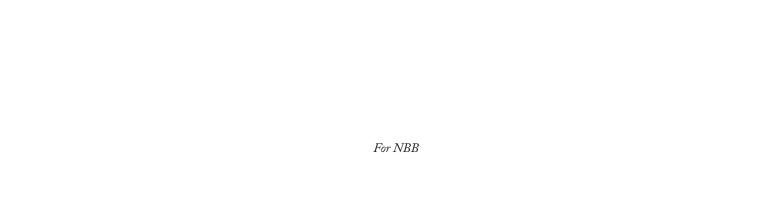


Matthew Lippman



# **Essential Criminal Law**

**3rd Edition** 



# **Essential Criminal Law**

### **3rd Edition**

## **Matthew Lippman**

University of Illinois at Chicago





FOR INFORMATION:

SAGE Publications, Inc. 2455 Teller Road Thousand Oaks, California 91320 E-mail: order@sagepub.com

SAGE Publications Ltd.

1 Oliver's Yard

55 City Road

London EC1Y 1SP

United Kingdom

SAGE Publications India Pvt. Ltd.
B 1/I 1 Mohan Cooperative Industrial Area
Mathura Road, New Delhi 110 044
India

SAGE Publications Asia-Pacific Pte. Ltd. 18 Cross Street #10-10/11/12 China Square Central Singapore 048423

Acquisitions Editor: Jessica Miller
Content Development Editor: Laura Kearns
Editorial Assistant: Sarah Manheim
Production Editor: Tracy Buyan
Copy Editor: Melinda Masson
Typesetter: C&M Digitals (P) Ltd.
Proofreader: Barbara Coster

Cover Designer: Candice Harman Marketing Manager: Jillian Ragusa

Indexer: Michael Ferreira

Copyright © 2020 by SAGE Publications, Inc.

All rights reserved. Except as permitted by U.S. copyright law, no part of this work may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, without permission in writing from the publisher.

All third-party trademarks referenced or depicted herein are included solely for the purpose of illustration and are the property of their respective owners. Reference to these trademarks in no way indicates any relationship with, or endorsement by, the trademark owner.

Model Penal Code © 1985 by The American Law Institute. Reprinted with permission. All rights reserved.

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Names: Lippman, Matthew Ross, author.

Title: Essential criminal law / Matthew Lippman, University of Illinois at Chicago.

Description: Third edition. | Thousand Oaks : Sage Publications, [2019] |

Includes bibliographical references and index.

Identifiers: LCCN 2019007038 | ISBN 9781544355986 (pbk. : alk. paper)

Subjects: LCSH: Criminal law-United States.

Classification: LCC KF9219.85 .L57 2019 | DDC 345.73—dc23 LC record available at https://lccn.loc.gov/2019007038

This book is printed on acid-free paper.

19 20 21 22 23 10 9 8 7 6 5 4 3 2 1

# **Brief Contents**

PREFACE		xvi
ABOUT THE	AUTHOR	xix
		1
CHAPTER 1	The Nature, Purpose, and Function of Criminal Law	1
CHAPTER 2	Constitutional Limitations	19
CHAPTER 3	Elements of Crimes	46
CHAPTER 4	Parties to Crime	74
CHAPTER 5	Attempt, Solicitation, and Conspiracy	89
CHAPTER 6	Criminal Defenses: Justifications and Excuses	111
CHAPTER 7	Homicide	153
CHAPTER 8	Other Crimes Against the Person	177
CHAPTER 9	Crimes Against Property	209
CHAPTER 10	White-Collar and Organized Crime	245
CHAPTER 11	Crimes Against Public Order and Morality	273
CHAPTER 12	Crimes Against Social Order and Morality: Alcohol and Drug Offenses	293
CHAPTER 13	Offenses Against Public Administration and the Administration of Justice	323
Available O	nline: edge.sagepub.com/lippmaness3e	
	Crimes Against the State	
NOTES		349
GLOSSARY		360
CASE INDEX		371
SHRIECT INI	NEV	<b>77</b> /

# **Detailed Contents**

PREFACE		xvi
	CHAPTER ORGANIZATION	xvi
	ORGANIZATION OF THE TEXT	xvi
	DIGITAL RESOURCES	xvii
	THIRD EDITION	xvii
	ACKNOWLEDGMENTS	xviii
ABOUT THE	AUTHOR	xix
CHAPTER 1	The Nature, Purpose, and Function of Criminal Law	1
	TEST YOUR KNOWLEDGE: TRUE OR FALSE?	1
	INTRODUCTION	1
	THE NATURE OF CRIMINAL LAW	1
	CRIMINAL AND CIVIL LAW	1
	THE PURPOSE OF CRIMINAL LAW	2
	THE PRINCIPLES OF CRIMINAL LAW	3
	CATEGORIES OF CRIME	3
	Felonies and Misdemeanors	3
	Mala in Se and Mala Prohibita	4
	Subject Matter	4
	SOURCES OF CRIMINAL LAW	5
	The Common Law State Criminal Codes	5 5
	State Police Power	6
	The Model Penal Code	6
	Federal Statutes	7
	Constitutional Limitations	8
	THE CRIMINAL JUSTICE PROCESS	8
	THE STRUCTURE OF THE FEDERAL AND STATE COURT SYSTEMS	10
	The Federal Judicial System State Judicial Systems	11 13
	PRECEDENT	15
	CHAPTER SUMMARY	16
	CHAPTER SOMMARY  CHAPTER REVIEW QUESTIONS	17
	LEGAL TERMINOLOGY	17
	TEST YOUR KNOWLEDGE: ANSWERS	18
CHAPTER 2	Constitutional Limitations	19
	TEST YOUR KNOWLEDGE: TRUE OR FALSE?	19
	INTRODUCTION	20
	RULE OF LEGALITY	20
	BILLS OF ATTAINDER AND EX POST FACTO LAWS	20
	Bills of Attainder	20
	Ex Post Facto Laws	21
	The Supreme Court and Ex Post Facto Laws	21
	STATUTORY CLARITY	22
	Clarity	22
	Definite Standards for Law Enforcement  • YOU DECIDE 2.1	22 <b>23</b>
	- 100 DEGIDE Zil	23

	EQUAL PROTECTION	23
	Three Levels of Scrutiny	23
	YOU DECIDE 2.2	25
	THE BILL OF RIGHTS	25
	Nationalization	25
	FREEDOM OF SPEECH	27
	Overbreadth Symbolic Speech	28 29
	Hate Speech	29
	FREEDOM OF ASSEMBLY	30
	TIME, PLACE, AND MANNER RESTRICTIONS	30
	• YOU DECIDE 2.3	<b>30</b>
	FREEDOM OF RELIGION	31
	CRIMINAL LAW IN THE NEWS	32
	PRIVACY	32
	The Constitutional Right to Privacy	32
	The Constitutional Right to Privacy and Same-Sex Relations Between	77
	Consenting Adults in the Home  • YOU DECIDE 2.4	33 <b>34</b>
		34
	The Right to Privacy and the Fourth Amendment	
	THE RIGHT TO BEAR ARMS  • CRIMINAL LAW IN THE NEWS	35 <b>37</b>
	CRUEL AND UNUSUAL PUNISHMENT  Methods of Punishment	<b>39</b> 39
	CRIMINAL LAW AND PUBLIC POLICY	<b>39</b>
	The Amount of Punishment: The Death Penalty	41
	The Amount of Punishment: Sentences for a Term of Years	41
	Criminal Punishment and Status Offenses	42
	CASE ANALYSIS	42
	CHAPTER SUMMARY	43
	CHAPTER REVIEW QUESTIONS	44
	LEGAL TERMINOLOGY	44
	TEST YOUR KNOWLEDGE: ANSWERS	45
CHARTER 7	Elements of Crimes	46
CHAPIER 3	Elements of Crimes	TU
	TEST YOUR KNOWLEDGE: TRUE OR FALSE?	46
	INTRODUCTION	46
	CRIMINAL ACTS AND THOUGHTS	47
	A VOLUNTARY CRIMINAL ACT	47
	YOU DECIDE 3.1	49
	STATUS	50
	YOU DECIDE 3.2	51
	OMISSIONS	51
	The American and European Bystander Rules  • YOU DECIDE 3.3	51
		54
	POSSESSION  Pagagasian of Computer Files	54
	Possession of Computer Files	55 56
	MENS REA CRIMINAL INTENT	56 57
	GENERAL AND SPECIFIC INTENT	57
	INTENT UNDER THE MODEL PENAL CODE	<b>57</b> 58
	Purposely • CRIMINAL LAW IN THE NEWS	58
	Knowingly	60
	Recklessly	60
	Negligently	60

	TRANSFERRED INTENT	61
	STRICT LIABILITY OFFENSES	62
	CONCURRENCE OF ACT AND INTENT	64
	YOU DECIDE 3.4	64
	CRIMINAL LAW AND PUBLIC POLICY	64
	CAUSALITY	66
	Cause in Fact	66
	Legal or Proximate Cause	66 67
	Intervening Cause • YOU DECIDE 3.5	70
	CASE ANALYSIS CHAPTER SUMMARY	70 72
	CHAPTER SOMMARY  CHAPTER REVIEW QUESTIONS	72
	LEGAL TERMINOLOGY	72
	TEST YOUR KNOWLEDGE: ANSWERS	73
CHAPTER 4	Parties to Crime	74
	TEST YOUR KNOWLEDGE: TRUE OR FALSE?	74
	INTRODUCTION	74
	PARTIES TO A CRIME	75
	ACTUS REUS OF ACCOMPLICE LIABILITY	76
	YOU DECIDE 4.1	77
	MENS REA OF ACCOMPLICE LIABILITY	77
	YOU DECIDE 4.2	78
	Natural and Probable Consequences Doctrine	78
	YOU DECIDE 4.3	79
	ACCESSORY AFTER THE FACT	79
	The Common Law The Elements of Accessory After the Fact	79 79
	• YOU DECIDE 4.4	81
	CRIMINAL LAW IN THE NEWS	82
	VICARIOUS LIABILITY	83
	YOU DECIDE 4.5	84
	CRIMINAL LAW AND PUBLIC POLICY	84
	YOU DECIDE 4.6	85
	CASE ANALYSIS	85
	CHAPTER SUMMARY	87
	CHAPTER REVIEW QUESTIONS	87
	LEGAL TERMINOLOGY	87
	TEST YOUR KNOWLEDGE: ANSWERS	88
CHAPTER 5	Attempt, Solicitation, and Conspiracy	89
3 TER 3	TEST YOUR KNOWLEDGE: TRUE OR FALSE?	89
	INTRODUCTION	89
	ATTEMPT	90
	History of Attempt	90
	Public Policy and Attempt	91
	The Elements of Criminal Attempt	91
	Mens Rea of Attempt	91
	Actus Reus of Attempt	92
	YOU DECIDE 5.1      YOU DECIDE 6.2	93
	YOU DECIDE 5.2  IMPOSSIBILITY	93
	IMPOSSIBILITY  • YOU DECIDE 5.3	94 <b>95</b>
	.00 DEGIDE 5.5	93

	ABANDONMENT	96
	YOU DECIDE 5.4	96
	SOLICITATION  Public Policy	<b>96</b> 97
	The Crime of Solicitation	97
	YOU DECIDE 5.5	99
	CRIMINAL LAW IN THE NEWS	99
	CONSPIRACY	100
	Actus Reus	101
	Overt Act Mens Rea	102 102
	Parties	102
	The Structure of Conspiracies	103
	Criminal Objectives	103
	Conspiracy Prosecutions	104
	CRIMINAL LAW AND PUBLIC POLICY	106
	CASE ANALYSIS	107
	CHAPTER SUMMARY	108
	CHAPTER REVIEW QUESTIONS	109
	LEGAL TERMINOLOGY	110
	TEST YOUR KNOWLEDGE: ANSWERS	110
CHAPTER 6	Criminal Defenses: Justifications and Excuses	111
	TEST YOUR KNOWLEDGE: TRUE OR FALSE?	111
	INTRODUCTION	111
	The Prosecutor's Burden	111
	Affirmative Defenses	112
	JUSTIFICATIONS AND EXCUSES	112
	DEFENSES BASED ON A LACK OF CAPACITY TO COMMIT A CRIME	113
	The Insanity Defense	113
	YOU DECIDE 6.1	118
	Diminished Capacity	119
	CRIMINAL LAW IN THE NEWS	120
	Intoxication	121 122
	Age • YOU DECIDE 6.2	123
	DEFENSES BASED ON JUSTIFICATION OR EXCUSE	123
	Necessity	123
	YOU DECIDE 6.3	125
	Duress	125
	YOU DECIDE 6.4	127
	Consent	128
	YOU DECIDE 6.5  Mistake of Law and Mistake of Fact	129
	YOU DECIDE 6.6	129 <b>131</b>
	DEFENSES JUSTIFYING THE USE OF FORCE Self-Defense	<b>131</b> 131
	• YOU DECIDE 6.7	134
	Defense of Others	135
	Defense of the Home	136
	The Castle Doctrine in Florida	136
	CRIMINAL LAW AND PUBLIC POLICY	137
	Execution of Public Duties Resisting Unlawful Arrests	140 140

