Preface

This book reflects the insights and ideas developed over the course of more than 30 years of teaching criminal law and criminal procedure to undergraduate criminal justice students. The volume combines the concepts and learning tools found in undergraduate texts with the types of challenging cases and issues that are characteristic of law school casebooks. Each chapter incorporates several features:

- ***Essays.*** Essays introduce and summarize the chapters and topics.
- ***Cases.*** Edited cases are accompanied by Questions for Discussion.
- ***Case Notes.*** Following the edited case decisions, Cases and Comments and You Decide review exercises are provided. In the You Decide sections, actual cases are discussed, and readers are asked to act as judges.
- ***The Model Penal Code and Discussion Boxes.*** In these sections, selected statutes and the provisions of the Model Penal Code are reprinted and analyzed. Discussion boxes and graphs supplement the coverage in most chapters.
- ***Learning Tools.*** Learning tools summarize and reinforce the material. These include introductory vignettes, chapter outlines, the Test Your Knowledge and Crime in the News features, Questions for Discussion following each case, legal equations, Chapter Review Questions, and Legal Terminology lists.

The book provides a contemporary perspective on criminal law that encourages students to actively read and analyze the text. I hope that at the conclusion of the course, students will have mastered the substance of criminal law and have developed the ability to understand and to creatively apply legal rules. My aspiration is that students come to appreciate that criminal law is dynamic and evolutionary and is not merely a static and mechanical set of rules.

The Case Method

One of my aims is to provide a book that students find interesting and instructors consider educationally valuable. I have found that undergraduates enjoy and easily absorb material taught through the case method. In my experience, learning is encouraged when students are presented with concrete factual situations that illustrate legal rules. The case method also lends itself to an interactive educational environment in which students engage in role-playing or apply legal precedents to novel factual scenarios. The case method has the additional benefit of assisting students to refine their skills in critical reading and analysis and in logical thinking.

The cases in the text are organized to enhance learning and comprehension. The decisions have been edited to emphasize the core components of the judgments, and technicalities have been kept to a minimum. Each case is divided into **Facts, Issue, Reasoning,** and **Holding**. I strongly believe in the educational value of factual analysis and have included a fairly full description of the facts. The textbook highlights the following:

- ***Classic Cases.*** The book includes various classic cases that are fundamental to the study of criminal law as well as cases that provide a clear statement of the law.
- ***Contemporary Cases.*** I have incorporated contemporary cases that reflect our increasingly diverse and urbanized society. This includes cases that address the issues of drugs, gangs, stalking, terrorism, cybercrime, white-collar crime, cultural diversity, and animal rights. Attention is also devoted to gender, race, domestic violence, and hate crimes.
- ***Legal Issues.*** The vast majority of the decisions have been selected to raise important and provocative legal issues. For instance, students are asked to consider whether the law should be expanded to provide that a vicious verbal attack constitutes adequate provocation for voluntary manslaughter.
- ***Facts.*** In other instances, the cases illustrate the challenge of applying legal rules. For example, decisions present the difficulty of distinguishing between various grades of homicide and the complexity of determining whether an act constitutes a criminal attempt.
- ***Public Policy.*** I have found that among the most engaging aspects of teaching criminal law are the questions of public policy, law, and morality that arise in various cases. The book constantly encourages students to reflect on the impact and social context of legal rules and raises issues throughout, such as whether we are justified in taking a life to preserve several other lives under the law of necessity.

Chapter Organization

Each chapter is introduced by a **vignette**. This is preceded by the **Test Your Knowledge** feature, which is intended to interest students in the material and to help students focus on the important points. The **introduction** to the chapter then provides an overview of the discussion.

The cases are introduced by **essays**. These discussions clearly present the development and elements of the relevant defense, concept, or crime and include material on public policy considerations. Learning objectives are included to highlight what students should know. Each case is introduced by a **question** that directs students to the relevant issue.

At the conclusion of the case, **Questions for Discussion** ask students to summarize and analyze the facts and legal rule. These questions, in many instances, are followed by **Cases and Comments** that expand on the issues raised by the edited case in the textbook. There is also a feature titled **You Decide** that provides students with the opportunity to respond to the facts of an actual case.

The essays are often accompanied by an analysis of the **Model Penal Code**. This provides students with an appreciation of the diverse approaches to criminal statutes. The discussion of each defense or crime concludes with a **legal equation** that clearly presents the elements of the defense or crime.

The chapters close with a **chapter summary** that outlines the important points. This is followed by **Chapter Review Questions** and **Legal Terminology**. A **glossary** appears at the end of the book.

Most of the chapters also include **Crime in the News**. This is a brief discussion of legal developments and cases that students have likely encountered in the media. The purpose is to highlight contemporary issues and debates and to encourage students to consider the impact of the media in shaping our perceptions.

Organization of the Text

The textbook provides broad coverage. This enables instructors to select from a range of alternative topics. You will also find that subjects are included that are not typically addressed. The discussion of rape, for instance, includes "withdrawal of consent" and "rape shield statutes." Expanded coverage is provided on topics such as sentencing, homicide, white-collar crime, and terrorism.

The textbook begins with the nature, purpose, and constitutional context of criminal law as well as sentencing and then covers the basic elements of criminal responsibility and offenses. The next parts of the textbook discuss crimes against the person and crimes against property and business. The book concludes with discussions of crimes against public morality and crimes against the state.

- ***The Nature, Purpose, and Constitutional Context of Criminal Law.*** Chapter 1 discusses the nature, purpose, and function of criminal law. Chapter 2 covers the constitutional limits on criminal law, including due process, equal protection, freedom of speech, and the right to privacy. Chapter 3 provides an overview of punishment and sentencing and discusses the Eighth Amendment prohibition on cruel and unusual punishment.
- ***Principles of Criminal Responsibility.*** This part covers the foundation elements of a crime. Chapter 4 discusses criminal acts, and Chapter 5 is concerned with criminal intent, concurrence, and causation.
- ***Parties, Vicarious Liability, and Inchoate Crimes.*** The third part of the textbook discusses the scope of criminal responsibility. Chapter 6 discusses parties to crime and vicarious liability. Chapter 7 covers the inchoate crimes of attempt, conspiracy, and solicitation.
- ***Criminal Defenses.*** The fourth part of the text discusses defenses to criminal liability. Chapter 8 outlines justifications, and Chapter 9 encompasses excuses.

Chapter 1

The Nature, Purpose, and Function of Criminal Law

Learning Objectives

1.1 Know the definition of a crime

1.2 Understand the difference between criminal and civil law

1.3 Know the function of criminal law

1.4 Understand the specific and general parts of criminal law

1.5 Know approaches to categorizing crimes

Test Your Knowledge: True/False

1. The only difference in the enforcement of criminal and civil law is that violation of a criminal law may result in imprisonment.
2. Criminal law defines what is punished, and criminal procedure sets forth the rules on how crimes are investigated and prosecuted.
3. The only difference between felonies and misdemeanors is that felonies result in incarceration.
4. The best source to consult to find a comprehensive and relatively easy statement of the criminal law in a state is the criminal code rather than the decisions of the state supreme court.

Check your answers in Appendix A.

Can Police Officers Be Subjected to Prosecution in Both State and Federal Court?

As the videotape begins, it shows that [Rodney] King rose from the ground and charged toward Officer Powell. Powell took a step and used his baton to strike King on the side

> of his head. King fell to the ground. From the 18th to the 30th second on the videotape, King attempted to rise, but Powell and [Officer] Wind each struck him with their batons to prevent him from doing so. From the 35th to the 51st second, Powell administered repeated blows to King's lower extremities; one of the blows fractured King's leg. At the 55th second, Powell struck King on the chest, and King rolled over and lay prone. At that point, the officers stepped back and observed King for about 10 seconds. . . . At one-minute-five-seconds (1:05) on the videotape, [Officer] Briseno, in the District Court's words, "stomped" on King's upper back or neck. King's body writhed in response. At 1:07, Powell and Wind again began to strike King with a series of baton blows, and Wind kicked him in the upper thoracic or cervical area six times until 1:26. At about 1:29, King put his hands behind his back and was handcuffed. (*Koon v. United States*, 518 U.S. 81 [1996])

Introduction

Criminal law is the foundation of the criminal justice system. The law defines the conduct that may lead to an arrest by the police, trial before the courts, and incarceration in prison. When we think about criminal law, we typically focus on offenses such as rape, robbery, and murder. States, however, condemn a range of acts in their criminal codes, some of which may surprise you. In Alabama, it is a criminal offense to promote or engage in a wrestling match with a bear or to train a bear to fight in such a match.[1] A Florida law states that it is unlawful to possess "any ignited tobacco product" in an elevator.[2] Rhode Island declares that an individual shall be imprisoned for seven years who voluntarily engages in a duel with a dangerous weapon or who challenges an individual to a duel.[3] In Wyoming, you can be arrested for skiing while being impaired by alcohol[4] or for opening and failing to close a gate in a fence that "crosses a private road or river."[5] You can find criminal laws on the books in various states punishing activities such as playing dominos on Sunday, feeding an alcoholic beverage to a moose, cursing on a miniature golf course, making love in a car, or performing a wedding ceremony when either the bride or groom is drunk.[6] In Louisiana, you risk being sentenced to 10 years in prison for stealing an alligator, whether dead or alive, valued at $1,000.[7]

The Nature of Criminal Law

1.1 Know the definition of a crime

Are there common characteristics of acts that are labeled as crimes? How do we define a **crime**? The easy answer is that a crime is whatever the law declares to be a criminal offense and punishes with a penalty. The difficulty with this approach is that not all criminal convictions result in a fine or imprisonment. Rather than punishing a **defendant**, the judge may merely warn

them not to repeat the criminal act. Most commentators stress that the important feature of a crime is that it is an act that is officially condemned by the community and carries a sense of shame and humiliation. Professor Henry M. Hart Jr. defines crime as "conduct which, if . . . shown to have taken place," will result in the "formal and solemn pronouncement of the moral condemnation of the community."[8]

The central point of Professor Hart's definition is that a crime is subject to formal condemnation by a judge and jury representing the people in a court of law. This distinguishes a crime from acts most people would find objectionable that typically are not subject to state prosecution and official punishment. We might, for instance, criticize someone who cheats on their spouse, but we generally leave the solution to the *individuals involved*. Other matters are left to *institutions* to settle; schools generally discipline students who cheat or disrupt classes, but this rarely results in a criminal charge. Professional baseball, basketball, and football leagues have their own private procedures for disciplining players. Most states leave the decision whether to recycle trash to the *individual* and look to *peer pressure* to enforce this obligation.

Criminal and Civil Law

1.2 Understand the difference between criminal and civil law

How does criminal law differ from **civil law**? Civil law is that branch of the law that protects the individual rather than the public interest. A legal action for a civil wrong is brought by an individual rather than by a state prosecutor. You may sue a mechanic who breaches a contract to repair your car or bring an action against a landlord who fails to adequately heat your apartment. The injury is primarily to you as an individual, and there is relatively little harm to society. A mechanic who intentionally misleads and harms a number of innocent consumers, however, may be charged with criminal fraud.

Civil and criminal actions are characterized by different legal procedures. For instance, conviction of a crime requires the high standard of proof beyond a reasonable doubt, although responsibility for a civil wrong is established by the much lower standard of proof by a preponderance of the evidence or roughly 51% certainty. The high standard of proof in criminal cases reflects the fact that a criminal conviction may result in a loss of liberty and significant damage to an individual's reputation and standing in the community.[9]

The famous 18th-century English jurist William Blackstone summarizes the distinction between civil and criminal law by observing that civil injuries are "an infringement . . . of the civil rights which belong to individuals. . . . [P]ublic wrongs, or crimes . . . are a breach and violation of the public rights and duties, due to the whole community . . . in its social aggregate capacity." Blackstone illustrates this difference by pointing out that society has little interest in whether someone sues a neighbor or emerges victorious in a land dispute. On the other hand, society has a substantial investment in the arrest, prosecution, and conviction of individuals responsible for espionage, murder, and robbery.[10]

The difference between a civil and criminal action is not always clear, particularly with regard to an action for a **tort**, which is an injury to a person or to their property. Consider the drunken driver who runs a red light and hits your car. The driver may be sued in tort for negligently damaging you and your property as well as criminally prosecuted for reckless driving. The purpose of the civil action is to compensate you with money for the damage to your car and for the physical and emotional injuries you have suffered. In contrast, the criminal action punishes the driver for endangering society. Civil liability is based on a preponderance of the evidence standard, while a criminal conviction carries a possible loss of liberty and is based on the higher standard of guilt beyond a reasonable doubt. You may recall that former football star O. J. Simpson was acquitted of murdering Nicole Brown Simpson and Ron Goldman but was later found guilty of wrongful death in a civil court and ordered to compensate the victims' families in the amount of $33.5 million.

The distinction between criminal and civil law proved immensely significant for Leroy Hendricks, who was incarcerated in Kansas. Hendricks was about to be released after serving 10 years in prison for molesting two 13-year-old boys. This was only the latest episode in Hendricks's almost 30-year history of indecent exposure and molestation of young children. Hendricks freely conceded that, when not confined, the only way to control his sexual urge was to "die."

Upon learning that Hendricks was about to be released, Kansas authorities invoked the Sexually Violent Predator Act of 1994, which authorized the institutional confinement of individuals who, due to a "mental abnormality" or a "personality disorder," are likely to engage in "predatory acts of sexual violence." Following a hearing, a jury found Hendricks to be a "sexual predator." The U.S. Supreme Court ruled that Hendricks's continued commitment was a civil rather than criminal penalty, and that Hendricks was not being unconstitutionally punished twice for the same criminal act of molestation. The Court explained that the purpose of the commitment procedure was to detain and to treat Hendricks in order to prevent him from harming others in the future rather than to punish him.[11] Do you think that the decision of the U.S. Supreme Court makes sense?

The Purpose of Criminal Law

1.3 Know the function of criminal law

We have seen that criminal law primarily protects the interests of society, and civil law protects the interests of the individual. The primary purpose or function of criminal law is to help maintain social order and stability. The Texas Criminal Code proclaims that the purpose of criminal law is to "establish a system of prohibitions, penalties, and correctional measures to deal with conduct that unjustifiably and inexcusably causes or threatens harm to those individual or public interests for which state protection is appropriate."[12] The New York Criminal Code sets out the basic purposes of criminal law as follows[13]:

- *Harm.* To prohibit conduct that unjustifiably or inexcusably causes or threatens substantial harm to individuals as well as to society.

- *Warning.* To warn people both of conduct that is subject to criminal punishment and of the severity of the punishment.
- *Definition.* To define the act and intent that is required for each offense.
- *Seriousness.* To distinguish between serious and minor offenses and to assign the appropriate punishments.
- *Punishment.* To impose punishments that satisfy the demands for revenge, rehabilitation, and deterrence of future crimes.
- *Victims.* To ensure that the victim, the victim's family, and the community interests are represented at trial and in imposing punishments.

The next step is to understand the characteristics of a criminal act.

The Principles of Criminal Law

1.4 Understand the specific and general parts of criminal law

The study of **substantive criminal law** involves an analysis of the definition of specific crimes (specific part) and of the general principles that apply to all crimes (general part), such as the defense of insanity. In our study, we will first review the general part of criminal law and then look at specific offenses. Substantive criminal law is distinguished from **criminal procedure**. Criminal procedure involves a study of the legal standards governing the detection, investigation, and prosecution of crime and includes areas such as interrogations, search and seizure, wiretapping, and the trial process. Criminal procedure is concerned with "how the law is enforced"; criminal law involves "what law is enforced."

Professors Jerome Hall[14] and Wayne R. LaFave[15] identify the basic principles that compose the general part of the criminal law. Think of the general part of the criminal law as the building blocks that are used to construct specific offenses such as rape, murder, and robbery.

- *Criminal Act.* A crime involves an act or failure to act. You cannot be punished for bad thoughts. A criminal act is called actus reus.
- *Criminal Intent.* A crime requires a criminal intent or mens rea. Criminal punishment is ordinarily directed at individuals who intentionally, knowingly, recklessly, or negligently harm other individuals or property.
- *Concurrence.* The criminal act and criminal intent must coexist or accompany one another.
- *Causation.* The defendant's act must cause the harm required for criminal guilt, death in the case of homicide, and the burning of a home or other structure in the case of arson.

- *Responsibility.* Individuals must receive reasonable notice of the acts that are criminal so as to make a decision to obey or to violate the law. In other words, the required criminal act and criminal intent must be clearly stated in a statute. This concept is captured by the Latin phrase *nullum crimen sine lege, nulla poena sine lege* (no crime without law, no punishment without law).
- *Defenses.* Criminal guilt is not imposed on an individual who is able to demonstrate that their criminal act is justified (benefits society) or excused (the individual suffered from a disability that prevented them from forming a criminal intent).

We now turn to a specific part of the criminal law to understand the various types of acts that are punished as crimes.

Categories of Crime

1.5 Know approaches to categorizing crimes

Felonies and Misdemeanors

There are a number of approaches to categorizing crimes. The most significant distinction is between a **felony** and a **misdemeanor**. A crime punishable by death or by imprisonment for more than one year is a felony. Misdemeanors are crimes punishable by less than a year in prison. Note that whether a conviction is for a felony or for a misdemeanor is determined by the punishment provided in the statute under which an individual is convicted rather than by the actual punishment imposed. Many states subdivide felonies and misdemeanors into several classes or degrees to distinguish between the seriousness of criminal acts. A **capital felony** is a crime subject either to the death penalty or to life in prison in states that do not have the death penalty. The term **gross misdemeanor** is used in some states to refer to crimes subject to between 6 and 12 months in prison, whereas other misdemeanors are termed **petty misdemeanors**. Several states designate a third category of crimes that are termed **violations** or **infractions**. These tend to be acts that cause only modest social harm and carry fines. These offenses are considered so minor that imprisonment is prohibited. This includes the violation of traffic regulations.

Florida classifies offenses as felonies, misdemeanors, or noncriminal violations. Noncriminal violations are primarily punishable by a fine or forfeiture of property. The following list shows the categories of felonies and misdemeanors and the maximum punishment generally allowable under Florida law:

- *Capital Felony.* Death or life imprisonment without parole.
- *Life Felony.* Life in prison and a $15,000 fine.
- *Felony in the First Degree.* Thirty years in prison and a $10,000 fine.

- *Felony in the Second Degree.* Fifteen years in prison and a $10,000 fine.
- *Felony in the Third Degree.* Five years in prison and a $5,000 fine.
- *Misdemeanor in the First Degree.* One year in prison and a $1,000 fine.
- *Misdemeanor in the Second Degree.* Sixty days in prison and a $500 fine.

The severity of the punishment imposed is based on the seriousness of the particular offense. Florida, for example, punishes as a second-degree felony the recruitment of an individual for prostitution knowing that force, fraud, or coercion will be used to cause the person to engage in prostitution. This same act is punished as a first-degree felony in the event that the person recruited is under 14 years old or if death results.[16]

Mala in Se and Mala Prohibita

Another approach is to classify crime by "moral turpitude" (evil). **Mala in se** crimes are considered "inherently evil" and would be evil even if not prohibited by law. This includes murder, rape, robbery, burglary, larceny, and arson. **Mala prohibita** offenses are not "inherently evil" and are considered wrong only because they are prohibited by a statute. This includes offenses ranging from tax evasion to carrying a concealed weapon, leaving the scene of an accident, and being drunk and disorderly in public.

Why should we be concerned with classification schemes? A felony conviction can prevent you from being licensed to practice various professions, bar you from being admitted to the armed forces or joining the police, and prevent you from adopting a child or receiving various forms of federal assistance. In some states, a convicted felon is still prohibited from voting, even following release. The distinction between mala in se and mala prohibita is also important. For instance, the law provides that individuals convicted of a "crime of moral turpitude" who are not U.S. citizens may be deported from the United States.

There are a number of other classification schemes. The law originally categorized as **infamous crimes** those crimes that were considered to be deserving of shame or disgrace. Individuals convicted of infamous offenses such as treason (betrayal of the nation) or offenses involving dishonesty were historically prohibited from appearing as witnesses at a trial.

Subject Matter

This textbook is organized in accordance with the subject matter of crimes, the scheme that is followed in most state criminal codes. There is disagreement, however, concerning the classification of some crimes. Robbery, for instance, involves the theft of property as well as the threat or infliction of harm to the victim, and there is a debate about whether it should be considered a crime against property or against the person. Similar issues arise in regard to burglary. Subject matter offenses in descending order of seriousness are as follows:

- *Crimes Against the State.* Treason, sedition, espionage, terrorism (Chapter 16).
- *Crimes Against the Person: Homicide.* Homicide, murder, manslaughter (Chapter 10).

