

CHAPTER 5: CRIMES

LECTURE OUTLINE

1. The *Hartley* case, *United States v. Hartley*, 678 E.2d 961 (11th Cir. 1982), although factually somewhat humorous (Hartley is convicted of fraud and RICO violations for providing breaded shrimp that did not conform to military specifications), raises serious criminal law issues discussed in this chapter: (1) the constitutional protections of those accused of crimes, (2) the difficult burden imposed on the government to prove someone guilty, and, (3) white collar crime. As a starting point, the case can be used to discuss the growing importance of criminal law to businesspeople since criminal law is increasingly being used as a corporate control device.
2. Note that crimes are offenses against society.
 - a. Criminal cases are brought in the name of the state, by the state's representative: the prosecutor in state cases and the United States Attorney in federal cases.
 - b. Note that the prosecutor's power to decide who will be prosecuted for crime makes him or her one of the most powerful persons in the criminal justice system. Discuss the fact that prosecutors are elected officials and the effects this may have on their decisions.
 - c. You may want to expand your discussion to include the purposes and limits of the criminal sanction.
3. Discuss the *felony/misdemeanor* distinction.
4. Discuss the arguments for decriminalization of "victimless crimes" (they are difficult to enforce, they facilitate corruption, they overburden the courts and police, and they foster disrespect for the law). Point out that criminalization of behavior is a social issue.
5. Discuss the *essentials of crime*. This discussion can be tied in with the first and second questions raised by *Hartley*.
 - a. Prior statutory prohibition: stress that criminal offenses are now all statutory offenses. Discuss the constitutional limits on the government to criminalize behavior.
 - (1). No *ex post facto* laws regarding either criminalizing acts or changing punishment. *Example: Problem Case* number 8.

- (2). Due process requires that criminal statutes be clearly worded (that they put an ordinary person on notice). *Example*: Problem Case number 6.
 - (3). Legislatures can't outlaw constitutionally protected behavior.
 - (4). You may also want to point out that the Equal Protection Clause prohibits arbitrary discrimination, and the Eighth Amendment outlaws cruel and unusual punishment. Recently, death penalties have sometimes been successfully challenged under the latter.
- b. *Proof of every element* of the offense charged beyond a reasonable doubt, within the framework of constitutionally provided safeguards.
- (1). Note the reasons for the greater burden of proof in criminal versus civil cases. You may want to discuss the difficulty of proving something *beyond reasonable doubt* in the context of the O.J. Simpson trial featured in two TV series in 2016.
 - (2). Note that many criminal defense lawyers believe that juries don't actually presume that criminal defendants are innocent.
 - (3). *Additional Example* of proof of every element of offense. Give the class the elements of common law burglary:
 - (a). breaking (a forcible entry concept)
 - (b). and entering
 - (c). the dwelling of another
 - (d). with intent to commit a felony therein
 - (e). by the defendant
 - (4). Is the defendant guilty of burglary if:
 - (a). He opened the victim's door, entered his house and took a stereo he'd seen through the window? Yes. All the required elements are present.
 - (b). Same facts as above, but defendant walked through an open door? No, no "breaking" present; defendant is liable for larceny (theft), though.

- (c). Same facts as (a), but defendant entered by pushing already open door three inches further open? Yes, any use of force, however slight, is enough for breaking.
 - (d). If the defendant broke down the victim's door, and entered her home with the intent of raping her? Yes. Rape is a felony and all elements of burglary are present.
 - (e). If the defendant had a trained monkey open the victim's window, enter and steal the stereo? Yes. The monkey is an agent of the defendant's will and all the elements are present.
- (5). Another *example* can be tied into the *Hartley* case. Hartley, a vice president of Treasure Isle, Inc., was charged with conspiracy to defraud the government. An essential element of conspiracy is an agreement between two or more parties. The government charged that Hartley conspired with Treasure Isle. One of the issues raised on appeal was whether a corporation is capable of conspiring with its officers and employees to meet this requirement. The court found that it could for criminal conspiracy purposes.
- c. Explain *mens rea* and the defendant's *capacity* to form the required criminal intent.
- (1). Note that the level of intent required for a crime depends on the wording of the statute. Some criminal statutes require intentional wrongdoing, while others impose sanctions for reckless or negligent conduct. Note also that intent can be *inferred* from the nature of the defendant's conduct.