	DEFENSES BASED ON GOVERNMENTAL MISCONDUCT	141
	Entrapment • YOU DECIDE 6.8	141 <b>145</b>
	NEW DEFENSES	145
	Some New Defenses	145
	The Cultural Defense	147
	CASE ANALYSIS	147
	CHAPTER SUMMARY	149
	CHAPTER REVIEW QUESTIONS	150
	LEGAL TERMINOLOGY	151
	TEST YOUR KNOWLEDGE: ANSWERS	152
CHAPTER 7	Homicide	153
	TEST YOUR KNOWLEDGE: TRUE OR FALSE?	153
	INTRODUCTION	153
	TYPES OF CRIMINAL HOMICIDE	154
	ACTUS REUS AND CRIMINAL HOMICIDE	156
	MENS REA AND CRIMINAL HOMICIDE	156
	MURDER	156
	First-Degree Murder	157
	CRIMINAL LAW AND PUBLIC POLICY	158
	Capital and Aggravated First-Degree Murder	159
	Second-Degree Murder Depraved Heart Murder	160 161
	• YOU DECIDE 7.1	162
	Felony Murder	162
	YOU DECIDE 7.2	165
	MANSLAUGHTER	165
	Voluntary Manslaughter	166
	Voluntary Manslaughter Reconsidered	166
	YOU DECIDE 7.3	167
	Involuntary Manslaughter	167
	Negligent Manslaughter  • YOU DECIDE 7.4	168
		168
	CRIMINAL LAW IN THE NEWS	168
	THE BEGINNING OF HUMAN LIFE	170
	THE END OF HUMAN LIFE	171
	CRIMINAL LAW AND PUBLIC POLICY	171
	THE YEAR-AND-A-DAY RULE	172
	CORPUS DELICTI	172
	CASE ANALYSIS	173
	CHAPTER SUMMARY	174
	CHAPTER REVIEW QUESTIONS	175
	LEGAL TERMINOLOGY	175
	TEST YOUR KNOWLEDGE: ANSWERS	176
CHAPTER 8	Other Crimes Against the Person	177
	TEST YOUR KNOWLEDGE: TRUE OR FALSE?	177
	INTRODUCTION	177
	ASSAULT AND BATTERY	178
	The Elements of Battery	178 180
	Assault • YOU DECIDE 8.1	180 182
		102

	STALKING	182
	YOU DECIDE 8.2	183
	THE COMMON LAW OF RAPE	184
	The Elements of the Common Law of Rape	185
	Rape Reform Punishment and Sexual Assault	186 187
	The Actus Reus of Modern Rape	188
	Mens Rea	189
	CRIMINAL LAW AND PUBLIC POLICY	190
	YOU DECIDE 8.3	191
	CRIMINAL LAW IN THE NEWS	192
	Statutory Rape	193
	YOU DECIDE 8.4	194
	Withdrawal of Consent	194
	Rape Shield Statute	195
	YOU DECIDE 8.5	196
	Rape Trauma Syndrome	196
	YOU DECIDE 8.6	197
	SEXUAL BATTERY	198
	CRIMINAL LAW AND PUBLIC POLICY	198
	KIDNAPPING	199
	Kidnapping Statutes Criminal Act	200 201
	FALSE IMPRISONMENT	203
	YOU DECIDE 8.7	204
	CASE ANALYSIS	204
	CHAPTER SUMMARY	206
	CHAPTER REVIEW QUESTIONS	207
	LEGAL TERMINOLOGY	207
	TEST YOUR KNOWLEDGE: ANSWERS	207
CHAPTER 9	Crimes Against Property	209
	TEST YOUR KNOWLEDGE: TRUE OR FALSE?	209
	INTRODUCTION	209
	LARCENY	210
	Actus Reus: Trespassory Taking	211
	Asportation	211
	Property of Another	211
	Mens Rea Grades of Larceny	212 212
	• YOU DECIDE 9.1	214
	EMBEZZLEMENT	214
	FALSE PRETENSES	215
	Actus Reus	216
	Mens Rea	216
	THEFT	218
	RECEIVING STOLEN PROPERTY	219
	Actus Reus	219
	Mens Rea	220
	YOU DECIDE 9.2     CRIMINAL LAW AND PUBLIC POLICY	221 221
	FORGERY AND UTTERING	223
	Actus Reus	223
	Mens Rea	224

	Uttering	224
	Simulation	224
	YOU DECIDE 9.3	225
	ROBBERY  Actus Reus	<b>225</b> 226
	Mens Rea	226
	Concurrence	226
	Grading Robbery	227
	YOU DECIDE 9.4	228
	CARJACKING	228
	EXTORTION	228
	BURGLARY	230
	Breaking	230
	Entry Dwelling House	231 231
	Dwelling of Another	231
	Nighttime	232
	Intent	232
	Aggravated Burglary	232
	Do We Need the Crime of Burglary? • YOU DECIDE 9.5	233 <b>234</b>
	• YOU DECIDE 9.6	234
	TRESPASS	235
	ARSON	236
	Burning	236
	Dwelling	236
	Dwelling of Another	236
	Willful and Malicious Grading	237 237
	CRIMINAL LAW IN THE NEWS	238
	CRIMINAL MISCHIEF	239
	Actus Reus	240
	Mens Rea	240
	YOU DECIDE 9.7	240
	CASE ANALYSIS	241
	CHAPTER SUMMARY	242
	CHAPTER REVIEW QUESTIONS	243
	LEGAL TERMINOLOGY	244
	TEST YOUR KNOWLEDGE: ANSWERS	244
CHAPTER 10	White-Collar and Organized Crime	245
	TEST YOUR KNOWLEDGE: TRUE OR FALSE?	245
	INTRODUCTION	245
	CORPORATE CRIMINAL LIABILITY	247
	CRIMINAL LAW AND PUBLIC POLICY	248
	ENVIRONMENTAL CRIMES	249
	OCCUPATIONAL SAFETY AND HEALTH	251
	SECURITIES FRAUD	252
	Insider Trading	
	CRIMINAL LAW IN THE NEWS	252 <b>254</b>
		<b>254</b> 255
	• CRIMINAL LAW IN THE NEWS  MAIL AND WIRE FRAUD	254 255 256
	• CRIMINAL LAW IN THE NEWS  MAIL AND WIRE FRAUD • YOU DECIDE 10.1	<b>254</b> 255
	CRIMINAL LAW IN THE NEWS  MAIL AND WIRE FRAUD     YOU DECIDE 10.1  THE TRAVEL ACT	254 255 256 256

	IDENTITY THEFT	259
	ACCESS DEVICE FRAUD	260
	YOU DECIDE 10.2	260
	MONEY LAUNDERING	261
	CURRENCY VIOLATIONS	262
	TAX CRIME	262
	COMPUTER CRIME  • YOU DECIDE 10.3	263 <b>265</b>
	THEFT OF INTELLECTUAL PROPERTY  Copyright	<b>265</b> 266
	Trademark Fraud	266
	THEFT OF TRADE SECRETS	266
	RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS	266
	YOU DECIDE 10.4	267
	CASE ANALYSIS	267
	CHAPTER SUMMARY	270
	CHAPTER REVIEW QUESTIONS	271
	LEGAL TERMINOLOGY	271
	TEST YOUR KNOWLEDGE: ANSWERS	272
CHAPTER 11	Crimes Against Public Order and Morality	273
	TEST YOUR KNOWLEDGE: TRUE OR FALSE?	273
	INTRODUCTION	273
	DISORDERLY CONDUCT	274
	YOU DECIDE 11.1	276
	RIOT	277
	PUBLIC INDECENCIES: QUALITY-OF-LIFE CRIMES	278
	VAGRANCY AND LOITERING	279
	HOMELESSNESS	280
	YOU DECIDE 11.2	281
	GANGS	281
	THE OVERREACH OF CRIMINAL LAW	282
	PROSTITUTION  The Crime of Prostitution	<b>283</b> 284
	Legal Regulation of Prostitution	285
	CRIMINAL LAW AND PUBLIC POLICY	286
	OBSCENITY	287
	CRIMINAL LAW AND PUBLIC POLICY	288
	YOU DECIDE 11.3	288
	CRIMINAL LAW IN THE NEWS	289
	CASE ANALYSIS	289
	CHAPTER SUMMARY	291
	CHAPTER REVIEW QUESTIONS	292
	LEGAL TERMINOLOGY	292
	TEST YOUR KNOWLEDGE: ANSWERS	292
CHAPTER 12	Crimes Against Social Order and Morality:	
	Alcohol and Drug Offenses	293
	TEST YOUR KNOWLEDGE: TRUE OR FALSE?	293
	INTRODUCTION	293
	ALCOHOL OFFENSES	294
	Alcohol Offenses and Juveniles Public Intoxication	294 294

	Driving and Alcohol Offenses	295
	YOU DECIDE 12.1	297
	CRIMINAL LAW IN THE NEWS	297
	CONTROLLED SUBSTANCES	298
	The "War on Drugs"	298
	The Evolution of American Antinarcotics Strategy	299
	State Antidrug Laws Possession of Narcotics and Possession With Intent to	301
	Distribute Narcotics	301
	YOU DECIDE 12.2	303
	CRIMINAL LAW AND PUBLIC POLICY	303
	YOU DECIDE 12.3	306
	Marijuana	307
	CRIMINAL LAW AND PUBLIC POLICY	309
	Crystal Meth	311
	PRESCRIPTION DRUGS	312
	Opioids	312
	CRIMINAL LAW IN THE NEWS	313
	Drug Paraphernalia	314
	YOU DECIDE 12.4	315
	Assets Forfeiture Drug Testing	316
	• YOU DECIDE 12.5	317 <b>318</b>
	Drug Courts	318
	Office of National Drug Control Policy	318
	CASE ANALYSIS	319
	CHAPTER SUMMARY	321
	CHAPTER REVIEW QUESTIONS	321
	LEGAL TERMINOLOGY	321
	TEST YOUR KNOWLEDGE: ANSWERS	322
CHAPTER 13	Offenses Against Public Administration and	
	the Administration of Justice	323
	TEST YOUR KNOWLEDGE: TRUE OR FALSE?	323
	INTRODUCTION	323
	OFFICIAL MISCONDUCT	324
	BRIBERY	324
	COMMERCIAL BRIBERY	327
	SPORTS BRIBERY	328
	FOREIGN CORRUPT PRACTICES ACT	328
	YOU DECIDE 13.1	329
	EXTORTION	329
	PERJURY	329
	YOU DECIDE 13.2	331
	Subornation of Perjury	332
	YOU DECIDE 13.3	332
	OBSTRUCTION OF JUSTICE	333
	CRIMINAL LAW IN THE NEWS	334
	THE CITIZEN'S DUTY TO ASSIST LAW ENFORCEMENT	336
	RESISTING ARREST	336
	COMPOUNDING A CRIME	337
	ESCAPE	339
	Defenses to Prison Escape	339
	YOU DECIDE 13.4	340
	CRIMINAL LAW AND PUBLIC POLICY	340

341
343
343
344
344
344
345
346
347
347
348

### Available Online: edge.sagepub.com/lippmaness3e

### Crimes Against the State

TEST YOUR KNOWLEDGE: TRUE OR FALSE?

INTRODUCTION

TREASON

Criminal Act and Criminal Intent

**Prosecuting Treason** 

**SEDITION** 

SABOTAGE

**ESPIONAGE** 

### **TERRORISM**

Definition of Terrorism

Terrorism Outside the United States

Terrorism Transcending National Boundaries

Weapons of Mass Destruction

Mass Transportation Systems

Harboring or Concealing Terrorists

Material Support for Terrorism

Terrorist Recruitment

Criminal Law in the News

Combat Immunity

State Terrorism Statutes

Criminal Law and Public Policy

### **IMMIGRATION**

Violations of Immigration Law

State Laws

INTERNATIONAL CRIMINAL LAW

CASE ANALYSIS

CHAPTER SUMMARY

CHAPTER REVIEW QUESTIONS

LEGAL TERMINOLOGY

TEST YOUR KNOWLEDGE: ANSWERS

NOTES

NOTES	349
GLOSSARY	360
CASE INDEX	371
SUBJECT INDEX	374

# **Preface**

Essential Criminal Law discusses the central elements of common law and statutory crimes. The text provides a book for faculty who find that cases are challenging for students to read and to understand and are an ineffective and inefficient tool for learning. The aim of this book is to combine a brief definition of crimes with illustrative examples and with a discussion of larger public policy concerns. The text is comprehensive in coverage and includes important topics that often are not included in undergraduate criminal law texts. I hope that nonlawyers as well as lawyers will find that the book achieves the goal of enhancing teaching and learning in the classroom.

### CHAPTER ORGANIZATION

Each chapter is introduced by a **vignette** that raises a significant issue discussed in the text. The Test Your Knowledge sections and chapter introductions help students focus on key points in the chapter. In many instances, following the discussion of a particular crime, the text features a **legal equation** that summarizes the law. Relevant portions of the **Model Penal Code** also are reprinted and analyzed. A number of the topics covered in each chapter are followed by a **You Decide** section that asks students to apply the material to a new and novel factual scenario. The answer is available on the book's **study site** at edge.sagepub.com/lippmaness3e. The book relates the law to current developments by including **Criminal Law in the News** and **Criminal Law and Public Policy** features. Various chapters also offer **charts** listing the frequency that crimes are committed in the fifty states. At the end of each chapter, there is a **Case Analysis**, which is an edited version of a case that is relevant to the material discussed in the chapter. The chapters conclude with a **chapter summary** and with **chapter review questions** that are designed to help students review the material. **Legal terminology** is listed at the end of each chapter, and the book also includes a **glossary**. Cases, statutes, and various learning tools are included on the **study site** accompanying the book.

### ORGANIZATION OF THE TEXT

Criminal law is one of the most dynamic areas of American law. You only need to look at a newspaper to read about controversies regarding the law of self-defense, marijuana legalization, and sexual offenses. I have taught criminal law for more than thirty years and have the same excitement in teaching the topic that I had when I started.

The textbook provides comprehensive coverage of criminal law. It begins with the nature, purpose, function, and constitutional context of criminal law 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 order and morality, crimes against the administration of justice, and crimes against the state.

- Nature, Purpose, Function, and Constitutional Context of Criminal Law. Chapter 1 discusses the nature, purpose, and function of criminal law. This is followed by Chapter 2, which covers the constitutional limits on criminal law, including due process, equal protection, freedom of speech, and the right to privacy.
- *Principles of Criminal Responsibility.* This section of the book covers the foundational elements of a crime. Chapter 3 discusses criminal acts and criminal intent, concurrence, and causation.
- Parties, Vicarious Liability, and Inchoate Crimes. The next part of the text discusses the scope of criminal responsibility. Chapter 4 discusses parties to crime and vicarious liability. Chapter 5 covers the inchoate crimes of attempt, solicitation, and conspiracy.
- Criminal Defenses. The next section of the text in Chapter 6 discusses defenses to criminal liability.
- *Crimes Against the Person.* This part of the book focuses on crimes against the person. Chapter 7 covers homicide. Chapter 8 discusses assault and battery, criminal sexual conduct, kidnapping, and false imprisonment.
- Crimes Against Habitation and Property, and White-Collar Crime. Chapter 9 covers crimes against property, including larceny, embezzlement, and robbery. Chapter 10 discusses white-collar crime.

