

Hi students, this is Professor Faith, and I'm recording this lecture for my business law students.

The purpose of this lecture is to work on criminal law. So when you look at the materials for this module, you'll find our agenda is these five different learning objectives. Some have to do with how the civil and criminal justice system are different from each other, and the realities that you can have two parallel court cases pending that involve more or less the same situation, but one that could be tried on the civil side and the other that could be on the criminal side, and it permits independent results that can be contradictory results from each other.

In addition, we'll spend some time looking at different kinds of crimes, the elements of those crimes, how they might apply to particular situations, also potential defenses to criminal charges. And the other couple things that I wanted to spend some time on with you are to look at constitutional criminal procedure, and to understand what the investigative process is.

So the sign reading in this lecture is to support those learning objectives.

The criminal law, as you can imagine, it's hardly a new idea that people shouldn't kill each other, and the criminal law is designed to either deter and/or punish behavior that violates the sense of a public wrong that one should not do this - you should be punished by the state for engaging in such conduct. Old idea since there's been organized societies, there have been criminal sanctions for certain kinds of unacceptable behavior. And some of the basic ideas, it should murder people or steal from them, that's hardly new ground for me to suggest that that continues to be illegal today.

But beyond that, in terms of this topic, there are also this set of ideas about statutory crimes, crimes that are defined by statute in 2023, and defenses to those crimes, which we'll talk a little bit more about. And again, there are some innovations in the criminal law beyond historically where we might start our British legacy in initiating some of the definitions of what's a crime and what isn't.

And then the other part of this lecture has to do with criminal procedure, which is rooted really in the U.S. Constitution, which we talked about a little bit previously this semester. We'll go a little bit further into some of those constitutionally protected rights of the accused and discuss some of the application of them.

So as I said, there is a historical legacy, you know, dating back probably thousands of, you know, if you go back to Roman times, it was illegal to kill people then, it's illegal in the British system, it's illegal in the French system, and it's generally illegal. And so we do have a legacy of certain kinds of felonies, the definitions for felonies that were imported from colonial practice into state practice and are present really in our criminal justice system today.

However, it's 2023, and so one of the realities is that crime is really defined by statute today. And so there are criminal sanctions that are defined under state law, Maryland law, under any other state's law, and there's also federal crimes in Title 18 of the U.S. Code, which extensively define behavior that is illegal now. In them are incorporated into those statutes common law concepts that you have read about or that we've talked about in the course, such as, you know, what

constitutes murder versus manslaughter - murder is a killing with malice and planning and deliberation, whereas manslaughter is something less than that, perhaps in the spur of the moment, maybe it's a criminally negligent act that resulted in a killing.

But those ideas really are not new, and even though the statutes, if you look at the Maryland criminal law article, it talks about murdering, manslaughter, it gives you information there, there's stuff that's not in there that's really from court cases, from prior decisions that explain the nuances and the differences, what really is a malicious killing versus an angry or extremely upset killing.

And so you know, there's stuff in in those statutes that really come back from interpretations of prior court decisions and in some cases hundreds of years of court decisions about what constitutes a particular crime.

One of the other aspects initially of our criminal justice system was the idea that we really criminalized when people acted with intention to kill, intended to steal, intended to burn down a house, commit a rape, and so on. It really was an intentional system - you had to have the appropriate mens rea, or mental state, that corresponded with the action that resulted in a bad thing, whatever that might be.

And so when you look at what I call common law felonies, common law crimes, there is a common thread that they involve intentional conduct by the defendant. And really, when you go through the textbook and look at those common law felonies, there really aren't that many relative to the statute books today that go on for hundreds of pages and criminalize all sorts of conduct well beyond just merely murder in manslaughter or burglary, robbery, and rape, and so on.

We've changed how the criminal law really its focused, it's more than just really meaning to do certain kinds of acts that gets you into criminal trouble now.

The other thing is that even though having to mean to do it is definitely relevant to common law felonies, when you look at statutory crimes today, that it's not necessarily the same level of intention or even any intention that is truly required in order to commit a crime. And so that we've broadened the sense of what could be criminalized as a consequence of, in part, modern problems, modern technology, more complex relationships, more complex economic issues that have created a greater need for complex statutes and criminal sanctions.

