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CONSTITUTIONAL LIMITATIONS

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 at the end of the chapter on page 64.

Was the Defendant Discriminated Against Based on Gender?

Gary Simmonds used unlawful violence on [his wife] Tracia Simmonds with the intent to injure her and therefore was guilty of aggravated assault and battery. . . . Under the Virgin Islands Code . . . [a]ssault and battery involves the use of "unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used. . . ." An assault or battery "unattended with circumstances of aggravation" is simple assault and battery. Assault and battery becomes aggravated if [in part it is] committed . . . [by] an adult male, upon the person of a female or child, or being an adult female, upon the person of a child. . . . Simmonds challenges the constitutionality of the . . . aggravated assault and battery statute as denying equal protection of the law to males based on their gender. (*People of the Virgin Islands v. Simmonds*, 58 V.I. 3 [Super. Ct. 2012])

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

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

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* laws⁷:

- Every law that makes an action done before the passing of the law and which was *innocent* when done, criminal and punishes such action
- 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 offender*

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

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

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.”¹²

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.”¹³

The Supreme Court has stressed that the lack of standards presents the danger that a law will be applied in a discriminatory fashion against minorities and the poor. 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 poor, minority groups, and nonconformists would be targeted for arrest based on the belief that they posed a threat to public safety.¹⁴ 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.”¹⁵

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.”¹⁶

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.¹⁷ 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.¹⁸ 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 1132 (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

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 slaves. This was reinforced by Article IV, Section 2, the Fugitive Slave Clause, which requires the return of a slave escaping into a state that does not recognize slavery.¹⁹

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.²⁰

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.”²¹ 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.²²

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**.²³

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.”²⁴

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.”²⁵

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.”²⁶ 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.”²⁷ 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.”²⁸

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."²⁹ 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.³⁰

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 the poor, the elderly, and the mentally challenged and to distinctions based on age.
- *Strict Scrutiny Test.* A law singling out a racial or ethnic minority 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. Simmonds*, 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. SIMMONDS, 58 V.I. 3 (SUPER. CT. 2012)

Opinion by Donohue, J.

Issue

Was Simmonds's conviction for aggravated assault and battery based on a statute that denied him equal protection of the law based on his gender?

Facts

Gary Simmonds assaulted his wife, Tracia Simmonds, during an argument in May 2005. Tracia Simmonds immediately went to the Ann Schrader Command precinct on St. Croix to report the assault. Virgin Islands police arrested Gary Simmonds later that day for “slapping his wife in the face, therefore causing visible injuries.” At the time, Gary Simmonds was 33 years old, had a medium build, weighed 197 pounds, and stood 5’9” tall. He was sober and unarmed. Gary Simmonds was charged with one count of aggravated assault and battery as an act of domestic violence. He pled not guilty. On September 22, 2005, Gary Simmonds was tried by this Court in a bench trial. Four witnesses testified on behalf of the People. Gary Simmonds did not put on a case.

Based on the testimony and evidence presented at trial, the Court found that Tracia Simmonds and Gary Simmonds were married. At the time of the assault, Gary Simmonds was an adult male and Tracia Simmonds was an adult female. People’s Exhibits 1 and 2 were photographs that showed a red, swollen area around the eye region on the left side of Tracia Simmonds’s face. Based on Tracia Simmonds’s dark-skinned complexion, the blow to her face could not have been weak in order to cause the degree of redness depicted. Despite her testimony, Tracia Simmonds was not the initial aggressor. The police officers’ testimonies that Gary Simmonds assaulted Tracia Simmonds without provocation were more credible. The People proved beyond a reasonable doubt that . . . Gary Simmonds used unlawful violence on Tracia Simmonds with the intent to injure her and therefore was guilty of aggravated assault and battery.

