Criminal Law and Cyber Crime

INTRODUCTION

This chapter may be the first, and will probably be the last, study of criminal law for most of your students. Nevertheless, it may also be one of the most interesting chapters for them.

Sanctions used to maintain a peaceful and ordered society, in which businesses can compete and flourish, include damages for tortious conduct and breaches of contract. Courts of equity may restrain certain unlawful conduct or require that things done unlawfully or having certain unlawful effects be undone by tailoring other relief to fit the circumstances.

Punitive sanctions have developed for other, particularly undesirable acts. These acts are crimes. A crime is a wrong defined by and perpetrated against society. Just as the sanctions are different from those in the civil law, criminal law prerequisites of fault or guilt are different. Also, unlike torts, courts cannot create new crimes. Only legislative bodies can create or abolish crimes as public knowledge, experience, and technology change.

Cyber crime, which is a category that groups crimes according to a particular means of commission, is also discussed in this chapter.

ADDITIONAL RESOURCES—

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AUDIO & VIDEO SUPPLEMENTS ★☆★

The following audio and video supplements relate to topics discussed in this chapter—
CHAPTER OUTLINE

I. Civil Law and Criminal Law
   Civil law relates to duties between persons or between citizens and their governments, except for the duty not to commit crimes. Criminal law concerns crime—wrongs against society declared in statutes and punishable through fines, imprisonment, or death. Crimes are offenses against society as a whole and are prosecuted by public officials (local district attorneys, for example), not by victims.

A. MAJOR DIFFERENCES BETWEEN CIVIL AND CRIMINAL LAW

   1. Burden of Proof
      Proof that a certain person committed a crime must be beyond a reasonable doubt. The government must prove that the defendant committed each element of the offense with which she or he is charged beyond a reasonable doubt. If a jury views the evidence as reasonably permitting either a guilty or a not guilty verdict, then the jury's verdict must be not guilty.

   2. Criminal Sanctions
      Criminal sanctions are intended to punish those who commit crimes and to deter others from committing similar acts. Sanctions include fines, imprisonment, and death.

B. CIVIL LIABILITY FOR CRIMINAL ACTS
   Criminal acts may also be subject to civil liability.

II. Classification of Crimes
   Crimes are classified as felonies or misdemeanors.

A. FELONIES
   Felonies are punishable by death or by imprisonment in a federal or state penitentiary for more than a year. Felonies can be subdivided by type of punishment—capital offenses (punishable by death), first degree felonies (punishable by life imprisonment), and so on.

B. MISDEMEANORS AND PETTY OFFENSES
   Misdemeanors (such as disorderly conduct and trespass) are crimes punishable by a fine or by confinement for up to a year in a local jail. Some states classify misdemeanors according to lengths of confinement. Petty offenses (for example, traffic violations) are a subset of misdemeanors. A party guilty of a petty offense may be jailed for a few days, fined, or both.

III. Criminal Liability
   Crime requires (1) the performance of a prohibited act and (2) a specified state of mind. All criminal statutes prohibit certain behavior.
CHAPTER 9: CRIMINAL LAW AND CYBER CRIMES

A. THE CRIMINAL ACT
Most crimes require an act of commission—an *actus reus*, or guilty act. Some acts of omission are crimes. Attempting certain acts (murder, for example, or robbery) may also be crimes, if substantial steps toward a criminal objective are taken.

B. STATE OF MIND
What constitutes a wrongful mental state—*mens rea*—varies according to the act. For murder, the act is the taking of a life, and the mental state is the intent to take life. For theft, the act is the taking of another person’s property, and the mental state involves both the knowledge that the property is another’s and the intent to deprive the owner of it.

C. CORPORATE CRIMINAL LIABILITY

1. Liability of the Corporate Entity
A corporation may be held liable for crimes committed by its agents or employees within the course and scope of their employment. The prosecution must show that the corporation authorized or could have prevented the crime. A corporation may also be liable for failing to perform a duty required by law.

2. Liability of Corporate Officers and Directors
Corporate directors and officers are personally liable for the crimes they commit, and may be liable for the actions of employees under their supervision under the “responsible corporate officer” doctrine.

☆ ★ ★ ANSWER TO VIDEO QUESTION LTR. B ☆ ★ ☆

Assume that Ace committed a crime by giving politicians comps. Can the casino, Tangiers Corporation, be held liable for that crime? Why or why not? How could a court punish the corporation? The Tangiers Corporation could probably be held liable for Ace’s crimes. Corporations normally are liable for the crimes committed by their agents and employees within the course and scope of their employment. The corporation obviously cannot be imprisoned, but it could be fined or denied certain legal privileges.

IV. Types of Crimes
Criminal acts can be grouped into the following categories.

A. VIOLENT CRIME
Murder, sexual assault (rape), assault and battery, robbery (the taking of another’s personal property, from his or her person or immediate presence, by force or intimidation)—these crimes are classified by degree, subject to intent, weapon, and level of victim’s pain and suffering.

B. PROPERTY CRIME

1. Burglary
*Burglary* is, in most states, breaking and entering the building of another.

2. Larceny
*Larceny* is the wrongful or fraudulent taking and carrying away by any person of the personal property of another.
3. Arson
Arson is the willful and malicious burning of a building or some other structure, and in some states personal property.

4. Receiving Stolen Goods

5. Forgery
Forgery is the fraudulent making or alteration of any writing that changes the legal liability of another.

6. Obtaining Goods by False Pretenses
Obtaining goods by false pretenses is representing as true some fact or circumstance that is not true, with the intent of deceiving and with the result of defrauding an individual into relinquishing property without adequate compensation.

C. PUBLIC ORDER CRIME
Public drunkenness, prostitution, gambling, illegal drug use.

ENHANCING YOUR LECTURE—

THE CASE OF THE “CUSSING CANOEIST”

Timothy Boomer, then a twenty-eight-year-old engineer, went on a swearing rampage when his canoe tipped over on the Rifle River in Michigan. Others heard the swearing, including a couple and their two children, and a sheriff, who wrote him a ticket for violating an 1897 Michigan law that banned cursing in front of women and children. Specifically, the law made it illegal for anyone to use indecent, immoral, obscene, vulgar, or insulting language near children and women. Boomer was convicted and ordered to pay a fine of $75 and serve four days in a child-care program. Boomer, with the assistance of the American Civil Liberties Union, appealed the decision, arguing that the law was unconstitutionally vague. After all, what might be considered “vulgar” or “obscene” to one person might not be by another. A Michigan appellate court agreed and struck down the law.*

THE BOTTOM LINE

Eight other states—Louisiana, New Mexico, Oklahoma, South Carolina, South Dakota, Texas, Virginia, and Wisconsin—also have “swearing laws.” Whether these laws will survive challenges remains to be seen.

D. WHITE-COLLAR CRIME
White-collar crime is often committed in the course of a legitimate occupation.

ADDITIONAL BACKGROUND—

The Creation of Embezzlement

In 1799, in England, a bank clerk received from a depositor money for deposit in the bank. The bank clerk put the money in his pocket instead of the cash drawer, intending to misappropriate it. He was caught and charged with larceny.
The Doctrine of Constructive Possession. Larceny was a common law crime (that is, it had been invented by judges rather than Parliament). Larceny was committed when one person misappropriated the property of another by taking the property from the owner’s possession without his or her consent. Requiring that the property be taken from the owner’s possession proved to be a difficult element. For example, if a master gave property to his servant to keep for him, the servant’s subsequent misappropriation could not qualify as larceny. Thus, the courts invented the doctrine of constructive possession, under which, when an employer handed property to an employee, the employee was considered to have mere custody of the property and the employer impliedly remained in possession.

