Corporate accountability
- Corporations may be held criminally liable (New York Central & Hudson River RR v. US)
  o Policy reasons for this:
    ▪ Corporation profits from criminal activity
    ▪ Necessity of prosecuting corporation to curb criminal abuses
  o Against: shareholders didn’t vote on such conduct
    ▪ Possible corruption a risk taken in investing?
    ▪ Corporations may pass on the fine, if they are able to (given other market forces)
- When the corporation is liable
  o Quasi-respondeat superior rule – Commonwealth v. Beneficial Finance
    ▪ Corporate employee acting on behalf of corporation (e.g., by paying $$ from corporate coffers)
    ▪ Corporation must have placed agent in a position where he has the enough authority and responsibility to act for & in behalf of corporation in handling the particular business / operation / project that he was engaged in when he committed a criminal act
    ▪ Criminal act must be directly related to acts that agent is authorized to perform
    • May have de facto authority if management has failed to curb a practice
    ▪ Does not require a “high managerial agent” to carry out the act, nor authorization for the act by such an agent or the board
  o Action despite instructions to the contrary – Hilton Hotels
    ▪ GO BACK AND READ
    ▪ So long as you’re acting w/in the scope of your employment when you commit criminal act, it doesn’t matter if you’re instructed not to take an act – your act can be imputed to corporation
    ▪ Instruction to the contrary doesn’t matter so long as you have discretion / authority to take the act, and are acting pursuant to that
    ▪ Act must be of the sort that you’re authorized to take
    ▪ Must be acting w/ intent to benefit
    • To ascribe liability to the corporation, the agent need not act with the sole intent to benefit corporation
    • Intent to benefit can be imputed if the corporation could economically benefit from the criminal act
    • Intent to benefit has been refined to mean in furtherance of some job-related responsibility
- Partnership liability – Lessoff & Berger
  o Partnership can be held criminally liable for the acts of one partner; w/o regard to knowledge / participation of other partners
  o Fines come out of the general partnership assets
  o Law firms not immune
  o Strong incentive to monitor partners
- Imputing knowledge & willfulness to corporation: Bank of New England
Corporation has knowledge when:
- Knowledge of single employee can be imputed to corp.
- Knowledge must be w/in scope of employment
- Several of its employees have knowledge that, taken in the aggregate, would be knowledge of the essential fact
- Collective knowledge allows cutting through bureaucracy

Corporation acts willfully when:
- Employee acts willfully (again, can impute from single employee)
- Corporation is “flagrantly indifferent” to its obligations (e.g., compliance structures)
  - Important to distinguish btw this and negligence: “I don’t want to check b/c it’s too much trouble” vs. “I don’t want to check so that I don’t confirm my suspicions.”

Resume p. 30 book, p. 8 notes

When ought we prosecute corporations (DOJ guidelines)
- Exception rather than rule, relevant considerations include:
  - Deterrent value: requires that it is an industry-wide, or widespread problem
  - Severity of the crime (public health menace, for ex.)
  - Does corporation cooperate with the prosecution, and is that cooperation meaningful? Is it timely (as soon as wrongdoing is discovered)?
  - Remedial actions: compliance program, disciplining wrongdoers, replace guilty parties, cooperate w/ gov’t
  - Specific corporate culture factors w/ respect to conduct:
    - Pervasiveness of conduct w/in corporation – i.e., corporate culture prevents reform
    - Duration of criminal conduct
    - Does corporation do anything to discipline the responsible parties
    - History of similar conduct
  - Existence & adequacy of corporate compliance program
  - Collateral consequences to non-guilty parties (shareholders, community)
  - Adequacy of non-criminal remedies (civil & regulatory)
- Plea bargains:
  - Plea bargains may include corporate governance measures / overhaul mandated by gov’t
  - Should seek plea to most serious, readily available charge
  - Generally should NOT accept plea of corporation in exchange for dismissal against officers
  - Shouldn’t be structured as a settlement, i.e. in a way that later allows corporation to deny guilt – it is an acknowledgement of corporate guilt
- C.R. Bard – illustration of corporate plea that was accepted
Personal Liability in an Organizational Setting
- Individuals are subject to criminal liability for their acts as corporate officers – Wise
  o Doesn’t matter if they’re acting as an agent, in their capacity as an officer, or on their own account / for themselves
  o Statutory definition of “person” to include “corporation” does not then mean that “person” is only “artificial persons”

GO BACK AND READ HANDOUT 1, PP. 1-3
- Individual responsibility for corporate crimes, Park:
  o Corporate agent through whose act, default, or omission the corporation committed the crime, is also guilty individually of the crime
    ▪ Applies whether or not the crime requires “consciousness of wrongdoing,”
  o Also applies to those who, by virtue of managerial position, may be deemed responsible for the act’s commission
  o Gov’t meets its burden when it proves that an individual has the responsibility to either prevent or promptly correct the violation & failed to do so
  o Defense of powerlessness or objective impossibility exists
    ▪ Did all in my power and still couldn’t prevent it
    ▪ Ex: outside sabotage
    ▪ Wouldn’t work: employee sabotage, when you had reason not to trust the employee
    ▪ Continued reliance on a system that wasn’t working (i.e., Park)
    ▪ Incremental steps may or may not be enough – should look at the first step and ask “could this have really accomplished anything?”

GO BACK AND READ HANDOUT 1, PP. 3-6 (Jorgensen)
- Individual responsibility for crimes committed by other people w/in corporation, Jorgensen:
  o Jorgensen is really more about aiders and abettors than “responsible relationship,” but that is teased out here too
  o In that case, needed to have an intent to defraud to be found vicariously liable
  o Could have “responsible corporate officer” doctrine apply based on the acts of another (rather than based on your own omissions)
  o Courts have mostly teased out the idea in the context of environmental statutes, even when the crime is a felony and requires a culpable mental state

- MIGHT WANT TO REVIEW HERE – NEED SOME CLARITY
Mail and Wire Fraud

18 U.S.C. §§ 1030(a)(4)-(5); (e)(2); (e)(8) – Fraud & related activity in connection w/ computers

(a)(4)
- Knowingly & w/ intent to defraud
- Accesses unauthorized computer / exceeds access
- By means of access, furthers intent of fraud & obtains anything of value
- Exception: not if object of fraud is use of the computer & the value of use is under $5K
  - Is this an exception to element #3, or to (a)(4) as a whole?

