good faith sought advice of atty D considers competent
3. For the purpose of securing advice on future conduct
4. Made full and accurate report to his atty of all material facts which defendant knew and
5. Acted in strict accordance with advice of atty.
   * Good faith is a defense: Notice here, that only good faith belief, rather than reasonable belief, is required as long as you fit into the above elements. And because this is not an affirmative defense, but rather a rebuttal to proof of willfulness, the prosecutor must prove beyond a reasonable doubt.
   * However, if you raise this defense, you **implicitly waive atty-client privilege** with respect to correspondence between d and atty who lead him to alleged good faith belief in legality of behavior.
   * Very rarely a successful defense.
   * **Limited to rebuttals of specific intent to violate the law**: Remember, the defense is only available when there is a “**willfulness plus” requirement**, which is to say that a specific intent to violate the law is required.

Bank Secrecy Act: Financial Institutions must file a currency transaction report whenever they receive greater than $10,000 in a transaction.

* Aggregation: multiple transactions must be treated as a single transaction if institution “knows” they are conducted on by of on behalf of the same person (appears in Bank of New England).
* **Willfulness plus**: “Willful” failure to do so is criminal, with willfulness extending to knowledge that conduct is violative of law; ie specific intent to violate provision.

Anti-structuring provision: illegal to attempt to evade reporting requirements by “structuring” transactions to avoid 10,000 reporting trigger.

* Regular Willfulness; **knowledge of anti-structuring provision itself not necessary**: after Ratzlaf, Congress amended the anti-structuring provision to require only knowledge of BSA (which is implicit in an attempt to evade the BSA), rather than knowledge of the anti-structuring provision itself.

Ratzlaf (1994):

* Facts:
  + D ran up some $160,000 debt with casino, comes in with $100,000 cash
  + Casino informs him of bank secrecy act and provides limo for him to run around to different banks and get cashiers checks from each bank just under 10,000.
    - Side note: that he had 100,000 cash is interesting because had he withdrawn this from a bank account, he would have already run into BSA issues, which Casino clearly thinks he did not since they help him to avoid BSA issues, apparently assuming and not caring that the cash came from questionable sources.
* Anti-structuring provision: But sadly for Ratzlaf there is a separate provision prohibiting structuring of transactions to avoid bank secrecy act reporting, and imposing criminal penalties if one “violates” the anti-structuring provision ”willfully.”
* **Willfulness Plus**: Majority construes willfully to **require knowledge of the illegality of the structuring**, rather than merely knowledge of the BSA reporting requirements themselves
  + **Knowledge of BSA is implicit in an attempt to evade it**, so “willfully” in the structuring act context would be rendered surplusage if willfulness in the anti-structuring provision applied only so far.
    - This of course is premised on the fact that the underlying BSA violation must be willful as to illegal nature of conduct, lest a person be criminally liable for structuring transactions to avoid hitting 10,000, merely because they hate the number 10,000.
  + Reasoning unpacked: if violation of the anti-structuring statute requires violation of the BSA, and the violation of the BSA requires knowledge of the BSA, then for the anti-structuring act to require knowledge only of the BSA, as opposed to knowledge of the anti-structuring act itself, would render the anti-strucuring act’s willfulness requirement redundant since such knowledge is implicit in a violation of the BSA, which is a prerequisite to violation of the anti-structuring statute.
* Omnibus willfulness plus requirement for reporting violations: In addition, there is an “omnibus” provision in this subchapter of the US code which courts have read to require “knowledge of the reporting requirement” and “specific intent to commit the crime/disobey the law” in order to find a “willfull” violation.
  + **Here, there is knowledge of a reporting requirement, but not the reporting requirement defendant is alleged to have violated (the anti-structuring provision), so defendant gets off**.
* Malum prohibitum to malum in se?
  + As the dissent points out, these appellate interpretations of the omnibus provision were justified on the grounds that these regulations are malum prohibitum (this is simply a gate-keeping statute meant to lead investigators to the actual wrongs) and so people are less likely to be aware they are violating the law, putting us closer to Liparato territory.
  + **Evasive techniques look malum in se**: But in the case of the anti-structuring provision, **evasive techniques presuppose an awareness that the area is regulated by the reporting requirements**, so this looks more like the environmental context in that sense, distinguished from the other reporting requirements to which the omnibus provision applies.
  + Valid reasons for structuring? But perhaps there are legitimate reasons to avoid BSA reporting (tax avoidance, rather than evasion, so it’s valid purpose), eccentric lady that didn’t want to attract burglars, hide money from spouse…)
  + Lenity: whatever the case, the Court appears to run with lenity and adopts the interpretation most favorable to the defendant.
* **Subsequent Amendment**: Congress subsequently amended the anti-structuring provision to require only knowledge of the original statute and intent to evade it, rather than knowledge of the anti-structuring provision itself.

Specific v. General Intent:

Bryan (1998):

* Facts:
  + D traffics guns from Ohio, shaves off serial numbers, resells them.
  + Convicted of **dealing firearms without a license**, which has a willfulness requirement.
* Selling guns without a license may not itself constitute a malum in se crime (Staples court acknowledges cultural assumptions about gun ownership fail to put people on notice s to regulated area), so willfulness requirement may be willfulness plus (specific intent to violate law).
* Knowledge that conduct was “generally unlawful” sufficient:
  + **Willful violation of *a* law constitutes willful mens rea for violation of *this* law**: Court holds that a general knowledge that behavior is wrongful (or rather, “generally unlawful”) is sufficient to establish willful violation of the law, **even without knowledge of precise legal duty he’s violating**.
  + **Offense could still be malum prohibitum with fact-specific determination for mens rea**: To the extent a bald violation of the statute might not present facts which should lead one to the conclusion they have sufficient mens rea to violate the law, rendering the violation one of malum prohibitum, *this* defendant’s generalized sense of wrongfulness fills in the intuitive moral culpability necessary to found a malum in se interpretation of willfulness (requiring only knowledge of the facts of the violation) on this fact pattern only.
* Does the punishment fit the crime?
  + Dissent argues that the other violations of the law (filing off serial numbers, trafficking guns into the state) shouldn’t be relevant to determining the mens rea for this specific act.
  + If you want to convict on those, then you should do so, and punish the criminal on those penalties rather than the penalties for the crime for which you didn’t have the requisite mens rea.

Willful blindness/conscious avoidance: and remember, you can infer knowledge when D deliberately closed their eyes to what would otherwise have been obvious to them.

1. Actus Rea: Acting in an Organizational Setting
2. Liability for Acts Done to Benefit firm

The scope of a “Person:”

* Many statutes extend liability to any “person,” and often it’s clear that Congress had corporations in mind when using that term
  + For ex: kinda hard for a natural person to commit an antitrust violation without a corporation.
* **Generally however, courts interpret “person” to extend to natural persons unless the statute or context suggests otherwise.**
* Wise elaborates.

Wise (1962):

* Antitrust conviction appealed on two grounds.
* “Person” does not extend to natural persons:
  + The plain text does not afford that reading.
  + Deterrence: without individual liability, the criminal penalities meant to deter Sherman Act violations become “mere licensing fees for illegitimate corporate operations.”
* Law extends only to actions taken by natural persons on their own behalf, and not in an agency capacity:
  + Agency liability in criminal law? Defendant simply acted as an agent with actual authority on behalf of a principal, binding the principal and, consistent with agency law, not binding the agent individually.
  + Nope. Legislative history shows that they intended the Act to reach even those persons merely “following orders” in carrying out the violation, which would seem to include those acting in an agency capacity.

Following orders defense:

* Not a real defense, generally speaking.
* US v. Gold court explained that **following orders is a defense to criminal liability only to the extent it negates the mens rea**, so with respect to malum prohibitum willfulness plus offenses that require knowledge of illegality of actions, the absence of such knowledge.
* Right to rely as mistake of fact: Another scenario is if you’re an accountant entitled to rely on certain facts stipulated by your superiors, and on those facts there is no crime, you are not required to investigate the accuracy of those facts, so this establishes a mistake of fact that serves to negate the knowledge requirement of the mens rea.
* SOX reporting up requirements: subordinate atty has responsibility to report securities fraud to supervising atty, and if the supervising atty fails to fulfill their reporting up/out requirements, the subordinate atty is *permitted* to take those steps themselves.

1. Responsible Corporate Officer Doctrine

Allows for conviction of corporate officers with no actus reas when the failure/omission to fulfill duty as an officer responsible for certain corporate activity plays a causal role in the commission of the crime: ie officer had the power and duty to stop the crime, but failed to do so.

* Notice: aiding and abetting liability would not reach these defendants because it requires an affirmative act in furtherance of the crime (if only in ordering its commission), which will not be established by mere omission.
* Mens rea: in the case of strict liability offenses, D need not have guilty mens rea OR actus reus, but if there is mens rea to offense then it must be met for those charged on responsible corporate officers doctrine as well (MacDonald).
* Powerlessness defense: goes to negate “responsible share” of causation by omission, which **requires that there was absolutely nothing D could have done to prevent crime**, rather than nothing reasonable they could have done, since the latter would import a negligence mens rea and this is a strict liability offense.

Policy:

* Avoid deterrence distortions of limited liability:
  + This doctrine has been expanded significantly in the environmental area because deliberate undercapitalization plus limited liability prevented people from fully internalizing the costs of environmental harms (they operate recklessly and hope they don’t cause environmental harm, but if they do and they get sued then they’ll just fold and reinvent a new corporation the next day since no capital was actually in the firm itself). We need criminal liability to fill this gap.
* Incentivize good corporate structure:
  + We want to get the guy who structures his business in a way to create a likelihood of criminal violations without directly carrying them out, or ordering that they be carried out. So Congress explicitly extended liability to “responsible corporate officers” picking up on the Dotterwhich “in responsible relation” to crimes in RCRA (at issue in MacDonald).

Dotterweich (1943):

* Facts:
  + Pharmaceutical company had shipped misbranded/adulterated pharmaceuticals in violation of strict liability federal food, drug and cosmetic act.
  + Jury found CEO of company guilty and defendant appeals verdict.
* Could this be brought on aiding and abetting?
  + No. Although there is no mens rea requirement, accomplice liability requires an affirmative act in the furtherance of the crime, and here all we have is an omission.
* Vicarious liability?
  + Might be able to get to the firm, but not to the CEO because vicarious liability is founded in agency law, and the employees are agents of the firm, not the CEO, so you can’t impute liability to the CEO as a principal since the CEO is not a principal.
* Congressional intention for individual liability:
  + But the statute evinces an intent for “individuals” to be personally liable, in addition to corporations. Who is Congress trying to get here? The warehouse employee (who may be the only one taking an affirmative act in furtherance of the particular crime and thus fulfilling the actus reus)? Unlikely.
* **“Responsible corporate officers:”** The Court says those who “commit” the crime extends to all those with

1. a “responsible relation” to the crime (ie a duty to monitor the activity) or
2. a “responsible share” in **causing** the crime (crime would not have happened had officer fulfilled duty).

* Here, the CEO clearly **had the power to prevent the crime** from happening or even just prevent liability by seeking a guaranty under the statute (provision allowing for the elimination of liability for violation if you successfully seek guarantee that pharmaceuticals are not misbranded/adulterated in violation of statute from supplier). He is **at least as responsible, in a causal sense, for the ultimate commission of the crime as anyone who had an affirmative act, by virtue of his position of responsibility**.

Park (1975):

* Facts:
  + Defendant is CEO of firm, convicted for violations FDCA resulting from failure to maintain warehouses storing food in sufficiently sanitary condition, after several warnings form the FDA.
  + But D delegated responsibility for ensuring specific violations did not occur to “dependable subordinates.”
* **Scope of officer liability**: those with a “responsible relation” to the violations in the sense that they are responsible for ensuring, in a general sense, that violations don’t happen, or having a “responsible share” in the occurrence of the violation in that they had the power to prevent the crime.
  + This can include a duty to ensure that sufficient preventative policies are in place prior to violation.
* Powerlessness defense?
  + Another way of phrasing this holding: the corporate officer had a responsible relation to the crimes in that they had a duty to prevent them and failed to fulfill that duty, **which sounds negligency BUT…**.
  + Professor Arlen thinks the **“powerlessness”** defense as one which **goes to causation, rather than mens rea** (since mens rea was strict liability by statute here),
  + which is to say it is **limited to the defense that there was absolutely nothing the defendant could have done to prevent the commission of the crime, rather than nothing reasonable the defendant could have done** (which is what a negligence standard would imply).
  + Phrased differently, “responsible relation” goes to causation by omission, and an element of responsible relation is the power to prevent the crimes from happening, so claiming powerlessness goes to negate the “responsible relation” element of causation.
* The jury charge should have been: did he have a responsible relation (ie authority) either directly or indirectly to the cleanliness of the warehouses? But Court decides that the jury instructions actually given (responsible relation to firm at large) was inconsequential difference and so they **denied him a retrial**.

Macdonald & Watson Waste Co. (1st Cir. 1991)

* Here, in contrast to Dotterwhich, there is a knowledge requirement.
* Government argues that for responsible corporate officers, they just need to show knowledge that the type of shipments which resulted in this particular violation had previously occurred.
* **Mens rea ports to responsible corporate officer theory charges as well**: Court rejected this, instead requiring knowledge of the particular events of the particular crime. If a “responsible corporate officer” is defined to qualify as a “person” and “persons” have to have “knowledge,” then even those who are established as responsible corporate officers must also have the same level of knowledge for the crime as the statute requires of anyone else.
* Court notes that you can prove by circumstantial evidence (as may have been the case here) and you **can prove willful blindness** to suffice as knowledge.

Hong: acting CEO avoided accepting that title apparently with the purpose of avoiding liability. Court saw through this formalism and focused on de facto control/responsible relation to find a responsible corporate officer.

1. Mail Fraud and Wire Fraud
2. Statutes and Jurisdiction

Elements:

* Engage in “scheme to defraud”
  + Materiality
  + Scienter
* Using or causing to be used, a mail or (interstate) wire communication “in furtherance” of scheme
  + “in furtherance” interpreted so broadly as to reduce mail/wire element to jurisdictional hook (see Smuck exploration)
* Scheme resulted, would have resulted upon completion, or was intended to result in either
  + Loss of property or
  + Loss of intangible right to honest services

Mailing/Wiring In Furtherance Element:

Schmuk (1989):

* Facts:
  + Intermediary used car dealer would roll back odometers, sell them at inflated prices to retailers, who would subsequently sell them to unsuspecting customers at fraud-affected price.
  + Mailing: retailers had to register with DMV (through mail) in order to resell to customers.
* “**cause to be mailed**:” D doesn’t have to personally do the mailing, but just set in motion a chain of events during which you **know or have reason to foresee that mailing or wiring will happen as a result of your actions**.
  + Mailing that would have taken place in the absence of your scheme doesn’t count; **must have but-for causation**.
  + To drive this point home, the mailing in this was actually adverse to defendant so he definitely didn’t intend it, but it was nonetheless a foreseeable result of the scheme.
  + For wiring, you do have to know that you will cause wiring, but not that it will be interstate (it’s been held that **the interstate nature of wiring is merely jurisdictional and does not require foreseeability**, though it must actually cross state lines)
* **In furtherance**:
  + The mail/wire need not be itself fraudulent, but must be “in furtherance” of the scheme. But the **mailing need not be “essential” to the scheme, but only “incidental,” for the it to be “in furtherance” of.**
  + D argues this mailing was not in furtherance of the scheme because the transaction between him and the retailer (his portion of the fraud) has already taken place by the time the mailing happens.
  + There is some precedent to support D’s argument:
    - Kann
      * held that defendants who had cashed fraudulent checks at bank could not be convicted of mail fraud based on the bank’s subsequently mailing the checks to the drawee bank on the grounds that how the bank decided to communicate with the drawee bank was immaterial to the success of the fraud, which was complete by the time of mailing. Here, it was irrelevant to the defendant how the retailers decided to deliver their papers to the DMV since his fraud was complete anyways.
      * **Ongoing Scheme:** But Court distinguishes on the ground that this was an on-going scheme and so the successful resale of the cars, for which the mailing happened, was at least incidentally related to repeat fraudulent sales to the same party.
    - Parr
      * But this very same argument was made in the Parr, where public school officials committed ongoing tax fraud, dependent on the mailing of tax documents.
      * Yet there was arguably not but-for causation on the mailings in Parr because the checks were going to be cashed by the school whether or not they were cashed by the defendants.
    - Maze
      * D stole roommate’s credit card and went south on “winter jaunt,” staying in hotels and purchasing food along the way.
      * While there was but-for causation in maze, there was not the same ongoing scheme because the success of D’s scheme was in no way dependent on a continuing relationship of trust and confidence, as he burned bridges all the way to Mexico.
  + Here, 1) the mailing of the DMV forms was an essential step in the successful passage of title at the retail level, 2) which was essential to the maintenance of D’s “**relationship of trust and confidence**” with the retailers, 3) which was essential to the perpetuation of D’s **ongoing scheme to defraud**.
  + Ultimately, this question seems to come down to your view of Congressional intent, and it’s clear that the majority views the mailing and wiring elements as jurisdictional hooks out of concern for state’s resources and ability to effectively prosecute fraud.