- *Crimes Against the Person: Sexual Offenses and Other Crimes.* Sexual offenses, assault and battery, false imprisonment, kidnapping (Chapter 11).
- *Crimes Against Habitation.* Burglary, arson, trespassing (Chapter 12).
- *Crimes Against Property.* Larceny, embezzlement, false pretenses, receiving stolen property, robbery, fraud (Chapters 13 and 14).
- *Crimes Against Public Order.* Disorderly conduct, riot (Chapter 15).
- *Crimes Against the Administration of Justice.* Obstruction of justice, perjury, bribery (Chapters 14 and 15).
- *Crimes Against Public Morals.* Prostitution, obscenity (Chapter 15).

The book also covers the general part of criminal law, including the constitutional limits on criminal law (Chapter 2), sentencing (Chapter 3), criminal acts (Chapter 4), criminal intent (Chapter 5), the scope of criminal liability (Chapters 6 and 7), and defenses to criminal liability (Chapters 8 and 9).

You Decide 1.1

Consider the following factual scenario that is from the U.S. Supreme Court's description of the events surrounding the beating of Rodney King. Should the defendants, once acquitted in state court, have been prosecuted in federal court?[17]

On the evening of March 2, 1991, Rodney King and two of his friends sat in King's wife's car in Altadena, California, a city in Los Angeles County, and drank malt liquor for a number of hours. Then, with King driving, they left Altadena via a major freeway. King was intoxicated. California Highway Patrol [CHP] officers observed King's car traveling at a speed they estimated to be in excess of 100 miles per hour. The officers followed King with red lights and sirens activated and ordered him by loudspeaker to pull over, but he continued to drive. The CHP officers called on the radio for help. Units of the Los Angeles Police Department joined in the pursuit, one of them manned by petitioner Laurence Powell and his trainee, Timothy Wind. [The officers are all Caucasian; King is African American. King later explained that he fled because he feared that he would be returned to prison after having been released four months earlier following a year spent behind bars for robbery.]

King left the freeway and, after a chase of about eight miles, stopped at an entrance to a recreation area. The officers ordered King and his two passengers to exit the car and to assume a felony prone position—that is, to lie on their stomachs with legs spread and arms behind their backs. King's two friends complied. King, too, got out of the car but did not lie down. Petitioner Stacey Koon arrived, at once followed by Ted Briseno and Roland Solano. All were officers of the Los Angeles Police Department [LAPD], and as sergeant, Koon took charge. The officers again ordered King to assume the felony prone position. King got on his hands and knees but did not lie down. Officers Powell, Wind, Briseno, and Solano tried to force King down, but King resisted and became

combative, so the officers retreated. Koon then fired Taser darts (designed to stun a combative suspect) into King.

The events that occurred next were captured on videotape by a bystander. As the videotape begins, it shows that King rose from the ground and charged toward Officer Powell. Powell took a step and used his baton to strike King on the side of his head. King fell to the ground. From the 18th to the 30th second on the videotape, King attempted to rise, but Powell and Wind each struck him with their batons to prevent him from doing so. From the 35th to the 51st second, Powell administered repeated blows to King's lower extremities; one of the blows fractured King's leg. At the 55th second, Powell struck King on the chest, and King rolled over and lay prone. At that point, the officers stepped back and observed King for about 10 seconds. Powell began to reach for his handcuffs. (At the sentencing phase, the district court found that Powell no longer perceived King to be a threat at this point.) At one-minute-five-seconds (1:05) on the videotape, Briseno, in the district court's words, "stomped" on King's upper back or neck. King's body writhed in response. At 1:07, Powell and Wind again began to strike King with a series of baton blows, and Wind kicked him in the upper thoracic or cervical area six times until 1:26. At about 1:29, King put his hands behind his back and was handcuffed. . . .

Powell radioed for an ambulance. He sent two messages over a communications network to the other officers that said "oops" and "I haven't [*sic*] beaten anyone this bad in a long time." Koon sent a message to the police station that said, "Unit just had a big time use of force. . . . Tased and beat the suspect of CHP pursuit big time." King was taken to a hospital where he was treated for a fractured leg, multiple facial fractures, and numerous bruises and contusions. Learning that King worked at Dodger Stadium, Powell said to King, "We played a little ball tonight, didn't we, Rodney? . . . You know, we played a little ball, we played a little hardball tonight, we hit quite a few home runs. . . . Yes, we played a little ball and you lost and we won."

Koon, Powell, Briseno, and Wind were tried in California state court on charges of assault with a deadly weapon and excessive use of force by a police officer. The officers were acquitted of all charges, with the exception of one assault charge against Powell that resulted in a hung jury. [The jury was composed of 1 Hispanic American, 1 Asian American, and 10 white jurors.] The verdicts touched off widespread rioting in Los Angeles. More than 40 people were killed in the riots, more than 2,000 were injured, and nearly $1 billion in property was destroyed. [Los Angeles Mayor Tom Bradley acknowledged the dangerous trend, at least in certain sections of the LAPD, toward racially motivated events; and President George H. W. Bush announced in May that the verdict had left him with a deep sense of personal frustration and anger and that he was ordering the Justice Department to initiate a prosecution against the officers.]

On August 4, 1992, a federal grand jury indicted the four officers, charging them with violating King's constitutional rights under color of law. Powell, Briseno, and Wind were charged with willful use of unreasonable force in arresting King. Koon was charged with willfully permitting the other officers to use unreasonable force during the arrest. After a trial in U.S. District Court for the Central District of California, the jury convicted Koon and Powell but acquitted Wind and Briseno. [Koon and Powell were sentenced to 30 months in prison. This jury was composed of 1 Hispanic American, 2 African American, and 9 white jurors. King later won a $3.8 million verdict from the City of Los Angeles. He used some of the money to establish a rap record business.] See *Koon v. United States*, 518 U.S. 81 (1996).

The issue to consider is whether individuals may be prosecuted and acquitted in California state court and then prosecuted in federal court. This seems to violate the prohibition on double jeopardy in the Fifth Amendment to the U.S. Constitution, which states that individuals shall not be "twice put in jeopardy of life or limb." Double jeopardy means that an individual should not be prosecuted more than once for the same offense. Without this protection, the government could subject people to a series of trials in an effort to obtain a conviction.

It may surprise you to learn that judges have held that the dual sovereignty doctrine permits the U.S. government to prosecute an individual under federal law who has been acquitted on the state level. The theory is that the state and federal governments are completely different entities and that state government is primarily concerned with punishing police officers and with protecting residents against physical attack, while the federal government is concerned with safeguarding the civil liberties of all Americans. Each of these entities provides a check on the other to ensure fairness for citizens. The evidence introduced in the two prosecutions to establish the police officers' guilt in the King case was virtually identical, and the federal prosecution likely was brought in response to political pressure. On the other hand, the federal government historically has acted to prevent unfair verdicts, such as the acquittal of members of the Ku Klux Klan charged with killing civil rights workers during the 1960s.

Do you believe that it was fair to subject the Los Angeles police officers to the expense and emotional stress of two trials? As the attorney general of the United States, would you have advised President Bush to bring federal charges against the officers following their acquittal by a California jury?

Sources of Criminal Law

1.6 Know the sources of criminal law

We now have covered the various categories of criminal law. The next questions to consider are these: What are the sources of criminal law? How do we find the requirements of criminal law? There are a number of sources of criminal law in the United States:

- *English and American Common Law.* These are English and American judge-made laws and English acts of Parliament.
- *State Criminal Codes.* Every state has a comprehensive written set of laws on crime and punishment.
- *Municipal Ordinances.* Cities, towns, and counties are typically authorized to enact local criminal laws, generally of a minor nature. These laws regulate the city streets, sidewalks, and buildings and concern areas such as traffic, littering, disorderly conduct, and domestic animals.

- *Federal Criminal Code.* The U.S. government has jurisdiction to enact criminal laws that are based on the federal government's constitutional powers, such as the regulation of interstate commerce.
- *State and Federal Constitutions.* The U.S. Constitution defines treason and together with state constitutions establishes limits on the power of government to enact criminal laws. A criminal statute, for instance, may not interfere with freedom of expression or religion.
- *International Treaties.* International treaties signed by the United States establish crimes such as genocide, torture, and war crimes. These treaties, in turn, form the basis of federal criminal laws punishing acts such as genocide and war crimes when Americans are involved. These cases are prosecuted in U.S. courts.
- *Judicial Decisions.* Judges write decisions explaining the meaning of criminal laws and determining whether criminal laws meet the requirements of state and federal constitutions. Judges typically rely on **precedent** or the decision of other courts in similar cases.

At this point, we turn our attention to the common law origins of American criminal law and to state criminal codes.

The Common Law

The English **common law** is the foundation of American criminal law. The origins of the common law can be traced to the Norman conquest of England in 1066. The Norman king, William the Conqueror, was determined to provide a uniform law for England and sent royal judges throughout the country to settle disputes in accordance with the common customs and practices of the country. The principles that composed this common law began to be written down in 1300 in an effort to record the judge-made rules that should be used to decide future cases.

By 1600, a number of **common law crimes** had been developed, including arson, burglary, larceny, manslaughter, mayhem, rape, robbery, sodomy, and suicide. These were followed by criminal attempt, conspiracy, blasphemy, forgery, sedition, and solicitation. On occasion, the king and Parliament issued decrees that filled the gaps in the common law, resulting in the development of the crimes of false pretenses and embezzlement. The distinctive characteristic of the common law is that it is for the most part the product of the decisions of judges in actual cases.

The English civil and criminal common law was transported to the new American colonies and formed the foundation of the colonial legal system that in turn was adopted by the 13 original states following the American Revolution. The English common law was also recognized by each state subsequently admitted to the Union; the only exception was Louisiana, which followed the French Napoleonic Code until 1805 when it embraced the common law.[18]

State Criminal Codes

States in the 19th century began to adopt comprehensive written criminal codes. This movement was based on the belief that, in a democracy, the people should have the opportunity to know the law. Judges in the common law occasionally punished an individual for an act that had never before been subjected to prosecution. A defendant in a Pennsylvania case was convicted of making obscene phone calls despite the absence of a previous prosecution for this offense. The court explained that the "common law is sufficiently broad to punish . . . although there may be no exact precedent, any act which directly injures or tends to injure the public."[19] There was the additional argument that the power to make laws should reside in the elected legislative representatives of the people rather than in unelected judges. As Americans began to express a sense of independence, there was also a strong reaction against being so clearly connected to the English common law tradition, which was thought to have limited relevance to the challenges facing America. As early as 1812, the U.S. Supreme Court proclaimed that federal courts were required to follow the law established by Congress and were not authorized to apply the common law.

States were somewhat slower than the federal government to abandon the common law. In a Maine case in 1821, the accused was found guilty of dropping the dead body of a child into a river. The defendant was convicted even though there was no statute making this a crime. The court explained that "good morals" and "decency" all forbid this act. State legislatures reacted against these types of decisions and began to abandon the common law in the mid-19th century. The Indiana Revised Statutes of 1852, for example, proclaim that "[c]rimes and misdemeanors shall be defined, and punishment fixed by statutes of this State, and not otherwise."[20]

Some states remain **common law states**, meaning that the common law may be applied where the state legislature has not adopted a law in a particular area. The Florida Criminal Code states that the "common law of England in relation to crimes, except so far as the same relates to the mode and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject." Florida law further provides that, where there is no statute, an offense shall be punished by fine or imprisonment but that the "fine shall not exceed $500, nor the term of imprisonment 12 months."[21] Missouri and Arizona are also examples of common law states. These states' criminal codes, like that of Florida, contain a **reception statute** that provides that the states "receive" the common law as an unwritten part of their criminal law. California, on the other hand, is an example of a **code jurisdiction**. The California Criminal Code provides that "no act or omission . . . is criminal or punishable, except as prescribed or authorized by this code."[22] Ohio and Utah are also code jurisdiction states. The Utah Criminal Code states that common law crimes "are abolished and no conduct is a crime unless made so by this code . . . or ordinance."[23]

Professor LaFave observes that courts in common law states have recognized a number of crimes that are not part of their criminal codes, including conspiracy, attempt, solicitation, uttering gross obscenities in public, keeping a house of prostitution, cruelly killing a horse, public inebriation, and false imprisonment.[24]

You also should keep in mind that the common law continues to play a role in the law of code jurisdiction states. Most state statutes are based on the common law, and courts frequently

consult the common law to determine the meaning of terms in statutes. In the well-known California case of *Keeler v. Superior Court*, the California Supreme Court looked to the common law and determined that an 1850 state law prohibiting the killing of a "human being" did not cover the "murder of a fetus." The California state legislature then amended the murder statute to punish "the unlawful killing of a human being, or a fetus."[25] Most important, our entire approach to criminal trials reflects the common law's commitment to protecting the rights of the individual in the criminal justice process.

State Police Power

Are there limits on a state's authority to pass criminal laws? Could a state declare that it is a crime to possess fireworks on the Fourth of July? State governments possess the broad power to promote the public health, safety, and welfare of the residents of the state. This wide-ranging **police power** includes the "duty . . . to protect the well-being and tranquility of a community" and to "prohibit acts or things reasonably thought to bring evil or harm to its people."[26] An example of the far-reaching nature of the state police power is the U.S. Supreme Court's upholding of the right of a village to prohibit more than two unrelated people from occupying a single home. The Supreme Court proclaimed that the police power includes the right to "lay out zones where family values, youth values, the blessings of quiet seclusion, and clean air make the area a sanctuary for people."[27]

State legislatures in formulating the content of criminal codes have been profoundly influenced by the Model Penal Code.

The Model Penal Code

People from other countries often ask how students can study the criminal law of the United States, a country with 50 states and a federal government. The fact that there is a significant degree of agreement in the definition of crimes in state codes is due to a large extent to the **Model Penal Code**.

In 1962, the American Law Institute (ALI), a private group of lawyers, judges, and scholars, concluded after several years of study that despite our common law heritage, state criminal statutes radically varied in their definition of crimes and were difficult to understand and poorly organized. The ALI argued that the quality of justice should not depend on the state in which an individual was facing trial and issued a multivolume set of model criminal laws, *The Proposed Official Draft of the Model Penal Code*. The Model Penal Code is purely advisory and is intended to encourage all 50 states to adopt a single uniform approach to the criminal law. The statutes are accompanied by a commentary that explains how the Model Penal Code differs from existing state statutes. Roughly 37 states have adopted some of the provisions of the Model Penal Code, although no state has adopted every single model law. The states that most closely follow the code are New Jersey, New York, Pennsylvania, and Oregon. As you read this book, you may find it interesting to compare the Model Penal Code to the common law and to state statutes.[28]

This book primarily discusses state criminal law. It is important to remember that we also have a federal system of criminal law in the United States.

Federal Statutes

The United States has a federal system of government. The states granted various powers to the federal government that are set forth in the U.S. Constitution. This includes the power to regulate interstate commerce, to declare war, to provide for the national defense, to coin money, to collect taxes, to operate the post office, and to regulate immigration. The Congress is entitled to make "all Laws which shall be necessary and proper" for fulfilling these responsibilities. The states retain those powers that are not specifically granted to the federal government. The Tenth Amendment to the Constitution states that the powers "not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The Constitution specifically authorizes Congress to punish the counterfeiting of U.S. currency, piracy and felonies committed on the high seas, and crimes against the "Law of Nations" as well as to make rules concerning the conduct of warfare. These criminal provisions are to be enforced by a single Supreme Court and by additional courts established by Congress.

The **federal criminal code** compiles the criminal laws adopted by the U.S. Congress. This includes laws punishing acts such as tax evasion, mail and immigration fraud, bribery in obtaining a government contract, and the knowing manufacture of defective military equipment. The **Supremacy Clause** of the U.S. Constitution provides that federal law is superior to a state law within those areas that are the preserve of the national government. This is termed the **preemption doctrine**. In 2012, the Supreme Court held that federal immigration law preempted several sections of an Arizona statute directed at undocumented individuals.

Several recent court decisions have held that federal criminal laws have unconstitutionally encroached on areas reserved for state governments. This reflects a trend toward limiting the federal power to enact criminal laws. For instance, the U.S. government, with the **Interstate Commerce Clause**, has interpreted its power to regulate interstate commerce as providing the authority to criminally punish harmful acts that involve the movement of goods or individuals across state lines. An obvious example is the interstate transportation of stolen automobiles.

In the past few years, the U.S. Supreme Court has ruled several of these federal laws unconstitutional based on the fact that the activities did not clearly affect interstate commerce or involve the use of interstate commerce. In 1995, the Supreme Court ruled in *United States v. Lopez* that Congress violated the Constitution by adopting the Gun-Free School Zones Act of 1990, which made it a crime to have a gun in a local school zone. The fact that the gun may have been transported across state lines was too indirect a connection with interstate commerce on which to base federal jurisdiction.[29]

In 2000, the Supreme Court also ruled unconstitutional the U.S. government's prosecution of an individual in Indiana who was alleged to have set fire to a private residence. The federal law made it a crime to maliciously damage or destroy, by means of fire or an explosive, any building used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. The Supreme Court ruled that there must be a direct connection between a building and interstate commerce and rejected the government's contention that it is sufficient that a building is constructed of supplies or serviced by electricity that moved across state lines or that the owner's insurance payments are mailed to a company located in another state. Justice Ruth Bader Ginsburg explained that this would mean that "every building in the land" would fall within the reach of federal laws on arson, trespass, and burglary.[30]

In 2006, in *Gonzales v. Oregon*, the Supreme Court held that U.S. Attorney General John Ashcroft lacked the authority to prevent Oregon physicians acting under the state's "death with dignity" law from prescribing lethal drugs to terminally ill patients who are within six months of dying.[31]

The sharing of power between the federal and state governments is termed **dual sovereignty**. An interesting aspect of dual sovereignty is that it is constitutionally permissible to prosecute a defendant for the same act at both the state and federal levels. In 2019, in *Gamble v. United States*, the Supreme Court affirmed that this type of double prosecution does not constitute **double jeopardy**.[32] You will remember from You Decide 1.1 that in 1991 Rodney King, an African American, was stopped by the Los Angeles police. King resisted and eventually was subdued, wrestled to the ground, beaten, and handcuffed by four officers. The officers were acquitted by an all-white jury in a state court in Simi Valley, California, leading to widespread protest and disorder in Los Angeles. The federal government responded by bringing the four officers to trial for violating King's civil right to be arrested in a reasonable fashion. Two officers were convicted and sentenced to 30 months in federal prison, and two were acquitted.

We have seen that the state and federal governments possess the power to enact criminal laws. The federal power is restricted by the provisions of the U.S. Constitution that define the limits on governmental power.

Constitutional Limitations

The U.S. Constitution and individual state constitutions establish limits and standards for the criminal law. The U.S. Constitution, as we shall see in Chapter 2, requires the following:

- A state or local law may not regulate an area that is reserved to the federal government. A federal law may not encroach upon state power.
- A law may infringe upon the fundamental civil and political rights of individuals only in compelling circumstances.
- A law must be clearly written and provide notice to citizens and to the police of the conduct that is prohibited.
- A law must be nondiscriminatory and may not impose cruel and unusual punishment. A law also may not be retroactive and punish acts that were not crimes at the time that they were committed.

The ability of legislators to enact criminal laws is also limited by public opinion. The American constitutional system is a democracy. Politicians are fully aware that they must face elections and that they may be removed from office in the event that they support an unpopular law. As we learned during the unsuccessful effort to ban the sale of alcohol during the Prohibition era in the early 20th century, the government will experience difficulties in imposing an unpopular law on the public.

Of course, the democratic will of the majority is subject to constitutional limitations. A classic example is the Supreme Court's ruling that popular federal statutes prohibiting and punishing flag burning and desecration compose an unconstitutional violation of freedom of speech.[33]

Crime in the News

In 1996, California became 1 of 23 states at the time to authorize the use of marijuana for medical purposes. (The other states are Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, and the same applies in the District of Columbia. Maryland exempts medical marijuana users from jail sentences.)

California voters passed Proposition 215, the Compassionate Use Act of 1996, which is intended to ensure that "seriously ill" residents of California are able to obtain marijuana. The act provides an exemption from criminal prosecution for doctors who, in turn, may authorize patients and primary caregivers to possess or cultivate marijuana for medical purposes. The California legislation is directly at odds with the federal Controlled Substances Act, which declares it a crime to manufacture, distribute, or possess marijuana. There are more than 100,000 medical marijuana users in California, and roughly one tenth of 1% of the population uses medical marijuana in the states that collect information on medical marijuana users.

Angel Raich and Diane Monson are two California residents who suffer from severe medical disabilities. Their doctors have found that marijuana is the only drug that is able to alleviate their pain and suffering. Raich's doctor goes so far as to claim that Angel's pain is so intense that she might die if deprived of marijuana. Monson cultivates her own marijuana, and Raich relies on two caregivers who provide her with California-grown marijuana at no cost.