- Crimes Against Public and Social Order and Morality. Chapter 11 focuses on crimes against public order and morality that threaten the order and stability of the community, including disorderly conduct, rioting, and vagrancy, and efforts to combat homelessness, gangs, and prostitution. Chapter 12 covers two other crimes against social order and morality: alcohol and drug offenses.
- *Crimes Against the Administration of Justice.* Chapter 13 discusses crimes against the administration of justice, including bribery, perjury, obstruction of justice, resisting arrest, compounding a crime, and escape.
- Crimes Against the State. The text concludes with Chapter 14, available on the study site, discussing treason, sedition, espionage, and counterterrorism.

### **DIGITAL RESOURCES**

### **Instructor Teaching Site**

A password-protected site, available at edge.sagepub.com/lippmaness3e, features resources that have been designed to help instructors plan and teach their courses. These resources include suggested answers to the You Decide questions, reprints of cases and statutes, online appendices, downloadable tables and figures, and more.

### **Student Study Site**

An open-access study site is available at edge.sagepub.com/lippmaness3e. This site includes eFlashcards, suggested answers to the You Decide questions, reprints of cases and statutes, and online appendices.

### THIRD EDITION

A number of modifications have been made to the third edition.

**Text.** Material has been included in the text that discusses new developments in criminal law and that provides additional illustrative examples, related to critical concepts such as warrantless GPS tracking of individuals, Good Samaritan statutes, possession of computer files, the difference between reckless and negligent intent, natural and probable causes doctrine, the insanity defense, mistake of law and mistake of fact, revisions to felony murder laws, stalking, and fraudulent representation of identity and rape. Recent events are also critically examined in regard to criminal law, such as the rise of hate crimes, the debate over the Second Amendment and gun control, the death penalty, the hackings related to the 2016 and 2018 elections, the opioid epidemic, terrorism recruitment, the legality of sanctuary cities, and the policies and actions of the Trump administration.

**Opening vignettes.** Most chapters include new opening vignettes on important topics like elder abuse, rape and withdrawal of consent, robbery versus burglary, cybercrime, sex offenders' use of social media, and freedom of expression.

You Decide features. A number of new You Decide boxes have been incorporated into the text and examine issues of gender disparity under the law, involuntary manslaughter, attempted murder, shoplifting in a self-service store, and aggravated identity theft.

Features. Most chapters include new Criminal Law in the News boxes, Criminal Law and Public Policy boxes, and tables that explore such topics as the recent shootings at the Tree of Life synagogue, Marjory Stoneman Douglas High School, Emanuel African Methodist Episcopal Church, and the Pulse nightclub; the use of lethal injection; mental illness and crime; rap music as evidence of a defendant's criminal intent; fraternity hazing; the Slender Man stabbing; "stand your ground" laws; the Bill Cosby trial for sexual assault; the dark web and Silk Road; revenge porn; and the Trump administration's stance on drug crimes.

Cases. New cases have been included in the Case Analysis section at the end of most chapters, exploring crucial issues such as the possession of narcotics in a school zone, resisting arrest, street gangs and terrorism, justifications for driving under the influence of alcohol, aggravated kidnapping, and malicious mischief.

Study site. New material has been included on the student study site at edge.sagepub.com/lippmaness3e.

### **ACKNOWLEDGMENTS**

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

I have benefited from the comments and suggestions of colleagues who reviewed the text. They took the task seriously and greatly improved the text. I owe them a great debt of gratitude.

Barbara Abbott, JD, New England College

Janet Heuer, Bemidji State University

Sarah Jakub, MA, JD, Associate Professor of Sociology and Criminal Justice, Bucks County Community College

Dory Mizrachi, University of Nevada, Las Vegas

Michael B. Shapiro, JD, Clinical Assistant Professor, Department of Criminal Justice and Criminology, Andrew Young School of Policy Studies, Georgia State University

Renee Stamper, JD, Grand Valley State University

Mercedes Valadez, California State University, Sacramento, Division of Criminal Justice

The people at SAGE are among the most skilled professionals that an author is likely to encounter. An author is fortunate to publish with SAGE, a publisher that is committed to quality books. Acquisitions Editor Jessica Miller took an active and intense interest in the book and provided intelligent suggestions. Laura Kearns, Content Development Editor, deserves full credit for her efficient and effective work on the study site. I would also like to thank all the expert professionals at SAGE in production and design who contributed their talents, particularly Production Editor Tracy Buyan, who expertly coordinated the preparation and publication of this lengthy manuscript. A special thanks as well to Marketing Manager Jillian Ragusa. The text was immensely improved by the meticulous, intelligent, and insightful copyediting of Melinda Masson.

At the University of Illinois at Chicago, I must mention colleagues Greg Matoesian, John Hagedorn, Lisa Frohmann, Dennis Judd, Beth Richie, the late Gordon Misner, Laurie Schaffner, Dagmar Lorenz, Evan McKenzie, Dick Simpson, the late Gene Scaramella, Nancy Cirillo, Natasha Barnes, Bette Bottoms, Dean Astrida Tantillo, and Dennis Rosenbaum. A great debt of gratitude, of course, is owed to my students, who constantly provide new and creative insights.

I am fortunate to have loyal friends who have provided inspiration and encouragement. These include my dear friends Wayne Kerstetter, Deborah Allen-Baber, Agata Fijalkowski, Sharon Savinski, Mindie Lazarus-Black, Bill Black, Kris Clark, Donna Dorney, the late Leanne Lobravico, Sean McConville, Sheldon Rosing, Bryan Burke, Maeve Barrett Burke, Bill Lane, Kerry Peterson, Ken Janda, Annamarie Pastore, Jess Maghan, Oneida Meranto, Robin Wagner, Jennifer Woodard, Tom Morante, and Marianne Splitter. I also must thank the late Ralph Semsker and Isadora Semsker and their entire family. Dr. Mary Hallberg has continued to be an important source of support in my life, and the late Lidia Janus remains my true north and inspiration.

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 parents, Mr. and Mrs. S. G. Lippman, who provided me with a love of learning. My late father, S. G. Lippman, practiced law for seventy 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.

# **About the Author**

Matthew Lippman is Professor Emeritus at the University of Illinois at Chicago (UIC) and has taught criminal law and criminal procedure in the Department of Criminology, Law, and Justice for more than thirty years. He has also taught courses on civil liberties, law and society, and terrorism and teaches international criminal law at John Marshall Law School in Chicago. He earned a doctorate in political science from Northwestern University and a Master of Laws from Harvard Law School, and is a member of the Pennsylvania Bar. He has been voted by the graduating seniors at UIC to receive the Silver Circle Award for outstanding teaching on six separate occasions and has also received the UIC Flame Award from the University of Illinois Alumni Association, as well as the Excellence in Teaching Award, Teaching Recognition (Portfolio) Award, Honors College Fellow of the Year Award, and HOPE Award. The university chapter of Alpha Phi Sigma, the criminal justice honors society, named him "criminal justice professor of the year" on three occasions. In 2008, he was recognized as College of Liberal Arts and Sciences Master Teacher. He was honored by the College of Liberal Arts and Sciences, which named him Commencement Marshal at the May 2012 graduation.

Professor Lippman is author of one hundred articles, two coauthored books, and one single-authored book. These publications focus on criminal law and criminal procedure, international human rights, and comparative law. He also is author of five other SAGE volumes: Contemporary Criminal Law: Concepts, Cases, and Controversies (5th ed., 2018); Criminal Procedure (4th ed., 2019); Law and Society (2nd ed., 2017); Criminal Evidence (2015); and Striking the Balance: Debating Criminal Justice and Law (2017). In 2018, Professor Lippman received the Cornerstone Author Award from SAGE Publishing. His work is cited in hundreds of academic publications and by domestic and international courts and organizations. He has also served on legal teams appearing before the International Court of Justice in The Hague, has testified as an expert witness on international law before numerous state and federal courts, and has consulted with both private organizations and branches of the U.S. government. Professor Lippman regularly appears as a radio and television commentator and is frequently quoted in leading newspapers. He has served in every major administrative position in the Department of Criminology, Law, and Justice including Department Head, Director of Undergraduate Studies, and Director of Graduate Studies.

Sara Miller McCune founded SAGE Publishing in 1965 to support the dissemination of usable knowledge and educate a global community. SAGE publishes more than 1000 journals and over 600 new books each year, spanning a wide range of subject areas. Our growing selection of library products includes archives, data, case studies and video. SAGE remains majority owned by our founder and after her lifetime will become owned by a charitable trust that secures the company's continued independence.

Los Angeles | London | New Delhi | Singapore | Washington DC | Melbourne

# The Nature, Purpose, and Function of Criminal Law

### INTRODUCTION

The 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. A Florida law states that it is unlawful to possess "any ignited tobacco product" in an elevator. 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. In Wyoming, you can be arrested for skiing while being impaired by alcohol or for opening and failing to close a gate in a fence that "crosses a private road or river." 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. In Louisiana, you risk being sentenced to ten years in prison for stealing an alligator, whether dead or alive, valued at \$1,000.1

### 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 him or her 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."

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 his or her 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 the criminal law differ from the **civil law**? The civil law is that branch of the law that protects the individual rather than the public interest. A legal

# TEST YOUR KNOWLEDGE: TRUE OR FALSE?

- The only difference between criminal law and civil law is that violation of a criminal law may result in imprisonment.
- There is no significant relationship between the criminal law and criminal procedure.
- The primary distinction between felonies and misdemeanors is that felonies may result in incarceration and that misdemeanors may result in only a monetary fine.
- A state criminal code will tell you all you need to know to understand the elements of crimes and criminal defenses in a state.
- After being charged with a federal criminal offense, the next procedural step is for a defendant to stand trial in federal court.
- All state court systems provide that a criminal defendant has the right to an automatic appeal to the state supreme court.
- Criminal law is different from other areas of the law in that judges are not required to follow the precedent established in previous cases.

Check your answers on page 18.

1

Master the content at edge.sagepub.com/lippmaness3e

\$SAGE edge™

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 find himself or herself 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 percent 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.<sup>3</sup>

The famous eighteenth-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 an individual 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.<sup>4</sup>

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 his or her 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 ten years in prison for molesting two thirteen-year-old boys. This was only the latest episode in Hendricks's almost thirty-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. <sup>5</sup> Do you think that the decision of the U.S. Supreme Court makes sense?

### THE PURPOSE OF CRIMINAL LAW

We have seen that the criminal law primarily protects the interests of society, and the civil law protects the interests of the individual. The primary purpose or function of the 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." The New York criminal code sets out the basic purposes of criminal law as follows.

- 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<sup>8</sup> and Wayne R. LaFave<sup>9</sup> 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 his or her criminal act is justified (benefits society) or excused (the individual suffered from a disability that prevented him or her 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 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. **Capital felonies** are crimes 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 six and twelve 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 fourteen years old or if death results.<sup>10</sup>

### 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 only considered wrong 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, prohibit 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 crimes that were considered to be deserving of shame or disgrace as **infamous crimes**. 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 are as follows:

- Crimes Against the Person: Homicide. Homicide, murder, manslaughter (Chapter 7)
- Crimes Against the Person: Sexual Offenses and Other Crimes. Rape, assault and battery, false imprisonment, kidnapping (Chapter 8)
- *Crimes Against Property and Habitation.* Larceny, embezzlement, false pretenses, receiving stolen property, robbery, burglary, trespassing, arson (Chapter 9)
- White-Collar Crimes. Corporate and environmental fraud, identity theft, computer crime (Chapter 10)
- *Crimes Against Public and Social Order and Morality*. Disorderly conduct, riot, prostitution, alcoholism, narcotics (Chapters 11 and 12)
- Crimes Against the Administration of Justice. Obstruction of justice, perjury, bribery (Chapter 13)
- *Crimes Against the State.* Treason, sedition, espionage, terrorism (Chapter 14)

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

### SOURCES OF CRIMINAL LAW

We now have covered the various categories of criminal law. The next question to consider is this: What are the sources of the criminal law? How do we find the requirements of the criminal law? There are a number of sources of the 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. 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.

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 thirteen 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.<sup>11</sup>

### **State Criminal Codes**

States in the nineteenth 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." 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-nineteenth 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." <sup>13</sup>

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." 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." 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."

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.<sup>17</sup>

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 subsequently amended the murder statute to punish "the unlawful killing of a human being, or a fetus." 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 4? 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." 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." <sup>20</sup>

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 fifty 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 is 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 fifty 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 various existing state statutes. Roughly thirty-seven 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.<sup>21</sup>

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, in *Arizona v. United States*, the Supreme Court held that federal immigration law preempted several sections of an Arizona statute directed at undocumented individuals.<sup>22</sup>

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 has interpreted its power to regulate interstate commerce under the Interstate Commerce Clause 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.<sup>23</sup>

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.<sup>24</sup>

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 Act from prescribing lethal drugs to terminally ill patients who are within six months of dying.<sup>25</sup>

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 so long as the criminal charges slightly differ. You might recall in 1991 that 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 thirty months in federal prison, and two were acquitted. The U.S. Supreme Court is expected to issue a decision on the constitutionality of the dual sovereignty doctrine.

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 that

- 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 twentieth 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.<sup>26</sup>

### THE CRIMINAL JUSTICE PROCESS

A person accused of a felony in the federal criminal justice system progresses through a number of stages that are outlined below. Keep in mind that this process is somewhat different in the federal criminal justice system than it is in state systems (see Figure 1.1). The striking feature of the criminal justice process is the number of procedures that exist to protect individuals against an unjustified detention, arrest, prosecution, or conviction. Individuals may be weeded out of the system because there is a lack of evidence that they committed a crime, or because a police officer, prosecutor, or judge or jury exercises discretion and decides that there is little social interest in continuing to subject an individual to the criminal justice process. The police may decide not to arrest an individual; a prosecutor may decide not to file a charge, to file a less serious charge, or to enter into a plea bargain; the jury may acquit a defendant; or a judge may determine that the offender merits a lenient sentence.