That said, when we talk about intention, there really is some complexity here as well. And I have this slide describing what is, I guess, a sliding scale of criminal intention. On the one side is acting with malice, and on the other is acting with a criminally negligent intention - it's more than just an accident, but less than some of the other intentions that we're talking about here. And then you have actions that people take with knowledge that are reckless and disregard to the safety or well-being of other people or their property. You have these things kind of in the middle, and not all of these are consistent with each other, not all are used to mean all crimes.

Right, you can not really commit a criminally negligent murder - that requires some kind of malice. But manslaughter could be a criminally negligent standard, potentially. It might be other crimes specifically are defined in the statute as requiring knowledge of the wrongful conduct or knowledge of some illegal intention, but it doesn't require malice, it doesn't require "I meant to kill you" in particular or "ruin you" in particular, not that level of intention.

And so we have a broader scale today than we would have historically in 18th century colonies, again responsive to an ongoing complexity that our society has today that really wasn't present in an agrarian 18th century colony.

Now, as I mentioned earlier, it's the state that brings these charges, and the burden that they have to prove them is beyond a reasonable doubt. As you know, that's not the standard for civil cases generally, it's a lesser standard of more likely than not. And so the crimes really require relative certainty, not absolute certainty, but relative certainty that the defendant did it, and it's the state's burden to prove that, as opposed to civil actions, which is the wronged person, the injured person, that's supposed to sue and bring the action and prove more likely than not that that's what the defendant did to them.

That's not how it works on the criminal side. In addition to that, the state has to prove all the elements beyond a reasonable doubt - it can't be like three out of four, you have to get all of that beyond a reasonable doubt in order for a conviction to be proper. Again, relatively high standards to convict people, and I'd say that overall the conviction rates are less than 50 percent in charges on average that are brought in the United States. A lot of that has to do with this - it's just difficult to prove it, you have to convince a judge and/or a jury, if one is properly demanded, that the defendant really did almost certainly do what the state charged them with doing.

Now, the other problem with this is criminalizing behavior that is vaguely defined or that is overly broadly defined, and that the constitution does not permit according to the Supreme Court. What do I mean by that? Well, generally one way to look at vagueness is that what a police officer have to exercise discretion as to whether to arrest for the alleged conduct.

You know, that's a problem of maybe different officers would look at it differently, and that maybe someone think it's a crime and some not. If police officer can't agree, then it's very difficult for the public to know what they're not supposed to do under the circumstances. So laws are not supposed to be vague - there's a fundamental sense of fairness that you should be on notice of what you shouldn't do or face criminal sanctions for. And so sometimes laws are overly vague and difficult to enforce, difficult to interpret, difficult for the public to know what conduct is not permitted.

The other side of it is overly broad statutes that criminalize both illegal and legal activity. One example of this is criminal statutes of speech. You generally have a very broad protection for First Amendment rights in the United States, and so we tolerate a fairly wide range of different viewpoints, some of which we probably don't like, many of which we may disagree with, even, but few can be criminalized. There's a broad protection because there's a chilling effect on an overly broad criminal statute that would probably deter people to speak in a gray area that made

these criminal, maybe not - they don't want to go through the criminal process to find out if they should go to jail.

So the Supreme Court over time has really narrowed the criminal sanctions for speech - what really is it to incite violence, what really are fighting words, what's the imminence of it. It's pretty narrow when you look at court cases, because again, people say a lot of things sometimes in anger, maybe they should have exercised better judgment. There's certainly a few things you really can go to jail for saying, right? And so again, there's a sense that criminal statutes should be very limited, and to really the the wrongful behavior - they shouldn't cover more than they need to. Overly broad statutes also could potentially be unconstitutional and unenforceable.

Now, in a business law context, individuals, we're talking about initially, can go to jail. But corporations can be liable too, criminally. The thing is that corporations, because they're not natural people, they can't physically be put in jail, and so it's not quite the same thing. Generally, we're talking about fines paid to the state by the corporation for illegal conduct for which the corporation is responsible. But as you know, that's because people, natural people, work for that corporation or that business entity, and they must have been doing illegal things. So the question is, when is it that the corporation is additionally responsible, and it's not automatic.