On August 15, 2000, agents from the federal Drug Enforcement Administration (DEA) raided Monson's home and destroyed all six of her marijuana plants. The DEA agents disregarded objections from the Butte County Sheriff's Department and the local California District Attorney's Office that Monson's possession of marijuana was perfectly legal.

Monson and Raich, along with several doctors and patients, refused to accept the destruction of the marijuana plants and asked the U.S. Supreme Court to rule on the constitutionality of the federal government's refusal to exempt medical marijuana users from criminal prosecution and punishment. The case was supported by the California Medical Association and the Leukemia and Lymphoma Society. Raich suffers from severe chronic pain stemming from fibromyalgia, endometriosis, scoliosis, uterine fibroid tumors, rotator cuff syndrome, an inoperable brain tumor, seizures, life-threatening wasting syndrome, and constant nausea. She also experiences extreme chemical sensitivities that result in violent allergic reactions to virtually every pharmaceutical drug. Raich was confined to a wheelchair before reluctantly deciding to smoke marijuana, a decision that led to her enjoying a fairly normal life.

A doctor recommended that Monson use marijuana to treat severe chronic back pain and spasms. She alleges that marijuana alleviates the pain that she describes as comparable to an uncontrollable cramp. Monson claims that other drugs have proven ineffective or resulted in nausea and create the risk of severe injuries to her kidneys and liver. The marijuana reportedly reduces the frequency of Monson's spasms and enables her to continue to work.

The U.S. Supreme Court, in *Gonzales v. Raich* in 2005, held that the federal prohibition on the possession of marijuana would be undermined by exempting marijuana possession in California and other states from federal criminal enforcement. The Supreme Court explained that the cultivation of marijuana under California's medical marijuana

law, although clearly a local activity, frustrated the federal government's effort to control the shipment of marijuana across state lines, because medical marijuana inevitably would find its way into interstate commerce, increase the nationwide supply, and drive down the price of the illegal drug. There was also a risk that completely healthy individuals in California would manage to be fraudulently certified by a doctor to be in need of medical marijuana. Three of the nine Supreme Court judges dissented from the majority opinion. Justice Sandra Day O'Connor observed that the majority judgment "stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently."[34]

Following the decision, Angel Raich urged the federal government to have some "compassion and have some heart" and not to "use taxpayer dollars to come in and lock us up. . . . [W]e are using this medicine because it is saving our lives." She asked why the federal government was trying to kill her. Opponents of medical marijuana defend the Supreme Court's decision and explain that individuals should look to traditional medical treatment rather than being misled into thinking that marijuana is an effective therapy. They also argue that marijuana is a highly addictive drug that could lead individuals to experiment with even more harmful narcotics.

The Obama administration initially did not enforce federal marijuana laws against individuals in medical marijuana states. In 2011, the Department of Justice (DOJ) announced that although individuals could grow and use small amounts of medical marijuana, the DOJ would criminally prosecute growers of more than 100 plants and individuals involved in the commercial marketing and sale of marijuana. In 2013, the Obama administration reversed course and announced that it would not prosecute individuals in medical marijuana states unless the individuals threatened certain federal law enforcement interests. This included the distribution of marijuana to minors, providing revenue to criminal enterprises, diversion of marijuana to states where marijuana remains illegal, and the possession and use of marijuana on federal property.

In 2014, Congress adopted a law prohibiting the DOJ from using resources to prevent states from "implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."

President Donald Trump, during the 2016 presidential election campaign, indicated that marijuana was a state rather than federal issue. In 2017, Attorney General Jeff Sessions, however, wrote a letter to Congress opposing the continued congressional prohibition on the use of federal funds to prosecute medical marijuana. He argued that the law was "unwise," given America's drug epidemic, and that the law interfered with federal efforts to combat international drug organizations and crimes of violence associated with drug trafficking. Attorney General Sessions also noted that marijuana use had negative psychological and physical effects. President Trump, on signing an earlier extension of the law in 2016, issued a "signing statement" indicating that he would enforce the law in accordance with his "constitutional responsibility to take care that the laws be faithfully executed."

Attorney General Sessions, in January 2018, sent a memo to U.S. attorneys rescinding the policy of the Obama administration on marijuana prosecutions. Attorney General Sessions wrote that U.S. attorneys should use their own discretion in determining whether to bring charges for marijuana possession or sale in states where marijuana use for recreational or medical purposes is lawful.

President Joe Biden on assuming office favored decriminalization of possession of marijuana and expungement of criminal convictions, endorsed medical marijuana and a reduction in federal penalties relating to marijuana, and supported allowing states and localities to follow their own policies.

In October 2022, President Biden announced a full and unconditional pardon for individuals convicted of the federal offense of marijuana possession. The presidential pardon effectively lifted barriers based on a criminal conviction to housing, employment, and educational opportunities for roughly 6,557 individuals. The pardon applied only to marijuana possession and did not extend to any other federal offense for which an individual was charged or convicted. The president had no authority to pardon state crimes and urged governors to address the situation of individuals convicted of state marijuana offenses. Roughly 78% of individuals pardoned were male, 41% were white, 31% were Latinx, and 23% were Black.

State governors in states like Colorado, Illinois, Nevada, Pennsylvania, Oregon, and Washington have initiated a pardon process. In 2024, Maryland Governor Wes Moore pardoned 175,000 individuals convicted of misdemeanor possession of marijuana or misdemeanor use or possession with intent to use marijuana drug paraphernalia. Roughly two dozen states have begun to expunge low-level convictions for marijuana from individuals' records. Every state has DUID (driving under the influence of drugs) legislation.

In December 2022, President Biden signed the Medical Marijuana and Cannabidiol Research Expansion Act, which streamlines the previously complicated process of allowing medical research on marijuana. The act is the first stand-alone marijuana-related bill passed by both houses of Congress.

In April 2022, the U.S. House of Representatives passed the Marijuana Opportunity Reinvestment and Expungement (MORE) Act. The act would repeal the federal prohibition on the possession, distribution, or production of marijuana; expunge the narcotics conviction of people with prior federal marijuana convictions; and impose a tax on marijuana products, which would fund new programs intended to support "individuals and businesses in communities impacted by the war on drugs." The legislation has yet to be approved by the Senate.

In May 2024, Attorney General Merrick Garland announced the DOJ would initiate the lengthy process of reclassifying marijuana. Marijuana for more than half a century has been categorized as a Schedule I drug on the same level as highly addictive drugs like heroin that have no accepted medical application. The recommendation is to reclassify marijuana as a Schedule III drug along with Tylenol with codeine, ketamine, and testosterone.

Where do you stand on the marijuana controversy?

Thirty-nine states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands at present have approved comprehensive, publicly available medical marijuana/cannabis programs. Nine states allow use of "low THC, high cannabidiol (CBD)" products for medical reasons in limited situations. Twenty-four states, three territories, and the District of Columbia allow recreational use of marijuana.[35]

Chapter Summary

Criminal law is the foundation of the criminal justice system. The law defines the acts that may lead to arrest, trial, and incarceration. We typically think about crime as involving violent conduct, but in fact a broad variety of acts are defined as crimes.

Criminal law is best defined as conduct that, if shown to have taken place, will result in the "formal and solemn pronouncement of the moral condemnation of the community." Civil law is distinguished from criminal law by the fact that it primarily protects the interests of the individual rather than the interests of society.

The purpose of criminal law is to prohibit conduct that causes harm or threatens harm to the individual and to the public interests, to warn people of the acts that are subject to criminal punishment, to define criminal acts and intent, to distinguish between serious and minor offenses, to punish individuals committing offenses, and to ensure that the interests of victims and the public are represented at trial and in the punishment of individuals committing offenses.

In analyzing individual crimes, we will concentrate on several basic issues that comprise the general part of the criminal law. A crime occurs when there is a concurrence between a criminal act (actus reus) and criminal intent (mens rea) and the causation of a social harm. Individuals must be provided with notice of the acts that are criminally condemned in order to have the opportunity to obey or to violate the law. Individuals must also be given the opportunity at trial to present defenses (justifications and excuses) to a criminal charge.

The criminal law distinguishes between felonies and misdemeanors. A crime punishable by death or by imprisonment for more than one year is a felony. Other offenses are misdemeanors. Offenses are further divided into capital and other grades of felonies and into gross and petty misdemeanors. A third level of offenses includes violations or infractions, acts that are punishable by fines.

Another approach is to classify crime in terms of "moral turpitude." Mala in se crimes are considered "inherently evil," and mala prohibita crimes are not inherently evil and are considered wrong only because they are prohibited by statute.

Our textbook categorizes crimes in accordance with the subject matter of the offense, the scheme that is followed in most state criminal codes. This includes crimes against the person, crimes against habitation, crimes against property, crimes against public order, and crimes against the state.

There are a number of sources of American criminal law. These include the common law, state and federal criminal codes, the U.S. and state constitutions, international treaties, and judicial decisions. The English common law was transported to the United States and formed the foundation for the American criminal statutes adopted in the 19th and 20th centuries. Some states continue to apply the common law in those instances in which the state legislature has not adopted a criminal statute. In code jurisdiction states, however, crimes are punishable only if incorporated into law.

States possess broad police powers to legislate for the public health, safety, and welfare of the residents of the state. The drafting of state criminal statutes has been heavily influenced by the American Law Institute's Model Penal Code, which has helped ensure a significant uniformity in the content of criminal codes.

The United States has a system of dual sovereignty in which the state governments have provided the federal government with the authority to legislate various areas of criminal law. The Supremacy Clause provides that federal law takes precedence over state law in the areas that the U.S. Constitution explicitly reserves to the national government. There is a trend toward strictly limiting the criminal law power of the federal government. The U.S. Supreme Court, for example, has ruled that the federal government has unconstitutionally employed the Interstate Commerce Clause to extend the reach of federal criminal legislation to the possession of a firearm adjacent to schools.

The authority of the state and federal governments to adopt criminal statutes is limited by the provisions of federal and state constitutions. For instance, laws must be drafted in a clear and nondiscriminatory fashion and must not impose retroactive or cruel or unusual punishment. The federal and state governments possess the authority to enact criminal legislation only within their separate spheres of constitutional power.

Chapter Review Questions

1. Define a crime.
2. Distinguish between criminal and civil law. Distinguish between a criminal act and a tort.
3. What is the purpose of criminal law?
4. Is there a difference between criminal law and criminal procedure? Distinguish between the specific and general part of the criminal law.
5. List the basic principles that compose the general part of criminal law.
6. Distinguish between felonies, misdemeanors, capital felonies, gross and petty misdemeanors, and violations.
7. What is the difference between mala in se and mala prohibita crimes?
8. Discuss the development of the common law. What do we mean by common law states and code jurisdiction states?
9. Discuss the nature and importance of the state police power.
10. Why is the Model Penal Code significant?
11. What is the legal basis for federal criminal law? Define the preemption doctrine and dual sovereignty. What is the significance of the Interstate Commerce Clause?
12. What are the primary sources of criminal law? How does the U.S. Constitution limit criminal law?
13. Why is understanding criminal law important in the study of the criminal justice system?

Legal Terminology

capital felony
civil law
code jurisdiction
common law
common law crimes
common law states
crime
criminal procedure
defendant
double jeopardy
dual sovereignty
federal criminal code
felony
gross misdemeanor
infamous crimes
infractions
Interstate Commerce Clause
mala in se
mala prohibita
misdemeanor
Model Penal Code
petty misdemeanors
police power
precedent
preemption doctrine
reception statute
substantive criminal law
Supremacy Clause
tort
violations

Chapter 2

Constitutional Limitations

Learning Objectives

2.1 Know the rule of legality

2.2 Understand bills of attainder and ex post facto laws

2.3 Understand statutory clarity

2.4 Understand the three levels of scrutiny under the Equal Protection Clause

2.5 Know the main categories of speech which are not protected under the First Amendment

2.6 Know the constitutional basis and protections provided by the right to privacy

2.7 Understand the Second Amendment right to keep and bear arms

Test Your Knowledge: True/False

1. Bills of attainder prohibit punishing an individual for an act that was not criminal at the time it was committed.
2. One purpose of statutory clarity is to ensure that individuals know what acts are prohibited by a law.
3. Laws that distinguish between individuals based on race or based on gender, in most instances, are held to be constitutional by courts.
4. The courts do not recognize any limitations on expression under the First Amendment.
5. The U.S. Constitution explicitly provides for a right to privacy.
6. The Second Amendment right to bear arms does not protect individuals' right to keep firearms within the home.

Check your answers in Appendix A.

Was the Defendant Discriminated Against Based on Gender?

Defendant Johnson Lake allegedly assaulted his wife. . . . Defendant contends that 14 V.I.C. § 298(5) "heightens the six month misdemeanor offense of simple assault and battery to the one year misdemeanor offense of aggravated assault and battery in instances where the complaining witness is female and the accused is an adult male. However, there is no reciprocal enhancement where the complaining witness is an adult male and the accused is female." This paragraph clearly articulates Defendant's contention that he is subject to a different legal standard because of his gender in violation of the Equal Protection Clause. . . .

[T]he People argue that "the purpose of section 298 is to address size disparities among [*sic*] the aggressor and victim and to prevent serious injury to the victim." . . . [T]his statute is about size not gender disparities. The statute's purpose, it contends, is to protect smaller individuals from the aggression of larger individuals more likely to inflict harm because of these size differences. (*People of the Virgin Islands v. Lake*, 59 V.I. 178 [Super. Ct. 2013])

Introduction

In the American democratic system, various constitutional provisions limit the power of the federal and state governments to enact criminal statutes. For instance, a statute prohibiting students from criticizing the government during a classroom discussion would likely violate the First Amendment to the U.S. Constitution. A law punishing individuals engaging in "unprotected" sexual activity, however socially desirable, may unconstitutionally violate the right to privacy.

Why did the framers create a **constitutional democracy**, a system of government based on a constitution that limits the powers of the government? The Founding Fathers were profoundly influenced by the harshness of British colonial rule and drafted a constitution designed to protect the rights of the individual against the tyrannical tendencies of government. They wanted to ensure that the police could not freely break down doors and search homes. The framers were also sufficiently wise to realize that individuals required constitutional safeguards against the political passions and intolerance of democratic majorities.

The limitations on government power reflect the framers' belief that individuals possess natural and inalienable rights, and that these rights may be restricted only when absolutely necessary to ensure social order and stability. The stress on individual freedom was also practical. The framers believed that the fledgling new American democracy would prosper and develop by freeing individuals to passionately pursue their hopes and dreams.

At the same time, the framers were not wide-eyed idealists. They fully appreciated that individual rights and liberties must be balanced against the need for social order and stability. The striking of this delicate balance is not a scientific process. A review of the historical record indicates that the emphasis has been placed at times on the control of crime and at other times on individual rights.

Chapter 2 describes the core constitutional limits on criminal law and examines the balance between order and individual rights. Consider the costs and benefits of constitutionally limiting the government's authority to enact criminal statutes. Do you believe that greater importance

should be placed on guaranteeing order or on protecting rights? You should keep the constitutional limitations discussed in this chapter in mind as you read the cases in subsequent chapters. The topics covered in the chapter are as follows:

- The first principle of American jurisprudence is the rule of legality.
- Constitutional constraints include the following:
  - Bills of attainder and ex post facto laws
  - Statutory clarity
  - Equal protection
  - Freedom of speech
  - Privacy
  - The right to bear arms

We will discuss an additional constitutional constraint, the Eighth Amendment prohibition on cruel and unusual punishment, in Chapter 3.

The Rule of Legality

2.1 Know the rule of legality

The **rule of legality** has been characterized as "the first principle of American criminal law and jurisprudence."[1] This principle was developed by common law judges and is interpreted today to mean that an individual may not be criminally punished for an act that was not clearly condemned in a statute prior to the time that the individual committed the act.[2] The doctrine of legality is nicely summarized in the Latin expression ***nullum crimen sine lege, nulla poena sine lege***, meaning "no crime without law, no punishment without law." The doctrine of legality is reflected in two constitutional principles governing criminal statutes:

- The constitutional prohibition on bills of attainder and ex post facto laws
- The constitutional requirement of statutory clarity

Bills of Attainder and Ex Post Facto Laws

2.2 Understand bills of attainder and ex post facto laws

Article I, Sections 9 and 10 of the U.S. Constitution prohibit state and federal legislatures from passing **bills of attainder** and **ex post facto laws**. James Madison characterized these provisions as a "bulwark in favor of personal security and personal rights."[3]

Bills of Attainder

A bill of attainder is a legislative act that punishes an individual or a group of persons without the benefit of a trial. The constitutional prohibition of bills of attainder was intended to safeguard Americans from the type of arbitrary punishments that the English Parliament directed against opponents of the Crown. Parliament disregarded the legal process and directly ordered that dissidents be imprisoned, executed, or banished and forfeit their property.[4] The prohibition of a bill of attainder was successfully invoked in 1946 by members of the American Communist Party, who were excluded by Congress from working for the federal government.[5]

Ex Post Facto Laws

Alexander Hamilton explained that the constitutional prohibition on ex post facto laws was vital because "subjecting of men to punishment for things which, when they were done were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instrument of tyranny."[6] In 1798, Supreme Court Justice Samuel Chase in *Calder v. Bull* listed four categories of ex post facto laws[7]:

- Every law that makes criminal and punishes an action that was done before the passing of the law and was *innocent* when done
- Every law that *aggravates* a crime, or makes it *greater* than it was when committed
- Every law that *changes the punishment* and inflicts a *greater punishment* than the law annexed to the crime, when committed
- Every law that alters the *legal* rules of *evidence* and receives less or different testimony than the law required at the time of the commission of the offense *in order to convict the individual committing the offense*

The constitutional rule against ex post facto laws is based on the familiar interests in providing individuals notice of criminal conduct and protecting individuals against retroactive "after the fact" statutes. Supreme Court Justice John Paul Stevens noted that all four of Justice Chase's categories are "mirror images of one another. In each instance, the government refuses, after the fact, to play by its own rules, altering them in a way that is advantageous only to the State, to facilitate an easier conviction."[8]

In summary, the prohibition on ex post facto laws prevents legislation being applied to *acts committed before the statute went into effect.* The legislature is free to declare that in the *future* a previously innocent act will be a crime. Keep in mind that the prohibition on ex post facto laws is directed against enactments that disadvantage defendants; legislatures are free to retroactively assist defendants by reducing the punishment for a criminal act.

The distinction between bills of attainder and ex post facto laws is summarized as follows:

- A bill of attainder punishes a specific individual or specific individuals. An ex post facto law criminalizes an act that was legal at the time the act was committed.

- A bill of attainder is not limited to criminal punishment and may involve any disadvantage imposed on an individual. An ex post facto law is limited to criminal punishment.
- A bill of attainder imposes punishment on an individual without trial. An ex post facto law is enforced in a criminal trial.

The Supreme Court and Ex Post Facto Laws

Determining whether a retroactive application of the law violates the prohibition on ex post facto laws has proven more difficult than might be imagined given the seemingly straightforward nature of this constitutional ban.

In *Stogner v. California*, the Supreme Court ruled that a California law authorizing the prosecution of allegations of child abuse that previously were barred by a three-year statute of limitations constituted a prohibited ex post facto law.[9] This law was challenged by Marion Stogner, who found himself indicted for child abuse after having lived the past 19 years without fear of criminal prosecution for an act committed 22 years prior. Justice Stephen Breyer ruled that California acted in an "unfair" and "dishonest" fashion in subjecting Stogner to prosecution many years after the state had assured him that he would not stand trial. Justice Anthony Kennedy argued in dissent that California merely reinstated a prosecution that was previously barred by the three-year statute of limitations. The penalty attached to the crime of child abuse remained unchanged. What is your view?

We now turn our attention to the requirement of statutory clarity.

Statutory Clarity

2.3 Understand statutory clarity

The Fifth and Fourteenth Amendments to the U.S. Constitution prohibit depriving individuals of "life, liberty or property without due process of law." Due process requires that criminal statutes should be drafted in a clear and understandable fashion. A statute that fails to meet this standard is unconstitutional on the grounds that it is **void for vagueness**.

- *Due process requires that individuals receive notice of criminal conduct.* Statutes are required to define criminal offenses with sufficient *clarity* so that ordinary individuals are able to understand what conduct is prohibited.
- *Due process requires that the police, prosecutors, judges, and jurors are provided with a reasonably clear statement of prohibited behavior.* The requirement of definite standards ensures the uniform and nondiscriminatory enforcement of the law.

In summary, due process ensures clarity in criminal statutes. It guards against individuals being deprived of life (the death penalty), liberty (imprisonment), or property (fines) without due process of law.