Gary Simmonds was sentenced to six months incarceration, suspended, and one year of probation. The Court also ordered Simmonds to complete an anger management program for batterers because he was in contact with Tracia Simmonds after the trial. In August 2006, the Office of Probation petitioned to revoke Simmonds’s probation because Tracia Simmonds had obtained a permanent restraining order against him in a . . . domestic violence action. The Court held a hearing and found cause for revoking Simmonds’s probation. The Court sentenced Simmonds to time served and extended his probation for six months. Gary Simmonds was discharged from probation in April 2007.

Simmonds appealed his conviction . . . claiming that the aggravated assault and battery statute denied him equal protection based on his gender.

Reasoning

The Fourteenth Amendment to the United States Constitution prohibits States, and by congressional extension Territories, from denying equal protection of the law to any person within their respective jurisdictions. “‘Equal protection’ . . . emphasizes disparity in treatment by a [government] between classes of individuals whose situations are arguably indistinguishable.” Statutes providing for different treatment on the basis of gender establish a classification subject to intermediate scrutiny under the Equal Protection Clause. The fact that a statute “discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.” The Government must show that the gender classification at issue “serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’” “If the [government]’s objective is legitimate and important, [the Court] next determine[s] whether the requisite direct, substantial relationship between objective and means is present.” “The purpose of requiring that close relationship is to assure that the validity of a

classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.”

Simmonds challenges the constitutionality of the . . . aggravated assault and battery statute as denying equal protection of the law to males based on their gender. This statute elevates simple assault and battery to aggravated assault and battery if the act is committed by an adult male on a female. Males face harsher punishment than females for the same action. Because on its face the statute contains a classification that distinguishes on the basis of gender, it is subject to scrutiny under the Equal Protection Clause.

Under the Virgin Islands Code . . . [a]ssault and battery involves the use of “unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used. . . .” An assault or battery “unattended with circumstances of aggravation” is simple assault and battery. Assault and battery becomes aggravated if in part it is committed . . . “[by] an adult male, upon the person of a female or child, or being an adult female, upon the person of a child. . . .

The People proffered [as a basis] to justify the gender-based classification in the aggravated assault and battery statute . . . the prevalence of gender-based domestic violence. “[But], the test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females.” . . .

The People are correct that legislation can serve to discourage and eliminate gender-based domestic violence. . . . Justifications offered in support of gender-based classifications “must be genuine, not hypothesized or invented [after the fact] in response to litigation.” They cannot rest “on overbroad generalizations about the different talents, capacities, or preferences of males and females.” “Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where . . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.”

Unfortunately, domestic violence remains a difficult and disturbing social problem that must be eradicated. But as Simmonds correctly pointed out, “[d]omestic violence is a problem for everybody—men, women, children.” It is not a problem unique to the Virgin Islands . . . “[and] until approximately twenty-five years ago, the [American] criminal justice system did not recognize domestic violence as an issue of concern, much less focus on methods to attack it.”

Holding

If Section 298’s goal is to deter violence, particularly domestic violence . . . then the statute fails to achieve that goal because assault and battery as an act of domestic violence committed against a male by a female or another male . . . can only be prosecuted as simple assault and battery, a misdemeanor offense. The U.S. Constitution guarantees equal protection based on gender. Classifications based on gender must have legitimate objectives that are substantially related to the statute’s purpose. Here, there is no legitimate basis for punishing males more severely than females for committing the same criminal act: assault and battery.

“Legislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the ‘proper place’ of women and their need for special protection. . . . Here . . . the government’s purpose can be just as well “served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the [government] cannot be permitted

to classify on the basis of sex.” Accordingly, the Court finds that the People have failed to show that important government objectives are served by the Virgin Islands aggravated assault statute and have not shown that the statute is substantially related to the achievement of those objectives. Since the statute employs a gender-based classification on its face and does not survive intermediate scrutiny review, the statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Questions for Discussion