*Criminal investigation.* The criminal investigation phase involves detecting and investigating criminal offenses. The questions for the police are, first, to determine whether a crime has been committed and, second, to identify who committed the crime. The police may receive reports of a crime from a victim or from an informant, or they may discover ongoing criminal activity and arrest an alleged offender at the scene of the crime.

Arrest. Once the police have established that there is probable cause to believe that a crime has been committed and that there is probable cause to believe that a suspect has committed a crime, they are authorized to execute an arrest of an individual and to place him or her in custody. The police may seize a suspect without a warrant or obtain an arrest warrant from a judicial official. A suspect may be searched at the time of his or her arrest.

**Postarrest.** An individual who has been subjected to a custodial arrest will be booked at the police station or jail. This phase involves recording information regarding the arrestee and taking a mug shot and fingerprints. An individual may be subjected to an inventory of his or her possessions.

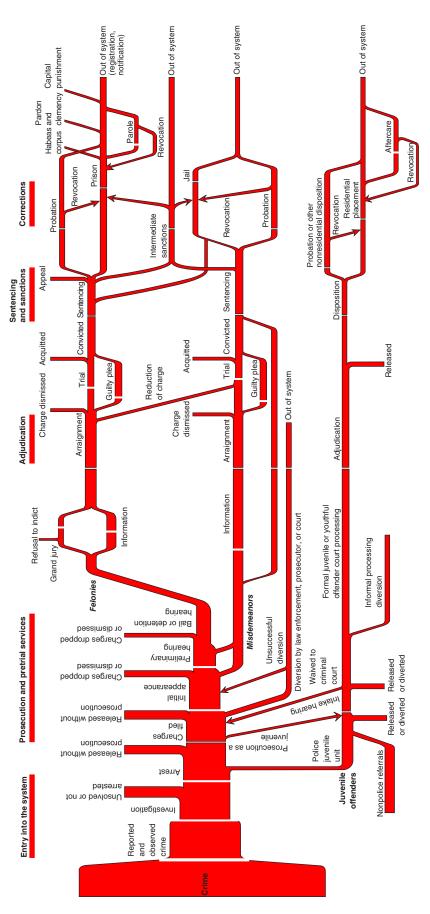
*Postarrest investigation.* Following an individual's arrest, the police may continue to engage in investigative activities designed to gather evidence of the suspect's guilt.

The criminal charge. Prosecutors have the discretion to formally charge suspects with criminal offenses or to decide not to file formal charges and release suspects from custody. Prosecutors who decide to pursue cases file complaints that describe the alleged crimes and the relevant sections of the criminal code. Suspects are then brought for their first appearance before a magistrate (a lawyer appointed by a district court judge for an eight-year term)

FIGURE 1.1

# Criminal Justice Flow Chart

What is the sequence of events in the criminal justice system?



Source: US Department of Justice.

Note: This chart gives a simplified view of caseflow through the criminal justice system. Procedures vary among jurisdictions. The weights of the lines are not intended to show actual size of caseloads.

and are informed of the charges against them and of their rights to silence and counsel. Lawyers are appointed for indigents, and bail is fixed. In the case of a warrantless arrest, the first appearance often is combined with a *Gerstein* hearing to determine whether there was probable cause to arrest and to detain the suspect.

Pretrial. The next step in some jurisdictions is a preliminary hearing at which a magistrate determines whether there is probable cause to believe that the defendant committed the crime charged in the complaint. The prosecutor presents witnesses who may be cross-examined by the defense. This allows the defense to learn what some of the evidence is that will be relied on by the prosecution. The defense also may file a motion for discovery, which is a court order requiring the prosecution to turn over information, such as the results of physical examinations or scientific tests, to the defense. A determination that probable cause is lacking results in the magistrate dismissing the case. In the majority of states, a determination of probable cause to support the charge results in the prosecutor filling an information with the clerk of the court and the case being bound over for trial. In the federal system and in a minority of states, the case is bound over from the preliminary hearing to a grand jury. A finding of probable cause by the grand jury results in the issuance of an indictment against the defendant. Keep in mind that a prosecutor may decide to dismiss the complaint by filing a motion of nolle prosequi.

The next step is the arraignment, at which individuals are informed of the charges against them, advised of their rights, and asked to enter a plea. At this point, plea negotiations between the defense attorney and prosecution may become more heated, as both sides recognize that the case is headed for trial.

*Pretrial motions.* The defense attorney may file various pretrial motions. These include a motion to dismiss the charges on the grounds that the defendant already has been prosecuted for the crime or has been denied a speedy trial, a motion to change the location of the trial, or a motion to exclude unlawfully seized evidence from the trial.

*Trial.* The accused is guaranteed a trial before a jury in the case of serious offenses. A jury trial may be waived where the defendant pleads guilty or would prefer to stand trial before a judge. A jury generally is composed of twelve persons, although six-person juries are used in some states for less serious felonies and for misdemeanors. Most states require unanimous verdicts despite the fact that nonunanimous verdicts are permitted under the U.S. Constitution.

Sentencing. Following a criminal conviction, the judge holds a sentencing hearing and establishes the defendant's punishment. There are various types of punishments available to the judge, including incarceration, fines, and probation. States have adopted a variety of approaches to sentencing that provide trial court judges with varying degrees of discretion or flexibility.

Appeal. A defendant has the right to file an appeal to a higher court. The U.S. Supreme Court and state supreme courts generally possess the discretion to hear a second appeal.

*Postconviction.* Individuals who have been convicted and have exhausted their appeals may file a motion for postconviction relief in the form of a writ of habeas corpus, claiming that the appeals courts committed an error.

### THE STRUCTURE OF THE FEDERAL AND STATE COURT SYSTEMS

The United States has a federal system of government in which the Constitution divides powers between the federal government and the fifty state governments. As a result, there are parallel judicial systems. Federal courts address those issues that the U.S. Constitution reserves to the federal government, while state courts address issues that are reserved to the states. Federal courts, for example, have exclusive jurisdiction over prosecutions for treason, piracy, and counterfeiting. Most common law crimes are matters of state jurisdiction. These include murder, robbery, rape, and most property offenses. A state supreme court has the final word on the meaning of a state constitution or state statutes, and the U.S. Supreme Court has no authority to tell a state how to interpret matters of state concern.

The U.S. Supreme Court has recognized the **concurrent jurisdiction** or joint authority of federal and state courts over certain areas, such as claims under federal civil rights law that a law enforcement official has violated an individual's civil rights. This means that an action may be filed in either a state or a federal court.

The federal government and a state government are separate sovereign entities, and an individual may be prosecuted for the same crime in both a federal and a state court. For example, Terry Nichols was convicted in federal court of involvement in the bombing of the federal building in Oklahoma City and was given life imprisonment. He later was tried in an Oklahoma state court for the same offense and was convicted of 161 counts of murder and was sentenced to

161 life sentences. An individual also can be prosecuted in two states so long as some part of the crime was committed in each state jurisdiction.

### The Federal Judicial System

Article III, Section 1 of the U.S. Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and in such "inferior Courts as the Congress may establish."

The federal judicial system is based on a pyramid (see Figure 1.2). At the lowest level are ninety-four district courts. These are federal trial courts of general jurisdiction that hear every type of case. District courts are the workhorses of the federal system and are the venue for prosecutions of federal crimes. A single judge presides over the trial. There is at least one judicial district in each state. In larger states with multiple districts, the district courts are divided into geographic divisions (e.g., Eastern District and Western District). There also are judicial districts in the District of Columbia, in the Commonwealth of Puerto Rico, and for the territories of the Virgin Islands, Guam, and the Northern Mariana Islands. Appeals to district courts may be taken from the U.S. Tax Court and from various federal agencies, such as the Federal Communications Commission.

One or more U.S. magistrate judges are assigned to each district court. A magistrate judge is authorized to issue search warrants, conduct preliminary hearings, and rule on pretrial motions submitted by lawyers. Magistrates also may conduct trials for misdemeanors (crimes carrying criminal penalties of less than a year in prison) with the approval of the defendant.

The ninety-four district courts, in turn, are organized into eleven regional circuits (see Figure 1.3) and the District of Columbia. Appeals may be taken from district courts to the court of appeals in each circuit. The eleven regional circuit courts of appeals have jurisdiction over district courts in a geographical region. The U.S. Court of Appeals for the Fifth Circuit, for example, covers Texas, Mississippi, and Louisiana. The U.S. Court of Appeals for the Tenth Circuit

FIGURE 1.2
Federal Court Hierarchy

### **District Courts**



- Lowest level in the federal system
- 94 judicial districts in 50 states and territories
- · No appellate jurisdiction
- Original jurisdiction over most cases

### **Courts of Appeal**



- Intermediate level in the federal system
- 12 regional "circuit" courts, including D.C. circuit
- No original jurisdiction; strictly appellate

### **Supreme Court**



- Highest court in the federal system
- Nine justices, meeting in Washington, D.C.
- Appeals jurisdiction through certiorari process
- Limited original jurisdiction over some cases

Source: Adapted from Center for Assistive Technology and Environmental Access (CATEA). Photos from © Comstock/Stockbyte/Thinkstock Images. © iStock.com/dlewis33, and WikimediaCommons/Murad.

encompasses Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming. The U.S. Court of Appeals for the District of Columbia hears appeals from cases involving federal agencies. A thirteenth federal circuit court of appeals has jurisdiction over the Federal Circuit in Washington, D.C., and has nationwide jurisdiction over patent and copyright cases and other specialized appeals involving federal law.

Circuit courts of appeals sit in three-judge panels. In certain important cases, all of the judges in the circuit will sit **en banc**. The decisions of a court of appeals are binding on district courts within the court's circuit. In the event that an appeal is not taken from a district court decision, the district court decision will be final. The number of judges in each circuit varies depending on the size of the circuit. The Ninth Circuit, which includes California, has twenty-eight judges, while the First Circuit in New England has six. Courts of appeals tend to have differing levels of respect and influence within the legal community based on the reputation of the judges on the circuit. One measure of the importance of a circuit is the frequency with which the circuit court's decisions are affirmed by the U.S. Supreme Court.

The U.S. Supreme Court sits at the top of the hierarchy of federal and state courts. It is called the "court of last resort," because there is no appeal from a decision of the Supreme Court. The Supreme Court decision sets the **precedent** and is the binding authority on every state and every federal court in the United States on the meaning of the U.S. Constitution and on the meaning of a federal law. In other words, any court in the country that hears a case involving an issue on which the Supreme Court has ruled is required to follow the Supreme Court's judgment. Precedent is based on the judicial practice of following previous opinions or *stare decisis*, which literally translates as "to stand by precedent and to stand by settled points."

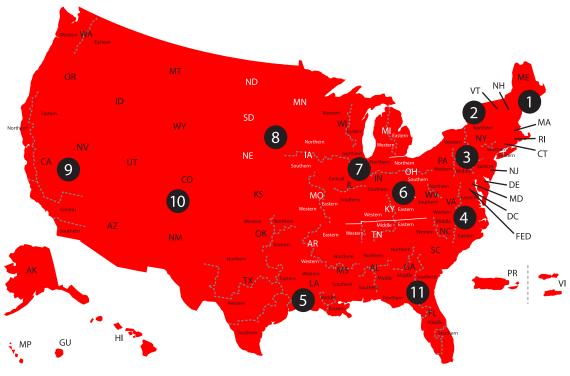
The U.S. Supreme Court consists of a chief justice and eight associate justices. The Court reviews a relatively limited number of cases. In an active year, the Supreme Court may rule on 150 of the 7,000 cases it is asked to consider. These cases generally tend to focus on issues in which different federal circuit courts of appeals have made different decisions or on significant issues that demand attention. There are two primary ways for a case to reach the Supreme Court.

FIGURE 1.3

Map of Federal Court of Appeals

### **Geographic Boundaries**

of United States Courts of Appeals and United States District Courts



Source: Administrative Office of the US Courts.

- Original jurisdiction. The Court has original jurisdiction over disputes between the federal government and a state, between states, and in cases involving foreign ministers or ambassadors. Conflicts between states have arisen in cases of boundary disputes in which states disagree over which state has a right to water or to natural resources. These types of cases are extremely rare.
- Writ of certiorari. The Court may hear an appeal from the decision of a court of appeals. The Supreme Court also will review state supreme court decisions that are decided on the basis of the U.S. Constitution. Four judges must vote to grant certiorari for a lower court decision to be reviewed by the Supreme Court. This is termed the rule of four.

The U.S. Supreme Court requires the lawyers for the opposing sides of a case to submit a **brief** or a written argument. The Court also conducts oral arguments, in which the lawyers present their points of view and are questioned by the justices. The party appealing a lower court judgment is termed the **appellant**, and the second name in the title of a case typically is the party against whom the appeal is filed, or the **appellee**.

Individuals who have been convicted and incarcerated and have exhausted their state appeals may file a constitutional challenge or **collateral attack** against their conviction. The first name in the title of the case on collateral attack is the name of the inmate bringing the case, or the **petitioner**, while the second name, or **respondent**, typically is that of the warden or individual in charge of the prison in which the petitioner is incarcerated. These habeas corpus actions typically originate in federal district courts and are appealed to the federal court of appeals and then to the U.S. Supreme Court. In a collateral attack, an inmate bringing the action files a petition for habeas corpus review, requesting a court to issue an order requiring the state to demonstrate that the petitioner is lawfully incarcerated. The ability of a petitioner to compel the state to demonstrate that he or she has been lawfully detained is one of the most important safeguards for individual liberty and is guaranteed in Article I, Section 9, Clause 2 of the U.S. Constitution.