**Lulling**: this flexibility has been further expanded to cases in which the fraud is complete before the incidental mailing AND there is no on-going scheme, but where the **post-fraud mailings are used to lull the victim into a false sense of security (by discouraging investigation) or otherwise stymie detection**.

NCAA case:

* Facts:
  + Agent made illegal contracts with college athletes to represent them post-graduation, for which continued NCAA eligibility for the remainder of college play was necessary.
  + Mailing: Colleges subsequently filed routine forms with the NCAA for eligibility of athletes, unbeknownst to the defendant.
* **Mens rea as to mailing**: He didn’t know or have reason to believe that mailings would happen, so he didn’t have the requisite intent with respect to the incidental mailing
  + being that the mailing is the actus reas, “knowingly causes” mens rea must apply to mailing.
* Defendant got off.
* Would he get off under but-for causation requirement in Schmuk FN 7? Arlen says no, but I’m skeptical.

Scheme to Defraud Element:

Inchoate Offenses:

* “any scheme or artifice for obtaining money or property” was added to the statute as a codification of Durland, in which the court found that only intent to defraud was necessary, not a successfully completed fraud; the inchoate offense counts.

Neder (1999):

* Facts:
  + Defendant financed real estate investments through fraudulently obtained loans: D told banks there was a lake 5 miles from the property, but neglected to reveal that it was largely inaccessible to the public.
* Materiality Necessary? yes
  + Question of materiality was not submitted to the jury.
  + Court says that the **materiality element of common law fraud was incorporated by statutory reference to fraud**.
* Court notes that **reliance and harm elements of common law fraud are dropped**, but that Congress evinced a clear intent to do so by extending the offense to inchoate frauds which cannot have reliance and harm elements since they are not yet completed.
* Materiality:
  + **Reasonable man would attach importance to truth in deciding whether or not to enter transaction** OR
  + The **maker of the representation has reason to believe that its recipient is likely to regard that information as important to their decision, even if a reasonable man would not.**
    - Note: “importance” does not necessarily mean determinative of the transaction; **don’t have to prove transaction causation**.
  + Here, although the D **did not technically lie**, his **omission** to state the inaccessible nature of the lake rendered his overall statement regarding the existence of the lake **rendered his mention of the short distance to the lake** **materially misleading in the context** of a sales pitch on the financial prospects of a land development.
    - Notice: **half-truths don’t cut it** if omission renders statement materially misleading in context.
* **Gullible people**: notice that even if a reasonable person wouldn’t go for your misrepresentation, if you have reason to believe the particular person with whom you’re transacting is likely to do so (perhaps by virtue of the nature of the representation, such as those Nigerian king schemes), then the misrepresentation is still material.

Defenses:

* **Good faith**: acting with good will and without intent to defraud **negates scienter**
* Reliance on counsel: Is this the same as reliance on counsel in Cheek?
  + Sought counsel in good faith before acting
  + Fully disclosed material facts to counsel
  + Honestly relied on attorney’s advice in attempt to conform with the law

Intent to defraud: Intent to injure?

Circuit split: First circuit requires no intent to injure, but only intent to secure ill-gotten gains, at least in bank fraud.

* Obviously, this would not apply to mere “deprivation” of honest services.

Regent (2d Cir. 1970):

* Facts:
  + Stationary supplies salesman would lie about relation to customer (such as a friend just died and needs to offload this stationary to help relieve difficult situation*) to get past secretaries* to purchasing agents.
  + They never sold stationary at anything other than the normal price and never made inaccurate claims about the utility of the stationary.
* Government argued that any deceptive statement in the process of a sale establishes intent to defraud, relying on Row, which found fraud where a victim was denied the opportunity to bargain on true facts when salesman lied about prices of comparable properties in real estate negotiation.
* Court distinguishes on the ground that while there need not be any actual harm, **there must be one contemplated by the schemer**, **and it must be material**.
* Here, there was no intent to harm because **lie wasn’t material to the bargain itself** in that there was no misrepresentation as to the quality of the product.
  + In Rowe deceit did go to nature of the bargain because the distorted perception of the price affected the terms of the transaction.
* Notice: had the lies about the friend dying been made to the purchasing agent themselves, there may have been fraud in that the salesman would have misrepresented a consumptive aspect of the good inherent in the charitable nature of the transaction, inuring to the benefit of the salesman in that they make a sale, or make a larger sale, than they would if not for the misrepresentation. Arlen says that question is not at issue in the case because facts to that effect were not plead.

Permissible Objects of a Scheme to Defraud:

Includes:

* Tangible Property: including money and financial instruments
* Intangible Property: such as confidential business information (deprivation of confidential nature included)
* Intangible non-property rights: such as right to honest services

In isolating permissible objects of fraud, focus on

* the distinction between the wrongs typically associated with fraud, deceit, and mere breaches of fiduciary duty.
* What types of harms are within the scope of the fraud statutes?
* How do the courts handle a breach of a duty to one party, resulting in harm to another party (Skilling)?
* Pay attention to the nature of the victim, and the differences in treatment between Arlen’s Three Categories:

1. public as victim,
2. employer as private victim, and
3. 3rd party as private victim.
4. Scope: Types of Fraud

Siegel (2d Cir. 1983):

* Facts:
  + Over the course of 9 years, defendant executives make illegal sales of leftover toys to create off-the-books slush fund of a total of 100,000.
  + The uses of that fund are obscure on the evidence, but at least some of it went to bribes on the firm’s behalf, and the jury was instructed to find guilt if they conclude beyond reasonable doubt that money went to “private uses AND bribes.” (emphasis in original… PSYCH)
* **Breach of fid duty elevated to fraud**: There appears to be a breach of fiduciary duty, but how do we raise that to fraud? Where is the “**something more**” necessary for deceit?
  + This embezzlement is distinguished from regular robbery, which is not fraud, on the grounds that the **defendants had a fiduciary duty to disclose their use of corporate property, which they failed to do here, resulting in a misrepresentation** sufficient to establish the requisite deceit for fraud.
  + What if the defendants had fully disclosed to the board and the board had approved? This would probably negate the deceit necessary for a fraud conviction, which should focus us on the “something more” in addition to breach of fiduciary duty necessary to derive a fraud action from a breach of fiduciary duty.
* Materiality:
  + As we know, the standard for materiality is whether a reasonable stockholder or corporate officer would consider it important in decision-making.
  + Here, 100,000 over nine years is a rounding error for a corporation of this size, so wherein lies the materiality?
  + **Court finds materiality**, perhaps because the misappropriation of corporate property for personal use involves a certain betrayal that may inform the board’s perception of the executives’ judgment and ultimately, their decision about whether or not to keep them on the payroll.
  + More likely, **true materiality probably hinged on the risks associated with the use of the money for bribery**, but the government did not want to pursue that argument because it would require them to prove the bribery.
* Injury:
  + the court defines the injury as “self-enrichment,” established by the jury’s reasonable inference as to the fate of the money not accounted for by bribery, for which they determine there is sufficient circumstantial evidence for a reasonable jury to conclude at least some of the money went to self-enrichment.
  + Jury instructions ordered conviction of fraud if missing money went to “bribes *and* self-enrichment.” One might argue that a new trial is necessary in case jury thought all of the money went to bribery, rather than self-enrichment, and circumstantial evidence is only sufficient to find the latter.
  + But **“bribes and self-enrichment” is stated in the conjunctive and so we assume that the jury found evidence of both** (questionable assumption for grammatical acumen of juries, but the presumption that juries understand instructions is necessary for judicial economy).
  + But what about materiality? The jury’s determination of materiality may have hinged on the bribery use of funds, so because the court doesn’t find sufficient evidence of use of funds for bribery, the more limited self-enrichment use of the funds alone may not have been sufficient to convince the jury of materiality.
* **Nevertheless, court upholds conviction**.
* Notice here, **mere silence forms the actus reas**:
  + The court extends fraud to include certain failures to silence in violation of fiduciary duty, a wrong not traditionally within the province of common law fraud.
  + However, courts still insist on a harm, the nature of which becomes controversial.

McNally (1987): overruled by section 1346 amendment.

* Facts:
  + Defendants are Gray, a former public official and thus a “public fiduciary,” and McNally, a **private individual made constructive/de facto public fiduciary** by virtue of
    1. others’ reliance on his “special relationship in the government” AND
    2. in fact having made governmental decisions, as determined by the appeals court because he “substantially participated in government affairs and exercised significant, if not exclusive, control over awarding” the insurance contracts in question.
  + The fuckers distribute government insurance contracts to companies in which they have a financial stake, rather than auctioning them off competitively to the lowest bidder, and makes hush money payments to losing insurance companies.
* **Non-disclosure of financial conflict of interest** in selection of insurance companies founds **requisite deceit for fraud** because it is a **violation of public fiduciary duties** (as explained above).
* Deprivation of right to honest services: **“The breach itself becomes both the deceit and the injury.” Court rejects! Only to be later overruled by 1346.**
  + It seems like the government could have charged the injury/harm as the amount of money actually embezzled, but the government does not pursue this argument for one reason or another, leaving them with the deprivation of honest services harm.
  + Court says that **non-property interests are excluded from protection under fraud statutes** because the language is simply a codification of Durland, which extended the scope of fraudulent misrepresentations beyond the past and present circumstances required for common-law “false pretenses” actions, to include misstatements about future actions (in that case, that the bond seller would repay the bonds when they had no intention of doing so). So the court chocks the amendment up to an effort to codify this holding about future statements, rather than extending the injury beyond property.
  + To buttress this construction, they invoke lenity.
* Note: the construction chosen by the court seems strained.
  + normally when property is one of several things listed, the implication is that the statute applies beyond property, but whatev.
  + In any event, the Court is overruled in 1346.

Carpenter (1987):

* Facts:
  + WSJ reporter contributes to influential “heard on the street column,” the stock picks of which go up after announcement.
  + Reporter conspires to capture this increase by releasing picks ahead of announcement for co-conspirators to invest on.
* Mail fraud hook is the publication and dissemination of the WSJ.
  + Is this a problem under Kann?
  + Schmuk justified post-actus mailing as part of the fraud on the grounds that it was essential to the perpetuation of an ongoing scheme by virtue of its “lulling” effect on car dealers, enticing them to return for further purchases.
  + Here, there’s no lulling effect, so it can’t be a Schmuk-based argument.
  + Instead, **the fraud was not complete until the publication caused the stock to increase, conferring the fraudulent gain to the defendants. It’s part of the fraud itself**.
* **Breach of duty to disclose profits arising out of employment**: defendant has a duty to their employer to disclose their intention (profits arising out of employment), so D’s failure to do so is a breach of fiduciary duty **sufficiently deceptive in nature to establish fraud**.
* But what was the **harm** to WSJ? **Misappropriation of confidential information**
  + D argues that they didn’t cause any economic harm to the WSJ, and **only traded on publicly available facts**.
  + But the confidential information misappropriatedis **the *analysis* of publicly available informatio**n, which is what has the real effect on the market.
    - What is confidential is not how much money apple is making, but that the WSJ is going to recommend that people purchase apple stock on the basis of that information.
    - This is material because the market has traditionally moved in response to the publication of this confidential analysis.
* But is this not just honest services (a harm eliminated in Mcnally)?
  + No, **Intangible property is still “property:”** This is “property or services” because the journal’s information is its property (albeit intangible property).
  + **Deprivation of exclusive use property right**: Part of this property right is the right to make exclusive use of the information (right to control dissemination/confidentiality).
* Plus deprivation of foregone profits is defraud of tangible property anyways: In addition, even if the court hadn’t recognized the information itself as an infringed, intangible property right, the court notes that the agent’s breach of the duty to account for profits arising out of employment actually deprives the Journal of money that should have been theirs (defendants actually hold this in constructive trust for the Journal).
* Could the Journal decide to trade in advance of its own announcements in heard on the street?
  + Arlen says yes. Although the analysis is, as we established, material non-public information, they own it (unlike their employees) and are under no duty to disclose it to the shareholders of other corporations (unlike the fiduciaries traditionally prosecuted under insider trading rules).
  + So in view of this legality if the employer did it, we’re **criminalizing action taken by an employee solely on the basis the breach of fid duty**, which is not the traditional province of fraud. This is **very controversial** about the holding.
  + Perhaps it then follows that under this theory of the breach of a fid duty constituting both the deceit and the harm of a fraud action would allow for a reversal of the defendants’ exoneration in Mcnally since they breached fid duty to public by failing to account for profits arising our of agency relationship.

Further contours:

* Pasquantino (2005): Guy evaded Canadian liquor tax through deceptive means. Court ruled this deprived Canada of right to collect this revenue, constituting harm.
* Cleveland (2000): D obtained license to operate video poker machines through deceptive means.
  + Government argued that although D paid full amount for license, he defrauded state of **right to control who they grant licenses to**.
  + Court rejected, **reducing this interest to a regulatory interest, rather than a property interest, since he deprived them of no revenue**.

**1346**: Congress comes back and explicitly states that harm for fraud includes deprivation of “intangible right to honest services.”

1346 prosecutions prior to Skilling:

1. 3rd party harm: deceived party did not actually suffer harm (prosecutors did not have to prove that bribery/kickback actually caused contract to go to party it would not otherwise have, or at a higher price since deprivation of honest services not dependent on economic consequences…)
2. Self-dealing (breach of fid duty enough, even if couldn’t prove it hurt corp).

Skilling (2010): interpreting 1346

* Facts:
  + The dude was CEO of Enron, participated in grand scheme to deceive market into believing the company was healthier than it was, resulting in massive bonuses, stock option benefits, continued salary…
  + They had the fucker on real money fraud already, but decided to tack on honest services fraud for the hell of it.
* Jury instructions: conviction of honest services fraud if 1) material breach of fid duty that 2) results in detriment to employer.
* Why cases like these may be so morally challenging:
  + remember from corporations that violations of duty of candor for failure to disclose material financial interest in transaction only gets you past BJR, and D could still get off under entire fairness.
  + In contrast here, the courts don’t require prosecutors to prove beyond a reasonable doubt any fairness element since the breach of fid duty is in itself a deprivation of honest services, however fair the transaction.
* **Scope of deprivation of honest services limited to kickbacks and bribes**: Court decides that to avoid risk of constitutional void for vagueness and erring on the side of lenity, they must construe the statute to reinstate only the lowest common denominator (the “core”) of pre-Mcnally honest services case law, which is to say those actions which most clearly fell into honest services across jurisdictions: **only kickbacks and bribes**.
  + **Most notable** about this limitation in scope is that it **excludes failure to disclose self-dealing conflict of interest from deprivation of honest services**.
* Remand? Nah.
  + D had been convicted of three offenses in a single verdict, so the jury could have convicted him on any one of the three. Since honest services fraud was changed to have different elements, if the jury had convicted him of that only, then he might get off of all the offenses under the new standard (or at least that possibility demands a new trial).
  + Court decides to uphold conviction of securities fraud anyways because elements of former honest services fraud to which the jury must have stipulated had they convicted him under the old version are sufficient to form the basis of securities fraud. Conviction of those offenses upheld without new trial.

Weyrauch (9th Cir. 2008): the scope of “bribe/kickback”

* Facts:
  + D was state legislator in Alaska. Voted in favor of oil interests in return for promise of future legal work with the company.
  + He’s being charged with honest services fraud and after Skilling, we can only get him on “bribes and kickbacks.”
* Scope of bribery/kickback: state quid pro quo standard or federal general understanding standard?
  + While a quid pro quo is required for bribery under both state and federal law, the latter has more flexibility to find bribery in less explicit and more general understandings.
  + At trial, the government’s charge to the jury did not require a state law bribery quid pro quo.
  + The 5th cir. requires violation of state bribery laws, in part because this is federal regulation not just of an area traditionally governed by states (fraud), but this is the regulation of fraud *in the state government* itself (“federalism squared”). But this is the **minority view**.
  + The 9th rejects this and instead **adopts federal standard** because
    - you don’t want a federal statute to have a different effect in different states.
    - there’s some sense that you don’t want state legislators to be able to determine the legality vel non of bribery.
    - And in any event, Congress indicated no intention for such differential effect, so we don’t assume disuniformity is desired.
* The court finds two wrongs:
  1. The nondisclosure of material conflict of interest
     + Excluded post-Skilling, there wouldn’t be liability there.
  2. The exchange of voting for future legal work
  + The way 2 is phrased is that the **expected benefit is merely hoped for**, rather than arranged as a sure exchange.
    - This looks more like a “gratuity” under federal law…
    - bribery requires exchange of value “in return for,” while gratuity requires only exchange “because of,” so there’s greater flexibility for simply currying favor in the latter,
    - and Skilling leaves it unclear whether a mere gratuity can form the basis of a deprivation of honest services fraud.
  + A further difficulty is even if they embrace gratuity as a source of liability for deprivation of honest services, whether the mere hope even counts as a gratuity or if greater concreteness is still necessary..