1. What are the facts in *Simmonds*, and why does Simmonds contend that his conviction for aggravated assault and battery violates the Equal Protection Clause of the U.S. Constitution?
2. What is the legal test applied by the court to determine whether a law constitutes gender discrimination?
3. Explain whether you agree or disagree with the holding of the court in *Simmonds* that the important government objectives of deterring and punishing domestic violence are served by the Virgin Islands aggravated assault statute although the government of the Virgin Islands failed to demonstrate that the statute is substantially related to the achievement of this objective. What of the court’s conclusion that there is no meaningful justification for the differential treatment of men and women under the Virgin Islands statute?
4. Does the law promote gender stereotypes or reflect the fact as argued by the government of the Virgin Islands during oral argument that because men commit domestic violence more frequently than women harsher penalties are required to be imposed on men than on women to deter domestic violence?
5. What of the argument made by the government of the Virgin Islands in a subsequent case that there is a substantial likelihood that because men are “bigger and stronger” than women batteries committed by men against women are likely to result in greater harm than batteries committed by women against men and that as a result batteries committed by men against women are justifiably punished more harshly than batteries committed by women against men? See *People of the Virgin Islands v. Lake*, 59 V.I. 178 (Super. Ct. 2013).
6. 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, in part based 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 women or hitting women because I take a very dim view of men hitting women,” and ordered jail time 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).
7. Was Simmonds’s punishment for aggravated battery proportionate to the crime he committed? Note that the South Carolina Supreme Court in *State v. Wright*, 563 S.E.2d 311 (S.C. 2000), and appellate courts in North Carolina and California have found statutes similar to the statutes in *Simmonds* to be constitutional because of the differential physical sizes and strengths of males and females. As a result, an assault by a male is likely to cause greater harm than an assault by a female. The judges reason that although there are exceptions to this generalization, a statute is not required to adjust the law because of a situation that does not fit the overwhelming number of cases. Do you agree with the decision in *State v. Wright*?

8. How would you draft a domestic violence statute that the court in *Simmonds* would find constitutional?
9. Can you explain why Tracia Simmonds testified that she was the aggressor although the court found the testimony of the police officers that Gary Simmonds was the aggressor more credible?

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 Trump's executive order restricting immigration from certain countries into the United States. Chief Justice 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 fiancé 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-fiancé in a hotel parking lot. Following a second confrontation, Doe's petition for an order of protection against her ex-fiancé 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. Around 4:30 a.m., Indianapolis police officer Jerry Durham responded to a report of three females exposing themselves to the occupants of other vehicles. Durham observed 16-year-old C.T. and another woman "pulling their bra[s] and their shirt[s] down over their exposed breast[s]." Indiana punishes an individual who "knowingly or intentionally appear[s] in a public place in a state of nudity with the intent to be seen by another person." Indiana Code section 35-45-4-1(d) (2008) defines *nudity* as "the showing of the female breast with less than a fully opaque covering of any part of the nipple[.]" Officer Durham at trial testified that he had seen C.T.'s nipple during the incident. The juvenile court found that C.T. had "committed what would be public nudity if committed by an adult and discharged her to her mother." C.T. claims that her conviction violated equal protection under law because the display of male breasts does not constitute a criminal offense. Do you agree? See *C.T. v. State*, 939 N.E.2d 626 (Ind. Ct. App. 2010).

FREEDOM OF SPEECH

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.”³¹

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 Amendment³²:

- 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*³³ 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.”³⁴ 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.”³⁵ 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.”³⁶
- *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.³⁷

- *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.”³⁸ 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.³⁹ Child pornography may be limited despite the fact that it does not satisfy the *Miller* standard.⁴⁰ (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.”⁴¹ 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.⁴² 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.”⁴³

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.”⁴⁴

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.”⁴⁵ 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.”⁴⁶ 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.”⁴⁷ 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, *In re George T.*, the California Supreme Court was asked to determine whether a student poem constituted a criminal threat. Do you agree with the court’s judgment?

DID A STUDENT POEM CONSTITUTE A CRIMINAL THREAT?

IN RE GEORGE T., 93 P.3D 1007 (CAL. 2004)

Opinion by Moreno, J.