In the bank clerk’s case, the clerk had not taken the money from the possession of the bank. The clerk had put the money in his pocket before it came into the bank’s possession. It might have been argued that the bank had constructive possession of the money—in other words, when the depositor handed the money to the bank clerk, possession immediately lodged in the bank with the clerk merely acquiring custody. Under this argument, the clerk’s misappropriation would amount to common law larceny.

The court held, however, that the constructive possession idea did not apply to property coming to an employee for an employer from a third person until the employee handed the property to the employer or put it in a receptacle, such as a cash drawer, provided by the employer for safe-keeping. The result was that the bank clerk was not held guilty of larceny—and there was then no other crime that covered his conduct.

Embezzlement Statutes. Of course, it was the turn of the eighteenth century, and the times were changing. Shops and banks were growing into something more than one-person and one-family operations. It was necessary to make conduct such as the bank clerk’s criminal. Accordingly, in the same year as the court’s decision in the bank clerk’s case, Parliament enacted the first of a long line of embezzlement statutes.

Earlier, English judges had not hesitated in the face of the need to create the common law crimes of murder, manslaughter, burglary, arson, robbery, larceny, and others. Why did the judges hesitate in the late 1700s to expand larceny to include embezzlement? At the end of the eighteenth century, Parliament was advancing in power and prestige. Also, increasingly, the courts were coming to be seen as interpreters of custom rather than as framers of policy. Perhaps a more direct influence was a contemporary revulsion for capital punishment, which was the penalty for all theft except petty larceny during most of the 1700s. The severity of the penalty made judges reluctant to increase the number and kinds of acts that would fit the definition of larceny. In fact, there were a number of judge-made exclusions grafted onto the offense (for example, the exclusion of thefts of fixtures, deeds, and dogs).

Parliament, too, elected not to alter the old crime of larceny to cover embezzlement. Instead, it created a new crime and assigned it a less severe punishment than that for larceny. In America, the states generally adopted England’s division of theft into three separate crimes—larceny, embezzlement, and false pretenses. This division has often caused difficulties in successfully prosecuting thieves.


1. Embezzlement

Embezzlement is the fraudulent conversion of property or money owned by one person but entrusted to another. Intending to ultimately return embezzled property is not a defense.
2. **Mail and Wire Fraud**

*Use of the mails to defraud* is a federal crime that requires (1) devising a scheme to defraud and (2) using the mails to carry it out.

**CASE SYNOPSIS—**

**Case 9.1: United States v. Lyons**

In 1994, in California, Gabriel Sanchez and Timothy Lyons set up six charities and hired telemarketers to solicit donations. More than $6 million was raised. The telemarketers kept 80 percent as commissions, and Lyons took 10 percent. Most of the rest of the money went to Sanchez, who spent it on himself. In 2002, Lyons and Sanchez were charged in a federal district court with mail fraud and other crimes. The defendants were convicted and imprisoned. They appealed, asserting that the prosecution had used the high cost of fundraising as evidence of fraud even though the defendants had not lied about the cost.

The U.S. Court of Appeals for the Ninth Circuit upheld the convictions. The defendants’ “undoing was not that the commissions were large but that their charitable web was a scam.” A failure to reveal the high cost of fundraising to potential donors does not establish fraud. But when “nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener,” the high cost of fundraising may be introduced as evidence of fraud.

Notes and Questions

The court explained that “many charities, especially small, obscure or unpopular ones, could not fund their operations without telemarketers. Some professional telemarketers take the lion’s share of solicited donations, sometimes requiring and receiving commission rates of up to 85%. Most donors would probably be shocked or surprised to learn that most of their contributions were going to for-profit telemarketers instead of charitable activities. But ... the bare failure to disclose these high costs to donors cannot, by itself, support a fraud conviction.”

Could the prosecution have proved fraud on the part of Lyons and Sanchez by showing that 10 to 20 percent of the donations to their six charities were not spent on charitable activities, without showing what happened to the rest of the money? No. The prosecution could not have proved fraud solely by showing that 80 percent or more of the donated funds were paid to the telemarketers. Similarly, a showing that a percentage of the funds was not spent on the charities could not, without more, support a fraud conviction. In this case, however, “[t]he evidence is overwhelming that between telemarketers’ fees and Lyons’ and Sanchez’s personal expenses, the six FCL charities spent virtually no money on charitable activities promised to donors.”

**ANSWER TO “THE ETHICAL DIMENSION” QUESTION IN CASE 9.1**

*It may have been legal in this case, but was it ethical for the prosecution to repeatedly emphasize the size of the telemarketers’ commissions? Why or why not?* Probably, at least within the context of this case. In the assessment of the court, the prosecution “did not solely or relentlessly focus on the high cost of fundraising to prove fraud. To be sure, the government asked many witnesses about the high fundraising costs, but the vast bulk of questions concerned misrepresentations or FCL’s failure to apply donated funds to charitable purposes. Nor was the high commission rate itself a basis of the government’s fraud case. Rather, the commission was a legitimate expense and part of the overall picture of how the money was allocated.”
ANSWER TO “THE LEGAL ENVIRONMENT DIMENSION”  
QUESTION IN CASE 9.1

In what circumstance would the prosecution be prevented from introducing evidence of high fund-raising costs? Why?
The court pointed out in the Lyons case that “the government is constrained from charging that high fundraising costs per se are tantamount to fraud.” The court explained that the reason for this constraint is that under the First Amendment “the solicitation of charitable contributions is protected speech, and ... using percentages to decide the legality of the fundraiser’s fee is not narrowly tailored to the State’s interest in preventing fraud.”

3. Bribery
- Bribery of public officials is a crime. The bribe can be of anything that the official considers valuable. Commission of the crime occurs when the bribe is tendered—the official does not have to agree to do anything nor even accept the bribe.
- Commercial bribery—kickbacks and payoffs from an individual working for one company to another individual working for another company—is a crime. Commercial bribes are typically given to obtain proprietary information, cover up an inferior product, or secure new business. Industrial espionage sometimes involves commercial bribery.
- Bribing foreign officials to obtain favorable business contracts is a crime.

ANSWER TO VIDEO QUESTION LTR. A

In the video, a casino manager, Ace (Robert DeNiro), discusses how politicians “won their ‘comp life’ when they got elected.” “Comps” are the free gifts that casinos give to high-stakes gamblers to keep their business. If an elected official accepts comps, is he or she committing a crime? If so, what type of crime? Explain your answers. The elected official is probably not committing a crime simply by accepting the casino’s ‘comps’, but if the ‘comps’ are given in exchange for political favors, the official is accepting a bribe. Bribery is a white-collar crime—a non-violent crime committed in the course of a legitimate occupation to obtain a personal or business advantage.

4. Bankruptcy Fraud
To be relieved of oppressive debt under the bankruptcy laws (Chapter 30), a debtor must disclose all assets. A debtor who fraudulently transfers assets to favored parties before or after petitioning for bankruptcy, or who fraudulently conceals property commits a crime. Creditors may not file false claims against a debtor.