Questions you need answered for honest services fraud:

* Is gratuity cool?
* Is a mere hope of exchange (short of an actual quid pro quo) sufficient?
* Does state law control as in above?
* One other thing I think.

Rybicki: private sector honest services fraud DON’T NEED TO KNOW but helpful for understanding skilling.

* Facts:
  + Personal Injuries attys paid off insurance agents to expedite settlements on behalf of their clients.
* Breach of fid duty? Attys induced agents’ breach of candor to their employer
  + Non-disclosure not fraud unless there’s a duty to disclose and the attys had no duty to insurance company.
  + However, the attys paid a gratuity to the insurance adjusters not to disclose to the insurance company, which conflicted with company policy.
  + So the attys were included in total scheme, including insurance adjusters and attys, to defraud for failure to acct for profits arising out of employment.
* Question arising in case: Does federal deprivation of honest services fraud apply to breaches of fiduciary duty in private companies? Yes according to 2d Cir.
  + Skilling would seem to help resolve this question in the affirmative because the D in Skilling was violating a private fiduciary duty although they ultimately found him innocent, the declined to do so on the grounds that he was not a public fiduciary, suggesting that private fiduciaries are subject to honest services fraud.
* **Court announces elements of deprivation of honest services fraud**:
  1. Scheme or artifice to defraud
  2. For the purpose of knowingly and intentionally depriving another of the intangible right of honest services
  3. Where misrepresentations or omissions are material in that they have the natural tendency to influence or are capable of influencing the employer to change its behavior and
  4. Use of the mails or wires in furtherance of the scheme.
* Intent requires materiality, rather than harm:
  + The fraud simply resulted in the more expeditious payment of the attys’ clients, not any additional payment, so **no harm to the employer was actually plead**.
  + Court here dismissed that concern on the grounds that self-dealing honest services fraud doesn’t require proof of harm.
    - But the court in Skilling excludes mere self-dealing as the basis of honest services fraud liability, so that justification won’t fly.
    - But on the other hand, if honest services fraud requires both pecuniary gain to defendant AND harm to victim, then it starts to look like regular money fraud again…
  + Whatever the reasoning, the court goes with materiality.
* Case also leaves open the question of whether a mere gratuity counts post-Skilling.

Post-Skilling wrap-up:

* It’s really unclear at this point what constitutes a bribe or kickback.
* Skilling would seem to suggest that the court isn’t feeling particularly expansive in this area, so a mere gratuity would likely not cut it.
* But wouldn’t a gratuity found the basis of a money fraud offense? Makes sense given agency law duty to acct for profits arising out of agency relationship. But Court might still find a way to deny this because the sentence for gratuities is about a tenth of that for mail fraud (seems to present disconnect).

1. Insider Trading

Securities Fraud Generally (for some reason labeled under insider trading):

10B-5 Elements:

1. Misstatement or omission (statement that is misleading in light of omitted fact).
2. Materiality TSC v. Northway “alter the total mix of information” a “reasonable investor” would consider important in transaction decisions.

* **Sliding scale for materiality of uncertain events**: (Probability)x(Magnitude)

1. **Probability** that event transpires (informs sliding scale of materiality) **and**
2. **Magnitude** of potential event (greater magnitude, more likely material)
3. Scienter: Knowing/intentional misstatements, rather than negligent, though recklessness (“**willful ignorance**” to misleading nature of statement) can rise to level of knowledge.
   * Notice: knowledge that you will mislead **does not require intent to mislead**, just that you know your statements will have that effect (Earnst & Earnst). Whereas recklessness is more like you make a statement that you suspect is untrue and would in that case be misleading, but you don’t bother to look it up**.**
   * **Also implies knowledge of materiality** of statement.

4) In connection with the purchase/sale of any security.

Side note case:

Virginia Bankshares: CS cashes out minority SH in self-dealing merger, which SH vote to approve on board’s subjective recommendation of “high value” in the proxy, though SH vote was not required for merger to proceed.

**Materiality:**

**Can opinions be materially misleading statements of fact?** Yes, **implicit in an opinion** are two facts, a **good faith belief** in the veracity of the opinion and that the **reasons stated** for holding that opinion are your **true motivations**. However the court recognizes the evidentiary challenges of an exclusively subjective test so they require **two elements for an opinion to constitute 14a-9 materiality**:

1. **Subjective falsity**: board did not have good faith belief in their opinion, or their stated reasons were not their true motivations **and**
2. **Objective falsity**: objective evidence of the opinion’s falsity.

14a-9: same thing but covers proxy fraud.

Insider Trading:

Why should insider trading be illegal?

* Investor and market place impact:
  + No transaction causation: In large, liquid markets, no given inside trader “causes” the transaction that harms the other party in the sense that the harm would not have occurred in the absence of the insider’s decision to sell because the anonymity of trading means they would have bought it from someone else at the same or a similar price even if the insider has not sold.
  + Insider trading improves efficiency: to the extent we buy into the Basic Court’s premise that companies have some “true” value underlying their stock price, trading on the basis of inside information moves the stock closer to the true value than the valuation resulting exclusively from the less informed public’s approximation.
* Impact on the company and its operations:
  + Some argue that insider trading acts as an important form of management compensation in that it aligns the interests of the mgmt. with those of the company, all at no cost to the company itself!
  + But this would seem inefficient due to the inherent unpredictability of stock prices, even for insiders.
  + And to the extent it is a good plan, stock options work just as well (and they don’t pay out a downside like a short might, so there’s no perverse incentive to introduce indiscriminate volitility).
  + You don’t want mgmt. distracting from their work duties to determine how office goings on will affect the stock price and thus, their personal investments, especially as managers race to exploit inside information.
* Effects on disclosure:
  + The desire to capitalize on inside information before the market moves may incentivize insiders to maintain secrecy over material information.
    - This may even extend to secrecy within the company.
  + Critics counter that any time lag will be minimal because
    - Insiders want to move quickly on exploitation
    - Other forces such as 10b-5/derivative actions compel disclosure
    - Marketplace favors companies who display practice of candor with market.
  + Fairness:
    - It offends our sense of the fiduciary duty to have the mgmt. profit at the shareholder’s expense (if not directly, then in foregone profits the SH could have reaped on the basis of information arising out of agency relationship).
    - Market integrity:
      * Cheater, cheater, pumpkin eater: Intuitively, we don’t like when people don’t play by the rules.
      * But this has broader ramifications for the capital formation in that insofar as securities trading is a zero sum game, widespread and sanctioned cheating discourages outside investment.
        + Look at India’s capital markets LOL!
    - Politically, this may just reduce to the desire of those second in line to trade on non or quasi-public information, ie the investment analysts, to avoid sharing their profits with insiders.

10b5-1:

1. Trading
   * Note: deciding to abstain from trading, even if deviation from a written plan, is perfectly fine since it’s not a “purchase or sale” on mat non-pub info.
   * However, there might be 1348 liability if “in connection with any security”
2. On the basis of

* **Knowing possession = rebuttal presumption of use**: If you trade while “aware” of material nonpublic information (in breach of duty w/scienter of course) there’s rebuttal presumption that you traded *on* such info.
* Available affirmative defenses:
  + D entered into binding contract to trade at amount/price/date he ultimately traded at (better have a record of this).
  + D had provided instructions to another to execute a trade for D’s acct at amount/price/date he ultimately traded
  + D had prior written plan, previously adhered to (legitimizing plan so you can’t just write down a bunch of ideas and go with the one which insider developments command), specifying amount/price/date.
    - Martha Stewart attempted this defense, but she was probably doctoring documents.

1. Material, non-public information
2. **In breach of a duty of trust or confidence** that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.
3. Willful violation required for criminal conviction (78dd-1)

14e-3: Tender Offer Misappropriation:

* Criminal when

1. Substantial steps have been taken to commence a tender offer
2. in possession of material non-public information relating to tender offer
3. which he knows or has reason to know
4. comes from any offering person or target, and all those working on their behalf (including attys, accts, etc.);
5. To purchase or sell or cause to be purchased or sold any security

* Note: doesn’t require fid duty because scope of congressional auth not limited to fraud.

Chiarella (1980):

* Market v. corporate information:
  + This is market information (information specific to market valuation of company), rather than corporate information (information specific to the actual operations of company).
  + Court makes no such distinction.
* Identities are blacked out on documents, but he figures it out, perhaps suggestive of scienter?
* Breach of fid duty? Required and not found
  + Purchases stock in target, rather than client of his employer (acquirer).
  + Chiarella argues that he **had no duty to the target company’s shareholders**, and the 10B-5 duty to disclose or abstain arises only from fiduciary relationship.
  + SEC argues that its interpretation of 10B-5 requires anyone in possession of material non-public information to disclose or abstain.
  + Court determines this interpretation of 10B-5 exceeds the scope of its statutory authority granted by section 10, which is fraud statute, which imports common law fraud requirement of fid duty for duty to disclose/abstain.
  + **Policy of incentivizing information development**: Moreover, policy demands that we avoid a prohibition this broad because the efficiency of markets depends on the willingness of people to ferret out and make public information about a company, which requires an incentive to engage in such diligence, which is the opportunity to trade on that information in front of the market.
  + Where is fid duty in sales of stock? Curios
    - In spite of the above limitation, courts have found no problem finding liability for insiders who sell stock, despite the fact that they owe no duty to those buyers until the transaction is complete and they become shareholders. They have apparently articulated no basis for doing so.
* Foreshadowing misappropriation theory:
  + Court notes that D had an agency relationship with employer, and that employer’s agency relationship/fid duty with its client (the acquirer) imputed to Chiarella, leaving the door open to misappropriation theory (duty to account for profits arising out of agency relationship/analogous to Carpenter), as we shall see.
  + This is what you would claim today, and Chiarella would totally go to jail. Prosecutors attempted to raise this at the appellate level, but court says they didn’t present it to the jury, so he gets off anyways.

Tipper/Tipee Liability:

Dirks (1983):

* Facts:
  + Secrist is trying reveal fraud of his employer, tells Dirks, Dirks advises his clients to sell.
  + Dirks attempted to tell the WSJ, which looks a lot like disclosure and would seem to be a pattern of behavior the SEC would want to incentivize, which makes his prosecution appear a somewhat dubious (read: incompetent) choice on the part of the SEC.
* **Chain of fid duty to disclose/abstain**:
  + If fiduciary (tipper) discloses material non-public information to outside party (tipee)
  + in violation of fid duty: here defined as **disclosure with intent for personal pecuniary gain**, either direct or as the indirect result of reputational gain; **“personal benefit test”** AND
  + tippee knows or has reason to know disclosure is in breach of tipper’s fid duty, then duty to abstain or disclose attaches to tippee
* **FN 14 Constructive Insider**:
  + When insider with fid duty discloses inside info for legitimate business reason to third party under a “**relationship of trust and confidence**,” established either through explicit request to keep confidential or implicit in the nature of relationship, then the outside party becomes “**constructive insider**” (**Dirks FN 14**) with fid duties of their own.
  + If constructive insider then discloses that information and the recipient trades, constructive insider breached fid duty for misappropriation of confidential information, resulting in tipper liability for him, and to the extent the recipient knew of such a breach in the source of the information, the tipee is liable as well.
  + **Disclosure in breach of duty alone establishes tipper liability**:
    - This would be true even if the constructive insider, or any tipper for that matter, did not know the tippee would trade on the basis of that info. It is enough that the fiduciary should have presumed the disclosure of material non-public information would lead to misuse.
  + Tippee only liable if knew disclosure was in breach:
    - Helps analysts to be certain they don’t inadvertently insider trade.
  + **Gifts still constitute personal benefit**: Gifts of tips to relatives, although not intended for personal benefit at first blush, are treated as the tipper making the trade and then gifting the profits, so you’re still liable.

O’Hagan (1997):

* Facts:
  + Partner at law firm which was hired to work for acquiring firm.
  + After firm had withdrawn from representation, partner traded target firm’s stock on info gained from firm’s work with acquirer (was desperate to do so because he was covering up embezzlement, which shouldn’t affect our view of his guilt, but it is an interesting fact)
* **Misappropriation theory**:
  + Court cites Carpenter (WSJ reporter case) to establish proposition that confidential information constitutes property for fraud purposes, and the misappropriation of that information constitutes a breach of fid duty merely in the deprivation of its confidentiality, **independent of any monetary harm to employer**.
    - Notice: as in mail/wire fraud, no need to prove monetary harm, but merely deprivation of intangible property.
  + **Relationship of “trust and confidence” such as employer + acquisition of information in context that connotes confidentiality = liability.**
* **10B-5(2) scope of “trust and confidence” relationship**: A person receiving confidential information **owes a duty of trust & confidence** to the person from whom he got the information if he trades in the following circumstances:
  + - When the person receiving the information agreed to keep it confidential
    - When the people involved in the communication had a **history or pattern of sharing confidences that resulted in a reasonable expectation of confidentiality**
    - When the person who provided the information was a spouse, parent, child or sibling of the other, unless it is affirmatively shown, based on the facts of that family relationship, that there was no reasonable expectation of confidentiality

Reg FD: **No selective disclosure**

* Whenever an issuer is disclosing material non-public information, it must do so through public disclosure.
  + Can’t hold a private press conference with only select analysts invited unless ou simultaneously announce it to the world.
* While this may remove some of the conflicts of interest, it does frustrate the ability of analysts to work independently to develop corporate knowledge worthy of trading on, which arguably upsets the balance the Supreme Court had hoped to strike with the Chiarella decision.
* **Exempts disclosure made under duty of trust and confidence**.

Willfulness - 78dd-1:

* For criminal prosecution, fraud must be willful, but what is the scope of willful?.
* “**No knowledge proviso**:” Conviction, but no imprisonment, for violation without knowledge of substance of the regulation/provision violated.
  + D’s need not know the name and date of promulgation of the law, but only a general understanding of the substance of regulation. Lilley
  + Under the facts of Lilley, a general knowledge that securities fraud is illegal (even though they may have had a good faith belief their behavior did not constitute securities fraud) was enough without being able to name 10b-5.
  + Burden of proof on D: Court also held that this provides D opportunity to rebut presumption of knowledge of securities laws, but does not eliminate that presumption (shifting burden).
* False statement: “Willful and knowing” false statement also criminal: but DOJ never prosecutes publicly held firms criminally, so this particular one is **not really relevant to us**.
  + Though this plays role in statutory construction in Tarallo.

Tarallo (9th Cir. 2004):

* **Jury instructions flawed**: in that they required finding of “knowing” mens rea, when they only needed “willful” mens rea.
  + Didn’t need knowledge that behavior was unlawful, only that it was wrongful.
* **Error harmless**: However, the instructions went on to equate “knowing” and “willful,” so the mistake was rendered harmless because the jury was evaluating offense by the correct standard ultimately.
* **Willfulness = knowledge acts are wrongful**: Willfulness *in this context* (cites Ratzlaf for contextual meaning of “willful”), requires only that the defendant intended the actions and knew that they were wrongful, not that they were unlawful. Justified by:
  + Precedent
  + Comparison to “willful and knowing” requirement for false statement conviction (different section of 78dd)
    - “knowing” would be surplusage is implicit in willful.
  + affirmative defense (to imprisonment sentencing, rather than conviction, but still informs statutory construction) for unknowing violations of a rule/reg would be rendered meaningless if lack of knowledge would serve to prevent conviction in the first place.

1348 SoX Securities Fraud Offense:

* Knowingly instead of willfully
* Defraud any person in connection with “security of an issuer”
  + Not in connection with purchase/sale, so broader
* Not explicit duty requirement but “defraud” implies silence not wrong w/o duty
* No mail/wire jurisdictional hook required, instead jurisdiction conferred via national security listing affecting interstate commerce.