Issue

We consider in this case whether a high school student made a criminal threat by giving two classmates a poem labeled “Dark Poetry,” which read, in part,

I am Dark, Destructive, & Dangerous. I slap on my face of happiness but inside I am evil!! For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I’m BACK!!

Facts

Fifteen-year-old George T. (minor) had been a student at Santa Teresa High School in Santa Clara County for approximately two weeks when on Friday, March 16, 2001, toward the end of his honors English class, he approached fellow student Mary S. and asked her, “Is there a poetry class here?” Minor then handed Mary three sheets of paper and told her, “Read these.” Mary did so. The first sheet of paper contained a note stating, “These poems describe me and my feelings. Tell me if they describe you and your feelings.” The two other sheets of paper contained poems. Mary read only one of the poems, which was labeled “Dark Poetry” and entitled “Faces”:

Who are these faces around me? Where did they come from? They would probably become the next doctors or loits [sic] or something. All really intelligent and ahead in their game. I wish I had a choice on what I want to be like they do. All so happy and vagrant. Each original in their own way. They make me want to puke. For I am Dark, Destructive, & Dangerous. I slap on my face of happiness but inside I am evil!! For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I’m BACK!!

by: Julius AKA Angel 1

Minor had a “straight face,” not “show[ing] any emotion, neither happy or sad or angry or upset,” when he handed the poems to Mary. Upon reading the “Faces” poem, Mary became frightened, handed the poems back to minor, and immediately left the campus in fear. After she informed her parents about the poem, her father called the school, but it was closed. Mary testified she did not know minor well, but they were on “friendly terms.” When asked why she felt minor gave her the poem to read, she responded, “I thought maybe because the first day he came into our class, I approached him because that’s the right thing to do” and because she continued to be nice to him.

After Mary handed the poems back to minor, minor approached Erin S. and Natalie P., students minor had met during his two weeks at Santa Teresa High School. Erin had been

introduced to minor a week prior and had subsequently spoken with him on only three or four occasions, whereas Natalie considered herself minor's friend and had come to know him well during their long after-school conversations, which generally lasted [from] an hour to an hour and a half and included discussions of poetry. Minor handed Erin a "folded up" piece of paper and asked her to read it. He also handed a similarly folded piece of paper to Natalie, who was standing with Erin. Because Erin was late for class, she only pretended to read the poem to be polite but did not actually read it. She placed the unread poem in the pocket of her jacket.

The next day, Saturday, Mary e-mailed her English teacher William Rasmussen to report her encounter with minor. [A substitute teacher had been teaching the class on the day that Mary received the note.] She wrote:

I'm sorry to bother you over the weekend, but I don't think this should wait until Monday. During 6th period on Friday, 3/16, the guy in our class called Julius (actually his name is Theodore?) gave me two poems to read. He explained to me that these poems "described him and his feelings," and asked if I "felt the same way." I was surprised to find that the poems were about how he is "nice on the outside," and how he's "going to be the next person to bring a gun to school and kill random people." I told him to bring the poems to Room 315 to Ms. Gonzalez because [she] is in charge of poetry club. He said he would but I don't know for sure if he did.

Mary remained in fear throughout the weekend, because she understood the poem to be personally threatening to her, as a student. Asked why she felt the poem was a threat, Mary responded:

It's obvious he thought of himself as a dark, destructive, and dangerous person. And if he was willing to admit that about himself and then also state that he could be the next person to bring guns and kill students, then I'd say that he was threatening.

She understood the term "dark poetry" to mean "angry threats; any thoughts that aren't positive."

Rasmussen called Mary on Sunday regarding her e-mail. Mary sounded very shaken during the conversation, and based on this and on what she stated about the contents of the poem, Rasmussen contacted the school principal and the police. He read "Faces" for the first time during the jurisdictional hearing and, upon reading it, felt personally threatened by it, because, according to Rasmussen, "He's saying he's going to come randomly shoot." His understanding of "dark poetry" was that it entailed "the concept of death and causing and inflicting a major bodily pain and suffering. There is something foreboding about it."