(a)(5)
- Knowingly causes transmission of sth, & thereby causes damage w/o authorization to protected computer
- Intentionally accesses protected computer w/o authorization & as a result, recklessly causes damage
- Intentionally accesses computer w/o authorization, & as a result causes damage

(e)(2), Defines “protected computer”
- Either exclusively for use of US gov’t or financial institution, or partially used by US gov’t / financial institution & the conduct constituting the offense affects that use
- Used in interstate / foreign communication

(e)(8), Defines “damage”
- Aggregate loss of $5,000+
- Modifies / impairs medical diagnosis / treatment
- Causes physical injury to person
- Threatens public health / safety

18 U.S.C. § 1341 – Mail Fraud Statute
- Elements:
  - Scheme or artifice
    - To defraud
    - To obtain $$ or property by false or fraudulent pretenses, etc.
  - For the purpose of executing / attempting to execute such scheme, uses the mail or causes the mail to be used
- Important note: interstate carriers like FedEx and UPS count

18 U.S.C. § 1343 – Wire Fraud Statute
- Same as mail fraud, but jurisdictional hook is use of wires or causing wires to be used

18 U.S.C. § 1344 – Bank Fraud Statute
- Knowingly execute / attempt to execute a scheme or artifice:
  - To defraud a financial institution
  - To obtain $$, etc. owned by / under control of a financial institution by false or fraudulent pretenses

18 U.S.C. § 1346 – Honest Services Fraud Statute
- Scheme or artifice to defraud includes scheme or artifice to deprive another of the intangible right to honest services
Fraud vs. False Pretenses:
False pretenses: actor, intending to defraud, knowingly makes a false representation of a past or present fact to induce another to part with title to property.
- Promises and representations to the future don’t count, even though person may be falsely representing a fact (their state of mind)

Fraud: an effort to gain an undue advantage or to bring about some harm through misrepresentation or breach of duty.
- More fluid concept
- Broader; things that are not false pretenses may be fraudulent representation.
- One definition of intent to defraud: “to act with intent to defraud means to act knowingly and with the intent to deceive someone for the purpose of causing some financial loss … to another of bringing about some financial gain to oneself or another to the detriment of a third party.”
- Fraud is a very elastic concept
  o Not really defined in statute or cases
  o To be punishable, fed. gov’t doesn’t need to have the power to punish fraud – can reach through the jurisdictional hook
  o Not (technically) punishing fraud, but the abuse of the mails / wires
- Must be a material misrepresentation to defraud
  o Ex: lies to the secretary to get to the purchasing agent – probably not “material”
- Always look for evidence of fraudulent intent (see e.g. U.S. v. George)
- Hawkey: harm / detriment to another need not be an economic loss
  o Sheriff defrauded ticket purchasers by skimming from charity – there was fraud even though they got to see the concert
  o Fraud b/c acted knowingly, w/ purpose to deceive, and obtained an undeserved personal gain (also, was a material misrepresentation)
- Facts don’t have to be literally false to constitute fraud; Lustinger
  o Can have fraud from statements that are literally true, but on the whole misleading
  o Look at whether the literally true statements, taken together, were made to give a false impression
  o Courts usually articulate a “would this mislead a reasonable person” standard, but won’t ignore people the most in need of protection from the statute (gullibility does not undo reasonableness)
- If the contracting party expects to get a bargain in compliance with the law, failure to comply with the law can be fraud (e.g., sludge removal, problem 4-2)
  o Certainly, when you contract, you can contract for another’s action in compliance with the law (not just for their action)
  o Also, the “guilty-conscience” approach – attempt to hide noncompliance with statutory requirements may be indicative of intent to defraud
- U.S. v. George
  o Kickback scheme
  o Used as an example of “intangible right of honest services,” see below
Can be recast in terms of harm to property rights: $$ that Zenith was “spending” in kickbacks was $$ they could have saved off the purchase price.

- W/o considering “intangible rights,” intangible property (like the right to keep confidential information) can count as property that one can be defrauded of, under the statute; Carpenter v. U.S.

  - It is something of value, and an essential part of property rights is the right to exclude / exclusive use
  - Journal could also be defrauded of its reputation (an intangible piece of property?)
    - Even if it’s not, could lead to sales and revenue falling
    - And mail fraud statute does not require a showing of actual harm, only anticipated / foreseeable harm
  - Also, the fact that a newspaper is printed and mailed / wired is sufficient to satisfy the jurisdictional hook; fact that the column was published was an essential part of the scheme

- Licenses, while in the state regulator’s hands, are not a property interest, Cleveland v. U.S.

  - Have expected value, and gov’t has power to exclude, but that’s not enough – core concern is regulatory, not economic
  - Also, where’s the harm (whether actual or anticipated)? Lying on licensing forms doesn’t stop the gov’t from collecting fees
  - Other concerns: federalism, rule of lenity

- But, a scheme to deprive foreign gov’t of tax revenues can count! Pasquantino v. U.S.

  - Right to collect taxes / be paid is a property right
  - Consistent w/ Cleveland?
    - Tax is not “purely regulatory”; no allegation in Cleveland that the gov’t was defrauded of any $$
  - This doesn’t have “extraterritorial effect,” not enforcing other gov’t’s (Canada’s) laws, so long as the jurisdictional facility is satisfied

“Honest Services Fraud”

- McNally – for a while, this theory was read out of the statute, until § 1346 codified it

- Company may have right to honest services of employee; if they are acting in their own self-interest rather than in the employer’s interest, they can be scheming to defraud the employer (U.S. v. George, now § 1346)

  - Employee had discretion, effective control over purchasing
  - Engaged in kickback scheme
  - Have a right to his honest services in deciding from whom to purchase

- Means different things in public and private sector, DeVegter

  - Public officials have inherent duty to act in public’s best interests
  - But private employee’s loyalty is not an end in itself
  - Prosecution under § 1346 for private sector honest services fraud requires a breach of a fiduciary duty and reasonably foreseeable economic harm
- **CLARIFY THIS HOLDING – SEE BRIEF**
  - *Czubinski* – public “honest services fraud” does not cover all official misconduct
    - conduct must actually deprive public of right to honest services
      o No showing that Czubinski didn’t do his job
      o Typical examples involve serious corruption, conflicts of interest, self-dealing

**The Jurisdictional Hook**
- Does not need to be an essential part of the fraud
- Does not count if the jurisdictional hook occurs after the scheme is completed
- OK if hook is “incident to an essential part in the scheme,” or a “step in the plot”
  o *Carpenter*: WSJ, the victim, did the mailing, and no fraudulent content in the mailing, but it was essential to the scheme that the paper be mailed (& affect the market)
  o *Schmuck*: Title transfers through the mail were essential to maintain buyer confidence, which was in turn essential to continuation of ongoing scheme of odometer fraud
  o May not be enough if the scheme is completely over and then a mailing happens, but it all depends on your characterization of “scheme.”
- A use of the mails after money is obtained may still be part of the scheme; “lulling” or inducing a false sense of security, avoiding detection / prosecution can all count as part of the scheme – *Sampson*

**Bank Fraud**
- A wholly owned subsidiary of a financial institution might not count as a financial institution; some banks (or organizations with “Bank” in the title) might not count either; but the excerpted statute provides no definition
  o “Financial institution” must be federally insured – member, FDIC.
  o *Reamue*
- The defrauding of a financial institution’s wholly-owned subsidiary, which leads to a reduction in the financial institution’s assets, is sufficient to meet the “affecting a financial institution” requirement. *Bouyea*
- Intent to deceive, combined with intent to get $$ or property held by the bank, is enough to satisfy the bank fraud statute; do not need any harm. *Doke*
- Nondisclosures that put a bank in violation of banking regulations may form a sufficient basis for a bank fraud prosecution, despite the defendant’s creditworthiness or the soundness of the investment. *Doke*
  o Doesn’t matter whether or not the deal was a sham or had soundness
- *Reamue*: have intent to defrauding of financial institution where:
  o Intent to defraud some entity was present, and
  o That intended fraud placed a federally insured financial institution at risk of loss
  o Sub-principles:
    - Bank fraud statute is violated, when there is no risk of loss to financial institution, if D’s intent is to expose institution to loss
- Also violated when fraudulent activity causes bank to transfer funds

