knowledgeable-user defense. We have already seen assumption of risk and comparative/contributory negligence in terms of negligence actions; the application of these is similar in products-liability actions.

Under product misuse, a plaintiff who uses a product in an unexpected and unusual way will not recover for injuries caused by such misuse. For example, suppose that someone uses a rotary lawn mower to trim a hedge and that after twenty minutes of such use loses control because of its weight and suffers serious cuts to his abdomen after dropping it. Here, there would be a defense of product misuse, as well as comparative or contributory negligence. However, product misuse will fail as a defense where the misuse was foreseeable by the defendant. A misuse is foreseeable where the a product is used in an unintended way – but a way that could be predicted by general human behavior. http://www.iadclexicon.org/reasonably-foreseeable-misuse/

Consider the urban (or Internet) legend of Mervin Gratz, who supposedly put his Winnebago on autopilot to go back and make coffee in the kitchen, then recovered millions after his Winnebago turned over and he suffered serious injuries. There are multiple defenses to this alleged action; these would include the defenses of contributory negligence, comparative negligence, and product misuse. (There was never any such case, and certainly no such recovery; it is not known who started this legend, or why.)

Another defense against strict liability as a cause of action is the knowledgeable user defense. If the parents of obese teenagers bring a lawsuit against McDonald's, claiming that its fast-food products are defective and that McDonald's should have warned customers of the adverse health effects of eating its products, a defense based on the knowledgeable user is available. In one case, the court found that the high levels of cholesterol, fat, salt, and sugar in McDonald's food is well known to users. The court stated, "If consumers know (or reasonably should know) the potential ill health effects of eating at McDonald's, they cannot blame McDonald's if they, nonetheless, choose to satiate their appetite with a surfeit of supersized McDonald's products." *Pelman v. McDonald's Corp.*, 237 F.2d 512 (S.D.N.Y. 2003).

Criminal Law

At times, unethical behavior by businesspeople can be extreme enough that society will respond by criminalizing certain kinds of activities. Ponzi schemes, arson, various kinds of fraud, embezzlement, racketeering, foreign corrupt practices, tax evasion, and insider trading are just a few. A corporation can face large fines, and corporate managers can face both fines and jail sentences for violating criminal laws. This section aims to explain how criminal law differs from civil law, to discuss various types of crimes, and to relate the basic principles of criminal procedure.

Criminal law is the most ancient branch of the law. Many wise observers have tried to define and explain it, but the explanations often include many complex and subtle distinctions. A traditional criminal law course would include a lot of discussions on criminal intent, the nature of criminal versus civil responsibility, and the constitutional rights accorded the accused. But in this chapter, we will consider only the most basic aspects of intent, responsibility, and constitutional rights.
Unlike civil actions, where plaintiffs seek compensation or other remedies for themselves, crimes involve "the state" (the federal government, a state government, or some subunit of state government). This is because crimes involve some "harm to society" and not just harm to certain individuals. But "harm to society" is not always evident in the act itself. For example, two friends of yours at a party argue, take the argument outside, and blows are struck; one has a bloody nose and immediately goes home. The crimes of assault and battery have been committed, even though no one else knows about the fight and the friends later make up. By contrast, suppose a major corporation publicly announces that it is closing operations in your community and moving operations to Southeast Asia. There is plenty of harm to society as the plant closes down and no new

jobs take the place of the company's jobs. Although the effects on society are greater in the second example, only the first example is a crime.

Crimes are generally defined by legislatures, in statutes; the statutes describe in general terms the nature of the conduct they wish to criminalize. For government punishment to be fair, citizens must have clear notice of what is criminally prohibited. Ex post facto laws—laws created "after the fact" to punish an act that was legal at the time—are expressly prohibited by the US Constitution. Overly vague statutes can also be struck down by courts under a constitutional doctrine known as "void for vagueness."

What is considered a crime will also vary from society to society and from time to time. For example, while cocaine use was legal in the United States at one time, it is now a controlled substance, and unauthorized use is now a crime. Medical marijuana was not legal fifty years ago when its use began to become widespread, and in some states its use or possession was a felony. Now, some states make it legal to use or possess it under some circumstances. In the United States, you can criticize and make jokes about the president of the United States without committing a crime, but in many countries it is a serious criminal act to criticize a public official. Attitudes about appropriate punishment for crimes will also vary considerably from nation to nation. Uganda decreed long prison sentences for homosexuals and death to repeat offenders. In Saudi Arabia, the government proposed to deliberately paralyze a criminal defendant who criminally assaulted someone and unintentionally caused the victim's paralysis. Limits on punishment are set in the United States through the Constitution's prohibition on "cruel or unusual punishments" under the 8th Amendment to the Constitution.

It is often said that ignorance of the law is no excuse. But there are far too many criminal laws for anyone to know them all. Also, because most people do not actually read statutes, the question of "criminal intent" comes up right away: if you don't know that the legislature has made driving without a seat belt fastened a misdemeanor, you cannot have intended to harm society. You might even argue that there is no harm to anyone but yourself!

The usual answer to this is that the phrase "ignorance of the law is no excuse" means that society (through its elected representatives) gets to decide what is harmful to society, not you. Still, you may ask, "Isn't it my choice whether to take the risk of failing to wear a seat belt? Isn't this a victimless crime? Where is the harm to society?" A policymaker or social scientist may answer that your injuries, statistically, are generally going to be far greater if you don't wear one and that your choice may actually impose costs on society. For example, you might not have enough insurance, so that a public hospital will have to take care of your head injuries, injuries that would likely have been avoided by your use of a seat belt.

But, as just noted, it is hard to know the meaning of some criminal laws. Teenagers hanging around the sidewalks on Main Street were sometimes arrested for "loitering." The constitutional void-for-vagueness doctrine has led the courts to overturn statutes that are not clear. For example, "vagrancy" was long held to be a crime, but US courts began some forty years ago to overturn vagrancy and "suspicious person" statutes on the grounds that they are too vague for people to know what they are being asked not to do.

This requirement that criminal statutes not be vague does not mean that the law always defines crimes in ways that can be easily and clearly understood. Many statutes use terminology developed by the common-law courts. For example, a California statute defines murder as "the unlawful killing of a human being, with malice aforethought." If no history backed up these words, they would be unconstitutionally vague. But there is a rich history of judicial decisions that provides meaning for much of the arcane language like "malice aforethought" strewn about in the statute books.

Because a crime is an act that the legislature has defined as socially harmful, the parties involved cannot agree among themselves to forget a particular incident, such as a barroom brawl, if the authorities decide to prosecute. This is one of the critical distinctions between criminal and civil law. An assault is both a crime and a tort. The person who was assaulted may choose to forgive his assailant and not to sue him for damages. But he cannot stop the prosecutor from bringing an indictment against the assailant. (However, because of crowded

dockets, a victim that declines to press charges may cause a busy prosecutor to choose to not to bring an indictment.)
A crime consists of an act defined as criminal—an actus reus—and the requisite "criminal intent." Someone who has a burning desire to kill a rival in business or romance and who may actually intend to murder but does not act on his desire has not committed a crime. He may have a "guilty mind"—the translation of the Latin phrase mens rea—but he is guilty of no crime. A person who is forced to commit a crime at gunpoint is not guilty of a crime, because although there was an act defined as criminal—an actus reus—there was no criminal intent.