On Sunday, March 18, 2001, officers from the San Jose Police Department went to minor's uncle's house, where minor and his father were residing. An officer asked minor, who opened the door when the officers arrived, whether there were any guns in the house. Minor "nodded." Minor's uncle was surprised that minor was aware of his guns, and handed the officers a .38-caliber handgun and a rifle. When asked about the poems disseminated at school, minor handed an officer a piece of paper he took from his pocket. The paper contained a poem entitled, "Faces in My Head," [which read as follows]:

Look at all these faces around me.

They look so vacant.

They have their whole lives ahead of them.

They have their own individuality.

Those kind of people make me wanna puke.
 For I am a slave to very evil masters.
 I have no future that I choose for myself.
 I feel as if I am going to go crazy.
 Probably I would be the next high school killer.
 A little song keeps playing in my head.
 My daddy is worth a dollar not even 100 cents.
 As I look at these faces around me
 I wonder why r they so happy.
 What do they have that I don't.
 Am I the only one with the messed up mind.
 Then I realize, I'm cursed!

As with the poem titled "Faces," this poem was labeled "dark poetry," but it was not shown or given to anyone at school. Minor had drafted "Faces in My Head" that morning in an attempt to capture what he had written in "Faces," because he wanted a copy for his poetry collection. Minor was taken into custody.

Police officers went to the school the following Monday to investigate the dissemination of the poem. Erin was summoned to the vice-principal's office and asked whether minor had given her any notes. She responded in the affirmative, realized that the poem was still in the pocket of her jacket, and retrieved it. The paper contained a poem entitled "Faces," which was the same poem given to Mary. Upon reading the poem for the first time in the vice-principal's office, Erin became terrified and broke down in tears, finding the poem to be a personal threat to her life. She testified that she was not in the poetry club and had no interest in the subject.

Natalie, who testified on behalf of minor, recalled that minor said, "Read this" as he handed her and Erin the pieces of paper. The folded-up sheet of paper Natalie received contained a poem entitled, "Who Am I." When a police officer went to Natalie's home to inquire about the poem minor had given her on Friday, Natalie was not completely cooperative and truthful, telling the officer that the poem was about water and dolphins and that she believed it was a love poem. The police retrieved the poem from Natalie's trash can and although it was torn, some of it could still be deciphered:

... I created? ... cause it really ... feel as if ... stolen from ... of peace ... Taken to a place that you hate. Your locked up and when your let out of your cage it is to perform. Not able to be yourself and always hiding & thinking would people like me if I behaved differently? by Julius AKA Angel.

Natalie did not feel threatened by the poem; rather it made her "feel sad" because "it was kind of lonely." She testified that "dark poetry is ... relevant to like pure emotions, like sadness, loneliness, hate or just like pure emotions. Sometimes it tells a story, like a dark story." Based on her extended conversations with minor, Natalie found him to be "mild and calm and very serene" and did not consider him to be violent.

Minor testified the poem "Faces" was not intended to be a threat, and because Erin and Natalie were his friends, he did not think they would have taken his poems as such. He thought of poetry as art and stated that he was very much interested in the subject, particularly as

a medium to describe “emotions instead of acting them out.” He wrote “Faces” during his honors English class on the day he showed it to Mary and Erin. Minor was having a bad day as a consequence of having forgotten to ask his parents for lunch money and having to forgo lunch that day, and because he was unable to locate something in his backpack. He had many thoughts going through his head, so he decided to write them down as a way of getting them out. The poem “Who Am I,” which was given to Natalie, was written the same day as “Faces,” but was written during the lunch period. Neither poem was intended to be a threat. Instead they were “just creativity.”

