Formal group photograph of the Supreme Court as it was comprised on June 30, 2022 after Justice Ketanji Brown Jackson joined the Court. The Justices are posed in front of red velvet drapes and arranged by seniority, with five seated and four standing.

Seated from left are Justices Sonia Sotomayor, Clarence Thomas, Chief Justice John G. Roberts, Jr., and Justices Samuel A. Alito and Elena Kagan.

Standing from left are Justices Amy Coney Barrett, Neil M. Gorsuch, Brett M. Kavanaugh, and Ketanji Brown Jackson.

Fred Schilling, Collection of the Supreme Court of the United States

1 INTRODUCTION AND OVERVIEW OF CRIMINAL LAW

LEARNING OBJECTIVES

After reading and studying this chapter, you should be able to

1.1 Identify the key concepts of criminal law.

1.2 List three sources of law.

1.3 Identify differences between types of crimes (felonies, capital crimes).

1.4 List four types of correctional supervision.

1.5 Summarize the stages of the criminal justice system.

1.6 Identify the key components of a case brief.

> [P]enal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils.
>
> *Herbert Wechsler, The Challenge of a Model Penal Code (1952)*

In the United States, the system of criminal law and punishment is dynamic. We each play a role: as victims, as offenders, as jury members, as voters, as responsible neighbors when we report crime, and as concerned community members when we protest criminal laws that we believe are unfair. Acknowledging the complexity and importance of our system of criminal laws is an ideal starting point for this first chapter. This chapter reviews definitions of crime, the sources of criminal law, and the organization of the justice system. By establishing a clear framework for understanding the criminal justice system, this discussion sets the stage for the remaining chapters. This book examines the constitutional limits on defining criminal activity, the elements of a crime, the elements of specific offenses, defenses to crimes, punishment, and sentencing.

INTRODUCTION

This chapter provides an overview of the structure and processes of the American criminal justice system. This material is divided into five sections. The first part reviews a broad range of foundational issues related to criminal law. It introduces and explains the important concepts, terms, and definitions of criminal law. The second part reviews the sources of American criminal law. Our criminal law comes from a wide range of sources, from timeworn common law to modern legislation. The third part examines who is in the criminal justice system and looks at the number of people who are in the United States correctional system. The fourth part reviews the three-part structure of the criminal justice system: police, courts, and corrections. This section reviews the main decision points along the criminal justice system continuum—including

pre-arrest through arraignment, trial, sentencing and punishment, and post-conviction. It also includes an overview of the federal and state court systems that handle criminal cases. The final part examines how all the structures of the justice system come together in a court case. It concludes with a detailed discussion on the elements of a case brief.

This first chapter should be used as a reference guide for the remaining chapters. The foundational terms, concepts, procedures, and structures related to criminal law are highlighted in this chapter. Students are encouraged to revisit this chapter throughout their course instruction.

CRIMINAL LAW TERMS AND CONCEPTS

> In 2022, less than one-half of all violent crime was reported to the police.
>
> *Bureau of Justice Statistics, 2023*[1]

Defining Crime

A criminal act may be the result of an affirmative act or a negative act. An affirmative act refers to an action that someone engages in, such as punching another person in the nose. Purchasing a penknife to puncture someone's tires or hacking into someone's computer are also examples of affirmative acts.

In contrast, a negative act refers to *inaction*, or to an action that someone fails to take. In general, a person cannot be held criminally liable for failing to act. However, if someone has a legal duty to act, they can be held responsible for a failure to meet that responsibility. For example, parents have a legal duty to provide for the health, safety, and welfare of their children. If a parent does not provide food for their child while they are in their care and the child starves to death, the parent may be held criminally liable for their death. Likewise, a motorist who is involved in a traffic accident that causes injury to their passenger has a legal duty to call the police. If a driver hits a pedestrian walking across the street, the driver is required to stop and seek assistance. If they fail to do so, they may face punishment. In addition to an act or a failure to act, a crime requires that the action or inaction violate an existing law. Based on this discussion we can now consider a working definition of **crime**:

> An act or omission punishable by the state or federal government through the enforcement of its criminal law.

The definition of crime and the definition of wrongdoing are not the same. "Crimes" refer to actions and inactions that society deems both wrong *and* punishable. Thus, an act is only a crime if the law says it is. We might consider a particular action to be wrong: a teacher who does not grade fairly, a girlfriend who is unfaithful, or neighbors who do not mow their lawn. However wrong these actions may be, they are not crimes. An action constitutes a crime only if a legislative body—for example, a municipality, a state legislature, or Congress—has passed legislation stating that it is a crime. Even after an act is defined as criminal, to be punishable, it must be brought to the attention of law enforcement.

Each year, U.S. law enforcement agencies receive millions of crime reports. As already noted, more than one-half of all offenses are never reported to crime enforcement agencies. Legally speaking, these offenses do not exist. Unreported incidents are sometimes referred to as the "dark figure" of crime. There are many reasons that crime victims and witnesses may be reluctant to report crimes. The fear of retaliation by the offender or offenders is one reason. Another is that the victim may not know that they have been the victim of a crime. An example of this is someone who does not know that some of their bank checks were stolen and used to purchase expensive items. It is also possible that a victim may be too embarrassed to go to the police to report a crime. For instance, someone who unwittingly gets involved with a fraudulent investment scheme (sometimes called a Ponzi scheme) and is scammed out of their retirement savings.

Crime and Morality

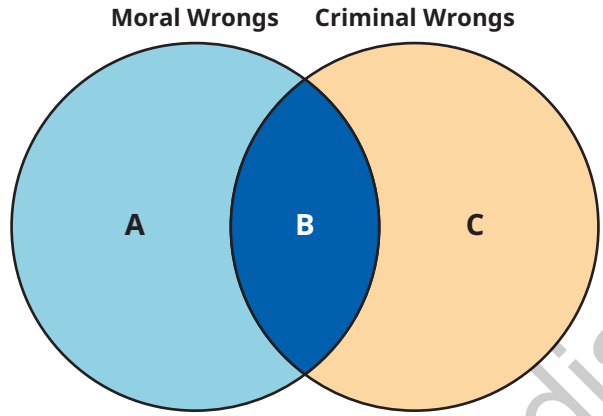
Making certain actions criminal reflects a value judgment by our society that an action or series of actions are wrong and should be punished. However, sometimes there is a gap between what is wrong and what is punished under the law. Consider the following scenario, drawn from a classic law school hypothetical:

> *Janet is an excellent swimmer. It's spring break, and she's at the beach, soaking up some sun. She scrolls through TikTok, while she updates her Instagram page.*
>
> *As Janet basks in the sun, she sees a little girl splashing about in the ocean water. The girl, Ambrosia, appears to be about 3 years old. Ambrosia is approximately 25 feet from Janet. Janet looks around and does not see anyone else on the beach besides Ambrosia.*
>
> *Just moments later, Janet sees Ambrosia gasping for air. Ambrosia screams, "Help!" Janet watches. Janet, who does not want to get her hair or nails wet, makes no attempt to rescue the sinking toddler. With a little effort, Janet could have saved Ambrosia. Instead, Janet uses her cellphone to take notes! She records how many times Ambrosia's head bobs up and down, how many times she yells for help, and her final gasps for air. Ambrosia drowns.*

Is Janet criminally responsible for Ambrosia's death? Applying our definition of crime, is there an affirmative act or an omission? In this instance, Janet failed to act to save Ambrosia. Many of us would agree that Janet's failure to at least try to save Ambrosia is morally wrong. However, the law does not punish every moral wrong. To hold Janet criminally accountable for Ambrosia's death, she must have a legal duty to act. For instance, if Janet had been Ambrosia's babysitter, she would have had an affirmative duty to assist a child left in her care. The above scenario highlights the fact that in some instances an action that is considered wrong may not be considered criminal. Figure 1.1 illustrates the relationship between criminal wrongs and moral wrongs.

As indicated, there are three possible relationships between moral wrongs and criminal wrongs. In some instances, there is no intersection between actions that are deemed morally wrong and actions that are deemed criminally wrong. For instance, actions such as rudeness or greed can be considered moral wrongs but are not against the law. These are represented as the section "A" in Figure 1.1. In some instances, there is overlap between moral wrongs and criminal wrongs. The dark shaded section of the chart labeled "B" represents this overlap.

FIGURE 1.1 ■ Moral Wrongs & Criminal Wrongs



In these instances, the criminal law reflects society's moral sentiments (e.g., murder, assault). Some criminal wrongs are not moral wrongs. Examples of this include **mala prohibita** offenses. This is represented as section "C" on the chart.

Let's look more closely at these distinctions. The differences between these groups of wrongs may be understood by considering the distinction between **mala in se** offenses and mala prohibita offenses. Offenses that society considers to be inherently wrong and morally unacceptable are known as mala in se crimes. Mala in se, a Latin phrase, refers to crimes such as murder, rape, and theft. These contrast with mala prohibita offenses, which are actions that are considered wrong because they violate the law, not because they are morally wrong. Examples of mala prohibita offenses include laws that require automobile drivers to wear seat belts; laws that impose seasonal restrictions, such as months and time of day that one can hunt deer; and laws that prohibit carrying a concealed weapon. Figure 1.2 lists examples of mala in se and mala prohibita offenses.

FIGURE 1.2 ■ Mala In Se and Mala Prohibita Offenses

Mala In Se	Mala Prohibita
Theft	Hunting restrictions
Murder	Seat belt laws
Kidnapping	Building without a permit
Arson	Littering
Mayhem	Prohibited alcohol purchases
Rape	Draft evasion

"Victimless" Crimes

There is another group of actions that do not fall neatly into either the mala in se or mala prohibita categories. These are sometimes referred to as "victimless" crimes. One example is adultery, which many people view as morally objectionable. Some people believe it is wrong for a married person to have sexual relations with a person other than their spouse. However, in the majority of states, adultery is no longer a crime. In centuries past, adultery was a **felony**—an offense that could result in not only a lifetime of community shame for the adulterer, but also jail, exile, and sometimes death. The view of adultery as a felonious act is symbolized by Hester Prynne, the protagonist in Nathanial Hawthorne's book, *The Scarlet Letter.* Following an adulterous affair, Prynne was forced to wear a red "A" on her clothing as a mark of her indiscretion. While a few states still have laws against adultery, in many instances, these laws are no longer enforced (see Chapter 6 for a discussion of offenses against public decency).