**Computer Fraud**
- *Middleton:*
  - A corporation can count as an “individual” under the statute
    - Not sure if that applies to any of the statutory provisions we’re dealing with
  - For the purpose of calculating damage, can use the hourly rate of someone who fixes problem
    - And, if the person is salaried, can use what a reasonable hourly rate would be – damage doesn’t turn on hiring outside help
  - Can’t count costs of improvement in damage – but can count replacement – so if you’re replacing an outdated thing, there will necessarily be an improvement, and you get a reasonable cost
- Unauthorized access must be a means to an end; satisfying curiosity does not count as getting “anything of value.” *Czubinski*

**QUICK-SCAN BOOK, HANDOUTS TO MAKE SURE THERE’S NOT STH FROM THIS SECTION THAT I’M MISSING.**
Securities Fraud

Statute:
- Willful violation of any part of the Securities chapter is a felony
  o Elevates any violation of civil provision to felony, if done intentionally
  o SEC has no criminal authority; refers cases to DOJ
17 C.F.R. § 240.10b-5, p. 225
(b) Defines when a sale is made “on the basis of” material nonpublic information
(c) Provides an affirmative defense to B, dealing with a pre-existing plan to buy stock & leaving no discretion in hands of purchaser

- Wide array of people can be caught up in this, b/c of the staff necessary for an IPO
- Sa-Ox added 18 U.S.C. § 1348, unclear what that adds to the mix
  o Likely to be construed in line w/ mail and wire fraud
  o Does not require breach of fiduciary duty
  o “Fraud in connection with any security” – how much broader is this than purchase or sale?

- Weiner
  o Negligence is not enough to establish a willful violation
  o “Willful blindness” is, or failure to follow standards + bad faith in doing so (different way of articulating)
  o So, disregard of professional standards can be evidence of a willful violation: esp. if over a long period of time, standards that are commonly & widely known, etc.
- The “no knowledge proviso”: Lilly
  o Cannot be imprisoned for violating a Securities rule, the substance of which you did not know
  o It’s the substance that’s important; you need not know the actual rule, just that the substantive conduct it prohibits is illegal
  o This results in a reduced penalty (not going to prison); does not invalidate conviction
  o Burden of proving “no knowledge” is on D; P need not disprove

Insider trading, 2 theories:
- Trading on the basis of material, nonpublic information
- The relevant “disclosure” would be to the market abt the inside information, not to the person furnishing the information, or to the company about “I’m going to trade”
- Classical
  o Must be an insider of a corporation
  o Must have information on the corporation in which you’re an insider
  o Trade on the basis of that information
  o Have a duty either to disclose the information or abstain from trading
- Possession of inside information, without more, does not make one an insider. 
  *Chiarella*
  o Ex: a takeover of one company by the other. Employees of the company to be taken over have duty to disclose / abstain from trading in the stock of that company. Employees in the company doing the takeover have no such duty w/ respect to the stock of the company that they’re taking over, b/c they’re not in any sort of fiduciary relationship to the stockholders of that company

- “Misappropriation,” *O’Hagan*:
  o Can have same duties as insider, as an outsider, if you misappropriate confidential information
  o Duty stems from relationship to the source of the information (ex: fiduciary relationship between lawyers / law firm & their clients)

- “Tipper / Tippee” Liability, *Dirks*:
  o Directed at situations where an insider discloses to a 3rd party, so that either the tipper or 3rd party can benefit economically and circumvent the law
  o Insider has the same duties as under the classical theory
  o Not only needs to be breach of fiduciary duty in tipping the tippee, but there needs to be an economic motive in passing it along
  o Outsider (tippee)’s breach is derivative of insider (tipper)’s breach
  o A “tippee” (someone being told material, nonpublic information) only assumes a fiduciary duty not to trade on that information when the “tipper” insider has breached a fiduciary duty to shareholders by disclosing the information to the “tippee” and the “tippee” knew or should have known of the breach
  o Just getting the information, alone, does not make one an insider
  o Doesn’t matter whether the “tippee” is a shareholder; liability comes only from the “tipper’s” breach
    ▪ But, it would matter if the tipper had an economic motive to see the tippee benefit.

- Tipper / Tippee liability and family businesses, *Chestman*
  o Family relationship, or marriage, standing alone, did not make someone a fiduciary; need to be w/in company
  o Mutual expectations, regularly sharing info can make someone a fiduciary
  o Can’t unilaterally impose a fiduciary duty
  o Section 10b5-2 overrules this case and codifies *Reed*, now, duty of trust and confidence exist:
    ▪ Where person agrees to maintain trust / confidence
    ▪ When the person communicating the info & the other have a history of sharing confidences, such that the recipient knows or should know that the other expects confidentiality
    ▪ Family relationship – but this one’s a rebuttable presumption, burden on D to rebut

**IS THERE A CONFLICT BETWEEN DIRKS AND CHESTMAN?**
Teicher – Knowing possession of material, nonpublic information is enough; the prosecution need not show that the information was used as a basis for the trade
  - Would put P to an impossible standard
  - 10b5-1 somewhat addresses this with its framework for a defense on a pre-existing trade agreement

Can you cancel a prescheduled trading plan on the basis of material, nonpublic, bad information?
  - Seems to be a loophole in the rules, nothing in the rules suggest that you can’t do this
  - Purpose of cancellation is to stop trading; you’re doing what the insider trading rules would have you do in the absence of a plan; rules shouldn’t require you to keep following the plan
  - If Brickey were counseling someone, she’d tell them to make it clear in the rules that you can cancel if you get bad news on the stocks.

Reread O’Hagan and Chiarella – in fact, this whole section

Additionally:
Problem 5-2
False Statements

18 U.S.C. § 1001, p. 144

- Whoever, w/in jurisdiction of any branch of US gov’t, knowingly & willfully
  o Falsifies, conceals, covers up by trick, scheme, or device a material fact
  o Makes a materially false, fictitious, or fraudulent statement / representation
  o Makes or uses any false writing or document, knowing it to contain a materially false, fictitious, or fraudulent statement / representation

- Punishment clause
- This doesn’t apply to (book p. 302-03)
  o A party or party’s counsel for anything submitted to a judge or magistrate in a judicial proceeding

- W/ regard to the legislative branch, this applies to
  o Administrative matters
  o Investigation or review conducted pursuant to authority

- For something to be “within the jurisdiction,” it just needs to be w/in an area where agency has authority, such as agency’s authority to investigate
  o Agency need not have power to make final & binding determination for sth to be “w/in jurisdiction. Rogers

- If an agency of the federal government has authority in a certain area (say, the EPA) and they delegate some of that authority (even primary authority) to a state agency, a false statement made to that state agency is still within the jurisdiction of the federal gov’t. Wright
  o Statements need not be filed directly to federal gov’t; can be filed to the state organization to which gov’t has delegated authority
  o If they delegate exclusive authority, then probably no longer within their jurisdiction