5. Insider Trading
An individual who obtains material inside information about a corporation can often make considerable profit by using the information to buy and sell the corporation’s securities. Insider trading is covered under federal securities laws (Chapter 41).

6. The Theft of Trade Secrets
The Economic Espionage Act of 1996 made the theft of trade secrets a federal crime. The act also made it a crime to buy or possess trade secrets of another, knowing that they were acquired without the owner’s authorization. Sanctions include imprisonment up to ten years and fines up to $500,000 ($5 million for a corporation or other entity). Property acquired as a result of the violation and property used in its commission is subject to forfeiture.
E. ORGANIZED CRIME
Organized crime operates illegitimately to supply illegal goods and services.

1. Money Laundering
Under federal law, financial institutions must report currency transactions of over $10,000. To avoid detection under this law, those who engage in illegal activities may attempt to launder the money through legitimate businesses. For example, criminal profits might be reported as a restaurant’s income.

2. RICO
To curb the entry of organized crime into legitimate business, the Organized Crime Control Act of 1970 included the Racketeer Influenced and Corrupt Organizations Act (RICO).

   a. Prohibited Activities
   It is a federal crime (1) to use income obtained from racketeering activity to purchase any interest in an enterprise, (2) to acquire or maintain an interest in an enterprise through racketeering activity, (3) to conduct or participate in the affairs of an enterprise through racketeering activity, or (4) to conspire to do any of these things.

   b. Criminal Provisions
   RICO incorporates by reference twenty-six federal crimes and nine state felonies; if a person commits two of these offenses, he or she is guilty of racketeering activity. Criminal sanctions include fines up to $25,000 per violation or imprisonment up to twenty years, or both, and forfeiture of assets used in the illegal activity or acquired because of it.

   c. Civil Liability
   The government can seek divestiture of a defendant’s interest in a business or dissolution of the business. Private individuals may recover treble damages, plus attorneys' fees, for business injuries caused by a violation of the statute.

V. Defenses to Criminal Liability
The burden of proving a defense is on the accused.

A. INFANCY
Children (i.e., those under the age of majority) may be tried in juvenile courts. Exceptions in some states include those over fourteen charged with a felony.

B. INTOXICATION
Involuntary intoxication is a defense if its effect was to make a person either incapable of understanding that the act committed was wrong or incapable of obeying the law. Voluntary intoxication is a defense if it precludes having the required mental state, but it is not a defense to crimes of recklessness or negligence.

C. INSANITY
To defend against charges on this ground, a defendant must meet a test for legal insanity. Most federal courts and some states use the test in the Model Penal Code: “A person is not responsible for criminal conduct if ... as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.” Other states use the M’Naghten test. Some states use the irresistible impulse test.

D. MISTAKE
In some states, a person who claims that he or she honestly did not know that a law was being broken may have a valid defense if the law was not published, or reasonably made known to the
E. CONSENT
Consent is not a defense to most crimes. For instance, the law forbids murder whether or not the victim consents. Consent is most successful as a defense to charges of crimes against property.

F. DURESS
Duress exists when a wrongful threat induces a person to do something that he or she would not otherwise do. Duress excuses the crime if the threat is immediate and inescapable.

G. JUSTIFIABLE USE OF FORCE
Generally, people can use the amount of force that is reasonably necessary to protect themselves, their dwellings or other property, or to prevent the commission of a crime. Deadly force can be used in self-defense if there is a reasonable belief that imminent death or great bodily harm will otherwise result. Deadly force can be used to defend a dwelling only to prevent imminent death or great bodily harm, or (in some jurisdictions) to prevent the commission of a felony in the dwelling.

H. NECESSITY
A defendant may be relieved of liability if his or her criminal act was necessary to prevent an even greater harm.

I. ENTRAPMENT
This occurs when a government officer suggests that a crime be committed and pressures or induces an individual to commit it. The important issue is whether a person who committed a crime was predisposed to do so.

J. STATUTES OF LIMITATIONS
Most crimes, with the exception of murder, must be prosecuted within a certain time.

K. IMMUNITY
To obtain information, the state can grant immunity from prosecution. A person may then be compelled to answer questions (under the Fifth Amendment a person can refuse to answer questions only on the ground of self-incrimination). Often a grant of immunity is part of a plea bargain under which a defendant may be convicted of a lesser offense, and the state uses his or her testimony to prosecute accomplices for more serious crimes.

ANSWERS TO CRITICAL ANALYSIS QUESTIONS IN THE FEATURE—EMERGING TRENDS IN BUSINESS LAW

1. Those who are against stand-your-ground laws argue that they encourage vigilantism and preemptive shootings. Do you agree? Explain. No, because such laws discourage crime, and a lessening of crime reduces vigilantism and preemptive shootings by otherwise law-abiding citizens. Yes, because such laws encourage persons to “take the law into their own hands” with impunity.

2. “A person’s home is his or her castle.” Does this traditional saying justify the use of deadly force against an intruder under all circumstances? Why or why not? No, human life is more valuable than property under any circumstance, even when that life belongs to an intruder. Yes, because an intrusion into one’s “castle” or other property can be as fearful and threatening as an act against one’s “person.”
Plea Bargaining

In most criminal cases, defendants plead guilty. Usually, this is after the prosecutor promises that concessions will be granted (or at least sought). This is known as plea negotiation, or plea bargaining. Sometimes a defendant agrees to plead guilty to a charge less serious than the evidence supports because the consequences are not as undesirable. A lesser penalty will result, for example. In other cases, a defendant pleads guilty to the original charge in exchange for the prosecutor’s promise to seek leniency, or at least not to oppose the defendant’s request for leniency, or to drop other charges.

Plea bargaining came about, in part, because of crowded court dockets and expensive changes in the jury process. Thus, from the prosecutor’s point of view, plea bargaining helps dispose of large numbers of cases—in some cities, 80 to 95 percent of all criminal cases—in a quick and simple way. Critics charge that the practice has at least two negative results: serious offenders get undeserved leniency and innocent persons plead guilty (to avoid delays before trial and risks of conviction on greater charges).

VI. Criminal Procedures

Criminal procedures protect the rights of the individual and preserve the presumption of innocence.

A. FOURTH, FIFTH, SIXTH, AND EIGHTH AMENDMENT PROTECTIONS

These safeguards apply in all federal courts. The United States Supreme Court has ruled that most of them also apply in state courts (by virtue of the due process clause of the Fourteenth Amendment). They include—

- The Fourth Amendment protection from unreasonable searches and seizures.
- The Fourth Amendment requirement that no warrants for a search or an arrest can be issued without probable cause.
- The Fifth Amendment requirement that no one can be deprived of “life, liberty, or property without due process of law.”
- The Fifth Amendment prohibition against double jeopardy.
- The Sixth Amendment guarantees of a speedy trial, trial by jury, a public trial, the right to confront witnesses, and the right to legal counsel.
- The Eighth Amendment prohibitions against excessive bail and fines and cruel and unusual punishment.

B. THE EXCLUSIONARY RULE

Under the exclusionary rule, all evidence obtained in violation of the rights spelled out in the Fourth, Fifth, and Sixth Amendments must be excluded, as well as all evidence derived from the illegally obtained evidence. The courts exercise some discretion in determining whether evidence has been obtained improperly.

