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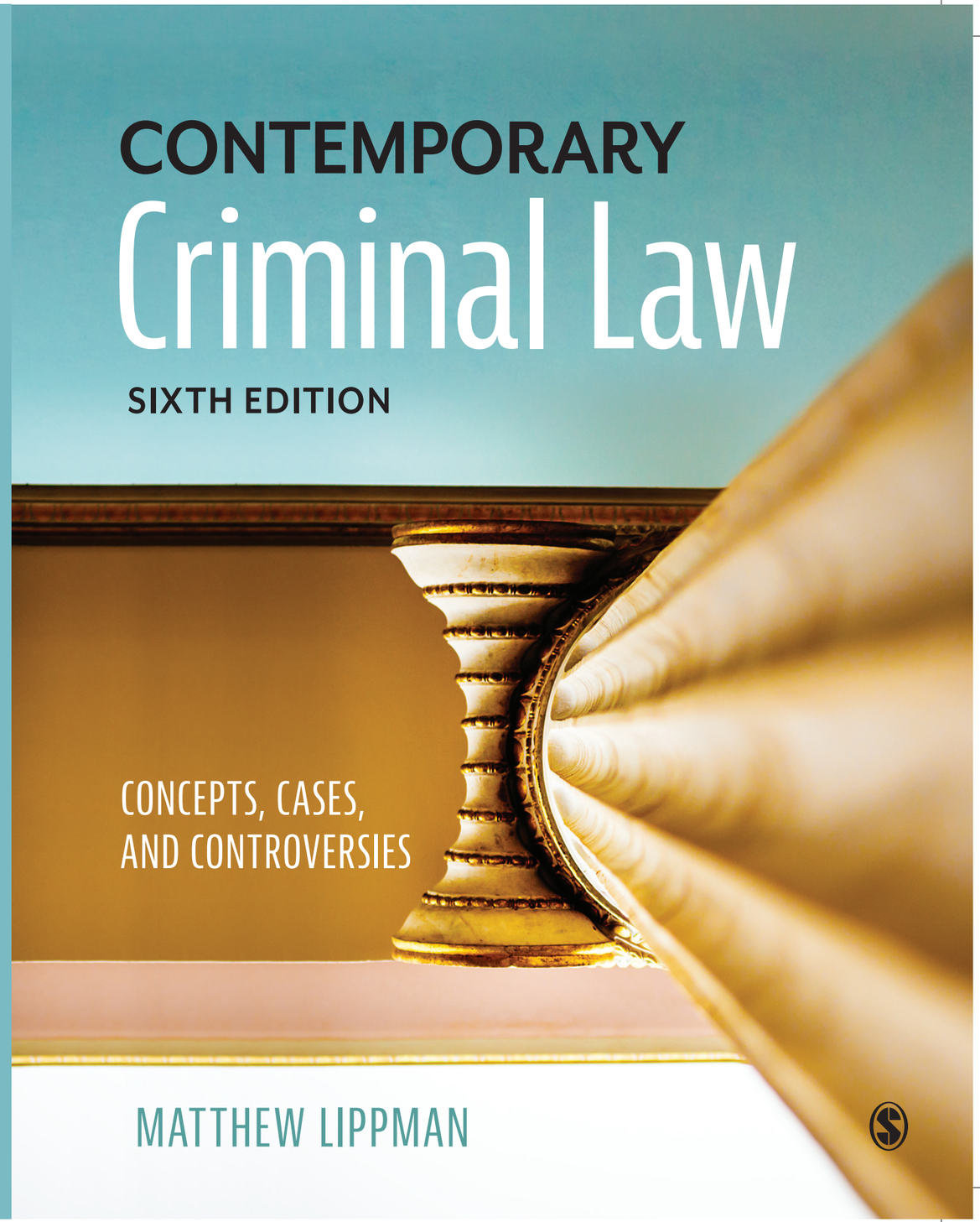
LIPPMAN

CONTEMPORARY Criminal Law SIXTH EDITION

CONTEMPORARY Criminal Law

SIXTH EDITION



CONCEPTS, CASES, AND CONTROVERSIES

MATTHEW LIPPMAN

SAGE

Contemporary Criminal Law

6th Edition

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Contemporary Criminal Law

Concepts, Cases, and Controversies

6th Edition

Matthew Lippman

University of Illinois at Chicago

SAGE

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PREFACE

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

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

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

THE CASE METHOD

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

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

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

CHAPTER ORGANIZATION

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

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

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

feature titled **You Decide** that provides students with the opportunity to respond to the facts of an actual case.

