

Criminal Law and Civil Law

In previous chapters, we have covered extensively about **civil laws**, which concerns:

- **Interpersonal** wrongdoings
- Punishment is usually **compensation**
- Lawsuits **by individuals**

Criminal laws, however, concern deeper issues related to the society.

- Wrongdoings to the **society**
- Punishment is usually **incarceration or imprisonment** (harsher)
- Prosecuted by the government, brought by a **state or federal prosecutor**

Torts and crimes are **NOT mutually exclusive**.

Important

Definition 8.1: Mens Rea

In criminal law, mens rea, or "guilty mind", is the mental state of a defendant who is accused of committing a crime.

Different mental states lead to different kinds of crimes.

A criminal case requires both **mens rea** and **facts**, and thus carry a higher burden of proof to win a criminal case ("beyond a reasonable doubt") than to win a civil case ("preponderance of the evidence").

Summary

Civil Case vs Criminal Case

- Civil: court decides which side is more likely to be believable (> 50% likelihood of guilt)
- Crime: court requires beyond a reasonable doubt (> 90% of likelihood of guilt)

It is **a lot harder** for prosecution to win a criminal case.

White-Collar Crime

More influential than perceived - the economic impact from business crimes is a magnitude greater than street crime.

Leading sources of white-collar prosecutions include:

- Fraud
 - Any deception intended to induce someone to part with property or money
- [Bribery](#) and money laundering
- Food and (pharmaceutical) drugs
- Antitrust
- Environmental crimes

In the list above, fraud and bribery consist the majority.

RICO

Important

Definition 8.2: RICO

The Racketeer Influenced and Corrupt Organizations Act (RICO) is a **federal law** targeting organized criminal activity and racketeering. RICO targets **augmented, organized crimes** by connecting **small wrongdoings to a single act of crime**.

- Strict punishment
- Super-charging

RICO prohibits (1) investing, (2) acquiring in interests, (3) participating in, or (4) conspiring to conduct racketeering activities in an enterprise.

RICO Elements

To claim a RICO violation, we need to show the following:

1. Conduct
 - Party is **associated** with and **carried out** the directions of the enterprise
 - Requires **direct evidence**, regardless of conductor being high or low level employee

- **EASY** to prove in business context
2. Racketeering Activity
 - E.g. [Mail and wire fraud](#), Bribery, Fraud, 35 crimes in total
 - Each act (to each party) counts as **one** instance, separately
 3. Pattern of Racketeering Activity
 - Need **at least 2 acts** of racketeering activity within 10 years
 4. Enterprise
 - Racketeering activities have to be committed **THROUGH** this associated enterprise
 - **EASY** to prove in business context

Apart from the "augmented" RICO claim, a prosecutor can also sue for individual crimes that make up the RICO case.

Mail and Wire Fraud

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A federal crime. To prove the crime, the prosecutor needs to establish **TWO elements**:

- There are false representations that were material to the **scheme to defraud**, and
- The scheme was transmitted by wire, radio, or television communications in interstate commerce
 - Being interstate allows federal government to have [personal jurisdiction](#)

We don't need to demonstrate that there is a victim - all required is that there exists a scheme.

False Statement Act

Targets **make-up crimes**.

To prove a False Statement Act violation, the government must establish that the defendant:

- Made a **materially false statement** in any matter
 - Doesn't matter the motivation or even if it has to do with a crime
- Within the **jurisdiction of the federal government**,
- **To a government official**

In this case, the best way to avoid this potential liability is to shut up.

- [The fifth amendment](#) grants that power
 - Silence cannot be treated as evidence of convicted crimes
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Vicarious Liability

Vicarious liability describes how one can be prosecuted **for someone else's** crime. Note that previously we've seen [Respondeat Superior](#), which applies to both crimes and torts.

We will focus on the Responsible Corporate Officer Doctrine. This is much narrower than Respondeat Superior, as it applies to **supervisors ONLY**.

Important

Definition 8.3: Responsible Corporate Officer Doctrine

A strict personal liability theory interpreted by the government as permitting (in certain circumstances) the **prosecution of corporate officers and directors** for misdemeanor criminal offenses **WITHOUT** the need to establish their intent or personal involvement in wrongful conduct.

The rule of thumb is that:

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if orders_to_commit_crime:
    CRIME
elif was_responsible and can_prevent
    CRIME
elif not_knowing and didnt_order:
    COMPANY_CANT_FIRE
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Governments would offer financial incentive to officers who **disclose** crimes.

Bribery

Important

Definition 8.4: Bribery

The offering, giving, soliciting, or **receiving of any item of value** as a means of influencing the actions of an individual holding a **public or legal duty**.

There is an inherent risk for conducting global businesses:

- Corporations must usually secure licenses, permits, registrations, or other government approvals
- Foreign government may require appointment of a “sponsor,” which is required to be paid on an annual basis

All of these factors could give rise to the crime of bribery.

FCPA

The Foreign Corrupt Practices Act (FCPA) is established in the premise of a US-centric global economy.

- Extremely powerful and popular
- Other bribery laws model the FCPA
- Jointly enforced by the SEC and DOJ

Reach

The FCPA has extensive reach (**enforced worldwide**):

- To US persons and companies who commit designated acts abroad
- To non-US persons/companies where any part of the bribery **touches the United States**
 - Shareholders, employees, officers, partners

Note

There is separate statutes that apply to U.S. government officials only regarding bribery.

Provision

There are two primary provisions of the FCPA:

1. The Anti-Bribery Provision

- FCPA prohibits bribes or anything of value being paid to **foreign government officials** to aid in **obtaining or retaining business**
 - Foreign government officials are individuals **employed or associated** with a foreign government or state-owned businesses
- Applies to anywhere in the world of US citizens, US companies, and **payments by non-US companies** that "touch on" the United States

2. The Accounting Provision

- Requires that US public companies **keep books and records** that accurately reflect their business transactions

Important

The penalty of violating the FCPA is **two times** the amount of the potential benefit of the bribery.

Exception

The FCPA doesn't apply to the following situations:

- Expediting or facilitating payments
- Lobbying

Naturally, the US government **CANNOT** prosecute foreign government officials that reside in a foreign country, though they violated the FCPA.

- **NO personal jurisdiction**
 - However, this crime bars this individual from traveling to the US
 - Or, seek expedition

In other words, the FCPA **DOESN'T** prohibit the **RECEIVING** of bribery.