☆ ★☆ ★☆ ANSWER TO VIDEO QUESTION LTR. C ☆ ★☆

Suppose that the Federal Bureau of Investigation (FBI) wants to search the premises of Tangiers for evidence of criminal activity. If casino management refuses to consent to the search, what constitutional safeguards and criminal procedures, if any, protect Tangiers? The Fourth Amendment provides protection against unreasonable searches and seizures and re-
quires that probable cause must exist before a warrant for a search or arrest can be issued. If the management at Tangiers refuses to consent to a search, the Federal Bureau of Investigation (FBI) will have to get a search warrant. If the FBI searches without a warrant and cannot show that it had a legal reason to do so (consent or exigent circumstances), the exclusionary rule will prohibit the introduction at trial of any evidence the FBI obtains.

CASE SYNOPSIS—

**Case 9.2: Fellers v. United States**

In February 2000, an indictment was issued charging John Fellers with conspiracy to distribute methamphetamine. Police officers went to Fellers’s home to arrest him where he admitted that he had used methamphetamine. The officers took Fellers to jail and advised him for the first time of his right to counsel. He waived this right and repeated his earlier statements. After Fellers’s conviction, he appealed to the U.S. Court of Appeals for the Eighth Circuit, arguing that the officers had elicited his incriminating “home statements” without advising him of his right to counsel and that his “jailhouse statements” should thus have been excluded from his trial as “fruits” of his earlier statements. The appellate court affirmed. Fellers appealed.

The United States Supreme Court reversed and remanded. The Sixth Amendment bars the use at trial of a suspect’s incriminating words, deliberately elicited by police after an indictment, in the absence of either counsel or a waiver of the right to counsel, regardless of whether police conduct constitutes an “interrogation.” Here, Fellers’ “discussion” with the police “took place after petitioner had been indicted, outside the presence of counsel, and in the absence of any waiver of petitioner’s Sixth Amendment rights.”

Notes and Questions

Isn’t it simply “routine police practice” for police officers to inform an indicted suspect that they want to talk about pending charges, as the officers did in this case? This is what the government argued in its defense. The Court recognized that indicted suspects have certain rights, but in remanding this case the Court postponed deciding the extent of those rights.

**ANSWERS TO QUESTIONS AT THE END OF CASE 9.2**

1. Why did Fellers argue on appeal that his “jailhouse statements” should have been excluded from his trial? It appears that without those statements, the government may not have been able to obtain a conviction against Fellers for the offenses with which he was charged.

2. Should Fellers’s “jailhouse statements” have been excluded from his trial? Why or why not? This was the issue for a determination of which the Court remanded the case. The Court held that the lower court “improperly conducted its ‘fruits’ analysis under” the wrong principles. “Specifically, it *** [held] that the admissibility of the jailhouse statements turns solely on whether the statements were knowingly and voluntarily made. The Court of Appeals did not reach the question whether the Sixth Amendment requires suppression of petitioner’s jailhouse statements on the ground that they were the fruits of previous questioning conducted in violation of the Sixth Amendment deliberate-elicitation standard.” It could be argued that the later statements should be
excluded because they were only repetitions of the earlier excludable statements. It could be argued that they are admissible, however, because they were made after the suspect had been advised of his rights.

C. THE MIRANDA RULE

Individuals who are arrested must be informed that they have a right to remain silent and a right to legal counsel. These rights may be waived if the waiver is knowing and voluntary.

CASE SYNOPSIS—

Case 9.3: Miranda v. Arizona

Ernesto Miranda was arrested for kidnapping and raping an eighteen-year-old girl near Phoenix, Arizona. During the police interrogation, Miranda, who was not informed of his right to remain silent or his right to counsel, confessed to the crime. The confession was introduced at trial, and Miranda was convicted. Miranda appealed, claiming that he had not been informed of his constitutional rights. His case was consolidated with three other cases involving similar issues and reviewed by the United States Supreme Court.

The United States Supreme Court reversed Miranda’s conviction, ruling that he could not be convicted of the crime on the basis of his confession because his confession was inadmissible as evidence. As a prerequisite to the admissibility of any statement made by a defendant, the defendant must be informed, before a police interrogation, of certain constitutional rights. These are: (1) that he or she has a right to remain silent, (2) that anything said can and will be used against the individual in court, (3) that he or she has the right to have an attorney present during questioning, and (4) that if the individual cannot afford an attorney, one will be appointed. If the accused waives his or her rights to remain silent and to have counsel present, the government must be able to demonstrate that the waiver was done knowingly and intelligently.

Notes and Questions

Why wasn’t the paragraph at the top of Miranda’s signed confession, stating that he had “full knowledge of [his] legal rights,” sufficient to waive those rights? This paragraph was not in sufficiently “clear and unequivocal terms.” The United States Supreme Court stated, “From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had ‘full knowledge’ of his ‘legal rights’ does not approach the knowing and intelligent waiver required to relinquish constitutional rights.” [Emphasis added.]

Is the Miranda decision an unnecessary burden on law enforcement? The actual reading of the Miranda rights takes less than a minute. It is possible, however, that fewer confessions and self-incriminating statements have been made by criminal suspects since Miranda than before that decision was rendered. Given that the decision has survived largely intact for over thirty-five years, there appears to be substantial support among judges, lawyers, and law enforcement officials for the proposition that the gain in procedural fairness outweighs any reduction in the efficiency of law enforcement.
Although the Supreme Court has held that the remedy for the failure to read the *Miranda* warnings is to make the defendant’s pre-warning statements inadmissible as evidence, alternative remedies could be imagined. Should the suppression-of-evidence remedy be abolished and criminal defendants given instead a cause of action for civil damages against police departments whose officers fail to read defendants their rights? Such an alternative approach might modestly increase conviction rates. The civil damages remedy, however, would not address the procedural unfairness of convictions based on defendants’ ignorance of their rights.

Should illegally seized evidence be excluded from a criminal trial even if the evidence clearly shows the guilt of the person charged? Why should defendants who have admitted that they are guilty be allowed to avoid criminal liability because of procedural violations? The Bill of Rights was enacted to protect all citizens’ civil rights from the potential coercion of the government. The Constitution is the supreme law of the land and violations of these rights are among the most serious transgressions. Policies behind the *Miranda* decision include the fact that accused persons may be citizens who have the constitutional right against self-incrimination. Of course, there is also the policy that criminals should be brought to justice. As the question suggests, these policies can conflict when, for example, evidence obtained in violation of an accused’s constitutional rights is excluded from trial. Essentially, the law attempts to balance the rights of all citizens, including criminal defendants, against the need to protect all citizens from crimes. The ethical underpinnings for these policies and their application can be ascribed to all sources of ethical principles—religion and philosophy—and viable arguments can be made for nearly any point of view.

**ADDITIONAL CASES ADDRESSING THIS ISSUE —**

Recent cases considering, in the context of the *Miranda* rule, whether an accused’s statements to the police are admissible include the following.

- **United States v. Abdulla,** 294 F.3d 830 (7th Cir. 2002) (a defendant’s spontaneous statement to police officers, while in custody, that “I robbed a bank, everyone knows I robbed a bank,” was voluntary, even though the statement was made before the defendant was advised of his *Miranda* rights and even though he had previously responded with an identical statement when the police asked him whether he knew why he was being arrested).

- **People v. Sanders,** __ A.D.2d __, 743 N.Y.S.2d 618 (3 Dept. 2002) (the failure of the police to read-administer *Miranda* warnings after a break in questioning a defendant did not render the defendant’s later statements involuntary, when the defendant was continuously in custody, the statements were made no more than two and a half hours after the *Miranda* warnings were administered, and there was no proof that the defendant exercised his right to remain silent or that the officers used tactics that overbore his will).