- A false statement to an intermediary, if made to mislead the federal gov’t (b/c you know it will get back to them) is “w/in their jurisdiction” and prosecutable. Steiner Plastics
- A matter is “w/in jurisdiction” when gov’t has an oversight / inspection role. Steiner Plastics
- You’re probably not making a false statement if you prepare false reports but never file them. Wright hypo
- For judicial proceding, that begins at indictment. So stuff is protected even at a very early stage. Distinction between “housekeeping” and “adjudicative” role is irrelevant. McNeil
- For the legislative branch, the false statement can’t itself trigger the investigation; language contemplates interference with something that’s ongoing. Pickett
- A promise / prediction of future performance can qualify as a false statement under the statute, if made with the intent to break it. Shah.
  o No real distinction between promise and performance, it seems
  o This is distinguished from puffing by the “materiality” requirement
- It doesn’t matter what the government knows or believes; criminal liability attaches when you lie to the gov’t, not when the gov’t believes you (6-1)
  o Statement needs to have the tendency to influence someone, but this depends on the statement, not the amount of information that the listener in fact has.
  o Important thing is tendency to influence in the abstract
- What constitutes a statement:
  o “This is our relationship, and that’s it.” False if that isn’t it (6-1).
  o An “exculpatory no” – mere denial of wrongdoing without more explanation – is a statement under this statute. Brogan
    ▪ But of course, saying “I plead not guilty” cannot count as a false statement – distinction without a difference if a lawyer is present, but not otherwise
    ▪ Again, doesn’t matter what investigators already know
- Yermian – rejected the argument that the declarant making the false statement had to know of federal jurisdiction (don’t have to intend to lie / know you’re lying to the gov’t), but left open the question of whether a lesser mental state was required
  o Later: there is no culpable mental state required as to federal jurisdiction in order to establish a violation of the statute. Green
  o If you knowingly made a false statement, and this happened to fall within federal jurisdiction, you’re criminally liable
- Green hypo: your lie must be w/in federal jurisdiction at the time that it’s made
  o So if you lie on a job app., and later get a promotion, and for that promotion need a security clearance, there’s no violation of this statute – your lie was too old.
- Can charge multiple crimes for the same act so long as each crime involves proof of a fact that the other does not (Ramos, Blockburger)
  o S. 1542, giving false information w/ intent to secure a passport (probably not on exam)
  o A lot of false statement statutes, many of which overlap with s. 1001 – prosecutor can charge them all

**REVIEW 6.1**

(a) Whoever knowingly executes (or attempts) any scheme or artifice w/ intent
  (1) to defraud US
  (2) to obtain money or property by false or fraudulent pretenses, representations, promises
in any procurement as prime contractor w/ US or as a subcontractor where there is a prime contract w/ US, if the value of the prime contract, subcontract, or any constituent part is over $1,000,000 … shall be punished
(b)-(c) deal with punishment & fines
- It doesn’t have to be your contract that’s worth more than $1 million; just any contract with which you’re associated. *Brooks*
  o So if you’re a subcontractor, and the prime contractor has >$1 mil with the US gov’t, you can be prosecuted for fraud
  o If there are 2 prime contracts of $750K each going to same person, and for each have single supply subcontractor (>1 mil), you also have jurisdictional hook satisfied
  o Even if you were the bubblewrap supplier, you could be caught?
  o Again, knowledge of the jurisdictional hook isn’t required
- Statute punishes multiple executions of a scheme to defraud, but does not punish multiple acts in furtherance of the one scheme to defraud. *Sain*
  o To distinguish “executions” from “acts in furtherance,” look at chronological separation, intent to get a certain amount of $$ (or other factors tying the separate acts together)

18 U.S.C. § 287, p. 142
Whoever:
- Presents to any person in service of US
- Any claim upon / against US
- Knowing that claim to be false, fictitious, or fraudulent
- Shall be punished

- This statute does not require an intent to defraud the government, *Maher*
  o If you thought you were entitled to do this (or were “correcting” billing) but knew your submissions to be false, you can still be criminally liable
  o Purpose of statute not to prevent cheating gov’t, but to protect integrity of submissions to gov’t
  o Knowledge of the falsity of the claim is enough, even if you lack fraudulent intent and seriously believe that the gov’t is going to pay you what it rightfully owes
- 287 requires that you actually present the claim to the gov’t; 1001 doesn’t require you to make the statement to the gov’t
- Also, 1001 doesn’t require claim for money or property
Perjury & False Statements

18 U.S.C. § 1621 – Perjury generally

Whoever

(1) Having taken an oath … willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, or
(2) In any declaration … under penalty of perjury as under 28 U.S.C. § 1746, willfully subscribes as true any material matter which he does not believe to be true

Is guilty of perjury.

18 U.S.C. § 1623(a) – False declaration before grand jury or court

- Whoever under oath
- In any proceeding before or ancillary to any court or grand jury
- Either
  - Knowingly makes any false material declaration, or
  - Makes or uses any information knowing the same to contain false material declaration

Shall be punished

- It is not perjury to offer answers that are literally true but nonresponsive (and misleading by implication). *Bronston*
  - Prosecutor should be aware of this
  - This probably applies to s. 1623 as well.
- Giving wrong numerical information is perjury, problem 7-1
  - But not being responsive is not – no duty to volunteer information
  - Depends on the context, how many follow-up questions were asked, how specific the witness’s answers became
- You can be guilty of this statute (1623(a)) through 18 U.S.C. § 2(b) if you cause another to testify falsely. *Walser*
  - Walser filled out false forms; the person who she sent them to testified at trial
  - D’s intent to cause a false statement under oath combines w/ W’s action / capacity to make such a statement.
  - Caused him to testify b/c she followed up with him, asked him if he saw the docs, etc. Would be more attenuated if she submitted the docs and then he testified to them on his own – less likely to prove causation there. Would want to know if she submitted them in anticipation of litigation
- Two-witness rule, *Davis*
  - Perjury must be proved by the testimony of:
    - Two witness, or
    - One witness + independent corroborating evidence
  - Corroborating evidence must tend to substantiate the part of the testimony of the principal prosecution witness that is material in showing the falsity of D’s testimony, but
- Need not be strong, nor independently sufficient
  o Admissions of the party charged with perjury can be the independent
    corroborating evidence, if they’re made under circumstances that make
    them clearly admissible
  o Statements taken by the “one witness” (say, a cop) are OK as
    corroborating evidence – if signed / adopted by another. Otherwise,
    they’re just another statement by the same witness.
  o 1623(e) explicitly abandons the two witness rule for s. 1623
- Under 1623, if you have two contradictory statements, don’t have to prove which
  one is false
  o Explicit in § 1623(c)