What the literature suggests is that if management of the corporation was aware and could have prevented the crime that was carried out by an employee on behalf of the corporation, or management was aware and approved of the conduct that is then criminal, then the corporation can also be subject to fines for that misconduct. Sometimes this arises in situations of bribery, where a business is trying to speed up building a building or they're trying to speed up the permitting process so they're trying to get a license to sell stuff quicker than their competitors, and perhaps they engage in bribery to get public officials to ratify the plan or to issue the permit or whatever it might be.

So the individuals that actually commit the bribe, you know, they come and get the money and then they go pay the public official off, and then they get the favorable treatment for the business. But whether the business itself could be liable is a question of whether it was aware of and could have prevented it - you know, did they engage in behaviors at the corporate level that discourage this kind of conduct, or did a manager say "go bribe that guy, you know, so we can get the building built quicker"?

So corporate liability requires more specific facts, but it is possible that a business entity could also be subject to criminal sanctions for the misconduct of employees. Now, you can't use the Nuremberg defense, say "well, I was an employee, just following orders" - you go to jail too when you engage your criminal conduct. It's just a question of who else might go to jail or who else might be fined and be responsible for this misconduct.

So when you're looking at the textbook, there is this table of some of the big crimes against persons, property, or against public order. One can quibble about whether these are properly categorized or that these are the right three categories, but it's just to give you an idea - there's a lot of different crimes, some of which are old, like murder and manslaughter, have been defined for a long time, others more recent ideas, like violating the FDA act for selling adulterated drugs

or drugs that aren't properly tested, insider trading, which is really a 20th century statute that has to do with trading on corporate securities with inside information, the RICO statute, money laundering - things like that that we've added in the 20th century or later, but gives you kind of a broad overview of the different kinds of crimes that people can be subject to criminal penalties for.

Now, the other part of this are the procedures that the state and the police use to investigate and to punish crime, and so this area of law primarily is a matter of federal statutes - the federal constitutional provisions. However, states also have procedure, and in some cases states may have additional or supplemental protections for citizens of that particular state that go beyond what the Federal Constitution requires. But these are procedural rights of defendants and procedures that the state is supposed to follow to ensure a fair and proper conviction of people for their criminal activity.

So when you're talking about the Federal Constitution, there are several amendments that were added that address the rights of the accused. One of them is the Fourth Amendment, which is difficult, I think, on the first reading to really understand what it's about, but it literally says "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

When you look at this amendment, it's really, and courts often interpreted as, really two parts. The first part is you're not supposed to have or be subject to unreasonable searches or seizures. The other part has to do with when a warrant is supposed to issue and on what evidentiary basis and by whom - you know, that a judge is supposed to issue that, that the state in investigating a crime is supposed to have probable cause, they're supposed to make statements that are under oath about the evidence that they've collected that supports the idea that someone has committed a crime, and they're supposed to describe where they're looking, what they're looking for, as a part of the warrant.

So generally speaking, there is an expectation of privacy, and you look at constitutional law cases about the Fourth Amendment, there's a lot of questions of well, what's your expectation of privacy under these circumstances versus these other circumstances. Generally speaking, you have a lot of expectation of privacy in your home most of the time - the police are going to need a warrant to get into your house, absent some extraordinary circumstance.

And you know, again, there's an expectation that unless you have a really good reason to be in someone's home, you shouldn't be there if you're the police, unless you're invited in or something else. But generally, you need a warrant, and generally you have to have pretty good information to explain why you would get in there. But when you're out on the public street, when you're in your car, probably have a lesser expectation of privacy. When you're in jail, you have a much lower expectation of privacy, and so what's reasonable to search you then is different than what's necessary to search your home, search your person in your home.

The charitable expectation is that the police will get a warrant before they conduct a search or they arrest somebody, that that's the expectation, that they have evidence that they've collected, perhaps from a confidential informant, perhaps the police officer observed, and then they take that information and they put it into an application, and a judge reviews it and decides, should a warrant issue here, is it proper for this person to be arrested or for this person to be searched.

