

Table of Contents

PREFACE	v
ACKNOWLEDGMENTS.....	vii
SUMMARY OF CONTENTS.....	xvi
Chapter 1. Introduction	1
A. Definition: Selecting Statutes for study in “Substantive” Portion of the Course.....	4
B. Recurring Themes in Examining “Substantive” Federal Law	7
1. Criminalization	7
18 U.S.C. § 3553	8
Richard J. Lazarus, <i>Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Law</i> , 83 Geo. L.J. 2407, 2441-45 (1995)	8
2. Overcriminalization; Federalization; Judicial Role; Prosecutorial Function	10
Julie R. O’Sullivan, <i>The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study</i> , 96 J. Crim. L. & Criminology 643 (2006)	10
C. Practice: Selecting “Procedural” Topics Relevant to White-Collar Crime	32
D. Professional Responsibility	45
1. Prosecutorial Role.....	45
a. Federal Prosecutors’ Duty to “Do Justice”	45
b. Applicable Ethical Standards	50
2. Defense Challenges.....	52
Kenneth Mann, <i>Defending White-Collar Crime: A Portrait of Attorneys at Work 16-17</i> (Yale Univ. Press 1985)	52
Chapter 2. Mens Rea	53
A. The Public Welfare Doctrine.....	55
<i>United States v. International Minerals & Chem. Corp.</i>	55
Notes	56
<i>Staples v. United States</i>	62
Notes	70
<i>United States v. Weitzenhoff</i>	76
Notes	83
B. Awareness of Legal Requirements	85
<i>Bryan v. United States</i>	86
Notes	93
C. Other Doctrines and Defenses.....	94
1. Specific and General Intent.....	94

2. Good Faith Defense.....	96
3. Good Faith Reliance on Counsel Defense.....	98
4. “Willful Blindness,” “Conscious Avoidance,” or “Ostrich” Instructions.....	99
Chapter 3. U.S. Sentencing Guidelines	105
A. Real- versus Charge-Offense Sentencing	109
B. Guidelines Structure	115
C. Constitutional Analysis	123
<i>United States v. Booker</i>	123
Notes	141
Chapter 4. Entity Liability.....	149
A. Criminalizing Corporate Conduct.....	150
Harvey L. Pitt & Karl A. Groskaufmanis, <i>Minimizing Corporate Civil and Criminal Liability: A Second Look at Corporate Codes of Conduct</i> , 78 Geo. L. J. 1559, 1562-97 (1990)	150
Brent Fisse, <i>Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions</i> , 56 S. Cal. L. Rev. 1141, 1145-67 (1982)	152
Julie Rose O’Sullivan, <i>Professional Discipline for Law Firms? A Response to Professor Schneyer’s Proposal</i> , 16 Geo. J. Legal Ethics 1 (2002)	159
B. Principles of Liability	164
1. “Within the Scope of Employment” Requirement	164
<i>New York Central & Hudson River R.R. Co. v. United States</i>	164
Notes	167
2. “Intention to Benefit the Corporation” Requirement	171
<i>United States v. Sun-Diamond Growers of California</i>	172
Notes	175
3. Liability Where Criminal Action is Contrary to Corporate Policy/Orders	176
<i>United States v. Hilton Hotels Corp.</i>	176
Notes	178
Amicus Brief for the Ass’n of Corporate Counsel, et al. in <i>United States v. Ionia Management</i> , 555 F.3d 303 (2d Cir. 2009)	181
4. Difficulties Where Responsibility Is Defused.....	186
<i>United States v. Bank of New England, N.A.</i>	187
Notes	191
C. Department of Justice and SEC Charging Policies	192
Federal Prosecution of Business Organizations (aka The Filip Memo)	194
Notes	213
John Hasnas, <i>Ethics Problem of White Collar Crime</i> , 54 Am. U. L. Rev. 632-637 (2005)	214
SEC Charging Policy	217
D. U.S. Sentencing Guidelines: Organizational Sentencing.....	221
1. Background	221
2. Key Features	224
a. Part B—Remedying the Harm From Criminal Conduct—	