Types of Crimes

Most classifications of crime turn on the seriousness of the act. In general, **seriousness** is defined by the nature or duration of the punishment set out in the statute. A **felony** is a crime punishable (usually) by imprisonment of more than one year or by death. (Crimes punishable by death are sometimes known as **capital crimes**; they are increasingly rare in the United States.) The major felonies include murder, rape, kidnapping, armed robbery, embezzlement, insider trading, fraud, and racketeering. All other crimes are usually known as misdemeanors, petty offenses, or infractions. Another way of viewing crimes is by the type of social harm the statute is intended to prevent or deter, such as offenses against the person, offenses against property, and white-collar crime.

Table 7 Major Crimes

Major Crimes Against Persons	Major Crimes Against Property	Crimes Against Public Order
• Homicide (Murder and Manslaughter) • Robbery • Assault & Battery (Criminal Assault) • Rape (Sexual Assault)	• Theft (Larceny) • Receiving Stolen Property • Burglary • Arson • Forgery • Mail & Wire Fraud • Theft of Trade Secrets • Insider Trading • Fraud • Foreign Corrupt Practices Act (FCPA) • Racketeering Influenced and Corrupt Organizations Act (RICO) • Money Laundering • Cyber Crime	• Bribery & Blackmail • Perjury • Attempt & Conspiracy • Food & Drug Act Violations

Major Offenses against the Person

There are many crimes that are considered offenses against the person. For the purposes of this course, we are only going to consider homicide, robbery and assault/battery.

Homicide

Homicide is the killing of one person by another. Not every killing is criminal. When the law permits one person to kill another—for example, a soldier killing an enemy on the battlefield during war, or a killing in self-defense—the death is considered the result of justifiable homicide.

All other homicides are criminal. The most severely punished form is **murder**, defined as homicide committed with "malice aforethought." This is a term with a very long history. Boiled down to its essentials, it means that the defendant had the intent to kill. A killing need not be premeditated for any long period of time; the premeditation might be quite sudden, as in a bar fight that escalates in that moment when one of the fighters reaches for a knife with the intent to kill.

Sometimes a homicide can be murder even if there is no intent to kill; an intent to inflict great bodily harm can be murder if the result is the death of another person. A killing that takes place while a felony (such as armed robbery) is being committed is also murder, whether or not the killer intended any harm. This is the so-called felony murder rule. Examples are the accidental discharge of a gun that kills an innocent bystander or the asphyxiation death of a fireman from smoke resulting from a fire set by an arsonist. The felony murder rule is more significant than it sounds, because it also applies to the accomplices of one who does the killing. Thus the driver of a getaway car stationed a block away from the scene of the robbery can be convicted of murder if a gun accidentally fires during the robbery and someone is killed.

Manslaughter is an act of killing that does not amount to murder. **Voluntary manslaughter** is an intentional killing, but one carried out in the "sudden heat of passion" as the result of some provocation. An example is a fight that gets out of hand. **Involuntary manslaughter** entails a lesser degree of willfulness; it usually occurs when someone has taken a reckless action that results in death (e.g., a death resulting from a traffic accident in which one driver recklessly runs a red light).

Robbery

Robbery is the taking of personal property or obtaining services from another by force or threat of force. It is considered a crime against a person because the perpetrator's actions are directed at an individual. So when a person comes home and find their house has been broken into and the TV stolen, it is incorrect to state that they have been robbed. You cannot rob a house, you can only rob a person. Your house has been burgled- which will be discussed later. In committing a robbery, the perpetrator's intent must be to permanently deprive the individual of their property.

Assault and Battery

Ordinarily, we would say that a person who has struck another has "assaulted" him. Technically, that is a **battery**—the unlawful application of force to another person. The force need not be violent. Indeed, a man who kisses a woman is guilty of a battery if he does it against her will. The other person may consent to the force. That is one reason why surgeons require patients to sign consent forms, giving the doctor permission to operate. In the absence of such a consent, an operation is a battery. That is also why football players are not constantly being charged with battery. Those who agree to play football agree to submit to the rules of the game, which of course include the right to tackle. But the consent does not apply to all acts of physical force: a hockey player who hits an opponent over the head with his stick can be prosecuted for the crime of battery.

Criminal assault is an *attempt* to commit a battery or the deliberate placing of another in fear of receiving an immediate battery. If you throw a rock at a friend, but he manages to dodge it, you have committed an assault. Some states limit an assault to an attempt to commit a battery by one who has a "present ability" to do so. Pointing an unloaded gun and threatening to shoot would not be an assault, nor, of course, could it be a battery. The modem tendency, however, is to define an assault as an attempt to commit a battery by one with an *apparent* ability to do so.

Assault and battery may be excused. For example, a bar owner (or her agent, the bouncer) may use reasonable force to remove an unruly patron. If the use of force is excessive, the bouncer can be found guilty of assault and battery, and a civil action could arise against the bar owner as well.

Rape & Sexual Assault

Under the common law, **Rape** was defined as the sexual penetration of a person without consent and with the threat of violence. By modern statute, this type of conduct is generally described as a "rape in the first degree." Md. Crim. Law Code Ann. §. 3-303. However, many states recognize many other types of sexual crimes, including prohibitions against adults engaging in any form of sexual contact, even consensual contact, with a minor. Md. Crim. Law Code Ann. § 3-307(a)(3)-(5) (engaging in sexual act with a minor under 14 and the perpetrator is at least four years older, or a perpetrator over age 21 engaging in a sexual act with a 14 or 15 year old).

Theft and Related Property Offenses

Theft: Larceny, Embezzlement, False Pretenses

The concept of theft is familiar enough. Less familiar is the way the law has treated various aspects of the act of stealing. Criminal law distinguishes among many different crimes that are popularly known as theft. Many technical words have entered the language—burglary, larceny, embezzlement—but are often used inaccurately. Brief definitions of the more common terms are discussed here.

The basic crime of stealing personal property is **larceny**. By its old common-law definition, still in use today, larceny is the wrongful "taking and carrying away of the personal property of another with intent to steal the same." Today, most statutes define **theft** more broadly as any property, including real estate, personal property (whether tangible or intangible), and services. And most modern statutes have done away with the requirement of taking and carrying away and simply make it a crime to exert unauthorized control over property.

Larceny involves the taking of property from the possession of another. Suppose that a person legitimately comes to possess the property of another and wrongfully appropriates it—for example, an automobile mechanic entrusted with your car refuses to return it, or a bank teller who is entitled to temporary possession of cash in his drawer takes it home with him. The common law had trouble with such cases because the thief in these cases already had possession; his crime was in assuming ownership. Today, such wrongful conversion, known as **embezzlement**, has been made a statutory offense in all states. Maryland treats any unauthorized control as theft and limits embezzlement to the fraudulent and willful appropriation of money or anything of value by a fiduciary. Md. Code Ann., Crim. Law Sec. 7-113. 2017.