In some instances, the issues of victimless crime, morality, and definitions of crime overlap. The following three scenarios explore these intersections in more detail:

- *Yago is a 21-year-old college junior. Before each of his midterm exams and final exams, he smokes marijuana to relax. He buys the drugs from another student in his dormitory on campus. Yago is a straight "A" student. He does not live in a state where marijuana is legal.*
- *Millicent is a college professor. She teaches large introductory courses at a top-10 community college. She has a ritual for the first day of each semester—she smokes crystal methamphetamine. The drug makes her feel upbeat, and she always gives a great first lecture.*
- *Anthony is a 25-year-old student. Anthony attended college for 1 year but had to drop out because he could not afford the tuition. To make money, he now works as a prostitute. His clients, whom he meets online or through referrals, pay to have sex with him. Anthony hates sex work but is doing it until he saves enough money to return to school.*

Some legal scholars would argue that the actions described in the hypotheticals are not crimes. According to this view, when consenting adults agree to engage in activity, it should not be labeled criminal. Stated another way, if there is no victim, there is no crime. The argument is that the private, voluntary actions of an adult should not be subject to governmental regulation or punishment. Arguments made by law professors Norval Morris and Gordon Hawkins strongly support this viewpoint:

> When the criminal law invades the spheres of private morality and social welfare, it exceeds its proper limits at the cost of neglecting its primary tasks. This unwarranted extension is expensive, ineffective, and criminogenic . . . [M]an has an inalienable right to go to hell in his own fashion . . . The criminal law is an inefficient instrument for imposing the good life on others.[2]

By this logic, Yago, Millicent, and Anthony may be involved in morally questionable activity. However, because it is by choice, because they are adults, and because they are not forcing

their behavior on anyone else, there should be no criminal sanction. In fact, each one has chosen, voluntarily, to engage in specific actions. Some scholars argue that when the law reaches too far into the personal lives of citizens, it loses its legitimacy and its ability to deter crime. Punishing victimless crimes, as Morris and Hawkins argue, is a waste of taxpayer dollars and encourages underground markets to develop. By this rationale, the violence associated with drug trafficking would end if marijuana, heroin, and cocaine were made legal. Further, social service agencies, not the criminal justice system, are best able to handle issues of drug addiction, mental illness, and structural unemployment.

Some legal commentators, however, reject the idea of **victimless crime**. They argue that whenever people are engaged in antisocial behavior, there is a victim, regardless of consent. Whether the activity takes place in public or private, there is a social cost when people engage in illicit activity. Dallin Oaks, a former law professor, argues that it is not always possible to identify the victims:

> In some so-called victimless crimes, all society is the victim . . . one person cannot rationally contend that what he does to or with himself is of no concern to anyone but himself. Each person steers his ship of life through a very narrow passage. The wreckage of one person in that passage becomes a serious navigational hazard for many others.[3]

Let's consider these perspectives in view of the above scenarios. In the case of Yago, his illegal use of marijuana is the end point of a violent underground international drug market enterprise. For Millicent, using crystal methamphetamine could cause her to have an accident while driving, lead to addiction, or bring about other negative consequences that could impact her family, friends, employers, and strangers. Anthony's prostitution involves a range of potential social harms, including rape, assault, and the spread of sexually transmitted diseases. Drug use and related harms place enormous burdens on social service agencies. Some commentators note that when individual choices have social and economic consequences they should be subject to public regulation and criminal sanction.

Sanctions for victimless crime are often controversial. For instance, for offenses involving low-level drug possession. Research indicates that harsh punishments for nonviolent crimes have detrimental social costs and may impose life-long punishments. The criminal law's changing response to these questions reflects a shift in social attitudes and resource allocation within the justice system.

This section has addressed how crime is defined and how it is distinct from moral wrongdoing. The next section examines the sources of American criminal law. As discussed, criminal law is drawn from a wide range of sources, including the U.S. Constitution, common law, and federal, state, and local legislation.

SOURCES OF CRIMINAL LAW

American criminal law is drawn from a wide range of historical and contemporary sources. These sources include English common law created by judges, the United States Constitution, **administrative regulations**, **executive orders**, and federal, state, and municipal legislation.

This broad foundation highlights the fact that American criminal law comes from each of the three branches of government—legislative, judicial, and executive. This section provides an overview of the origins of criminal law and how each source links to today's criminal justice system.

Common Law

The **common law** refers to the legal rules applied by English judges in the absence of written laws. Judges imposed laws that reflected the customs and moral codes of the community. By the turn of the 17th century, English judges drew heavily from the common law. When North American colonizers brought common law with them from England during the 1600s, there was a solid body of common law in what became the United States. Common law is sometimes referred to as "judge-made" law because a judge, rather than a legislative body, makes the law. When judges were presented with cases involving harm that had no existing legal remedy, they had to determine what law should apply in a particular case. *Commonwealth v. Mochan* (1955) offers an example of judge-made law.

In this 1955 Pennsylvania case, the defendant was charged and convicted of "immoral practices and conduct." During a 1-month period, Mochan telephoned the victim numerous times and referred to her as lewd and immoral. He used obscene language to describe sex acts he would commit against the victim, a married woman. At trial, the defendant argued that he could not be convicted of a crime because there was no written or common law rule that outlawed his actions. The court disagreed and stated that the common law can be used to punish acts that directly harm the public. The court determined that Mochan's actions had injured public morality and could be punished as a misdemeanor offense.

Today most states have abolished common law crimes and replaced them with statutory crimes enacted by state legislatures. There are several reasons for this. First is the constitutional prohibition against charging someone with violating a law that did not exist at the time of their actions. A second reason is that the common law does not promote uniform laws across the states. Judge-made laws may be responsive to local community beliefs, but they do not necessarily reflect national attitudes or broad public consensus. Further, under a common law system, legal outcomes are less predictable because different judges in different counties and states reach different legal conclusions. However, as noted, a handful of states still recognize common law crimes.

Federal Legislation

The federal government has its own laws, which are separate from the laws of individual states. Whether an offense is a federal violation depends on several factors, such as the location of the offense (whether it took place on federal property) and the status of the victim and offender (whether the victim or offender is a federal employee). The United States Capitol building in Washington, DC, sits on federal property, and offenses that take place on its grounds, including its airspace, can trigger federal law. The January 6, 2021,

storming of the U.S. Capitol building, by thousands of Donald Trump supporters who protested his presidential election loss to Joe Biden, is the most well-known, contemporary example of crimes taking place on federal property. More than 700 people were convicted of violating federal laws associated with the protest and breach of the United States Capitol building. The range of charges included entrance onto a restricted federal area, obstruction of an official proceeding, destruction and theft of federal property, conspiracy, and assault. In 2025, as one of his first acts following reelection as president, Donald Trump pardoned, commuted, and dismissed charges against all January 6, 2021 capitol rioters. **Federal legislation** applies to federal employees, federal property, and federal lands. Approximately one third of all U.S. land—approximately 650 million acres—is owned by the federal government. This includes national parks, forests, wildlife refuges, military facilities, and American Indian reservations. Punishment may be greater for crimes that take place on federal property.

State Legislation

The states and the District of Columbia have a criminal code. **State legislation** passed by state legislative bodies identifies various crimes, punishments, and procedures for handling unlawful actions that take place within a state's jurisdiction. Most criminal cases are prosecuted under state laws. Most of the criminal cases that become big news headlines involve a violation of state law.

Consider the following scenario:

> *While visiting Marie's house, Jewell steals her prized copy of Harper Lee's book* To Kill a Mockingbird. *Jewell removes the valuable book from Marie's library. The book is a first edition copy, signed by the author, and is valued at $25,000. Both Jewell and Marie live in Florida.*

Under Florida law, it is grand theft when someone intentionally and unlawfully takes another person's property, to prevent the owner from using it or takes it for their own personal use. If the property is worth less than $100,000, it is second degree grand theft.[4] If the state is able to prove each element of the crime, Jewell can be found guilty of grand theft and will face up to 15 years in prison. In addition to the value of the stolen property, the location of the crime matters. For instance, if Jewell had stolen the book from the Library of Congress, which sits on federal property, she would have been charged under a federal theft statute and faced harsher punishment.

Municipal Ordinances

All municipalities, including towns, cities, counties, and boroughs, are empowered to enact laws that punish low-level, nonfelony offenses. **Municipal ordinances** cover a broad range of actions that protect the general welfare and maintain public health and safety. For instance, zoning and building regulations detail land use restrictions, while fire and safety ordinances outline the rules for commercial and residential properties. Other examples include ordinances that impose leash laws and regulate parking and snow removal.

In some cases, municipal ordinances regulate city services to reduce costs and ensure public access. For instance, in Anchorage, Alaska, residents may be fined for making excessive calls to the police. If the police are called to a home more than eight times in 1 year, the property owner may face a $500 fine for each additional call.[5] City ordinances may also regulate the actions of residents. A Los Angeles ordinance, for example, bans the use of gas-powered leaf blowers. This ordinance was enacted to address environmental concerns that leaf blowers increase the presence of airborne particles, which could cause problems for people with upper respiratory ailments. A $100 fine may be imposed for a violation of the ordinance.[6] When a state law and a municipal ordinance punish the same offense, the state law is the final authority.