Five of the nine Supreme Court justices are required to agree if they are to issue a **majority opinion**. This is a decision that will constitute a legal precedent. A justice may agree with the majority and want to write a **concurring opinion** that expresses his or her own view. A justice, for example, may agree with the majority decision but base his or her decision on a different reason. In some cases, four justices may agree and, along with various concurring opinions from other justices, constitute a majority. In this instance, there is a **plurality opinion**, and no single majority opinion. A justice who disagrees with the majority may draft a **dissenting opinion** that may be joined by other justices who also disagree with the majority decision. In some instances, a justice may disagree with some aspects of a majority decision while concurring with other parts of the decision. There are examples of dissenting opinions that many years later attract a majority of the justices and come to be recognized as the "law of the land." A fifth type of decision is termed a **per curiam** decision. This is an opinion of the entire Court without any single justice being identified as the author.

In the event that a justice has a conflict of interest or is ill and does not participate in a case or there is an untimely death, the Court will sit with fewer than nine judges. An evenly divided court such as 4–4 is considered a "nondecision," and the lower court decision remains in effect.

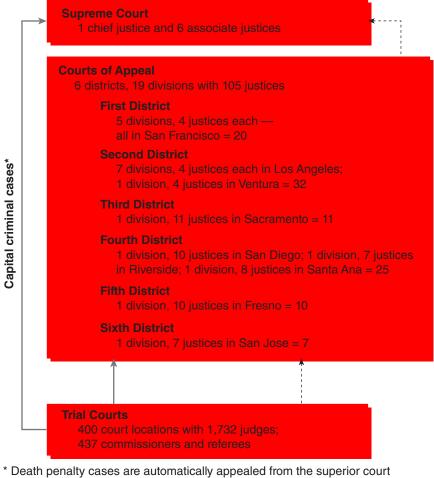
Supreme Court justices and other federal judges are appointed by the U.S. president with the approval of the U.S. Senate, and they have lifetime appointments so long as they maintain "good behavior." The thinking is that this protects judges from political influence and pressure. There is a question whether Supreme Court justices should have limited tenure, rather than a lifetime appointment, to ensure that there is a turnover on the Court. The notion that an unelected judge should hold a powerful court appointment for many years strikes some commentators as inconsistent with democratic principles.

You should also be aware that there are a number of specialized federal courts with jurisdiction that is limited to narrow questions. Two special courts are the U.S. Court of Federal Claims, which considers suits against the government, and the Court of International Trade, which sits in New York and decides international trade disputes and tariff claims. There are also a number of other "non–Article III" courts. These are courts that the framers of the Constitution did not provide for in Article III of the U.S. Constitution and that have been created by Congress. These courts include the U.S. Tax Court, bankruptcy courts, the U.S. Court of Appeals for the Armed Forces and Court of Appeals for Veterans Claims, and the courts of administrative law judges who decide the cases of individuals who appeal an administrative agency's denial of benefits (e.g., a claim for social security benefits).

### State Judicial Systems

There is significant variation among the states in the structure of their state court systems. Most follow the general structure outlined below. The organization of California courts in Figure 1.4 illustrates how one state arranges its judicial system. You may want to compare this with the structure of the judicial system in your state.

Prosecutions are first initiated or originate in **courts of original jurisdiction**. There are two types of courts in which a criminal prosecution may originate. First, there are trial **courts of limited jurisdiction**. These local courts are commonly called municipal courts, police courts, or magistrate's courts. The courts prosecute misdemeanors and in some instances



\* Death penalty cases are automatically appealed from the superior court directly to the supreme court.

(Judgeship numbers are current as of 2016)

Line of Appeal Line of Discretionary Review

### Two types of courts

California has two types of courts: 58 trial courts, one in each county, and appellate courts. Trial courts are the superior courts; appellate courts are the six districts of the Courts of Appeal and the California Supreme Court. In the trial courts, a judge and sometimes a jury hear witnesses' testimony and other evidence and decide cases by applying the relevant law to the relevant facts. In the appellate courts, people who are not satisfied with a trial court decision appeal cases to judges. The California courts serve more than 39 million people.

**Trial courts.** In June 1998, California voters approved Proposition 220, a constitutional amendment that permitted the judges in each county to merge their superior and municipal courts into a "unified," or single, superior court. As of February 2001, all of California's 58 counties have voted to unify their trial courts.

Superior courts now have trial jurisdiction over all criminal cases including felonies, misdemeanors, and traffic matters. They also have jurisdiction over all civil cases, including family law, probate, juvenile, and general civil matters. Over 6.2 million cases were filed in the trial courts at some 400 court locations throughout the state during 2015–2016. Appeals in limited civil cases (where \$25,000 or less is at issue) and misdemeanors are heard by the appellate division of the superior court. When a small claims case is appealed, a superior court judge decides the case.

### Appellate courts

Supreme Court: The state's highest court, the supreme court, may grant review of cases decided by the courts of appeal. Certain other cases, such as death penalty appeals and disciplinary cases involving judges and attorneys, are appealed directly to this court. At least four of the seven justices must agree on decisions of the court. The court's decisions are binding on all other state courts.

Courts of Appeals: Panels of three justices hear appeals from superior courts, except in death penalty cases, which are appealed automatically to the supreme court. The courts of appeal determine whether a trial court committed legal error in handling the cases that are presented on appeal.

Source: Superior Court of California, County of Glenn (2009).

specified felonies. Judges in municipal courts also hear traffic offenses, set bail, and conduct preliminary hearings in felony cases. In most instances, judges preside over criminal cases in these courts without a jury. A case in which a judge sits without a jury is termed a bench trial. Most jurisdictions also have specialized courts of limited jurisdiction to hear particular types of cases. These include juvenile courts, traffic courts, family or domestic courts, small claims courts, and courts that hear offenses against local ordinances.

Trial **courts of general jurisdiction** hear more serious criminal and civil cases. In some states, courts of general jurisdiction have jurisdiction over criminal appeals from courts of limited jurisdiction. This typically entails a **trial** *de* **novo**, which means that a completely new trial is conducted that may involve the same witnesses, evidence, and legal arguments that formed the basis of the first trial. These courts of general jurisdiction commonly are referred to as circuit courts, district courts, or courts of common pleas; and they have jurisdiction over cases that arise in a specific county or region of the state. New York curiously names its court of general jurisdiction the supreme court.

Appeals from courts of general jurisdiction are taken in forty of the fifty states to **intermediate appellate courts**. An appeal as a matter of right may be filed to an intermediate court, which typically sits in panels of two or three judges. The court usually decides the case based on the transcript or written record of the trial from the lower court. The **appellate court** does not hear witnesses or consider new evidence.

The supreme court is the court of last resort in a state system and has the final word on the meaning of local ordinances, state statutes, and the state constitution. (Note that New York is different and refers to its court of last resort as the court of appeals.) A discretionary appeal may be available from an intermediate court. This means that the supreme court is not required to review the decision of a lower court and will do so at its discretion. In those states that do not have intermediate appellate courts, appeals may be directly taken from trial courts to the state supreme court. State supreme courts function in a similar fashion to the U.S. Supreme Court and hear every type of case. The U.S. Supreme Court has no authority to tell a state supreme court how to interpret the meaning of its state constitution.

State court judges are selected using a variety of procedures. Some states elect judges in a partisan election in which judges run under the label of a political party, while other states hold nonpartisan elections in which judges are not identified as belonging to a political party. In other states, judges are elected by the state legislature. A fourth approach is appointment by the governor with the consent of the legislature. The so-called Missouri Plan provides for appointment by the governor, and following a judge's initial period of judicial service, the electorate is asked whether to retain or to reject the judge's continuation in office. A minority of states provide for the lifetime appointment of judges. Most states limit the length of the judge's term in office. In many states, different procedures are used for different courts. There is a continuing debate over whether judges should be elected or appointed based on merit and qualifications.

### **PRECEDENT**

We have seen that courts follow *stare decisis*, which means that once a court has established a legal principle, this rule constitutes a precedent that will be followed by courts in future cases that involve the same legal issue. The advantage of precedent is that courts do not have to reinvent the wheel each time that they confront an issue and, instead, are able to rely on the opinion of other judges. A judgment that is based on precedent and the existing law also takes on credibility and is likely to be respected and followed. Precedent is merely the method that all of us rely on when undertaking a new challenge: We ask how other people went about doing the same task.

Courts have different degrees of authority in terms of precedent. As noted, U.S. Supreme Court decisions constitute precedent for all other courts in interpreting the U.S. Constitution and federal laws. Circuit courts of appeals, U.S. district courts, and state courts are bound by Supreme Court precedent. Circuit courts of appeals and state supreme courts establish binding precedents within their territorial jurisdictions. In other words, a state supreme court decision constitutes precedent for all courts within the state.

What if there is no precedent? A case that presents an issue that a court has never previously decided is termed a case of **first impression**. In these instances, a court will look to see how other courts have decided the issue. These other court decisions do not constitute precedent, but they are viewed as **persuasive authority**, or cases to be considered in reaching a decision. For example, a federal court of appeals will look to see how other courts of appeals have decided an issue and will view these decisions as persuasive authority rather than as **binding authority**.

A decision of the supreme court of California has binding authority on all lower courts in California. The decision of a lower-level California court that fails to follow precedent likely will be appealed and reversed by the supreme court of California. The decisions of the supreme court of California do not have binding authority on courts outside of California, but they may be consulted as persuasive authority. Courts are viewed as carrying different degrees of status within the legal world in regard to their persuasive authority. For example, the U.S. Court of Appeals for the Second Circuit in New York is viewed as particularly knowledgeable on financial matters, because the judges are experienced in deciding cases involving Wall Street, banking, and finance. Courts are reluctant to overturn precedents, although this does occur on rare occasions. A court may avoid a precedent by distinguishing the facts of the case that the judges are deciding from the facts involved in the case that constitutes a precedent.

#### 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 interest, 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 focus on several basic concerns that compose the general part of the criminal law. A crime is composed of 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 comprises 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 only considered wrong because they are prohibited by statute.

In this textbook, crimes are categorized in accordance with the subject matter of the offense, the scheme that is followed in most state criminal codes. This includes crimes against the state, crimes against the person, crimes against habitation, crimes against property, crimes against public order, and crimes against the administration of justice.

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 nineteenth and twentieth 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.

A criminal felony in the federal criminal justice system progresses through a number of stages. A case may begin with a police investigation and may not conclude until the individual's claim for postconviction relief is exhausted. A striking feature of the criminal justice process is the number of procedures that exist to protect individuals against unjustified detention, arrest, prosecution, and conviction.

The United States has a federal system of government in which the U.S. Constitution divides powers between the federal government and the fifty state governments. As a result, there are parallel judicial systems. Federal courts address those issues that the U.S. Constitution reserves to the federal government, while state courts address issues that are reserved to the states. The federal judicial system is based on a pyramid of authority. At the lowest level are ninety-four district courts. District courts are the workhorses of the federal system and are the venue for prosecutions of federal crimes. The ninety-four district courts, in turn, are organized into eleven regional circuits. There is also a U.S. Court of Appeals for the District of Columbia. A thirteenth U.S. court of appeals is the Federal Circuit in Washington, D.C. Appeals may be taken from district courts to the court of appeals in each circuit. The U.S. Supreme Court sits at the top of the hierarchy of federal courts and may grant certiorari and hear discretionary appeals from circuit courts. The Supreme Court is called the "court of last resort," because there is no appeal from a decision of the Court. A Supreme Court decision sets precedent and has binding authority on every state and every federal court in the United States with respect to the meaning of the U.S. Constitution and on the meaning of federal laws.

There is significant variation in the structure of state court systems. Prosecutions are first initiated in courts of original jurisdiction. In courts of limited jurisdiction, misdemeanors and specified felonies are prosecuted. In trial courts of general jurisdiction, more serious criminal and civil cases are heard. In some states, courts of general jurisdiction have jurisdiction over criminal appeals from courts of limited jurisdiction. Appeals from courts of general jurisdiction are taken in most states to intermediate appellate courts. The state supreme courts are the courts of last resort in each state and have the final word on the meaning of local ordinances, state statutes, and the state constitution. A discretionary appeal is available from intermediate courts to the state supreme court.

Courts have different degrees of authority in terms of precedent. As noted, U.S. Supreme Court decisions constitute precedent for all other courts in interpreting the U.S. Constitution and federal laws. Circuit courts of appeals, district courts, and state courts are bound by U.S. Supreme Court precedent. Circuit courts of appeals and state supreme courts establish binding precedents within their territorial jurisdictions. In those instances in which there is no precedent, an appellate court may look to other coequal courts for persuasive authority.

#### **CHAPTER REVIEW QUESTIONS**

- 1. Define 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 parts of the criminal law.
- 5. List the basic principles that comprise the general part of the criminal law.
- 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 the criminal law?
- 13. Outline the steps in the criminal justice system.
- 14. Describe the organization of the federal and state judicial systems.
- **15.** What is the role of precedent in judicial decision making?

#### LEGAL TERMINOLOGY

appellant 13	common law crimes 5	dissenting opinion 13
appellate courts 15	common law states 6	dual sovereignty 7
appellee 13	concurrent jurisdiction 10	en banc 12
bench trial 15	concurring opinion 13	federal criminal
binding authority 15	courts of general jurisdiction 15	code 7
brief 13	courts of limited jurisdiction 13	felony 3
capital felony 3	courts of original jurisdiction 13	first impression 15
certiorari 13	crime 1	Gerstein hearing 10
civil law 1	criminal procedure 3	gross misdemeanor 3
code jurisdiction 6	defendant 1	indictment 10
collateral attack 13	discretionary appeal 15	infamous crimes 4

information 10
infraction 3
intermediate appellate courts 15
Interstate Commerce Clause 7
magistrate 8
majority opinion 13
mala in se 4
mala prohibita 4
misdemeanor 3

Model Penal Code 6
original jurisdiction 13
per curiam 13
persuasive authority 15
petitioner 13
petty misdemeanor 3
plurality opinion 13
police power 6
precedent 12
preemption doctrine 7

reception statute 6
respondent 13
rule of four 13
stare decisis 12
substantive criminal law 3
Supremacy Clause 7
tort 2
trial de novo 15
violation 3

### TEST YOUR KNOWLEDGE: ANSWERS

1. False.

3. False.

5. False.

7. False.

2. False.

4. False.

6. False.

# \$SAGE edge™

Get the tools you need to sharpen your study skills. SAGE edge offers a robust online environment featuring ari impressive array of free tools and resources.