1. False Statements, False Claims
2. False Statements

18 USC 1001 Elements:

1. Defendant either
   1. made or used a false statement, representation or writing; or falsified, or
      1. **Argue ambiguity! G**ov’t must prove “**objective falsity,**” meaning there must be **no reasonable interpretation of the statement that would render it true**, even if the statement is misleading because much *more* reasonable interpretation of statement was false.
   2. affirmatively concealed or covered up by trick, scheme, or device, a fact that the defendant had a legal duty to disclose
      1. **Need legal duty to disclose** such as tax forms, SEC filings, customs declarations forms, fiduciary duties AND
      2. **Affirmative act of concealment**
      3. **No objective falsity needed**, but merely an attempt to preserve the misleading nature of statements. More flexible.
2. Materiality of false statement or information concealed
   1. Statement has “natural tendency to influence, or be capable of influencing, the decision of the decision-making body to which it is addressed.”
   2. Gov’t need *not* prove:
      1. False statement was at all credible or in fact believed
      2. False statement was actually relied upon or influenced decision-making
      3. Any intended or actual financial or property loss to federal gov’t
         1. **No pecuniary harm necessary**
      4. That the statements were required to be made
         1. **Applies to voluntary statements** as well.
      5. That the statement was read or even received by gov’t
3. Within qualified jurisdiction of executive, judicial or legislative branches of gov’t.
   1. Juris of whatever governmental agency you lie to limited to their “core functions,” but see malleability of state unemp. Insur.
      1. Rodgers: need not be seeking official gov’t decision
         * D told FBI his wife had been kidnapped to get their assistance in tracking her down after she left him.
         * Although the FBI would have had no authority to charge a kidnapping offense, the judge found that people tracking was within the FBI’s “core functions,” so the statutory jurisdiction was sufficient.
         * Case meant to show us that you can still get jurisdiction even when defendant not seeking official decision-making, but merely influencing an investigation.
      2. Circuit split on jurisdiction over state unemployment insurance:

* 11th in Herring: state activities which federal government funds or in some way facilitates are within jurisdiction
* 9th Cir: statement must affect an authorized function of federal agency
* 5th Cir.: statements not directly submitted to the government, *but that are subject to gov’t review or audit*, are still within federal jurisdiction
  1. Judicial proceeding exception:
     1. Carved out in order to avoid conflict with perjury.
     2. **Only applies to parties and their counsel, so witnesses are not exempted** from liability for false testimony in proceeding before court.
     3. Only applies to statements made “**before a court**,” so statements made to probation officer not excluded under this exemption.
  2. Legislative branch exception: Limited scope for statements relating to legislative branch to enumerated categories
     1. Designed to **include statements made before congress** such as
        + Mislead Congressional investigation (Clinton)
        + Ethics financial disclosure forms…
     2. Excludes voluntary submissions to Congress such as **letters to congress** (not administrative action).
     3. “**speech and debate clause**” excludes senators debating on the floor from liability

1. In doing so, acted “knowingly and willfully”
   1. For false statement:
      1. Knowingly: D must have **actual knowledge of falsity of statement**
         1. Creates evidentiary challenges given proof beyond reasonable doubt standard.
         2. **Reckless indifference/willful blindness** to falsity of fact elevates mens rea to knowledge.
         3. Knowledge of federal agency jurisdiction not necessary:
            1. Actual knowledge rejected by SCOTUS (Yermian)
            2. Circuits have generally applied strict liability standard with regard to awareness of federal jurisdiction.
            3. Treated like a jurisdictional hook, similar to how you don’t need to know the interstate nature of wiring in wire fraud.
      2. Willfulness:
         1. Specific intent to deceive? Circuit split.
         2. **Not willfulness plus**: ie D doesn’t need knowledge of this offense.
   2. For Concealment (from slide):
      1. D’s knowledge of duty to disclose
      2. Intentional failure to comply
      3. Intent to deceive (inferred from circumstantial evidence)

Herring (11th cir. 1990): Circuit split on whether 1001 reaches state Unemp. Ins. Forms.

* Facts:
  + Guy who was employed made false statement in submitting request for unemployment insurance benefits with *Georgia* department of labor, convicted of false statement offense.
  + State unemployment benefits paid out of state coffers, but administrative tasks of state dep of labor funded and regulated by federal govt.
* D contests on agency jurisdiction and materiality.
* Agency jurisdiction:
  + Money that goes to the claimant is state money, so you’re defrauding the state government rather than the federal gov’t, and thus there is no federal jurisdiction.
  + Court rejects this on the grounds that those **state activities which federal government funds or in some way facilitates are within jurisdiction** of 1001.
* Materiality:
  + **D argues that materiality must be assessed from the federal government perspective**; it must be material to the federal government, rather than the state government.
  + Here, the crux of the materiality, the mistaken distribution of funds, was relevant to the state coffers, with the **federal government funding only the administrative actions** of the state department of labor.
  + **Court rejects** this argument on the grounds that the frustration of a state governmental process is nonetheless a frustration of government process, and **jurisdictional prong is a separate element from materiality**.
  + In addition, the administrative costs associated with the processing of the fraudulent unemployment benefits were incurred by the feds, ad because the feds oversee the solvency of the state departments of labor, fraudulent claims frustrate that goal of the feds as well.
* **Circuit Split**:
  + **9th Cir has rejected** agency jurisdiction over state unemployment insurance forms on the grounds that the statement must affect an authorized function of federal agency, and here the Feds had no authority to directly respond to statement.
  + **Even Broader View than 11th Cir**: Subject to government review/audit: some of the jurisdictions with broader interpretations of the agency jurisdiction element have determined that even those documents which are **not directly submitted to the government, *but that are subject to gov’t review or audit***, are still within federal jurisdiction for 1001 purposes.

Exculpatory “No” Defense: Rejected!

Brogan (1998):

* Facts:
  + D had accepted illegal payments, FBI busts in his house and asks him if true, he says no, FBI reveals their evidence of truth (in no way are they mislead by this statement).
  + The statement “could be capable” of misleading in this context, and indeed the defendant hoped it would, so that’s enough for materiality even if it didn’t actually mislead the FBI.
* **The “exculpatory no” defense**:
  + Prior to the most recent amendment to 1001, some courts had found that the mere denial of culpability, without elaboration, in the context of an investigation does not constitute a “statement” in the sense Congress intended because it implicates a question of 5th amendment right against self-incrimination.
  + Court rejects this on the grounds that it contradicts the plain meaning of the statute and Congress had, after the development of the exculpatory no doctrine, amended the statute to provide an exception for certain proceedings, implying that they intended no such exception for the exculpatory no or they would have included it in the amendments.
* 5th amendment problem:
  + Majority brushes it off because the 5th amendment only protects your right to remain silent, not your right to lie, even if silence might be used to impeach you at trial.

Differences with Other statutes:

* False statement vs Fraud
  + Not need to prove intent to deprive gov’t of money or property
  + Objective falsity more stringent test than materially misleading
* False Statement vs 1621 Perjury
  + FS Not need to be under oath (unlike 1621)
  + Two witness rule of 1621 not apply
  + Perjury requires pros prove actually false
    - Whereas FS: charge D misled thru concealment of material fact
  + But FS does not apply to lie by party/lawyer in court (judicial proceeding exception)
* FS vs Obstruction
  + FS: need not show knowledge of pending proceeding
  + No need for “corrupt” motive
  + Not need to show nexus btw FS and due admin justice

1. False Claims

Two statutes:

1. False Claims Statute (Criminal)

2. False Claims Act (Civil Counterpart)

False Claims Statute:

1. D presented a claim against any agency or department of the US

* Claim presented to federal agency
* Or filing to avoid payment to agency "all fraudulent attempts to cause the Government to pay out sums of money." US v. Neifert-White, 390 U.S. 228 (1968).
* Includes settlement proposal seeking to recover $ from govt
* Includes false factual data to support a claim
* D **must physically present claim to gov’t** (directly/indirectly) but it need not be honored
* No need to show gov’t actually lose money or property
* Claim can be presented by a third party
* **Scope of "government:"** Can reach gov’t thru a state or local gov’t, gov’t contractor, insurance company, or an individual seeking federal reimbursement funding

1. Claim was false, fictitious or fraudulent
2. D knew claim was false fictitious or fraudulent
   1. Conscious avoidance allows inference of actual knowledge.
   2. Intent to defraud? Most courts require only knowledge
      1. and even where intent is required, it follows pretty naturally from knowingly lying to the government.
   3. Materiality? Not required.

False Claims Act (Civil):

* Congress drastically expanded scope of offense to encompass any person who:

1. knowingly **presents**, or causes to be presented, a false or fraudulent claim for payment or approval;
2. **causes false claim**: knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
3. **conspires** to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
4. **skimming gov't funds**: has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;
5. **delivery of fraudulent receipt**: is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, **intending to defraud the Government**, makes or delivers the receipt without completely knowing that the information on the receipt is true;
6. **Purchase of public property**: knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or
7. **False record/statement material to payment to or by govt (includes avoidance of payment obligation)**: knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

* is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104–410[1]), **plus 3 times the amount of damages which the Government sustains because of the act of that person.**
  + **Notice: treble damages!**
  + **But see damages reduction policies below.**

(2) **Damages reduced** to 2 times harm if

1. Person violating FCA **reported** and provided all known information **w/in 30 days of learning of violation**
2. Such person **fully cooperated** with any Government investigation of such violation; **and**
3. S**elf reporting before commencement** criminal prosecution, civil action, or administrative action AND person **did not have actual knowledge of the existence of an investigation** into such violation,

(3) **Costs of civil actions**.— A person violating this subsection shall also be liable to the United States Government for the **costs of a civil action** brought to recover any such penalty or damages.

* Attys Fees!

**Mens rea**:

* "**Knowingly**" means that a person, with respect to information— (i) has actual knowledge of the information;
  + **Conscious avoidance**: acts in deliberate ignorance of the truth or falsity of the information; or
  + acts in reckless disregard of the truth or falsity of the information; and
* Require **no proof of specific intent to defraud**;
  + **Explicitly disclaims specific intent.**

Patient protection and Affordable Care Act (2010):

* Claims submitted in violation of the AKS **automatically constitute false claims for purposes of the FCA**.
* The **Federal Anti-Kickback Statute**, 42 U.S.C. 1320a-7b(b) (“AKS”) is a criminal statute which makes it improper for anyone to solicit, receive, offer or pay remuneration (monetary or otherwise) in exchange for referring patients to receive certain services that are paid for by the government.
* **AKS Mens Rea**: “a person need not have actual knowledge … or specific intent to commit a violation” of the AKS.
  + Accordingly, providers will not be able to successfully argue that they did not know they were violating the FCA because they were not aware the AKS existed; Double inadvertent liability!

1. Qui Tam & Health Care Fraud

Qui Tam 31 US 3729: Allows private person (relator) to bring case on behalf of the US where private person has information that D has knowingly submitted or caused submission of false/fraudulent claim to US gov’t.

* Relator suing on behalf of US.
* Need not be harmed personally
* Can get a bounty of 15-30% (of any treble recovery)
* DOJ Not intervene: Relator gets 25%-30% + Att Fees
* DOJ Intervene: Relator gets 15-25% + fees
* Priv Person can’t sue a state govt (Vermont Agency of Natural Resources)

Process

* Filed Under seal (for at least 60 days)
  + Complaint given to US DOJ & judge; Ct can make it available to others
  + US Att can petition to keep it secret longer on showing of “good cause”
  + Relator also files “disclosure statement” with DOJ, which includes their evidence of violation
  + All evidence in possession of the relator (Not available to Defendant)
  + Atty Gen (or DOJ Atty) investigates
* **DOJ then determines course of action choosing between the following**:

1. intervene in one or more counts of the pending action.
   * This intervention expresses the Government’s intention to participate as a plaintiff in prosecuting that count of the complaint.
   * Upon intervention approval, the Department of Justice files
2. a notice of intervention, setting forth the specific claims as to which the United States is intervening; and
3. a motion to unseal the qui tam complaint filed by the relator and the notice of intervention.
   * All other documents filed by the Department of Justice up to that point remain under seal.
4. decline to intervene in one or all counts pending qui tam action.
   * If so the **relator may prosecute the action on behalf of the United States**, but the United States not a party, apart from its right to any recovery (minus bounty).
5. move to dismiss the complaint, either b/c there is no case or case conflicts w/ significant statutory or policy interests of the gov’t.

DOJ Also can:

1. **settle** the pending qui tam action with the defendant prior to the intervention decision.
2. advise the relator that the Department of Justice intends to decline intervention.

* Usually, but not always, results in dismissal of action.

Who Can File?

* Relator: information that D knowingly submitted/caused submission of false claim
* **First to file**: Bars follow on Qui tam
* **Suits based on publicly available information barred:** 
  + Because qui tam has an i**nformation-seeking purpose**, relator cannot proceed on publicly available information, since this doesn’t help to promote private investigation/disclosure.
  + Public disclosure in civil, criminal, admin, hearings or news reports
* Gov’t has final word on whether to dismiss
* **Originator of public information exception:**
  + No bar where relator original source of information
  + An original source is now someone who either
    1. has voluntarily disclosed to the government the information on which allegations or transactions in a claim are based OR
    2. has “knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions," and who voluntarily provided it to the gov't before filing an action.

Riley

* Claims not constitutional?
* Article II **Take Care Clause**: Executive must take care that the laws be faithfully executed
* Court:
  + Take care clause doesn’t mean Congress must say executive only person civil cases (cf insider trading)
  + Criminal different (so are indep. Counsel)
  + Here govt retains a lot of control
    - Can intervene and cease control
    - Can veto settlement even if not intervene
    - Can seek dismissal or settle over relator objection
      * Relator gets notice

Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765

(2000), private individual may not bring suit in federal court on behalf of the United States against a State (or state agency) under the FCA.

Allison Engine Co. v. United States ex rel. Sanders, the United States Supreme (**Overruled)**

* Court considered whether a false claim had to be presented directly to the Federal government, or if it merely needed to be paid with government money, such as a false claim by a subcontractor to a prime contractor.
* The Court found that the claim need not be presented directly to the government, but that the false statement must be made with the intention that it will be relied upon by the government in paying, or approving payment of, a claim.
* **The Fraud Enforcement and Recovery Act of 2009 reversed the Court's decision** and made the types of fraud to which the False Claims Act applies more explicit.

Govt Procurement Fraud 18 USC 1031:

* Specific Offense of Procurement fraud for government contract fraud **involving one million dollars or more**.

Why do we need qui tam litigation?

* + Shouldn’t self-reporting be enough? Not if there isn’t a realistic probability of getting caught.
  + In closely held firms, self-reporting might lead to the criminal liability of the very people who we want to self-report, so we need someone to tattle on them instead.
  + Also gives employees who may fear retribution (the secretaries of the world) an incentive to come forward
    1. Plus, protected against retaliation by whistleblower protection.

Concerns:

* + Frivolous claims filed for their nuisance value.
  + **Perverse incentive to delay**: Calculating damages on the basis of harm to a party other than that who can recover incentivizes waiting to file while more fraud is being committed in order to collect on that fraud as well
    1. Mitigated by first to file policy.
  + **Discourage internal self-reporting**: enticement of qui tam payout may discourage internal self-reporting in order to go for qui tam, **undermining the compliance schemes** the government has tried so hard to set the incentives for.
  + And companies might be hesitant to self-report if it might buttress the argument of plaintiffs who have already filed their qui tam actions (since info would not have been public at time of filing, so they wouldn’t be barred from bringing suit), so you might be subjecting yourself to treble damages via qui tam, as opposed to allowing the government to uncover you and paying only full compensation.

Practical Concerns for Defense Counsel:

* Challenges of parallel civil and criminal proceedings
  + Even if civil qui tam proceeding, evidence can be used in criminal proceeding, so you must treat it as such.
    - **Assert 5th amendment where necessary**
* Remove relator from stream of information
  + But risk running afoul of anti-retaliation whistle-blower protections
* Persuade DOJ not to intervene (drastically reduced likelihood of recovery)
  + though you may risk committing to certain facts/foreclosing certain defenses
* Seek to conform to damages reduction terms.

1. Foreign Corrupt Practices Act & UK Bribery Act
2. Overview

Two sources of liability:

1. Anti-bribery
2. Accounting provisions: Books and Records, Internal Controls.

Accounting/Record-keeping Provisions: all US Issuers

* **All US issuers** must devise internal accounting controls to provide “**reasonable assurances**” that all transactions are recorded in “**reasonable detail”** and in accordance with GAAP.
* Generally, an SEC civil enforcement tool, which can be useful to defense counsel to resolve potential FCPA violations in civil settlements with the SEC, BUT
* Criminal violations: must be “willful”
  + “willful” violations (including circumvention) can be prosecuted criminally, with even larger fines available than with bald FCPA violations.
  + Note: criminal fines imposed on individuals may not be paid by employer/principal.
  + **Subsidiaries:** In addition, the books and records duties **extend to subsidiaries** in which you have a **> 50% share**.

Anti-bribery---------------------------------------------------------------------

Elements:

* Actus reas: give thing of value
  + Plus jurisdictional hook if necessary.
  + No de minimis exception
* To foreign official
  + Including agents who will pass to foreign official
  + **Lindsey Factors for determining if FO**: it should be clear that the company pursues governmental objectives:
    - Does it provide service to citizens?
    - **Gov’t Appointment**: Are the key officers/directors appointed by the gov’t
    - **Government Financing**: Is the entity financed, at least in large measure, through government or other government-mandated taxes, licensing fees, etc.
    - **Monopoly power**: Is the entity vested with exclusive or controlling power to administer its designated functions?
    - Entity is **widely perceived** to be performing official government functions (gets to integrity interest).
* Purpose: both

1. To influence official decision (or induce inaction) AND
   * + “Degree of specificity” to exchange (arlen):
       - Quid pro quo bribe? Yes
       - Gratuity-type payment for agreed-upon *type* of conduct? Maybe
       - Relationship-building/vague hope for future conduct? No
2. For the purpose of “assisting” in “obtaining or retaining business” (business nexus)

* Includes not only gov’t contracts, but merely additional sales as well.
* “assist” is very expansive, even extending to lowering costs, which is presumed to lower price, which is presumed to increase sales (Kay)
* Mens rea: “corruptly”
  + Intent to influence foreign official
    - Kay court defines as anything that touches “decision-making process,” meaning anything that compels the FO to deviate from normal duties.
      * Even if you really deserved the gov’t contract and you’re just paying the FO to do their job, that’s not sufficiently routine to qualify as grease payment, instead touching the decision-making process.
    - Relationship building: mere intent to build relationship, absent quid pro quo or gratuity, probably negates “corrupt” mens rea.
  + No specific intent: Need not know you violate law.