- **State v. Higgins,** 2002 Me. 77, 796 A.2d 50 (2002) (“custodial interrogation,” for the purposes of determining whether a *Miranda* warning is required before questioning a defendant, is questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, and thus a *Miranda* warning is necessary only if a defendant is (1) in custody, and (2) subject to interrogation).

- **State v. Pender,** 181 Or.App. 559, 47 P.3d 63 (2002) (a police officer’s question to a defendant, as he was placing the defendant under arrest, but before giving the defendant the *Miranda* warnings, as to whether the defendant had knives, guns, or syringes, was permissible under the exception to the
general rule that officers are required to deliver Miranda warnings before subjecting suspects to custodial interrogation for considerations of public safety).

ADDITIONAL BACKGROUND—

**The Miranda Rights**

In *Miranda v. Arizona*, the United States Supreme Court held that the police must inform suspects, before interrogation, of certain constitutional rights. These rights have become popularly known as the **Miranda rights**.

**Voluntariness Test.** Before the United States Supreme Court decided the *Miranda* case, the admissibility at trial of a confession was governed by the voluntariness test—voluntary confessions were admissible; involuntary confessions were not. Because the voluntariness test was uncertain, however, each case had to be evaluated on its own facts, and trial and appellate courts had considerable leeway to go either way on the voluntariness question. Over a period of more than thirty years, the Supreme Court decided more than sixty cases under the voluntariness test, but the test never became any more certain or objective. For example, a confession was not automatically ruled involuntary if the police denied a suspect’s request to consult with an attorney before interrogation, but the denial was a factor for a court to consider, along with all the other circumstances, in determining whether a suspect’s statement was voluntary.

During the 1960s, disillusionment with the voluntariness test converged with other events to create pressure for a more concrete approach to confession law. This period witnessed renewed interest in a suspect’s right to be represented by counsel and a heightened sensitivity to the plight of the poor in the criminal justice system. In 1963, for example, the United States Supreme Court held for the first time that the states had to provide lawyers for indigents in felony trials. Before this decision, many defendants who could not afford lawyers had to defend themselves. In *Escobedo v. Illinois*, the Supreme Court held that the police violated a defendant’s right to counsel when they prevented him from seeing his attorney, who was at the police station, until the interrogation was over. The 1960s also saw the Supreme Court apply to the states most of the provisions of the Bill of Rights—protections in the Constitution that originally applied only against the federal government. In 1964, the Supreme Court held for the first time that the Fifth Amendment protection against compulsory self-incrimination applied to the states as well as the federal government.

**Informing Suspects of Their Rights.** In *Miranda*, the United States Supreme Court relied on the Fifth Amendment prohibition against compulsory self-incrimination, which it had applied to the states just two years earlier. Reviewing the practices of police interrogation, the Supreme Court concluded that certain inherent pressures undermine a suspect’s ability to exercise free choice in deciding whether to make a statement. For example, the Supreme Court observed that a suspect is taken from familiar surroundings to the isolated setting of a police interrogation room, where, cut off from family and friends, the suspect is thrust into a police-dominated atmosphere. The Court viewed the requirement that suspects in custody be informed of their rights before interrogation as necessary to alleviate the pressures. Notice of the right to remain silent “will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.” Because the “circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege,” the Court concluded that a right to the presence of counsel was also necessary. Finally, because the “need for counsel in order to protect the privilege exists for the indigent as well as the affluent,” the Court required the police to advise suspects that a lawyer would be appointed to represent them if they were indigent. Failure of the police to abide by the requisite procedure results in the inadmissibility of the defendant’s statement at trial, even though the statement may be considered voluntary under the old voluntariness test.
Questions and Effects. Although more certain than the old voluntariness test, the Miranda rule created problems of its own. A person must be advised of his or her rights only if the person is in custody. When is a person in custody? The United States Supreme Court has held that a person in a friend’s home and not under arrest is not in custody and thus the person does not have to be informed of his or her rights before being interrogated. The person’s statements are admissible if they satisfy the old voluntariness test. Defining interrogation has also been a difficult issue. Is it interrogation if no questions are asked—for example, is it interrogation if the police simply tell a suspect that her fingerprints were found at the scene of the crime? Suspects can waive their rights, but when is a waiver valid, and for how long? Can a suspect change his or her mind? Can the police keep trying to get a suspect to talk until he or she agrees to do so without a lawyer?

Studies indicate that defendants informed of their rights seldom request counsel and that about as many confessions are obtained by giving the Miranda rights as were gotten before the Miranda decision. It also appears that Miranda has had little effect on conviction rates. This is apparently because most suspects do not grasp the significance of the rights and seem unable to understand that the object of a police officer’s questions is to gather evidence that could put the suspect in jail.

As for Ernesto Miranda, he was retried, with the confession excluded, and reconvicted. In 1976, he was stabbed to death during an argument over a card game in a bar in Phoenix, Arizona. In his pockets were two Miranda cards—that is, cards printed with the Miranda rights. Supposedly, Ernesto Miranda had been printing and selling the cards. One of the police officers took one of the cards from Miranda’s pocket and read one of Miranda’s suspected murderers his rights.

1. Congress’s Response to the Miranda Ruling
Congress enacted the Omnibus Crime Control Act of 1968, which states that confessions voluntarily made can be used against their makers. The United States Supreme Court held that this statute does not overrule the Miranda rights.

2. Exceptions to the Miranda Rule
In some circumstances, a voluntary confession can used even if the accused is not informed of his or her rights. Among other exceptions to the rule, the United States Supreme Court recognized a “public safety” exception and held that a suspect must assertively state that he or she wants to see a lawyer to exercise that right (not “maybe I should talk to a lawyer”).

D. CRIMINAL PROCESS

1. Arrest
Before a warrant for arrest can be issued, probable cause must exist for believing that the individual has committed a crime. An arrest may be made without a warrant when there is no time to get one, but it is still judged by the standard of probable cause.

2. Indictment or Information
Individuals must be formally charged before they can be brought to trial. This charge is by indictment if issued by a grand jury. For lesser crimes, a person may be charged by an information issued by a magistrate (such as a justice of the peace). The grand jury or the magistrate must determine there is sufficient evidence to justify bringing the individual to trial.
3. Trial
At trial, guilt must be proved beyond a reasonable doubt. “Not guilty” does not mean “innocent”; it means that the court had insufficient evidence to enter a “guilty” verdict.

E. Federal Sentencing Guidelines
Federal sentencing guidelines establish a range of penalties for each federal crime.

1. Shift Away from Mandatory Sentencing
A federal judge may depart from the guidelines, however, if he or she believes that it is reasonable to do so.

2. Increased Penalties for Certain Criminal Violations
For criminal violations of securities laws (Chapter 41), antitrust laws (Chapter 46), employment laws (Chapters 33 and 34), mail and wire fraud, commercial bribery, and kickbacks and money laundering (discussed above), judges can take into consideration such factors (listed in the text) as a defendant company’s history of past violations.

VII. Cyber Crime
These are crimes that occur within the Internet community.

A. Cyber Theft
Cyber theft is accessing a computer online, without authority, to obtain classified, restricted, or protected data, or attempting to do so.