Access suggested answers to the You Decide questions, reprints of cases and statutes, online appendices practice quizzes, eFlashcards, video, and multimedia at

# Constitutional Limitations

# DID ELONIS'S FACEBOOK POST CONSTITUTE A CRIMINAL THREAT?

Anthony Douglas Elonis was an active user of the social networking website Facebook. In May 2010, Elonis's wife of nearly seven years left him, taking with her their two young children. Elonis began "listening to more violent music" and posting self-styled "rap" lyrics inspired by the music. Eventually, Elonis changed the username on his Facebook page from his actual name to a rapstyle nom de plume, "Tone Dougie," to distinguish himself from his "on-line persona." The lyrics Elonis posted as "Tone Dougie" included graphically violent language and imagery. This material was often interspersed with disclaimers that the lyrics were "fictitious," with no intentional "resemblance to real persons." Elonis posted an explanation to another Facebook user that "I'm doing this for me. My writing is therapeutic."

Elonis's coworkers and friends viewed the posts in a different light. Around Halloween in 2010, Elonis posted a photograph of himself and a coworker at a "Halloween Haunt" event at the amusement park where they worked. In the photograph, Elonis was holding a toy knife against his coworker's neck, and in the caption, Elonis wrote, "I wish." Elonis was not Facebook friends with the coworker and did not "tag" her, a Facebook feature that would have alerted her to the posting. But the chief of park security, who was a Facebook friend of Elonis, saw the photograph and fired him.

In response, Elonis posted a new entry on his Facebook page:

Moles! Didn't I tell y'all I had several? Y'all sayin' I had access to keys for all the f-ing gates. That I have sinister plans for all my friends and must have taken home a couple. Y'all think it's too dark and foggy to secure your facility from a man as mad as me? You see, even without a paycheck, I'm still the main attraction. Whoever thought the Halloween Haunt could be so f-ing scary?

Elonis's posts frequently included crude, degrading, and violent material about his soon-to-be ex-wife. Shortly after he was fired, Elonis posted an adaptation of a satirical sketch that he and his wife had watched together. In the actual sketch, called "It's Illegal to Say . . . ," a comedian explains that it is illegal for a person to say he wishes to kill the president, but not illegal to explain that it is illegal for him to say that. When Elonis posted the script of the sketch, however, he substituted his wife for the president. The posting was part of the basis for count two of the indictment, threatening his wife.

•••••

In this chapter, you will learn about criminal threats and freedom of expression.

# TEST YOUR KNOWLEDGE: TRUE OR FALSE?

- Bills of attainder prohibit punishing an individual for an act that was not a crime at the time it was committed.
- One purpose of statutory clarity is to ensure that individuals know what is prohibited by the criminal law.
- Laws that distinguish between individuals based on age, race, or gender in most instances are held to be constitutional by courts.
- The courts do not recognize any limitations on expression under the First Amendment.
- The U.S. Constitution explicitly provides for a right to privacy.
- The Second Amendment right to bear arms does not protect individuals' right to keep firearms outside the home.
- The Eighth Amendment prohibition on cruel and unusual punishment has been interpreted by courts to prohibit all methods of capital punishment other than lethal injection.

Check your answers on page 45.

Master the content at edge.sagepub.com/lippmaness3e

\$SAGE edge™

#### 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 only be restricted 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, at times, the emphasis has been placed on the control of crime and, at other times, stress has been placed on individual rights.

Chapter 2 describes the core constitutional limits on the criminal law and examines the balance between order and individual rights. 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:
  - o Bills of attainder and ex post facto laws
  - Statutory clarity
  - Equal protection
  - o Freedom of speech
  - Freedom of religion
  - Privacy
  - The right to bear arms
  - o Cruel and unusual punishment

## **RULE OF LEGALITY**

The **rule of legality** has been characterized as "the first principle of American criminal law and jurisprudence." 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. 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, and
- 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."

#### **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. The Parliament disregarded the legal process and directly ordered that dissidents should be imprisoned, executed, or banished and forfeit their property.

The prohibition of a bill of attainder was successfully invoked in 1946 by three members of the American Communist Party who were excluded by Congress from working for the federal government.<sup>2</sup> In 1965, in *United States v. Brown*, the U.S. Supreme Court held that a law prohibiting all members of the Communist Party from serving as officials of labor unions violated the prohibition on bills of attainder. The Court explained that Congress was free to ban all individuals who were likely to initiate strikes and disrupt the economy from holding office in unions, although Congress was prohibited from barring a specific group of "subversive" individuals from union office. Excluding all members of the Communist Party from union office made little sense because party members differ in their willingness to call strikes and to disrupt the economy.<sup>3</sup>

#### Ex Post Facto Laws

An *ex post facto* law is a law "passed after the fact." 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." In 1798, in *Calder v. Bull*, Supreme Court justice Samuel Chase listed four categories of *ex post facto* laws:

- Every law that makes an action, done before *the passing of the law*, and 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."

In summary, the prohibition on *ex post facto* laws prevents legislation from 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; *ex post facto* laws are 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. This law was challenged by Marion Stogner, who found himself indicted for child abuse after having lived the past nineteen years without fear of criminal prosecution for an act committed twenty-two 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 federal and state governments from depriving individuals of "life, liberty or property without due process of law." Due process requires that criminal statutes 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 be 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."

In another example, the Supreme Court ruled in *Coates v. Cincinnati* that an ordinance was held 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 he or she 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."

# **Definite Standards for Law Enforcement**

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, at providing definite standards for the enforcement of the law.<sup>10</sup>

Broadly worded statutes are a threat to a democracy that is 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 are 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."

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. <sup>12</sup> In *Papachristou v. 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, minorities, and nonconformists would be targeted for arrest based on the belief that they posed a threat to public safety. 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." <sup>13</sup>

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. 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?<sup>14</sup>

#### YOU DECIDE 2.1

In State v. Stanko, Stanko was clocked at eighty-five miles per hour and was ticketed for speeding. The arresting officer testified that the portion of the road over which he clocked Stanko was narrow with curves and hills and obscured vision. The weather was dry, and visibility was good. Section 61-8-303(1), MCA (Montana Code Annotated), 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.

Is the Montana statute void for vagueness? See *State v. Stanko.* 974 P.2d 1132 (Mont. 1998).

You can find the answer at edge.sagepub.com/lippmaness3e

#### **EQUAL PROTECTION**

Immediately following the Civil War, in 1865, Congress enacted and the states ratified the Thirteenth Amendment, which prohibits slavery and involuntary servitude. Discrimination against African Americans nevertheless continued, and Congress responded by approving the Fourteenth Amendment in 1866. Section 1 provides that "no state shall deprive any person of life, liberty or property without due process of law, or deny any person equal protection of the law." The Supreme Court declared in 1954 that the Fifth Amendment Due Process Clause imposes an identical obligation to ensure the **equal protection** of the law on the federal government.<sup>15</sup>

The Equal Protection Clause was rarely invoked for almost one hundred years. Justice Oliver Wendell Holmes Jr., writing in 1927, typified the lack of regard for the Equal Protection Clause when he referred to the amendment as "the last resort of constitutional argument." The famous 1954 Supreme Court decision in *Brown v. Board of Education* ordering the desegregation of public schools with "all deliberate speed" ushered in a period of intense litigation over the requirements of the clause. 17

#### Three Levels of Scrutiny

Criminal statutes typically make distinctions based on various factors, including the age of victims and the seriousness of the offense. For instance, a crime committed with a dangerous weapon may be punished more harshly than a crime committed without a weapon. Courts generally accept the judgment of state legislatures in making differentiations so long as a law is rationally related to a legitimate government purpose. Legitimate government purposes generally include public safety, health, morality, peace and quiet, and law and order. There is a strong presumption that a law is constitutional under this rational basis test or minimum level of scrutiny test. <sup>18</sup>

In Westbrook v. State, nineteen-year-old Nicole M. Westbrook contested her conviction for consuming alcoholic beverages when under the age of twenty-one. Westbrook argued that there was no basis for distinguishing between a twenty-one-year-old and an individual who was slightly younger. The Alaska Court of Appeals recognized that there

may be some individuals younger than twenty-one who possess the judgment and maturity to handle alcoholic beverages and that some individuals over twenty-one may fail to meet this standard. The court observed that states have established the drinking age at various points and that setting the age between nineteen and twenty-one years of age seemed to be rationally related to the objective of ensuring responsible drinking. As a result, the court concluded that "even if we assume that Westbrook is an exceptionally mature 19-year-old, it is still constitutional for the legislature to require her to wait until she turns 21 before she drinks alcoholic beverages."

In contrast, the courts apply a **strict scrutiny test** in examining distinctions based on race and national origin. Racial discrimination is the very evil that the Fourteenth Amendment was intended to prevent, and the history of racism in the United States raises the strong probability that such classifications reflect a discriminatory purpose. In *Strauder v. West Virginia*, the U.S. Supreme Court struck down a West Virginia statute as unconstitutional that limited juries to "white male persons who are twenty-one years of age."<sup>20</sup>

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

The Supreme Court has adopted a third, intermediate level of scrutiny for classifications based on gender. The decision to apply this standard rather than strict scrutiny is based on the consideration that although women historically have confronted discrimination, the biological differences between men and women make it more likely that gender classifications are justified. Women, according to the Court, also possess a degree of political power and resources that are generally not found in "isolated and insular minority groups" and are able to combat discrimination through the political process. Intermediate scrutiny demands that the state provide some meaningful justification for the different treatment of men and women and not rely on stereotypes or classifications that have no basis in fact. Justice Ruth Bader Ginsburg applied intermediate scrutiny in ordering that the Virginia Military Institute admit women and ruled that gender-based government action must be based on "an exceedingly persuasive justification ... the burden of justification is demanding and it rests entirely on the State." 23

In *Michael M. v. Superior Court*, the U.S. Supreme Court upheld the constitutionality of California's "statutory rape law" that punished "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." Is it constitutional to limit criminal liability to males? The Supreme Court noted that California possessed a "strong interest" in preventing illegitimate teenage pregnancies. The Court explained that imposing criminal sanctions solely on males roughly "equalized the deterrents on the sexes," because young men did not face the prospects of pregnancy and child-rearing. The Court also deferred to the judgment of the California legislature that extending liability to females would likely make young women reluctant to report violations of the law.<sup>24</sup>

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

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

In 2013, in *United States v. Windsor*, the U.S. Supreme Court struck down part of the federal Defense of Marriage Act (DOMA), a law that defined marriage as "only a legal union between one man and one woman." The effect of DOMA was to deny roughly one thousand federal benefits to same-sex couples whose marriages were recognized under state

law. The Court held that "no legitimate purpose overcomes the purpose and effect" of the law, which is to "injure" and to "demean" and to deny "equal status" to same-sex marriages. <sup>25</sup>

In 2015, in *Obergefell v. Hodges*, the U.S. Supreme Court held by a vote of 5–4 that the Fourteenth Amendment Due Process and Equal Protection Clauses guarantee same-sex couples the same fundamental right to marry as is afforded to opposite-sex couples and ruled that state prohibitions on same-sex marriage were unconstitutional. The Court also held that the Fourteenth Amendment requires states to recognize same-sex marriages performed in other states.<sup>26</sup>

#### YOU DECIDE 2.2

Around 4:30 a.m., Indianapolis police officer Jerry Durham responded to a report of three females exposing themselves to the occupants of other vehicles. Durham observed sixteen-year-old C.T. and another woman "pulling their bra[s] and their shirt[s] down over their exposed breast[s]." Indiana punishes an individual who "knowingly or intentionally appear[ed] in a public place in a state of nudity with the intent to be seen by another person[.]" Indiana Code section 35-45-4-1(d) (2008) defines "nudity" as "the showing of the female breast

with less than a fully opaque covering of any part of the nipple[.]" Officer Durham at trial testified that he had seen C.T.'s nipple during the incident. The juvenile court found that C.T. had "committed what would be public nudity if committed by an adult and discharged her to her mother." C.T. claims that her conviction violated equal protection under law because the display of male breasts does not constitute a criminal offense. Do you agree? See C.T. v. State, 939 N.E.2d 626 (Ind. Ct. App. 2010).

You can find the answer at edge.sagepub.com/lippmaness3e

We next look at the protections for freedom of speech and privacy, the right to bear arms, and the prohibition against cruel and unusual punishment.

Read Webster v. Virgin Islands and Wright v. South Carolina on the study site:

#### THE BILL OF RIGHTS

## **Nationalization**

The last half of the twentieth century witnessed the *nationalization* or what law professors refer to as the *constitutionalization* of the criminal justice process. This involved interpreting the Fourteenth Amendment **Due Process Clause** to extend most of the protections of the **Bill of Rights** (the first ten amendments to the Constitution) to the states. There now is a single standard of rights and liberties that all levels of government must satisfy. You may be prosecuted in Indiana, in Iowa, or in the federal system, and your rights are fundamentally the same. This constitutionalization or development of a single standard that applies to the federal government as well as to the states marked a true revolution in the law.