Restitution.....	224
b. Part C—Fines	225
c. Part D—Organizational Probation	233
3. Effective Compliance Program: The <i>Caremark</i> Decision	236
E. Corporate Internal Investigations.....	238
Julie R. O’Sullivan, <i>Does the DOJ’s Compelled-Voluntary Privilege Waiver Threaten the Rationales Underlying the Attorney-Client Privilege or the Work Product Doctrine? A Preliminary No,</i>	
45 Am. Crim. L. Rev. 1280-85, 1258-63 (2008)	239
F. Managerial Liability: “Responsible Corporate Officer” Doctrine	246
<i>United States v. Park</i>	249
Notes	257
<i>United States v. Brittain</i>	258
<i>United State v. MacDonald & Watson Waste Oil Co.</i>	261
Notes	265
Chapter 5. Perjury, False Statements, and False Claims.....	267
A. Perjury	267
1. Elements/Principles of Liability	268
2. Defenses	270
a. Recantation	270
b. “Literal Truth” and “Ambiguity”	271
<i>Bronston v. United States</i>	272
Notes	276
B. False Statements	281
1. Elements/Principles of Liability	282
a. False Statements and Affirmative Concealment of Material Facts ...	282
b. Materiality	284
c. “Jurisdiction”	286
d. The “[E]xecutive, [L]egislative, or [J]udicial [B]ranch”	288
e. <i>Mens Rea</i>	294
f. Federalization	298
<i>United States v. Herring</i>	298
Notes	300
2. Defenses	301
<i>Brogan v. United States</i>	301
Notes	308
C. False Claims	308
1. Criminal False Claims Cases Under § 287	310
2. Civil False Claims: <i>Qui Tam</i> Litigation.....	312
a. Practical Issues	316
b. Constitutional Questions	318
<i>Riley v. St. Luke’s Episcopal Hospital</i>	319
D. Charging Considerations: Double Jeopardy.....	332
1. Multiple Punishments for the Same Offense	332
<i>United States v. Woodward</i>	332
Notes	335
a. Multiplicity	337

b. Duplicity	338
2. Successive Prosecutions for the Same Offense	339
3. Dual Sovereignty	342
Chapter 6. Obstruction of Justice	345
A. The “Omnibus” Clause of 18 U.S.C. § 1503	346
<i>United States v. Aguilar</i>	347
Notes	353
<i>United States v. Cueto</i>	357
Notes	366
B. Obstruction of Proceedings Before Congress and Federal Agencies	
Under 18 U.S.C. § 1505	372
C. Witness Tampering Under 18 U.S.C. § 1512	376
<i>Arthur Andersen LLP v. United States</i>	377
Notes	382
D. Sarbanes-Oxley Act of 2002 Prohibition of Destruction of Records and Whistleblower Provisions: 18 U.S.C. §§ 1519, 1520, 1513, 1541	394
Chapter 7. Mail and Wire Fraud	401
A. The Mailing or Wiring in Furtherance Element	404
<i>Schmuck v. United States</i>	404
Notes	408
B. Scheme to Defraud Element	414
1. Materiality and Reliance	414
<i>Neder v. United States</i>	414
Notes	417
<i>Bridge v. Phoenix Bond & Indemnity Co.</i>	418
Notes	422
2. Intent to Defraud: Intent to Injure?	425
<i>United States v. Regent Office Supply Co.</i>	425
Notes	428
3. Varieties of Fraud	431
<i>United States v. Siegel</i>	431
Notes	436
C. Permissible Objects of a Scheme to Defraud	438
1. Property	438
<i>McNally v. United States</i>	438
Notes	446
2. Intangible Property	446
<i>Carpenter v. United States</i>	446
Notes	450
3. Section 1346 and “Honest Services” Prosecutions	454
a. Public-Sector “Honest Services” Cases	455
<i>United States v. Weyhrauch</i>	455
Notes	460
b. Private-Sector “Honest Services” Cases	466
<i>United States v. Rybicki</i>	466
Notes	481