1. Financial Crime
Financial crimes include transferring funds via computer without authorization.

2. Identity Theft
Identity theft occurs when a form of identification is stolen and used illegitimately. The Identity Theft and Assumption Deterrence Act of 1998 made this a federal crime. The Fair and Accurate Credit Transactions Act of 2003 gives victims rights to work with creditors and credit bureaus to remove negative information from credit reports. The Identity Theft Penalty Enhancement Act of 2004 authorized more severe penalties.

B. Hacking
Hacking consists of using one computer to break into another.

1. Cyberterrorism
Cyberterrorism is exploiting computers for serious impacts, such as the exploding of an internal data “bomb” to shut down a central computer or spreading a virus to cripple a computer network.

2. The Threat to Business Activities
The consequences of a disruption in communications networks and other possible cyberterrorist acts are mentioned in the text.

C. SPAM
In some states, spamming is a crime (in certain circumstances, a felony).

D. Prosecuting Cyber Crimes
Jurisdictional issues and the anonymous nature of technology can hamper investigation and prosecution of cyber crimes.
E. THE COMPUTER FRAUD AND ABUSE ACT

The Counterfeit Access Device and Computer Fraud and Abuse Act of 1984 prohibits cyber theft. The crime consists of (1) accessing a computer without authority and (2) taking data. Penalties include fines and imprisonment for up to twenty years (and civil suits).

ENHANCING YOUR LECTURE—

“HOW CAN YOU PROTECT AGAINST CYBER CRIME?”

In addition to protecting their physical property, business owners today also are concerned about protecting their intangible property—such as computer data or files—from unauthorized access. U.S. business firms lose millions of dollars to industrial espionage and sabotage every year. Once a computer system has been corrupted, it can be difficult to recover. To prevent losses through computer systems, some firms hire experts to improve the security of the systems.

COMPUTER SYSTEM SAFEGUARDS

Many sources of software offer security programs that can easily be used to protect computers that are connected to an internal network or to the Internet. For example, most word processing programs include a “password” function. To gain access to information within the program, a user must know the password. A document that can be unlocked only with the password can be e-mailed as an attachment, providing some security.

Cryptography also provides increased protection for computer data and files. Encryption hardware is available in the form of computer chips and is commonly used in automated teller machines. These chips quickly encrypt, or decrypt, information. The same results can be achieved using encryption software.

Additionally, effective “firewalls” can be installed at the interface between computers and the Internet to protect against unwanted intruders. Firewall software can also be used to keep internal network segments secure.

EMPLOYMENT POLICIES

Although outside hackers are a threat, employees, former employees, and other “insiders” are responsible for most computer abuse, including breaches of information security. Generally, employees should be given access only to information that they need to know. Additionally, employees and other insiders should be instructed in what constitutes proper and improper use of your company’s computer systems. They should also be told that any form of computer abuse is against company policy, is illegal, and will be the basis for termination of employment.

Another safeguard is to have employees agree, in a written confidentiality agreement, not to disclose confidential information during or after employment without the employer’s consent. Monitoring certain computer-related employee activities may be appropriate, but if monitoring is to take place, employees should be informed (see Chapter 33). Still other security measures include the use of digital signatures (see Chapter 19), facility lockups, visitor screenings, and announced briefcase checks.

CHECKLIST FOR THE BUSINESS OWNER

1. Consider protecting your computer security and documents through the use of passwords, encryption, and firewalls.
2. Instruct your employees in how computers and computer information are to be used and not used.

3. Consider using confidentiality agreements, monitoring, and digital signatures to protect your computer system and data against unauthorized use.

TEACHING SUGGESTIONS

1. A good starting point might be to discuss the basis of criminal responsibility—the criminal act and the criminal state of mind. Emphasize that criminal liability is not imposed for merely thinking about a crime (if it was, we might all be guilty of something). Point out that an accused’s mental state is determined by examining what happens after it happens—in other words, the law uses hindsight to discern intent, which may be evident from an individual’s stated purpose, his or her knowledge, or his or her acting in spite of certain knowledge or in spite of something that he or she should have known. There are some crimes for which an individual will be held strictly liable (selling liquor to a minor, for example).

2. The objectives of criminal law are: (1) to protect persons and property, (2) to deter criminal behavior, (3) to punish criminal conduct, and (4) to rehabilitate criminals. Discuss these objectives with your students. Protecting persons and property is often said to be the ultimate goal of all civilized societies, but what priority should the other three objectives be given? Ask students whether punishment, for example, is more important than rehabilitation. If punishment is emphasized, will that also serve to deter? Is state-met punishment the only deterrent to criminal behavior? Emphasizing deterrence as an objective may serve to create appropriate punishments. What are appropriate punishments? What is an appropriate standard for determining that a criminal has been rehabilitated? How should that standard be met—that is, how should a criminal be rehabilitated (if education is the means, for example, should prisons become trade schools and colleges)?

3. It should be clear to your students by now that the law is not so frozen that there is no room for disagreement. Attorneys, and even judges, often disagree with each other over the interpretation and application of the law. Your students might be reminded that to put apparently contradictory statements together in a meaningful way, they should pay close attention to how you—their teacher—presents the material (what is covered and in what order, for example). You might also remind them that a review shortly after a topic is discussed can be as helpful as the time spent on the topic before it is discussed.

4. Encryption, hacking, and computer security issues are frequently in the news. Choose a contemporary case or circumstance as a springboard for a discussion of the topics covered in this chapter.

Cyberlaw Link

Does the Fourth Amendment prevent the seizure, without cause, of email messages? Does the propagator of a virus (at the time of this writing, “Melissa” is a famous virus) violate traditional criminal laws?

DISCUSSION QUESTIONS

1. On what basis are misdemeanors and felonies distinguished? The punishment: Felonies are crimes punishable by death or by imprisonment in a federal or state penitentiary for more than a year; mis-
demeanors are punishable by a fine or by confinement for up to a year in a local jail. Felonies are often further categorized by type of punishment (for example, capital offenses are those punishable by death and first degree felonies are those punishable by life imprisonment) and may be divided into degrees to provide less severe penalties for some. Some states also classify misdemeanors according to lengths of confinement.

2. **What are the elements of a crime?** A crime requires (1) the performance of a prohibited act and (2) a specified state of mind. All criminal statutes prohibit certain acts. Most are acts of commission; some are acts of omission. Attempting a criminal act may also be a crime, if substantial steps toward a criminal objective are taken. Elements of the requisite state of mind vary with the act. For larceny, for example, the required act is the taking of another person’s property, and the necessary state of mind is both the knowledge that the property is another’s and the intent to deprive the other of it. States of mind also vary in degree, and punishment varies accordingly. There are also certain conditions that will relieve an accused of criminal liability. These are called defenses.

3. **What are some of the crimes affecting businesses?** **Forgery.** Forgery is the fraudulent making or alteration of any writing that changes the legal liability of another. Most states have special statutes for additional prosecution of crimes of forgery involving credit cards. **Robbery.** Robbery is the taking of another’s personal property from his or her person or immediate presence by force or intimidation. **Burglary.** At common law, burglary was breaking and entering the dwelling of another at night with the intent to commit a felony. Most states have eliminated some of these requirements: the time at which the crime occurs is usually immaterial; often, no breaking is required; and all buildings are included. **Larceny.** The wrongful or fraudulent taking and carrying away by any person of the personal property of another is larceny. Larceny is distinguished from robbery by the fact that robbery involves force or intimidation and larceny does not. **Obtaining goods by false pretenses.** Representing as true some fact or circumstance that is not true, with the intent of deceiving and with the result of defrauding an individual into relinquishing property without adequate compensation, is obtaining goods by false pretenses. **Receiving stolen goods.** It is only required that the recipient of stolen goods knows or should have known that the goods are stolen. **Arson.** The willful and malicious burning of a structure (and in some states personal property) owned by another is arson. Every state has a special statute that covers burning a building for the purpose of collecting insurance.