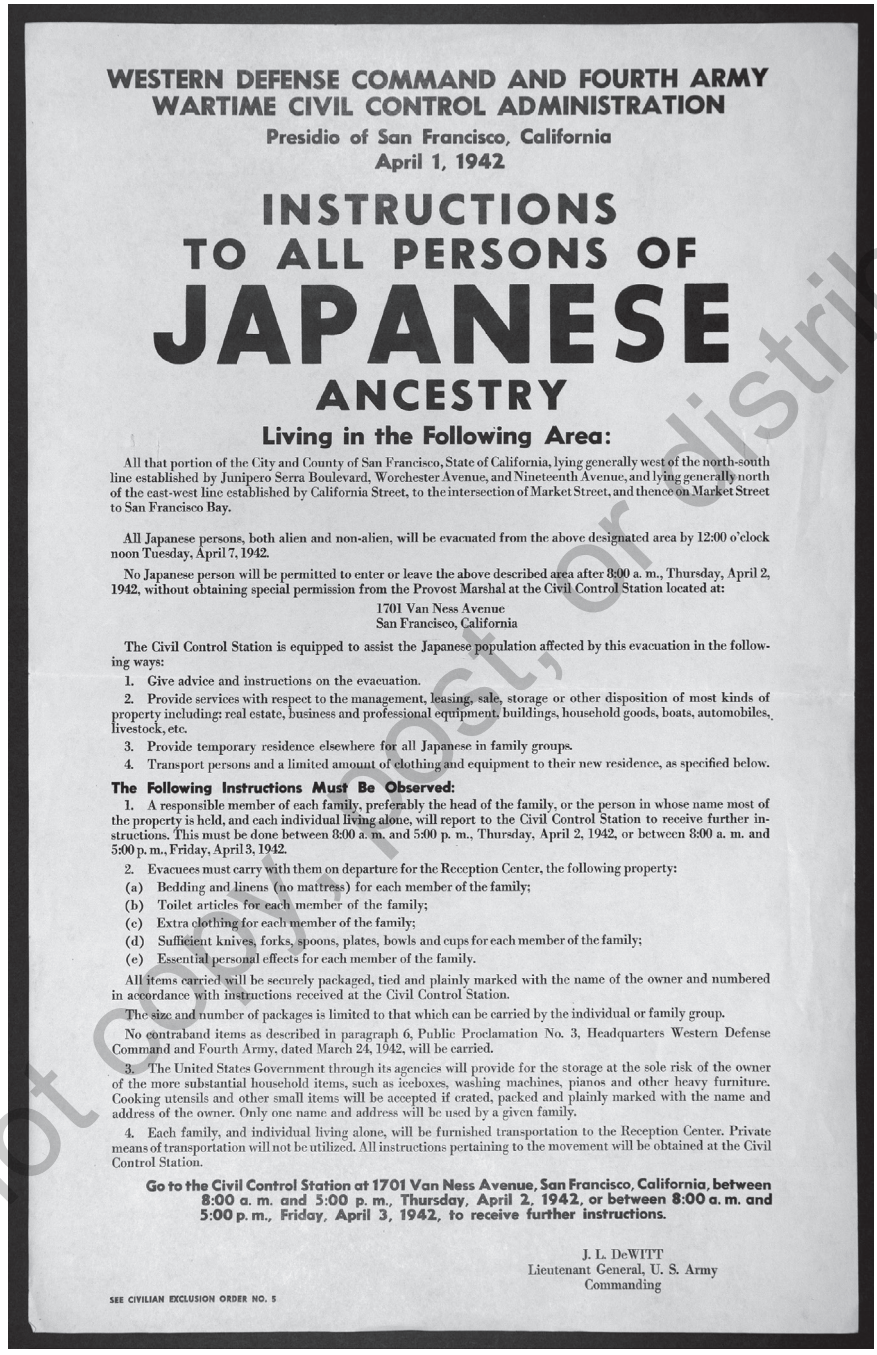
Executive Orders

The executive order is a type of federal law that can only be enacted by a sitting American president. Executive orders require neither the consent of Congress nor a vote by the people. In some instances, executive orders are largely symbolic and do not alter the status quo. In other cases, executive orders reflect a president's effort to make or change the law. Some commentators argue that executive orders violate the separation of powers doctrine because they allow the executive branch to carry out legislative functions. The U.S. Congress may overturn an executive order by a two-thirds vote. A president may reverse the executive orders of former presidents. Governors also have the authority to pass executive orders at the state level.

In 1789, President George Washington issued the first executive order. It was a proclamation to recognize the first national day of Thanksgiving. In 1863, President Abraham Lincoln signed the Emancipation Proclamation, which ordered freedom for enslaved Blacks in select territories. Another significant executive order was signed by President Franklin Roosevelt, following Japan's 1941 attack on Pearl Harbor, Hawaii. More than 2,000 people died in the air assault. In 1942, Roosevelt's response was to issue an executive order that authorized the internment of Japanese American citizens and Japanese citizens:

> I hereby authorize and direct the Secretary of War, and the Military Commanders . . . to prescribe military areas . . . from which any or all persons may be excluded, and with respect to which, the right of any persons to enter, remain in, or leave shall be subject to whatever restriction the Secretary of War or the appropriate Military Commander may impose in his discretion.[7]

This executive action mandated the removal of more than 100,000 Japanese American citizens and Japanese nationals. They were removed to internment camps across America's West Coast, including California, Oregon, and Washington. Although the executive order did not explicitly reference race, it was clear which racial groups were subject to removal. The featured poster image lists the rules imposed on Japanese citizens and nationals. Executive Order 9066 was upheld by the U.S. Supreme Court in *Korematsu v. United States* (1944). An executive order was also used to arrest and intern some Italian and German residents.



WESTERN DEFENSE COMMAND AND FOURTH ARMY
WARTIME CIVIL CONTROL ADMINISTRATION
Presidio of San Francisco, California
April 1, 1942

INSTRUCTIONS TO ALL PERSONS OF JAPANESE ANCESTRY

Living in the Following Area:

All that portion of the City and County of San Francisco, State of California, lying generally west of the north-south line established by Junipero Serra Boulevard, Worchester Avenue, and Nineteenth Avenue, and lying generally north of the east-west line established by California Street, to the intersection of Market Street, and thence on Market Street to San Francisco Bay.

All Japanese persons, both alien and non-alien, will be evacuated from the above designated area by 12:00 o'clock noon Tuesday, April 7, 1942.

No Japanese person will be permitted to enter or leave the above described area after 8:00 a. m., Thursday, April 2, 1942, without obtaining special permission from the Provost Marshal at the Civil Control Station located at:

1701 Van Ness Avenue
San Francisco, California

The Civil Control Station is equipped to assist the Japanese population affected by this evacuation in the following ways:

1. Give advice and instructions on the evacuation.
2. Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property including: real estate, business and professional equipment, buildings, household goods, boats, automobiles, livestock, etc.
3. Provide temporary residence elsewhere for all Japanese in family groups.
4. Transport persons and a limited amount of clothing and equipment to their new residence, as specified below.

The Following Instructions Must Be Observed:

1. A responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each individual living alone, will report to the Civil Control Station to receive further instructions. This must be done between 8:00 a. m. and 5:00 p. m., Thursday, April 2, 1942, or between 8:00 a. m. and 5:00 p. m., Friday, April 3, 1942.
2. Evacuees must carry with them on departure for the Reception Center, the following property:
   (a) Bedding and linens (no mattress) for each member of the family;
   (b) Toilet articles for each member of the family;
   (c) Extra clothing for each member of the family;
   (d) Sufficient knives, forks, spoons, plates, bowls and cups for each member of the family;
   (e) Essential personal effects for each member of the family.

All items carried will be securely packaged, tied and plainly marked with the name of the owner and numbered in accordance with instructions received at the Civil Control Station.

The size and number of packages is limited to that which can be carried by the individual or family group.

No contraband items as described in paragraph 6, Public Proclamation No. 3, Headquarters Western Defense Command and Fourth Army, dated March 24, 1942, will be carried.

3. The United States Government through its agencies will provide for the storage at the sole risk of the owner of the more substantial household items, such as iceboxes, washing machines, pianos and other heavy furniture. Cooking utensils and other small items will be accepted if crated, packed and plainly marked with the name and address of the owner. Only one name and address will be used by a given family.

4. Each family, and individual living alone, will be furnished transportation to the Reception Center. Private means of transportation will not be utilized. All instructions pertaining to the movement will be obtained at the Civil Control Station.

Go to the Civil Control Station at 1701 Van Ness Avenue, San Francisco, California, between 8:00 a. m. and 5:00 p. m., Thursday, April 2, 1942, or between 8:00 a. m. and 5:00 p. m., Friday, April 3, 1942, to receive further instructions.

J. L. DeWITT
Lieutenant General, U. S. Army
Commanding

SEE CIVILIAN EXCLUSION ORDER NO. 5

World War II U.S. Army poster detailing evacuation and interment orders for people of Japanese ancestry. Collection of Oakland Museum of California.

Collection of Oakland Museum of California

U.S. presidents continue to utilize the executive order. In 2022, President Joe Biden signed an executive order making June 19 a federal holiday. The holiday, known as Juneteenth, memorializes the date that the last enslaved Black people in the United States learned that they had been freed. In 1865, 18 months after the Emancipation Proclamation was signed, 250,000 Black Americans in Galveston, Texas, became free citizens. More than 11,000 executive orders have been signed into law by U.S. presidents.

Federal and State Constitutions

The **U.S. Constitution** and each of the 50 state constitutions are also sources of criminal law. The federal Constitution outlines the foundational protections and guarantees of American criminal law. It references a few specific criminal offenses, including treason, bribery, breach of the peace, and "other high crimes and misdemeanors." Treason is the only explicit crime defined within the U.S. Constitution (see Chapter 9 for a detailed discussion of treason). The Bill of Rights places boundaries on the actions that state legislatures may criminalize. In contrast to the U.S. Constitution, state constitutions detail criminal offenses, underscore constitutional rights guaranteed by the federal constitution, and add additional protections. For instance, some state constitutions include specific language to protect citizens' privacy rights.

Treaties and Other International Conventions

Treaties are official agreements between nations. These agreements may provide for criminal sanctions if one side breaches the contract. Countries sometimes sign two-way treaty agreements. These agreements set the parameters for how the countries will handle potential criminal matters. Mutual legal assistance treaties (MLATs) offer an example. The United States has MLAT treaties with numerous countries, including Argentina, the Bahamas, Canada, Italy, the Netherlands, Panama, South Korea, Switzerland, Thailand, and Turkey. Countries may also agree to have some disputes resolved by an international court. These disagreements may be resolved by courts such as the International Court of Justice (ICJ) and the International Criminal Court (ICC). The ICJ, the judicial arm of the United Nations, hears cases and writes advisory opinions. The ICC is designed to identify and punish war crimes, genocide, and crimes against humanity. The United States is a party to the ICJ but is not a party to the treaty that established the ICC.

Administrative Regulations

Federal agencies are authorized by Congress to regulate a wide range of activities. These agencies adopt administrative regulations, which have the same force as statutory law. Some federal agencies, such as the Environmental Protection Agency (EPA), have regulations that impose criminal sanctions for regulatory violations. For instance, under the Clean Air Act, the owner of a construction company who is found guilty of unlawful asbestos removal could receive a prison term for violating EPA regulations. Other agencies with administrative regulations and criminal sanctions include the Equal Employment Opportunity Commission (EEOC), the Occupational Safety and Health Administration (OSHA), and the Food and Drug Administration (FDA).

Model Penal Code

The American Law Institute (ALI) is an organization of judges, lawyers, and legal scholars. The goal of the group was to clarify and modernize the law. In 1962, the ALI published the **Model Penal Code (MPC)** to help state legislatures address gaps and inconsistencies in the law. ALI members, which include judges, lawyers, and legal scholars, worked together to fix the widespread inconsistencies and disproportionate sanctions in state criminal laws. The Illinois state code that was in effect in 1961 provides an example of this problem. Different sections of the Illinois code listed different punishments for the same offenses. For instance, while one section stated there was a $200 fine for "contributing to delinquency," another imposed a $1,000 fine for the same offense. An example of disproportionate sentencing under the code was the punishment for stealing a horse. The minimum punishment for stealing a horse was 3 years in prison, while the minimum punishment for stealing a car was 1 year. Such widespread variations in punishment were problematic since they could result in unfair punishment and undercut public faith in the judicial system.

Criminal law in the United States is codified in 52 criminal codes. This includes the federal criminal code, the 50 state codes, and the criminal code of the District of Columbia. The MPC provides state legislatures with a template for drafting their criminal laws. Following the initial publication of the MPC, most states revised their criminal codes. This overhaul of state criminal laws led to greater uniformity across the states. The MPC continues to have a significant effect on the drafting and interpretation of criminal law by American courts. Additionally, judges frequently cite sections of the MPC in their court opinions. The MPC is not a law and is not legally binding on states or U.S. courts. The MPC is relied on by judges, attorneys, legal scholars, and law professors across the country. Thus, due to its popularity, some have concluded that the MPC is a de facto American criminal legal code.[8]

As this discussion makes clear, the origins of U.S. criminal law are broad. In some instances, an individual may be responsible for deciding and making the law in a specific case. Common law and executive orders are examples of lawmaking by individuals. In other instances, groups of people write and adopt criminal laws. The U.S. Constitution and the 50 state constitutions are examples of lawmaking by groups. Laws passed by federal, state, and local legislatures are another example. Finally, in the case of treaties, countries voluntarily unite to establish rules for resolving conflicts.