<i>Sorich v. United States</i>	487
D. Mail/Wire Fraud Exercise.....	489
<i>United States v. Blackmon</i>	489
Chapter 8. Public Corruption	493
A. Federal Bribery and Gratuities Under § 201	494
<i>United States v. Sun-Diamond Growers of California</i>	494
Notes	501
<i>United States v. Alfisi</i>	511
Notes	518
B. Extortion Under Color of Official Right § 1951 (The Hobbs Act).....	520
<i>Evans v. United States</i>	520
Notes	529
<i>United States v. Gotti</i>	534
C. Federal Program Bribery, Theft, and Fraud Under § 666.....	539
<i>Fischer v. United States</i>	539
Notes	546
<i>Sabri v. United States</i>	547
Notes	551
D. The Foreign Corrupt Practices Act.....	552
<i>United States v. Kay</i>	554
Notes	566
Chapter 9. Securities Fraud	577
A. Rationale for Insider Trading Prohibition	578
Donald C. Langavoort: Insider Trading: Regulation, Enforcement, and Prevention § 1:2 to 1:6, at 1-8 to 1-17 (West 2002)	578
B. Traditional Theory.....	583
1. Principle Liability	583
<i>Chiarella v. United States</i>	583
Notes	588
2. Tipper/Tippee Liability.....	589
<i>Dirks v. SEC</i>	589
Notes	595
C. Misappropriation Theory.....	597
<i>United States v. O'Hagan</i>	597
Notes	608
D. Securities Fraud Under 18 U.S.C. § 1348	612
E. Accounting Fraud	613
Ernest L. Ten Eyck & Laureen Ryan, How Does Financial Statement Fraud Occur? Is Something Rotten in the Accounting Department 1438 PLI/Corp 9 (July 2004).....	613
<i>United States v. Ebbers</i>	628
Chapter 10. Conspiracy	639
A. Practical Consequences of a Conspiracy Charge.....	640
1. Fed. R. Evid. 801(D)(2)(E)	640
2. Joinder	641

3. Venue	643
4. Statute of Limitations	644
B. Elements/Principles of Liability	645
1. Defraud and Offense Clauses	645
<i>United States v. Arch Trading Co.</i>	645
Notes	647
2. Agreement	650
a. Plurality	650
<i>United States v. Stevens</i>	650
Notes	652
b. Intent, Impossibility, and Withdrawal	655
<i>United States v. Recio</i>	655
Notes	656
c. Defining the “Essential Nature” of the Agreement	658
<i>United States v. Stavroulakis</i>	658
Notes	661
3. Defining the Scope of the Conspiracy	662
<i>United States v. Gatling</i>	663
Notes	668
4. Overt Acts	671
5. <i>Pinkerton</i> Liability	672
<i>United States v. Tilton</i>	672
Notes	674
C. U.S. Sentencing Guidelines: Conspiracy Exercise	675

Chapter II. The Racketeer Influenced and Corrupt Organizations Act (“RICO”)

677	
A. Elements/Principles of Liability	681
1. Enterprise	681
<i>United States v. Turkette</i>	681
Notes	685
<i>Cedric Kushner Promotions, Ltd. v. King</i>	686
Notes	689
2. Pattern of Racketeering Activity	694
<i>H.J. Inc. v. Northwestern Bell Tel. Co.</i>	694
Notes	699
3. Conduct of Enterprise’s Affairs	701
<i>Reves v. Ernst & Young</i>	701
Notes	704
4. RICO Conspiracy	708
<i>United States v. Elliot</i>	708
Notes	714
<i>Salinas v. United States</i>	718
B. Prosecutorial Powers and Policies	720
1. Charging and Evidentiary Considerations	720
2. Criminal Forfeiture	721
3. DOJ Approval Requirements and Charging Directions	724
C. U.S. Sentencing Guidelines: RICO Exercise	726