Now, the thing is that's the general rule, but the way that this has worked out in the 20th century is sometimes you don't need a warrant, and the textbook talks about this, gives you some cases that are examples of different situations, like the police observe the crime, or they stop you and they notice the baggie of cocaine in your passenger front seat in plain view - they don't need a warrant to seize the drugs or to seize you. That, you know, because it's an exception to this general rule.

When you consent - when the police ask, can they come in and search your home, and you say, "sure, how about it?" You know, when you're in your car and they say, "can I search your trunk?" You say, "yeah, go ahead" - you know, that sort of thing eviscerates your right to object later on to the Fourth Amendment, because you consented. Again, another exception to this. And as you can imagine, the handful of cases that we represent in the textbook are, you know, just a small sample of many cases where defendants have litigated Fourth Amendment issues, where there was no warrant issued, but yet there was still search, and there is evidence collected from it that's being used to charge the person.

And so there's a lot of litigation, a lot of nuances with this, but this basically is about one of the protections of the public from being searched unreasonably and just arbitrarily - the police need particularized suspicion most of the time, and they really need a warrant most of the time to be able to search you, search your home, search your car, search whatever. But yes the exceptions are many and if you look through some of these cases on what's an exigency or what's caretaking or when you got arrested and what they can search them or take an inventory search or I could say there's a lot of nuances here in the case law that is pretty complicated in terms of these exceptions so being familiar with these understanding is not an absolute requirement that you have a warrant by the police for a proper search but most of the time you will these exceptions don't apply all the time to everything.

Now in the Constitution, we also added the Fifth Amendment which says a bunch of different things. One, no person shall be subject for the same offense to be twice put in jeopardy of life or limb - try saying that five times fast. Nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law. So three different, really related ideas here.

One of which is that there should be a trial, that the judge should, you know, be involved in the allegations or the case. You might, you know, have the right to pre-trial evidence, you have other kind of fairness considerations with due process. You know, that those all kind of part and parcel to the Fifth Amendment statement here.

You can't be tried for the same crime twice that arises out of the same events. Of course, there are exceptions. What do we really mean by that? You know, you can be charged by Maryland for

a crime and also by the federal government, and it could be the same situation, but judgment in the one is not a bar to the other, right? Different sovereigns to which the Fifth Amendment applies. But, you know, the fundamental idea of this is that if the state gets a chance to charge me, and they don't win, if the jury doesn't convict me, you really can't try me again for that same crime that involves that same person. Right? That's what the Fifth Amendment is to prevent - the state just keeping on prosecuting you until they finally win; they have to charge you with something different that isn't foreclosed by Double Jeopardy from the prior trial where you were not convicted.

Also, the Fifth Amendment says that you or cannot be compelled to be a witness against yourself, which traditionally meant that the defendant had a right to be silent at his trial or her trial. Then they have to testify; it couldn't be compelled to testify. And, you know, other later Court opinions have said, and the fact that the defendant didn't testify can't be used as consideration as to whether they're guilty or not. Can't make statements like, "Well, you know, an innocent person would defend themselves in court." You're not required to say anything. You know, the Fifth Amendment is really, but it does is it puts the burden on the state to prove it, not on you to disprove it. It's for them to prove it to whom the burden is to trust.

Now, this has been expanded over time to go beyond trial. So in the 60s, the Supreme Court decided that this also applies to custodial interrogations by the police, and the Miranda case famously requires the police to say, you know, the right to remain silent and right to counsel and the rest of the stuff. Yeah, everybody's heard that from crime dramas for the last hundred years that came from Arizona of the Miranda case. Where the Supreme Court said the Fifth Amendment requires that warning, and that also really over time, the Supreme Court has said that the police, you don't have to talk to them either. You know, they're a part of the the prosecution a case-in-chief; admissions to them is admissions is confessions. You don't have to do that. They don't have a right to compel you to testify against yourself, and requests to get your Council that's unambiguous or request to remain silent and not talk to the police, you have that right, and they have to stop interrogating you at the point that that occurs.

Now, of course, you need a custodial interrogation. What does that mean? Probably when you're in their custody, right? You're in a room, you can't leave at down at the police precinct. That's a little bit different when they come over and have tea with you at your home; maybe that's not a custodial interrogation to which the Fifth Amendment may not apply. But nonetheless, there is this idea that the police really, they really should interview everybody else, they should collect the physical evidence pursuant to a warrant, they should do the job of proven Beyond A Reasonable Doubt without you being compelled to testify against yourself.