GO BACK AND REREAD HANDOUT 2A – SHERMAN
- Recantation defense, Sherman & § 1623(d)
  o If W admits to lie, that admission bars prosecution if:
    ▪ Declaration has not substantially affected the proceeding, “or”
    ▪ It has not become manifest that the falsity will be exposed
      • Witness needs to be able to read the writing on the wall
    ▪ Because this bars prosecution, D (the W) raises this defense before
      trial & not at trial
    ▪ W must affirmatively acknowledge false testimony and then
      correct it
  o How do you tell a substantial affect?
    ▪ Jury verdict in line with testimony
    ▪ If it happens before verdict, if you have to ask for a continuance or
      mistrial
    ▪ If it’s at the GJ level, and it leads them on a goose chase / prompts
      further investigation
  o Disjunctive – “or” means “and”
    ▪ Most courts have read the “or” to be “and” – otherwise, would be
      too easy to escape perjury (once it becomes manifest, but if it has
      not substantially affected the proceeding); plus, this law is based of
      a statute that says “and” and that fits better with the intent of
      Congress
  o Available in s. 1623 but not s. 1621
    ▪ Prosecutor has discretion to charge one but not the other, so long
      as his sole reason for doing so is not to deprive D of a defense
    ▪ Needs to be a reason provided besides tactical advantage (“this
      statute better fits the crime,”) but that said, you’d be making the
      choice b/c of tactical advantage
  o For a lawyer with a lying witness, have to yank off the stand & get them to
    recant; if they won’t cooperate, have a duty to go to the court
- The overlapping nature of the statutes
  o 1623 applies to judicial proceedings – court or grand jury
    ▪ “Ancillary” has been taken to mean “something at least as formal
      as a depo”
1621 include other statements, other tribunals (besides judiciary) where you’re subject to penalty of perjury

- Tax forms, SEC hearings, etc.
- Potentially broader in application, but stricter in proof

- Use of immunized testimony in perjury / false statement trial, *Apfelbaum*

  o Neither immunized testimony, nor information derived from immunized testimony, can be used against an immunized witness except in prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. s. 6002

  - That doesn’t mean that you have immunity from prosecution on the underlying crime to which you’re testifying, but gov’t would have a very high burden to show that it’s not basing any of its theory on the immunized testimony (or derivative information)

  o But in that prosecution for perjury, all the testimony may be admitted as evidence – no rule that only the false immunized testimony can come in and the truthful immunized testimony is out

  o What perjuries can this reach?

    - Not a retroactive perjury – perjury that happened before the immunity (and about which you’re testifying to while immune)
    - If W perjured self before immunity, and then under immunity repeated perjury, that would be OK
    - If W perjures self, gets immunity & testifies truthfully, & then re-perjures self in a 3rd trial, statute probably can’t reach that
      - Not testifying falsely in violation of order of immunity

- D is entitled to a new trial b/c of perjury of prosecution witnesses when:

  o Gov’t knew of the perjury or should have known of the perjury – reversal virtually automatic, will occur if “there is any reasonable likelihood that the perjured testimony influenced the jury.”
    - May not be a new trial if independent evidence supports conviction

  o If prosecution was unaware of perjury, reversal if:

    - Testimony was material, and
    - But for perjured testimony, D most likely wouldn’t have been convicted

  o If:

    - False statements were collateral (say, about an expert’s qualifications rather than his opinion)
    - Jury verdict makes it clear that they weren’t influenced by the perjury (reject the count in which there was perjury)
    - Both sides, or other evidence, confirm the perjurious witness’s substantive point

  o Then the perjury won’t call for a new trial (this is all assuming P is unaware)
Obstruction of Justice

18 U.S.C. § 1503
Whoever

- Corruptly / by threats or force / by any threatening communication
- Endeavors to influence … any grand or petit juror, or officer in/of any court
  - Or, injures juror b/c of indictment or verdict, or officer b/c of performance of official duties
  - Or … impedes / endeavors to influence … the due administration of justice …
    - THE OMNIBUS CLAUSE!

Shall be punished

- Judicial proceeding begins when a GJ subpoena is issued. 
  - Simmons
    - GJ need not be aware that a subpoena has been issued
    - This acknowledges the reality of GJ practice – GJs are passive, AUSAs are the real investigators
    - Subpoena has to be in furtherance of an actual GJ investigation; might have exceptional cases where it’s not, and a mere subpoena wouldn’t suffice to start the clock
    - Judicial proceeding ends when all of the appeals and everything are finished.
- This statute even reaches destruction of documents in civil discovery. 
  - Lundwall
    - Statute can apply to civil case abuses, nothing to suggest otherwise
    - Would reach this under the omnibus clause, even if the judicial proceeding hadn’t begun (lawsuit wasn’t filed), but the actions were corruptly taken in anticipation of such a lawsuit.
- Behavior doesn’t have to obstruct justice in fact; D’s conduct just needs to have the natural and probable effects of impeding justice. 
  - Collis
    - See a pattern?
      - Might read this similar to the false statement holding
      - Might read it more broadly, b/c this statute is broader
    - Reading the statute otherwise would knock out the “endeavor” language
    - If you, as a lawyer, and your client drafts a fraudulent letter to the judge, and you go ahead and submit it for him, you’re guilty too
- Elements, Collis (for the Omnibus Clause):
  - Judicial proceeding
  - D had notice of that proceeding
  - D acted corruptly w/ intent of influencing, obstructing, impeding the proceeding
- Testimony that blocks the flow of information, even if not perjurious, is prosecutable under the Omnibus clause. 
  - Griffin
    - Perjury must be the functional equivalent of refusing to testify – “no” or “I don’t remember” which cuts off inquiry; designed to prevent the introduction of evidence
    - Still must be material
Brickey said that the holding of this case is probably limited to perjuring self about mind (“I don’t remember”) as that’s impossible to disprove (vs. a flat denial of sth).

- Counseling your client to be evasive, as in Bronston, is neither suborning perjury nor obstruction of justice. 8-1

- Cintolo:
  - A lawyer counseling a client to continue pleading the 5th, in the face of a grant of immunity, commits obstruction of justice (even if such counseling is innocent)
    - A non-lawyer counseling someone to plead the 5th doesn’t commit obstruction if it’s done out of belief in a legitimate claim; but if done to protect me (or for other corrupt purpose), then it is obstruction
    - Mixed motives (to protect you and also me) creates a question of whether it’s corrupt; have plausible argument for obstruction
  - A lawyer counseling a client not to testify out of a desire to protect another client, rather than in his own client’s best interests, also commits obstruction (and has major conflict issues)
  - Also rejects an idea that if an attorney offers a facially valid reason for an action, the court is bound to consider his action on that reason alone (w/o plumbing for the real reason)
  - Otherwise legal conduct can be brought under this statute by an inquiry into motives

- Knowledge requirement for obstruction, Aguilars:
  - Defendant must have knowledge of the judicial proceeding and intent to obstruct it
  - Also seems that the person would have to know that their actions have the natural and probable consequences of obstructing
  - “LIKELY TO AFFECT” REQUIREMENT – GABRIEL’S READING OF AGUILAR
  - HOW IS THIS DIFFERENT FROM A MERE ‘ENDEAVOR TO OBRUST?’
  - THIS WOULD BE A GOOD AREA TO CLARIFY

- Fear as a reason for refusing to testify, 8-2
  - Can’t be guilty of obstruction of justice; lack requisite corrupt intent. Banks (note)
  - But, fear is not a bar to a contempt charge. Carradine (note)

Lawyer Liability note

- 1515(c) attempted to address the Cintolo problem: a lawyer cannot be held criminally liable under the obstruction chapter of Title 18 for providing bona fide legal representation services.
  - Wouldn’t have changed Cintolo