CLASSIFICATIONS, DISTINCTIONS, AND LIMITATIONS IN CRIMINAL LAW

Felony v. Misdemeanor

In the hierarchy of crimes, a felony offense is more serious than a **misdemeanor** offense. Examples of a felony include murder, carjacking, rape, and drug trafficking. Examples of misdemeanors include disorderly conduct, shoplifting, and prostitution. A range of sanctions may attach to a felony conviction, such as probation or a fine. Typically, a felony conviction means that the offender could receive a sentence of more than 1 year behind bars. At a minimum, a felony sentence could

be for 1 year and a day. At the other end of the scale, a person convicted of a felony sentence could be sentenced to life imprisonment—and in rare cases, to the death penalty. Additional sanctions may attach to a felony conviction, such as disenfranchisement—loss of the right to vote. A person who is charged with a felony is entitled to a jury trial. A misdemeanor conviction may result in a jail sentence of up to 1 year or a fine. For a misdemeanor charge, a jury trial is only guaranteed if the punishment would result in more than 6 months behind bars. Both the federal and state systems distinguish between felonies and misdemeanors. Many state statutes also include a third tier of criminal offending, known as infractions. Infractions are petty offenses that are subject to fines but do not result in jail time. Examples include littering, jaywalking, and disturbing the peace.

Crime v. Tort

A criminal action differs from a **tort** action. A tort is a civil action. Civil actions are brought in civil courts, which hear noncriminal cases. Examples of civil actions include a homeowner suing a construction company for failure to complete the work on a house, a driver filing a lawsuit against the owner of a vehicle who ran a red light and crashed into their car, and a patient suing a surgeon after she discovers that a surgical sponge was not removed from her abdomen following a medical procedure.

There are three key distinctions between a crime and a tort. First, the goal of a criminal case is to get a conviction and impose a sentence against the offender. However, with a tort action, the plaintiff's goal is to receive money damages from the defendant for causing harm. Second, in a criminal action, the party who brings the case to court is a municipality, state, or the federal government. In a civil action, the suit is brought by an individual person, a group of people, or by the government. Third, the burden of proof is higher in a criminal case than in a civil action. In a criminal case, the prosecution is required to prove its case "beyond a reasonable doubt." The Ninth Circuit's Model of Criminal Jury Instructions states that reasonable doubt is established when there is "proof that leaves you firmly convinced the defendant is guilty."[9] Absolute certainty is not required. By comparison, in a civil case, the plaintiff's burden is by a "preponderance of the evidence." This lower burden requires that the plaintiff prove that it is more likely than not that their version of events is true. The different burdens of proof reflect the different consequences of a criminal conviction versus civil liability. A criminal conviction may result in a prison sentence, a loss of physical freedom, or even death. These are not risks typically faced by a defendant in a civil action.

Sometimes a single incident can result in both criminal and civil charges. For example, in 1995, O. J. Simpson, former Heisman Trophy winner, was tried and acquitted of two counts of murder. The following year, in a separate cation (in a different court with a different judge and jury), he was sued by the parents of one of the murder victims. Simpson was found liable for wrongful death and a civil judgment was entered against him for $33 million.

The September 11, 2001, terrorist attacks on the United States, in which nearly 3,000 people were killed, are another example of how criminal and civil actions may arise from a single incident. Criminal charges were filed against members of Al Qaeda who were suspected of planning the strikes. Numerous civil actions were filed as result of the September 11 attacks. For instance, victims' family members filed tort claims against various corporations and agencies, including United Airlines and New York's Port Authority for pain and suffering, economic loss,

and medical costs. Also, in 2010, thousands of Ground Zero rescue and maintenance workers reached a $675.5 million dollar settlement against New York City for health-related injuries.

Capital Offense v. Noncapital Offense

Some offenses are considered so horrible that they may be punished by state-sanctioned death. These are capital offenses. The term "capital" refers to a method of execution practiced centuries ago—the severing of one's head with the guillotine. A **capital offense** is a type of aggravated murder. Examples of crimes that may trigger a death sentence include killing an on-duty law enforcement officer, killing two or more people, killing someone during a burglary, or killing someone for pecuniary gain. Capital cases are rare. A tiny percentage of homicide cases are charged as death penalty cases. In 2024, there were less than 3,000 prisoners on death row in the United States. In the United States, 29 states, the U.S. military, and the federal government permit the death penalty for some of society's most heinous crimes.

This section has addressed key material about the criminal justice system. Keep this discussion in mind as we continue to develop the framework for understanding the detailed working of the justice system. The next part of this chapter examines the people *in* the justice system—those under its control. This is followed by an outline of the key stages of the justice system.

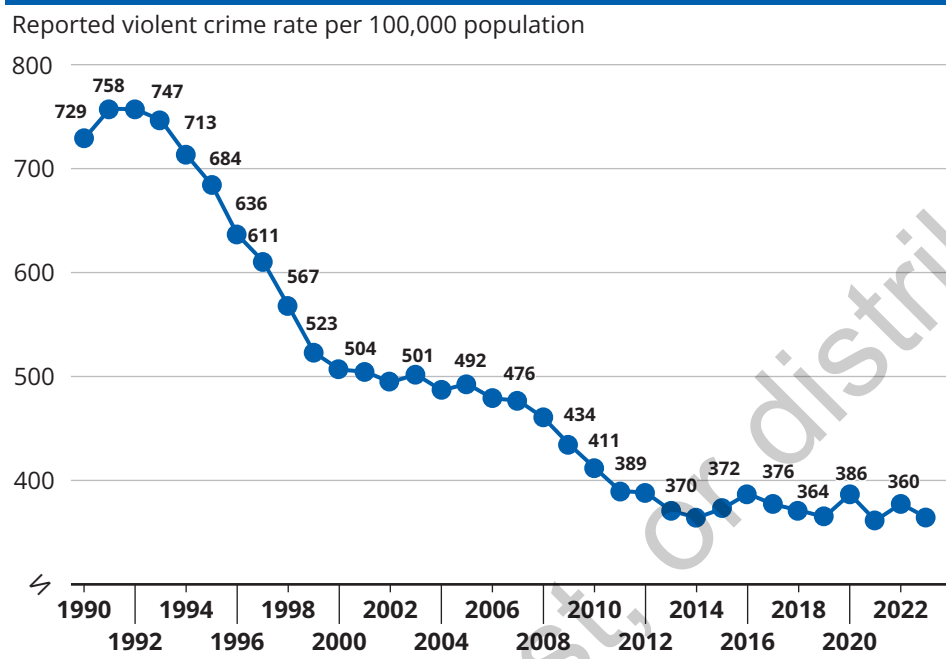
Statutes of Limitations

Statutes of limitation are the legal time frame within which criminal charges must be brought by a prosecutor. The time frames vary from state to state and vary based on the severity of the offense. For some serious felony offenses, there is no time limit. For instance, in Florida, some of the serious felony offenses that do not have a time limit include crimes that lead to death, sexual battery, and human trafficking.[10] Other felonies must be brought within 4 years (if it involves a 1st degree felony) or 3 years (if it involves at 2nd degree felony) time frame. Serious misdemeanor charges must be brought within 2 years. Why are there time restrictions on filing some criminal cases? The main rationale is that we do not want the courts to adjudicate "stale" cases. The longer it takes to file a case, the more likely it is that the victims and the witnesses' memories have faded and that important evidence may be lost or unavailable. A lengthy delay between the time an offense happened and the time it is prosecuted may raise due process concerns since a conviction should be based on sound evidence.

CRIME AND PEOPLE IN THE CRIMINAL LEGAL SYSTEM

In 2022, there were 951,270—or nearly one million—violent crimes reported in the United States. Violent crimes include homicide, rape, robbery, and aggravated assault. Aggravated assaults comprise 71% of violent crimes, followed by robbery (16%), rape (11%), and homicide (2%). The overwhelming majority of crimes, however, involve nonviolent offenses. These include property crimes, such as burglary, theft, alcohol- and drug-related offenses, and arson. In 2022, there were over 12 million nonviolent crimes. In 2019, U.S. law enforcement officers made over 10 million arrests. Approximately 5% were for violent crimes. Property crimes, such as burglary, theft, and arson, comprised about 10% of the offenses. The overwhelming majority of arrests were involved low-level, nonviolent crimes.

FIGURE 1.3 ■ U.S. Violent Crime Rate, 1990–2022



Statista. Reported violent crime rate in the United States from 1990 to 2023. https://www.statista.com/statistics/191219/reported-violent-crime-rate-in-the-usa-since-1990/

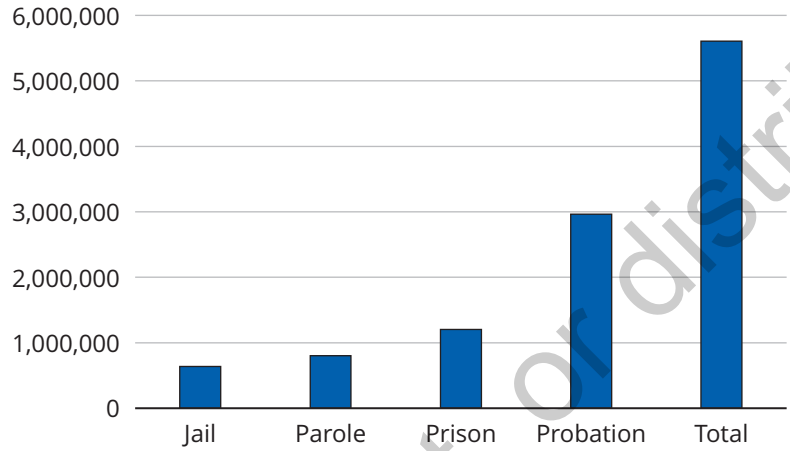
A look a violent crime rates shows that it has steadily dropped since the 1990s (Figure 1.3). In the early 1990s approximately 729 out of 100,000 people were victims of crime. For 2022, the violent victimization rate had dropped to 369 out of 100,000 people. Notably this steep decline is at odds with public perceptions. A 2023 Gallup Poll reported that 61% of respondents said crime in the U.S is extremely or very serious.[11]

There are millions of people in the American correctional system (Figure 1.4). There are four ways a person can be under the supervision of the criminal justice system. Correctional supervision includes prison, jail, probation, and parole. In 2021, the Department of Justice estimated that there were approximately 5.5 million people under correctional supervision in the United States. The majority were on probation (54%), followed by those serving prison sentences (22%), those on parole (14%), and those in jail (11%).[12]

Department of Justice statistics show that 1:33 adults are tied to the correctional system. The millions of people tethered to the system—those in jail, prison, on probation, or on parole—results in a huge societal cost. It is estimated that on average it costs states $144,000 per year to incarcerate one prisoner—a low of $18,000 in Mississippi and a high of $135,000 in Wyoming.[13] A look at the racial breakdown of those in state and federal prisons show some noteworthy racial trends. In 2020, an estimated 33% of the people incarcerated in the United States were African Americans. Whites made up approximately 30% of the incarcerated population,

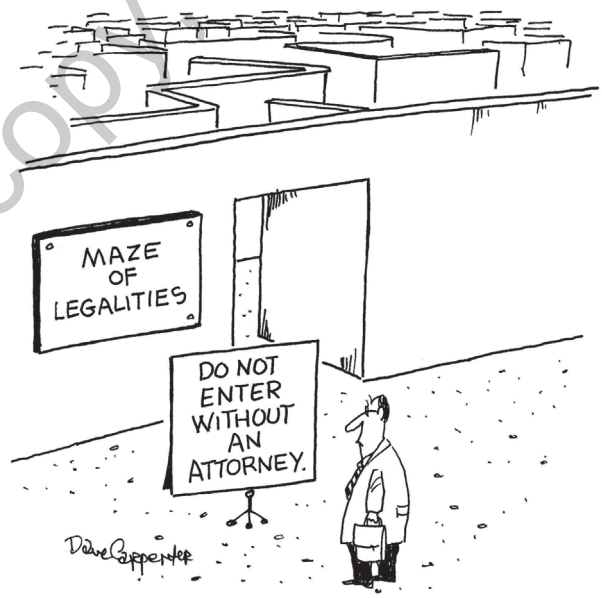
Hispanics constituted over 23%, American Indians/Alaskan Natives were less than 2%, and Asians were approximately 1%.[14] The next section examines the criminal justice system process—from arrest to sentencing—and an overview of the court system.