Jurisdiction:

- Issuers (78dd-1):

* Issuer + mails/wires in furtherance = jurisdiction
* Alternative jurisdiction: Issuer + organized under US law = jurisdiction

- Domestic Concerns (78dd-2):

* Citizen/national/resident of US + mails/wires = jurisdiction
* Principal Place of Business US + mails/wires = jurisdiction
* Alternative jurisdiction:
  + Citizen/national/resident of US + foreign commerce = jurisdiction
  + PPB in US + Foreign Commerce = jurisdiction
  + Foreign commerce: act outside of US in furtherance of scheme, which will always be met in F*oreign*CPA context.
    - Does this imply that foreign commerce would NOT suffice for issuers?
    - 78dd-1 applies to domestic concerns “other than issuers,” so in theory a US issuer that might otherwise be liable as a domestic concern by virtue of foreign commerce might get off.

- Other qualifying Persons:

* While in US + corrupt use of mail/wires OR any other act in furtherance = jurisdiction.
  + The DOJ has interpreted the “any other act” to extend to the mere “causing” of an act in the US by a foreign company, from oversees.
  + Presumably, this incorporates the more flexible **reasonably foreseeable result of action** sense of causation from the mail fraud context since intent is not required for jurisdictional elements of crimes.
    - **Panalpina DPA** **theory of jurisdiction**: Caused a US dollar payment to be wired from acct in Amsterdam to acct in Switzerland via correspondent banks in NY
  + But a court may reject this interpretation because the statute asks that the actus reas be committed “while in the US,” so presumably that would extend to the act of inducing acts in furtherance as well.

- Agents: For all these bases of jurisdiction.

* Use of the term “agent” rather than “employee” is meant to extend beyond the scope of vicarious liability to reach **independent contractors**.



Policy:

* This shit is broad as fuck. 90% of 2011’ FCPA enforcement action against firms was against foreign firms. 100% of action against individuals was against foreigners. Why this focus on international enforcement?
  + This focus is in our economic interest because if American firms have to compete with the bribery of foreign firms, then it raises costs for us.
  + In addition, we’re making a killing in these settlements, serving as an alternative tax on foreign firms.
  + And we don’t trust other countries to enforce.
  + Plus our enforcement has encouraged other countries to enforce.
  + Perhaps it’s some disincentive to list on us exchange, but we can probably get jurisdiction anyways, and to the extent there is disincentive, we’ve decided it’s cost-justified.

1. Knowledge/Conscious Awareness

Mens rea (“corruptly”):

* 8th Cir. only explicit interpretation of “corruptly” in FCPA context: “voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end/result by some unlawful method or means.”
  + Seems circular
* **Arlen-preferred**: Kay court suggested that corrupt intent element was meant to exempt grease payments for the execution of normal ministerial duties, requiring instead an **intent to cause the official to deviate from his normal duties** (arlen likes this one).
  + But doesn’t this conception of the corruptly element render the grease payments exemption (later added by amendment) surplusage, suggesting this interpretation is incorrect?
* **Specific intent not required**: In the FCPA sentencing guidelines, “willful” violations of the FCPA are distinguished, suggesting that the mens rea of corruptly falls short of the most limited definition of willful (perhaps merely a general knowledge that conduct is unlawful, rather than knowledge of the specific law).

Use of third parties/**willful blindness**:

* Intermediaries: Can be liable for actions of agents or intermediaries if “**know**” that thing of value you give intermediary/agent will be given, in whole or in part, yada yada to a foreign official.
  + Give money to “any other person while **knowing** that all or a portion of such money will be *offered*, directly or indirectly, to” foreign official.
  + Book says this means acts of agent alone can give rise to principal liability if principal has requisite mens rea.
* **Statutory definition of “knowing**:”
  + Actual awareness of current fact or substantial certainty of future fact
  + Subjective belief in current fact or substantial certainty of future fact
  + **Willful blindness**: When actual knowledge is required, such knowledge is established if a person is aware of a “**high probability**” that the circumstance exists, **unless** they have a **subjective belief to the contrary**.
    - If you know there’s normally a 90% chance, but this time you genuinely believe you’re in the 10%, then you’re off the hook.

Bourke (2d Cir. 2011):

* Pirate of Prague case..
* **Conscious avoidance**:
  + Court rules that circumstantial evidence can be used to establish conscious avoidance.
  + Bourke took aggressive steps to shield himself from FCPA liability, knew of partner’s seedy reputation, knew of pervasiveness of bribery, all of which comes together to establish sufficient evidence for a reasonable jury to conclude that there was conscious avoidance.

1. Foreign Official

Qualifying recipients of a bribe:

* Foreign official, foreign political party or official thereof, foreign political candidate, OR “any other person while **knowing** that all or a portion of such money will be *offered*, directly or indirectly, to” any of the above.
* **State-owned enterprises**: “Foreign officials” includes employees of state-owned enterprises.
* **NGO**s: Also includes those acting on behalf of public international organizations (ie IMF).

Definition of foreign official:

* Note: our cases here are all lower court cases, so this is really just our best guess of how this will shake out.
* As we learned in talk, many countries consider all doctors “foreign officials,” and the DOJ has recently conducted “industry sweeps,” asking pharmaceutical companies to provide information on every doctor they work with in foreign nations.

Lindsey:

* Can a government-owned corporation ever be a foreign official?
* Yes, under “instrumentality,” FCPA extends to state-owned corporations under certain circumstances.
* Basically, it should be clear that the company pursues governmental objectives:
  + Does it provide service to citizens?
  + Are the key officers/directors appointed by the gov’t
  + Is the entity financed, at least in large measure, through government or other government-mandated taxes, licensing fees, etc.
  + Is the entity vested with exlucsive or controlling power to administer its designated functions?
  + Entity is widely perceived to be performing official government functions.

Carson:

* Same basic question as Lindsey: what is a foreign official?
* Importantly, court notes that the requirement of a “corrupt” mens rea will negate many of the scenarios of inadvertent FCPA violation defendants envision under expansive definition of foreign official.
  + The DOJ is currently debating the appropriate mens rea with respect to the foreign official status of the recipient in FCPA cases.

Policy: why extend to state-owned enterprise?

* No market discipline:
  + Private companies have internal incentives to limit bribery because it affects their profits, which is the purpose of the enterprise.
  + In contrast, government agencies are not subject to market discipline, so the risk of bribery is higher.
  + So to the extent a government organization resembles a government agency in that it lacks market discipline to prevent bribery, the FCPA should apply with equal force.
* Monopoly power:
  + This is especially true where, as the Lindsey factors suggest is important, there is **monopoly power**, since **no competitor would move in** to discipline company if bribery results in lower efficiency/quality.
  + **Integrity interest**: And the inescapability of bad healthcare or water or transportation leads to greater ire towards the bribers on the part of the citizenry, the avoidance of which was one of the goals of the FCPA in restoring the “integrity” of American firms abroad.

Passive bribery? Nope

* Traditionally, the FCPA has only applied to the active supply-side bribers, rather than the demand side, passive bribes, in part due to jurisdictional concerns about getting to foreign officials.
* But the extension of jurisdiction to “qualifying person” perhaps signals a Congressional intention to ignore those previous concerns.
* But I think that prosecuting the officials of foreign governments for their own internal corruption is a greater intrusion into their sovereignty than Congress would prescribe absent an explicit statement to this effect (and not to mention a break from judicial interpretation up to the date of amendment, which would also imply Congress’ acquiescence absent language to the contrary) whatever the deterrent value of attacking the problem from the demand side as well as the supply side.
* Conspiracy? Nope: can’t get to em on conspiracy either because they are not in the class of defendants Congress intended to reach, and you can’t circumvent Congressional intent via conspiracy.

1. Defenses

Affirmative defenses:

* **Grease payment** defense for facilitating “routine governmental actions.”
  + Does not apply to any touching “decision-making process,” but merely ministerial duties to which defendant was already entitled (Kay).
* **Payment was lawful** under written laws and regulations of the country at issue
  + Presumption of illegality: Does not apply to actions merely not explicitly illegalized, but only affirmatively permitted acts (Kay).
  + Never been asserted successfully.
* Payment was a reasonable and bona fide expenditure (such as travel or lodging) incurred by or on behalf of foreign official in connection with either

1. Promotion, explanation or demonstration of defendant’s products, or
2. The execution/performance of a contract with a foreign government.
   * **Factors likely to matter in distinguishing:**
     + Size of payments: gifts are small)
     + Context: payment when meeting official for first time would suggest an arms length nature to gift, resembling a bribe rather than a friendly relationship
     + Timing of payment in relation to action
     + Does official ask for payment and conceal it?
     + Does company feel safe reporting on taxes as business expense? Other evidence of concealment on defendant’s part?

Kay:

* Facts:
  + Classic pattern: American parent co with wholly owned Haitian subsidiary which deals with parties in Haiti on behalf of parent.
    - Why have sub? Could be local preferences, laws, tax benefits, though it could also be an attempt to limit liability either for creditors, FCPA, tort..
  + ARI faced import taxes based on amount of rice imported. Bribed foreign officials to submit fraudulent tax forms understating import amounts.
* Grease payment affirmative defense?
  + District court dismissed on the grounds that it fell under the “routine government action” exception.
  + **Can’t influence “decision-making process**:” Court reverses this part because this **narrow** exception applies to **the mere facilitation of otherwise legitimate business action**, excluding anything involved in the “decision-making process,” including decisions about how much taxes to levy.
  + Note **no de minimis exception**: small amount of money involved, but there is no de minimis exception to the FCPA.
* Lawful in foreign country defense?
  + This practice is **clearly customary** in Haiti and there is no evidence of enforcement against this practice, and it may not even be illegal under the laws as written.
  + **Limited to written permissions**: But court rejects because the defense is **limited to actions that are affirmatively lawful under the written law of the country** (not just the absence of a law prohibiting the action).
* **Business Nexus**: “**business nexus element**” not fulfilled because no “business purpose” in that the bribe was not intended to “obtain/retain business,” but only to avoid taxes on business already being transacted.
  + **“Obtain business” Includes additional sales**: Court rules this is not limited to bribes which allow one to get a government contract, but any form of business, including additional sales.
  + **“Assist” includes lowering costs**: And the court reasons that the narrowness of the routine governmental action exception informs the broadness of the “**assist**” in obtaining/retaining business
  + Here, the “assist” is in lowering costs, which allow them to lower prices of their goods and as a result, obtain more customers, ie obtain business.
* Policy:
  + Congressional Intent: Is this the type of practice we want to prevent? The original purpose of the act was to improve the integrity of American businesses abroad, and bribery for the purpose of tax fraud may threaten this integrity.
  + Cynical pro-American interest:
    - But moral/political concerns aside, these bribes are not of the type that might pit US firms against one another, transferring payment to foreigners (ie competing bribes for foreign gov’t contracts increases cost to all firms involved of doing business in foreign country).
    - Here, the bribery simply deprives Haiti of revenue, and in fact **reduces the cost of doing business abroad** (they will only pay bribes up to the point of decreased tax liability).
  + Legislative history: Also, “interfering with collecting taxes” was in the bill, but was knocked out by the senate. Surely there are multiple interpretations, but perhaps the most intuitive is that they did not want the scope of obtain/retain business to extend to tax avoidance.
  + Agency deference: However, SEC did promulgate rule in which they appear to believe this would be included.
  + Statutory construction: And the court reasons that the narrowness of the routine governmental action exception informs the broadness of the “**assist**” in obtaining/retaining business.
* Sufficiency of the indictment: business nexus not “core crime”
  + Indictment does not explain business nexus, does not explicitly articulate how the bribe assists in obtaining business.
  + But court rules that the business nexus element does not go to the “core crime,” which is the bribery of official with corrupt intent. So **the business nexus element need not be articulated precisely in indictment**.
  + Unclear whether this part of the ruling will have staying power (FN 96 mentions the possibility that lenity and/or due process notice may require that the government be more specific in describing business nexus in indictment, even though business nexus is not part of the “core,” the theory under which the district court erroneously found the indictment insufficient).

Friedman (3rd Cir. 2011): Extortion defense?

* Facts:
  + It’s a domestic bribery case but it’s relevant to FCPA.
  + Building owner pays off inspector to remove violation.
* Extortion a defense?
  + In 2d cir. extortion only defense when
  1. D is paying a bribe to secure a service to which he is legally entitled AND
  2. The defendant faced significant economic loss without service.
  + Defendant did not satisfy above test so 3d cir. didn’t reach question of whether or not to adopt 2d cir. test.
* But would the 2d cir. test apply to FCPA?
  + **No**: Arlen thinks it may not because “corrupt” mens rea requires only an intent to influence official in any way outside of that exempted in affirmative defenses (under Kay court definition).
  + **Beyond the scope of grease payment**: Arlen also thinks this would not be subsumed by the grease payment exception because it is not sufficiently routine.
    - Even if you’re the best candidate for the gov’t contract, so you’re bribing officials to do their job correctly, you would probably still run afoul of FCPA.

Gratuities vs. Bribery: related to “reasonable and bona fide expenditure” defense

* Recall the debate from Sun Diamond and related materials about what constitutes an inducement sufficient to qualify as bribery for fraud violation: similar questions abound in FCPA about whether explicit quid pro quo is required, or whether more nebulous understanding is sufficient.
  + Agreeing on a “type” of action, rather than a specific action, is sufficient.
  + Test: size of gifts, evidence of concealment, timing of gift in relation to favorable action…
* FCPA:
  + It’s an anti-bribery statute, so perhaps quid pro quo will be required.
  + But the purpose to obtain/retain business, rather than secure gov’t contract, suggests less direct benefits count (remember the attenuated business purpose of increasing sales by lowering prices through lower taxes in Haiti case still cognizable)
  + But also recall from Haiti case that there was a more direct quid pro quo between defendant and foreign official, suggesting that the actus reas itself requires a quid pro quo.
  + My thought: to the extent the affirmative defenses for payments relating to the “promotion, demonstration, or explanation of products or services” resembles an exemption for certain gratuities, one can infer that other Congress intended criminalize other gratuities (you can’t carve something outta nothing).
* **Intent to build good will v. intent to induce public official to specific action to help D obtain/retain business.**
  + **Corrupt intent v. Relationship building: if the latter, likely permissible as a lack of corrupt intent would negate the necessary mens rea.**
  + **Factors likely to matter in distinguishing**
    - **Size of payments (gifts are small)**
    - **Context (payment when meeting official for first time would suggest an arms length nature to gift, resembling a bribe rather than a friendly relationship)**
    - **Timing of payment in relation to action**
    - **Does official ask for payment and conceal it?**
    - **Does company feel safe reporting on taxes as business expense? Other evidence of concealment on defendant’s part?**
* Bribe v. Campaign contribution:
  + In US, D’s have gotten away with large campaign contributions in part because of 1st amendment interest, which does not analogously exist in the FCPA context because 1st amendment doesn’t protect right to participate in foreign political process.
    - However, it’s unlikely Congress intended to criminalize political contributions that are legal in foreign country.
  + Boundary line comes down to degree of specificity of expected action: a vague hope for favorable treatment in the future is quite different from an expected specific action.

1. Parent Liability and Dodd-Frank Whistleblower

Parent Liability:

Wholly-owned subsidiary:

* Could get to parent company by…
  + **Statutory intermediary liability**: If sub acted as agent for parent and parent had requisite mens rea (including knowledge that subsidiary is likely to bribe)
  + **Common law doctrines** of piercing the corporate veil (sub as instrumentality of parent) and vicarious liability.
  + Act in furtherance: Parent company acted “in furtherance” of sub’s corrupt payment (subject to jurisdictional limitations and mens rea)
  + **Successor liability**: Common law successor liability (Alliance One DPA resolving pre-acquisition violations of acquired company)
    - **M&A Ramifications**: smaller target companies often will not have as sophisticated of compliance programs, so potential acquirers are walking away from transactions for fear of acquiring FCPA liability.
  + **Aiding and Abetting**:

1. Principal committed a crime
2. Aider knew of the crime or P’s intent to commit
3. Aider provided assistance to P
   * + Before or after commission
     + Agreement is not needed
     + As applied: DOJ is charging foreign firms if they aid & abet bribe by US firm, even if not in US
   * **Conspiracy**:
     + **Territorial nexus not required**: Pete from DC, a source of much FCPA knowledge, said a member of the DOJ's FCPA enforcement team talked a few weeks ago about the conspiracy statute. The prosecutor said it's sometimes used to avoid jurisdictional problems that come up with substantive FCPA charges. For example, if an FCPA defendant is neither an issuer nor a domestic concern, establishing [**jurisdiction**](http://www.fcpablog.com/blog/2008/2/5/jurisdiction-untangled.html) requires a territorial nexus. See 15 U.S.C. §§ 78dd-1(a), 78dd-2(a). But under the conspiracy statute, the territorial nexus doesn't need to be proved. Case in point, according to the DOJster, is Snamprogetti. In July, the Dutch unit of Italian parent company ENI agreed to pay a $240 million criminal fine after [**pleading guilty**](http://www.fcpablog.com/blog/2010/7/7/snamprogetti-eni-in-365-million-settlement.html) to one count of conspiracy to violate the FCPA and one count of aiding and abetting. The charges arose from Snamprogetti's role in the [**TSKJ-Nigeria**](http://www.fcpablog.com/blog/2009/2/12/kbr-and-halliburton-resolve-charges.html) joint venture.
     + **Can overcome statute of limitations problems**: **Conspiracy is a continuing offens**e. While the SoL for substantive violations is five years, conspiracy SoL starts running at date of last overt act in furtherance of the scheme

* Could get to foreign sub by…
  + Acted as agent for issuer or domestic concern
  + “caused” any act to happen in US in furtherance of scheme, which surely took place in Kay given export of rice, transfer of money… both of which are in furtherance if government articulated business nexus that included the lowering of the price in order to generate greater sales, the profits from which presumably go to sole SH, the parent company.