Statutes against larceny and embezzlement did not cover all the gaps in the law. A conceptual problem arises in the case of one who is tricked into giving up his title to property. In larceny and embezzlement, the thief gains possession or ownership without any consent of the owner or custodian of the property. Suppose, however, that an automobile dealer agrees to take his customer's present car as a trade-in. The customer says that he has full title to the car. In fact, the customer is still paying off an installment loan and the finance company has an interest in the old car. If the finance company repossesses the car, the customer—who got a new car at a discount because of his false representation—cannot be said to have taken the new car by larceny or embezzlement. Nevertheless, he tricked the dealer into selling, and the dealer will have lost the value of the repossessed car. Obviously, the customer is guilty of a criminal act; the statutes outlawing it refer to this trickery as the crime of false pretenses, defined as obtaining ownership of the property of another by making untrue representations of fact with intent to defraud.

A number of problems have arisen in the judicial interpretation of false-pretense statutes. One concerns whether the taking is permanent or only temporary. The case of *State v. Mills,* 396 P.2d 5 (Ariz. 1964) shows the subtle questions that can be presented and the dangers inherent in committing "a little fraud." In the *Mills* case, the claim was that a mortgage instrument dealing with one parcel of land was used instead for another. This is a false representation of fact. Suppose, by contrast, that a person misrepresents his state of mind: "I will pay you back tomorrow," he says, knowing full well that he does not intend to. Can such a misrepresentation amount to false pretenses punishable as a criminal offense? In most jurisdictions it cannot. A false-pretense violation relates to a past event or existing fact, not to a statement of intention. If it were otherwise, anyone failing to pay a debt might find himself facing criminal prosecution, and business would be less prone to take risks.

Receiving Stolen Property

One who engages in receiving stolen property with knowledge that it is stolen is guilty of a felony or misdemeanor, depending on the value of the property. The receipt need not be personal; if the property is delivered to a place under the control of the receiver, then he is deemed to have received it. "Knowledge" is construed broadly: not merely actual knowledge, but (correct) belief and suspicion (strong enough not to investigate for fear that the property will turn out to have been stolen) are sufficient for conviction.

Forgery

Forgery is false writing of a document of legal significance (or apparent legal significance!) with intent to defraud. It includes the making up of a false document or the alteration of an existing one. The writing need not be done by hand but can be by any means—typing, printing, and so forth. Documents commonly the subject of forgery are negotiable instruments (checks, money orders, and the like), deeds, receipts, contracts, and bills of lading. The forged instrument must itself be false, not merely contain a falsehood. If you fake your neighbor's signature on one of his checks made out to cash, you have committed forgery. But if you sign a check of your own that is made out to cash, knowing that there is no money in your checking account, the instrument is not forged, though the act may be criminal if done with the intent to defraud.

The mere making of a forged instrument is unlawful. So is the "uttering" (or presentation) of such an instrument, whether or not the one uttering it actually forged it. The usual example of a false signature is by no means the only way to commit forgery. If done with intent to defraud, the backdating of a document, the modification of a corporate name, or the filling in of lines left blank on a form can all constitute forgery.

Extortion

Under common law, **extortion could** only be committed by a government official, who corruptly collected an unlawful fee under color of office. A common example is a salaried building inspector who refuses to issue a permit unless the permittee pays him. Under modern statutes, the crime of extortion has been broadened to include the wrongful collection of money or something else of value by anyone by means of a threat (short of a threat of immediate physical violence, for such a threat would make the demand an act of robbery). This kind of extortion is usually called **blackmail**. The blackmail threat commonly is to expose some fact of the victim's private life or to make a false accusation about him.

Offenses against Property and Other Public Order Offenses

Burglary

Depending on the jurisdiction **burglary** can be defined as a property crime or a crime against habitation. Under common law it was limited to "the breaking and entering of the dwelling of another in the nighttime with intent to commit a felony." Today, jurisdictions have removed the nighttime requirement and consider it burglary when someone breaks and enters into the dwelling of another with the intent to commit theft or a crime of violence. Md. Code Ann., Crim. Law. Sec. 6-202. (2017).

The intent to steal is not an issue: a man who sneaks into a woman's home intent on raping her has committed a burglary, even if he does not carry out the act. The student doing critical thinking will no doubt notice that the definition provides plenty of room for argument. What is "breaking"? (The courts do not require actual destruction; the mere opening of a closed door, even if unlocked, is enough.) What is entry? Courts usually allow for any crossing of the threshold of a dwelling to suffice. What kind of intent? Whose dwelling? Can a landlord burglarize the dwelling of his tenant? (Yes.) Can a person burglarize his own home? (No.)

Arson

Under common law, arson was the malicious burning of the dwelling of another. Burning one's own house for purposes of collecting insurance was not an act of arson under common law. The statutes today make it a felony intentionally to set fire to any building, whether or not it is a dwelling and whether or not the purpose is to collect insurance. So, today the intentional burning of one's own residence can be prosecuted as arson.

Bribery

Bribery is a corrupt payment (or receipt of such a payment) for official action. The payment can be in cash or in the form of any goods, intangibles, or services that the recipient would find valuable. Under common law, only a public official could be bribed. In most states, bribery charges can result from the bribe of anyone performing a public function.

Bribing a public official in government procurement (contracting) can result in serious criminal charges. Bribing a public official in a foreign country to win a contract can result in charges under the Foreign Corrupt Practices Act.

Perjury

Perjury is the crime of giving a false oath, either orally or in writing, in a judicial or other official proceeding (lies made in proceedings other than courts are sometimes termed "false swearing"). To be perjurious, the oath must have been made corruptly—that is, with knowledge that it was false or without sincere belief that it was true. An innocent mistake is not perjury. A statement, though true, is perjury if the maker of it believes it to be false. Statements such as "I don't remember" or "to the best of my knowledge" are not sufficient to protect a person who is lying from conviction for perjury. To support a charge of perjury, however, the false statement must be **"material,"** meaning that the statement is relevant to whatever the court is trying to find out.

White-Collar Crime

White-collar crime, as distinguished from "street crime," refers generally to fraud-related acts carried out in a nonviolent way, usually connected with business. Armed bank robbery is not a white-collar crime, but embezzlement by a teller or bank officer is. Many white-collar crimes are included within the statutory

definitions of embezzlement and false pretenses. Most are violations of state law. Depending on how they are carried out, many of these same crimes are also violations of federal law.

Any act of fraud in which the United States postal system is used or which involves interstate phone calls or Internet connections is a violation of federal law. Likewise, many different acts around the buying and selling of securities can run afoul of federal securities laws. Other white-collar crimes include tax fraud; price fixing; violations of food, drug, and environmental laws; corporate bribery of foreign companies; and—the newest form—computer fraud.

Mail and Wire Fraud

Federal law prohibits the use of the mails or any interstate electronic communications medium for the purpose of furthering a "scheme or artifice to defraud." The statute is broad, and it is relatively easy for prosecutors to prove a violation. The law also bans attempts to defraud, so the prosecutor need not show that the scheme worked or that anyone suffered any losses.