FIGURE 1.4 ■ U.S. Correctional Population: Prison, Jail, Probation, Parole, 2022



Source: Department of Justice (DOJ), "Prisoners in 2022" DOJ, Nov. 2023; "Jail Inmates in 2021 – Statistical Tables" DOJ December 2022; and "Correctional Populations in the United States, 2021 – Statistical Tables" DOJ February 2023.

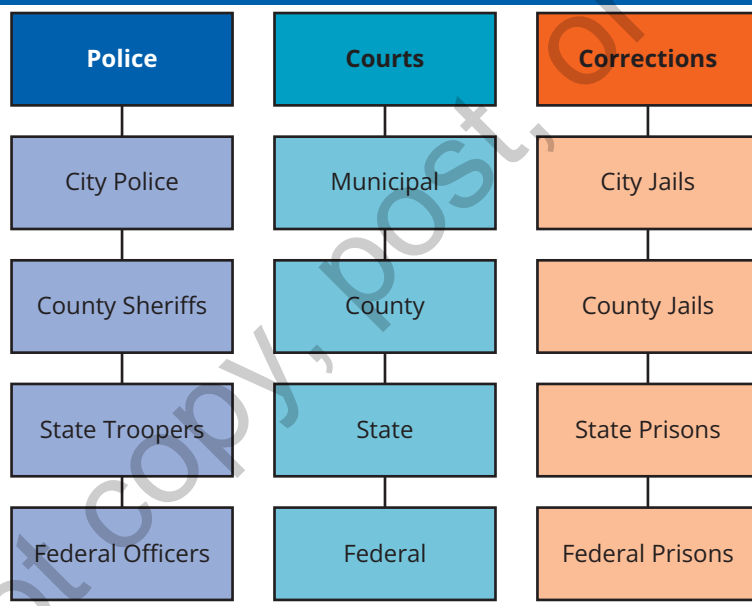
THE STRUCTURE AND PROCESS OF THE CRIMINAL LEGAL SYSTEM



http://www.cartoonstock.com/cartoonview.asp?catref=dcrn983

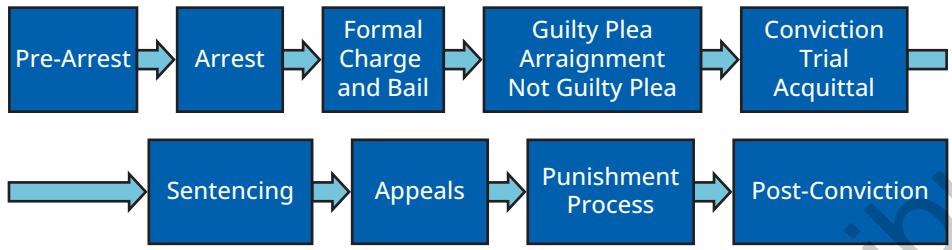
The U.S. criminal legal system is both mammoth and complex. It is made up of three main parts: police, courts, and corrections (Figure 1.5). As the cartoon illustrates, people who enter the justice system face a daunting legal maze. An attorney can guide and advocate for alleged or convicted offenders and help them navigate their way through the system—from the filing of criminal charges to what happens after a person has been convicted. A person who has been charged with a crime is typically represented by either a private attorney or a public defender. In *Gideon v. Wainwright* (1963), the Supreme Court held that the state must provide legal counsel to criminal defendants who cannot afford to hire their own attorneys. This section provides a structural overview for understanding the criminal legal system. First, there is a discussion of the main parts of the system. Second, there is a discussion of how to prepare a **case brief**. Given that case law is the central focus of this material, we also look at the organization of the American court system.

FIGURE 1.5 ■ Types of Police, Courts, and Corrections



The criminal legal system typically begins with an arrest by a police officer (in some cases it begins with a grand jury investigation). The next part is the court system, which is followed by the corrections system. Each year, the number of reported crimes is much larger than the number of arrests. Further, the number of arrests is much larger than the number of cases that end in criminal conviction and punishment. This explains why the criminal justice system is commonly referred to as a funnel. Figure 1.6 is a streamlined snapshot of the key components of the criminal justice system process.

FIGURE 1.6 ■ The Criminal Legal System, Streamlined View



Pre-Arrest and Arrest

An arrest is typically thought of as the official beginning point of the criminal legal system. Once a person is arrested, the wheels of the system begin. However, there may be pre-arrest interactions between police officers and citizens that do not result in an arrest (e.g., when a police officer pulls over a driver for speeding and issues a verbal warning). When there is an arrest, depending on the location of the offense, it may be made by a local, state, or federal law enforcement official. In rare instances, there may be what is called a "citizen's arrest." This occurs when a non-law enforcement officer witnesses a crime and detains the suspect until police arrive on the scene.

Formal Charging Process

At this stage, an alleged offender is officially charged with violating a specific section or sections of the criminal code (under local, state, or federal law). The criminal charge is sometimes referred to as an "information," which is a formal criminal charge brought by the prosecutor. If the charge is a felony, there may be a grand jury investigation. Grand jury investigations are led by the prosecutor. If the grand jury finds that there is probable cause to believe that the defendant committed the crime or crimes, it will issue an indictment. The United States Constitution requires a grand jury in federal felony cases. Most states use grand juries in felony cases.

Bail and Arraignment

After a person is arrested, a decision is made regarding bail. The person may be released on their "own recognizance," which means that the person is released if they promise to show up at a future court hearing. Alternatively, a person might be released on "cash bail." This requires that the person pay money in exchange for being released. In recent years, many have argued that cash bail is discriminatory: Those who have money can secure their release from jail, and those who cannot become pretrial detainees and are incarcerated. Cash bail establishes a two-tier system, one that allows people with financial resources to be accorded the presumption of innocence and those without money to be placed in jail. For those people who cannot afford bail, there is a presumption of presumptive guilt. *More than two thirds of the people serving time in jail are pretrial detainees.*[15] Only a handful of states—Illinois, New Jersey, and New York—have eliminated or severely reduced the use of cash bail. Also, there is no cash bail in the District of

Columbia or in the federal system. The length and nature of cash bail also raises in concern. A pretrial detainee could spend years behind bars. This means that someone could be forced to spend more time behind bars awaiting trial than they would be sentenced to if they are found guilty of a crime. It is also possible that a pretrial detainee, who is in jail because they could not afford bail, will be found not guilty. In addition to being confined in jail before a finding of guilt, a pretrial detainee may also be sentenced to solitary confinement. The Kalief Browder story is a cash bail cautionary tale.

KALIEF BROWDER STORY

In 2010, Kalief Browder, a 16-year-old high school student from the Bronx, was arrested for stealing a backpack. He was charged with assault, grand larceny, and theft, and his bail was set at $3,000. Because his family could not afford to post bail, Browder was sent to jail at Rikers Island. He maintained his innocence and rejected early plea deals. Browder spent more than 3 years behind bars. He spent nearly 700 days in solitary confinement—kept in a 7 x 12-foot cell for 23 hours a day. During his mother's visits, Browder told her about the physical and emotional abuse he was subjected to in jail. He said he had to continually fight to protect himself. In 2013, prosecutors dismissed the charges against Browder and he was released. In 2015, Browder committed suicide.[16]

Photo of Kalief Browder at a protest following his death.
ZUMA Press, Inc./Alamy Stock Photo

An arraignment takes place after the person has either been held or released on bail. An arraignment is an official court appearance where the judge reads the charges to the person accused of a crime. At this point, the defendant enters a plea of "not guilty," "guilty" or "no contest."

Guilty Plea

There is usually a status hearing at a later stage of the process during which the defendant informs the court whether they intend to go to trial or enter a guilty plea. The prosecutor may offer the defendant the option of pleading guilty to a lesser offense in exchange for their agreement to give up their right to a trial—a process known as "plea bargaining." If the person pleads guilty, the judge may determine the punishment at that time or at a later sentencing hearing. If the person pleads not guilty, the judge sets a date for trial. Here's an astonishing fact: *Approximately 95% of all cases, federal and state, end in a guilty plea*. This figure stands in contrast to the mainstay media image that most criminal cases are resolved by a jury trial.

On rare occasions, the prosecutor may offer the defendant a plea of "no contest" (or *nolo contendere*). With this plea, the defendant accepts the charge and the sentence, but neither admits nor denies committing the offense. A person who pleads no contest faces the same penalties as a person who pleads guilty.

Jury Selection and Trial

A criminal case may be decided by either a jury or a judge. A person who faces criminal charges that might result in a sentence of at least 6 months behind bars is entitled to a jury trial. During the jury selection process, potential jurors are asked questions by the judge, the prosecutor, and the defense attorney. Based on their responses, they may be excused or selected as members of the jury. The names of eligible jurors are typically drawn from a state's list of registered voters or licensed drivers. After the prosecution presents its case, the defense may present evidence that refutes the charges but is not required to do so. After hearing all the evidence, the judge or jury either finds the defendant guilty or acquits them. When a jury cannot agree on a verdict, the judge declares a mistrial. When this happens, the prosecutor has the discretion to retry or drop the case.

Sentencing

Following a guilty verdict, the judge imposes a sentence, which may or may not involve time behind bars. State and federal codes establish the sentencing range for each crime. The more serious the crime, the greater the criminal sanction. For instance, rape and murder are punished more severely than lower-level crimes, such as theft and assault. The length of an offender's prison sentence, and in some instances the amount of restitution an offender may be required to pay, will vary according to the seriousness of an offense. While some offenders are sentenced to time behind bars, the majority are sentenced to probation (see Figure. 1.3).

Appeals

Following a conviction, a defendant may file an appeal. By initiating the appeals process, the defendant is asking a higher court to review their case to determine whether there were procedural or constitutional errors. If the appeals court agrees with the defendant, it will overturn their conviction. However, if the appeals court agrees with the trial court, it will uphold the conviction.