Minor and his friends frequently joked about the school shootings at Columbine High School in Colorado (where, in 1999, 2 students killed 12 fellow students and one faculty member). They would jokingly say, “I’m going to be the next Columbine kid.” Minor testified that Natalie and Erin had been present when he and some of his friends had joked about Columbine, with someone stating that “I’ll probably be the next Columbine killer,” and indicating who would be killed and who would be spared. Given this history, minor believed Natalie and Erin would understand the poems as jokes.

The poems were labeled “dark poetry” to inform readers that they were exactly that, and minor testified,

If anybody was supposed to read this poem, or let’s say if my mom ever found my poem or something of that nature, I would like them to know that it was dark poetry. Dark poetry is usually just an expression. It’s creativity. It is not like you’re actually going to do something like that, basically.

Asked why he wrote, “For I can be the next kid to bring guns to school and kill students,” minor responded:

The San Diego killing [on March 5, 2001, a student at Santana High School shot and killed 2 students and wounded 13 others] was about right around this time. So since I put the three Ds—dark, destructive, and dangerous—and since I said—“I am evil,” and since I was talking about people around me—faces—how I said, like, how they would make me want to—did I say that?—well, even if I didn’t—yeah, I did say that. Okay. So, um, I said from all these things, it sounds like, for I can be the next Columbine kid, basically. So why not add that in? And so, “Parents, watch your children, because I’m back,” um, I just wanted to—kind of like a dangerous ending, like a—um, just like ending a poem that would kind of get you, like,—like, whoa, that’s really something.

Minor stated that he did not know Mary and did not give her any poems. However, he was unable to explain how Mary was able to recount the contents of the “Faces” poem.

On cross-examination, minor conceded that he had had difficulties in his two previous schools, including being disciplined for urinating on a wall at his first school, and had been asked to leave his second school for plagiarizing from the internet. He explained that the urination incident was caused by a doctor-verified bladder problem. He denied having any ill will toward the school district, but he conceded when pressed by the prosecutor that he felt the schools “had it in for me.”

An amended petition under Welfare and Institutions Code section 602 was filed against minor, alleging minor made three criminal threats in violation of Penal Code section 422. The victims of the alleged threats were Mary (count 1), Erin (count 3), and Rasmussen (count 2).

Following a contested jurisdictional hearing, the juvenile court found true the allegations with respect to Mary and Erin but dismissed the allegation with respect to Rasmussen. At the hearing, the court adjudicated minor a ward of the court and ordered a 100-day

commitment in juvenile hall. Minor appealed, challenging the sufficiency of the evidence to support the juvenile court's finding that he made criminal threats. Over a dissent, the court of appeal affirmed the juvenile court in all respects with the exception of remanding the matter for the sole purpose of having that court declare the offenses to be either felonies or misdemeanors. We granted review and now reverse.

Holding

For the foregoing reasons, we hold the poem entitled "Faces" and the circumstances surrounding its dissemination fail to establish that it was a criminal threat, because the text of the poem, understood in light of the surrounding circumstances, was not "so unequivocal, unconditional, immediate, and specific as to convey to [the two students] a gravity of purpose and an immediate prospect of execution of the threat." Our conclusion that the poem was not an unequivocal threat disposes of the matter and we need not, and do not, discuss minor's contention that he did not harbor the specific intent to threaten the students, as required by section 422.

This case implicates two apparently competing interests: a school administration's interest in ensuring the safety of its students and faculty versus students' right to engage in creative expression. Following Columbine, Santee, and other notorious school shootings, there is a heightened sensitivity on school campuses to latent signs that a student may undertake to bring guns to school and embark on a shooting rampage. Such signs may include violence-laden student writings. For example, the two student killers at Columbine had written poems for their English classes containing "extremely violent imagery." Ensuring a safe school environment and protecting freedom of expression, however, are not necessarily antagonistic goals.

Minor's reference to school shootings and his dissemination of his poem in close proximity to the Santee school shooting no doubt reasonably heightened the school's concern that minor might emulate the actions of previous school shooters. Certainly, school personnel were amply justified in taking action following Mary's e-mail and telephone conversation with her English teacher, but that is not the issue before us. We decide here only that minor's poem did not constitute a criminal threat.