4. **What are some white-collar crimes?** **Embezzlement.** Embezzlement is the fraudulent conversion of property or money owned by one person but entrusted to another. Embezzlement involves conversion by a person in lawful possession of another’s property; larceny involves the taking and carrying away of another’s property, usually without any right to possession. Embezzlement is not robbery because there is no taking by force or intimidation. A special form of embezzlement called misapplication of trust funds occurs when funds are entrusted to a contractor for a specific purpose, and the contractor does not use the money for the purpose. **Use of the mails to defraud.** Use of the mails to defraud requires a scheme to defraud and use of the mails to carry it out. It is also a crime to use a telegram, telephone, radio, or television to defraud. Unlike obtaining goods by false pretenses, mail fraud does not require that the scheme succeed. **Bribery.** Bribery of public officials is a crime. The bribe can include anything that the official considers valuable. The crime occurs when the bribe is tendered (the official does not have to agree to do anything or accept the bribe). In some states, commercial bribery (kickbacks and payoffs) is a crime. Commercial bribes are typically given to obtain proprietary information, cover up an inferior product, or secure new business. Industrial espionage sometimes involves commercial bribery. Bribery foreign officials to obtain favorable business contracts is also a crime. **Insider trading.** Insider trading is using material inside information about a corporation to profit by buying and selling the corporation’s securities. Inside information is information not available to the public. Generally, one who possesses inside information has a duty to disclose it to whoever is on the other side of the transaction.

5. **What are some of the defenses to criminal charges?** **Infancy.** Children up to seven years of age are considered incapable of committing a crime. In most states, children between seven and fourteen are presumed to be incapable of committing a crime, unless the child understood act’s wrongful nature. (Some
states instead set a minimum age for criminal responsibility.) **Intoxication.** Involuntary intoxication (taking an intoxicating substance: by force, unaware that it contains an intoxicant, or under medical advice) is a defense if it makes the person unable to understand that an act was wrong or unable to obey the law. Voluntary intoxication is a defense only if it prevents the requisite state of mind. **Insanity.** An accused must first create a reasonable doubt as to his or her sanity. In some states, he or she must then prove insanity by a preponderance of the evidence; in other states, the state must prove sanity beyond a reasonable doubt. In most federal courts and some states, a person is not responsible for criminal conduct if “as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.” Other states excuse a criminal act if a mental defect makes a person incapable of either appreciating the nature of the act or knowing that it was wrong. Some states excuse an act if a person operating under an irresistible impulse knows that the act is wrong but is unable to keep from doing it. **Mistake.** In some states, a person who claims that he or she honestly did not know that a law was being broken may have a valid defense if the law was not published or reasonably made known to the public, or if the person relied on an official statement of the law that was in error. A mistake of fact, as opposed to a mistake of law, may succeed as a defense if it negates the requisite state of mind. **Consent.** Consent is a defense if it cancels the harm that the law is designed to prevent. The question is whether the law forbids an act against the victim’s will or forbids the act without regard to the victim’s wish. **Duress.** Duress is when a wrongful threat induces a person to do something that he or she would not otherwise do. The threat must be of serious bodily harm or death, the harm that is threatened must be greater than the harm that will be caused by the crime, the threat must be immediate and inescapable, and the situation must have arisen through no fault of the accused. **Justifiable use of force.** Persons may use force that is reasonably necessary to protect themselves, their dwellings or other property, or to prevent the commission of a crime. Deadly force (force likely to result in death or serious bodily harm) may be used in self-defense if there is a reasonable belief that imminent death or great bodily harm will otherwise result, if the attacker is using unlawful force, and if the person has not initiated or provoked the attack. Deadly force can be used to defend a dwelling only if it is believed necessary to prevent imminent death or great bodily harm or (in some jurisdictions) if it is believed necessary to prevent the commission of a felony in the dwelling. In defense of other property, the use of nondeadly force (force that reasonably appears necessary to prevent the imminent use of criminal force) is justified to prevent or to end a criminal attempt to take away or otherwise interfere with the property. Deadly force can be used to prevent only crimes that involve a substantial risk of death or great bodily harm. **Entrapment.** Entrapment occurs when an officer suggests that a crime be committed and pressures or induces an individual to commit it. **Statutes of limitations.** Statutes of limitations provide a time limit within which to prosecute a crime. The limits vary by state and by crime. A limit runs from the time the crime is committed, unless it is a crime that is difficult to discover, in which case it runs from the time the crime is discovered. It is suspended if the suspect leaves the state or cannot be found. Time may be subtracted if the suspect is not available to stand trial. **Immunity.** The state can grant immunity from prosecution.

6. **What are some important constitutional protections of individuals’ rights that apply in the area of criminal law?** Important constitutional protections of individuals’ rights in the area of criminal law include the Fourth Amendment protection against unreasonable searches and seizures; the Fourth Amendment requirement of probable cause before a warrant for a search or an arrest can be issued; the Fifth Amendment requirement that no one can be deprived of life, liberty, or property without due process; the Fifth Amendment prohibition against double jeopardy; the Sixth Amendment guarantees of a speedy trial, trial by jury, a public trial, the right to confront witnesses, and the right to legal counsel; and the Eighth Amendment prohibitions against excessive bail and fines and cruel and unusual punishment. All evidence obtained in violation of the rights guaranteed by the Fourth, Fifth, and Sixth Amendments must be excluded, as must all evidence derived from any illegally obtained evidence. Individuals who are arrested must be informed that they have a right to remain silent and a right to legal counsel. These restrictions apply in all federal courts, and the United States Supreme Court has ruled that most of them also apply in state courts (through the due process clause of the Fourteenth Amendment).

7. **Describe the prosecutorial process from arrest to conviction.** Probable cause must exist for believing that an individual has committed a crime. A warrant for arrest is then issued (an arrest may be
made without a warrant if there is no time to get one, but the probable cause standard still applies). A grand jury or a magistrate determines whether there is sufficient evidence to bring the individual to trial. (The standard used to determine this varies—some courts use probable cause; others, preponderance of the evidence; some, a prima facie case standard). Individuals are formally charged. After the indictment or information is filed, the defendant is arraigned (brought before a judge, informed of the charges, and asked to enter a plea). If the defendant pleads guilty, he or she waives the right to a trial. If not, the case goes to trial. At the trial, the accused need not prove his or her innocence; the prosecution proves the accused's guilt (which must be established beyond a reasonable doubt).