That said, you can waive your rights, and there are a lot of cases about whether a defendant really waived their right to be interrogated. The general principle here is don't talk to the police, right? If you change your mind later and say, "Well, I maybe I will talk to you," and then say things that are incriminating, then you want to take it back, you can't get away with that, right? Those admissions will come in. So you really have to be careful about waving it, but the point is that you have this right.

And what was announced in the Supreme Court case really extending the Fifth Amendment uh to Beyond just Court proceedings. Now, the Sixth Amendment also adds some additional rights to defendants. You have the right to confront the witnesses against you, and the the assistance of counsel. You don't have a constitutional rights counsel for civil matters, so again, probably most business law issues, businesses don't have a right to counsel for them. It's only in criminal cases where there is this right.

And the Supreme Court, you know, after the Supreme Court said that you have a right to counsel, states began creating public defender offices, as Maryland has, where if you can't afford an attorney, one can be provided to represent you as a part of the proceedings to advise you about what's going on, how to deal with your defense, and prepare, you know, whether to testify and so on. That that is a constitutionally protected right, one kind of irrespective of your ability to pay for it.

The right to confront Witnesses means you have a right to cross-examine the state's Witnesses, the evidence that they've presented, you know, to prove that they're misrepresenting what happened or that they have a beef with you and that's the real reason why they're testifying, to attack their credibility of the state's Witnesses. And so there is this also a constitutional right to that effective assistance of council. Notice it says you have a right to cancel it; it didn't say they have to be any good. But Sixth Amendment challenges sometimes have to do with whether initial defense counsel did what a reasonable attorney would do, and did they fail to question a witness, that they fail to gather evidence, that they fail to do things that a reasonable defense attorney would have done, that might be the basis for a new trial if defense counsel at the original trial failed to act accordingly.

So the Sixth Amendment, who's a lot of these different ideas as the rights of the accused. Finally, the Eighth Amendment says that excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Now, for the longest time, the Eighth Amendment prohibitions here on excessive fines didn't apply to the states. Over time, the cruel and unusual punishment Clause was used to attack uh death penalty charges by States or the process of killing defendants that were convicted and were sentenced to die, with mixed results. Again, when you look at the Supreme Court over time, generally what they interpret this to mean is, you know, you can't be drawn and quartered by four horses that tear you apart while you're alive, or you know, be tortured in the Iron Maiden, things like you know, barbaric things like that. But they've been less inclined overall to prevent death penalty uh cases in in other circumstances.

What you have seen over time is we really don't execute minors, that's unconstitutional, probably don't execute people with a low IQ, where some cases with people with IQs under 70 that really probably didn't understand what was going on sufficiently from the course point of view to say that they really should have been executed for the crime. So in some cases, we have said, "Well, there's limits here," but it's still possible to die by firing a squad in certain States, and that's not unconstitutional to do that in most states.



That don't have the death penalty don't have it because the state decided either by legislation or by an amendment to their constitution, it's not because the Eighth Amendment prohibits it. Yeah, I mentioned excessive fines. It's funny because you think this is an old document, this was written in 1790 something, and adopted by the states, didn't apply to the states until the Supreme Court started to incorporate these through the 14th amendment in the 1870s. That that this is a limitation on what states may do, but it was until 2019 that the Supreme Court took up a case about excessive fines, where a person had been subject to a pre-trial forfeiture of an asset for relatively small fine, you know, it was like a fifty thousand dollar car but it was a five hundred dollar fine if they were convicted.

And it's very controversial that people have their assets seized by the state and they never really return. This sort of turns it into a fine, even convicted or not, you know, even convicted, you know, you lose your car over 500 charge, man, it just seemed disproportionate. Supreme Court decided that this particular Clause actually does apply to the states too, and it found that that conduct, that pre-trial pre-judgment uh taking by the police, was really illegal, it violated the Constitution's prohibition here.

This lecture was a short tour of these different ideas under the Constitution and a brief of some of these concepts of what constitutes a crime potentially, what might be a defense to it.