Clarity

Would a statute that punishes individuals for being members of a gang satisfy the test of statutory clarity? The U.S. Supreme Court, in *Grayned v. Rockford*, ruled that a law was void for vagueness that punished an individual "known to be a member of any gang consisting of two or more persons." The Court observed that "no one may be required at peril of life, liberty or property to speculate as to the meaning of [the term *gang* in] penal statutes."[10]

In another example, the Supreme Court ruled in *Coates v. Cincinnati* that an ordinance was unconstitutionally void for vagueness that declared that it was a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by." The Court held that the statute failed to provide individuals with reasonably clear guidance because "conduct that annoys some people does not annoy others," and that an individual's arrest may depend on whether the individual happens to "annoy" a "police officer or other person who should happen to pass by." This did not mean that Cincinnati was helpless to maintain the city sidewalks; the city was free to prohibit people from "blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct."[11]

At times a court confronts the question whether to interpret a statute to encompass acts that are not explicitly included in the legislative text. In the often-cited U.S. Supreme Court decision of *McBoyle v. United States*, Justice Oliver Wendell Holmes Jr. writing for a unanimous Court majority held that the term *motor vehicle* in the National Motor Vehicle Theft Act did not cover stolen aircraft. Justice Holmes reasoned that a "fair warning" should be provided to individuals in "language that the common world will understand" and held that when "a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to stolen aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used."[12]

Definite Standards for Law Enforcement

Edward Lawson was detained or arrested on roughly 15 occasions between March and July 1977. Lawson certainly stood out; he was distinguished by his long dreadlocks and habit of wandering the streets of San Diego at all hours. Lawson did not carry any identification, and each of his arrests was undertaken pursuant to a statute that required that an individual detained for investigation by a police officer present "credible and reliable" identification that carries a "reasonable assurance" of its authenticity and that provides "means for later getting in touch with the person who has identified himself."[13]

The U.S. Supreme Court explained in *Kolender v. Lawson* that the void-for-vagueness doctrine was aimed at ensuring that statutes clearly inform citizens of prohibited acts and simultaneously provide definite standards for the enforcement of the law. The California statute was clearly void for vagueness, because no standards were provided for determining what constituted "credible and reliable" identification, and "complete discretion" was vested in the police to determine whether a suspect violated the statute. Was a library or credit card or student

identification "credible and reliable" identification? A police officer explained at trial that joggers who are not carrying identification might satisfy the statute by providing their running route or name and address. Did this constitute "credible and reliable" identification? The Court was clearly concerned that a lack of definite standards opened the door to the police using the California statute to arrest individuals based on their race, gender, or appearance.

Due process does not require "impossible standards" of clarity, and the Supreme Court stressed that this was not a case in which "further precision" was "either impossible or impractical." There seemed to be little reason why the legislature could not specify the documents that would satisfy the statutory standard and avoid vesting complete discretion in the "moment-to-moment judgment" of a police officer on the street. Laws were to be made by the legislature and enforced by the police: "To let a policeman's command become equivalent to a criminal statute comes dangerously near to making our government one of men rather than laws."[14]

The Supreme Court has stressed that the lack of standards presents the danger that a law will be applied in a discriminatory fashion against marginalized groups and those who are economically insecure. In *Papachristou v. City of Jacksonville*, the U.S. Supreme Court expressed the concern that a broadly worded vagrancy statute punishing "rogues and vagabonds"; "lewd, wanton and lascivious persons"; "common railers and brawlers"; and "habitual loafers" failed to provide standards for law enforcement and risked that the economically insecure, marginalized groups, and nonconformists would be targeted for arrest based on the belief that they posed a threat to public safety.[15] The Court humorously noted that middle-class individuals who frequented the local country club were unlikely to be arrested, although they might be guilty under the ordinance of "neglecting all lawful business and habitually spending their time by frequenting . . . places where alcoholic beverages are sold or served."[16]

Broadly worded statutes are a particular threat in a democracy in which we are committed to protecting even the most extreme nonconformist from governmental harassment. The U.S. Supreme Court, in *Coates v. Cincinnati*, expressed concern that the lack of clear standards in the local ordinance might lead to the arrest of individuals who were exercising their constitutionally protected rights. Under the Cincinnati statute, association and assembly on the public streets would be "continually subject" to whether the demonstrators' "ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens."[17]

Void for Vagueness

Judges are aware that language cannot achieve the precision of a mathematical formula. Legislatures are also unable to anticipate every possible act that may threaten society, and understandably they resort to broad language. Consider the obvious lack of clarity of a statute punishing a "crime against nature." In *Horn v. State*, the defendant claimed that a law punishing a "crime against nature" was vague and indefinite and failed to inform him that he was violating the law in raping a 10-year-old boy. An Alabama court ruled that the definition of a "crime against nature" was widely discussed in legal history and was "too disgusting and well known" to require further details or description.[18] Do you agree?

Judges appreciate the difficulty of clearly drafting statutes and typically limit the application of the void-for-vagueness doctrine to cases in which the constitutionally protected rights

and liberties of people to meet, greet, congregate in groups, move about, and express themselves are threatened.

A devil's advocate may persuasively contend that the void-for-vagueness doctrine provides undeserved protection to "wrongdoers." In *State v. Metzger*, a neighbor spotted Metzger standing naked with his arms at his sides in the large window of his garden apartment for roughly five seconds.[19] The neighbor testified that he saw Metzger's body from "his thighs on up." The police were called and observed Metzger standing within a foot of the window eating a bowl of cereal and noted that "his nude body, from the mid-thigh on up, was visible." The ordinance under which Metzger was charged and convicted made it unlawful to commit an "indecent, immodest or filthy act within the presence of any person, or in such a situation that persons passing might ordinarily see the same." The Nebraska Supreme Court ruled that this language provided little advance notice as to what is lawful and what is unlawful and could be employed by the police to arrest individuals for entirely lawful acts that some might consider immodest, including holding hands, kissing in public, or wearing a revealing swimsuit. Could Metzger possibly believe that there was no legal prohibition on his standing nude in his window? Keep these points in mind as you read the first case in the textbook, *State v. Stanko.*

Did the Defendant Know That He Was Driving at an Excessive Rate of Speed?

STATE V. STANKO, 974 P.2D 1139 (MONT. 1998)

Opinion by Trieweiler, J.

Facts

Kenneth Breidenbach is a member of the Montana Highway Patrol who, at the time of trial and the time of the incident that formed the basis for Stanko's arrest, was stationed in Jordan, Montana. On March 10, 1996, he was on duty patrolling Montana State Highway 24 and proceeding south from Fort Peck toward Flowing Wells in "extremely light" traffic at about 8 a.m. on a Sunday morning when he observed another vehicle approaching him from behind.

He stopped or slowed, made a right-hand turn, and proceeded west on Highway 200. About one-half mile from that intersection, in the first passing zone, the vehicle that had been approaching him from behind passed him. He caught up to the vehicle and trailed the vehicle at a constant speed for a distance of approximately eight miles while observing what he referred to as the two- or three-second rule. . . . He testified that he clocked the vehicle ahead of him at a steady 85 miles per hour during the time that he followed it. At that speed, the distance between the two vehicles was from 249 to 374 feet. . . . Officer Breidenbach signaled him to pull over and issued him a ticket for violating Section 61-8-303(1), Montana Code Annotated (MCA). The basis for the ticket was the fact that Stanko had been operating his vehicle at a speed of 85 miles per hour at a location where Officer Breidenbach concluded it was unsafe to do so.

The officer testified that the road at that location was narrow, had no shoulders, and was broken up by an occasional frost heave. He also testified that the portion of the road over which he clocked Stanko included curves and hills that obscured vision of the roadway ahead. However, he acknowledged that at a distance of from 249 to 374 feet behind Stanko, he had never lost sight of Stanko's vehicle. The roadway itself was bare and dry, there were no adverse weather conditions, and the incident occurred during daylight hours. Officer Breidenbach apparently did not inspect the brakes on Stanko's vehicle or make any observation regarding its weight. The only inspection he conducted was of the tires, which appeared to be brand new. He also observed that it was a 1996 Camaro, which was a sports car, and that it had a suspension system designed so that the vehicle could be operated at high speeds. He also testified that while he and Stanko were on Highway 24 there were no other vehicles that he observed, that during the time that he clocked Stanko . . . they approached no other vehicles going in their direction, and that he observed a couple of vehicles approach them in the opposite direction during that eight-mile stretch of highway.

Although Officer Breidenbach expressed the opinion that 85 miles per hour was unreasonable at that location, he gave no opinion about what would have been a reasonable speed, nor did he identify anything about Stanko's operation of his vehicle, other than the speed at which he was traveling, which he considered to be unsafe. Stanko testified that on the date he was arrested he was driving a 1996 Chevrolet Camaro that he had just purchased one to two months earlier and that had been driven fewer than 10,000 miles. He stated that the brakes, tires, and steering were all in perfect operating condition, the highway conditions were perfect, and he felt that he was operating his vehicle in a safe manner. He conceded that after passing Officer Breidenbach's vehicle, he drove at a speed of 85 miles per hour but testified that because he was aware of the officer's presence he was extra careful about the manner in which he operated his vehicle. He felt that he would have had no problem avoiding any collision at the speed that he was traveling. Stanko testified that he was fifty years old at the time of trial, drives an average of 50,000 miles a year, and has never had an accident.

Issue

Is Section 61-8-303(1), MCA, so vague that it violates the Due Process Clause found at Article II, Section 17, of the Montana Constitution? Stanko contends that Section 61-8-303(1), MCA, is unconstitutionally vague because it fails to give a motorist of ordinary intelligence fair notice of the speed at which he or she violates the law, and because it delegates an important public policy matter, such as the appropriate speed on Montana's highways, to policemen, judges, and juries for resolution on a case-by-case basis. . . . Section 61-8-303(1), MCA, provides as follows:

> *A person operating or driving a vehicle of any character on a public highway of this state shall drive the vehicle in a careful and prudent manner and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point*

of operation, taking into account the amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to the view ahead. The person operating or driving the vehicle shall drive the vehicle so as not to unduly or unreasonably endanger the life, limb, property, or other rights of a person entitled to the use of the street or highway.

. . . The question is whether a statute that regulates speed in the terms set forth above gave Stanko reasonable notice of the speed at which his conduct would violate the law.

Reasoning

In Montana, we have established the following test for whether a statute is void on its face for vagueness: "A statute is void on its face if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." . . . No person should be required to speculate as to whether his contemplated course of action may be subject to criminal penalties. We conclude that, as a speed limit, Section 61-8-303(1), MCA, does not meet these requirements of the Due Process Clause of Article II, Section 17, of the Montana Constitution, nor does it further the values that the void-for-vagueness doctrine is intended to protect.

For example, while it was the opinion of Officer Breidenbach that 85 miles per hour was an unreasonable speed at the time and place where Stanko was arrested, he offered no opinion regarding what a reasonable speed at that time and place would have been. Neither was the attorney general, the chief law enforcement officer for the state, able to specify a speed that would have been reasonable for Stanko at the time and place where he was arrested. . . .

The difficulty that Section 61-8-303(1), MCA, presents as a statute to regulate speed on Montana's highways, especially as it concerns those interests that the void-for-vagueness doctrine is intended to protect, was further evident from the following discussion with the attorney general during the argument of this case:

Q. Well how many highway patrol men and women are there in the State of Montana?

A. There are 212 authorized members of the patrol. Of that number, about 190 are officers and on the road.

Q. And I understand there are no specific guidelines provided to them to enable them to know at what point, exact point, a person's speed is a violation of the basic rule?

A. That's correct, Your Honor, because that's not what the statute requires. We do not have a numerical limit. We have a basic rule statute that requires the officer to take into account whether or not the driver is driving in a careful and prudent manner, using the speed.

Q. And it's up to each of their individual judgments to enforce the law?

A. It is, Your Honor, using their judgment applying the standard set forth in the statute. . . .

It is evident from the testimony in this case and the arguments to the court that the average motorist in Montana would have no idea of the speed at which he or she could operate

his or her motor vehicle on this state's highways without violating Montana's "basic rule" based simply on the speed at which he or she is traveling. Furthermore, the basic rule not only permits, but requires the kind of arbitrary and discriminatory enforcement that the Due Process Clause in general, and the void-for-vagueness doctrine in particular, are designed to prevent. It impermissibly delegates the basic public policy of how fast is too fast on Montana's highways to "policemen, judges, and juries for resolution on an ad hoc and subjective basis."

. . . For example, the statute requires that a motor vehicle operator and Montana's law enforcement personnel take into consideration the amount of traffic at the location in question, the condition of the vehicle's brakes, the vehicle's weight, the grade and width of the highway, the condition of its surface, and its freedom from obstruction to the view ahead. However, there is no specification of how these various factors are to be weighted, or whether priority should be given to some factors as opposed to others. This case is a good example of the problems inherent in trying to consistently apply all of these variables in a way that gives motorists notice of the speed at which the operation of their vehicles becomes a violation of the law. . . .

Holding

We do not, however, mean to imply that motorists who lose control of their vehicles or endanger the life, limb, or property of others by the operation of their vehicles on a street or highway cannot be punished for that conduct pursuant to other statutes. . . . We simply hold that Montanans cannot be charged, prosecuted, and punished for speed alone without notifying them of the speed at which their conduct violates the law. . . . The judgment of the district court is reversed. . . .

Dissenting, *Turnage, C.J.*

This important traffic regulation has remained unchanged as the law of Montana . . . since 1955. . . . Apparently for the past forty-three years, other citizens driving upon our highways had no problem in understanding this statutory provision. Section 61-8-303(1), MCA, is not vague and most particularly is not unconstitutional as a denial of due process. . . .

Dissenting, *Regnier, J.*

The arresting officer described in detail the roadway where Stanko was operating his vehicle at 85 miles per hour. The roadway was very narrow with no shoulders. There were frost heaves on the road that caused the officer's vehicle to bounce. The highway had steep hills, sharp curves, and multiple no-passing zones. There were numerous ranch and field access roads in the area, which ranchers use for bringing hay to their cattle. The officer testified that at 85 miles per hour, there was no way for Stanko to stop in the event there had been an obstruction on the road beyond the crest of a hill. In the officer's judgment, driving a vehicle at the speed of 85 miles per hour on the stretch of road in question posed a danger

to the rest of the driving public. In my view, Stanko's speed on the roadway where he was arrested clearly falls within the behavior proscribed by the statute. . . .

Questions for Discussion

1. What were the facts the police officer relied on in arresting Stanko for speeding? Contrast these with the facts recited by Stanko in insisting that he was driving at a reasonable speed.
2. The statute employs a "reasonable person" standard and lists a number of factors to be taken into consideration in determining whether a motorist is driving at a proper rate of speed. Was the decision of the Montana Supreme Court based on the lack of notice provided to motorists concerning a reasonable speed or based on the failure to provide law enforcement officers with clear standards for enforcement?
3. Why does Chief Justice Turnage refer to Section 61-8-303(1), MCA, as an "important traffic regulation" and stress that this has been the law for 43 years? Can you speculate as to why Montana failed to post speed limits on highways?
4. Do you agree with the majority opinion or with the dissenting judges?
5. The Montana state legislature reacted by establishing speed limits of "75 mph at all times on Federal . . . interstate highways outside an urban area" and "70 mph during the daytime and 65 mph during the nighttime on any other public highway." Why did the legislature believe that this statute solved the void-for-vagueness issue?

Cases and Comments

Stanko's Subsequent Arrests. Stanko was arrested for reckless driving on August 13, 1996, and again on October 1, 1996. He was charged on both occasions with operating a vehicle with "willful or wanton disregard for the safety of persons or property." Two officers cited the fact that Stanko was driving between 117 and 120 miles per hour on narrow, hilly highways with the risk of encountering farm, ranch, tourist, and recreational vehicles and wildlife and placing emergency personnel at risk. Stanko possessed extraordinary confidence in his driving ability and dismissed the suggestion that he was driving in a wanton and reckless fashion.

He pointed out that he drove roughly 6,000 miles a month without an accident and that he had won several stock-car races in Oregon almost 20 years previously. The Montana Supreme Court unanimously ruled that Stanko should have reasonably understood that the manner in which he was driving posed a risk to other motorists who "do not assume the risk of driving in racetrack conditions." The Montana Supreme Court stressed that Stanko's conviction was not "based on speed alone" and dismissed his claim that the reckless driving law was unconstitutionally vague. Why did the Montana Supreme Court reach differing results in Stanko's speeding and reckless driving cases? See *State v. Stanko*, 974 P.2d 1139 (Mont. 1998).

You Decide 2.1

David C. Bryan was involved in a relationship with a young woman during the fall semester of 1994 at the University of Kansas. The relationship ended, and Bryan allegedly repeatedly contacted the young woman, including personally approaching her in a university building. Bryan subsequently was charged under the Kansas stalking statute. The Kansas statute at the time prohibited an "intentional and malicious following or course of conduct when such following or course of conduct seriously alarms, annoys or harasses the person." The statute failed to specify whether a "following" that "alarms, annoys or harasses" was to be measured by the standard of a "reasonable person." Bryan contends that the statute is unconstitutionally vague. How should the judge rule? How would you suggest the state legislature clarify the law? Consider the perspectives of a female victim and male defendant. See *State v. Bryan*, 910 P.2d 212 (Kan. 1996). Another Kansas case on stalking is *State v. Rucker*, 987 P.2d 1080 (Kan. 1999).

Equal Protection

2.4 Understand the three levels of scrutiny under the Equal Protection Clause

The U.S. Constitution originally did not provide for the **equal protection** of the laws. Professor Erwin Chemerinsky observes that this is not surprising, given that African Americans were enslaved and women were subject to discrimination. Slavery, in fact, was formally embedded in the legal system. Article I, Section 2 of the U.S. Constitution provides for the apportionment of the House of Representatives based on the "whole number of free persons" as well as three fifths of the enslaved persons. This was reinforced by Article IV, Section 2, the Fugitive Slave Clause, which requires the return of an enslaved person escaping into a state that does not recognize slavery.[20]

Immediately following the Civil War in 1865, Congress enacted and the states ratified the Thirteenth Amendment, which prohibits slavery and involuntary servitude. Discrimination against African Americans nevertheless continued, and Congress responded by approving the Fourteenth Amendment in 1868. Section 1 provides that "no state shall deprive any person of life, liberty or property without due process of law, or deny any person equal protection of the law." The Supreme Court declared in 1954 that the Fifth Amendment Due Process Clause imposes an identical obligation to ensure the equal protection of the law on the federal government.[21]

The Equal Protection Clause was rarely invoked for almost 100 years. Justice Oliver Wendell Holmes Jr., writing in 1927, typified the lack of regard for the Equal Protection Clause when he referred to the amendment as "the last resort of constitutional argument."[22] The famous 1954 Supreme Court decision in *Brown v. Board of Education* ordering the desegregation of public schools with "all deliberate speed" ushered in a period of intense litigation over the requirements of the clause.[23]

Three Levels of Scrutiny

Criminal statutes typically make distinctions based on various factors, including the age of victims and the seriousness of the offense. For instance, a crime committed with a dangerous weapon may be punished more harshly than a crime committed without a weapon. Courts generally accept the judgment of state legislatures in making differentiations so long as a law is rationally related to a legitimate government purpose. Legitimate government purposes generally include public safety, health, morality, peace and quiet, and law and order. There is a strong presumption that a law is constitutional under this **rational basis test** or **minimum level of scrutiny test**.[24]

In *Westbrook v. State*, 19-year-old Nicole M. Westbrook contested her conviction for consuming alcoholic beverages when under the age of 21. Westbrook argued that there was no basis for distinguishing between a 21-year-old and an individual who was slightly younger. The Alaska Supreme Court recognized that there may be some individuals younger than 21 who possess the judgment and maturity to handle alcoholic beverages and that some individuals over 21 may fail to meet this standard. The court observed that states have established the drinking age at various points and that setting the age between 19 and 21 years of age seemed to be rationally related to the objective of ensuring responsible drinking. As a result, the court concluded that "even if we assume that Westbrook is an exceptionally mature 19-year-old, it is still constitutional for the legislature to require her to wait until she turns 21 before she drinks alcoholic beverages."[25]

In contrast, the courts apply a **strict scrutiny test** in examining distinctions based on race and national origin. Racial discrimination is the very evil that the Fourteenth Amendment was intended to prevent, and the history of racism in the United States raises the strong probability that such classifications reflect a discriminatory purpose. In *Strauder v. West Virginia*, the U.S. Supreme Court struck down a West Virginia statute as unconstitutional that limited juries to "white male persons who are twenty-one years of age."[26]

Courts are particularly sensitive to racial classifications in criminal statutes and have ruled that such laws are unconstitutional in almost every instance. The Supreme Court observed that "in this context . . . the power of the State weighs most heavily upon the individual or the group."[27] In *Loving v. Virginia*, in 1967, Mildred Jeter, a Black woman, and Richard Loving, a white man, pled guilty to violating Virginia's ban on interracial marriages and were sentenced to 25 years in prison, a sentence that was suspended on the condition that the Lovings leave Virginia. The Supreme Court stressed that laws containing racial classifications must be subjected to the "most rigid scrutiny" and determined that the statute violated the Equal Protection Clause. The Court failed to find any "legitimate overriding purpose independent of invidious racial discrimination" behind the law. The fact that Virginia "prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their justification, as measures designed to maintain White Supremacy. . . . There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."[28] The strict scrutiny test also is used when a law limits the exercise of "fundamental rights" (such as freedom of speech).