Punishment

The punishment phase of the justice system typically begins after the defendant is sentenced. Most defendants begin serving their time while their cases are being appealed. In some instances, judges will allow a defendant to remain free until their appeal is resolved. In cases where the defendant is detained before trial and ultimately found guilty, they will receive credit for the time they have already served behind bars.

Post-Conviction

Following a conviction, an offender may pursue various legal routes to reduce or end their sentence. For instance, they may argue that their constitutional rights have been violated, such as the right to practice the religion of their own choosing; that their jury was racially biased, in violation of the 14th amendment; or that their sentence is cruel and unusual, in violation of the 8th Amendment.

The U.S. Court System

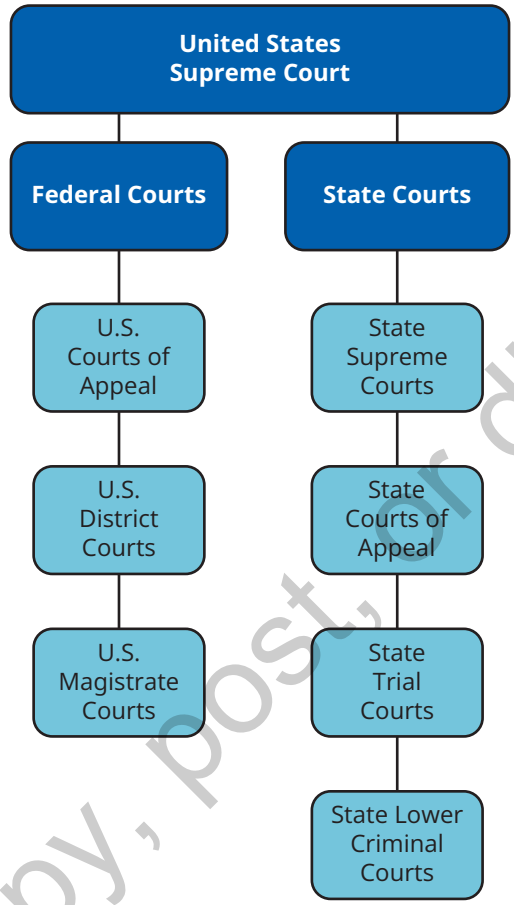
U.S. courts have a heavy caseload of criminal cases. Each year, millions of criminal cases are brought in state courts across America. In 2022, more than 87,000 cases involving criminal matters were received by the U.S. Attorneys' office.[17] In the United States, there are two separate court systems that adjudicate criminal cases: the federal court system and the state court system.

The **U.S. Supreme Court**, the "highest court in the land," sits at the top of both court systems, making it the court of last resort. Figure 1.7 provides a sketch of the two court systems. Cases begin in the lower courts and sometimes make their way farther up the court ladder. A typical state criminal case that goes to trial begins in the state's lower criminal court or trial court. These are sometimes referred to as district courts. At the federal level, cases start in U.S. magistrate or U.S. district court. This "district court" language can be confusing since both state and federal lower courts may be referred to as district courts.

When reading a case, start by determining whether the case is in state or federal court. When lower federal courts issue conflicting decisions on a legal issue, the Supreme Court often decides to accept an appeal involving that issue to resolve the conflict and determine the law. In any given year, the Supreme Court hears fewer than 100 cases—a tiny fraction when compared with the hundreds of thousands of criminal cases handled by U.S. courts each year.

In the federal system there is an additional tier of courts, including bankruptcy courts and courts of special jurisdiction (e.g., Military Court, Tax Court, and the Court of Appeals for the Armed Forces).

FIGURE 1.7 ■ Federal and State Courts



BRIEFING A CASE

Court cases are used throughout this textbook to illustrate how criminal law is applied and interpreted by the courts. With few exceptions, the case excerpts are decisions by appeals courts. These are courts that review the legal decisions of lower courts. For example, the "State Courts of Appeals" are lower courts—they are below the U.S. Supreme Court and the State Supreme Courts (see Figure 1.7). Most of the case excerpts included in this book are taken from decisions by either State Supreme Courts or State Courts of Appeal. Federal cases are also highlighted, including numerous decisions by the U.S. Supreme Court. Reading and understanding court opinions takes practice. The first big step is learning *how* to read the cases.

In this section, we identify and define the key components of a court opinion. Following this, we locate these parts in an actual judicial opinion. The case summary process is known as "briefing a case." The written summary is a "case brief." For a case brief, there are six main parts to focus on:

- *Citation*: The name of the case and the case citation, including the court and the year of the decision.
- *Prior Proceedings*: If the case is now before an appeals court, the prior proceedings are an overview of the legal decisions reached by the lower courts. In other words, the prior proceedings state what happened in court *before* the current court's decision, such as the crime the defendant was convicted of committing, the statute they violated, and the sentence she received.
- *Facts*: The facts refer to the specific details of the case that led to the filing of criminal charges against the defendant. For instance, if there was an altercation between the defendant and the victim, the facts section would include the who, when, where, how, what, and why of the incident.
- *Issue*: The issue is a statement of the legal question(s) that the court is asked to address in the specific case. In general, the court is being asked to answer a question by the appellant—the side that lost in the court that previously heard the case. An issue may involve a question about the interpretation of a constitutional right, whether the trial court provided the proper instructions of law to the jury, or whether there was sufficient evidence to support the conviction.
- *Holding*: The holding is a statement of the court's decision. It is the court's answer to the legal issue posed by the appealing party. The court's "disposition," the directive from the court, may also be included in this section. Examples of case dispositions include "Affirmed" or "Reversed and remanded." This language usually appears at the end of a case.
- *Rationale*: The rationale is an explanation of the court's reasons for reaching its decision. The court's reasoning may include a range of factors, including prior case law (precedent) or public policy. Judicial opinions typically offer more than one rationale for their decisions.

When a case is appealed from a lower court to a higher court, the appeal may be heard by a court with more than one judge, such as the U.S. Supreme Court. In many cases, the justices who do not agree with the majority write separate dissenting opinions. Judges do not always agree on what the proper legal resolution should be in a case. This means that in some cases, there is a majority opinion, which is followed by either a "concurring" opinion or a "dissenting" opinion. A judge may write a concurring opinion when they agree with the decision of the majority but for different reasons. For reasons of space, this textbook does not include concurring and dissenting opinions. However, to get a broader view of the cases and legal perspectives, you are encouraged to look up concurrences and dissents online. Sometimes the legal arguments argued by the dissenting justices become the majority view.

It is important to note that sometimes the arguments relied on by dissenting judges become arguments relied on by the judges in the majority. If you are interested in reading concurring and dissenting opinions in a particular case, use the citation information to look up the full court opinion.

- *Concurring Opinion*: The opinion of a judge (or judges) who agrees with the decision of the judges who are in the majority, but for different legal reasons.
- *Dissenting Opinion*: The opinion of one or more of the judges who disagrees with the legal decision and findings of the judges in the majority. Sometimes important facts that were not discussed in the majority opinion are discussed in a dissenting or concurring opinion.

There are nine justices on the U.S. Supreme Court. One is the Chief Justice and the others are Associate Justices. One of the justices who is in the majority is assigned to write the Supreme Court's opinion in a case. In some instances, however, an opinion is not attributed to a specific Justice. Rather, it reflects the conclusion of the entire Court. These opinions are known as *per curiam* decisions.

Now, we turn to the case of **Crocker v. State**. As you read through the court opinion, underline or highlight the parts of the case that address the key parts of a case brief (detailed earlier). Preparing a case brief has several benefits. It provides a short, one-page summary of the case. It is also useful for students as a learning tool during class lectures. When a case is reviewed in class, write notes and comments on your brief and make any necessary additions and corrections. Case briefs are also useful during your preparation for midterms and final exams. Briefs allow for quick reviews and comparisons between court cases. It also gives you a structure for understanding how court cases are decided and how judges resolve legal issues.

Writing case briefs is a skill that improves with repetition. Early attempts to determine the facts, issue, holding, and rationale will be a challenge. It may also be difficult to confine your brief to one page. The more cases you read and discuss in class, the easier it will be to determine which facts matter the most and should be included in the case brief. With practice, it will become easier to spot the issue in a case, understand the holding, and identify the court's reasoning for its decision. Before you try your hand at briefing a case, let's do a warm-up exercise. Below is the **Martin v. State** case. Read through this short case a few times. As you read the case, highlight, circle, or otherwise mark the elements of the case brief.

MARTIN V. STATE

Court of Appeals of Alabama 31 Ala. App. 334 (Ala. Crim. App. 1944)

Appeal from Circuit Court, Houston County; D.C. Halstead, Judge.

Cephus Martin was convicted of public drunkenness, and he appeals.

SIMPSON, Judge. Appellant was convicted of being drunk on a public highway, and appeals. Officers of the law arrested him at his home and took him onto the highway, where he allegedly committed the proscribed acts, viz., manifested a drunken condition by using loud and profane language.

The pertinent provisions of our statute are: "Any person who, while intoxicated or drunk, appears in any public place where one or more persons are present, * * * and manifests a drunken condition by boisterous or indecent conduct, or loud and profane discourse, shall, on conviction, be fined", etc. Code 1940, Title 14, Section 120.

Under the plain terms of this statute, a voluntary appearance is presupposed. The rule has been declared, and we think it sound, that an accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer. Thomas v. State, 33 Ga. 134, 125 S.E. 778 . . .

Conviction of appellant was contrary to this announced principle and, in our view, erroneous. It appears that no legal conviction can be sustained under the evidence, so, consonant with the prevailing rule, the judgment of the trial court is reversed and one here rendered discharging appellant. Code 1940, Title 7, Section 260; Robison v. State, 30 Ala. App. 12, 200 So. 626; Atkins v. State, 27 Ala. App. 212, 169 So. 330.

Reversed and rendered.

After you have identified the elements of the case brief for *Martin v. State*, you are ready to read *Crocker v. State* and write your case brief.

ISSUE SPOTTER

Read the court case below and prepare a case brief. Use the case brief structure outlined earlier (prior proceedings, facts, issue, holding, rationale, concurring, and dissenting opinions). Do your best to include each of the elements of a case brief.

Crocker v. State (1973)

Supreme Court of Mississippi

272 So.2d 664 (Miss. 1973)

INZER, Justice:

Appellant George Leon Crocker was indicted, tried and convicted in the Circuit Court of Neshoba County for the crime of robbery. He was sentenced to serve a term of ten years in the State Penitentiary. From this conviction and sentence, he appeals. We reverse and remand.

The principal contention of appellant is that the trial court was in error in refusing to grant his request for a directed verdict at the close of the state's case.

The indictment in this case in effect charged that appellant committed an assault on one Jesse S. McKenzie and did thereby put him in bodily fear of immediate injury to his person and that appellant did take $500 from the person of Jesse S. McKenzie against his will, and did then and there feloniously and violently take, steal and carry away $500.