For the foregoing reasons, we reverse the judgment of the court of appeal.

Concurring, *Baxter, J.*

I agree the evidence does not establish this specific element. The writing, in the form of a poem, that defendant handed to Mary S. and Erin S. said that the protagonist, "Julius AKA Angel," "can be the next kid to bring guns to kill students at school." It did not say, in so many words, that defendant presently intended to do so. And the surrounding circumstances did not lend unconditional meaning to this conditional language. That said, there is no question that defendant's ill-chosen words were menacing by any common understanding, both on their face and in context. The terror they elicited in Mary S., and the concern they evoked in the school authorities, were real and entirely reasonable. It is safe to say that fears arising from a raft of high school shooting rampages, including those in Colorado and Santee, California, are prevalent among American high school students, teachers, and administrators. Certainly this was so on March 16, 2001, only eleven days after the Santee incident had occurred. That is the day defendant selected to press his violent writing on two vulnerable

and impressionable young schoolmates who hardly knew him. Defendant admitted at trial that he intentionally combined the subject matter and the timing for maximum shock value. Indeed, he acknowledged, his words would be interpreted as threats by “kids who didn’t know [he was] just kidding.”

Under these circumstances, as the majority observe, school and law enforcement officials had every reason to worry that defendant, deeply troubled, was contemplating his own campus killing spree. The important interest that underlies the criminal-threat law—protection against the trauma of verbal terrorism—was also at stake. Accordingly, the authorities were fully justified, and should be commended, insofar as they made a prompt, full, and vigorous response to the incident. They would have been remiss had they not done so. Nothing in our very narrow holding today should be construed as suggesting otherwise.

Questions for Discussion

1. Summarize the facts in *George T.*
2. Describe the responses of Mary, Erin, and Natalie to George T.’s poem. What occurred when the police confronted George T. at his home? How does George T. explain his intent in writing and disseminating the poem?
3. What are the elements of the crime of a “true threat” under Section 422 of the California Penal Code?
4. Why did the California Supreme Court conclude that George T.’s poem did not constitute a criminal threat? Did the court fully consider the content of the note and the circumstances surrounding the alleged threat?
5. Do you think that the California Supreme Court’s decision was influenced by the fact that George T. was a juvenile and that the alleged threat was contained in a “poem”? Note that a number of prominent writers viewed George T.’s prosecution as a violation of artistic freedom and urged the court to dismiss the charges against George T. They argued that there should be a presumption that a poem does not constitute a “true threat.” Would the court have ruled differently if the poem had stated clearly that George T. planned to return to school with a gun? What if George T. had expressed the sentiments in the letter directly to various students and teachers?
6. What facts were crucial in the court finding George T. not guilty?
7. Do you agree with the California Supreme Court’s ruling that George T.’s poem is protected speech under the First Amendment?
8. When does the poem “Roses are red. Violets are blue. I’m going to kill you, and your family too” constitute a “true threat”?

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. ____, 135 S. Ct. 2001 (2015).

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.”

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 *Packingham v. North Carolina*, 582 U.S. ___, 137 S. Ct. 1730 (2017), 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.” N.C. Gen. Stat. Ann. §§ 14-202.5(a), (e) (2015). 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.

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

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.⁴⁸

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.⁴⁹ 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.⁵⁰

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 and reproduction
- *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 media⁵¹

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.”⁵²

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.”⁵³

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.”⁵⁴

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.”⁵⁵ 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.⁵⁶

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.”⁵⁷

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.⁵⁸

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.⁵⁹

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 sales clerk and photographed her underwear. A Minnesota appellate court held that Morris had unlawfully violated the sales clerk’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 cause 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. ___ (2017). How does CSLI differ from continuous GPS monitoring or surveillance using facial recognition technology?