The Supreme Court has adopted a third, **intermediate level of scrutiny** for classifications based on gender. The decision to apply this standard rather than strict scrutiny is based on the consideration that although women historically have confronted discrimination, the biological differences between men and women make it more likely that gender classifications are justified. Women, according to the Court, also possess a degree of political power and resources that are generally not found in "isolated and insular minority groups." Intermediate scrutiny demands that the state provide some meaningful justification for the different treatment of men and women and not rely on stereotypes or classifications that have no basis in fact. Justice Ruth Bader Ginsburg applied intermediate scrutiny in ordering that the Virginia Military Institute admit women and ruled that gender-based government action must be based on "an exceedingly persuasive justification. . . . The burden of justification is demanding and it rests entirely on the State."[29]

In *Michael M. v. Superior Court*, the U.S. Supreme Court upheld the constitutionality of California's "statutory rape law" that punished "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years."[30] Is it constitutional to limit criminal liability to males?

The Supreme Court noted that California possessed a "strong interest" in preventing illegitimate teenage pregnancies. The Court explained that imposing criminal sanctions solely on males roughly "equalized the deterrents on the sexes," because young men did not face the prospects of pregnancy and child-rearing. The Court also deferred to the judgment of the California legislature that extending liability to females would likely make young women reluctant to report violations of the law.[31]

In summary, there are three different levels of analysis under the Equal Protection Clause:

- *Rational Basis Test.* A classification is *presumed valid* so long as it is rationally related to a constitutionally permissible state interest. An individual challenging the statute must demonstrate that there is no rational basis for the classification. This test is used in regard to the "nonsuspect" categories of individuals who are poor, elderly, or intellectually disabled and to distinctions based on age.
- *Strict Scrutiny Test.* A law singling out an individual from a racial or ethnic marginalized community must be strictly necessary, and there must be no alternative approach to advancing a compelling state interest. This test is also used when a law limits fundamental rights.
- *Intermediate Scrutiny.* Distinctions on the grounds of gender must be substantially related to an important government objective. A law singling out women must be based on factual differences and must not rest on overbroad generalizations.

The next case in the textbook, *People of the Virgin Islands v. Lake*, asks you to consider whether the defendant was prosecuted and convicted under a statutory provision that constitutes gender discrimination against the male defendant.

Did the Aggravated Assault Statute Discriminate Against a Male Defendant?

PEOPLE OF THE VIRGIN ISLANDS V. LAKE, 59 V.I. 178 (Super. Ct. 2013)

Opinion by Brady, J.

Issue

Aggravated assault and battery is punishable by up to one year incarceration, whereas simple assault is punishable by incarceration only for up to six months. The question is whether 14 V.I.C. § 298(5) establishes gender classifications that fail the intermediate scrutiny review prescribed by the United States Supreme Court and thereby it violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Has the prosecution demonstrated that this gender-based provision is substantially related to the achievement of an important governmental purpose?

Facts

Defendant Johnson Lake allegedly assaulted his wife, Melissa Barker-Lake, and his minor daughter, identified only as J.L., on or about June 12, 2011. Melissa Barker-Lake immediately contacted the Virgin Islands police who arrested Defendant later that day for "kicking his sixteen year old daughter in her stomach and binding his wife's right hand inwards." At the time, Defendant had a medium build, weighed 192 pounds, and stood 5′9″ tall. He was sober and unarmed.

Defendant was charged with two counts of aggravated assault and battery as acts of domestic violence, in violation of 14 V.I.C. § 298(5). Count One of the Information charges that Defendant committed an aggravated assault and battery against his wife, "a female"; and Count Two charges the same crime against Defendant's daughter, "a female, J.L., a minor." Defendant entered a plea of not guilty as to both counts. Defendant does not challenge Count Two of the Information charging aggravated assault on his minor daughter. Since an assault by any adult gives rise to aggravated assault regardless of the offender's gender under the provisions of 14 V.I.C § 298(5), Count Two does not present a constitutional question.

Reasoning

Defendant contends that 14 V.I.C. § 298(5) "heightens the six month misdemeanor offense of simple assault and battery to the one year misdemeanor offense of aggravated assault and battery in instances where the complaining witness is female and the accused is an adult male. However, there is no reciprocal enhancement where the complaining witness is an adult male and the accused is female." This paragraph clearly articulates Defendant's contention that he is subject to a different legal standard because of his gender in violation of the Equal Protection Clause. . . .

[T]he People argue that "the purpose of section 298 is to address size disparities among [*sic*] the aggressor and victim and to prevent serious injury to the victim." The People contends that because "it is a well-known fact that an adult male is larger than both an adult woman and a child and that an adult female is larger than a child," this statute is about size not gender disparities. The statute's purpose, it contends, is to protect smaller individuals from the aggression of larger individuals more likely to inflict harm because of these size differences.

To adopt the People's position would be to ignore the "plain and unambiguous meaning" of 14 V.I.C. § 298(5). Under this statute, a man who assaults a woman is guilty of aggravated assault; however a woman who assaults a man is not guilty of aggravated assault. While 14 V.I.C. § 298(5) also makes it aggravated assault for either a man or a woman to assault a child, this does not abrogate the gender distinction set out in the first ten words of 14 V.I.C. § 298(5): "being an adult male, upon the person of a female. . . ."

The statute does not mention the weight or size of the offender, but simply differentiates based upon the offender's gender. The Supreme Court requires that our inquiry cease if a statute's language is "unambiguous." "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."

With reference to an assault and battery committed by one adult against another adult, 14 V.I.C. § 298(5) clearly and without any equivocation draws a distinction based solely upon the offender's gender. . . . No further inquiry or statutory interpretation is required because it is the plain and unambiguous meaning of 14 V.I.C. § 298(5) to differentiate between male and female offenders solely based upon gender.

> Statutes which establish classifications of persons and openly discriminate between them based upon gender are subject to a heightened level of scrutiny under the Equal Protection Clause. While statutory classifications based upon gender are not subject to the "strict scrutiny" afforded to classifications distinguishing between racial and ethnic groups, explicit gender distinctions are subject to an intermediate level of scrutiny. The fact that a statute "discriminates against males rather than females does not exempt it from scrutiny or reduce the standard of review."

To pass constitutional muster, the People must demonstrate that the statute's gender classification "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The People argues that the Legislature specifically intended to protect female victims by subjecting men to "an aggravating factor when females are the victim." It claims that protecting the biologically weaker gender from the biologically stronger gender is an important governmental objective that was specifically considered by the Legislature in enacting 14 V.I.C. § 298(5). Without factual support . . . the People relies upon the "well-known fact that an adult male is larger than . . . an adult woman . . ." and, in effect, asks the Court to

adopt the type of "mechanical application of traditional, often inaccurate, assumptions" specifically rejected by the Supreme Court.

The People argues that men and women are not similarly situated when it comes to being victims of domestic or other physical violence. "[M]aking aggravated-assault domestic violence a felony is substantially related to the government interest of protecting women against acts of domestic violence. Women are disproportionally victims of domestic violence." The People claims, without support, that men assault women nine times more than women assault men. Citing biological factors, such as strength and stature, the People claims that "in 2011, only a small number of women were even charged by the Attorney General's office with simple assault-domestic violence where the victim was a male." The Equal Protection Clause, [the People] argues, "does not command that all persons be treated alike but, rather, 'direct[s] that all persons similarly situated should be treated alike.'" Because men and women are not similarly situated in terms of being victims of sexual abuse, the law does not have to treat them as if they were similarly situated. For the reasons that follow, the People's argument is unpersuasive. . . .

The Supreme Court has concluded that statutes which are remedial in nature, seeking to "remedy some part of the effect of past discrimination" are substantially related to an important governmental purpose. Additionally, statutes which operate purely on the scientific, non-stereotypical grounds that men and women are not similarly situated are permissible in limited circumstances.

However, certain statutes can mistakenly categorize women as sufficiently dissimilar from men to warrant impermissible disparate treatment. Such statutes are often based on "reinforcing the stereotypes about . . . women and their need for special protection," make unscientific assumptions about the perceived differences between the sexes, and are not substantially related to an important governmental purpose. In examining 14 V.I.C. § 298(5), it is clear that this statute is based on stereotypes, blanket generalizations, unsupported data and unscientific assumptions. "[D]omestic violence remains a difficult and disturbing social problem that must be eradicated. But as [the Defendant] correctly pointed out, '[d]omestic violence is a problem for everybody—men, women, children.'"

Without any support in the record, the People claims that "[w]omen are disproportionally victims of domestic violence" and that men assault women nine times more than women assault men. In *People of the Virgin Islands v. Simmonds*, 58 V.I. 3 (Super. Ct. 2012), the Court rejected this assertion based upon the record before the Court. The Defendant argued that "[t]he research is now overwhelming that women are as likely to abuse." . . . Section 298(5) perpetuates this problem. . . . The evil is violence not gender. . . ." The goal of domestic violence laws is to prevent domestic violence in all circumstances and in all forms. . . . Justice Désirée Bernard, the first female judge to sit on the Caribbean Court of Justice, discussed the gender-neutrality of domestic violence: "[w]hen one considers the whole issue of gender-based violence one immediately conjures up in one's mind violence against women despite the gender-neutral term. . . ." Domestic violence, she explained, "include[s] the all-pervasive scourge of violence committed against both male and female victims."

As articulated by Justice Désirée Bernard, domestic assaults involving male victims are on the rise. The unsupported and stereotypic assumption of the People that men are larger and stronger than women ignores the plain reality that the assumption is untrue as to a statistically significant percentage of the adult population of this Territory. The People's stubborn insistence that 14 V.I.C. § 298(5) can survive this constitutional analysis is based, in essence, on the premise that women are the weaker sex requiring protection through statutory inequality. Without any proof in the record by statistical analysis or otherwise of the differing physical characteristics of the sexes, or of the predominance of assaults by men against women, this Court cannot accept that the facial discrimination set out by the words of the statute is justifiable based upon outmoded stereotypes and unscientific assumptions.

For purposes of 14 V.I.C. § 298(5), women are similarly situated to men and it cannot be said that the disparity between different classifications of person in the statute is substantially related to the government's purpose of deterring domestic and other physical violence. As has been successfully accomplished in the domestic violence statutory arena . . . there is absolutely no reason that a gender-neutral statute cannot be crafted to address these important governmental purposes.

Holding

The statute violates the Equal Protection Clause of the United States Constitution. The legislative history fails to establish that the disparity in treatment between the sexes has as its purpose protecting women from domestic or other physical assault. The record is insufficient to permit a finding that the Legislature specifically intended to further an important governmental purpose, the protection of female victims from male predators, by subjecting men to "an aggravating factor when females are the victim." While protecting everyone from domestic assault is an important, governmental purpose, the Court cannot find that this or any other important governmental interest is served by the disparate treatment afforded men and women accused of committing assault and battery. . . . As written, 14 V.I.C. § 298(5) reinforces stereotypes and makes unscientific assumptions concerning the need to protect women through inequality under law. To the contrary, for the purposes of 14 V.I.C. § 298(5), men and women are similarly situated and, as such, 14 V.I.C. § 298(5) is not substantially related to an important governmental purpose, and is unconstitutional in denying equal protection to men and women under the laws of the United States and the Virgin Islands.

Questions for Discussion

1. What are the facts in *Lake*, and why does Johnson Lake contend that his conviction for aggravated assault and battery violates the Equal Protection Clause?
2. Explain the intermediate scrutiny test.
3. Why did Lake not challenge the constitutionality of his assault against his daughter?

4. Why does the Virgin Islands argue that the statute's gender classification "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives'"?
5. Does the law promote gender stereotypes or reflect the fact that, as argued by the government of the Virgin Islands, because males commit a greater number and more serious acts of domestic violence than women, harsher penalties are needed against men to deter them from committing acts of domestic violence?
6. How would you decide this case?
7. In *State v. Houston*, Brian Houston was convicted of an assault upon Amy Stocks. At the sentencing hearing, the judge sentenced Houston to 10 days in jail, based in part on the defendant's lack of remorse and the unprovoked nature of the attack. The judge also stated, "I generally give a short jail sentence when men are convicted of beating . . . or hitting women because I take a very dim view of men hitting women." The judge proceeded to sentence Houston to jail so that Houston would know that he "can't go around hitting women." Did Houston's sentence violate the Equal Protection Clause of the U.S. Constitution? See *State v. Houston*, 534 A.2d 1293 (Me. 1987).
8. Note that the South Carolina Supreme Court in *State v. Wright*, 563 S.E.2d 311 (S.C. 2002), held that a statute similar to the statute in *Lake* was constitutional because of the differential physical size of males and of females. The court reasoned that as a result an assault by a male was likely to cause greater harm than an assault by a female. The judges reasoned that although there are exceptions to the differential size of males and females, a court is not required to adjust the law to accommodate an exceptional situation that does not fit the overwhelming number of cases. Do you agree with the decision in *State v. Wright*?

Cases and Comments

Detention of Japanese Americans During World War II. In *Korematsu v. United States*, the U.S. Supreme Court upheld the conviction of Fred Korematsu, an American citizen of Japanese descent, for remaining in San Leandro, California, in defiance of Civilian Exclusion Order No. 34 issued by the commanding general of the Western Command, U.S. Army. This prosecution was undertaken pursuant to an act of Congress of March 21, 1942, that declared it was a criminal offense punishable by a fine not to exceed $5,000 or by imprisonment for not more than a year for a person of Japanese ancestry to remain in "any military area or military zone" established by the president, the secretary of defense, or a military commander. Japanese Americans who were ordered to leave their homes were detained in remote relocation camps. Exclusion Order No. 34 was one of a number of orders and proclamations issued under the authority of President Franklin Delano Roosevelt; it stated that "successful prosecution of the war [World War II] requires every possible protection against espionage and against sabotage to national defense material, national defense premises and

national-defense utilities." Justice Hugo Black recognized that legal restrictions that "curtail the civil rights of a single racial group are immediately suspect" and that individuals excluded from the military zone would be subject to relocation and detention without trial in a camp far removed from the West Coast. The Supreme Court nevertheless affirmed the constitutionality of the order by a vote of 6–3. The majority concluded the following:

> *Korematsu was not excluded from the Military Area because of hostility to him or to his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders, . . . determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—say that at that time these actions were unjustified.*

Justice Frank Murphy questioned the constitutionality of this order, which he contended unconstitutionally excluded both citizens and noncitizens of Japanese ancestry from the Pacific Coast. He concluded that the "exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism." Was this a case of racial discrimination or an effort to safeguard the United States from an attack by Japan? What is the standard of review? See *Korematsu v. United States*, 323 U.S. 214 (1944).

In *Trump v. Hawaii*, the U.S. Supreme Court upheld the constitutionality of President Donald Trump's executive order restricting immigration from certain countries into the United States. Chief Justice John Roberts wrote about *Korematsu* that the "forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority. But it is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission." Two justices interpreted this statement as overruling *Korematsu*. See *Trump v. Hawaii*, 585 U.S. ___ (2018).

You Decide 2.2

Jane Doe cohabited with her former same-sex fiancée between 2010 and 2015 and moved out of their shared apartment when the relationship ended. Doe contacted the police to report that she was assaulted by her ex-fiancée in a hotel parking lot. Following a second confrontation, Doe's petition for an order of protection against her ex-fiancée

was denied by a family court judge on the grounds that the South Carolina Protection From Domestic Abuse Act "leaves unmarried, same-sex victims of abuse without the benefit . . . afforded to their heterosexual counterparts." Doe alleged that by purposefully defining "household members" as "a male and female who are cohabiting or formerly have cohabited" the South Carolina General Assembly intentionally denied same-sex individuals the protections available to individuals in opposite-sex relationships.

Statistics reveal that "women are far more at risk from domestic violence at the hands of men than vice versa." Thus, the State of South Carolina maintains that the General Assembly defined "household members" as "a male and female who are cohabiting or formerly have cohabited" in a justifiable effort to address the primary problem of domestic violence, which is violence by men against women within opposite-sex couples. *As a judge, would you hold that the South Carolina statute does not violate the Equal Protection Clause?* See *Doe v. State*, 808 S.E.2d 807 (S.C. 2017).

Now consider the following case. In June 1989, Jeanine Biocic was walking on the beach on the Chincoteague National Wildlife Refuge in Accomack County, Virginia, with a male companion. Biocic explained to "get some extra sun" she removed the top of her two-piece bathing suit, fully exposing her breasts. An officer of the federal Fish and Wildlife Service observed Biocic in "this state of partial nudity" and issued her a summons charging a violation of a statute providing that "[a]ny act of indecency or disorderly conduct as defined by State or local laws is prohibited on any national wildlife refuge." Biocic was convicted by a judge who concluded that Biocic's conduct constituted an "act of indecency" within the meaning of the Accomack County Code. In relevant part, the "anti-nudity" ordinance provides that the county "deems it necessary to prohibit certain conduct . . . in order to secure and promote the health, safety and general welfare of the [county's] inhabitants" and therefore "makes it unlawful for any person to knowingly, voluntarily, and intentionally appear . . . in a place open to the public or open to public view, in a state of nudity." The judge concluded that Biocic's exposure of her breasts in a way that fell within the County Code's express prohibition of this form of nudity constituted an "act of indecency" as defined by local law, and hence violated the federal regulation. He fined her $25.

Biocic appealed based on an equal protection claim that the ordinance prohibited the public exposure of female breasts but not male breasts, which constitutes a gender-based distinction that is not substantially related to an important governmental interest. As a result, the ordinance does not satisfy the intermediate level of scrutiny in equal protection analysis. The government, on the other hand, argued that because the anatomical differences between males and females make the two incapable of "equal" treatment in this situation there is no denial of equal protection. In other words, this is "simply unequal treatment of unequals, which does not involve invidious discrimination."

What is your view? Do you agree with the conclusion of the appellate court in deciding this case that "in certain narrow circumstances men and women are not similarly situated in these circumstances, a gender classification based on clear differences between the sexes is not invidious, and a legislative classification realistically based upon these differences is not unconstitutional"? See *United States v. Biocic*, 92 F.2d 112 (4th Cir. 1991).

Freedom of Speech

2.5 Know the main categories of speech that are not protected under the First Amendment

The **First Amendment** to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The U.S. Supreme Court extended this prohibition to the states in a 1925 decision in which the Court proclaimed that "freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected under the Due Process Clause of the Fourteenth Amendment from impairment by the States."[32]

The Fourteenth Amendment to the Constitution applies to the states and was adopted following the Civil War in order to protect African Americans against the deprivation of "life, liberty and property without due process" as well as to guarantee former slaves "equal protection of the law." The Supreme Court has held that the Due Process Clause incorporates various fundamental freedoms that generally correspond to the provisions of the **Bill of Rights** (the first 10 amendments to the U.S. Constitution that create rights against the federal government). This **incorporation theory** has resulted in a fairly uniform national system of individual rights that includes freedom of expression.