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

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

Most of the chapters also include **Crime in the News.** This is a brief discussion of legal developments and cases that students have likely encountered in the media. The purpose is to highlight contemporary issues and debates and to encourage students to consider the impact of the media in shaping our perceptions. Several chapters also include **Crime on the Streets,** which employs graphs to illustrate the frequency of various criminal offenses or other pertinent information. This is intended to give students a sense of the extent of crime in the United States and to connect the study of criminal law to the field of criminal justice.

ORGANIZATION OF THE TEXT

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

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

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

vicarious liability. Chapter 7 covers the inchoate crimes of attempt, conspiracy, and solicitation.

- ***Criminal Defenses.*** The fourth part of the text discusses defenses to criminal liability. Chapter 8 outlines justifications, and Chapter 9 encompasses excuses.
- ***Crimes Against the Person.*** The fifth part focuses on crimes against the person. Chapter 10 provides a lengthy treatment of homicide. Chapter 11 is concerned with criminal sexual conduct, assault and battery, kidnapping, and false imprisonment.
- ***Crimes Against Habitation and Property, and White-Collar Crime.*** Chapter 12 covers burglary, trespass, arson, and mischief. These crimes against property were originally conceived as protecting the safety and security of the home. Chapter 13 centers on other crimes against property, including larceny, embezzlement, identity theft, and carjacking. Chapter 14 provides an overview of white-collar crime, commercial offenses that are designed to illegally enhance an individual's income or corporate profits. This chapter covers a range of topics, including environmental crimes, securities fraud, mail and wire fraud, and public corruption.
- ***Crimes Against Public Order, Morality, and the State.*** Chapter 15 focuses on crimes against public order and morality that threaten the order and stability of the community. The chapter covers a number of topics including disorderly conduct, riot, vagrancy, and efforts to combat homelessness, gangs, and prostitution. Chapter 16 discusses crimes against the state, stressing counterterrorism.

NEW TO THE SIXTH EDITION

In writing the sixth edition I have drawn on my experience in teaching the text. The changes to the book were adopted following a thorough review of contemporary court decisions and developments. I focused my efforts on sharpening topics that caused students particular problems in previous editions. The standard was whether a modification assisted in teaching and learning. The primary changes to the text include the following:

- ***Cases.*** New cases have been added that illuminate important concepts. This includes decisions on constitutional rights, criminal acts, attempt, necessity, consent, age, intoxication, stalking, kidnapping, arson, the unhoused, identity theft, and terrorism. Several cases from the fifth edition have been edited to highlight important aspects of the decision.
- ***New Material.*** Chapters have been updated to maintain the contemporary content and theme of the book and to clarify concepts discussed in the book. The text references a number of recent U.S. Supreme Court decisions and other legal

developments of interest. There are a number of additions to the Cases and Comments feature.

- ***You Decide.*** Most chapters include a new "You Decide" feature. These problems clarify concepts, illustrate the complexity of legal analysis, and enhance the interactive character of the text.
- ***Crime in the News.*** Several chapters have new or updated "Crime in the News" features.
- ***Reorganization.*** The book has undergone some reorganization to streamline the text.

ACKNOWLEDGMENTS

I am hopeful that the textbook conveys my passion and enthusiasm for the teaching of criminal law and contributes to the teaching and learning of this most fascinating and vital topic. The book has been the product of the efforts and commitment of countless individuals who deserve much of the credit.

The people at SAGE Publishing are among the most skilled professionals that an author is likely to encounter. An author is fortunate to publish with SAGE, a company that is committed to quality books. Sponsoring Editor Jessica Miller provided intelligent suggestions and expert direction. Content Development Editor Darcy Scelsi is responsible for supervising the construction of the online version of the book. Senior Project Editor Tracy Buyan once again proved to be a superb professional and supervised the preparation of the lengthy manuscript and was responsible for monitoring a myriad of details associated with publication of the text. A special thanks as well to Acquisitions Editor Joshua Perigo. I would also like to thank all the expert professionals at SAGE in production and design, and in marketing and sales, who contributed their talent. The text was immensely improved by the meticulous and intelligent copyediting and expertise of Copy Editor Melinda Masson. The book could not have been produced without Melinda's extraordinary efforts.