- This is an element of the crime for the prosecutor to prove, not an affirmative defense
  - Also wouldn’t have changed Cintolo
1512 – Tampering with a witness
   (a) Killing someone to obstruct
   (b) Knowingly uses intimidation or physical force; threatens or corruptly persuades another person (or attempts to do so); or engages in misleading conduct toward another, w/ intent to …
   (c) Amends statute to include document destruction, or otherwise obstructing an official proceeding
   (d) Intentionally harasses a person, and thereby …

- After 1512 was added, the words “any witness” were deleted from 1503, but the omnibus provision remained
  o Formerly, 1512 only dealt w/ coercive witness tampering
- Noncoercive witness tampering (hiding witness to prevent trial appearance) still falls under the 1503 omnibus, *Lester*
  o Didn’t want to read 1512 to create gaps in the previous statutory coverage
  o 1512 since amended to cover the *Lester* situation
  o Statutes still work in tandem, unclear if addition of “corruptly persuade” makes 1512 the exclusive witness tampering statute (probably not; omnibus of 1503 probably still applies)
- Network of statutes, designed to cover everything that is part of and precedes a formal investigation
- In 1512(b), “knowingly” modifies “corruptly,” *Arthur Andersen*
  o “Knowingly” read to mean “consciousness of wrongdoing” – unclear if “knowingly corruptly” means that you had to know that what you were doing was against the law.
  o Compliance with a valid document retention policy is not illegal; destruction in compliance w/ a valid policy under ordinary circumstances is not illegal
  o Similarly, persuading someone not to testify or to withhold information is not *per se* unlawful
- 1512(c) is meant to plug holes in 1512(b); formerly, it seemed that a person who destroyed documents himself was not criminally liable under (b), but if he persuaded another to do it, he would be criminally liable
- With Sa-Ox:
  o 1519 reaches just about all forms of tampering with tangible evidence
    ▪ Has language about agency “jurisdiction” that tracks s. 1001
  o 1520 now imposes record retention requirements on accountants who audit corporations subject to SEC reporting requirements
    ▪ Makes it a crime to knowingly and willfully violate the record retention requirements
- In 1512, *unlike in 1503’s omnibus clause*, there is no requirement that misleading conduct be “likely to affect” a judicial proceeding (or anything)
  o “ Likely to affect” was a requirement applied to 1503 because of the broad scope of the omnibus clause
- Language is clear: need to, through misleading conduct or corrupt persuasion, act w/ intent to influence testimony at an official proceeding
- Statutory language makes it clear that an official proceeding need not be pending or about to be brought
- In the “threatening” portion of 1512(b), Wilson:
  - Harassment can be one act; need not be several
  - Protection sticks with witness throughout trial (even after witness has been excused); not safe from liability if you intimidate a witness who has already testified
  - Statute punishes attempts as well as actual witness intimidation; if you attempt to intimidate a witness, doesn’t matter whether or not the witness has yet to testify
- Intimidation vs. Harassment (Willard vs. Wilson)
  - Indimidation: straightforward, tangible harm threatened, explicit & specific threat
  - Harassment: veiled threats; Wilson not in position to act
  - Threats of divine retribution or “I’ll have you prosecuted” count as intimidation under 1512(b), Willard

1510(a) – Bribery to obstruct criminal investigation

1519: Crime to
- Knowingly alter … any record, document, tangible object
- W/ intent to impede … investigation / administration of
- Any matter w/in jurisdiction of any department or agency of US, or
- A bankruptcy case, or
- In relation or contemplation of any such matter in any case.

REVIEW HANDOUT, LAY CASE STUDY
- Corporate records are corporate, even if they might implicate an individual
- No 5th amendment privilege in corporations
- But, Lay’s act of production can’t be used against him, in that gov’t can’t ID him as the record-holder, or force him to authenticate them
  - Jury can figure it out from surrounding circumstances
- If corporate records were mixed with personal records, can claim 5th amendment privilege as to the personal records
  - But can’t do it partway through, or after turning over a ton of other docs.
  - If you turn them over in another action, you waive privilege
- Criticism of DOJ approach of going up the ladder, rather than straight to the top; but sometimes you need building block approach – to make case, need info that only insiders have
Bribery
18 U.S.C. § 201 (a)-(b)
(a) defines “public official”; “person selected to be a public official”; “official act”
- “Public official” really includes people on all rungs, at all levels
(b) Bribery portion
(c) Gratuities portion
(d) Paragraphs (3) and (4) of (b), and (2) and (3) of (c) [bribery and gratuity relating
to witness testimony], isn’t construed to prohibit payment or receipt of witness
fees, or reasonable cost of travel, subsistence, or time lost, or expert witness fees
for preparing opinion, appearing, and testifying.
(e) The offenses of this provision are separate from and in addition to 1503-05 (incl.
Obstruction of Justice)

- To be an “official act,” need not be an act w/in formal authority, *Parker*
  - Can be an act that you are enabled to do because of your position
  - Also, encompasses use of the computer systems that you have access to as
    employee for your own benefit or the benefit of a 3rd party, even if that
    wasn’t part of your authority.
  - Abuse of position of trust on a matter pending before your office
- Even if you have already taken action and the money does not induce you to do
  anything, you can still be guilty of bribery for soliciting money in exchange for
  that action. *Arroyo*
  - Key is that you make the bribe-payer believe that there is a quid-pro-quo,
    that you will take action in exchange for money
  - It’s a bribe b/c Ds were representing it as s.th they could do in exchange
    for money; designed to induce that belief
- In order to establish a violation of 201(c)(1)(A), gov’t must prove a link between
  a thing of value conferred upon a public official and a specific “official act” for or
  because of which it was given. *Sun Diamond Growers*
  - Not gratuity if you’re giving gifts unconnected to official acts, or to build
    goodwill to encourage future favorable acts
- Distinguishing between bribery or gratuity:
  - Bribery requires intent to influence, or be influenced in, an official act
  - Gratuity requires that payment be accepted “for or because of an official
    act”
  - Gratuity is a lesser included offense of bribery
- Can have one party guilty of bribery & the other guilty of gratuity; they can both
  have different mental states. *Anderson*
  - Say payer intends to induce a certain official act, and payee has already
    decided how to act…
- Lobbyists are bound by the same criminal laws as the rest of us. *Anderson.*
  Crosses into criminal influence peddling when you have “something of value”
- The phrase “anything of value” means anything that the bribe recipient believes to
  have value, whether or not it in fact had value. *Williams*
  - Another victory for sting operations
Would this conversely apply to the payor – anything that the payor believed to have value?

- A promise to make a payment is enough to come under the bribery statute, and money (or promises) can change hands through an intermediary. 9-A
- Need not be in privity with / have a contractual relationship to US Gov’t to be a “public official.” Can be a public official if you administer a federal program, occupy a position of public trust, and have discretion over disbursement of federal funds. Dixson
  - Those who administer block-grant programs can be characterized as public officials to the extent that they have the discretionary authority to implement the policy for which the grants were awarded & to disburse the funds.