Professor Erwin Chemerinsky observed that if the Bill of Rights applies only to the federal government, the state and local governments "then are free to infringe even the most precious liberties" and to "violate basic constitutional rights." A state, for example, might not provide an individual the right to a trial by jury or the right to a lawyer when charged with a serious criminal offense. On the other hand, there is a widespread belief that the federal government should not intrude into the affairs of state governments and that the citizens of each state should be left free to determine what rights and liberties they wish to preserve and to protect. Criminal justice, in particular, was viewed as a local matter. 28

This system of states' rights did not fully survive the Civil War. Slavery in the states of the former Confederacy would no longer be tolerated, and former African American slaves were to enjoy the full rights of citizenship. The Fourteenth Amendment was added to the Constitution in 1868 in order to guarantee equal treatment and opportunity for African Americans. The amendment reads as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The first sentence recognized that African Americans are citizens of the United States and of the state in which they reside. The purpose was to reverse the Supreme Court's 1857 decision in *Scott v. Sandford*, which held that African American slaves were not eligible to become U.S. citizens.<sup>29</sup>

The twentieth century witnessed continued efforts by defendants to extend the protection of the Bill of Rights to the states. There was an increasing call for fairer procedures in state courts. Lawyers argued that the Due Process Clause of the Fourteenth Amendment, which applied to the states, included various provisions of the Bill of Rights to the U.S. Constitution. Supreme Court justices have employed one of three approaches to incorporate aspects of the Bill of Rights into the Fourteenth Amendment and to extend these protections to the fifty states. The three theories of incorporation are as follows:

- *Fundamental Fairness*. The Supreme Court decides on a case-by-case basis whether rights are fundamental to the concept of ordered liberty and therefore apply to the states.
- *Total Incorporation and Total Incorporation Plus.* The entire Bill of Rights applies to the states. Total incorporation plus includes additional rights not in the Bill of Rights along with the entire Bill of Rights.
- Selective Incorporation. Particular rights in the Bill of Rights apply to the states. Selective incorporation plus includes additional rights not in the Bill of Rights along with the particular rights in the Bill of Rights.

The majority of judges favor selective incorporation. They argue that only those provisions of the Bill of Rights that are essential to liberty are incorporated into the Fourteenth Amendment.

The U.S. Supreme Court has incorporated a number of the fundamental rights included in the Bill of Rights into the Fourteenth Amendment Due Process Clause. The rights that are incorporated are listed in Table 2.1. The Court has not incorporated the following four provisions of the Bill of Rights into the Fourteenth Amendment, and therefore, a state is free although not required to adopt a law or include a provision in its constitution that extends these four protections to its citizens.

- *Third Amendment.* Prohibition against quartering soldiers without consent of the owner.
- Fifth Amendment. Right to indictment by a grand jury for capital or infamous crimes.

**TABLE 2.1**Bill of Rights Provisions Related to Criminal Procedure Incorporated Into the Fourteenth Amendment

Amendment	Rights Protected	Case Example
First Amendment	freedom of speech	Fiske v. Kansas, 274 U.S. 380 (1927)
Second Amendment	right to bear arms	McDonald v. Chicago, 561 U.S. 742 (2010)
Fourth Amendment	unreasonable searches and seizures	Wolf v. Colorado, 338 U.S. 25 (1949)
	exclusionary rule	Mapp v. Ohio, 367 U.S. 643 (1961)
Fifth Amendment	compelled self-incrimination	Malloy v. Hogan, 378 U.S. 1 (1964)
	double jeopardy	Benton v. Maryland, 395 U.S. 784 (1969)
Sixth Amendment	right to counsel	Gideon v. Wainwright, 372 U.S. 335 (1963)
	speedy trial	Klopfer v. North Carolina, 386 U.S. 213 (1967)
	public trial	In re Oliver, 333 U.S. 257 (1948)
	right to confront witnesses	Pointer v. Texas, 380 U.S. 400 (1965)
	impartial jury	Duncan v. Louisiana, 391 U.S. 145 (1968)
	right to compulsory process for obtaining favorable witnesses at trial	Washington v. Texas, 388 U.S. 14 (1967)
Eighth Amendment	cruel and unusual punishment	Robinson v. California, 370 U.S. 660 (1962)

- Seventh Amendment. Right to trial in civil law cases.
- *Eighth Amendment*. Prohibition against excessive bail and fines.

#### FREEDOM OF SPEECH

The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The U.S. Supreme Court extended this prohibition to the states in a 1925 Supreme Court decision in which the Court proclaimed that "freedom of speech and of the press . . . are among the fundamental personal rights and 'liberties' protected under the Due Process Clause of the Fourteenth Amendment from impairment by the States." 30

The famous, and now deceased, First Amendment scholar Thomas I. Emerson identified four functions central to democracy performed by freedom of expression under the First Amendment:<sup>31</sup>

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

The First Amendment is vital to the United States' free, open, and democratic society. Justice William O. Douglas wrote in *Terminiello v. Chicago*<sup>32</sup> that speech

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

Justice Robert H. Jackson, reflecting on his experience as a prosecutor during the Nuremberg trials of Nazi war criminals following World War II, cautioned Justice Douglas that the choice is not between order and liberty. It is between liberty with order and anarchy without either. There is the danger that if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact. Justice Jackson is clearly correct that there must be some limit to freedom of speech. But where should the line be drawn? The Supreme Court articulated these limits in *Chaplinsky v. New Hampshire* and observed that there are "certain well-recognized categories of speech which may be permissibly limited under the First Amendment." The Supreme Court explained that these "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." <sup>33</sup>

The main categories of speech for which *content is not protected by the First Amendment* and that may result in the imposition of criminal punishment are as follows:

- Fighting Words. Words directed to another individual or individuals that an ordinary and reasonable person should be aware are likely to cause a fight or breach of the peace are prohibited under the fighting words doctrine. In Chaplinsky v. New Hampshire, the Supreme Court upheld the conviction of a member of the Jehovah's Witnesses who, when distributing religious pamphlets, attacked a local marshal with the accusation that "you are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."
- Incitement to Violent Action. A speaker, when addressing an audience, is prohibited from incitement to violent action. In Feiner v. New York, Feiner addressed a racially mixed crowd of seventy-five or eighty people. He was described as "endeavoring to arouse" the African Americans in the crowd "against the whites, urging that they rise up in arms and fight for equal rights." The Supreme Court ruled that "when clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious." On the other hand, in Terminiello v. Chicago, the Supreme Court stressed that a speaker could not be punished for speech that merely "stirs to anger, invites dispute, brings about a

condition of unrest, or creates a disturbance."<sup>35</sup> In *Brandenburg v. Ohio*, the Court clarified the standard for incitement when it overturned the conviction of an Ohio Ku Klux Klan leader for a speech that instructed the audience on the duty and necessity of violence against the government. The Court held that the government may outlaw speech when it is directed at inciting or producing "imminent lawless action" and is likely to incite or produce such action. The statute under which *Brandenburg* was convicted was unconstitutional because it did not distinguish between mere teaching and advocacy of violence from incitement to imminent lawless action.<sup>36</sup>

• Threat. A developing body of law prohibits threats of bodily harm directed at individuals. Judges must weigh and balance a range of factors in determining whether a statement constitutes a political exaggeration or a true threat. In Watts v. United States, the defendant proclaimed to a small gathering following a public rally on the grounds of the Washington Monument that if inducted into the army and forced to carry a rifle, "the first man I want to get in my sights is L.B.J. [President Lyndon Johnson].... They are not going to make me kill my black brothers." The onlookers greeted this statement with laughter. Watts's conviction was overturned by the U.S. Supreme Court, which ruled that the government had failed to demonstrate that Watts had articulated a true threat and that these types of bold statements were to be expected in a dynamic and democratic society divided over the Vietnam War.<sup>37</sup>

In *Elonis v. United States*, as you may remember from the opening vignette, Anthony Douglas Elonis adopted the online name "Tone Dougie" and posted vicious and violent rap lyrics on Facebook against a former employer, his soon-to-be ex-wife, a kindergarten class, and an FBI agent. Elonis was convicted under a federal statute that prohibits the transmission in interstate commerce of any "threat . . . to injure another." The Supreme Court held that Elonis could not be convicted based solely on the reaction of a reasonable person to his posts and that the government was required to establish that Elonis possessed a criminal intent. Elonis claimed he was acting under his online persona and lacked a specific intent to threaten individuals. The Supreme Court asked the lower court to decide whether it was sufficient for a conviction under the federal law that Elonis may have been reckless in his Facebook posts.<sup>38</sup>

- Obscenity. Obscene materials are considered to lack "redeeming social importance" and are not accorded constitutional protection. Drawing the line between obscenity and protected speech has proven problematic. The Supreme Court conceded that obscenity cannot be defined with "God-like precision," and Justice Potter Stewart went so far as to pronounce in frustration that the only viable test seemed to be that he "knew obscenity when he saw it."<sup>39</sup> The U.S. Supreme Court was finally able to agree on a test for obscenity in Miller v. California. The Supreme Court declared that obscenity was limited to works that when taken as a whole, in light of contemporary community standards, appeal to the prurient interest in sex; are patently offensive; and lack serious literary, artistic, political, or scientific value. This qualification for scientific works means that a medical textbook portraying individuals engaged in "ultimate sexual acts" likely would not constitute obscenity. <sup>40</sup> Child pornography may be limited despite the fact that it does not satisfy the Miller standard. <sup>41</sup>
- *Libel.* You should remain aware that the other major limitation on speech, **libel**, is a civil law rather than a criminal action. This enables individuals to recover damages for injury to their reputations. In *New York Times Co. v. Sullivan*, the U.S. Supreme Court severely limited the circumstances in which public officials could recover damages and held that a public official may not recover damages for a defamatory falsehood relating to his or her official conduct "unless... the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." The Court later clarified that states were free to apply a more relaxed, simple negligence (lack of reasonable care in verifying the facts) standard in suits for libel brought by private individuals. 43

Keep in mind that these are narrowly drawn exceptions to the First Amendment's commitment to a lively and vigorous societal debate. The general rule is that the government may neither require nor substantially interfere with individual expression. The Supreme Court held in *West Virginia v. Barnette* that a student may not be compelled to pledge allegiance to the American flag. The Supreme Court observed that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or action their faith therein." This commitment to a free "marketplace of ideas" is based on the belief that delegating the decision as to what "views shall be voiced largely into the hands of each of us" will "ultimately produce a more capable citizenry and more perfect polity and . . . that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." "44

The Supreme Court has been reluctant to expand the categories of prohibited speech. In 2010, the Supreme Court held unconstitutional a federal law that punished depictions of animal cruelty. The Court noted that there was a long tradition of prohibiting animal cruelty in the United States. This, however, was "not a category of speech that historically had been prohibited and depictions of animal cruelty were protected under the First Amendment." <sup>45</sup>

#### Overbreadth

The doctrine of **overbreadth** is an important aspect of First Amendment protection. This provides that a statute is unconstitutional that is so broadly and imprecisely drafted that it encompasses and prohibits a substantial amount of protected speech relative to the coverage of the statute.<sup>46</sup> In *New York v. Ferber*, the U.S. Supreme Court upheld a New

York child pornography statute that criminally punished an individual for promoting a "performance which includes sexual conduct by a child less than sixteen years of age." Sexual conduct was defined to include "lewd exhibition of the genitals." Justice Byron White was impatient with the concern that although the law was directed at hard-core child pornography, "[s]ome protected expression ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute." White doubted whether these applications of the statute to protected speech constituted more than a "tiny fraction of the materials" that would be affected by the law, and he expressed confidence that prosecutors would not bring actions against these types of publications. This, in short, is the "paradigmatic case of state statute whose legitimate reach dwarfs its arguably impermissible applications."

#### Symbolic Speech

The Supreme Court has interpreted "expression" under the First Amendment to include **symbolic speech** or actions that have "communicative content." For example, the Court has held that the First Amendment protects high school students wearing black armbands to protest the Vietnam War<sup>48</sup> and a religious individual covering up the motto "Live Free or Die" on the New Hampshire license plate as a means of expressing the view that his ultimate loyalty was to God rather than to the state.<sup>49</sup>

In *Texas v. Johnson*, the U.S. Supreme Court addressed the constitutionality of Texas Penal Code Annotated Section 42.09, which punished the intentional or knowing desecration of a "state or national flag." Desecration under the statute was interpreted as to "efface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." <sup>50</sup>

Johnson participated in a political demonstration during the Republican National Convention in Dallas in 1984 to protest the policies of the Reagan administration and to dramatize the consequences of nuclear war. Johnson unfurled an American flag, doused the flag with kerosene, and set it on fire. The demonstrators chanted, "America, the red, white, and blue, we spit on you," as the flag burned.

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

In 1989, the U.S. Congress adopted the Flag Protection Act, 18 U.S.C. § 700. The act provided that anyone who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" a U.S. flag shall be subject to both a fine and imprisonment for not more than one year. This law exempted the disposal of a "worn or soiled" flag. In *United States v. Eichman*, Justice Brennan failed to find that this law was significantly different from the Texas statute in *Johnson* and ruled that the law "suppresses expression out of concern for its likely communicative impact." <sup>51</sup>

# **Hate Speech**

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

The United States is an increasingly diverse society in which people inevitably collide, clash, and compete over jobs, housing, and education. Racial, religious, and other insults and denunciations are hurtful, increase social tensions and divisions, and possess limited social value. This type of expression also has little place in a diverse society based on respect and regard for individuals of every race, religion, ethnicity, and nationality. Regulating this expression, on the other hand, runs the risk that artistic and literary depictions of racial, religious, and ethnic themes may be deterred and denigrated. In addition, there is the consideration that debate on issues of diversity, affirmative action, and public policy may be discouraged. Society benefits when views are forced out of the shadows and compete in the sunlight of public debate.

The most important U.S. Supreme Court ruling on hate speech is *R.A.V. v. St. Paul.* In *R.A.V.*, several Caucasian juveniles burned a cross inside the fenced-in yard of an African American family.<sup>52</sup> The young people were charged under two statutes, including the St. Paul Bias-Motivated Crime Ordinance (St. Paul Minn. Legis. Code § 292.02), which provided that "whoever places on public or private property a symbol, object, including and not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment . . . on the basis of race, color, creed, religion or gender, commits disorderly conduct . . . [and] shall be guilty of a misdemeanor." The Supreme Court noted that *St. Paul* punishes certain fighting words, yet permits other equally harmful expressions. This discriminates against speech based on the content of ideas. For instance,

what about symbolic attacks against greedy real estate developers or middle-class individuals who move into a gentrifying neighborhood that makes these economically privileged individuals fearful for their safety? A year later in 1993, in *Wisconsin v. Mitchell*, the Supreme Court ruled that a Wisconsin statute that enhanced the punishment of individuals convicted of hate crimes did not violate the defendant's First Amendment rights.<sup>53</sup> The Wisconsin court had increased Mitchell's prison sentence for aggravated assault from a maximum of two years to a term of four years based on his intentional selection of the person against "whom the crime is committed because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."