Elonis v. United States, pg. 95

A man whose wife left him went on Facebook under an assumed name, and using self-styled rap lyrics that were graphically violent plus imagery about his wife and others including a kindergarten class, was prosecuted for transmitting a communication containing a threat to injure another. The Court held that a negligence standard was not sufficient to support a conviction of *Elonis*.

Points for Discussion: Ask the students if they would feel threatened if this behavior was directed toward them. Do they think *Elonis* meant his posts to be threatening? What about his statements that the content did not relate to real people and he was exercising his First Amendment rights? Note that no right is absolute and ask if they think he crossed the line (the Court did not rule on this issue). Have the students explain why the Court did not think that a negligence standard (would a reasonable person feel threatened) was not enough to prove the crime. Explain that the case was remanded and

what that means. Note that there is an increasing awareness of cyber bullying and efforts to prevent it. This is a good case to use to have the students argue both sides. You could have teams, and have some teams argue why he should or should not win.

- (2). Note that the idea behind capacity is that we want to punish the willful wrongdoer: an essentially moral idea. Does criminal law have to be based on morals? Is it moral to execute children who have murdered others, or the severely mentally challenged? The U.S. Supreme Court has ruled that it is unconstitutional to apply the death penalty to the latter and more recently, said the same in regard to juvenile offenders. In prohibiting the execution of the mentally challenged, the Court relied, in part, on a national consensus of what fair punishment means for such offenders. Noting a shared national sentiment, the Court concluded such punishment was excessive and held that the Eighth Amendment prohibiting cruel and unusual punishment restricts a state's power to take the life of such an offender. *Atkins v. Virginia*, 536 U.S. 304 (2002). The Supreme Court is cutting back on the instances in which the death penalty can be used, and many states either ban it or have quit imposing it.
 - (a). You may want to point out that some people are calling for tougher treatment of juveniles in light of their serious, violent, and repeated crimes. Ask the students if they think treatment of juveniles is too lenient. The Supreme Court recently ruled that life sentences for juveniles without possibility of parole is unconstitutional.
 - (b). The Supreme Court has found that states may establish a presumption that defendant is competent to stand trial and make the defendant prove that he isn't. (see *Medina v. California*, 1992).
- (3). Discuss the kinds of incapacity.
- (4). Note that juries are hostile to the insanity and intoxication defenses; they fear defendant is trying to "get off". Because of this hostility, the defense is rarely raised, and when raised, is often unsuccessful. Explain that it is not a true defense because the defendant who successfully pleads insanity may still be committed to an institution and never go free.
 - (a). You may want to note that involuntary intoxication may be a complete defense to criminal liability. However, this is extremely rare.

- (5). Note recent federal and state attempts to restrict use of the insanity defense.
 - (a). You may want to discuss the M’Naghten standard (a person is not responsible if, at the time of the offense, he did not know the nature and quality of his act, or if he did know it, he did not know that his act was wrong) since it is the primary common law test.
 - (b). Explain what happens to the defendant if s/he is found not guilty.
6. Discuss the theories behind *procedural safeguards*.
 - a. Note the unavoidable tension between protecting individual rights and promoting public security that any criminal justice system must face. Note that the Court has recently been narrowing the safeguards.
 - b. Discuss the Fourth Amendment’s protection against unreasonable searches and seizures. You could explore what is protected (e.g., Is garbage? See *California v. Greenwood*, 486 U.S. 35(1988); *United States v. Hall*, 47 F.3d 1091 (11th Cir. 1995). What is protected on a computer? (See *United States v. Mann*, 12462010 U.S. App. LEXIS (7th Cir. 2010).*Example*: Problem Case number 4.
 - c. Discuss the *exclusionary rule*. Ask the students if they agree with it. The Court has gradually narrowed the scope of the rule. *Example*: Problem Case number 7. You could use this case to point out the balancing approach the Court takes to most rights. There is a continuum regarding reasonable expectations (most in the home, lease in public when national security is involved).