"Fraud" is broadly construed: anyone who uses the mails or telephone to defraud anyone else of virtually anything, not just of money, can be convicted under the law. In one case, a state governor was convicted of mail fraud when he took bribes to influence the setting of racing dates. The court's theory was that he defrauded the citizenry of its right to his "honest and faithful services" as governor. *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974), cert. denied, 417 US 976 (1974) (though the *McNally* court subsequently limited the mail fraud statute to property rights, rather than the "intangible right of the citizen to good government" *McNally v. U.S.*, 483 U.S. 350 (1987)).

Violations of the Food and Drug Act

The federal Food, Drug, and Cosmetic Act prohibits any person or corporation from sending into interstate commerce any adulterated or misbranded food, drug, cosmetics, or related device. For example, in a 2010 case, drug manufacturer, Allergen paid a criminal fine for marketing Botox as a headache or pain reliever, a use that had not been approved by the Food and Drug Administration.

Unlike most criminal statutes, willfulness or deliberate misconduct is not an element of the act. As in the case *United States v. Park*, 412 U.S. 658 (1978), an executive can be held criminally liable even though he may have had no personal knowledge of the violation.

Theft of Trade Secrets

The assets of any business include not only its product, inventory, equipment, etc. but also its customer lists, business practices, creative or artistic works, inventions, and others. These intangible items are commonly referred to as **trade secrets** of a business. For example, for decades the recipe for Kentucky Fried Chicken was a closely guarded trade secret of 12 secret herbs and spices. Bush's Baked Beans has commercials regarding its secret recipe. These are trade secrets that a company protects just as much as its protects its tangible assets from potential theft.

The owner of a trade secret is entitled to its exclusive use and enjoyment. A trade secret is valuable not only because it enables a company to gain advantage over a competitor but also because it may be sold or licensed like any other property right. In contrast, commercial information that is revealed to the public, or at least to a competitor, retains limited commercial value. Consequently, courts vigilantly protect trade secrets from disclosure, appropriation, and theft. Businesses or opportunistic members of the general public may be held liable for any economic injuries that result from their theft of a trade secret. Employees may be held liable for disclosing their employer's trade secrets, even if the disclosure occurs after the employment relationship has ended.

"Unfair Competition." Legal Dictionary, *The Free Dictionary,* 17 July 2017, legal-dictionary.thefreedictionary.com/unfair+competition

Insider Trading

"Insider trading" is a term that most investors have heard and usually associate with illegal conduct. But the term actually includes both legal and illegal conduct. The legal version is when corporate insiders—officers, directors, and employees—buy and sell stock in their own companies. When corporate insiders trade in their own securities, they must report their trades to the Securities and Exchange Commission (SEC).

Illegal insider trading refers generally to buying or selling a security, in breach of a fiduciary duty or other relationship of trust and confidence, while in possession of material, nonpublic information about the security. Insider trading violations may also include "tipping" such information, securities trading by the person "tipped," and securities trading by those who misappropriate such information.

Examples of insider trading cases that have been brought by the SEC are cases against:

- Corporate officers, directors, and employees who traded the corporation's securities after learning of significant, confidential corporate developments;
- Friends, business associates, family members, and other "tippees" of such officers, directors, and employees, who traded the securities after receiving such information;
- Employees of law, banking, brokerage and printing firms who were given such information to provide services to the corporation whose securities they traded;
- Government employees who learned of such information because of their employment by the government; and
- Other persons who misappropriated, and took advantage of, confidential information from their employers.

Because insider trading undermines investor confidence in the fairness and integrity of the securities markets, the SEC has treated the detection and prosecution of insider trading violations as one of its enforcement priorities."

"Insider Trading." *Fast Answers,* Securities and Exchange Commission, 17 July 2017, www.sec.gov/fast-answers/answersinsiderhtm.html/.

Bankruptcy Fraud

Bankruptcy fraud is a white-collar crime that commonly takes four general forms:

- A debtor conceals assets to avoid having to forfeit them.
- An individual intentionally files false or incomplete forms. Including false information on a bankruptcy form may also constitute perjury.
- An individuals files multiple times using either false information or real information in several jurisdictions.
- An individual bribes a court-appointed trustee.

Commonly, the criminal commits one of these forms of fraud with another crime, such as identity theft, mortgage fraud, money laundering, and public corruption.

Common Forms of Fraud

Nearly 70% of all bankruptcy fraud involves the concealment of assets. Creditors can only liquidate assets listed by the debtor; thus, if the debtor fails to reveal certain assets, he can fraudulently keep them despite owing an outstanding debt. For further concealment, the debtor might transfer undisclosed assets to friends, relatives, or associates so it cannot be found. Fraudulent concealment makes loans more expensive, because it raises the risk and costs associated with lending and creditors passes those costs on to other hopeful borrowers.

Petition mills are one type of bankruptcy fraud scheme on the rise in the United States. Petition mills pass themselves off as consulting services, purporting to help tenants experiencing financial difficulties avoid eviction. While the tenant believes the service is negotiating on his behalf, the petition mill actually files for bankruptcy in his name and drags out the proceeding and charges him exorbitant fees. The tenant is left with no savings and a credit score in ruins.

Multiple filing fraud occurs when a debtor files for bankruptcy in multiple jurisdictions, using the same name and information, using aliases and false information, or using some combination of real and false information. Multiple filings clog up the bankruptcy court's docket, which slows down the whole process, including asset liquidation. Although multiple filings aren't criminal, they may still violate bankruptcy provisions, and they are often used to provide cover for a debtor trying to conceal assets.

Legal Consequences

Federal prosecutors can bring criminal charges for suspected bankruptcy fraud under 18 U.S.C. Chapter 9. Proof of fraud requires a showing that the defendant knowingly and fraudulently misrepresented a material fact. Bankruptcy fraud carries a sentence of up to five years in prison, or a fine of up to $250,000, or both. Even just *intending* to commit bankruptcy fraud may be punishable.

Victims of bankruptcy fraud may also seek civil remedies, according to the American Bankruptcy Institute.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 was meant in part to reduce the instances of bankruptcy fraud and abuse. Supreme Court case Ransom v. FIA Card Services addressed the "means test" which the Act imposed on someone filing for a Chapter 13 bankruptcy."

"Bankruptcy Fraud." *Wex,* Legal Information Institute, 17 July 2017, www.law.cornell.edu/wex/bankruptcy_fraud/.

Violations of the Foreign Corrupt Practices Act

As a byproduct of Watergate, federal officials at the Securities and Exchange Commission and the Internal Revenue Service uncovered many instances of bribes paid by major corporations to officials of foreign governments to win contracts with those governments. Congress responded in 1977 with the Foreign Corrupt Practices Act, which imposed a stringent requirement that the disposition of assets be accurately and fairly accounted for in a company's books and records. The act also made illegal the payment of bribes to foreign officials or to anyone who will transmit the money to a foreign official to assist the payor (the one offering and delivering the money) in getting business.

Violations of the Racketeering Influenced and Corrupt Organizations Act

In 1970 Congress enacted the Racketeering Influenced and Corrupt Organizations Act (RICO), aimed at ending organized crime's infiltration into legitimate business. The act tells courts to construe its language broadly "to effectuate its remedial purpose," and many who are not part of organized crime have been successfully prosecuted under the act. It bans a "pattern of racketeering," defined as the commission of at least two acts within ten years of any of a variety of already-existing crimes, including mail, wire, and securities fraud. The act thus makes many types of fraud subject to severe penalties.