Panalpina (NDA):

* Swiss shipping/logistics company operating in Nigeria, paying bribes.
* Theories of jurisdiction (none of which were directly tested by courts since this is a settlement)
  + Email/phone call to US discussing *one* of the bribes, establishing jurisdiction for qualifying persons who corruptly make use of mails/instrumentaities of interstate commerce in furtherance of bribe.
  + Caused a US dollar payment to be wired from acct in Amsterdam to acct in Switzerland via correspondent banks in NY:
    - Gets at loose sense of “causing” an act in furtherance of scheme to take place in US, which DOJ claims is sufficient but which has yet to be tested in the Courts.

Why Parent Liability?

**- Parents: Indirect Primary Violator:** Parent otherwise avoid liability by doing business thru wholly- owned sub whereparent exerts no direct control sufficient to find vicarious liability.

**- Parent can Deter Thru Compliance Program**

* Monitoring
* Education

**- Parent Liability Needed? Want optimal deterrence**

* Sub may be thinly capitalized
* Unique to foreign subs:
  + Govt may be unable to convict subsidiarybecause can’t subpoena info
  + Gov’t ability to use D/NPA undermined b/c can’t do the kind of investigations/interviews needed to get a few employees to cooperate and create credible threat
  + Gov’t may have hard time collecting any sanction imposed

Miscellaneous:

DOJ opinion procedure:

* can write the DOJ to request an opinion on the FCPA compliance of business activities, which extablishes a rebuttable presumption of compliance in any subsequent enforcement action.
* Procedure has not been popular because you risk sacrificing confidentiality, negative results, instigating further gov’t investigation.
* One also wonders what the benefit of the presumption is since the government has the burden of proof to begin with.

Other statutes:

* **Can’t prosecute foreign officials on conspiracy theory** because they fall outside the class of individuals to which Congress intended the statute to apply, and you can’t circumvent Congressional intent using conspiracy.
* Sometimes RICO, Travel Act and Mail/Wire Fraud may apply
* Giffen court rejected attempt to prosecute mail/wire fraud on a deprivation of honest services theory when deprivation affects foreign citizens’ intangible right to the honest services of their own government officials because such importation of US law violates international comity in a “form of legal imperialism” that “embodies the essence of sanctimonious chauvinism.”

Dodd-Frank Whistle-blower Program: for securities laws violations

1. Voluntarily provide the SEC (before being asked by gov’t, SRO or accounting board)
2. With original information

* Not already known by SEC or derived from public sources (though “independent analysis” counts)

1. That leads to the successful enforcement by the SEC of a federal court or administrative action. Must satisfy one of the following:
   1. **Prompt agency action**: The information is sufficiently specific, credible and timely to cause the Commission to open a new examination or investigation, reopen a closed investigation, or open a new line inquiry in an existing examination or investigation.
   2. **Significant Contribution**: The conduct was already under investigation when the information was submitted, and the information significantly contributed to the success of the action.
   3. The whistleblower reports original information through his or her employer’s internal whistleblower, legal, or compliance procedures before or at the same time it is passed along to the Commission; the employer provides the whistleblower’s information (and any subsequently-discovered information) to the Commission; and the employer’s report satisfies prongs (1) or (2) above
2. In which the SEC obtains monetary sanctions totaling more than $1 million
   * Allows aggregation of claims involving common nucleus of operative facts.

Excluded Parties:

* **Culpable participant**s: Anyone subject to a monetary sanction resulting from their own whistleblowing, or who participated or oversaw conduct at issue in enforcement action.
* People who have a **pre-existing legal or contractual duty to report** their information to the Commission.
* **Whistleblower Attorneys** (including in-house counsel) who attempt to use information obtained from **client engagements to make whistleblower claims** for themselves (unless disclosure of the information is permitted under SEC rules or state barrules).
* Illegally obtained info: People who obtain the information by means or in a manner that is determined by a U.S. court to violate federal or state criminal law.
* Foreign government officials.
* Fruits of internal compliance program: Officers, directors, trustees or partners of an entity who are informed by another person (such as by an employee) of allegations of misconduct, or who learn the information in connection with the entity’s processes for identifying, reporting and addressing possible violations of law (such as through the company hotline).
* Compliance and internal audit personnel.
* Public accountants working on SEC engagements, if the information relates to violations by the engagement client.
* **Exceptions**:
  + Prevent harm: The whistleblower believes disclosure may prevent substantial injury to the financial interest or property of the entity or investors.
  + Concealment: The whistleblower believes that the entity is engaging in conduct that will impede an investigation.
  + Internal reporting futile: At least 120 days have elapsed since the whistleblower reported the information to his or her supervisor or the entity’s audit committee, chief legal officer, chief compliance officer – or at least 120 days have elapsed since the whistleblower received the information, if the whistleblower received it under circumstances indicating that these people are already aware of the information.

Anti-retaliation:

* Whistleblower protected from employment retaliation if they had a **reasonable belief** information provided related to securities laws violation.
* Attempts to interfere with whistleblowing are unlawful, **including threats to enforce confidentiality agreement**s.

Preserving Incentives to participate in internal compliance programs:

* Whistleblower still eligible if they report internally, and company then self-reports.
* Mark date of whistleblow on date of internal reporting to preserve “place in line” for reward as first to come forward with original info.
* Factors influencing award size (as percentage of sanctions):
  + Increased for internal reporting
  + Decreased for interference with internal reporting.

Commercial Bribery:

* No Federal statute directly illegalizes commercial bribery
  + Mail/wire fraud for private sector deprivation of honest services only gets you so far.
  + State law often does criminalize commercial bribery.
* Travel act federalizes some state law commercial bribery: definition of “unlawful activity” extended to include “bribery” outlawed under state law.

Travel Act:

Whoever travels in **interstate or foreign commerce** or uses the mail or any facility in interstate or foreign commerce, with intent to –

* Jurisdiction: Must use “**facility of foreign/interstate commerce**” such as telephone, internet or personal travel.

1. Distribute the proceeds of any unlawful activity; or
2. Commit any crime of violence to further any unlawful activity; or
3. Otherwise promote, manage, establish, carryon, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity

* “Unlawful” means:
  + Any enterprise involving gambling, drugs, prostitution.
  + Bribery, extortion, arson.
  + Illegal monetary transaction.
  + **Includes state crimes**.

Carson case (travel act questions):

* Morrison held that US laws do not apply extraterritorially unless Congress states otherwise explicitly.
* District court held that Morrison’s applicability was limited to civil statutes, and Bowman holds that states should be able to protect their citizens from criminal violations across state lines, unless the Court explicitly overrules that decision.
* And in any event they don’t have to reach that question because enough happened in California to form the violation.

1. UK Anti-Bribery Act

UK bribery act:

* Creates 4 offenses:
  + Active commercial bribery
  + Passive commercial bribery
  + Active and passive government official bribery:
    - Government official defined as those performing public functions (narrower definition, though perhaps not that relevant ultimately since there’s a commercial violation as well.)
* Mens rea: Also broader than the FCPA in that there’s no corrupt intent required, only **intent to “influence” the recipient**.
* Corporate liability: strictly liable
  + the concept of corporate liability is generally narrower in the UK in that is requires that the board of directors (the “directing mind/will”) have been aware of or participated in crime.
  + But here, the **corporation is strictly liable** if any agent or employee commits the crime.
  + Compliance program defense: Only defense is proving that you had a good compliance program in place to prevent violations.
    - **No grease payments exemption**.
    - British law is silent on whether there is bona fide reasonable sales expenses exemption.
* Jurisdiction appears broader than FCPA in that you are subject to liability if you merely “do business” in the UK, which applies to every major multinational company.
  + Guidance suggests that UK gov’t will be particularly aggressive when the action hurts UK interests.
  + In reality, the UK enforcement authorities have very limited resources, so it doesn’t present as great of a threat right now.

1. Money Laundering

Three Offenses:

* 1956(a)(1) Domestic Money Laundering
  + Promotion
  + Concealment
* 1956(a)(2) International Money Laundering
  + Promotion
  + Concealment
* 1957 Tainted Money Spending
* Plus conspiracy to do any of the above.
  + Does not require overt act under Whitfield.

1956(a)(1) Domestic Money Laundering:

1. Mens Rea 1: Knowing that the property involved in a financial transaction represents the proceeds from **some form of unlawful activity** (general knowledge)
2. Actus Reas: conducts or attempts to conduct a financial transaction that **in fact** involves the proceeds of ***specified* unlawful activity**
   1. **Single merged actus reas precludes conviction**: Santos Court held that because the property in the 1956a1 transaction must be the “proceeds” of specified criminal activity, that activity must have occurred PRIOR to the acts constituting the 1956a1 violation itself, and not the same acts (though possession may not be necessary).
   2. **Proceeds means profits**: also from Santos, proceeds refers only to profits, and not to gross receipts. So you may be OK if you’re losing money on a criminal enterprise.
3. Mens Rea 2: either
   1. Promotion: with intent to promote the carrying on of specified unlawful activity or **tax fraud** OR
   2. Concealment: knowing that the transaction is designed in whole or in part to conceal or disguise the nature, location, ownership, source or control of the proceeds of specified unlawful activity, or avoid **transaction reporting requirements**.
      1. Knowledge here extends only to the fact that the transaction is designed to conceal, not to the “specified unlawful activity” itself.
      2. Factors that go to show intent to conceal:

* Existence of irregular/irrational transaction structure with the effect of concealment.
* Putting property in the names of others, or otherwise concealing ownership or value.
* Comingling illegal proceeds with legit funds.
* Moving money through a large number of accounts, frustrating traceability.
* Efforts to avoid reporting requirements.
* “Financial Transaction:” defined as jurisdictional hook
  + A transaction that in any way or degree affects **interstate commerce** involving the movement of funds by wire or other means, one or more “monetary instruments,” the transfer of title to any **real property, vehicle, vessel, or aircraft** or
  + A transaction involving a **financial institution** which is engaged in, or the activities of which affect, **interstate *or foreign* commerce** in any way or degree, which includes any bank or other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.
    - USA Patriot Act extends “financial institution” to include foreign banks.
* “Specified Unlawful Activity:” everything we’ve studied
  + Drugs, murder, kidnapping, RICO violations including mail/wire fraud, obstruction of justice, securities fraud, certain environmental regulations, general public corruption and federal program fraud, theft, bribery, travel act, FCPA, federal health care offense…
  + USA Patriot Act Specified Crimes: Material support for terrorists, computer fraud and abuse, **certain offenses against foreign nations including**: **bribery of public official, misappropriation, theft, or embezzlement of public funds** by or for the benefit of a public official, smuggling and export control violations…
    - Ex: Even if you don’t foot the bill for the Chinese official’s trip to Disney World (which could be FCPA violation), you could find yourself running afoul of 1956 for **facilitating embezzlement**.
* **Willful Blindness**: Counts as knowledge, as we see in Campbell decision, in which the court required an affirmative act demonstrating
* Extraterritorial Jurisdiction: 1956(f) states that there is extraterritorial jurisdiction over conduct which violates the act if by a US citizen or partly in US, or involves funds or monetary instruments (defined in 1957) over 10,000.

1956(a)(2): International Money Laundering

1. Did or attempted to transport/transmit/transfer a “monetary instrument” or fund
2. Jurisdiction: Into or out of US and

* Must actually cross a US border, though 1956(a)(1) might be useful for transactions that do not move into or out of US, assuming elements and extraterritorial jurisdiction applies.

1. Mens rea: Either
   1. Promotion: Intent to promote specified unlawful activity OR
   2. Concealment: Acted with knowledge that
      1. The monetary instrument or fund “represented” the proceeds of ***some* form of unlawful activity constituting a felony at state of federal law** AND
      2. The movement of funds was designed in whole or in part to conceal the source of proceeds of ***specified unlawful activity*** or avoid transaction reporting requirements.
         1. As in 1956a1, need only knowledge concealment of generally unlawful source, not knowledge of specified unlawful activity.
         2. **Single actus reas is not preclusive merger:** there is no requirement that the property involved be previously generated proceeds of unlawful activity, but only that they “represent” proceeds of unlawful activity, so the underlying crime and the money laundering CAN happen simultaneously.

* “Monetary Instrument;” narrower than 1956(a)(1)’s “financial transaction” definition
  + coin and currency (of any country), traveler’s checks, personal checks, bank checks, money orders and investment securities or negotiable instruments.
* “Funds:” Moneys held in bank accounts.
* Cuellar v. US: must show transport designed specifically for the purpose of concealment
  + Facts: D caught driving car to Mexico which contained 80K.
  + Court acquitted on the grounds that the movement that constitutes the actus reas must be designed for the purpose of concealment, and not that concealment is merely an effect of independently motivated transportation.
  + Ie it is insufficient to show concealment merely in the course of transport.

1956(a)(3): Undercover Investigations:

* In sting operations in which the proceeds would never in fact derive from unlawful activity, the gov’t can still convict if the gov’t:
  + Represented the proceeds as deriving from specified unlawful activity AND
  + For both promotion and concealment, defendant *intended* promotion/concealment, distinguished from the mere knowledge requirement normally applicable to concealment.
  + Tax fraud excluded.

Comparison between 1956(a)(1) and 1956 (a)(2):

* CAN be charged in the conjunctive.
* **Domestic vs. International**:1 deals with transactions within US, and 2 deals with the movement of funds into and out of the US.
* **Financial Transactions v. Monetary Instruments**: 1 defines “financial transactions” very broadly, and 2 deals with the more limited “monetary instruments.”
* **Intent to commit tax fraud** only constitutes promotion under 1.
* **Criminal derivation of property for promotion**: under 1956a1, even for the promotion offense you need the property involved in the transaction to be criminally derived in fact (unless sting operation), whereas for 1956a2 you need only intent to promote.

1957 Tainted Money Spending:

1. Engages or attempts to engage in a monetary transaction

* “Monetary transaction:”

1. Deposit, withdrawal, transfer, exchange affecting interstate or foreign commerce
2. of funds or monetary instruments (defined as in 1956(a)(2) to include coin/currency, checks, investment securities or negotiable instrument),
3. by, through or to a financial institution, but NOT including paying your atty as needed to preserve 6th amendment right.
4. **Knowing** that the proceeds were obtained via some form of criminal activtiy

* Willful blindness counts
* Needs to know only that proceeds have been obtained through from some form of criminal activity, and not a specified criminal activity.

1. That is of value greater than $10,000 and
2. That have in fact been obtained from specified unlawful activity (D need not know this)
   1. **No merger with underlying crime**: “obtained” is past tense and “criminally derived *property*” implies possession, so the money must have been obtained AND possessed through criminal means PRIOR to 1957 commission. (Piervinanzi).

* Extraterritorial jurisdiction: If offense takes place in the US, or defendant is US person.

Comparison between 1956(a)(1) and 1957:

* Scope:
  + 1956a1: Financial Transactions broadly defined.
  + 1957: Monetary Transactions requiring monetary instrument/funds through financial institution.
* Amount:
  + 1956a1:no minimum dollar amount
  + 1957: transaction must involve $10k or more
* Mens rea:
  + 1956a1: need proof D knew property constituted proceeds from *an* illegal activity AND acted with additional promotional intent or concealment knowledge.
  + 1957: need proof only that D knowingly engaged in transaction in criminally derived property.

Policy: Why do we need these if there must be an underlying crime of which you would convict the defendant anyways?

* Difficulties in securing conviction for underlying crime (including SoL and those guys who don’t personally commit the underlying crime such as the drug kingpin)
* Target Profiteering: Add criminality to profiting off of crime.
* Gatekeeping function:
  + Put everybody who may deal with criminals on notice that they may be implicated if they facilitate spending of money, encouraging them to report (such as the defendant in the Campbell case).
  + Derivative Moral Culpability? Is it really appropriate to use a criminal rather than civil penalty to serve a gate-keeping function? Offenses that are merely instrumental in the conviction of offenses committed by other people lack the moral culpability traditionally associated with crimes.