- The speech and debate clause of the Constitution forecloses any evidence as to acts taken in Congress or the motivation for those acts. However, to prove bribery, there is no need to prove that you followed through on your promise, and the taking of a bribe is not part of the legislative process. Brewster
  - Once you have promise / acceptance of money, that’s bribery regardless of what happens later
  - What you do as background research in preparation for legislation is also protected

- Grants of witness immunity, plea agreements between the prosecution and a criminal that require the criminal to testify at another trial, do not fall under 18 USC 201. Ware
  - The “whoever” does not countenance a prosecutor acting within the established prerogatives and statutory authority of office

18 U.S.C. § 666 – Theft or Bribery Concerning Programs Receiving Federal Funds
(a) Whoever, in the circumstance described in (b),
  (1) being an agent of an organization, or of a gov’t, or of a gov’t agency,
    (A) Embezzles, steals, obtains by fraud, or otherwise w/o authority knowingly converts … property that is valued at $5,000
    ii. Is valued at $5K or more, and
    iii. Is owned by … such org
    (B) Corruptly solicits or demands … anything of value from any person, intending to be influenced … in connection w/ any business … of such org … involving any thing of value of $5K or more
  (2) corruptly gives … anything of value to any person w/ intent to reward an agent … in connection w/ any business … involving anything of value of $5K or more
(b) The circumstance is that the org, gov’t, or agency receives, in 1 year, benefits over $10K from a federal program
(c) Doesn’t apply to bona fide salary, wages, fees, or other compensation paid in … usual course of business
(d) Definitions of terms

- What do we have to have to bring this statute into play?
- Have to have a program receiving $10,000
- Have to be acting as an agent of the program / organization receiving that money
- You have to receive something of value of at least $5,000

- This statute lacks the “public trust” and “administering federal policy” overlay of Dixson
- Statute was enacted before Dixson

- To prove a violation of 666, not necessary that the embezzlement / bribery affect federal funds; just that it falls into the category of a business that receives sufficient federal funds. Salinas
  - No requirement of misuse / misappropriation of the federal funds.
- Needs to be nexus between bribes and the government program. DeLaurentis
  - Limiting principle
  - Not necessary that the bribes affected the funds, but there must be some connection between the bribery and the federal interest
  - Sort of connection that works: federal $$ is for community policing; bribery keeps a crime-ridden bar in business; the policeman whose salary is paid by federal funds spends a lot of time policing that area.

- Supreme Court adopts Salinas over DeLaurentis – no nexus requirement. Sabri
  - Federal interest interpreted broadly, as protecting federal expenditures
  - Congress has power to do this under Spending Clause; no Congress Clause-type jurisdictional hook necessary
  - Money is fungible, and bribed officials are poor stewards of federal money
  - But even under this case, it might not work to prosecute corruption in one state agency when that state agency gets $0 federal, but another gets the required amount – probably can’t lump them together; that’s a local concern.

- What are the salient differences between 201 and 666?
  - 201:
    - Federal officials
    - Dixson – expands category of “officials” w/in reach of the statute:
      - To include those people who occupy positions of public trust
      - And who in that position are basically implementing a federal program / federal policy
  - 666:
    - Agent – state or local government
  - Both require some nexus:
    - Nexus under 666 can be more indirect so long as there is some bribe in connection w/ federal interest
  - Threshold / jurisdictional requirements:
    - 666 imposes additional limitations insofar as the actual amount of $$ received
- Federal funds obtained through purely commercial transactions cannot serve as a basis for a 666 prosecution; the funds must be given for assistance. *Copeland*
RICO

(1) Defines / Lists predicate crimes; (a) state, (b) federal)
   - State: must be “chargeable” under state law and “punishable” by more than 1 year
(3) Person = any individual or entity capable of holding a legal or beneficial interest in property
(4) Enterprise: any legal entity (individual, association, corporation) + any individuals associated in fact although not a legal entity
(5) Pattern of racketeering activity = at least 2 acts of racketeering activity; one of which occurred after RICO’s effective date, the last of which occurred at most 10 years (excluding period of imprisonment) from prior racketeering activity

§ 1962
(a) Unlawful for any person who has received income derived from a pattern of racketeering activity to invest that income in an enterprise affecting interstate commerce.
(b) Unlawful for any person, through a pattern of racketeering activity, to acquire or maintain any interest in an enterprise …
(c) It is illegal for a person employed by / associated with an enterprise to participate in the conduct of an enterprise’s affairs through a pattern of racketeering activity.
   - The enterprise must be engaged in, or have activities that affect, interstate or foreign commerce.
   - Conduct / participation can be either direct or indirect
   - The person must be distinct from the RICO enterprise
(d) Unlawful for any person to conspire to violate RICO

- An group that is only associated for the purpose of performing illegal acts can be an “enterprise” under RICO (associated in fact). Turkette
  - And thus, participating in such a gang’s affairs through a pattern of racketeering activity can be a RICO crime
- Problem 10-1
  - So, for instance, a governor’s office (as a legal entity) could be a RICO enterprise; as could a sub-group of particular people w/in office
  - For the most part, anything de minimis is OK to satisfy the “interstate commerce” requirement
    - Governor’s office affects interstate commerce; state purchases goods & services from other states
    - Can’t get too far removed though (as with arson statute; D burns down a home and that home was connected to power grid)
- The enterprise need not be profit-seeking; need not have commercial or economic motive to be RICO enterprise. NOW v. Scheidler.
- A “pattern of racketeering activity” does not require multiple illegal schemes, but does require continuity + relationship. Northwestern Bell Telephone
  - Continuity
    - Closed ended: series of related predicates extending over a substantial amount of time
Open ended: past conduct that threatens repetition into the future

- Relationship = “criminal acts that have the same purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.”

- State predicate crimes under RICO are used for their generic definition, Garner
  o So “bribery” includes gratuity, and doesn’t just mean “whatever the state defines as bribery”

- For state predicate crimes, procedural bars (statute of limitations, acquittal) do not affect whether the conduct was “chargeable” and “punishable” – relevant inquiry is whether the conduct is subject to state law, not this particular D. 10-2

- To “conduct” an enterprise, you must be involved in the operation and management of the enterprise, have some measure of control; means “to manage or direct”. Reves v. Ernst & Young
  o That’s “conduct”; “participate in the conduct” means to take part in this principal activity of operating or managing the affairs.
  o Can also apply to low-run participants working under management’s direction
  o Must be at a higher level than just some involvement in enterprise
  o Attorneys such as prosecutors, who exercise a high level of discretion, “participate in the conduct” of the AUSA’s office for purposes of RICO. 10-3
  o And so would people who bribe them, if he’s influencing the managerial decisions

- A sole proprietorship can be an “enterprise” under RICO so long as it is separable from the individual, either formally (by incorporation) or practically (multiple people working for the sole proprietorship). McCullough v. Suter
  o Either way, properly separates the person from the enterprise
  o But an unincorporated, one-man-show sole proprietorship wouldn’t cut it

- For a charge of conspiracy to violate RICO, there is no requirement that a conspirator agreed to engage in any predicate acts. He only needed to agree to further an endeavor that, if completed, would satisfy all of the substantive elements of the criminal offense. Salinas
  o Also, RICO’s conspiracy does not include a requirement of an overt act in furtherance
  o Conspirator may merely have the personal role of facilitating the endeavor

RICO forfeiture

1963(a) – Forfeiture
- Punishment clause, + whoever violates 1962 shall forfeit to US:
  o Any interest that the person has acquired / maintained in violation of 1962
  o Any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which the person has established / operated / controlled / conducted / participated in, in violation of 1962
- Any property constituting proceeds from the illegal activity which the
  person obtained from the pattern of racketeering activity
  - Title to forfeited property vests in US as of the time of the commission of the
    offense.