The famous, and now deceased, First Amendment scholar Thomas I. Emerson identified four functions central to democracy performed by freedom of expression under the First Amendment[33]:

- Freedom of expression contributes to *individual self-fulfillment* by encouraging individuals to express their ideas and creativity.
- Freedom of expression ensures *a vigorous "marketplace of ideas"* in which a diversity of views are expressed and considered in reaching a decision.
- Freedom of expression *promotes social stability* by providing individuals the opportunity to be heard and to influence the political and policy-making process. This promotes the acceptance of decisions and discourages the resort to violence.
- Freedom of expression ensures that there is a steady stream of innovative ideas and enables the *government to identify and address newly arising issues.*

The First Amendment is vital to the United States' free, open, and democratic society. Justice William Douglas wrote in *Terminiello v. Chicago*[34] that speech

> may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with the conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Justice Robert H. Jackson, reflecting on his experience as a prosecutor during the Nuremberg trials of Nazi war criminals, cautioned Justice Douglas that the

> choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

Justice Jackson is clearly correct that there must be some limit to freedom of speech. But where should the line be drawn? The Supreme Court articulated these limits in *Chaplinsky v. New Hampshire* and observed that there are "certain well-recognized categories of speech which may be permissibly limited under the First Amendment." The Supreme Court explained that these "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[35] The main categories of speech for which *content is not protected by the First Amendment* and that may result in the imposition of criminal punishment are as follows:

- *Fighting Words.* Words directed to another individual or individuals that an ordinary and reasonable person should be aware are likely to cause a fight or breach of the peace are prohibited under the **fighting words** doctrine. In *Chaplinsky v. New Hampshire*, the Supreme Court upheld the conviction of a member of the Jehovah's Witnesses who, when distributing religious pamphlets, attacked a local marshal with the accusation that "you are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."
- *Incitement to Violent Action.* A speaker, when addressing an audience, is prohibited from **incitement to violent action**. In *Feiner v. New York*, Feiner addressed a racially mixed crowd of 75 or 80 people. He was described as "endeavoring to arouse" the African Americans in the crowd "against the whites, urging that they rise up in arms and fight for equal rights." The Supreme Court ruled that "when clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious."[36] On the other hand, in *Terminiello v. Chicago*, the Supreme Court stressed that a speaker could not be punished for speech that merely "stirs to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."[37]
- *Threat. A* developing body of law prohibits threats of bodily harm directed at individuals. Judges must weigh and balance a range of factors in determining whether a statement constitutes a political exaggeration or a **true threat**. In *Watts v. United States*, the defendant proclaimed to a small gathering following a public rally on the grounds of the Washington Monument that if inducted into the army and forced to carry a rifle, "the first man I want to get in my sights is L.B.J. [President Lyndon Johnson]. . . . They

are not going to make me kill my black brothers." The onlookers greeted this statement with laughter. Watts's conviction was overturned by the U.S. Supreme Court, which ruled that the government had failed to demonstrate that Watts had articulated a true threat, and that these types of bold statements were to be expected in a dynamic and democratic society divided over the Vietnam War.[38]

- *Obscenity.* Obscene materials are considered to lack "redeeming social importance" and are not accorded constitutional protection. Drawing the line between obscenity and protected speech has proven problematic. The Supreme Court conceded that obscenity cannot be defined with "God-like precision," and Justice Potter Stewart went so far as to pronounce in frustration that the only viable test seemed to be that he "knew obscenity when he saw it."[39] The U.S. Supreme Court was finally able to agree on a test for obscenity in *Miller v. California.* The Supreme Court declared that obscenity was limited to works that when taken as a whole, in light of contemporary community standards, appeal to the prurient interest in sex; are patently offensive; and lack serious literary, artistic, political, or scientific value. This qualification for scientific works means that a medical textbook portraying individuals engaged in "ultimate sexual acts" likely would not constitute obscenity.[40] Child pornography may be limited despite the fact that it does not satisfy the *Miller* standard.[41] (Obscenity and pornography are discussed in Chapter 15.)

- *Libel.* You should remain aware that the other major limitation on speech, **libel**, is a civil law rather than a criminal action. This enables individuals to recover damages for injury to their reputations. In *New York Times Co. v. Sullivan*, the U.S. Supreme Court severely limited the circumstances in which public officials could recover damages and held that public officials may not recover damages for a defamatory falsehood relating to their official conduct "unless . . . the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[42] The Court later clarified that this "reckless disregard" or actual knowledge standard applied only to "public figures" and that states were free to apply a more relaxed, simple negligence (lack of reasonable care in verifying the facts) standard in suits for libel brought by private individuals.[43] Speech lacking First Amendment protection shares several common characteristics:
  - The expression lacks social value.
  - The expression directly causes social harm or injury.
  - The expression is narrowly defined in order to avoid discouraging and deterring individuals from engaging in free and open debate.

Keep in mind that these are narrowly drawn exceptions to the First Amendment's commitment to a lively and vigorous societal debate. The general rule is that the government may neither require nor substantially interfere with individual expression. The Supreme Court held in *West Virginia State Board of Education v. Barnette* that a student may not be compelled to pledge allegiance to the American flag. The Supreme Court observed that "if there is any fixed star in

our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or action their faith therein." This commitment to a free "marketplace of ideas" is based on the belief that delegating the decision as to what "views shall be voiced largely into the hands of each of us" will "ultimately produce a more capable citizenry and more perfect polity and . . . that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[44]

The First Amendment also protects freedom of assembly. Restrictions on assembly are subject to reasonable time, manner, and place restrictions although limitations on assembly must be "content neutral."

The National Park Service authorized a group to erect two tents in Lafayette Park across from the White House to draw attention to the plight of the homeless although existing regulations prohibited sleeping in tents other than at designated campgrounds. In *Clark v. Community for Nonviolence*, the U.S. Supreme Court upheld the constitutionality of a National Park Service regulation prohibiting sleeping in Lafayette Park across from the White House, explaining this was a reasonable time, place, and manner regulation and applied to all individuals and groups regardless of their point of view. The Court found that the Park Service had "a substantial interest in maintaining the parks in the heart of the Nation in an attractive and intact condition, readily available to the millions of people who wish to visit and see and enjoy them. . . . To permit camping would be totally inimical to these purposes." The enforcement of the Park Service regulation prohibiting camping according to the Court provided demonstrators with "ample" opportunities to communicate their message.[45]

The First Amendment also provides that Congress shall not pass laws prohibiting the "free exercise of religion." The federal Religious Freedom Restoration Act of 1993 (RFRA) requires that strict scrutiny be applied to any law that burdens religious freedom; such laws must further a compelling governmental interest and are required to be the least restrictive way in which to further the governmental interest. The following year, the law was amended to protect Indigenous Americans from state and federal prosecution for use, possession, and transportation of peyote for ceremonial religious purposes. A number of states have passed their own RFRA. Despite the protection of the free exercise of religions, a number of parents have been convicted of child neglect because of their failure to seek medical care for their sick children because of their religious beliefs.

Overbreadth

The doctrine of **overbreadth** is an important aspect of First Amendment protection. This provides that a statute is unconstitutional that is so broadly and imprecisely drafted that it encompasses and prohibits a substantial amount of protected speech relative to the coverage of the statute. In *New York v. Ferber*, the U.S. Supreme Court upheld a New York child pornography statute that criminally punished an individual for promoting a "performance which includes sexual conduct by a child less than sixteen years of age." Sexual conduct was defined to include "lewd exhibition of the genitals." Justice Byron White was impatient with the concern that although the law was directed at hard-core child pornography, "[s]ome protected expression

ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute." White doubted whether these applications of the statute to protected speech constituted more than a "tiny fraction of the materials" that would be affected by the law, and he expressed confidence that prosecutors would not bring actions against these types of publications. This, in short, is the "paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications."[46]

Hate Speech

Hate speech is one of the central challenges confronting the First Amendment. This is defined as speech that denigrates, humiliates, and attacks individuals on account of race, religion, ethnicity, nationality, gender, sexual preference, or other personal characteristics and preferences. Hate speech should be distinguished from hate crimes or penal offenses that are directed against an individual who is a member of one of these "protected groups."

The United States is an increasingly diverse society in which people inevitably collide, clash, and compete over jobs, housing, and education. Racial, religious, and other insults and denunciations are hurtful, increase social tensions and divisions, and possess limited social value. This type of expression also has little place in a diverse society based on respect and regard for individuals of every race, religion, ethnicity, and nationality.

Regulating this expression, on the other hand, runs the risk that artistic and literary depictions of racial, religious, and ethnic themes may be deterred and denigrated. In addition, there is the consideration that debate on issues of diversity, affirmative action, and public policy may be discouraged. Society benefits when views are forced out of the shadows and compete in the sunlight of public debate.

The most important U.S. Supreme Court ruling on hate speech is *R.A.V. v. St. Paul.* In *R.A.V.*, several white juveniles burned a cross inside the fenced-in yard of a Black family. The young people were charged under two statutes, including the St. Paul Bias-Motivated Crime Ordinance (St. Paul Minn. Legis. Code § 292.02), which provided that "whoever places on public or private property a symbol, object, . . . including and not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment . . . on the basis of race, color, creed, religion or gender commits disorderly conduct . . . shall be guilty of a misdemeanor."[47] The Supreme Court noted that St. Paul punishes certain fighting words, yet permits other equally harmful expressions. This discriminates against speech based on the content of ideas. For instance, what about symbolic attacks against a greedy real estate developer?

A year later, in *Wisconsin v. Mitchell*, in 1993, the Supreme Court ruled that a Wisconsin statute that enhanced the punishment of individuals convicted of hate crimes did not violate the defendant's First Amendment rights. Todd Mitchell challenged a group of other young Black males by asking whether they were "hyped up to move on white people." As a young white male approached the group, Mitchell exclaimed, "There goes a white boy; go get him," and led a collective assault on the victim. The Wisconsin court increased Mitchell's prison sentence for aggravated assault from a maximum of two years to a term of four years based on his intentional selection of the person against "whom the crime . . . is committed . . . because of the

race, religion, color, disability, sexual orientation, national origin or ancestry of that person."[48] Mitchell creatively claimed that he was being punished more severely for harboring and acting on racially discriminatory views in violation of the First Amendment. The Supreme Court, however, ruled that Mitchell was being punished for his harmful act rather than for the fact that his act was motivated by racist views. The enhancement of Mitchell's sentence was recognition that acts based on discriminatory motives are likely "to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." Mitchell also pointed out that the prosecution was free to introduce a defendant's prior racist comments at trial to prove a discriminatory motive or intent and that this would "chill" racist speech. The Supreme Court held that it was unlikely that citizens would limit the expression of their racist views based on the fear that these statements would be introduced one day against them at a prosecution for a hate crime.

In 2003, in *Virginia v. Black*, the U.S. Supreme Court held unconstitutional a Virginia law prohibiting cross burning with "an intent to intimidate a person or group of persons."[49] This law, unlike the St. Paul statute, did not discriminate on the basis of the content of the speech. The Court, however, determined that the statute's provision that the jury is authorized to infer an intent to intimidate from the act of burning a cross without any additional evidence "permits a jury to convict in every cross burning case in which defendants exercise their constitutional right not to put on a defense." This provision also makes "it more likely that the jury will find an intent to intimidate regardless of the particular facts of the case." The Virginia law failed to distinguish between cross burning intended to intimidate individuals and cross burning intended to make a political statement by groups such as the Ku Klux Klan that view the flaming cross as a symbolic representation of their political point of view.

In the next case in the text, *Commonwealth v. Knox*, the Pennsylvania Supreme Court was asked to determine whether a rap video constituted a criminal threat. Do you agree with the court's judgment?

Did the Rap Video Constitute a Criminal Threat?

COMMONWEALTH V. KNOX, 190 A.3d 1146 (PA. 2018)

Opinion by Saylor, J.

Issue

In this appeal by allowance, we address whether the First Amendment to the United States Constitution permits the imposition of criminal liability based on the publication of a rap-music video containing threatening lyrics directed to named law enforcement officers.

Facts

In April 2012, Pittsburgh Police Officer Michael Kosko initiated a routine traffic stop of a vehicle driven by Appellant [Jamal Knox]. Appellant's co-defendant, Rashee Beasley, was in the front passenger seat. While Officer Kosko was questioning Appellant, the latter sped

away, ultimately crashing his vehicle. He and Beasley fled on foot, but were quickly apprehended and placed under arrest. The police found fifteen stamp bags containing heroin and a large sum of cash on Appellant Knox's person, as well as a loaded, stolen firearm on the driver's-side floor of the vehicle. At the scene of the arrest, Appellant gave the police a false name. When Detective Daniel Zeltner, who was familiar with both Appellant and Beasley, arrived, he informed the officers that Appellant's real name was Jamal Knox.

Based on these events, Appellant and Beasley were charged with a number of offenses. Officer Kosko and Detective Zeltner, both of . . . the Pittsburgh Police Department, were scheduled to testify against them in connection with the charges.

While the charges were pending, Appellant and Beasley wrote and recorded a rap song entitled, "F--k the Police," which was put on video with still photos of Appellant and Beasley displayed in a montage. In the photos, the two are looking into the camera and motioning as if firing weapons. The video was uploaded to YouTube by a third party, and the YouTube link was placed on a publicly-viewable Facebook page entitled "Beaz Mooga," which the trial evidence strongly suggested belonged to Beasley.

The song's lyrics express hatred toward the Pittsburgh police. As well, they contain descriptions of killing police informants and police officers. In this latter regard, the lyrics refer to Officer Kosko and Detective Zeltner by name. They suggest Appellant and Beasley know when those officers' shifts end and that the crimes depicted in the song may occur in the officers' homes ("where you sleep"). The lyrics also contain a reference to Richard Poplawski, who several years earlier had strapped himself with weapons and murdered three Pittsburgh police officers. Finally, the song includes background sounds of gunfire and police sirens.

In light of the present issue—whether the song communicated a "true threat" falling outside First Amendment protections—we reproduce [parts of] the lyrics . . . although they include violent imagery and numerous expletives:

Chorus:

> *You dirty b-----s won't keep knockin' my riches/This ghetto superstar committee ain't wit it/F--k the Police . . .*

Verse 1 – Mayhem Mal, *i.e.*, Jamal Knox:

> *This first verse is for Officer Zeltner and all you fed force b-----s/And Mr. Kosko, you can suck my d--k you keep on knocking my riches/You want beef, well cracker I'm wit it, that whole department can get it/All these soldiers in my committee gonna f--k over you bitches . . .*
>
> *We makin' prank calls, as soon as you b-----s come we bustin' heavy metal. . . .*
>
> *And I'ma jam this rusty knife all in his guts and chop his feet/You taking money away from Beaz and all my s--t away from me/Well . . . I'm gonna f--k up where you sleep.*
>
> *Hello Breezos got you watching my moves and talkin' 'bout me to your partner/I'm watchin' you too, b-----s . . .*

(Chorus repeats)

Verse 2 – Soldier Beaz, *i.e.*, Rashee Beasley:

Clip filled to the tippy top wit some cop killas/F--k the police, they bring us no peace/ That's why I keep my heat when I'm roamin' through these streets. . . .

I ain't carry no 38 dog, I spit with a tec/That like fifty shots n---a, that's enough to hit one cop on 50 blocks n---a . . . Like Poplawski I'm strapped nasty.

(Chorus repeats)

Verse 3 – Mayhem Mal, *i.e.*, Jamal Knox:

My momma told me not to put this on CD, but I'm gonna make this f----n' city believe me, so n---a turn me up.

If Dre was here they wouldn't f--k wit dis here/Los in the army, when he comes back it's real n---a . . .

They tunin' in, well Mr. Fed, if you can hear me b---h/Go tell your daddy that we're boomin' bricks . . . And I know exactly who workin', and I'm gonna kill him wit a Glock . . .

Let's kill these cops cuz they don't do us no good . . .

(Chorus repeats)

Officer Aaron Spangler . . . discovered the video while monitoring the "Beaz Mooga" Facebook page. He alerted other police personnel, including Officer Kosko and Detective Zeltner, who watched the video. Thereafter, Appellant was again arrested and charged with . . . two counts each of terroristic threats . . . and witness intimidation. . . . A consolidated bench trial on both sets of charges ensued at which the Commonwealth introduced the video into evidence without objection and played it for the court. . . . Officer Spangler testified that he had spent time interacting with individuals in the relevant neighborhood and had learned some of their street slang. He indicated that "busting heavy" means to shoot many rounds; a "tec" is a TEC-9, a semi-automatic pistol which holds a large-capacity magazine; to "spit with a tec" means to shoot with a TEC-9; a "cop killa" is a type of bullet that can pierce armored vests; and "strapped nasty" means carrying multiple weapons. . . . With regard to the lyric, "Hello Breezos got you watching my moves," Officer Spangler explained that *Hello Breezos* was the title of an earlier rap song by Appellant and Beasley, and that a "breezo" is a "brick" of heroin consisting of 50 stamp bags.

Terroristic threats is defined, in relevant part, as follows:

Offense defined. —A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to: (1) commit any crime of violence with intent to terrorize another. . . .

The Crimes Code defines witness intimidation as follows:

Offense defined. —A person commits an offense if, with the intent to or with the knowledge that his conduct will obstruct, impede, impair, prevent or interfere

> with the administration of criminal justice, he intimidates or attempts to intimidate any witness or victim to: (1) Refrain from informing or reporting to any law enforcement officer, prosecuting official or judge concerning any information, document or thing relating to the commission of a crime. . . .

In terms of the song's effects, Officer Kosko testified that when he heard it he was "shocked" and it made him "nervous." He cited it as one of the reasons he decided to leave the Pittsburgh police force and relocate. For his part, Detective Zeltner stated he found the video "very upsetting," and that it made him concerned for his safety as well as that of his family and fellow officers. He explained that extra personnel had to be assigned to Zone 5 to deal with "the threat." As well, the detective was given time off and a security detail.

By the conclusion of the trial, it became clear that the rap song was the sole basis on which the Commonwealth sought convictions for witness intimidation and terroristic threats. In his summation, therefore, Appellant argued that the song was protected speech, and hence, any conviction based on it would violate his First Amendment rights. The trial court rejected this argument and found him guilty on both counts of witness intimidation and terroristic threats. In reaching its verdict on the witness intimidation counts, the court found beyond a reasonable doubt that Appellant and Beasley specifically intended to intimidate the officers so as to obstruct the administration of criminal justice, and that they did so in collaboration with one another. The court also found Appellant guilty of . . . possessing with intent to deliver a controlled substance.

Appellant denies he intended to threaten the police. . . . Appellant states that he "consider[s] himself a poet, musician, and entertainer. Rap music serve[s] as his vehicle for self-expression, self-realization, economic gain, inspiring pride and respect from . . . peers, and speaking on public issues including police violence, on behalf of himself and others. . . ."

Appellant is supported by several briefs submitted by interested parties who make similar observations. The American Civil Liberties Union of Pennsylvania argues that artistic expression "has the power to shock," and this is particularly true with rap, which is sometimes "saturated with outrageous boasts and violent metaphors." Rap is described as a "means for those who disagree with the status quo to vent their frustrations, thereby lowering the likelihood they will engage in physical violence." The Defender Association of Philadelphia . . . advocates that the video should not have been seen as "autobiography," but as "art, poetry, and fantasy" addressing social issues and arguing that rap is fiction aimed at projecting images—such as hustlers, gangsters, or mercenary soldiers—and that a "recurring rap genre" involves the "first person homicidal revenge fantasy." . . . The Association adds that Appellant's status as a semi-professional rap artist with a distinct rap persona ("Mayhem Mal") should have been taken into account as a contextual factor suggesting Appellant did not intend to communicate an actual threat. The Thomas Jefferson Center for the Protection of Free Expression and the Marion B. Brechner First Amendment Project, in a joint brief . . . add that violent depictions receive First Amendment protection in other media such as films and video games, and argue the same protection should extend

to rap music as a medium for the expression of ideas. The First Amendment prohibits Congress from abridging the freedom of speech. . . .

The "heart" of the First Amendment "has been described as the 'ineluctable relationship between the free flow of information and a self-governing people.'" . . . Hence, First Amendment freedoms apply broadly to different types of expression, including art, poetry, film, and music. Such freedoms apply equally to cultured, intellectual expressions and to crude, offensive, or tawdry ones.

In light of the above, the government generally lacks the authority to restrict expression based on its message, topic, ideas, or content. This means the state may not proscribe speech due to its own disagreement with the ideas expressed, or because those ideas are unpopular in society. Nevertheless, expressive rights are "not absolute." The Constitution tolerates content-based speech restrictions in certain limited areas when that speech is "of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." Accordingly . . . certain types of speech can be regulated if they are likely to inflict unacceptable harm . . .

Of particular relevance to this case, speech which threatens unlawful violence can subject the speaker to criminal sanction. . . . The government may criminalize "true threats" but not mere political hyperbole. Threats of violence fall outside the First Amendment's protective scope because of the need to "protect individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur."

The true-threat doctrine has its genesis in *Watts v. United States* (394 U.S. 705 [1969]). . . . Watts was convicted under a federal statute making it a crime to threaten the President. The Supreme Court found the statute valid in light of the "overwhelming" interest in protecting the President's safety and allowing him to perform his duties unhampered by threats of violence.

The Constitution allows states to criminalize threatening speech which is specifically intended to terrorize or intimidate. Second, in evaluating whether the speaker acted with an intent to terrorize or intimidate, evidentiary weight should be given to contextual circumstances such as those referenced in *Watts*.

The terroristic threats law under which Appellant was convicted qualifies as a general anti-threat statute. By contrast, the witness intimidation statute is aimed at deterring not only threats, but the public harm occasioned by such threats, namely, the obstruction of criminal justice. . . . As to both offenses, the court found beyond a reasonable doubt that Appellant acted with a subjective intent to terrorize or intimidate the officers in question. For purposes of terroristic threats, this follows from fact that such intent is an element of the offense.

We first review the content of the speech itself, beginning with the lyrics. They do not merely address grievances about police-community relations or generalized animosity toward the police. They do not include political, social, or academic commentary, nor are they facially satirical or ironic. Rather, they primarily portray violence toward the police, ostensibly due to

the officers' interference with Appellants' activities. In this regard, they include unambiguous threats with statements such as, "Let's kill these cops cuz they don't do us no good" and "that whole department can get it." They reference "soldiers" that will "f--k over" the police, a plan to make false emergency calls and "bust heavy metal" toward the officers who respond to the call, and a desire to "jam this rusty knife all in [the officer's] guts."