Chapter 12. Money Laundering	727
A. “Transaction” Offenses Under § 1956(a)(1) and § 1957.....	732
1. “Concealment” Offense Under § 1956(a)(1)(B)(i).....	732
<i>United States v. Campbell</i>	732
Notes	737
B. “Transportation” Offenses Under § 1956(a)(2).....	746
1. “Promotion” Offense Under § 1956(a)(2)(A).....	746
<i>United States v. Piervinanzi</i>	746
Notes	755
C. Non-Banking Systems: Challenges for Future?	760
Hawala and Underground Terrorist Financing Mechanisms, Prepared Statement of Mr. Patrick Jost, SRA International, U.S. Senate Committee on Banking, Housing, and Urban Affairs, Subcommittee on International Trade and Finance (Nov. 14, 2001)	761
D. Money Laundering: Case Study in Institutional Interaction In Sentencing.....	764
 Chapter 13. Grand Jury	 769
A. Grand Jury Function.....	770
Daniel C. Richman, <i>Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket</i> , 36 Am. Crim. L. Rev. 339 (1999)	774
B. Rules Controlling Grand Jury Operation: Fed. R. Crim. P. 6.....	776
1. “Disclosure” of Grand Jury Materials	777
2. “Matters Occurring Before the Grand Jury”.....	778
<i>In re Sealed Case No. 99-3091 (Office of Independent Counsel Contempt Proceeding)</i>	778
Notes	782
3. Enforcement of Rule 6(E)(2) Secrecy Rules	783
4. Supplementation of Rule 6(E)(2) Secrecy Rules	784
C. Investigative Function	784
1. Rules Applicable to Witnesses.....	785
Notes	788
2. Rules Applicable to Documents/Tangible Objects.....	790
<i>United States v. R. Enterprises, Inc.</i>	790
Notes	794
Robert J. Giuffra, Jr., <i>E-Mail: The Prosecutor’s New Best Friend</i> , 6 Bus. Crimes Bull. 1 (July 2003).....	794
3. Evidentiary Rules	797
Notes	798
D. Judicial Policing and Prosecutorial Misconduct.....	799
<i>Bank of Nova Scotia v. United States</i>	799
Notes	804
<i>United States v. Williams</i>	806
Notes	812
 Chapter 14. Discovery	 815
A. “Brady” Material.....	817
<i>Brady v. Maryland</i>	817

<i>United States v. Bagley</i>	818
Notes	827
<i>United States v. Ruiz</i>	837
Notes	841
B. Pretrial Discovery: Fed. R. Crim. P. 16	842
Notes	844
C. Jencks Act or “3500” Material: Witness Statements	847
D. Witness Lists.....	849
E. Trial Subpoenas: Fed. R. Crim. P. 17.....	850
F. Discovery Hypothetical	853
Chapter 15. Fifth Amendment: Testimony and Immunity	857
A. Formal immunity Pursuant to 18 U.S.C. § 6002-05	857
1. Constitutional Standards	857
<i>Kastigar v. United States</i>	857
Notes	865
Hon. Stephen S. Trott, <i>Words of Warning for Prosecutors Using Criminals as</i> <i>Witnesses</i> , 47 Hastings L. J. 1381 (1996)	872
2. Defense Witness Immunity.....	874
B. Proffers	878
1. Rationale	878
2. Fed. R. Crim. P. 11(E)(6) and Fed. R. Evid. 410.....	882
3. Sample Proffer.....	882
Notes	884
<i>United States v. Velez</i>	884
Notes	890
C. Informal Immunity Agreements.....	890
1. DOJ Policy	891
Notes	896
2. Sample Agreement	898
Notes	900
Chapter 16. Fifth Amendment: Documents and Tangible Objects	901
A. Natural Persons (and Sole Proprietorships)	901
B. What Constitutes “Compulsion”	902
<i>Fisher v. United States</i>	905
Notes	912
C. The Continuing Viability of the Collective Entity Doctrine After <i>Fisher</i>	915
<i>Braswell v. United States</i>	915
Notes	918
D. What Constitutes a “Testimonial Communication”	921
<i>Doe v. United States</i>	921
Notes	927
E. How “Incriminating” Must the Communication Be	927
<i>Hoffman v. United States</i>	927
Notes	929
F. “Act of Production” Immunity	930
<i>United States v. Hubbell</i>	930