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I have two members of my family living in Chicago. My sister, Dr. Jessica Lippman, and niece, Professor Amelia Barrett, remain a source of encouragement and generous assistance. Finally, the book is dedicated to my late parents, Mr. and Mrs. S. G. Lippman, who provided me with a love of learning. My late father, S. G. Lippman, practiced law for 70 years in the service of

the most vulnerable members of society. He believed that law was the highest calling and never turned away a person in need. Law, for him, was a passionate calling to pursue justice and an endless source of discussion, debate, and fascination.

My source for the Model Penal Code excerpts throughout the text is Model Penal Code © 1985 by the American Law Institute. Reprinted with permission. All rights reserved.

1 THE NATURE, PURPOSE, AND FUNCTION OF CRIMINAL LAW

TEST YOUR KNOWLEDGE: TRUE/FALSE

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

Check your answers at the end of the chapter on page 20.

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

As the videotape begins, it shows that [Rodney] King rose from the ground and charged toward Officer Powell. Powell took a step and used his baton to strike King on the side of his head. King fell to the ground. From the 18th to the 30th second on the videotape, King attempted to rise, but Powell and [Officer] Wind each struck him with their batons to prevent him from doing so. From the 35th to the 51st second, Powell administered repeated blows to King's lower extremities; one of the blows fractured King's leg. At the 55th second, Powell struck King on the chest, and King rolled over and lay prone. At that point, the officers stepped back and observed King for about 10 seconds. . . . At one-minute-five-seconds (1:05) on the videotape, [Officer] Briseno, in the District Court's words,

"stomped" on King's upper back or neck. King's body writhed in response. At 1:07, Powell and Wind again began to strike King with a series of baton blows, and Wind kicked him in the upper thoracic or cervical area six times until 1:26. At about 1:29, King put his hands behind his back and was handcuffed. (*Koon v. United States*, 518 U.S. 81 [1996])

INTRODUCTION

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

THE NATURE OF CRIMINAL LAW

Are there common characteristics of acts that are labeled as crimes? How do we define a **crime**? The easy answer is that a crime is whatever the law declares to be a criminal offense and punishes with a penalty. The difficulty with this approach is that not all criminal convictions result in a fine or imprisonment. Rather than punishing a **defendant**, the judge may merely warn them not to repeat the criminal act. Most commentators stress that the important feature of a crime is that it is an act that is officially condemned by the community and carries a sense of shame and humiliation. Professor Henry M. Hart Jr. defines crime as "conduct which, if . . . shown to have taken place," will result in the "formal and solemn pronouncement of the moral condemnation of the community."[8]

The central point of Professor Hart's definition is that a crime is subject to formal condemnation by a judge and jury representing the people in a court of law. This distinguishes a crime from acts most people would find objectionable that typically are not subject to state prosecution and official punishment. We might, for instance, criticize someone who cheats on their spouse, but we generally leave the solution to the *individuals involved*. Other matters are left to

institutions to settle; schools generally discipline students who cheat or disrupt classes, but this rarely results in a criminal charge. Professional baseball, basketball, and football leagues have their own private procedures for disciplining players. Most states leave the decision whether to recycle trash to the *individual* and look to *peer pressure* to enforce this obligation.

CRIMINAL AND CIVIL LAW

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

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

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

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

The distinction between criminal and civil law proved immensely significant for Kansas inmate Leroy Hendricks. Hendricks was about to be released after serving 10 years in prison for

molesting two 13-year-old boys. This was only the latest episode in Hendricks's almost 30-year history of indecent exposure and molestation of young children. Hendricks freely conceded that when not confined, the only way to control his sexual urge was to "die."

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

THE PURPOSE OF CRIMINAL LAW

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

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

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

THE PRINCIPLES OF CRIMINAL LAW

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

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

- *Criminal Act.* A crime involves an act or failure to act. You cannot be punished for bad thoughts. A criminal act is called *actus reus.*
- *Criminal Intent.* A crime requires a criminal intent or *mens rea.* Criminal punishment is ordinarily directed at individuals who intentionally, knowingly, recklessly, or negligently harm other individuals or property.
- *Concurrence.* The criminal act and criminal intent must coexist or accompany one another.
- *Causation.* The defendant's act must cause the harm required for criminal guilt, death in the case of homicide, and the burning of a home or other structure in the case of arson.
- *Responsibility.* Individuals must receive reasonable notice of the acts that are criminal so as to make a decision to obey or to violate the law. In other words, the required criminal act and criminal intent must be clearly stated in a statute. This concept is captured by the Latin phrase *nullum crimen sine lege, nulla poena sine lege* (no crime without law, no punishment without law).
- *Defenses.* Criminal guilt is not imposed on an individual who is able to demonstrate that their criminal act is justified (benefits society) or excused (the individual suffered from a disability that prevented them from forming a criminal intent).