The second verse, sung by Beasley, includes lyrics which portray the killing of police officers in an equally threatening manner. Due to the trial court's finding that the song was a collaborative effort on the part of Appellant and Beasley, and in light of the unifying theme of all three verses as well as the chorus, such words can reasonably be viewed as a joint expression of both defendants. Out of an abundance of caution, however, we will not consider the second verse in our true-threat analysis.

The lyrics also appear to express a consciousness that they step beyond the realm of fantasy or fiction in that they indicate Appellant was advised by one of his elders "not to put this on CD," but he is ignoring such advice so that the whole city will "believe" him. Similarly, Appellant vows that the activities described will be "real" once a certain named individual returns from military service.

These aspects of the song tend to detract from any claim that Appellant's words were only meant to be understood as an artistic expression of frustration. Most notably along these lines, Appellant mentions Detective Zeltner and Officer Kosko by name, stating that the lyrics are "for" them. Appellant proceeds to describe in graphic terms how he intends to kill those officers. In this way, the lyrics are both threatening and highly personalized to the victims.

Such personalization occurs, not only through use of the officers' names, but via other facets of the lyrics. They reference Appellant's purported knowledge of when the officers' shifts end and, in light of such knowledge, that Appellant will "f--k up where you sleep."

Additionally, the threats are directed at the officers based on the complaint, tied to interactions which had recently taken place between them and Appellant, that the police had been "knockin' my riches"—as Officer Kosko did by confiscating cash from Appellant upon his arrest—and vowing that the police "won't keep" doing so (reflecting Officer Spangler's testimony that "knocking riches" is a slang phrase which refers to a police officer confiscating cash during an arrest where drugs are involved). Along these same lines, they refer to the police having "tak[en] money away from" Beasley "and all my s--t away from me." Such harm to Appellant's personal wealth, and the officers' interference with his drug-selling activities, together with the upcoming criminal proceedings at which the latter were scheduled to testify against Appellant, are stated in the lyrics to provide the primary motivation for Appellant's desire to exact violent retribution.

Finally, the lyrics suggest a knowledge of the identity of the officers' confidential informants and a plan to murder at least one such informant with a Glock.

The words themselves are not the only component of Appellant's expressive conduct which tends to make the song threatening. The sound track includes bull horns, police sirens, and machine-gun fire ringing out over the words, "bustin' heavy metal."

Although the photos of Appellant and Beasley appearing to motion as if firing weapons may have added to the menacing nature of the communication, it was unclear whether Appellant was involved with that portion of the video, and at one point the court specifically referred to the "musical track" as containing the threats.

Pursuant to *Watts*, we also consider contextual factors in assessing whether the speech conveys a serious expression of an intent to inflict harm. These factors include such items as whether the threat was conditional, whether it was communicated directly to the victim, whether the victim had reason to believe the speaker had a propensity to engage in violence, and how the listeners reacted to the speech.

Here, unlike in *Watts*, the threats are mostly unconditional. As noted, moreover, Officer Spangler immediately notified other police personnel, reflecting that he did not see it as mere satire or social commentary. The victims developed substantial concern for their safety and took measures—such as separating from the police force earlier than planned, moving to a new residence, or obtaining a security detail—to avoid becoming victims of violence. Also, the police department allocated additional resources to Zone 5 to prevent the threatened violence from occurring.

Separately, although the song was not communicated directly to the police and a third party uploaded it to YouTube, this factor does not negate an intent on Appellant's part that the song be heard by the officers. Appellant's and Beasley's prior course of conduct suggested they either intended for the song to be published or knew publication was inevitable. Further, after the song was uploaded to YouTube, it was linked to the "Beaz Mooga" Facebook page. There was no suggestion the song was merely in jest or that it should not be conveyed to the police.

As for whether the officers had reason to believe Appellant might engage in violence, it is relevant that they were aware a loaded firearm had been found near Appellant's feet in the automobile he was driving. Although Appellant was ultimately acquitted of the firearm charges stemming from the weapon's presence in the car, the video was posted to the Internet and seen by the officers well before the trial occurred.

We acknowledge that, as Appellant argue[s], rap music often contains violent imagery that is not necessarily meant to represent an intention on the singer's part to carry through with the actions described. This follows from the fact that music is a form of art and "[a]rtists frequently adopt mythical or real-life characters as alter egos or fictional personas." We do not overlook the unique history and social environment from which rap arose, the fact that rap artists (like many other artists) may adopt a stage persona that is distinct from who they are as an individual, or the fact that musical works of various types may include violent references, fictitious or fanciful descriptions of criminal conduct, boasting, exaggeration, and expressions of hatred, bitterness, or a desire for revenge. In many instances, lyrics along such lines cannot reasonably be understood as a sincere expression of the singer's intent to engage in real-world violence.

Nor do we discount that First Amendment freedoms need "breathing space to survive." . . .

Even if we accept that most "gangsta rap" works solely constitute "art, poetry, and fantasy," the content and surrounding circumstances of the song in issue do not demonstrate an adherence to the distinction between singer and stage persona sufficient to ameliorate its threatening nature. Although some attributes of the song arguably reflect the difference—such as the use of Appellant's stage name "Mayhem Mal," references to an apparently fanciful "ghetto superstar committee," and sophisticated production effects—these features are contradicted by the many factors already discussed tending to suggest the singers are in earnest. Most saliently, the calling out by name of two officers involved in Appellant's criminal cases who were scheduled to testify against him, and the clear expression repeated in various ways that these officers are being selectively targeted in response to prior interactions with Appellant, stand in conflict with the contention that the song was meant to be understood as fiction.

Holding

All of this leads us to conclude that the trial court's finding as to Appellant's intent was supported by competent evidence. More generally, if this Court were to rule that Appellant's decision to use a stage persona and couch his threatening speech as "gangsta rap" categorically prevented the song from being construed as an expression of a genuine intent to inflict harm, we would in effect be interpreting the Constitution to provide blanket protection for threats, however severe, so long as they are expressed within that musical style. We are not aware of any First Amendment doctrine that insulates an entire genre of communication from a legislative determination that certain types of harms should be regulated in the interest of public safety, health, and welfare. . . . Pennsylvania's legislative body has made such a policy judgment by enacting statutes which prohibit the making of terroristic threats.

Questions for Discussion

1. What was the legal test used by the Pennsylvania Supreme Court to convict Jamal Knox of a criminal threat?
2. Identify the central facts relied on by the court to establish that the lyrics were intended as a criminal threat. Even if Knox did not view the video as a criminal threat, should he have known the video would be considered a criminal threat by the police officer?
3. The U.S. Supreme Court declined to review this case despite the claim that Mayhem Mal was engaged in artistic expression. A number of hip-hop artists filed a brief with the Supreme Court noting that, while other musical forms have lyrics that are equally violent, they are accepted as fantasy rather than viewed as true threats. What aspects of the rap video support the argument that the video was meant as artistic expression rather than a criminal threat?

4. Mayem Mal was sentenced to two years in prison based on making a criminal threat. Was the sentence justified?
5. In various instances, rap lyrics have been introduced at trial as criminal confessions to establish a defendant's guilt. Do you believe these lyrics may be relevant to establish an individual's guilt? Should it matter that a defendant expressed violent ideas in a song rather than in a direct statement?

Cases and Comments

1. ***Facebook.*** In 2015, in *Elonis v. United States*, Anthony Douglas Elonis adopted the online name "Tone Dougie" and posted vicious and violent rap lyrics on Facebook against a former employer, his soon-to-be ex-wife, a kindergarten class, and an FBI agent. Elonis was convicted under a federal statute that prohibits the transmission in interstate commerce of any "threat . . . to injure another." The Supreme Court held that Elonis could not be convicted based solely on the reaction of a reasonable person to his posts and that the government was required to establish a criminal intent. Elonis claimed he was acting under his online persona and lacked a specific intent to threaten individuals. The Supreme Court asked the lower court to decide whether it was sufficient for a conviction under the federal law that Elonis may have been reckless. See *Elonis v. United States*, 575 U.S. 723 (2015).

   The Court answered this question in *Counterman v. Colorado*. Billy Raymond Counterman over the course of several years sent online messages to singer-songwriter Coles Whalen, which she considered "weird" and "creepy." The messages became increasingly threatening, and as a result Whalen's mental health deteriorated, prompting her to cancel concerts, purchase a firearm, and leave Colorado. The Supreme Court by a vote of 7–2 held that a "true threat" was established if Counterman "consciously disregarded a substantial risk that his communications would be viewed as threatening violence." In other words, a "true threat" may be established by a reckless intent and does not in "every instance" require the government to establish that an individual acted with the purpose of frightening a person or knowing their message would cause their target to be fearful. See *Counterman v. Colorado*, 600 U.S. 66 (2023).
2. ***Flag Burning.*** In *Texas v. Johnson*, the U.S. Supreme Court addressed the constitutionality of Texas Penal Code Annotated section 42.09 (1989), which punished the intentional or knowing desecration of a "state or national flag." Desecration under the statute was interpreted as to "efface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."

   Gregory Lee Johnson participated in a political demonstration during the Republican National Convention in Dallas in 1984. The purpose was to protest the

policies of the Reagan administration and certain Dallas-based corporations and to dramatize the consequences of nuclear war. The demonstrators gathered in front of Dallas City Hall, where Johnson unfurled an American flag, doused the flag with kerosene, and set it on fire. The demonstrators chanted, "America, the red, white, and blue, we spit on you," as the flag burned. None of the participants were injured or threatened retribution.

Justice Brennan observed that the Supreme Court had recognized that conduct may be protected under the First Amendment where there is an intent to convey a particularized message and there is a strong likelihood that this message will be understood by observers. Justice Brennan observed that the circumstances surrounding Johnson's burning of the flag resulted in his message being "both intentional and overwhelmingly apparent." In those instances in which an act contains both communicative and noncommunicative elements, the standard in judging the constitutionality of governmental regulation of *symbolic speech* is whether the government has a substantial interest in limiting the nonspeech element (the burning).

The Supreme Court rejected Texas's argument that the statute was a justified effort to preserve the flag as a symbol of nationhood and national unity. This would permit Texas to "prescribe what is orthodox by saying that one may burn the flag . . . only if one does not endanger the flag's representation of nationhood and national unity." In the view of the majority, Johnson was being unconstitutionally punished based on the ideas he communicated when he burned the flag. See *Texas v. Johnson*, 491 U.S. 397 (1989).

In 1989, the U.S. Congress adopted the Flag Protection Act, 19 U.S.C. § 700. The act provided that anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" a U.S. flag shall be subject to both a fine and imprisonment for not more than one year. This law exempted the disposal of a worn or soiled flag. The U.S. government asserted an interest in preserving the flag as "emblematic of the Nation as a sovereign entity." In *United States v. Eichman*, Justice Brennan failed to find that this law was significantly different from the Texas statute in *Johnson* and ruled that the law "suppresses expression out of concern for its likely communicative impact." Justice Stevens, in a dissent joined by Justices Rehnquist, White, and O'Connor, argued that the government may protect the symbolic value of the flag and that this does not interfere with speakers' freedom to express their ideas by other means. He noted that various types of expression are subject to regulation. For example, an individual would not be free to draw attention to a cause through a "gigantic fireworks display or a parade of nude models in a public park." See *United States v. Eichman*, 496 U.S. 310 (1990).

3. ***Picketing Military Funerals.*** The American embrace of freedom of speech was tested in the 2011 case of *Snyder v. Phelps*, where the U.S. Supreme Court overturned a judgment against the Westboro Baptist Church for the civil tort of the intentional infliction of emotional distress. The case was brought by Al Snyder, the

father of Lance Corporal Matthew Snyder who had been killed in the line of duty in Iraq.

Members of the Westboro Baptist Church picketed Lance Corporal Snyder's funeral on public land adjacent to the burial site. The picketing was designed to call attention to the belief of church members that the United States had angered God by tolerating homosexuality and that God had retaliated by allowing the killing of American soldiers. The church had picketed more than 600 military funerals over the last six years. Chief Justice Roberts, writing for the eight-judge majority, overturned the verdict against Westboro Baptist Church, reasoning that the members of the congregation had "addressed matters of public import on public property, in a peaceful manner, in full compliance with the guidance of local officials. The speech . . . did not itself disrupt that funeral, and Westboro's choice to conduct its picketing at that time and place did not alter the nature of its speech.

"Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course— to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case." See *Snyder v. Phelps*, 562 U.S. 443 (2011).

In reaction to the picketing of military funerals, the U.S. Congress passed the Respect for America's Fallen Heroes Act (RAFHA). Roughly 29 states have adopted antipicketing statutes or have broadened their laws to impose restrictions on the picketing of funerals. These laws regulate the time, place, and manner of demonstrations at funerals and do not restrict the content of the demonstration.

4. ***Sex Offenders and Social Media***. In 2017's *Packingham v. North Carolina*, the issue before the Supreme Court was whether the North Carolina statute impermissibly restricts lawful speech in violation of the First Amendment. In 2002, Lester Gerard Packingham—then a 21-year-old college student—had sex with a 13-year-old female. He pled guilty to taking indecent liberties with a child, and he was required to register as a sex offender. As a registered sex offender, under North Carolina law, Packingham was barred from gaining access to commercial social networking sites.

   Justice Kennedy, writing for the Supreme Court majority, held that the North Carolina law was unconstitutional that made it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." The law did not extend to websites that "[p]rovid[e] only one of the following services: photo-sharing, electronic mail, instant messenger, or chat room or message board platform." The law also did not encompass websites that have as their "primary purpose the facilitation of commercial transactions involving

goods or services between [their] members or visitors." The North Carolina statute applied to roughly 20,000 individuals, and an estimated 1,000 individuals had thus far been prosecuted for violating the law.

Justice Kennedy noted that social media is the most important place for the exchange of ideas and information in modern society. "North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge." Seven in 10 American adults use at least one internet social networking service. One of the most popular of these sites is Facebook, the site used by Packingham, which was the basis of his criminal conviction. Justice Kennedy clarified that North Carolina would be justified in enacting a narrowly drafted law that prohibited sex offenders from engaging in conduct that may be the first step in a sexual crime, like contacting a minor or using a website to gather information regarding a minor. See *Packingham v. North Carolina*, 582 U.S. ___, 137 S. Ct. 1730 (2017).

You Decide 2.3

Lori MacPhail, a peace officer in Chico, California, assigned to a high school, observed Ryan D. with some other students off campus during school hours. She conducted a pat-down, discovered that Ryan possessed marijuana, and issued him a citation.

Roughly a month later, Ryan turned in an art project for a painting class at the high school. The projects generally are displayed in the classroom for as long as two weeks. Ryan's painting pictured an individual who appeared to be a juvenile wearing a green hooded sweatshirt discharging a handgun at the back of the head of a female peace officer with badge No. 67 (Officer MacPhail's number) and the initials CPD (Chico Police Department). The officer had blood on her hair, and pieces of her flesh and face were blown away. An art teacher saw the painting and found it to be "disturbing" and "scary," and an administrator at the school informed Officer MacPhail.

An assistant principal confronted Ryan, who stated the picture depicted his "anger at police officers" and that he was angry with MacPhail and agreed that it was "reasonable to expect that Officer MacPhail would eventually see the picture." Ryan was charged with a violation of Section 422 and brought before juvenile court.

How would you rule? See *In re Ryan D.*, 123 Cal. Rptr. 2d 193 (Cal. Ct. App. 2002).

Privacy

2.6 Know the constitutional basis and protections provided by the right to privacy

The idea that there should be a legal right to **privacy** was first expressed in an 1890 article in the *Harvard Law Review* written by Samuel D. Warren and Louis D. Brandeis, who was later appointed to the U.S. Supreme Court. The two authors argued that the threats to privacy associated with the dawning of the 20th century could be combated through recognition of a civil action (legal suit for damages) against individuals who intrude into others' personal affairs.[50]

In 1905, the Supreme Court of Georgia became the first court to recognize an individual's right to privacy when it ruled that the New England Life Insurance Company illegally used the image of artist Paolo Pavesich in an advertisement that falsely claimed that Pavesich endorsed the company.[51] This decision served as a precedent for the recognition of privacy by courts in other states.

The Constitutional Right to Privacy

A constitutional right to privacy was first recognized in *Griswold v. Connecticut* in 1965. The U.S. Supreme Court proclaimed that although privacy was not explicitly mentioned in the U.S. Constitution, it was implicitly incorporated into the text. The case arose when Griswold, along with Professor Buxton of Yale Medical School, provided advice to married couples on the prevention of procreation through contraceptives. Griswold was convicted of being an accessory to the violation of a Connecticut law that provided that any person who uses a contraceptive shall be fined not less than $50 or imprisoned not less than 60 days or more than one year or be both fined and imprisoned.[52]

Justice William Douglas noted that although the right to privacy was not explicitly set forth in the Constitution, this right was "created by several fundamental constitutional guarantees." According to Justice Douglas, these fundamental rights create a "zone of privacy" for individuals. In a famous phrase, Justice Douglas noted that the various provisions of the Bill of Rights possess "penumbras, formed by emanations from those guarantees . . . [that] create zones of privacy." Justice Douglas cited a number of constitutional provisions that together create the right to privacy.

The right of association contained in the penumbra of the First Amendment is one; the Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment's Self-Incrimination Clause "enables the citizen to create a zone of privacy that Government may not force him to surrender to his detriment." The Ninth Amendment provides that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

In contrast, Justice Arthur Goldberg argued that privacy was found within the Ninth Amendment, and Justice John Marshall Harlan contended that privacy is a fundamental aspect of individual "liberty" within the Fourteenth Amendment.

We nevertheless should take note of Justice Hugo Black's dissent in *Griswold* questioning whether the Constitution provides a right to privacy, a view that continues to attract significant support. Justice Black observed that "I like my privacy as well as the next one, but I am

nevertheless compelled to admit that government has a right to invade [my privacy] unless prohibited by some specific constitutional provision."

The right to privacy recognized in *Griswold* guarantees that we are free to make the day-to-day decisions that define our unique personality: what we eat, read, and watch; where we live and how we spend our time, dress, and act; and with whom we associate and work. In a totalitarian society, these choices are made by the government, but in the U.S. democracy, these choices are made by the individual. The courts have held that the right to privacy protects several core concerns:

- *Sanctity of the Home.* Freedom of the home and other personal spaces from arbitrary governmental intrusion
- *Intimate Activities.* Freedom to make choices concerning personal lifestyle and an individual's body
- *Information.* The right to prevent the collection and disclosure of intimate or incriminating information to private industry, the public, and governmental authorities
- *Public Portrayal.* The right to prevent your picture or endorsement from being used in an advertisement without permission or to prevent the details of your life from being falsely portrayed in the media[53]

In short, as noted by Justice Brandeis, "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They conferred as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[54]

There are several key Supreme Court decisions on privacy.

In *Eisenstadt v. Baird*, in 1972, the Supreme Court extended *Griswold* and ruled that a Massachusetts statute that punished individuals who provided contraceptives to unmarried individuals violated the right to privacy. Justice William Brennan wrote that "if the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[55]

The Supreme Court, in *Carey v. Population Services International*, next declared a New York law unconstitutional that made it a crime to provide contraceptives to minors and for anyone other than a licensed pharmacist to distribute contraceptives to persons over 15. Justice Brennan noted that this imposed a significant burden on access to contraceptives and impeded the "decision whether or not to beget or bear a child" that was at the "very heart" of the "right to privacy."[56]

In 1973, in *Roe v. Wade*, the U.S. Supreme Court ruled unconstitutional a Texas statute that made it a crime to "procure an abortion." Justice Harry Blackmun wrote that the "right to privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[57] The Supreme Court later ruled that Pennsylvania's requirement that a woman obtain her husband's consent unduly interfered with her access to an abortion.[58]

In 2022, in *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court by a vote of 6–3 overturned *Roe v. Wade*. Justice Samuel Alito wrote that the Due Process Clause of the Fourteenth Amendment "guarantees some rights that are not mentioned in the Constitution, but any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" The "inescapable conclusion" according to Justice Alito is that the right to abortion has not been historically accepted within the United States. As a result, the U.S. Constitution does not provide or protect for a right to an abortion, and access to an abortion is a matter to be decided by the law of each state.[59]

The zone of privacy also was extended to an individual's intellectual life in the home in 1969 in *Stanley v. Georgia*. A search of Stanley's home for bookmaking paraphernalia led to the seizure of three reels of film portraying obscene scenes. Justice Thurgood Marshall concluded that "whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."[60]

You Decide 2.4

The plaintiffs allege that the Florida law requiring motorcyclists to wear helmets violates their right to privacy under the U.S. Constitution. Are they correct? See *Picou v. Gillum*, 874 F.2d 1519 (11th Cir. 1989).