Notes	935
Chapter 17. The Attorney-Client Privilege and the Work Product Doctrine in a Corporate Setting	941
A. Qualifying for Protection	942
<i>Upjohn Co. v. United States</i>	942
Notes	948
B. Losing the Privilege: Waiver	955
<i>In re Grand Jury Proceedings (United States v. Doe)</i>	956
Notes	967
C. DOJ's "Compelled-Voluntary" Waiver Policy	977
Julie R. O'Sullivan, <i>The Last Straw: DOJ's Privilege Waiver Policy And the Death of Adversarial Justice in Criminal Investigations of Corporations,</i> -- DePaul L. Rev. -- (forthcoming 2007)	981
D. Losing the Privilege: Crime/Fraud Exception	986
<i>In re Sealed Case</i>	986
Notes	990
E. Privileges of Governmental Actors	994
<i>In re Grand Jury Investigation</i>	994
Notes	999
Chapter 18. Representation Issues	1001
A. Ethical Rules.....	1001
B. "Multiple" or "Joint" Representation	1004
1. Constitutional Issue	1004
<i>Wheat v. United States</i>	1005
Notes	1011
2. Multiple Representation Decisions in the Corporate Context	1014
Gregory J. Wallance, <i>Can You Represent Both Company & Employee After Receiving Grand Jury Subpoenas?</i> 6 Bus. Crimes Bull. 1, 5-6 (Nov. 1989) ..	1015
C. Pre-Indictment Sixth Amendment Protection	1018
<i>United States v. Stein</i>	1019
D. "Joint Defenses"	1035
Ethical Implications of Joint Defense/Common Interest Agreements, Committee on Professional Responsibility of the association of the Bar of the City of New York (1996)	1036
Model Joint Defense/Common Interest Agreement.....	1044
Notes	1046
<i>In re Grand Jury Subpoena et al.</i>	1048
Notes	1056
Chapter 19. Plea Bargaining and Cooperation Agreements	1057
A. Plea Bargaining: Constitutional Standards.....	1058
<i>Brady v. United States</i>	1058
Notes	1062
<i>Bordenkircher v. Hayes</i>	1065
Notes	1068
<i>Ricketts v. Adamson</i>	1071

Notes	1073
B. Fed. R. Crim. P. 11 and Guidelines Bargaining.....	1080
1. Fed. R. Crim. P. 11	1080
2. Guidelines Bargaining	1082
a. Acceptance of Responsibility	1086
b. Charge Bargaining	1086
c. Guidelines “Fact” or “Factor” Bargaining	1090
d. Sentence Bargaining	1091
e. Enforcement	1092
C. Cooperation Agreements	1093
1. Policy Discussion: <i>United States v. Singleton</i>	1093
2. U.S.S.G. 5K1.1.....	1102
3. Sample Agreement.....	1108
Notes	1111
4. Corporate Cooperation & Pleas: “DP” Agreements.....	1112
Christopher J. Christie & Robert M Hanna, <i>A Push Down the Road of Good</i> <i>Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney</i> <i>for the District of New Jersey and Bristol-Myers Squibb Co.</i> , <i>43 Am. Crim. L. Rev.</i> 1043 (2006)	1113
Notes	1125
Chapter 20. Parallel Proceedings	1129
A. Constitutionality	1129
<i>United States v. Mahaffy</i>	1131
B. Fifth Amendment Implications	1134
1. Waiver	1134
2. Adverse Inference and Other “Penalties”	1138
<i>LaSalle Bank Lake View v. Seguban</i>	1139
Notes	1143
C. Obtaining a Stay of Civil or Administrative Proceedings.....	1147
D. Obtaining a Protective Order in Civil or Administrative Proceedings.....	1149
<i>In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes</i>	1149
Notes	1153
E. Use of Grand Jury Materials	1155
<i>Douglas Oil Co. of California v. Petrol Stops Northwest</i>	1156
Notes	1158
F. Collateral Estoppel.....	1158
G. Global Settlements	1161
H. Double Jeopardy and Excessive Fines Provisions.....	1162
INDEX	1171