Money Laundering

The term "money laundering" refers to the activities and financial transactions that are undertaken specifically to hide the true source of the money. In most cases, the money involved is earned from an illegal enterprise and the goal is to give that money the appearance of coming from a legitimate source.

Crimes dealing with or motivated by money make up the majority of criminal activity in the nation. Money laundering is a very complex crime involving intricate details, often involving numerous financial transactions and financial outlets throughout the world. According to the IRS, money laundering is the means by which criminals evade paying taxes on illegal income by concealing the source and the amount of profit. Money laundering is in effect tax evasion in progress.

When no other crimes could be pinned to Al Capone, the Internal Revenue Service obtained a conviction for tax evasion. As the astonished Capone left the courthouse he said, "This is preposterous. You can't tax illegal income!" But the fact is income from whatever source derived (legal or illegal) is taxable income.

Had the money laundering statutes been on the books in the 1930's, Capone would also have been charged with money laundering. However, since October 1986, with the passage of the Money Laundering Control Act, organized crime members and many others have been charged and convicted of both tax evasion and money laundering. (https://www.irs.gov/uac/overview-money-laundering)

Cyber Crime

Computer crime generally falls into four categories: (1) theft of money, financial instruments, or property; (2) misappropriation of computer time; (3) theft of programs; and (4) illegal acquisition of information. The main federal statutory framework for many computer crimes is the Computer Fraud and Abuse Act (CFAA; see Table 8 "Summary of Provisions of the Computer Fraud and Abuse Act"). Congress only prohibited computer fraud and abuse where there was a federal interest, as where computers of the government were involved or where the crime was interstate in nature.

The Supreme Court recently reviewed the scope of CFAA to address the question of whether a person who accesses information in a computer system with intent to misuse the information violates CFAA. In *Van Buren v. U.S.*, 593 U.S. ___ (2021), the Court held that CFAA does not criminalize such behavior, but instead only criminalizes unauthorized access – that is, access beyond what the user's credentials permit them to access under section (a)(2) of CFAA. 18 U.S.C. § 1030.

Table 8 Summary of Provisions of Computer Fraud and Abuse Act (CFAA)

Obtaining national security information	Sec. (a)(1)	10 years maximum (20 years second offense)
Trespassing in a government computer	Sec. (a)(3)	1 year (5)
Compromising the confidentiality of a computer	Sec. (a)(2)	1 year (10)
Accessing a computer to defraud and obtain value	Sec. (a)4	5 years (10)

Intentional access and reckless damage	(a)(5)(A)(ii)	5 years (20)
Trafficking in passwords	(a)(6)	1 year (10)

Cyber fraud, Hacking, Cyber theft

Cyber fraud refers to any online intentional action used to commit a crime, such as identity theft, credit fraud or theft, cyber bullying, harassment, hacking etc. Cyber fraud is a growing threat with many instances occurring with individuals or entities in other countries, who commit fraud in the United States. Due to the world wide nature of the problem and that sophisticated individuals can hide behind a myriad of phony IP (internet provider) addresses, tracking and catching such individuals is very difficult.

However, prosecution is not an impossibility as was seen with the 2016 conviction of the internet hacker Guccifer. Hacker Guccifer Pleads Guilty

Cyber terrorism

Cyber terrorism is a more specific form of cyber fraud by using the internet to shut down areas of critical national infrastructure for political, ideological or religious purposes. And this is not merely hacking into a government website, but using online computer systems to hack into and effect water treatment plants, nuclear reactors, railways, airports, governmental operations, etc. (https://leb.fbi.gov/2011/november/cyber-terror)

The Nature of the Criminal Act

To be guilty of a crime, you must have acted. Mental desire or intent to do so is insufficient. But what constitutes an act? This question becomes important when someone begins to commit a crime, or does so in association with others, or intends to do one thing but winds up doing something else.

Attempt

It is not necessary to commit the intended crime to be found guilty of a criminal offense. An *attempt* to commit the crime is punishable as well, though usually not as severely. For example, Brett points a gun at Ashley, intending to shoot her dead. He pulls the trigger but his aim is off, and he misses her heart by four feet. He is guilty of an attempt to murder. Suppose, however, that earlier in the day, when he was preparing to shoot Ashley, Brett had been overheard in his apartment muttering to himself of his intention, and that a neighbor called the police. When they arrived, he was just snapping his gun into his shoulder holster.

At that point, courts in most states would not consider him guilty of an attempt because he had not passed beyond the stage of *preparation*. After having buttoned his jacket he might have reconsidered and put the gun away. Determining when the accused has passed beyond mere preparation and taken an actual step toward *perpetrating* the crime is often difficult and is usually for the jury to decide.

Conspiracy

Under both federal and state laws, it is a separate offense to work with others toward the commission of a crime. When two or more people combine to carry out an unlawful purpose, they are engaged in a conspiracy.

The law of conspiracy is quite broad, especially when it is used by prosecutors in connection with white-collar crimes. Many people can be swept up in the net of conspiracy, because it is unnecessary to show that the actions they took were sufficient to constitute either the crime or an attempt.

Usually, to establish a conspiracy, the prosecution needs to show only (1) an agreement and (2) a single overt act in furtherance of the conspiracy. Thus if three people agree to rob a bank, and if one of them goes to a store to purchase a gun to be used in the holdup, the three can be convicted of conspiracy to commit robbery. Even the purchase of an automobile to be used as the getaway car could support a conspiracy conviction. The act of any one of the conspirators is imputed to the other members of the conspiracy. It does not matter, for instance, that only one of the bank robbers fired the gun that killed a guard. All can be convicted of murder. That is so even if one of the conspirators was stationed as a lookout several blocks away and even if he specifically told the others that his agreement to cooperate would end "just as soon as there is shooting."

Agency and Corporations

A person can be guilty of a crime if he acts through another. Again, the usual reason for "imputing" the guilt of the actor to another is that both were engaged in a conspiracy. But imputation of guilt is not limited to a conspiracy. The agent may be innocent even though he participates. A corporate officer directs a junior employee to take a certain bag and deliver it to the officer's home. The employee reasonably believes that the officer is entitled to the bag. Unbeknownst to the employee, the bag contains money that belongs to the company, and the officer wishes to keep it. This is not a conspiracy. The employee is not guilty of larceny, but the officer is, because the agent's act is imputed to him. Since intent is a necessary component of crime, an agent's intent cannot be imputed to his principal if the principal did not share the intent.

The company president tells her sales manager, "Go make sure our biggest customer renews his contract for next year"—by which she meant, "Don't ignore our biggest customer." Standing before the customer's purchasing agent, the sales manager threatens to tell the purchasing agent's boss that the purchasing agent has been cheating on his expense account, unless he signs a new contract. The sales manager could be convicted of blackmail, but the company president could not.