The Constitutional Right to Privacy and Same-Sex Relations Between Consenting Adults in the Home

Privacy, however appealing, lacks a clear meaning. Precisely what activities are within the right of privacy in the home? In answering this question, we must balance the freedom to be let alone against the need for law and order. The issue of sodomy confronted judges with the question of whether laws upholding sexual morality must yield to the demands of sexual freedom within the home.

In 1986, in *Bowers v. Hardwick*, the Supreme Court affirmed Hardwick's sodomy conviction under a Georgia statute. Justice White failed to find a fundamental right deeply rooted in the nation's history and tradition to engage in acts of consensual sodomy, even when committed in the privacy of the home. He pointed out that sodomy was prohibited by all 13 colonies at the time the Constitution was ratified, and 25 states and the District of Columbia continued to criminally condemn this conduct.[61]

Bowers v. Hardwick was reconsidered in 2003, in *Lawrence v. Texas*. In *Lawrence*, the Supreme Court called in doubt the historical analysis in *Bowers* and noted that only 13 states currently prohibited sodomy and that, in these states, there is a "pattern of nonenforcement with respect to consenting adults in private." The Court held that the right to privacy includes the fundamental right of two consenting adults to engage in sodomy within the privacy of the home.[62]

Cases and Comments

1. ***Voyeurism.*** On April 26, 1999, Sean Glas used a camera to take pictures underneath the skirts of two women working at the Valley Mall in Union Gap, Washington. In one instance, Inez Mosier was working in the women's department at Sears and saw a light flash out of the corner of her eye. She turned around to discover Glas squatting on the floor a few feet behind her. She noticed a small, silver camera in his hand. The police later confiscated the film and discovered photos of the undergarments of Mosier and another woman. Richard Sorrells, in a separate case, was apprehended after using a video camera to film the undergarments of women and young girls at the Bite of Seattle food festival at the Seattle Center. Both Glas and Sorrells were convicted of voyeurism for taking photos underneath women's skirts ("upskirt" voyeurism). The Washington voyeurism statute (Wash. Rev. Code § 9A.44.115(2)(a)) reads,

   > *A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films: another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy.*

   The statute defines a place in which a person would have a reasonable expectation of privacy as a place where a "reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being filmed by another," or as a "place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance." The Washington Supreme Court interpreted a location where an individual may "disrobe in privacy" to include the bedroom, bathroom, dressing room, or tanning salon. A location in which an individual may reasonably expect to be safe from intrusion or surveillance includes the other rooms in an individual's home as well as locations where someone would not normally disrobe, but would not expect others to intrude, such as a private suite or office.

   The court acquitted the two defendants, ruling that although Glas and Sorrells engaged in "disgusting and reprehensible behavior," Washington's voyeurism statute "does not apply to actions taken in purely public places and hence does not prohibit the 'upskirt' photographs" taken by Glas and Sorrells. Do you agree that the women had no expectation of privacy? See *State v. Glas*, 54 P.3d 147 (Wash. 2002).

   In a Minnesota case, Tony O. Morris carried a bag into a department store and positioned a hidden camera under the skirt of a salesclerk and photographed her underwear. A Minnesota appellate court held that Morris had unlawfully violated the salesclerk's "reasonable expectation of privacy" by intentionally photographing the "intimate parts of her body." See *State v. Morris*, 644 N.W.2d 114 (Minn. App. 2002).

2. ***Cell-Site Location.*** In *Carpenter v. United States*, Chief Justice Roberts in a 5–4 decision held that Carpenter possessed an expectation of privacy under the Fourth Amendment in his historic cell-site location information (CSLI). The government

accordingly is required to meet a probable case warrant standard to "access historical cell phone records [from a private wireless carrier] that provides a comprehensive chronicle of the user's past movements." Justice Roberts in his majority decision reasoned that individuals retain an expectation of privacy in CSLI because the information is "unique" in the detail, nature, amount of information revealed, and historical character. The information cannot be said to be voluntarily turned over to an internet provider because individuals' phones are subjected to continuous monitoring without any affirmative act on their part. Justice Roberts concluded that in "light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection." See *Carpenter v. United States*, 585 U.S. ___ (2018). How does CSLI differ from continuous GPS monitoring or surveillance using facial recognition technology?

The Right to Bear Arms

2.7 Understand the Second Amendment right to keep and bear arms

The American people historically have considered the handgun to be the quintessential self-defense weapon. Handguns are easily accessible in an emergency and require only a modest degree of physical strength to use and cannot easily be wrestled away by an attacker. In the past several decades, various cities and suburbs have placed restrictions on the right of Americans to possess handguns, even for self-defense. The constitutionality of these limitations on the possession of handguns was addressed by two recent U.S. Supreme Court decisions.

The Second Amendment to the U.S. Constitution provides that "a well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

The meaning of the Second Amendment has been the topic of considerable debate. Courts historically focused on the first clause of the amendment that recognizes the importance of a "well regulated Militia" and held that the amendment protects the right of individuals to possess arms in conjunction with service in an organized government militia. In 1939 in *United States v. Miller*, the U.S. Supreme Court upheld the constitutionality of a federal law prohibiting the interstate shipment of sawed-off shotguns, reasoning that the Second Amendment protections are limited to gun ownership that has "some reasonable relationship to the preservation or efficiency of a well regulated militia."[63]

Gun rights activists contended that the Second Amendment protection of the "right of the people to keep and bear Arms" is not limited to members of the militia. They argued that the

Second Amendment also protects individuals' right to possess firearms "unconnected" with service in a militia. The Founding Fathers, according to gun activists, viewed gun ownership as essential to the preservation of individual liberty. A state or federal government could abolish the state national guard and leave citizens unarmed and vulnerable. The framers concluded that the best way to safeguard and to protect the people was to guarantee individuals' right to bear arms.

In 2008, in *District of Columbia v. Heller*, the U.S. Supreme Court adopted the view of gun rights activists. The Court majority held that the Second Amendment protects the right of individuals to possess firearms.[64] Dick Heller, a special police officer, was authorized to carry a handgun while on duty at the federal courthouse in the District of Columbia (D.C.) and applied for a registration certificate from the D.C. government for a handgun that he planned to keep at home for self-defense. A D.C. ordinance prohibited the possession of handguns and declared that it was a crime to carry an unregistered firearm. A separate portion of the D.C. ordinance authorized the chief of police to issue licenses for one-year periods. Lawfully registered handguns were required to be kept "unloaded and dissembled or bound by a trigger lock or similar device" when not "located" in a place of business or used for lawful recreational activities.

Justice Antonin Scalia, writing for a five-judge majority, held that the D.C. ordinance was unconstitutional because the regulations interfered with the ability of law-abiding citizens to use a firearm for self-defense in the home, the "core lawful purpose" of the right to bear arms. "Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct."

The Court decision noted that while D.C. could not constitutionally ban the possession of firearms in the home, the right to bear arms is subject to limitations. The Court did not limit the ability of states to prohibit possession of firearms by felons and the mentally challenged, to prohibit the carrying of firearms in "sensitive places" such as schools and government buildings, to regulate the commercial sale of arms, to ban the possession of dangerous and unusual weapons, or to require the safe storage of weapons.

Heller, although important for defining the meaning of the Second Amendment, applied only to D.C. and to other federal jurisdictions. In 2010, in *McDonald v. Chicago*, residents of Chicago and the Chicago suburb of Oak Park, Illinois, challenged local ordinances that were almost identical to the law that the Court struck down as unconstitutional in the federal enclave of Washington, D.C. The Supreme Court addressed whether the Second Amendment right of individuals to bear arms extended to state as well as to the federal government.[65]

The Fourteenth Amendment had been adopted following the Civil War to ensure former enslaved African Americans' equal rights, and the Supreme Court in a series of cases had ruled that most of the Bill of Rights was applicable to the states and protected individuals against the state as well as the federal government. The Second Amendment was one of the few amendments in the Bill of Rights that had not been incorporated into the Fourteenth Amendment and made applicable to the states. The result was that, even after *Heller*, the right to possess firearms was not considered a fundamental right protected by the Fourteenth Amendment, and state governments were free to restrict or even to prohibit the possession of firearms.

The Fourteenth Amendment prohibits a state from denying an individual life, liberty, or property without due process of law. The question in *McDonald v. Chicago* was whether the right to keep and to bear arms was a liberty interest protected under the Due Process Clause of the Fourteenth Amendment. Justice Samuel Alito wrote that self-defense is a "basic right, recognized by many legal systems from ancient times to the present day." He concluded that the Second Amendment right to possess firearms in the home for the purpose of self-defense is incorporated into the Fourteenth Amendment and is applicable to the states. The right to keep and bear arms for purposes of self-defense is "among the fundamental rights necessary to our system of ordered liberty," which is "deeply rooted in this Nation's history and tradition." A number of state constitutions already protected the right to own and to carry arms. The incorporation of the Second Amendment into the Fourteenth Amendment clearly established that the right to bear arms for the purpose of self-defense is a fundamental right that may not be infringed by state governments.

In 2016, the U.S. Supreme Court in *Caetano v. Massachusetts* held that the Second Amendment protects Tasers and held that the Second Amendment is not limited to weapons in existence at the time the Second Amendment was drafted and that the amendment's protection is not limited to "weapons of war."[66]

The precise meaning of the decisions in *Heller* and *McDonald* will not be clear until various state gun control laws are reviewed by the courts. There have been over 1,000 state and federal court decisions addressing the Second Amendment since the decision in *Heller.* State and federal courts in accordance with *Heller* have upheld laws prohibiting the possession of firearms by juveniles, by undocumented individuals, by "dangerous persons" including individuals convicted of felonies and of domestic violence, and by individuals who have been involuntarily committed to mental institutions. Laws also have been held constitutional that prohibit individuals from possessing firearms in "sensitive places" such as schools and government buildings; and courts also have affirmed the right of private institutions such as churches and businesses to prohibit the possession of firearms on their property. In addition, laws have been affirmed that prohibit the possession of machine guns, assault weapons, and large-capacity ammunition magazines. A number of states require that an applicant for a handgun permit demonstrate competence in handling firearms, on the grounds that people who are not well trained in the use of firearms are a menace to themselves and to others, and/or require a waiting period before completing the sale of a firearm. Other statutes require that individuals in homes with children take precautions to prevent juveniles from gaining access to the weapons. Several states impose taxes on the commercial sale of firearms and ammunition.

New York possessed one of the most restrictive laws and limited possession of firearms outside the home to individuals with a "proper cause." A "proper cause" included individuals in specific professions, those in specific locations such as a bank guard, and those desiring a firearm for target practice or hunting or self-defense. Individuals desiring a weapon for self-defense were required to demonstrate a "special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." In other words, only individuals with a real and approved reason to possess handguns were authorized to bring a firearm into the "public sphere."[67]

In 2020, in *New York State Rifle and Pistol Association v. New York City*, the U.S. Supreme Court held that a legal challenge to a New York City law was moot because there was no remaining issue for the Court to decide at the time. The New York City law provided that lawful gun owners could only transport their pistol outside the home to one of the seven shooting ranges within the city. New York City in anticipation of the Supreme Court review amended the law to allow individuals to transport a firearm to a second home or to a gun range outside the city. Justice Samuel Alito in dissent argued that this was not a "closed case" because there were remaining restrictions in the revised New York City law that needed to be addressed. The revised regulations, for example, required handgun owners to directly travel to their destination, required official written permission to take a weapon to a gunsmith, and did not authorize transporting a weapon to a summer rental home.[68]

In 2022, in *New York State Rifle and Pistol Association v. Bruen*, the U.S. Supreme Court in a 6–3 decision held unconstitutional the requirement in New York law that anyone who wanted to carry a concealed handgun outside the home demonstrate a "proper cause" for the license. Justice Clarence Thomas in his majority opinion held that there was no "historical tradition" that law-abiding citizens demonstrate "the kind of special need for self-defense required by New York law to carry a gun in public."

The Second Amendment according to the Court majority did not distinguish between gun rights in the home and gun rights in public. In fact, the right to carry a handgun in public for self-defense fell squarely within the conduct protected by the Second Amendment. Justice Thomas in his opinion recognized that there was historical support for restricting firearms in "sensitive places" like courthouses and polling places.[69]

In *United States v. Rahimi*, the U.S. Supreme Court affirmed the constitutionality under the Second Amendment of a federal law that prohibits an individual subject to a domestic violence restraining order from possessing a firearm if the order includes a finding that they pose a "credible threat to the physical safety of [an] intimate partner," or a child of the partner or individual. Zackey Rahimi assaulted his domestic partner C.M. and fired at her as she fled. He later called C.M. and warned her that he would shoot her if she reported the incident. In May 2020, a judicial restraining order included a finding that Rahimi had committed "family violence" and posed a credible threat to the physical safety of C.M. and their child. The order prohibited Rahimi from threatening C.M. and suspended Rahimi's gun license for two years. Three months later, Rahimi violated the restraining order by approaching C.M.'s home at night and began contacting her on social media. In November, Rahimi threatened a different woman with a gun, and while he was under arrest for that assault, the Texas police identified him as a suspect in five additional shootings. The police obtained a warrant to search Rahimi's home and seized a pistol, a rifle, and ammunition. Rahimi subsequently was indicted under a federal law that made it a crime to possess a firearm while subject to a domestic violence restraining order. He pled guilty and was sentenced to six years in prison.[70]

Rahimi filed an appeal and argued that the restraining order that suspended him from possessing a firearm violated his Second Amendment right to keep and bear arms. Chief Justice John Roberts held that the appropriate "analysis involves considering whether the changed regulation is consistent with the [broad] principles that underlie our regulatory tradition." After

reviewing the history of gun regulations, Justice Roberts held that "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threatened physical harm to others from misusing firearms. . . . [W]e conclude only this: An individual found by a court to pose credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment."

In 2024, the Court in a 6–3 decision held that the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) went beyond its administrative authority when it prohibited bump stocks. Congress, in the 1934 National Firearms Act, outlawed machine guns, and the Gun Control Act of 1968 amended the act to include parts that can convert a weapon into a machine gun. The ban on bump stocks was enacted by the ATF following a deadly shooting in Las Vegas in 2017 in which the shooter using assault rifles equipped with bump stocks killed 60 people and wounded hundreds of others. Justice Clarence Thomas writing for the majority held that the ATF improperly prohibited bump stocks as a device that transforms a weapon into a machine gun. He reasoned that a semiautomatic rifle equipped with a bump stock is not a machine gun under the National Firearms Act "because it cannot fire more than one shot 'by a single function of the trigger.'" Fifteen states and the District of Columbia have laws regulating bump stocks, which remain in effect.[71]

In 2025, in *Bondi v. VanDerStock* the U.S. Supreme Court by a vote of 7–2 upheld the authority of the ATF to regulate weapons parts kits that are "designed to or may readily be converted to expel a projectile." The ATF regulations required vendors and gun makers to be licensed to sell the kits, mandated serial numbers on the components so the guns could be tracked, and required background checks for would-be purchasers. Gun rights groups argued that the government lacked authority to regulate the gun kits because they did not meet the definition of firearms under the Gun Control Act of 1968. The Court majority reasoned that the kits were readily converted into a functioning weapon. There was a recognition that there was a compelling need to regulate kits because the use of the gun components and kits in crimes had increased to an alarming extent in the six years before the regulations were adopted in 2022.[72]

State laws on open carry of firearms are an area of continued disagreement. The laws on open carry are complicated.

According to the Giffords Law Center, three states (California, Connecticut, and Illinois), as well as the District of Columbia, generally prohibit the open carry of handguns in public places. Thirty-one states allow the open carry of a handgun without any license or permit, although in some jurisdictions the gun is required to be unloaded. The remaining states require some form of fairly easily obtained license or permit in order to openly carry a handgun.

Four states (California, Connecticut, Florida, and Illinois), as well as the District of Columbia, in general prohibit the open carry of long guns (rifles and shotguns). In the 46 remaining states, the open carry of a long gun is legal, although six of these states impose regulations on the carrying of long guns (Massachusetts, Minnesota, New Jersey, Pennsylvania, Tennessee, and Virginia).

Federal law does not restrict the open carry of firearms in public. Specific rules, however, may apply to various properties owned or operated by the federal government.[73]

Another area of continued controversy is assault rifles, which are prohibited in roughly nine states and the District of Columbia.

In June 2022, President Joe Biden signed into law the Bipartisan Safer Communities Act, which provided funding for states to adopt red flag laws that allow a court to order the removal of guns from people considered an extreme risk to themselves or to others as well as increasing funding for mental health, drug services, and school safety. The legislation also expanded background checks on juveniles and extended the prohibition on individuals convicted of domestic violence from possessing firearms to include serious dating partners. Criminal laws on the trafficking of firearms and straw purchases also were strengthened.

You Decide 2.5

George Mason University (GMU) prohibited the possession or carrying of any weapon by any person except a police officer on university property in academic buildings, administrative office buildings, student residence buildings, or dining facilities or while attending sporting, entertainment, or educational events. Rudolph DiGiacinto was not a student at GMU, although he made use of university resources, including the libraries. He argued that his inability to carry a firearm onto university property violated his Second Amendment right to carry a firearm. What is your view? Note that eight states—either as a result of state law or as a result of judicial decision—have "Campus Carry" laws that authorize individuals to carry concealed firearms on some or all areas of college and university campuses. Twenty-one states, in effect, leave this decision to the governing bodies of colleges and universities in the state or leave this decision to individual campuses. See *DiGiacinto v. Rector and Visitors of George Mason University*, 704 S.E.2d 365 (Va. 2011).

Chapter Summary

The United States is a constitutional democracy. The government's power to enact laws is constrained by the Constitution. These limits are intended to safeguard the individual against the passions of the majority and the tyrannical tendencies of government. The restrictions on government also are designed to maximize individual freedom, which is the foundation of an energetic and creative society and dynamic economy. Individual freedom, of course, must be balanced against the need for social order and stability. We all have been reminded that "you cannot yell 'fire' in a crowded theater." This chapter challenges you to locate the proper balances among freedom, order, and stability.

The rule of legality requires that individuals receive notice of prohibited acts. The ability to live your life without fear of unpredictable criminal punishment is fundamental to a free society. The rule of legality provides the philosophical basis for the constitutional prohibition on bills of attainder and ex post facto laws. Bills of attainder prohibit the legislative punishment of individuals without trial. Ex post facto laws prevent the government from criminally punishing acts that were innocent when committed. The constitutional provision for due process ensures that individuals are informed of acts that are criminally condemned and that definite

standards are established that limit the discretion of the police. An additional restriction on criminal statutes is the Equal Protection Clause. This prevents the government from creating classifications that unjustifiably disadvantage or discriminate against individuals; a particularly heavy burden is imposed on the government to justify distinctions based on race or ethnicity. Classifications on gender are subject to intermediate scrutiny. Other differentiations are required only to meet a rational basis test.

Freedom of expression is of vital importance in American democracy, and the Constitution protects speech that some may view as offensive and disruptive. Courts may limit speech only in isolated situations that threaten social harm and instability. The right to privacy protects individuals from governmental intrusion into the intimate aspects of life and creates "space" for individuality and social diversity to flourish. The U.S. Supreme Court has held that the Second Amendment protects the right of individuals to possess handguns for the purpose of self-defense in the home. Federal appellate courts have extended this right to bear arms beyond the home in certain circumstances. The full extent of the Second Amendment "right to bear arms" has yet to be determined.

This chapter provided you with the constitutional foundation of American criminal law. Keep this material in mind as you read about criminal offenses and defenses in the remainder of the textbook. We will look at the Eighth Amendment prohibition on cruel and unusual punishment in Chapter 3.

Chapter Review Questions

1. Explain the philosophy underlying the United States' constitutional democracy. What are the reasons for limiting the powers of state and federal government to enact criminal legislation? Are there costs as well as benefits in restricting governmental powers?
2. Define the rule of legality. What is the reason for this rule?
3. Define and compare bills of attainder and ex post facto laws. List the various types of ex post facto laws. What is the reason that the U.S. Constitution prohibits retroactive legislation?
4. Explain void for vagueness and the significance of this concept.
5. Why does the U.S. Constitution protect freedom of expression? Is this freedom subject to any limitations?
6. What is the difference between the "rational basis," "intermediate scrutiny," and "strict scrutiny" tests under the Equal Protection Clause?
7. Where is the right to privacy found in the U.S. Constitution? What activities are protected within this right?
8. Write a short essay on the constitutional restrictions on the drafting and enforcement of criminal statutes.
9. As a final exercise, consider life in a country that does not provide safeguards for civil liberties. How would your life be changed?

Legal Terminology

Bill of Rights
bills of attainder
constitutional democracy
equal protection
ex post facto laws
fighting words
First Amendment
hate speech
incitement to violent action
incorporation theory
intermediate level of scrutiny
libel
minimum level of scrutiny test
nullum crimen sine lege, nulla poena sine lege
overbreadth
privacy
rational basis test
rule of legality
strict scrutiny test
true threat
void for vagueness