Hypo 1: Chinese Official associated with Avon.

* Facts:
  + D is real estate agent in California, who regularly works for execs at Avon.
  + Last month Avon referred a Chinese party official to her from Dalia, a small city in southwest China.
  + They agree on a purchase price of 300K, but he’s unable to get a large US loan, so he pays her 250k cash in a suitcase in her office, and they agree to lower official price to 50K, for which he secures a loan.
    - They file forms showing 50k closing price.
  + She worries the cash could be drug money, or possibly corruption. It was the latter.
* 1956:
  + Mens rea 1: generalized suspicion of unlawful intent suffices if the defendant affirmatively avoids investigating.
  + Actus reas: it’s derived from corruption, which is either an FCPA violation or one of the “certain crimes against foreign nations” specified by the patriot act, including bribery of a public official and embezzlement of public funds.
  + Mens Rea 2:
    - Promotion? Perhaps promoting the commission of a false statement to the gov’t on HUD forms generated at closing, or perhaps tax evasion. Would be fact-specific.
    - Concealment? There is evidence to suggest that the transaction is designed to conceal, but is there enough to prove her subjective awareness of that intent? Or her conscious avoidance of coming into subjective awareness?
      * We have evidence of her subjective suspicion.
      * Public official from small town unlikely to have come in to 250K legally.
      * Referred by company implicated in corruption.
      * Paying in cash so likely avoiding currency laws.
      * STRAW THAT BREAKS CAMEL’S BACK: he conceals true price of house on loan forms, resulting in irrationally inflated interest rate (50k with no down payment vs. 50K with 250k down payment).
* 1957: it’s over 10k and it involves cash (monetary instrument) so if we find that it goes through financial institution and that there’s knowledge of concealment, then it looks like we’ve got her.
* False statement: may run into this problem on HUD forms.

Campbell (4th Cir. 1992):

* Facts:
  + D real estate agent contacted by drug dealer, Lawing, who alleged to own acompany, about purchasing a house on a lake.
  + Lawing had them decrease the list price and accept 60,000 in cash on the explanation that it would allow his parents to qualify for a mortgage, and that the structure had to remain secret in order to convince his parents he had gotten a good deal on the home.
  + Campbell draws up knew documents, and files gov’t forms reflecting the adjusted price.
* Mens rea 1: **Conscious avoidance required, and not merely negligence:** She had plenty of reason to be suspicious, but gross negligence is not sufficient. Instead, conscious avoidance/willful blindness is necessary to prove knowledge, requiring an affirmative act designed to avoid learning complete facts.
  + But practically speaking, this is proved to a jury based on the same circumstantial evidence of obviousness that would go to negligent failure to know and actual subjective knowledge.
  + There are some suspicious facts which go to negligent failure to recognize illegal source of proceeds, but the fact that goes directly to subjective awareness is her statement that the funds “may have been drug money.”
  + In addition, concealment facts (look to slide):
    - Putting your house in your parents name irrationally subjects you to estate tax, suggesting value to the avoiding the appearance of assets.
    - **MOST IMPORTANT for some reason**; **Irrational loan structure**: Banks would provide a better interest rate on 122,500 loan secured by 60k down payment plus more valuable collateral property, than they would on loan of same value for property of equivalent value with no down payment. So to structure the transaction in the latter form would be irrational absent a concealment objective.
    - The real estate agent would know that the above structuring would avoid the bank secrecy act reporting requirements, serving an intuitive concealment objective for structuring the transaction in the irrational way, and such concealment would only be valuable if the proceeds derived from illegal activity.
    - **Merger of evidence**: concealment facts go to knowledge both to mens rea 1 (illegally derived proceeds) and mens rea 2 (intent to conceal/promote unlawful activity).
* Mens rea 2:
  + No intent to conceal on her own behalf, but you need only “knowledge” that the transaction is designed to conceal, whether or not she was the one to design it.

Tencer (5th Cir. 1997): “open and notorious” defense to concealment

* Facts: Chiropractor runs insurance fraud scheme. Gets antsy. Transfers all his money to Las vegas bank accts, but in his own name. Appears to be leaving the country. Gets arrested.
* Argues that evidence of intent to conceal is insufficient because he didn’t hide his identity or move money through accts of 3rd party.
  + It was “**open and notorious**” use under Dobbs and thus not intended to conceal.
* **Court rejects** on the grounds that the standard: “remove all trace of involvement with the money or that the **particular transaction charged is itself highly unusual**” is a more nuanced standard in that it gets at intent on specific facts of each case.
  + Nature of “**open and norotious” use in Dobbs relevant only in that it negates intent on those facts**, which is not true here because the transactions were highly unusual and appeared designed to conceal, however amateurish.
* Conviction upheld.

US v. Sanders: mere cash payment, even if somewhat irregular, not sufficient evidence of concealment:

* Facts: Drug money used to purchase cars in cash, gov’t goes after car dealer.
* Holding: no evidence of concealment beyond use of cash because buyer purchased in his own name, correct price was recorded on documents, buyer openly used car so no indication he wanted to hide his wealth.

Piervinanzi (2d Cir. 1994): Simultaneous commission of underlying offense

* Facts: Bank fraud completed via the wiring of proceeds out of bank and to the Cayman Islands.
* Bank Fraud: REQUIRED OFFENSE
  + Knowingly execute a scheme to either
    - Defraud a financial institution OR
    - Obtain moneys/funds owned by or under custody of financial institution by false or fraudulent pretenses, representations or promises.
* 1957: overturns conviction:
  + Wiring the funds out of the bank completed the fraud, and wiring the funds into the Cayman Islands completed the 1957 tainted money spending, and at no point in between were the funds in the possession of the defendants.
  + 1957 requires that defendant transfer “property” “obtained” via means constituting the underlying specified criminal activity.
  + “Property” implies possession and the past tense of “obtained” implies the such possession exist *prior* to the actus reas of the 1957 offense.
  + Here, the defendants never had possession of the property before the transfer alleged to constitute the 1957 actus reas and therefore, the **elements of the offense are not me**t.
* 1956(a)(2):
  + The act of wiring the funds out of the bank was analytically distinct from wiring the funds overseas, and both are independently illegal.
  + 1956(a**)(1)** requires that the defendant launder the “proceeds” of criminal activity, implying a “two-step” process in which

1. the proceeds are derived from specified criminal activity and subsequently,
2. the proceeds are then laundered pursuant to 1956.
   * **In contrast**, 1956(a)**(2)** has no requirement that any “proceeds” first be derived from unlawful activity, instead it prohibits cross-border transactions “with the intent to promote the carrying on of specified criminal activity,” so **there need be no prerequisite obtention**.
   * **Carrying does not imply multiple, ongoing or otherwise subsequent specified criminal activity**: it can be one damn thing.

* **Clean money** Hypo: if executive, feeling altruistic, wires some of his own money overseas to pay for a bribe on the company’s behalf, would he run afoul of 1956a1 or 2?
  + 1: no. The money is clean at the time of transfer, and the transfer must involve the previously obtained “proceeds” of unlawful activity.
  + 2: According to DOJ, yes. Intent to promote the carrying on of illegal activity is itself sufficient; no previously obtained criminally derived proceeds needed.

Promote the carrying on of past crimes? Circuit split:

* Some circuits are perfectly cool with it.
* Others require that defendants **“plough” money back into ongoing scheme**, such as by paying off the first investors in Ponzi scheme in order to attract round 2.
* Still others completely reject it.
* Hypo: A bribes public official B by handing her a check, completing the crime. B then deposits the money in the bank, fulfilling the elements of promotion money laundering in the meanest courts.
  + Notice: depositing the money does not work to conceal it, but rather it allows her to spend it, which promotes the carrying on of the underlying offense (one supposes).

Hypo 2:

* Facts:
  + Abe is VP of bank, Acme.
  + Realizing that one customer is too wealthy to keep track of his money, he incorporates Gamma corp. in Switzerland, in which Abe is sole SH, creates Beta corp., which is owned by Gamma corp., and channels $1 million from customer’s acct to an offshore account in the Cayman islands, knowing that the drug lord will not request investigation.
* 1956(a)(1):
  + Clean money problem?
    - Money was clean at the time it was wired, so there were no unlawful derived proceeds in the defendant’s possession, prior to the wiring.
    - Or was it clean? If D knew that the customer acquired it from his activities as a drug lord and it did in fact derive from his activities as a drug lord, then there would be unlawfully derived proceeds and

1. Criminal Procedure Relating to Corporate Criminal Investigations
2. Grand Juries: Investigative Function

Grand juries Generally:

* Grand jury indictment required for felonies in federal system.
* No defense counsel (though they can wait outside, and client can pause to consult), no judges, only prosecutors, stenographer and 16-23 jurors of peers, of which 12 votes are needed to indict (99% indictment rate, though there may be some deterrent value).
* Three categories of people called before grand jury:

1. Witness: no potential criminal exposure so no right against self-incrimination.
2. Subject: witness whose conduct is “within the scope of the grand jury investigation,” meaning they may become subject to indictment.
3. Target: meaningful evidence connecting target to crime.
   * Do not have to tell you you’re a target, though DOJ policy instructs prosecutors to do so.
   * Targets are required to show up for oral testimony, but they do have 5th amendment rights, as we shall see.
   * Prosecutor not required to tell targets they have 5th amendment rights (and there’s no assistance of counsel), though DOJ policy instructs them to do so.

* 5th amendment waiver:
  + If you talk on a subject voluntarily, you implicitly waive your 5th amendment rights with respect to that subject.
  + Prosecutors will often invite targets to appear voluntarily, but good defense counsel will advise them to decline because testifying under threat of perjury can cause you to say to much, or inadvertently waive 5th amendment rights.
* Immunity: See more on this below.
  + Prosecutors can offer criminal immunity to subjects if they really need the testimony.
  + This eliminate 5th amendment rights because they can no longer self-incriminate.
* Blair: mere witness can’t challenge Constitutionality of statutory offense.
  + D before NY grand jury investigating primary election involving some election fraud in Michigan.
  + D claimed NY grand jury had no jurisdiction over him as a witness because it was about fraud in another state, rendering statutory basis for offense unconstitutional.
  + Court rejected: 1) witnesses can’t challenge constitutionality of a statute and 2) statute is not ripe for constitutional review until conviction.
* No formal charges necessary to enforce subpoena, since that would defeat investigatory purpose of grand jury (Hale v. Henkel).

Evidentiary rules:

* Hearsay rule doesn’t apply, though DOJ policy instructs prosecutors to explain hearsay to jury when they use it.
* Exclusionary rule doesn’t apply:
  + Even illegally/unconstitutionally obtained evidence is admissible, though DOJ policy instructs prosecutors against presenting evidence that “clearly violates the defendant’s Constitutional rights.”
  + Why shouldn’t exclusionary rule apply in grand jury context?
    - Illegal searches and seizures are violative of the 4th amendment in the intrusion itself, and not in the subsequent presentation of evidence acquired in court.
    - The exclusionary rule is merely prophylactic, meant to discourage that behavior by excluding it from trial.
    - So the allowance of evidence at the grand jury is not itself a 4th amendment violation, and whether a prophylactic measure is appropriate in this context as well is for Congress to decide.
* **Prejudicial Evidence**: when there is prosecutorial misconduct.
  + Standard: “**’grave doubt’** that decision to indict was free from “**substantial influence of such violations**,” with **no dismissal for mere “harmless error**.” Bank of Nova Scotia
  + Policy:
    - Bank of Nova Scotia Court says that efforts at deterring violations of grand jury rules should be calculated to punish the prosecutors, and not to confer a windfall to defendants.
    - Punitive/regulatory mechanisms include: DOJ discipline for policy violations, rules of professionalism, LOL become a prosecutor.
  + **Fundamental error**: when a “core Constitutional right” has been violated, such as depriving target of right to jury of peers by removing all women/black people from jury, then **prejudice will be presumed**.
* Violation of Secrecy: Grand jury secrecy does not extend to witnesses discussing their own testimony, and to the extent leakage results from violations, they are assessed by grave doubt standard.
* Perjured Testimony:
  + Prosecution knows that testimony is perjured: will lead to dismissal if **no other inculpatory evidence** because it likely caused prejudicial error.
  + Prosecution did not know testimony was perjured: indictment will stand unless there is harmful error, since the **jury is entitled to assess the reliability of testimony** anyways.
* Exculpatory Evidence:
  + Under Williams, prosecution has no duty to present exculpatory evidence in its possession at grand jury proceedings.
  + Policy:
    - Under Brady, prosecutors are required to share exculpatory evidence in their possession at trial.
    - **No right to defense at grand jury investigation**:
      * But this is connected to the right of the defendant to present a defense, which is not present at the grand jury stage.
      * Threat of circumnavigation: So the logical consequence of such a requirement, that **defendants would give all exculpatory evidence to prosecutor in order to trigger their duty to present** it to grand jury, would allow defendant to circumnavigate this limitation.
  + However, DOJ policy requires prosecutors to present exculpatory evidence at grand jury.
* **Conviction cures harmful error at grand jury stage**: Mistrial will not be declared if indictment is found prejudiced after conviction because whatever the circumstances of the indictment, it was clearly sufficiently meritorious as a jury of peers has now validated that suspicion of guilt beyond a reasonable doubt, exceeding the requirements for indictment.
* Judiciary cannot develop procedural rules for grand jury proceedings (Williams)
  + Among other things, Court explains that the grand jury is not a part of the judiciary, but stands on its own.
  + Because it’s not part of the judicial branch, courts do not have the discretion to develop their own procedural rules to apply to the grand jury proceedings. (subject to limitations).

4th Amendment:

* Two protections:
  1. 4th amendment on its face and
  2. Rule 17 (statutory manifestation of 4th amendment).
* Verbal vs. Document Subpoenas:
  + Verbal testimony is not a search and seizure, so there’s no 4th amendment right (though 5th may apply).
  + Document Subpoenas, “subpoena duces tecum,” do constitute a search and seizure, so 4th amendment is implicated as we see in Boyd.
* **Agents** CAN assert 4th on behalf of firm, but it’s a very weak interest; not “overbroad.”
* Hale:
  + A subpoena duces tecum sought seizure of broad swath of corporate documents.
  + The subpoena here asked for essentially all the records of the business, which the Court rules was so broad as to be unreasonable under the time constraints and just so damn broad as to be excessively burdensome (would severely interfere with business operations) no matter what the time frame, without some more specific connection to an investigation.
  + Very rarely will this be a successful defense, especially because, as the Hale Court notes, if the time period presents the undue burden, then the grand jury can just extend the time period for you.
* Probable cause? Not required!
  + Not required under R. Enterprises:
    - **Standard**: Court held that document subpoena only unreasonable under 4th amendment/rule 17 in grand jury context if there is “**no reasonable possibility**” that it will “**produce evidence** that is relevant.” **Very stringent standard for defendants**.
      * Note: possibility of “produce evidence” means that even this particular evidence doesn’t have to have a reasonable possibility of relevance, but only that it **may lead to relevant evidence**!
    - Contextual reasonableness:
      * Our understanding of “reasonableness” of search/seizures is contextual, so given the i**nvestigatory purpose of grand jury, context demands greater flexibility**.
      * We also don’t want defendants to mount procedural challenges to grand jury proceedings, a continual theme in these decisions.
      * **No physical intrusion**: This is also less invasive than breakin down your door, and there’s a level of secrecy to grand jury proceedings that mitigates collateral harm to privacy of document subpoenas.
  + On the facts of R. Enterprises, the similarity of businesses between the witness and the target suggested that the records of the witness might inform the prosecutor’s view of the records of the target in a way that ends up being “relevant.” So they’re required to give up the pussy.

Policy: The protection of trial

* All of these decisions are premised on the idea that the grand jury’s investigative role should be severed from any adjudicative function because we have the protection of trial to serve as an adjudicatory backstop on the consequences of investigatory abuses.
* But to the extent plea bargaining practice has transformed grand jury into the closest thing to trial (especially in the corporate context), this system of protections is undermined.
* **Bargaining in the shadow of trial**: The counterclaim is that all plea bargaining is conducted in the shadow of trial, so the Constitutional protections of trial that might limit the chance of conviction inform the plea bargaining process in a way that brings them to bear, in an indirect sense, on the ultimate outcome of the criminal proceedings.
* That being said, many corporate defendants can’t even afford the indictment because pending criminal indictments in areas such as health care law can debar the defendant from practicing before the agency, exacting crushing economic harm against the corporation.
  + Can be reputational as well, as we saw when Arthur Anderson went bankrupt after being indicted for accounting fraud.
* When the indictment effectively levels sanctions, the **grand jury becomes the trial**.