Can a corporation be guilty of a crime? For many types of crimes, the guilt of individual employees may be imputed to the corporation. Thus the antitrust statutes explicitly state that the corporation may be convicted and fined for violations by employees. This is so even though the shareholders are the ones who ultimately must pay the price—and who may have had nothing to do with the crime nor the power to stop it. The law of corporate criminal responsibility has been changing in recent years. The tendency is to hold the corporation liable under criminal law if the act has been directed by a responsible officer or group within the corporation (the president or board of directors).

Defenses to Criminal Liability

In General

The mens rea requirement depends on the nature of the crime and all the circumstances surrounding the act. In general, though, the requirement means that the accused must in some way have intended the criminal consequences of his act. Suppose, for example, that Charlie gives Gabrielle a poison capsule to swallow. That is the act. If Gabrielle dies, is Charlie guilty of murder? The answer depends on what his state of mind was. Obviously, if he gave it to her intending to kill her, the act was murder.

What if he gave it to her knowing that the capsule was poison but believing that it would only make her mildly ill? The act is still murder, because we are all liable for the consequences of any intentional act that may cause

harm to others. But suppose that Gabrielle had asked Harry for aspirin, and he handed her two pills that he reasonably believed to be aspirin (they came from the aspirin bottle and looked like aspirin) but that turned out to be poison, the act would not be murder, because he had neither intent nor a state of knowledge from which intent could be inferred.

Not every criminal law requires criminal intent as an ingredient of the crime. Many regulatory codes dealing with the public health and safety impose strict requirements. Failure to adhere to such requirements is a violation, whether or not the violator had mens rea.

Excuses That Limit or Overcome Responsibility

Mistake of Fact and Mistake of Law

Ordinarily, ignorance of the *law* is not an excuse. If you believe that it is permissible to turn right on a red light but the city ordinance prohibits it, your belief, even if reasonable, does not excuse your violation of the law. Under certain circumstances, however, ignorance of law will be excused. If a statute imposes criminal penalties for an action taken without a license, and if the government official responsible for issuing the license formally tells you that you do not need one (though in fact you do), a conviction for violating the statute cannot stand. In rare cases, a lawyer's advice, contrary to the statute, will be held to excuse the client, but usually the client is responsible for his attorney's mistakes. Otherwise, as it is said, the lawyer would be superior to the law.

Ignorance or mistake of *fact* more frequently will serve as an excuse. If you take a coat from a restaurant, believing it to be yours, you cannot be convicted of larceny if it is not. Your honest mistake of fact negates the requisite intent. In general, the rule is that a mistaken belief of fact will excuse criminal responsibility if (1) the belief is honestly held, (2) it is reasonable to hold it, and (3) the act would not have been criminal if the facts were as the accused supposed them to have been.

Impossibility

What if a defendant is accused of attempting a crime that is factually impossible? For example, suppose that men believed they were raping a drunken, unconscious woman, and were later accused of attempted rape, but defended on the grounds of factual impossibility because the woman was actually dead at the time sexual intercourse took place? Or suppose that a husband intended to poison his wife with strychnine in her coffee, but put sugar in the coffee instead? The "mens rea" or criminal intent was there, but the act itself was not criminal (rape requires a live victim, and murder by poisoning requires the use of poison). States are divided on this, but thirty-seven states have ruled out factual impossibility as a defense to the crime of attempt.

Legal impossibility is different, and is usually acknowledged as a valid defense. If the defendant completes all of his intended acts, but those acts do not fulfill all the required elements of a crime, there could be a successful "impossibility" defense. If Barney (who has poor sight), shoots at a tree stump, thinking it is his neighbor, Ralph, intending to kill him, has he committed an attempt? Many courts would hold that he has not. But the distinction between factual impossibility and legal impossibility is not always clear, and the trend seems to be to punish the intended attempt.

Entrapment

One common technique of criminal investigation is the use of an undercover agent or decoy—the policeman who poses as a buyer of drugs from a street dealer or the elaborate "sting" operations in which ostensibly stolen goods are "sold" to underworld "fences." Sometimes these methods are the only way by which certain kinds of crime can be rooted out and convictions secured.

But a rule against entrapment limits the legal ability of the police to play the role of criminals. The police are permitted to use such techniques to detect criminal activity; they are not permitted to do so to instigate crime. The distinction is usually made between a person who intends to commit a crime and one who does not. If the police provide the former with an opportunity to commit a criminal act—the sale of drugs to an undercover agent, for example—there is no defense of entrapment. But if the police knock on the door of one not known to be a drug user and persist in a demand that he purchase drugs from them, finally overcoming his will to resist, a conviction for purchase and possession of drugs can be overturned on the ground of entrapment.

Lack of Capacity

A further defense to criminal prosecution is the lack of mental capacity to commit the crime. Infants and children are considered incapable of committing a crime; under common law any child under the age of seven could not be prosecuted for any act. That age of incapacity varies from state to state and is now usually defined by statutes. Likewise, insanity or mental disease or defect can be a complete defense. Intoxication can be a defense to certain crimes, but the mere fact of drunkenness is not ordinarily sufficient.

Immunity

Immunity basically prevents the state from filing charges against an individual related to the commission of a crime. Immunity is granted because the state wants the individual to serve as a witness in the case against someone else.

Immunity can be complete, referred to as transactional immunity, relating to any charges arising out of a specific event (with the exception of perjury- if the person lies about the event), or it can be limited to not allowing the state to use statements you make against you – known as use immunity. With use immunity the state may still prosecute you, they just cannot use your own statements against you at trial.

How immunity works in federal cases
https://www.whitecollarcrimeresources.com/how-immunity-works-in-federal-criminal-cases.html

Statute of Limitations

The statute of limitations provides for a defense so a person does not have to fear prosecution for some crimes, especially minor crimes (misdemeanors) for the rest of his or her life. Most states limit misdemeanors to a one year to three years statute of limitations, however some are longer and some shorter, especially for really minor crimes. For serious crimes, such as felonies, states have longer statutes of limitations and some states, such as Maryland, have no statute of limitations. A chart of statute of limitations by state for various felonies and misdemeanors can be found at http://criminal.findlaw.com/criminal-law-basics/time-limits-for-charges-state-criminal-statutes-of-limitations.html.

Other Excuses: Duress, Consent, Necessity, Defense of Self, etc.

A number of other circumstances can limit or excuse criminal liability. These include duress (a gun pointed at one's head by a masked man who apparently is unafraid to use the weapon and who demands that you help him rob a store), honest consent of the "victim" (the quarterback who is tackled), adherence to the requirements of legitimate public authority lawfully exercised (a policeman directs a towing company to remove a car parked in a tow-away zone), the proper exercise of domestic authority (a parent may spank a child, within limits), necessity (breaking into a house to call an ambulance for an auto accident), and defense of self, others, property, and habitation. Each of these excuses is a complex subject in itself.

Criminal Procedure and Constitutional Safeguards

Criminal Procedure

The procedure for criminal prosecutions is complex. Procedures will vary from state to state. A criminal case begins with an arrest if the defendant is caught in the act or fleeing from the scene; if the defendant is not caught, a warrant for the defendant's arrest will issue. The warrant is issued by a judge or a magistrate upon receiving a complaint detailing the charge of a specific crime against the accused. It is not enough for a police officer to go before a judge and say, "I'd like you to arrest Bonnie because I think she's just murdered Clyde." She must supply enough information to satisfy the magistrate that there is probable cause (reasonable grounds) to believe that the accused committed the crime. The warrant will be issued to any officer or agency that has power to arrest the accused with warrant in hand.