McKenzie testified that at approximately eleven o'clock on the morning of June 26, 1971, appellant came to his home and after they had a cup of coffee, he and appellant went to the store where they drank some beer and whiskey. When they returned McKenzie changed his clothes. He had his billfold containing $500 in the bib of his coveralls which he removed. He stated that he removed the billfold and put it in his pocket. It is unclear from his testimony whether he put the billfold in the pocket of the coveralls which he removed, or whether he put it in the pocket of the clothes he put on. Apparently, he left it on the bed because he stated appellant got the billfold, removed $500 therefrom, laid the billfold down and left. Although the state attempted to get him to say that the appellant took the money from his person by force or violence, he never would say that any force or violence was used. On cross examination he stated that appellant did not in any way use force, violence, or fear to get his money. He concluded his testimony by stating that his clothes were on the bed and his wallet was in his clothes, and that appellant took his money from his wallet and left. He also stated at one point in his testimony that appellant had been gone for about an hour before he missed his money.

It is well settled that the three essential elements of robbery are as follows: (1) felonious intent, (2) force or putting in fear as a means of effectuating the intent, and (3) by that means taking and carrying away the property of another from his person or in his presence. All these elements must occur in point of time. If force is relied upon as proof of the charge it must be force by which another is deprived of and the offender gains possession of the property. If putting in fear is relied upon, it must be the fear under duress of which the owner parts with possession. It is apparent that the state failed to prove the second necessary element of the crime of robbery and therefore, the trial court was in error in refusing to grant the appellant's motion for a directed verdict, insofar as the crime of robbery is concerned.

The state, while contending the evidence is sufficient to sustain the charge of robbery, urges that although we find the evidence of the charge of robbery was insufficient to sustain the conviction, it was sufficient to sustain a conviction of the lesser included offense of larceny, and that this Court should sustain the conviction insofar as the conviction includes larceny and remand the case for proper sentencing. The state cites Section 2523, Mississippi Code 1942 Annotated (1956), which reads as follows:

> On an indictment for any offense the jury may find the defendant guilty of the offense as charged, or of any attempt to commit the same offense, or may find him guilty of an inferior offense, or other offense, the commission of which is necessarily included in the offense with which he is charged in the indictment, whether the same be a felony or misdemeanor, without any additional count in the indictment for that purpose.

Under the provisions of this section the jury could have found appellant guilty of grand larceny instead of robbery, and in that event the conviction would be upheld. The difficulty here is that the state chose to rely upon the charge of robbery, and the trial court submitted the case to the jury on that charge, instead of submitting the case to the jury on the lesser included offense of grand larceny. Under these circumstances, this Court cannot sustain a conviction of the constituent offense of grand larceny.

Reversed and appellant ordered held for further action of the grand jury.

Sample Case Brief

After you read the case and write your own brief, take a look at the sample brief below.

CROCKER V. STATE, 272 SO.2D 665 (1973)

SUPREME COURT OF MISSISSIPPI

Prior Proceedings

i. Circuit Court of Neshoba County

The appellant, George Crocker, was indicted, tried and convicted of robbery. Crocker, the defendant (D) received a 10-year prison sentence in the state penitentiary.

ii. Supreme Court of Mississippi (current court) D appeals his conviction (he argues there was insufficient legal basis for a conviction).

Facts

On June 26, 1971, at approximately 11am, the defendant went to the home of Jesse McKenzie. The pair drank coffee and then went to a store and drank whiskey and beer. They returned to McKenzie's home and he changed his clothes. McKenzie, who had $500 in his billfold, removed the money from the bib of his overalls to his pocket. He then left the money on his bed.

At a later time, D took the money from McKenzie's billfold, which was on the bed. D then left McKenzie's home.

McKenzie noticed that his money was missing about an hour after D left his home.

Issue

Can the D be properly convicted of robbery when he did not use force or violence to take another person's property?

State's argument: If D cannot be convicted of robbery, then he can be convicted of grand larceny, a lesser offense.

Holding

No, a person has not been properly convicted of robbery where there was no force or violence and the property was not taken in front of the victim.

The court reversed D's conviction for robbery.

Rationale

The court lists the 3 elements of robbery (felonious intent, force or putting in fear as a means of effectuating the intent and taking and carrying away another person's property from him or in his presence.

- The court finds that the state did not establish the second element—that the D used force or put victim in fear. At trial McKenzie testified that D did not use force, violence, or fear to take his money.
- Citing precedent, the court says that the state, which relied on a robbery charge, cannot now ask the court to uphold a conviction for robbery that the facts do not support. Further, the court cannot uphold a conviction for grand larceny. *Register v. State* (1957) and *Thompson v. State* (1955).

Notes

You can leave space on your briefing sheet for any questions you have, unfamiliar terms, and other items.

Keep in mind that the previous sample brief is merely a guide. In your early attempts at briefing a case, you may want to write a lot of details in your briefs. That's fine. In time, the more cases you read, the more you will be able to tell which information is most important to understanding the case and the decision. Also, you will see lots of new words. Look them up! Black's Law dictionary (https://thelawdictionary.org/) and law.com (https://dictionary.law.com/) are two resources.

CONCLUDING NOTE

This chapter has provided an overview and roadmap of criminal law and criminal justice issues that are covered in detail in this textbook. Now, test yourself on the material we have covered in this chapter. Good luck with the Issue Spotter exercise for this chapter. The exercise requires that you review and apply the case brief material discussed in this chapter.

KEY TERMS AND CASES

Administrative regulations
Capital offense
Case brief
Common law
Crime
Crocker v. State
Executive order
Federal legislation
Felony
Mala in se
Mala prohibita
Martin v. State
Misdemeanor
Model Penal Code (MPC)
Municipal ordinances
State legislation
Tort
Treaties
U.S. Constitution
U.S. Supreme Court
Victimless crime

Spencer Platt/Getty Images, Sipa USA/Alamy Stock Photo, Christopher Dilts/Bloomberg via Getty Images

2 CONSTITUTIONAL LIMITATIONS ON CRIMINAL LAWS

LEARNING OBJECTIVES

After reading and studying this chapter, you should be able to

2.1 Summarize the constitutional protections guaranteed by the First Amendment's free speech clause and relevant U.S. Supreme Court cases.

2.2 Summarize the constitutional protections guaranteed by the Second Amendment and relevant U.S. Supreme Court cases.

2.3 Summarize the meaning of Due Process under the Fifth & Fourteenth Amendments.

2.4 Discuss the cruel and unusual clause of the Eighth Amendment.

2.5 Define the Fourteenth Amendment's equal protection clause.

2.6 Summarize the right to privacy.

2.7 Describe ex post facto laws and bills of attainder and their rationales.

Public protest and assembly are staples of American democracy. In the United States, people have always protested in the public square. Anti-war rallies held by college students, marches for veterans, women marching against the Supreme Court's overturning of *Roe v. Wade*, gatherings to protest the disparate wealth gap, student sit-ins to protest the war in Gaza, White supremacist rallies, demonstrations against book banning, and Black Lives Matter protests against police violence, are all examples of protest. Expressions of speech also take symbolic forms, such as flag burning, displaying a flag upside down, or a professional athlete taking a knee during the singing of the national anthem. These actions raise constitutional issues that are addressed in this chapter, including the First Amendment rights to freedom of speech and freedom of assembly. We consider the legal boundaries of public speech and how far the government can reach to punish speech—popular and unpopular. Further, we discuss how the law handles speech that some people find offensive. Is the best response *more* speech, limitations on the offensive speech, or an outright ban? Beyond speech and expression, this chapter considers constitutional protections and limitations involving the Eighth Amendment's prohibition against cruel and unusual punishment, the Second Amendment's right to bear arms, the Fifth Amendment's Due Process guarantee, the 14th Amendment's Due Process and Equal Protection Clauses, and the right to privacy.

INTRODUCTION

State legislatures use their broad authority to enact criminal laws. These powers come with limitations. As a general rule, state laws may not encroach on individual rights guaranteed by the **Bill of Rights**—the first 10 amendments of the United States Constitution. A state law, for instance, may criminalize certain forms of language so long as it does not interfere with free speech guarantees protected by the First Amendment. A state may punish the crime of robbery. However, it may not impose a penalty so disproportionate to the crime (e.g., the

death penalty) that it violates the Eighth Amendment's protection against cruel and unusual punishment. A state may make it unlawful for people to engage in certain types of activities (e.g., gambling). However, the state may not have a law that punishes one racial group more harshly than others for engaging in the activity. To do so would violate the equal protection clause of the 14th Amendment. Courts strike down laws when they are found to interfere with constitutionally protected rights. By themselves, the constitutional protections in the Bill of Rights only apply to federal laws. However, the language of the 14th Amendment requires that states also protect most of these rights. This is another way of saying that the Bill of Rights is made binding on the states through the 14th Amendment. This is known as the doctrine of **incorporation**.

This chapter highlights several constitutional amendments, including the provisions in the First, Second, Fifth, Eighth, and 14th Amendments. The discussion examines their specific guarantees and their legal boundaries. We also look at the right to privacy, which is drawn from several constitutional amendments. This discussion does not detail the Fourth and Sixth Amendment protections, because those are typically discussed as part of a criminal procedure course. We examine how far states and the federal government can legislate to limit these rights. The cases illustrate how the U.S. Supreme Court balances the rights of the individual against the interests of the state or federal government.

FIRST AMENDMENT

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.
>
> *First Amendment, U.S. Constitution*

The **First Amendment** includes protections and guarantees that exist at the heart of democracy. Five rights are promised in its 45 words: free speech, freedom of religion, freedom of press, freedom of assembly, and the right to petition the state for redress of grievances. In this section, we highlight three of these; freedom of speech, freedom of assembly, and freedom of religion (the free exercise clause).

Freedom of Speech

> To suppress free speech is a double wrong. It violates the rights of the hearer as well as those of the speaker.
>
> Frederick Douglass, A Plea for Free Speech in Boston (1860)

The right to speak freely is the bedrock of a democratic society. When speech is protected, it encourages people to talk and exchange ideas—ideas that are popular as well as ideas that are incendiary. When free speech is not protected, for instance in totalitarian and militaristic societies, public speech may be censored by the government. In the United States, the right to free speech is both beloved and reviled. When we agree with what someone has said, we support and encourage more of the same kind of speech. When we disagree and believe that someone's speech has gone

too far, we may want to ban the speech. In the previous quote, Frederick Douglass, former slave and abolitionist, argues that society risks harm when it places barriers around speech. This section looks at how courts have determined which speech is constitutionally acceptable. The cases establish that the right to free speech is upheld even when the speech is unpopular and even when it is directed against the government. In *Snyder v. Phelps* (2011) Chief Justice, John Roberts wrote:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain . . . We cannot react to that pain by punishing the speaker. As a nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.[1]

The First Amendment prevents the government from restricting expression based on its ideas, subject matter, message, or content. The bottom line is that **freedom of speech** and expression are constitutionally protected to encourage people to speak freely—without fear of punishment. The give and take of ideas in public makes it possible to have a social atmosphere of awareness, tolerance, and respect for different opinions—the makings of a vibrant democracy. However, the guarantee of free speech also comes with social costs. We will not always approve of what others say in their exercise of free speech. At some point, each of us will likely encounter individuals or groups who engage in speech that deeply offends our sensibilities.