THE RIGHT TO 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.”⁶⁰

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.⁶¹ 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 disassembled 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.⁶²

The Fourteenth Amendment had been adopted following the Civil War to ensure former African American slaves' 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.”⁶³

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.

In 2013, in *Moore v. Madigan*, the Seventh Circuit Court of Appeals held unconstitutional an Illinois flat ban on carrying a loaded firearm within accessible reach outside the home. The only exceptions to this prohibition under Illinois law were police officers and other security personnel, hunters, and members of target shooting clubs. The Seventh Circuit Court of Appeals stated that although both *Heller* and *McDonald* held that “the need for defense of self, family, and property is most acute’ in the home,” this does not mean “it is not acute outside the home.” The court pointed out that *Heller* recognized a broader Second Amendment right than the right to have a gun in one’s home when the decision noted that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.” Confrontations are not limited to the home, and the Illinois law therefore is in violation of individuals’ Second Amendment rights.⁶⁴ In July 2013, the Illinois legislature passed a statute permitting individuals to obtain a license to carry a loaded or unloaded concealed weapon on their person or within a vehicle (430 ILCS 66).

New York has one of the most restrictive laws and limits possession of firearms outside the home to individuals with a “proper cause.” A “proper cause” includes 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 are 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 may bring a firearm into the “public sphere.”⁶⁵

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.⁶⁶

In 2017, the U.S. Court of Appeals for the District of Columbia held a D.C. Code provision unconstitutional that required applicants for a concealed carry permit for handguns to demonstrate a “good reason to fear injury to their person or property” or to demonstrate “any other proper reason for carrying a pistol” such as transporting cash or valuables as part of their job. Judge Thomas Griffith writing for a two-judge majority held that the requirements of the D.C. law by “the law’s very design” made it impossible for most residents to exercise their Second Amendment rights. “In this way, the District’s regulation completely prohibits most residents from exercising the constitutional rights to bear arms. . . . The good-reason law is necessarily a total ban on exercise of [the Second Amendment] for most D.C. residents.”⁶⁷

In 2018, in *Young v. State of Hawaii*, the Ninth Circuit Court of Appeals in a 2–1 decision held unconstitutional Hawaii’s “place to keep” statute, which generally required that gun owners

keep their firearms at the place of “business or residence.” Individuals were able to obtain a license from the police for concealed carry based on a “reason to fear injury to person or property” and were able to obtain a license for open carry based on the “urgency” or “need” to protect life or property. The two-judge majority held that the right to self-protection was at the core of the Second Amendment and the Hawaii law was unconstitutional because it restricted the right to openly carry a firearm to a “small and insulated subset of law-abiding citizens.” The decision, in effect, recognized that individuals have an equal right to possess firearms both inside and outside the home.⁶⁸

The Supreme Court in the past has declined to rule on the constitutionality of “good reason” concealed carry laws. What is your view of whether the requirement that individuals demonstrate a “good reason” for the concealed carry of firearms is a violation of the Second Amendment?

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, five states (California, Florida, Illinois, New York, and South Carolina), 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 must be unloaded. The remaining states require some form of license or permit in order to openly carry a handgun.

Six states (California, Florida, Illinois, Massachusetts, Minnesota, and New Jersey), as well as the District of Columbia, in general prohibit the open carry of long guns (rifles and shotguns). In the 44 remaining states, the open carry of a long gun is legal, although in three of these states (Iowa, Tennessee, and Utah) the long gun must be unloaded. Virginia and Pennsylvania limit the open carry of long guns to certain local jurisdictions.

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.⁶⁹

Another area of continued controversy is assault rifles, which are prohibited in roughly seven states and the District of Columbia. A number of states following the February 2018 Florida school shootings adopted “extreme risk” or “red flag” laws, which allow for the removal of guns from people considered an extreme risk to themselves or to others.

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

TEST YOUR KNOWLEDGE ANSWERS

1. False.
2. True.
3. False.
4. False.
5. False.
6. False.

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