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

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

The FBI reported that hate crimes increased by 17 percent in 2017. Nearly 60 percent were motivated by race, ethnicity, or ancestry; 22 percent were motivated by religious bias; 15 percent resulted from sexual orientation bias; and other attacks were motivated by gender-identity bias, gender bias, and disability bias.<sup>55</sup>

#### FREEDOM OF ASSEMBLY

The First Amendment right to freedom of nonviolent public assembly is integral to the ability of individuals to organize to influence public policy. In *DeJonge v. Oregon*, the Supreme Court stated that freedom of peaceful assembly is as fundamental as freedom of speech and the press to democracy.<sup>56</sup>

Demonstrations have been an important mechanism for groups of people to express their collective views on issues ranging from abortion to civil rights to immigration.

#### TIME, PLACE, AND MANNER RESTRICTIONS

The Supreme Court has upheld the reasonableness of laws that restrict the time, location, and manner of individuals' exercise of freedom of speech and assembly. A local government, for example, may limit the time or noise level or location of demonstrations. Time, place, and manner restrictions must be "content neutral," meaning that they are required to apply to all types of speech regardless of content. Individuals also must be provided or possess reasonable alternative means of expressing their message.

In *Grayned v. Rockford*, the U.S. Supreme Court upheld the restriction on demonstrations on the sidewalk adjacent to a school during school hours on the grounds that such protests may disrupt students' education. On the other hand, a demonstration nearby to the school during non–school hours likely would be constitutionally protected.<sup>57</sup>

The First Amendment protects freedom of religion as well as freedom of speech. The next section discusses the Free Exercise Clause of the First Amendment.

#### YOU DECIDE 2.3

Lori MacPhail, a peace officer in Chico, California, assigned to a high school, observed Ryan D. with

some other students off campus during school hours. She conducted a pat-down, discovered

that Ryan possessed marijuana, and issued him a citation.

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

painting and found it to be "disturbing" and "scary," and an administrator at the school informed Officer MacPhail.

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

How would you rule? See *In re Ryan D.*, 123 Cal. Rptr. 2d 193 (Cal. App. 2002). Compare the decision in *Ryan D.* to the decision in *In re George T.*, 93 P.3d 1007 (Cal. 2004).

You can find the answer at edge.sagepub.com/lippmaness3e

#### FREEDOM OF RELIGION

The first part of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first portion of the clause is known as the Establishment Clause, and the second part of the clause is referred to as the Free Exercise Clause.

The Establishment Clause regulates the relationship between government and religion. One view is that the government may favor and support religion so long as the government does not promote any particular religion. Some legal thinkers take a broader interpretation and argue that there is a "wall of separation" between government and religion and that government should not have any connection whatsoever to religion. Under the first approach, the government could provide textbooks to all religious schools. In contrast, the second view would prohibit the government from providing textbooks to all religious schools.

In the area of criminal law, the central concern is the Free Exercise Clause. The rule is that individuals have complete freedom of religious belief, although religious practice may be limited. There are several ways in which government regulation may collide with an individual's religious belief.

The general rule is that the courts will uphold laws that may affect an individual's religious practice that are directed to all individuals whether or not they are members of a religion. In 1990, in *Employment Division v. Smith*, the U.S. Supreme Court held that a law prohibiting consumption of the hallucinogenic drug peyote did not violate the free exercise of religion of members of the Native American Church, whose adherents used peyote as a sacrament. The Court held that the law applied to all individuals and that members of the Native American Church were not singled out for prosecution.<sup>58</sup> In 1878, in *Reynolds v. United States*, the Supreme Court upheld the criminal prosecution of polygamist members of the Church of Jesus Christ of Latter-day Saints.<sup>59</sup>

On the other hand, courts are required to demonstrate a compelling interest to justify a law that targets members of a religious faith. In 1993, in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, the Court struck down a city ordinance that prohibited the ritualistic sacrifice of animals, which was a sacred practice of the Santeria religion. <sup>60</sup> Justice Anthony Kennedy wrote that the "laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom."

Courts generally have held that while an adult may refuse medical treatment, a parent may not deny medical treatment to a child based on the parent's religious belief. The state's interest in protecting the life of the child takes precedence over the religious belief of the parent.<sup>61</sup>

In 1993, Congress adopted the Religious Freedom Restoration Act (RFRA), and various state legislatures have passed similar laws. The RFRA requires federal courts to apply a strict scrutiny test in determining whether a law that substantially burdens an individual's free exercise of religion is constitutional even if this burden results from a rule that applies to all religions. State RFRA laws typically provide that the laws do not provide legal protection to individuals who invoke religious reasons to justify discrimination against other individuals based on race, gender, national origin, or sexual preference.

In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000, which prohibits federal and state laws that burden the ability of prisoners to worship. In 2015, in *Holt v. Hobbs*, the U.S. Supreme Court held that an Arkansas prison regulation that prohibited inmates from growing beards other than for medical reasons violated the religious liberty of a Muslim inmate who sought to grow a "short," one-half-inch beard.<sup>62</sup>

In 2018, in *Masterpiece Cakeshop Ltd. v. Colorado Civil Rights Commission*, the U.S. Supreme Court ruled in favor of Jack Phillips, a Colorado baker who refused to make a marriage cake for a same-sex couple because he believed that this would compel him to express an idea that violated his religious beliefs. Justice Kennedy, writing in a 7–2 decision, held that the Colorado Civil Rights Commission had been hostile to Phillips's religious beliefs and that Phillips was entitled to a "fair and neutral" consideration of his claim by the Colorado administrative agency. The Court's narrow decision did not address the core contention that the Colorado Civil Rights Commission, by requiring Phillips to bake a cake for a same-sex couple, had violated Phillips's First Amendment right to the free exercise of religion. The question remains how courts in the future will balance the right to the free exercise of religion with the right to equal protection of the law.<sup>63</sup>

# Criminal Law in the News

The Church Arson Prevention Act of 1996, 18 U.S.C. § 247, prohibits the intentional defacement, damage, or destruction of religious real property and prohibits the intentional obstruction by force, or threat of force, of individuals in the enjoyment of the free exercise of religious beliefs. On October 26, 2018, Robert Bowers, 46, entered the Tree of Life synagogue in the diverse Squirrel Hill neighborhood in Pittsburgh, Pennsylvania, armed with an AR-15-style assault rifle and three handguns and in roughly twenty minutes killed eleven individuals and wounded two individuals attending religious services. During the exchange of gunfire with the police, Bowers wounded four officers. This was the most lethal attack on individuals of the Jewish religion in American history. Bowers was charged with forty-four federal charges and

if convicted may receive the death penalty or upwards of fifty years in prison. The charges include obstruction of the exercise of religious beliefs resulting in death and the obstruction of the exercise of religious beliefs resulting in bodily injury to public safety officers. Bowers also faces state criminal charges. The evidence indicated that Bowers had targeted Jews because of their religious beliefs. He intentionally attacked a Jewish synagogue, posted online anti-Semitic messages before and during the attack, and following the attack expressed anti-Semitic views and slogans promulgated by the Nazis and white nationalists including the endorsement of the genocide of the Jewish people. Bowers on social media also had posted discriminatory views toward immigrants, Muslims, and African Americans.

The right to privacy is a relatively recent right that is increasingly at the center of political debate.

## **PRIVACY**

The idea that there should be a legal right to **privacy** was first expressed in an 1890 article in the *Harvard Law Review* written by Samuel D. Warren and Louis D. Brandeis, who was later appointed to the U.S. Supreme Court. The two authors argued that the threats to privacy associated with the dawning of the twentieth century could be combated through recognition of a civil action (legal suit for damages) against those people who intrude into individuals' personal affairs.<sup>64</sup>

In 1905, the supreme court of Georgia became the first court to recognize an individual's right to privacy when it ruled that the New England Life Insurance Company unlawfully used the image of artist Paolo Pavesich in an advertisement that falsely claimed that Pavesich endorsed the company.<sup>65</sup> This decision served as a precedent for the recognition of privacy by courts in other states.

#### The Constitutional Right to Privacy

A constitutional right to privacy was first recognized in *Griswold v. Connecticut* in 1965.<sup>66</sup> The U.S. Supreme Court proclaimed that although privacy was not explicitly mentioned in the U.S. Constitution, it was implicitly incorporated into the text. The case arose when Griswold, along with Professor Buxton of Yale Medical School, provided advice to married couples on the prevention of procreation through contraceptives. Griswold was convicted of being an accessory to the violation of a Connecticut law that provided that any person who uses a contraceptive shall be fined not less than \$50 or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

Justice William O. Douglas noted that although the right to privacy was not explicitly set forth in the Constitution, this right was "created by several fundamental constitutional guarantees." According to Justice Douglas, these fundamental rights

create a "zone of privacy" for individuals. In a famous phrase, Justice Douglas noted that the various provisions of the Bill of Rights possess "penumbras, formed by emanations from those guarantees . . . [that] create zones of privacy." Justice Douglas cited a number of constitutional provisions that together create the right to privacy.

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

In contrast, Justice Arthur Goldberg argued that privacy was found within the Ninth Amendment, which provides that the statement of certain rights does not mean that there are not other rights retained by the people, and Justice John Marshall Harlan contended that privacy is a fundamental aspect of individual "liberty" within the Fourteenth Amendment.

We nevertheless should take note of Justice Hugo Black's dissent in *Griswold* questioning whether the Constitution provides a right to privacy, a view that continues to attract significant support. Justice Black observed that "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade [my privacy] unless prohibited by some specific constitutional provision."

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

- Sanctity of the Home. Freedom of the home and other personal spaces from arbitrary governmental intrusion
- *Intimate Activities*. Freedom to make choices concerning personal lifestyle and an individual's body and reproduction
- *Information*. The right to prevent the collection and disclosure of intimate or incriminating information to private industry, the public, and governmental authorities
- *Public Portrayal.* The right to prevent your picture or endorsement from being used in an advertisement without permission or to prevent the details of your life from being falsely portrayed in the media<sup>67</sup>

In short, as noted by Supreme Court justice Brandeis, "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness.... They conferred as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." (See Table 2.2.)

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

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

In 1986, in *Bowers v. Hardwick*, the Supreme Court affirmed Hardwick's sodomy conviction under a Georgia statute. <sup>69</sup> Justice White failed to find a fundamental right deeply rooted in the nation's history and tradition to engage in acts of consensual sodomy, even when committed in the privacy of the home. He pointed out that sodomy was prohibited by all thirteen colonies at the time the Constitution was ratified, and twenty-five states and the District of Columbia continued to criminally condemn this conduct.

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

The right to privacy extends to the right to be free from criminal invasion of individuals' privacy by private individuals. Tony O. Morris carried a bag into a department store and positioned a hidden camera under the skirt of a sales clerk and photographed her underwear. A Minnesota appellate court held that Morris had unlawfully violated the sales clerk's "reasonable expectation of privacy" by intentionally photographing the "intimate parts of her body."

Key U.S. Supreme Court Decisions on Privacy		
Case Name and Citation	Case Summary	
<i>Eisenstadt v. Baird,</i> 405 U.S. 438 (1972)	In 1972, the Supreme Court extended <i>Griswold</i> and ruled that a Massachusetts statute that punished individuals who provided contraceptives to unmarried individuals violated the right to privacy. Justice Brennan wrote that "if the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."	
Carey v. Population Services International, 431 U.S. 678 (1977)	The Supreme Court, in 1977, declared a New York law unconstitutional that made it a crime to provide contraceptives to minors and for anyone other than a licensed pharmacist to distribute contraceptives to persons over sixteen. Justice Brennan noted that this imposed a significant burden on access to contraceptives and impeded the "decision whether or not to beget or bear a child" that was at the "very heart" of the "right to privacy."	
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	In 1973, in <i>Roe v. Wade</i> , the Supreme Court ruled a Texas statute unconstitutional that made it a crime to "procure an abortion." Justice Blackmun wrote that the "right to privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." The Supreme Court later ruled in <i>Planned Parenthood v. Casey</i> , 505 U.S. 833 (1992), that Pennsylvania's requirement that a woman obtain her husband's consent unduly interfered with her access to an abortion.	
Gonzales v. Carhart, 550 U.S. 124 (2007)	The Supreme Court upheld the authority of Congress to prohibit "partial-birth abortion." The Court reasoned that there is a substantial government interest in protecting the fetus and that it was uncertain whether this procedure ever is required to preserve the life of the mother.	
<i>Stanley v. Georgia,</i> 394 U.S. 557 (1969)	A search of Stanley's home for bookmaking paraphernalia led to the seizure of three reels of film portraying obscene scenes. Justice Marshall, in his 1969 decision, concluded that "whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."	

#### YOU DECIDE 2.4

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

You can find the answer at edge.sagepub.com/lippmaness3e

### The Right to Privacy and the Fourth Amendment

The right to privacy is the philosophical basis of the **Fourth Amendment** protection of individuals' homes, papers, persons, and effects from "unreasonable searches and seizures" conducted without a search warrant founded on probable cause. In the famous case of *Katz v. United States*, Katz was suspected of using phones in two public phone booths to transmit unlawful interstate gambling information. The government without obtaining a search warrant placed a recording device on the phone booths and recorded Katz's conversations about gambling on college football. Katz's conviction for transmitting gambling information was overturned. The Supreme Court reasoned that when Katz shut the door of the phone booth and carried on his conversations, he expressed a reasonable expectation of privacy and that what an individual "seeks to preserve as private, even in an area accessible to the public," merits constitutional protection. When the government undertakes a search and seizure that impedes on an individual's expectation of privacy, it is required to obtain a warrant from a judicial official that strictly limits the extent of the search. FBI agents in *Katz* improperly decided on their own whether and how long to listen to Katz's conversations. Note that the Supreme Court in *Katz* clarified that our words as well as physical objects and our persons are protected under the Fourth Amendment.<sup>72</sup>