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

CATEGORIES OF CRIME

Felonies and Misdemeanors

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

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

- *Capital Felony.* Death or life imprisonment without parole
- *Life Felony.* Life in prison and a $15,000 fine
- *Felony in the First Degree.* Thirty years in prison and a $10,000 fine
- *Felony in the Second Degree.* Fifteen years in prison and a $10,000 fine
- *Felony in the Third Degree.* Five years in prison and a $5,000 fine
- *Misdemeanor in the First Degree.* One year in prison and a $1,000 fine
- *Misdemeanor in the Second Degree.* Sixty days in prison and a $500 fine

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

Mala in Se and *Mala Prohibita*

Another approach is to classify crime by "moral turpitude" (evil). ***Mala in se*** crimes are considered "inherently evil" and would be evil even if not prohibited by law. This includes murder, rape, robbery, burglary, larceny, and arson. ***Mala prohibita*** offenses are not "inherently evil"

and are considered wrong only because they are prohibited by a statute. This includes offenses ranging from tax evasion to carrying a concealed weapon, leaving the scene of an accident, and being drunk and disorderly in public.

Why should we be concerned with classification schemes? A felony conviction can prevent you from being licensed to practice various professions, bar you from being admitted to the armed forces or joining the police, and prevent you from adopting a child or receiving various forms of federal assistance. In some states, a convicted felon is still prohibited from voting, even following release. The distinction between *mala in se* and *mala prohibita* is also important. For instance, the law provides that individuals convicted of a "crime of moral turpitude" may be deported from the United States.

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

Subject Matter

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

- *Crimes Against the State.* Treason, sedition, espionage, terrorism (Chapter 16)
- *Crimes Against the Person: Homicide.* Homicide, murder, manslaughter (Chapter 10)
- *Crimes Against the Person: Sexual Offenses and Other Crimes.* Sexual offenses, assault and battery, false imprisonment, kidnapping (Chapter 11)
- *Crimes Against Habitation.* Burglary, arson, trespassing (Chapter 12)
- *Crimes Against Property.* Larceny, embezzlement, false pretenses, receiving stolen property, robbery, fraud (Chapters 13 and 14)
- *Crimes Against Public Order.* Disorderly conduct, riot (Chapter 15)
- *Crimes Against the Administration of Justice.* Obstruction of justice, perjury, bribery (Chapters 14 and 15)
- *Crimes Against Public Morals.* Prostitution, obscenity (Chapter 15)

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

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

YOU DECIDE 1.1

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

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

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

Powell radioed for an ambulance. He sent two messages over a communications network to the other officers that said "oops" and "I haven't [*sic*] beaten anyone this bad in a long time." Koon sent a message to the police station that said, "Unit just had a big time use of force. . . . Tased and beat the suspect of CHP pursuit big time." King was taken to a hospital where he was treated for a fractured leg, multiple facial fractures, and numerous bruises

and contusions. Learning that King worked at Dodger Stadium, Powell said to King, "We played a little ball tonight, didn't we, Rodney? . . . You know, we played a little ball, we played a little hardball tonight, we hit quite a few home runs. . . . Yes, we played a little ball and you lost and we won."

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

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

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

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

Do you believe that it was fair to subject the Los Angeles police officers to the expense and emotional stress of two trials? As the attorney general of the United States, would you have

advised President George H. W. Bush to bring federal charges against the officers following their acquittal by a California jury?