- As a predicate to forfeiture, you need to be convicted of a RICO violation, but do
  not have to be convicted of any particular predicate crime. Simmons
  - Liability is joint and several for RICO violators
    - Calculating proceeds as gross receipts, not as profits; punish all criminals,
      whether or not they turn a profit. Simmons
  - RICO forfeiture does allow for forfeiture of offices, but does not allow forfeiture
    in perpetuity, such as a ban on future officeholding or a prohibition of reacquiring
    forfeited assets (including offices). Rubin
  - Attorney fees are not exempt from forfeiture under RICO, and there is no 6th
    amendment problem with imposing forfeiture on criminally-derived fees paid to
    an attorney. Caplin & Drysdale

- Defense to forfeiture: bona fide purchaser for value
  - Person receiving funds was reasonably without cause to believe that the
    funds were subject to forfeiture
  - The funds were used to purchase a good or service from the person
    receiving the funds at about fair market price
  - Very unlikely that criminal defense firm can establish themselves as a bona fide
    purchaser for value (since they know they’re dealing with someone who may be
    guilty), but it’s a very fact-based analysis dealing with the situation. Moffit,
    Zwerling & Kemler
    - The mere fact of a RICO count, though, should put them on notice for
      forfeiture.
  - If the law firm spends the forfeitable property, can’t force the firm to forfeit over
    substitute assets; but can sue for conversion. Moffit
  - To establish a civil RICO claim, you need only prove the elements of criminal
    RICO by a preponderance of the evidence. Nothing more is needed. Sedima v.
    Imrex
    - No need for a “RICO-like” or “competitive” injury; person just needs to
      be injured in business or property by a violation
  - Libertad v. Welch: interpretation of “injury to business or property”
    - It’s not just any injury that might otherwise be actionable; show things like
      lost wages, property damage, expenses dealing w/ the RICO violation –
      harassment, intimidation don’t count unless they cause such damage
  - Commercial Cleaning
    - To raise a civil RICO claim, the RICO violation must be the proximate
      cause as well as the but-for cause of the injury
    - Injury must be direct – cannot be derivative of injury to a 3rd party
      - Ex: someone else is hurt by your RICO violation; the fact that
        they’re hurt, hurts me

1964(c) – Civil Remedies
- Any person injured in his business or property by a 1962 violation may sue, and shall recover 3x damages + reasonable attorney fees
Money Laundering

31 U.S.C. § 5324 – Structuring transactions to evade reporting requirement
- No person shall, w/ purpose of evading the reporting requirements of …
  o Cause or attempt to cause a domestic financial institution to fail to file a report
  o … to file a report that contains a material omission or misstatement
  o Structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions

- Have to have knowledge (or willful blindness) that you’re structuring – negligence won’t do – but you don’t have to show knowledge that the structuring is illegal.  Beidler

31 U.S.C. § 5322 – Criminal penalties
- Elevated penalties if you violate the reporting requirements while violating another US law, or as part of a pattern of illegal activity.
  o Not the same “pattern” as RICO

- Repeated failure to file can itself be the pattern of illegal activity.  St. Michael’s Credit Union. They’ll be a pattern if that’s the regular course of doing business.

26 U.S.C. § 6050I – Returns relating to cash received in trade or business
- (a) Any person who is engaged in a trade or business and receives more than $10,000 in cash in 1 transaction, shall make a return
- (f) No person shall, for the purposes of evading the requirements… see above (same idea)

- If you’re a lawyer and your client pays you with over $10K, it doesn’t violate the 6th amendment or attorney-client privilege to disclose his name. In fact, you have to disclose his name.  Goldberger & Dubin
  o Court does recognize that there may be “special circumstances,” in which case you can withhold the client’s name (such as “last link”)
- Irrelevant whether you believe that you have a good reason to omit information – the fact that you know that you have a duty to include the information and do not makes it intentional (and you criminally liable); “reasonable belief” doesn’t count. Lefcourt
- There are some times – when dealing with transactions involving consumer durables, collectibles, or entertainment – when cashier’s checks, travelers’ checks, money orders, etc. with face value of less than $10K – count as monetary instruments
  o So they’re like cash for the purposes of determining reporting requirements (and violation)

18 U.S.C. § 1956
(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity…
  - W/ intent to promote the carrying on of specified unlawful activity;
  - W/ intent to engage in conduct constitution a violation of 1 of 2 sections of Internal Revenue code;
  - Knowing that the transaction is designed in whole or in part
    o To conceal or disguise nature / location / source / ownership / control of the proceeds
    o To avoid a transaction reporting requirement

Shall be punished.

(b)
(4) Definition of financial transaction
(5) Definition of “monetary instruments”

- Short form:
  o Financial transaction
  o Illegal proceeds
    ▪ Need to have knowledge of those
  o Intent
    ▪ To promote
    ▪ To conceal

- No requirement for criminal liability that you conduct these transactions in a name other than your own. *Tencer*
  o Can try to conceal through normal banking channels – have to look at behavior.
  o But, if you’re using criminally derived assets from specified unlawful activity, and there’s no evidence of intent to hide where the money came from, then this doesn’t apply
    ▪ Ex: depositing money and then using it for family business & family expenses; no evidence of attempt to hide source of $$

- Again, willful blindness is enough to show knowledge. *Campbell*
  o Plus, under one of the prongs, you don’t have to intend to conceal the transaction yourself – if you know (or are willfully blind to the fact that) the $$ is proceeds of unlawful activity, and know (or are willfully blind) that the transaction is intended to conceal, you’ve broken the law
  o This case is about factors that should tip someone off, what is “willfully blind?”
    ▪ Under the table cash payments, briefcase full of cash, owns a business & has this cash but can’t get a loan, flashy cars, available during business hours all the time, you in fact have suspicions that he’s a drug dealer – this all adds up

- “Intent to promote” can be demonstrated with something as simple as paying off a mortgage or buying a new car, if your illegal scheme involves defrauding people and you want to convey an aura of legitimacy & financial security. *Johnson*
Kennedy – changes the rule of Johnson (below) – you don’t need actual possession of the funds first, what you really need is completion of the substantive crime first
  o So if you have completion of the substantive crime (which doesn’t involve actually getting funds – say, mail fraud) and then you get the funds, the transaction in which you get the funds can be in the same transaction as the violation, and that’s OK

18 U.S.C. § 1957
Whoever … knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value of >$10K and is derived from specified unlawful activity, shall be punished
  - Criminally derived property = property constituting, or derived from, proceeds obtained from a criminal offense.

  - Definition of criminally derived property means that you can only have a violation of 1957 after gaining possession of the proceeds generated by the criminal activity. Johnson.
    o Must have the money before engaging in the transaction
    o Also, although gov’t has the burden of proving that the funds were derived from specified unlawful activity, that does not mean the government must prove that no “untainted” funds are used. Once you commingle, they’re indistinguishable.