**ACTIVITY AND RESEARCH ASSIGNMENTS**

1. Have students bring to the class current news articles about business-related events that involve crimes or might ultimately involve criminal prosecutions. Ask them to identify possible crimes in the events and to discuss, based on the information in the articles, whether the elements of those crimes have been satisfied. **What are their predictions as to the outcome of any prosecution?**

2. Ask your students to attend a criminal trial and report what they observe. Ask them to find out how long it might be between an accused's arrest and his or her indictment, how long between the indictment and arraignment, and how long before a trial must commence. **Does it make any difference whether the accused is in custody? To what might any delays be attributed? What happens if the state exceeds these time periods?**

**EXPLANATIONS OF SELECTED FOOTNOTES IN THE TEXT**

**Footnote 2:** In the area of substantive criminal law, one of the most significant developments of the last thirty years has been the completion of the Model Penal Code. There were a total of thirteen drafts, consisting of proposed code sections and accompanying commentary, dating from 1953 to 1961. The Model Penal Code was approved by the American Law Institute in 1962 and published that year. Beginning in 1980, the Model Penal Code was republished in seven volumes with expanded and updated commentary. The Model Penal Code is a model code, not a uniform code. Different jurisdictions should, and do, have significant variations, based on local conditions or points of view. The Model Penal Code represents a systematic reexamination of substantive criminal law. Because of the lack of similar guidance in earlier years, most states' criminal codes suffered: The old codes were fragmentary and disorganized—for example, some codes did not define major crimes. Before the Model Penal Code was begun, only two states had reformed their codes; since that time, more than two-thirds of the states have adopted new substantive criminal law codes.

**Footnote 13:** *M’Naghten’s Case* involved the murder of the secretary of the prime minister of England. Daniel M’Naghten lived in London and believed that the British Home Secretary, Sir Robert Peel, wanted to kill him. (Peel was the founder of the British police, popularly known as “Bobbies.”) Acting under this delusion, M’Naghten shot and killed Edward Drummond, Peel's private secretary, whom he mistook for Peel. At his trial, the defense argued that M’Naghten was insane at the time of the shooting and should not be held responsible because his delusions caused him to act as he did. The jury agreed, and M’Naghten was found not guilty by reason of insanity. The court stated a rule by which M’Naghten’s conduct was to be measured. The rule is given in the text (if an accused, at the time of a crime, acts under such a defect of reason from a disease of the mind that he does not know the nature and quality of his actions, or if the accused does not know that what he or she is doing is wrong, he or she is to be adjudged not guilty by reason of insanity). The *M’Naghten* test has been adopted in many states to determine whether the defense of insanity is justified. According to its critics, the principal fault of the *M’Naghten* test is its narrowness and restricted application to only a small percentage of people who are mentally ill. Supporters argue that it is not a test of mental illness—it only lists conditions under which those who are mentally ill will be relieved of criminal responsibility. There are at least six other tests that fall under the rubric of the insanity defense and that are,
or have been, applied in U.S. courts. Whatever the test used to determine sanity, studies have shown that less than 1 percent of defendants in U.S. courts have used the insanity defense successfully. More than 99 percent of the defendants who use the insanity defense are found sane and therefore responsible for their acts. Despite these statistics, it is popularly believed that sane persons often use the defense successfully to avoid punishment for their crimes. At least two states have abolished the defense, and at least eight other states have enacted statutes creating the verdict of “guilty but mentally ill.” On this verdict, any sentence that could have been ordered for a conviction on the crime charged may be imposed, but the offender is provided psychiatric treatment while serving his or her sentence.

ANSWERS TO ESSAY QUESTIONS IN STUDY GUIDE TO ACCOMPANY BUSINESS LAW, ELEVENTH EDITION BY HOLLOWELL & MILLER

1. What are some of the significant differences between criminal law and civil law? Crimes are considered offenses against society as a whole; civil law is concerned with wrongs more personal in nature. Criminal defendants are prosecuted by public officials; civil defendants are sued by private individuals. Those who are found guilty of crimes are punished; those who lose in a civil suit are generally required to compensate the injured. Criminal law is primarily statutory; much of civil law is based on judicial rulings. The burdens of proof are different—in a criminal proceeding, the guilt of the accused must be established beyond a reasonable doubt; in a civil proceeding, elements must be proved by a lesser standard (which varies).

2. What constitutes criminal liability under the Racketeer Influenced and Corrupt Organizations Act (RICO) and what are the penalties? RICO makes it a federal crime to (1) use income obtained from racketeering activity to purchase any interest in an enterprise, (2) acquire or maintain an interest in an enterprise through racketeering activity, (3) conduct or participate in the affairs of an enterprise through racketeering activity, or (4) conspire to do any of the preceding activities. RICO incorporates by reference twenty-six separate types of federal crimes and nine types of state felonies and declares that if a person commits two of these offenses, he or she is guilty of “racketeering activity.” An individual found guilty of a violation is subject to a fine of up to $25,000 per violation, imprisonment for up to twenty years, or both.

Reviewing—

★★★★

Criminal Law and Cyber Crime

Edward Hanousek worked for Pacific & Arctic Railway and Navigation Company (P&A) as a roadmaster of the White Pass & Yukon Railroad in Alaska. Hanousek was responsible “for every detail of the safe and efficient maintenance and construction of track, structures and marine facilities of the entire railroad,” including special projects. One project was a rock quarry, known as “6-mile,” above the Skagway River. Next to the quarry, and just beneath the surface, ran a high-pressure oil pipeline owned by Pacific & Arctic Pipeline, Inc., P&A’s sister company. When the quarry’s backhoe operator punctured the pipeline, an estimated 1,000 to 5,000 gallons of oil were discharged into the river. Hanousek was charged with negligently discharging a harmful quantity of oil into a navigable water of the United States in violation of the criminal provisions of the Clean Water Act (CWA). Ask your students to answer the following questions, using the information presented in the chapter.

1. Did Hanousek have the required mental state (mens rea) to be convicted of a crime? Why or why not? Yes, because he was the corporate officer responsible for the project and had the power to prevent the criminal violation. Corporate directors and officers are personally liable for the crimes they commit, and can also be held liable for the crimes of employees under their supervision. Because
Hanousek was the corporate officer responsible for every detail of the “6-mile” quarry, he had the power to prevent the criminal violation. Therefore, Hanousek can be held criminally negligent for the backhoe operator puncturing the pipeline.

2. Which theory discussed in the chapter would enable a court to hold Hanousek criminally liable for violating the statute regardless of whether he participated in, directed, or even knew about the specific violation? Under the responsible corporate officer doctrine, a corporate officer can be held liable for a crime because he was in a responsible relationship to the corporation and could have prevented the violation. The corporate officer does not have to intend the crime or even know about it, to incur liability under this doctrine.

3. Could the quarry’s backhoe operator who punctured the pipeline also be charged with a crime in this situation? Why or why not? No, because he did not have the required mental state (mens rea) and was corporate officer in a responsible position to prevent the criminal violation. Criminal liability requires a guilty act at the same time as the defendant had a wrongful mental state. The backhoe operator pierced the pipeline (the guilty act), but he did not have a wrongful mental state because he was simply doing his job and may not even have been aware of the pipeline. A court would not apply the same standard to an employee as it would to a responsible corporate officer who “knew or should have known” of the existence of the pipeline. Because both elements of criminal liability (guilty act and wrongful mental state) did not occur, the backhoe operator could not be charged with a crime.

4. Suppose that at trial, Hanousek argued that he could not be convicted because he was not aware of the requirements of the CWA. Would this defense be successful? Why or why not? No, because Hanousek was the corporate officer responsible for the project and should have known the requirements of the law. Because Hanousek was in a responsible position at the corporation and in charge of the 6-mile quarry, a court would find that he “should have known” the requirements of the law. Therefore, lack of knowledge of the requirements of the CWA would not operate as a defense in his case.