1. Grand Juries and the 5th Amendment: Firms and Documents
2. Firms and the 5th Amendment

5th Amendment protection against self-incrimination protects

1. Natural persons (and sole proprietorships) from
2. Being compelled
3. To make testimonial communication
   1. And when the testimonial fact is implicitly communicated through an “act of production,” that fact is not a “foregone conclusion.”
4. That incriminates themselves
5. Absent a grant of governmental immunity

Basic Rules:

* Self-incrimination only: as we see in Hale, one can only assert the 5th amendment on their own behalf, and not on behalf of a 3rd party.
* No entity 5th amendment right:
  + As we see in White, entities other than natural persons do not have 5th amendment rights to the extent they “cannot be said to embody or represent the purely private or personal interests of its constituents, but rather embody group or common interests only.”
  + **Scope of the exception**: The scope of whatever exception was contemplated in White was narrowed in Bellis, in which the Court found that a 3 person law firm was not a mere “informal association or a temporary arrangement,” but rather a “**formal institutional arrangement organized for the continuing conduct of the firm’s legal practice**,” could not assert 5th amendment.
    - Factors that weighed in the court’s decision:
      * Bank account in firm’s name,
      * stationary in firm’s name,
      * held itself out as independent institution,
      * employed 6 people in addition to partners (employed by firm, rather than by partners), including two attys who practiced law on the firm’s behalf, rather than as individuals on their own behalf
  + **Sole Proprietorship**: in US v. Doe the Court determined that a sole proprietorship had no separate legal identity from the sole proprietor, so they could assert the 5th in business documents.
* **No privacy interest**: the Fisher Court completely severs the 4th and 5th amendments, limiting privacy interest exclusively to the former.
* **Private vs. Corporate Records**: **can only assert the 5th over private records**.
  + “the official records and documents of the organization that are held by them in a representative capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally.”
  + Mixed private/corporate records: people can assert 5th amendment immunity over documents in their possession to the extent they are private, so “mixed” records, if determined to be primarily corporate, may be culled of personal aspects (redactions).
  + Burden on defendant to prove private nature of records.

1. Documents and Tangible Objects
   1. Individuals and 5th Amendment

Incriminating contents?

* The 5th amendment protects only against the compulsion of testimony against oneself in a way that’s incriminating. Elements:
  + Compulsion
  + Testimony
  + Incriminating
* In the case os documents, the contents of which are incriminating, the contents of the documents are preexisting, so their creation is not itself “compelled.”
* So the Fisher Court limits the 5th amendment protections of incriminating documents to the testimonial aspects of producing the documents, spawning the “act of production” doctrine.

Act of Production Testimony:

* 5th amendment protection in the document subpoena context is limited to statements communicated implicitly via the act of production itself:

1. Existence
2. Possession
3. Authenticity: in determining what is responsive to the subpoena, you admit to the authenticity of those documents and could not later contest it (without intervening revelation one supposes).

* If any of the above communications are incriminating of themselves, rather than incriminating in that they lead to documents the contents of which are incriminating, then you can assert the 5th, subject to the foregone conclusion exception.
* Foregone Conclusion Exception:
  + Testimony can only be meaningfully incriminating insofar as the government cannot otherwise prove it to be true, only insofar as it provides the government with information it would not otherwise have and thus subjects the defendant to criminal liability beyond that to which they would otherwise be subject.
  + So act of production immunity can only be asserted over those testimonial aspects of production which inform the government of information it did not already have and has no alternative way of ascertaining, as that are the only truly incriminating testimony.
    - Your testimony to the existence and possession of tax documents described with particularity is not affirmatively incriminating since the subpoena itself demonstrates that the gov’t already has this information, or they would not have described the documents with such specificity.
    - Your testimony to the authenticity of the tax documents does not subject you to criminal liability beyond that to which you would otherwise be subject because the gov’t could authenticate with your accountant anyways (Fisher).
    - Your testifying to the authenticity of your diary subjects you to no additional criminal liability because the gov’t could authenticate it using a **handwriting exemplar**.
    - Other alternative means of verification (form Fisher): blood sample, forcing D to wear a shirt from the scene of crime, provide handwriting exemplar **all merely acts that do not require express self-incrimination**.
    - However, requiring a defendant to turn over a gun and then charging him with possession without a license would not be cool because the possession itself is incriminating in a way that could not be verified through an alternative means short of busting his door down, which would itself produce 4th amendment concerns.
  + So only when the testimonial aspects of your act of production would provide an **essential link** in the use of the evidence will the 5th be available, though it’s worth remembering that they can’t then use your having produced the documents at trial; they have to actually use that alternative means of authentication etc.

Atty-client privilege:

* **5th amendment Imputation:** When you turn over preexisting documents to your atty, 5th and 4th amendment protections impute to the atty, for policy reasons (client candor).
* Analogous 5th amendment limitations apply: But remember, this is only to the degree that the documents were protected in the first place, which is why the defendant loses in the first place.
* **Atty-client privilege must apply**: Documents must also be protected by atty-client privilege in the first place (details in atty-client privilege section).
* NOTE: the **atty must actually assert his own 5th amendment privilege**, not that of his client, since you can’t assert 5th on behalf of another.
  + Misphrasing this would be a really *cool* reason to lose a Constitutional right, dickheads.

Fisher:

* Facts:
  + Defendant gave tax documents to attorney in anticipation of litigation/seeking informed legal advice.
  + Atty declines to comply with subpoena for tax docs on the grounds that they contain incriminating information and thus, compelled production would result in (imputed) self-incrimination in violation of the 5th amendment.
* **5th amendment does not protect privacy:** Court overrules Boyd to the extent is was read to find a 5th amendment interest in personal privacy, an interest which the Court says is limited to the entirely severable 4th amendment.
* **Attorney Client privilege**: However, the Court notes that policy considerations (chiefly, encouraging candor with counsel) lead the attorney-client privilege doctrine to impute 5th amendment immunity to documents in the atty’s possession that would, if still in the client’s possession, be subject to 5th amendment protection.
  + So the Court proceeds to assess 5th amendment immunity status of the documents in question…
* 5th protection limited to “testimonial” communication:
  + Compulsion of evidence that does not rely on the express “truth-telling” of the defendant does not come within this protection:
  + blood sample, forcing D to wear a shirt from the scene of crime, provide handwriting exemplar all merely acts that do not require express self-incrimination and thus, do not fall within the scope of the 5th.
  + The compulsion of documents is only testimonial when their incriminating nature is actualized through the “communicative aspects” of turning them over, rather than in the contents of the documents; ie the act of turning the documents over must itself constitute an incriminating assertion of fact.
    - This could be the case because turning over documents implicitly asserts that they exist, they are in defendant’s possession and control, and they are authentic (see next class’s notes for extensive discussion of authenticity assertion).
    - Requiring defendant to turn over gun and then charging him with unlicensed possession not cool because the very turning over of the gun is itself incriminating.
    - Here, in contrast, the incriminating nature of the documents is contained in the documents themselves and requires no expression of guilt on the part of the defendant.
  + Foregone conclusion exception:
    - But does the defendant not aver that the documents he hands over are in fact those referred to in the subpoena?
    - Scalia says this doesn’t count because that he possessed those documents and that those he hands over are the correct ones are “foregone conclusions,” knowledge of which the government was already in possession and therefore the defendant admits nothing new in any testimonial communication to that effect.
      * Indeed, the case does not hinge on the existence/possession of those documents, but on the contents of those documents, which is not communicated in the act of handing them over.

US v. Doe (1988): Subpoena requesting consent in the hypothetical

* Cleverly worded subpoena requests that defendant consent to the release of information to the government by any existing bank accounts over which defendant may have signatory control, without naming any specific accounts or implying that any such accounts exist.
  + This is an attempt to circumvent bank secrecy laws in the Cayman Islands by getting D to waive secrecy protections.
* Court holds that because the consent (**or allowance that letter will be *construed* as consent if such bank accounts exist**) does not testify to the existence of or his control over any such bank accounts, but merely authorizes, hypothetically, his consent to their exploration, there are no assertions of fact which might constitute protected expression.
* 4th amendment problems? Notice that despite the broadness of this consent request, the 4th amendment is not implicated because it’s a consent request, rather than a subpoena, so it’s **not a search and seizure** until they follow up with a presumably more particular subpoena.
  1. Firms/Officers and 5th Amendment Revisited

Braswell: **Act of production testimony of corporate records**

* The corporation has no 5th amendment rights even as to testimonial nature of compliance with subpoenas.
* We subpoenaed the firm:
  + the firm has no right to contest on 5th,
  + you have no right to assert 5th on behalf of the firm,
  + you have no right to assert the 5th on your own behalf because you’re not being asked to produce in your personal capacity, but on behalf of the firm.
* **Can’t use the fact of your production against you**: However, the Court does note that the prosecutor cannot use the fact that defendant brought in the documents against them since they were, under our theory of these being the corporation’s actions, brought in by the firm.
  + In addition, the prosecutor can’t say that the firm produced the documents if the firm is so small that it would unavoidably imply that the defendant produced the documents.

Hubbell (2000): Legal Developments: 1) Act of production immunity against 2) derivative use of 3) document identification testimony.

* Facts:
  + Grand jury subpoena requests broad swath of documents not described with “reasonable particularity” in quintessential “**fishing expedition**,” with grant of maximum section 6002 “act of production immunity” allowed by law.
    - “’any and all documents reflecting, referring , or relating to any direct or indirect sources of money or other things of value received by or provided to’ an individual or members of his family.”
  + **Derivative crimes charged**: Government learns of entirely new crimes as a result of massive document surrender, puts together charges on the basis of evidence developed *with the use of subpoenad documents*, but without the need to present any of the actual documents themselves.
* **6002 act of production immunity**:
  + “use and derivative use” of documents responsive to subpoena under grant of 6002 immunity coextensive with 5th amendment privilege.
  + **Analysis**: if any document over which they could have asserted the 5th, but submitted under grant of immunity, provides an **essential link to evidence necessary for bringing charges**, then you can’t bring those charges.
  + Hubbell essentially holds that you shouldn’t grant immunity to your target unless you’ve exhausted every alternative means of gathering evidence because your charges will be assessed based on your knowledge/evidence that you had when you granted immunity since it’s so incredibly difficult to establish that you would have inevitably discovered anything you get after having granted immunity.
* **Derivative use**:
  + The direct use of testimonial aspects of the act of production is not at issue because the government has **no intention of introducing evidence directly responsive to the subpoena**.
  + However, if the testimonial aspects of the act of production provide a “**link in the chain of evidence needed to prosecute**,” or a “lead to incriminating evidence,” apart from the preexisting contents of the documents submitted, then use of such leads/links is barred under 5th amendment/6002 immunity.
    - Appears to change the result of possession of documents that is not itself illegal (such as possession of a firearm without a license) but that have contents showing illegal acts, to the extent the testimonial aspects of the submission provides a direct link in the chain of evidence, including a link to the incriminating contents of the documents.
* **Document Identification Testimony**:
  + Here, because the “mental and physical steps” necessary to provide the prosecutor with the many sources of potentially incriminating information (including the “**extensive use” of the ‘contents of his own mind’ in identifying responsive documents**) were necessary to the ultimate success of the fishing expedition, the government’s very possession of those documents was itself a product of testimonial aspects of the response to the subpoena.
  + Accordingly, the government is barred from using those documents, or documents derivative of those documents in bringing criminal charges against the defendant.
  + Post-Hubbel it appears that with any subpoena the respondent should be able to argue that their act of production was testimonial in that they used the “contents of their mind” to determine which documents were responsive to the subpoena.
* **Fisher foregone conclusion exception**:
  + Court cabins Fisher result (tax documents not protected by 5th) on the grounds that the existence and location of those particular tax documents were already known to the government and thus, a foregone conclusion
  + Makes sense because the govt wouldn’t need to utilize the “contents of defendant’s mind” in identifying which documents are responsive to subpoena, since they already know which documents they are, having identified them with reasonable particularity.
  + Here, the assertion that the gov’t knew that businessmen generally keep business records is too broad to constitute a foregone conclusion with respect to any specific documents.
  + **Reasonable particularity standard**: Courts have subsequently introduced a “reasonable particularity” standard to determine whether the gov’t had sufficient preexisting knowledge of the documents to render testimonial aspects of their submission foregone conclusions.

1. Attorney Client Privilege and Attorney Work Product
2. Scope of Privilege

Elements:

1. The asserted holder of the privilege is or sought to become a client;
2. The person to whom the communication was made
   1. Is a member of the bar of a court, or his subordinate and
   2. In connection with this communication is acting as an attorney;
3. The communication relates to a fact of which the atty was informed
   1. By his client
   2. In confidence (without the presence of strangers)
   3. For the purpose of securing primarily either
      1. An opinion of law
      2. Legal services or
      3. Assistance in some legal proceeding AND
      4. NOT for the purpose of committing a crime or tort AND
4. The privilege has been
   1. claimed AND
   2. not waived by the client

Basic concepts:

* “**Interpreters” do not break confidence**: Notes in book describe so-called “interpreters” for atty-client communications who do not break confidentiality and thus, privilege, by virtue of their inclusion.
  + Includes co-counsel, secretaries, certain forensic accountants (so-called Kovel accountants brought in to assist in the attys comprehension of the law).
  + Would not include investment banker brought in to conversation for the purpose of business advice.
* **Business advice vs. legal advice distinction**: only communications seeking legal advice are protected, which can be very significant for in-house counsel who often participate in business decisions.
* Selective waivers: not generally acceptable so **waiver to one party waives privilege to all parties**.
* Crime-fraud exception: communication can’t be for the purpose of facilitating a crime/fraud, such as advice on how not to get caught or avoid felony murder in the commission of a crime.

Work-product:

* Documents prepared by atty “in anticipation of litigation” absent a showing of “substantial need.”
  + Litigation must be “primary motivating purpose for creating document.
* For example, atty interviews witness who is not a client, memorandum would not be protected by atty-client privilege, but instead by work product doctrine.

Upjohn (1981):

* Facts:
  + Accountants alert firm to irregularities in audit of subsidiary suggestive of FCPA violations.
  + GC initiates internal investigation, sending letter to company explaining things, providing questionnaires, and requesting that all communications relating to this be sent directly to GC.
  + They inform SEC and IRS of goings on.
    - Note here: why is the IRS involved? They probably deducted bribes as business expenses, which is tax evasion.
  + SEC requests all the questionnaires and memorandums and notes of interviews
* Notice: no 5th amendment right here because corporation has no 5th right and there’s no natural person to assert it on their own behalf since it’s business documents.
* In contrast, agents can assert atty-client privilege on behalf of the firm.
  + Why?
  + 5th amendment is about preventing coerced confessions because they are opposed to truth and justice, a fear which does no manifest in the case of a corp, since only natural persons can be tortured.
  + Atty-client privilege is similarly truth seeking in that it plays an essential role in leveling the playing field for litigation, the adversarial system we have constructed to serve as our truth-seeking institution. To allow the government to undermine effective assistance of counsel by threatening candor with counsel would undermine the adversarial system, whether or not the defendant is a corporation or an individual.
* But in the context of corporate atty-client privilege, who is the client?
  + Previously, courts had used the “control group test:” limiting the scope of the client to those with authority to make decisions about legal strategy for the firm, on the theory that only those who could be making decisions on the basis of legal advice could coherently be said to consult an atty for legal advice (it’s not advice if you have no power to follow it).
  + But Court finds this insufficient because the corporation needs to be able to elicit candid consultation with anyone whose actions could result in liability for the firm, since the attorney must be able to advise those whose actions can result in criminal liability for the client, the firm, which is anyone within the scope of vicarious liability.
    - However, the Court fails to articulate this allegedly clearer test, so all we really know is that what Upjohn did worked:
      * **Told employees conversations were confidential**
      * **Made clear to employees that these communications were with the firm’s lawyer speaking to the firm (so it’s the firm’s privilege)**
      * **Concerned matter within the scope of employees’ corporate duties**
      * **The firm needed to talk to low level people in order to make legal decisions**
      * Post-upjohn, companies just try to adhere to this fact pattern as closely as possible.
* Work-product: so while the court rules that questionnaires and interview transcripts are protected by atty-client privilege, the subpoenas reach to notes about this stuff as well.
  + Notes are protected by work product doctrine as they reflect mental processes of atty.

Policy:

* Notice certain advantages over your average murder defendant:
  + Witnesses are usually your employees, who you’ve already talked to with corporate counsel
  + Employees have vested interest in well-being of firm (in theory)
  + Sometimes can’t get to witnesses in foreign countries
  + They can’t talk to witnesses without corporate counsel present
* DOJ addresses some of these problems in lenience guidelines
  + They used to request waiver of atty-client privilege/work product but this has been deemed contrary to the public interest in candor with counsel
  + They stopped doing this generally, but still provide leniency for providing the “facts” of the investigation (such as report generated from internal investigation).

1. Waiver

* It’s the firm’s privilege:
  + CEO can’t prevent waiver
  + Employees who interviewed can’t prevent waiver (which is why you have to make it clear that they are talking to corporate counsel and not their own counsel).
  + Board of directors would make the decision.