The accused will be brought before the magistrate for a preliminary hearing. The purpose of the hearing is to determine whether there is sufficient reason to hold the accused for trial. If so, the accused can be sent to jail or be permitted to make bail. **Bail** is a sum of money paid to the court to secure the defendant's attendance at trial. If he fails to appear, he forfeits the money. Constitutionally, bail can be withheld only if there is reason to believe that the accused will flee the jurisdiction.

Once the arrest is made, the case is in the hands of the prosecutor. In the fifty states, prosecution is a function of the district attorney's office. These offices are usually organized on a county-by-county basis. In the federal system, criminal prosecution is handled by the office of the US attorney, one of whom is appointed for every federal district.

Following the preliminary hearing, the prosecutor must either file **an information** (a document stating the crime of which the person being held is accused) or ask the grand jury for an indictment. The grand jury consists of twenty-three people who sit to determine whether there is sufficient evidence to warrant a prosecution. It does not sit to determine guilt or innocence. The indictment is the grand jury's formal declaration of charges on which the accused will be tried. If indicted, the accused formally becomes a defendant.

The defendant will then be **arraigned**, that is, brought before a judge to answer the accusation in the indictment. The defendant may plead guilty or not guilty. If he pleads not guilty, the case will be tried before either a judge (known as a **bench trial**) or a jury of 6-12 citizens. A defendant cannot be convicted unless the judge or jury finds the defendant guilty beyond a reasonable doubt. Most states require a unanimous jury verdict, however prior to 2020, two states did not. The Supreme Court held in *Ramos v. Louisiana* that a non-unanimous jury violated the sixth amendment right of the defendant. *Ramos v. Louisiana*, 590 U.S. 1390 (2020).

The defendant might have pleaded guilty to the offense or to a lesser charge (often referred to as a **"lesser included offense"**—simple larceny, for example, is a lesser included offense of robbery because the defendant may not have used violence but nevertheless stole from the victim). Such a plea is usually arranged through plea bargaining with the prosecution. In return for the plea, the prosecutor promises to recommend to the judge that the sentence be limited. The judge most often, but not always, goes along with the prosecutor's recommendation.

The defendant is also permitted to file a plea of **nolo contendere** (no contest) in prosecutions for certain crimes. In so doing, he neither affirms nor denies his guilt. He may be sentenced as though he had pleaded guilty, although usually a nolo plea is the result of a plea bargain. Why plead nolo? In some offenses, such as violations of the antitrust laws, the statutes provide that private plaintiffs may use a conviction or a guilty plea as proof that the defendant violated the law. This enables a plaintiff to prove liability without putting on witnesses or evidence and reduces the civil trial to a hearing about the damages to plaintiff. The nolo plea

permits the defendant to avoid this, so that any plaintiff will have to not only prove damages but also establish civil liability.

Following a guilty plea or a verdict of guilt, the judge will impose a sentence after presentencing reports are written by various court officials (often, probation officers). Permissible sentences are spelled out in statutes, though these frequently give the judge a range within which to work (e.g., twenty years to life). The judge may sentence the defendant to imprisonment, a fine, or both, or may decide to suspend sentence (i.e., the defendant will not have to serve the sentence as long as he stays out of trouble).

Sentencing usually comes before appeal. As in civil cases, the defendant, now convicted, has the right to take at least one appeal to higher courts, where issues of procedure and constitutional rights may be argued, as well as errors of law.

Table 9 Summary of Constitutional Criminal Protections

Fourth Amendment	Fifth Amendment	Sixth Amendment	Eighth Amendment
Right Against Unreasonable Searches or Seizures of Persons or Property	Right Against Self-Incrimination at Trial or during Custodial Interrogation	Right to Speedy Trial	Prohibition of Cruel and Unusual Punishment
Warrant Requirement supported by "Probable Cause"	Right of Due Process	Right to Cross Examine Accusers	Prohibition of Excessive Fines
	Right Against Double Jeopardy	Right to Counsel	Prohibition of Unreasonable Bail

Constitutional Safeguards

Search and Seizure

The rights of those accused of a crime are spelled out in four of the ten constitutional amendments that make up the Bill of Rights (Amendments Four, Five, Six, and Eight). For the most part, these amendments have been held to apply to both the federal and the state governments. The Fourth Amendment says in part that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Therein, individuals are entitled to a reasonable expectation of privacy in their person, houses, etc. from governmental intrusion. Although there are numerous and tricky exceptions to the general rule, ordinarily the police may not break into a person's house or confiscate his papers or arrest him unless they have a warrant to do so. This means, for instance, that a policeman cannot simply stop you on a street corner and ask to see what is in your pockets (a power the police enjoy in many other countries), nor can your home be raided without probable cause to believe that you have committed a crime.

Table 10 Fourth Amendment Warrant Exceptions

Exception	Description
Plain View	Police that view potential contraband in "plain view" need not obtain a warrant to seize the illegal object. *U.S. v. Gordon*, 741 F. 3d 64, 71 (10th cir. 2014).
Exigency	Searches incident to pursue a fleeing suspect, protect individuals threatened with imminent harm, or to prevent immediate destruction of evidence. *Carpenter v. U.S.*, 138 S. Ct. 2206, 2223 (2018)
Community Caretaking	Search to protect "the safety of the general public who might be endangered" in certain circumstances. *U.S. v. Bute*, 43 F.3d 531, 535 (10th cir. 1994) (limiting this exception to searches of automobiles)
Incident to Arrest	Search "only the space within an arrestee's 'immediate control,' meaning 'the area from within which he might gain possession of a weapon or destructible evidence.'" *Arizona v. Gant*, 556 U.S. 332 (2009).
Terry search	"Stop and Frisk" incident to a reasonable, articulable suspicion of criminal activity particularized to the defendant the time of the seizure. *U.S. v. Curry*, 965 F. 3d 313 (4th cir. 2020)
Inventory search	"Police may, without a warrant, impound and search a motor vehicle so long as they do so in conformance with the standardized procedures of the local police department and in furtherance of a community caretaking purpose, such as promoting public safety or the efficient flow of traffic." Such a search is valid to produce an inventory to protect the owner's property while in police custody, to assure against claims against the police of lost property, and protect the police from danger that might be posed by property in the vehicle. *U.S. v. Johnson*, 889 F. 3d 112 (9th cir. 2018).
Consent	A person can consent to a police search of their person or property and thereby waive any right to object later under the fourth amendment to the search. *U.S. v. DaCruz-Mendes*, 970 F.3d 904, 908 (8th cir. 2020) ("The encounter is considered consensual so long as a reasonable person would feel free to terminate the encounter or refuse to answer questions") .