Rodriguez v. United States pg. 97

The Court holds that evidence obtained through the use of a drug-sniffing dog after Rodriguez was stopped for driving on the road shoulder and given a warning cannot be used because the officer did not have reasonable suspicion.

Points for Discussion: Explain that the Fourth Amendment encompasses persons, houses, papers, and effects. Ask the students what a car is. The officer asked if he could use the dog and Rodriguez said no. The officer then summoned another officer and then used the dog. Note that even though the extra time for the sniff (about 7-8 minutes) was not long, it was still an unreasonable search. Have the students identify the elements the Court considered important to its opinion.

- d. Discuss the Fifth Amendment's protection against *compulsory self-incrimination*. Discuss how *Miranda* has helped enforce this. Point out the Supreme Court's recent limitations on Miranda rights.
 - (1). Note the difference between non-testimonial evidence, which one can be forced to produce, and testimonial evidence.
 - (2). You may want to discuss the "private papers" protection afforded by the Fourth and Fifth Amendments. Note that these have been substantially eroded by recent decisions, and that corporate officers, especially have virtually no protection under this doctrine.
 - e. Discuss the *USA PATRIOT Act* and its effect on procedural safeguards. Ask the students if they feel the law has made them safer. Has the government struck the appropriate balance between individual rights and security?
 - h. Discuss the trend toward granting victims rights and the Crime Victims Rights Act.
7. Discuss the danger of criminal liability for people in business resulting from the "get tough" attitude about *white-collar crime*. There is an increase in the number of businesspeople being sent to prison (as opposed to simply being fined), as well as in the number of prosecutions.
- a. Discuss the *responsible corporate officer* doctrine and the social factors contributing to the "get tough" attitude. *Example*: Problem Case number 5.
 - b. Discuss the problems of imposing criminal liability on persons in business, and against corporations, especially in regard to the intent element.
 - c. Discuss how the "get tough" attitude is reflected in the *Sentencing Guidelines*. Ask the students whether they think white-collar criminals should be dealt with in the same manner as other criminals?
 - d. You may want to note that the Guidelines are controversial, and many judges are deviating from them with a variety of justifications. Many corporations, however, are responding to the corporate guidelines by establishing or reinforcing codes of ethics, setting up reporting procedures, and appointing a company official to play an oversight role. Ask the students which they think will be more effective: the "carrot" approach of reducing sentences for good faith efforts at compliance or the "stick" of severe penalties.

- e. You may want to discuss some of the more common and important white-collar crimes such as regulatory offenses, fraud and bribery.
8. Discuss the *Sarbanes-Oxley Act* and the scandals that led to its passage. Note the recent criminal convictions of executives involved in these scandals. Point out that the CEO and the CFO must now certify reports submitted to the SEC. This is intended to force them to pay closer attention to things like financial reports. Whistleblowers were important in exposing much of the wrongdoing, and the Act contains whistleblower protection sections. Point out that the recent financial problems are leading to new regulations, particularly regarding banking and Wall Street. You may also want to discuss the Dodd-Frank law at this point. It encourages whistleblowing and rewards it in addition to other regulations and penalties.
 9. Discuss the increasing use of *RICO* and its broad application. *Hartley*, the breaded shrimp supplier, was accused of RICO violations.
 - a. You may want to discuss RICO requirements in the context of *Hartley*.
 - (1). The *Hartley* court found that Treasure Isle, Inc. was an enterprise affecting interstate commerce.
 - (2). Defendants, who were associated with that enterprise, participated in the conduct of its affairs.
 - (3). The participation involved a pattern of racketeering when they fraudulently supplied nonconforming shrimp, and then sought payment for the shrimp through the mail. Specifically, mail fraud was committed by sending invoices through the mail seeking payment for nonconforming shrimp. Interstate transportation of fraudulently obtained property was committed by obtaining money from the government in payment of the invoices. These two acts were the predicate acts necessary for racketeering activity.
 - b. Note that RICO is routinely used against legitimate businesses despite its name. Also note that, as in *Hartley*, it is relatively easy to prove a violation.