SOURCES OF CRIMINAL LAW

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

- *English and American Common Law.* These are English and American judge-made laws and English acts of Parliament.
- *State Criminal Codes.* Every state has a comprehensive written set of laws on crime and punishment.
- *Municipal Ordinances.* Cities, towns, and counties are typically authorized to enact local criminal laws, generally of a minor nature. These laws regulate the city streets, sidewalks, and buildings and concern areas such as traffic, littering, disorderly conduct, and domestic animals.
- *Federal Criminal Code.* The U.S. government has jurisdiction to enact criminal laws that are based on the federal government's constitutional powers, such as the regulation of interstate commerce.
- *State and Federal Constitutions.* The U.S. Constitution defines treason and together with state constitutions establishes limits on the power of government to enact criminal laws. A criminal statute, for instance, may not interfere with freedom of expression or religion.
- *International Treaties.* International treaties signed by the United States establish crimes such as genocide, torture, and war crimes. These treaties, in turn, form the basis of federal criminal laws punishing acts such as genocide and war crimes when Americans are involved. These cases are prosecuted in U.S. courts.
- *Judicial Decisions.* Judges write decisions explaining the meaning of criminal laws and determining whether criminal laws meet the requirements of state and federal constitutions. Judges typically rely on **precedent** or the decision of other courts in similar cases.

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

The Common Law

The English **common law** is the foundation of American criminal law. The origins of the common law can be traced to the Norman conquest of England in 1066. The Norman king,

William the Conqueror, was determined to provide a uniform law for England and sent royal judges throughout the country to settle disputes in accordance with the common customs and practices of the country. The principles that composed this common law began to be written down in 1300 in an effort to record the judge-made rules that should be used to decide future cases.

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

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

State Criminal Codes

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

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

Some states remain **common law states**, meaning that the common law may be applied where the state legislature has not adopted a law in a particular area. The Florida Criminal Code states that the "common law of England in relation to crimes, except so far as the same relates to the

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

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

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

State Police Power

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

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

The Model Penal Code

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

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

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

Federal Statutes

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

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

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

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

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

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

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

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

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

Constitutional Limitations

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

- A state or local law may not regulate an area that is reserved to the federal government. A federal law may not encroach upon state power.

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

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

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

CRIME IN THE NEWS

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

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

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

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

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

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

The U.S. Supreme Court, in *Gonzales v. Raich* in 2005,[34] held that the federal prohibition on the possession of marijuana would be undermined by exempting marijuana possession in California and other states from federal criminal enforcement. The Supreme Court explained that the cultivation of marijuana under California's medical marijuana law, although clearly a local activity, frustrated the federal government's effort to control the shipment of marijuana across state lines, because medical marijuana inevitably would find its way into interstate commerce, increase the nationwide supply, and drive down the price of the illegal drug. There was also a risk that completely healthy individuals in California would manage to be fraudulently certified by a doctor to be in need of medical marijuana. Three of the nine Supreme Court judges dissented from the majority opinion. Justice Sandra Day O'Connor observed that the majority judgment "stifles an express choice by some States, concerned for the lives and liberties of their people, to regulate medical marijuana differently."[35]

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

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

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

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

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

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

In December 2020, the U.S. House of Representatives passed the Marijuana Opportunity, Reinvestment, and Expungement (MORE) Act. The act would repeal the federal prohibition on the possession, distribution, or production of marijuana; expunge the narcotics conviction of people with prior federal marijuana convictions; and impose a tax on marijuana products, which would fund new programs intended to support "individuals and businesses in communities impacted by the war on drugs." The legislation has yet to be approved by the Senate.

Where do you stand on the medical marijuana controversy?

Thirty-six states, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands at present have approved comprehensive, publicly available medical marijuana/cannabis programs. Eleven states allow use of "low THC, high cannabidiol (CBD)" products for medical reasons in limited situations. Nineteen states, two territories, and the District of Columbia allow recreational use of marijuana.

CHAPTER SUMMARY

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

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

The purpose of criminal law is to prohibit conduct that causes harm or threatens harm to the individual and to the public interests, to warn people of the acts that are subject to criminal

punishment, to define criminal acts and intent, to distinguish between serious and minor offenses, to punish offenders, and to ensure that the interests of victims and the public are represented at trial and in the punishment of offenders.

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

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

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

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

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

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

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

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

CHAPTER REVIEW QUESTIONS

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

LEGAL TERMINOLOGY

capital felony
civil law
code jurisdiction
common law
common law crimes
common law states
crime
criminal procedure
defendant
double jeopardy
dual sovereignty
federal criminal code
felony
gross misdemeanor

infamous crimes
infractions
Interstate Commerce Clause
mala in se
mala prohibita
misdemeanor
Model Penal Code
petty misdemeanors
police power
precedent
preemption doctrine
reception statutes
substantive criminal law
Supremacy Clause
tort
violations

TEST YOUR KNOWLEDGE ANSWERS

1. False.

2. True.

3. False.

4. True.

2 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* laws[7]:

- 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