In evaluating whether a particular warrantless search is "reasonable" under the fourth amendment, courts have formulated various rules based on what the reasonable expectations of privacy are within society – a concept that changes with the times. Generally, courts are more likely to expect a warrant for the search of a person's home or its curtilage than they might for the search of a person's car incident to a traffic stop or arrest of the driver. Police activity in the public street – such as a police lip reader that watched a suspect while he made a phone call in a public payphone on a street corner or police investigation of an open field for narcotics– are less likely to require a warrant or even be considered a search. *Katz v. U.S.*, 389 U.S. 347 (1967); *Oliver v. U.S.*, 466 U.S. 170 (1984).

However, numerous cases demonstrate that these general principles give way to unexpected exceptions. In 2021, The Fourth Circuit *en banc* held that recorded aerial surveillance *en masse* of persons outside in Baltimore City by the police department violated the fourth amendment when that data was subsequently used by the police department to "deduce information from the whole of individuals' movements" without a warrant. *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, No. 20-1495 (4th cir. 2021 *en banc*). The Supreme Court held that, while visual surveillance of a home that is otherwise not a trespass does not violate a fourth amendment right, street-based infrared surveillance of the exteriors of homes requires a warrant. *Kyllo v. U.S.*, 533 U.S. 27 (2001). The lesson of these myriad cases is that there is tremendous litigation on the validity of searches that lack a warrant, and myriad rules that have been developed on what constitutes a reasonable search under the circumstances.

What if the police do search or seize unreasonably? The courts have devised a remedy for the use at trial of the fruits of an unlawful search or seizure. Evidence that is unconstitutionally seized is excluded from the trial. This is the so-called **exclusionary rule**, first made applicable in federal cases in 1914 and brought home to the states in 1961. The exclusionary rule is highly controversial, and there are numerous exceptions to it. But it remains generally true that the prosecutor may not use evidence willfully taken by the police in violation of constitutional rights generally, and most often in the violation of Fourth Amendment rights. (The fruits of a coerced confession are also excluded.)

Double Jeopardy

The Fifth Amendment prohibits the government from prosecuting a person twice for the same offense. The amendment says that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." If a defendant is acquitted, the government may not appeal. If a defendant is convicted and his conviction is upheld on appeal, he may not, thereafter, be re-prosecuted for the same crime.

Double jeopardy does not prevent a state government and the federal government or two separate state governments (like Maryland and Virginia) from trying the same individual for the same crime. That is because each state and the federal government are separate and sovereign entities. So, if a defendant committed an act that was a violation of both state and federal law, he or she could be tried by both the state government and the federal government for the same crime. Or, where a crime crosses multiple state lines, such as a kidnapping, each state can try the defendant for a violation of that state's laws. However, many times multiple prosecutions do not occur due to conserving judicial resources where one state has already received a conviction.

Self-Incrimination

The Fifth Amendment is also the source of a person's right against self-incrimination (no person "shall be compelled in any criminal case to be a witness against himself"). The debate over the limits of this right has given rise to an immense amount of literature and case law. In broadest outline, the right against self-incrimination means that the prosecutor may not call a defendant to the witness stand during trial and may not comment to the jury on the defendant's failure to take the stand. Moreover, a defendant's confession must be excluded from evidence if it was not voluntarily made (e.g., if the police beat the person into giving a confession). In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court ruled that a confession may not be admissible if the police have not first advised a suspect of his constitutional rights, including the right to have a lawyer present to advise him during the questioning. However, like most areas of the law there are exceptions to this rule. These so-called Miranda warnings have prompted scores of follow-up cases that have made this branch of jurisprudence especially complex.

Speedy Trial

The Sixth Amendment tells the government that it must try defendants speedily. How long a delay is too long depends on the circumstances in each case. In 1975, Congress enacted the Speedy Trial Act to give priority to criminal cases in federal courts. It requires all criminal prosecutions to go to trial within seventy-five days (though the law lists many permissible reasons for delay).

Cross-Examination

The Sixth Amendment also says that the defendant shall have the right to confront witnesses against him. No testimony is permitted to be shown to the jury unless the person making it is present and subject to cross-examination by the defendant's counsel.

Assistance of Counsel

The Sixth Amendment guarantees criminal defendants the right to have the assistance of defense counsel. During the eighteenth century and before, the British courts frequently refused to permit defendants to have lawyers in the courtroom during trial. The right to counsel is much broader in this country, as the result of Supreme Court decisions that require the state to pay for a lawyer for indigent defendants in most criminal cases. Notification of this right is included in the standard *Miranda* warnings read to defendants at arrest or interrogation.

Cruel and Unusual Punishment

Punishment under the common law was frequently horrifying. Death was a common punishment for relatively minor crimes. In many places throughout the world, punishments still persist that seem cruel and unusual, such as the practice of stoning someone to death. The guillotine, famously in use during and after the French Revolution, is no longer used, nor are defendants put in stocks for public display and humiliation. In pre-Revolutionary America, an unlucky defendant who found himself convicted could face brutal torture before death.

The Eighth Amendment banned these actions with the words that "cruel and unusual punishments [shall not be] inflicted." Virtually all such punishments either never were enacted or have been eliminated from the statute books in the United States. Nevertheless, the Eighth Amendment has become a source of controversy, first with the Supreme Court's ruling in 1972 that the death penalty, as haphazardly applied in the various states, amounted to cruel and unusual punishment. *Furman v. Georgia*, 408 U.S. 238 (1972) (Georgia subsequently enacted a new statute for the death penalty which was reviewed and approved by the Court in *Gregg)*. Later Supreme Court opinions have made it easier for states to administer the death penalty. *Gregg v. Georgia*, 428 U.S. 153 (1976). As of 2010, there were 3,300 defendants on death row in the United States. There are 19 states and the District of Columbia that have subsequently abolished the death penalty. Thirty-one states and the federal government currently allow for the death penalty. Under federal law only certain homicide offenses and treason qualify for the death penalty. https://deathpenaltyinfo.org/states-and-without-death-penalty

Of course, no corporation is on death row, and no corporation's charter has ever been revoked by a US state, even though some corporations have repeatedly been indicted and convicted of criminal offenses.

Adding to the complexity is that states may provide further or additional protections to criminal defendants that are greater than those defined by the federal constitution. For example, while the death penalty is not automatically a violation of the Eighth Amendment, some states have made this practice illegal, including Maryland. *Bellard v. State*, 452 Md. 467 (2017); 2013 Md. Laws 2298-99 (Vol. III, Ch. 156, S.B. 276). While random drug testing of student athletes may not offend the fourth amendment, such practice does violate the state constitution of Washington which affords fewer exceptions to the warrant requirement than its federal counterpart. *York v. Wahkiakum School Dist.*, 178 P.3d 995 (Wash. 2008). The fifth amendment right against self-incrimination requires the criminal defendant voluntarily confess, but under Maryland law, the state has the burden to demonstrate that the confession was actually voluntary. *Winder v. State*, 765 A.2d 97, 113 (Md. 2001). As the reader can imagine, there are numerous other wrinkles, exceptions, and rules of law that vary from state to state as to the rights of criminal defendants in addition to those found in the federal constitution. However, states are not free to provide criminal defendants with fewer protections; the federal constitution establishes a "floor" or minimum rights of all accused of or prosecuted for a crime. *Cooper v. California*, 386 U.S. 58 (1967); *Oregon v. Hass*, 420 U.S. (1975).

Presumption of Innocence