Boyle v. United States – pg.101

The Supreme Court holds that there does not need to be an ascertainable structure beyond that inherent in the pattern of racketeering to qualify as an “enterprise” under RICO.

Points for Discussion: Remind the students of the elements necessary to prove a RICO violation. Ask them how the Court found Boyle met the requirement. Note that many

states have adopted “baby RICOs” and that many individuals and businesses can face liability in multiple jurisdictions.

- c. Point out that companies often face liability under civil RICO. Discuss why plaintiffs would rather sue under RICO than for other claims they might have. Point out that while the Supreme Court has long expressed a wish for Congress to rein in RICO, some recent cases show a willingness to begin to do what Congress has refused to do. The Justice Department has voluntarily reigned in its use of RICO in certain instances by limiting the seizure of assets of RICO defendants and limiting its use in cases where the defendant is charged with filing false tax returns.
 - d. The ability to recover treble damages has led to the use of RICO in a wide variety of suits from employment cases, to abortion picketing, to securities sales. Popular evangelists Jim and Tammy Bakker were sued under civil RICO.
 - e. Discuss the ethical implications of using RICO as an offensive litigation tool. Greyhound Lines Inc., for example, filed a \$30 million civil RICO suit against the striking bus driver’s union in an effort to force a settlement of the 1990 strike. It accused the union of using coordinated criminal and extortionate means” to cripple the company financially. Is this a perversion of the law’s intent; was it meant to be used in routine labor disputes? Is it legitimate to use a law as a weapon for purposes for which it was clearly not intended? Is it ethical to formally allege that someone is a racketeer simply because they disagree with your labor policies?
10. Discuss the *Foreign Corrupt Practices Act*. The Act establishes record-keeping and internal control requirements for firms subject to the Securities Exchange Act of 1934.
- a. Note that payments are prohibited if the person making the foreign payment knows or should know that some or all of it will be used for the purpose of influencing a governmental decision. An offer to make a prohibited payment or a promise to do so is a violation, even if the offer is not accepted or the promise is not carried out. Payments of kickbacks to foreign businesses and their officials are not prohibited, unless it is known or should be known that these payments will be passed on to government official or other illegal recipients.
 - b. The FCPA also imposes record-keeping and internal controls requirements. The purpose of such controls is to prevent unauthorized payments and transactions as well as unauthorized access to company assets. This section requires companies to keep records that accurately reflect all of their transactions. It also requires the establishment and maintenance of a system of internal accounting controls. This system

must provide “reasonable assurances” that unauthorized transactions are not taking place. Each company must maintain its records in a fashion that will permit it to prepare financial statements that conform to generally accepted accounting principles.

- c. Point out that the IACAC, of which the U.S. is a signatory, is part of the global efforts to control corruption. Note the other efforts to combat bribery.
11. Point out that post-September 11 businesses are being asked to help with the “war on terror.” You might want to discuss the breadth of the new money laundering regulations.
 12. Discuss *Cybercrime* and the laws passed to deal with it.
 - a. Discuss the purposes and provisions of the *Electronics Communications Privacy Act*. Note that it is a derivative of the wiretap law.
 - (1) Note that the Act also protects stored communications.
 - b. Discuss the protections given by the *Computer Fraud and Abuse Act*.

United States v. Nosal pg. 104

The court narrowly interprets the CFAA and denies its use to allow prosecution of an ex-employee who persuaded other employees to download information for him.

Points for Discussion: Ask the students what the court considered to be the purpose of the statute and have them explain why Nosal’s actions did not fit within it. Ask them how many of them have used work computers to “waste time”, play games, shop, or for otherwise unauthorized purposes. Did any of them think they might be breaking the law? Do they think the court made the right decision here? Other courts have broadly interpreted the law.

- c. You may want to discuss computer piracy and the downloading of movies and music. Ask the students if they have downloaded music without paying for it. Is it ethical?
- d. Discuss the CSEA and the USA PATRIOT Act’s easing of restrictions on collecting personal information and the increase in ease of prosecution and increase in penalties under these laws. You may also want to discuss the government collection of information revealed by Snowden. The U.S. government thinks he should be prosecuted (he is living overseas to avoid prosecution) but many others think he is a whistleblowing hero.

- e. Ask the students if they have signed up for the CAN-SPAM Act's "do not mail" registry. Ask if the law is likely to be effective in stopping spam in light of its global nature.
- f. Note the global efforts to fight cybercrime.

ANSWERS TO QUESTIONS AND PROBLEM CASES pg. 105 - 106

1. Felonies are serious offenses that are generally punished by confinement in a penitentiary for a substantial period of time and can result in disenfranchisement. Misdemeanors are lesser crimes that are punishable by fines and or confinement in a city or county jail.
2. Criminal convictions require proof beyond a reasonable doubt. The civil law has a preponderance of evidence standard.
3. Oneway the PATRIOT ACT affects a constitutional right is that it requires that deposits of more than \$10,000 or suspicious monetary deposits be reported to the FBI. Another is that it facilitates access to personal records and tracking of email and Internet use with minimal oversight.
4. Yes. While people do not have a reasonable expectation of privacy protecting the numbers they call, they do have a reasonable expectation of privacy in terms of the locations of their phones because it can reveal their movements over a month rather than just one call site. A warrant should be required. *United States v. Davis*, 754 F.3d 1205 (11th Cir. Ct. App. 2014).
5. No. Under the CWA, a person is a "responsible corporate officer" if he has the authority to exercise control over the corporation's activity that is causing the harm. He does not have to actually exercise that authority. Here, Hong had the authority and failed to exercise it to prevent the harm. He knew the machinery would not work properly without an additional mechanism which he did not obtain. He was in control of finances and refused to authorize its purchase. He was aware of the inadequacy because he was there during improper discharge. He is responsible. *United States v. Hong*, 242 F.3d 528 (4th Cir. 2001).
6. No. While the statute looks to the original manufacturer's maximum design speed, it also encompasses any subsequent modification or redesign. Lock's vagueness argument is equivalent to a drunk driver arguing that a drunk driving statute is vague because he did not know until he was pulled over how many beers would render him impaired. This clearly would be unsuccessful. Lock's conviction stands. *Lock v. State*, 971 N.E. 2d 71 (Ind. Sup. Ct. 2012).
7. Yes. Under the Fourth Amendment, people are entitled to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. A vehicle is included in this protection. The installation of a GPS device and the use of

that device to monitor the vehicle's movement was a search. The location information gathered by the device falls within the Fourth Amendment's limits on government searches and seizures. *United States v. Jones*, 132 S.Ct. 945 (U.S. Sup. Ct. 2012).

8. The satellite monitoring law was passed after Cory's sentencing. The punitive effects of the monitoring device are sufficient to trigger the protection against *ex post facto* laws. While courts in other states have held that such laws are merely remedial in nature and not punitive, this court finds differently. *Commonwealth v. Cory*, No.SJC-10314 (Sup. Jud. Ct. Aug. 18, 2009).