The next two Supreme Court cases, **Brandenburg v. Ohio** (1969) and **Cohen v. California** (1971), involve controversial public speech. These two cases highlight the Constitution's broad protection of unpopular speech. The *Brandenburg* case involves derogatory racial slurs used by members of the Ku Klux Klan (KKK). The KKK, the oldest White supremacist organization in America, took shape after the Civil War. The *Cohen* case involves language that some people would consider highly offensive, especially since Paul Cohen's actions question the value of military service. Cohen wore a jacket with the statement, "Fuck the Draft. Stop the War," as he walked through the hallway of the Los Angeles County courthouse. At the time of the incident, 1968, the United States was at war with Vietnam.

Clarence Brandenburg challenged the Ohio law and argued that it violated the First *and* Fourteenth Amendments. He included the Fourteenth Amendment because he argued that Ohio, by passing the Criminal Syndicalism Act, had violated his First Amendment rights. As you read *Cohen v. California*, compare and contrast it with *Brandenburg*. Evaluate each speaker's message and their intended audience.

In both cases, the Supreme Court makes clear that constitutionality is not determined by popularity. Unpopular speech is entitled to constitutional protection as is popular speech. The Supreme Court states, "One man's vulgarity is another man's lyric." The Supreme Court also makes clear that some speech does not have constitutional protection. The Court considered the public's response to the words on the back of the defendant's jacket. They found no evidence that Cohen's coat had caused anyone to become violent.

Consider whether a change in the facts would strengthen or weaken Brandenburg's case. Discuss what would happen if:

- Brandenburg delivered his speech in front of a synagogue.
- Brandenburg made his remarks in front of Morehouse College, an Historically Black College or University (HBCU).

How might a change in the fact pattern in *Cohen* weaken or strengthen Cohen's case? Consider what would happen if:

- Cohen wore his jacket while visiting a friend at a Veteran's Memorial Hospital.
- Cohen wore has jacket while walking through Arlington National Cemetery (where war veterans are buried).

If Brandenburg's speech had been given outside of a synagogue, it is likely that the Court would have been concerned that his words could cause a public disruption and possibly violence. Likewise, if his speech, which included anti-Black and anti-Jewish slurs, had taken place in the courtyard of an HBCU, the Court might have determined that the speech would create a disturbance of the peace. In these scenarios, Brandenburg is speaking in person to members of racial and religious groups who are hated by Klansmen. The Court could find that Brandenburg's words were not protected under the First Amendment because his advocacy might lead to a violent public eruption, or what the Supreme Court refers to as "imminent lawless action."

In *Cohen*, the Court says that in deciding whether speech is protected under the First Amendment, it considers whether it might provoke a violent reaction. If Cohen had worn his jacket while walking through a veteran's hospital or a cemetery for veterans, it appears much more likely that his jacket would incite people to violence. Veterans who are in the hospital, the staff who work with them, and loved ones who are visiting them would be more likely to respond angrily than random people walking through a courthouse. This is also true for people who are visiting loved ones at a cemetery for veterans. However, the Court could still uphold Cohen's speech as constitutional since his remarks target a government policy, not individuals (unlike Brandenburg's speech).

Symbolic Speech

Freedom of speech protections are not limited to spoken or written words. As early as 1931, the U.S. Supreme Court acknowledged that **symbolic speech**—a form of nonverbal communication—has constitutional protection.[2] To receive First Amendment protection, symbolic speech must be designed to communicate a message. The Supreme Court has upheld various forms of symbolic speech. Table 2.1 lists several examples.

In protest against the Vietnam War, some Americans publicly burned their draft cards.

Bettmann/Contributor/Getty Images

As Table 2.1 highlights, the high Court has given constitutional protection to many expressions of nonverbal communication. Notably many of these cases involve people who have used the American flag to express their discontent with U.S. laws, policies, or practices. For some people, making any physical alterations to the American flag—beyond a proper burial when the flag is tattered or has been torn—is sacrilegious. These sentiments have historical roots. Thomas Jefferson and James Madison, for instance, believed that the flag, as an

TABLE 2.1 ■ Examples of Constitutionally Protected Symbolic Speech

Activity	Case
Refusing to salute the American flag	*W. Va. State Bd. of Ed. v. Barnette* (1943)
Sitting-in at a library (to protest segregation)	*Brown v. Louisiana* (1966)
Burning a draft card	*U.S. v. O'Brien* (1968)
Burning the flag	*Texas v. Johnson* (1989) *U.S. v. Eichman* (1990)
Wearing a black armband with a peace symbol	*Tinker v. Des Moines* (1969)
Wearing a military uniform to protest war	*Schacht v. U.S.* (1970)
Placing a peace sign on the flag	*Spence v. Washington* (1974)
Picketing outside of the supreme court	*U.S. v. Grace* (1983)

emblem of national sovereignty, should be protected from defacement.[3] Next is a discussion of three well-known flag cases that involve symbolic speech.

In **Spence v. Washington** (1974), a college student was arrested for altering a U.S. flag. Harold Spence, a community college student, hung his U.S. flag from the window of his apartment. Using removable tape, he placed a large peace symbol on both sides of his flag. It was 1970, and Spence said he displayed his flag to protest the U.S. invasion of Cambodia. He was also upset because 6 days earlier, four Kent State University students who were antiwar protesters, had been killed by National Guardsman. After seeing the flag, three Seattle police officers went to Spence's door. He was arrested and charged with violating a Washington state law prohibiting the "improper" display of an American flag. The statute made it unlawful to place "any word, figure, mark, picture, design, drawing, or advertisement of any nature upon any flag" and display it in public. Spence was sentenced to 10 days in jail and a $75 fine.

At his trial, Spence stated, "I felt that the flag stood for America and I wanted people to know that I thought America stood for peace." He was convicted of a misdemeanor and sentenced to jail. He argued that he used the flag and peace sign as symbolic communication and that his conviction violated his free speech rights. The case was appealed to the Supreme Court. The Court upheld Spence's speech as constitutional and said the flag carries different meanings for different people: "What is one man's comfort and inspiration is another's jest and scorn."

The case of **Texas v. Johnson** (1989) centers on an incident that occurred during the 1984 Republican National Convention. Gregory Johnson took part in a protest rally and march that began outside the convention hall. When the protest ended in front of the Dallas City Hall building, Johnson used kerosene to set fire to an American flag. As it burned, dozens of protestors chanted, "America, the red, white, and blue, we spit on you." Following a conviction for flag desecration, Johnson was fined $2,000 and sentenced to 1 year in prison. On appeal, Johnson argued that his actions were protected speech under the First Amendment. The Supreme Court agreed and reversed Johnson's conviction. It held that flag burning is constitutionally protected symbolic speech.

In response to the *Johnson* decision, Congress passed the Flag Protection Act, which made it unlawful to deface an American flag. A year later, in *United States v. Eichman* (1990), the Flag Protection Act was challenged, and the Supreme Court struck it down. Noting that "desecration of the flag is deeply offensive to many," the Court repeated the language it used in *Johnson*, "[T]he Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[4] Concerns about flag burning have also spurred Congress to consider passing a constitutional amendment that would outlaw the desecration of a U.S. flag. However, proposed amendments have failed to win the required two-thirds majority vote of Congress.

BRANDENBURG V. OHIO (1969)

U.S. Supreme Court 395 U.S. 444

PER CURIAM. The appellant [Clarence Brandenburg], a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for:

> [A]dvocat(ing) * * * the duty, necessity, or propriety * of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' [and for] voluntarily assembl(ing) with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism. Ohio Rev. Code Ann. §2923.13[. . .]

The appellant [Brandenburg] challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal . . . Appeal was taken to this Court, and we noted probable jurisdiction . . . We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan "rally" to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. [. . .] Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews. Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

> This is an organizers' meeting. We have . . . hundreds of members throughout the State of Ohio. I can quote from . . . from the Columbus, Ohio Dispatch . . . The Klan

> has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.

We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of "revengeance" was omitted, and one sentence was added: "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel." Though some of the figures in the films carried weapons, the speaker did not.

[Later Court] decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto v. United States* (1961),

> The mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence is not the same as preparing a group for violent action and steeling it to such action.

A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from government control. . .

Measured by this test, [Ohio's] Act cannot be sustained. The Act punishes persons who "advocate or teach the duty, necessity, or propriety" of violence "as a means of accomplishing industrial or political reform"; or who publish or circulate or display any book or paper containing such advocacy; or who "justify" the commission of violent acts "with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism"; or who "voluntarily assemble" with a group formed "to teach or advocate the doctrines of criminal syndicalism." Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments.

Reversed.

Questions

1. What is the issue in the case?
2. Are there any facts indicating that Brandenburg was involved in more than "mere advocacy"?
3. Assume that the Ohio statute made it unlawful to "advocate or encourage" the use of terrorism. Is it likely that the Court would have reached a different conclusion in the case? Why or why not?

COHEN V. CALIFORNIA (1971)

U.S. Supreme Court 403 U.S. 15

Mr. Justice HARLAN delivered the opinion of the Court.

This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.

''Appellant Paul Robert Cohen was convicted in the Los Angeles Municipal Court of . . . "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct . . . " He was given 30 days' imprisonment . . .:

> On April 26, 1968, the defendant was observed in the Los Angeles County Courthouse [. . .] wearing a jacket bearing the words "Fuck the Draft" which were plainly visible. There were women and children present in the corridor. The defendant was arrested. The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft.

The defendant did not engage in, nor threaten to engage in, nor did anyone as the result of his conduct in fact commit or threaten to commit any act of violence. The defendant did not make any loud or unusual noise, nor was there any evidence that he uttered any sound prior to his arrest . . .

In affirming the conviction, the Court of Appeal held that "offensive conduct" means "behavior which has a tendency to provoke *others* to acts of violence or to in turn disturb the peace," and that the State had proved this element . . . The California Supreme Court declined review by a divided vote. We now reverse . . .

In order to lay hands on the precise issue which this case involves, it is useful first to canvass various matters which this record does *not* represent.

The conviction quite clearly rests upon the asserted offensiveness of the words Cohen used to convey his message to the public. The only "conduct" which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon "speech" . . . Further, the State certainly lacks power to punish Cohen for the underlying content of the message the inscription conveyed. At least so long as there is no showing of an intent to incite disobedience to or disruption of the draft, Cohen could not, consistently with the First and Fourteenth Amendments, be punished for asserting the evident position on the inutility or immorality of the draft his jacket reflected. [. . .]

Appellant's conviction, then, rests squarely upon his exercise of the "freedom of speech" protected from arbitrary governmental interference by the Constitution, and can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys. This does not end the inquiry, of course, for the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases, or to use any form of address in any circumstances that he chooses. In this vein, too, however, we think it important to note that several issues typically associated with such problems are not presented here.

In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice

that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places . . . No fair reading of the phrase "offensive conduct" can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created.

In the second place, as it comes to us, this . . . is not, for example, an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic . . . It cannot plausibly be maintained that this vulgar allusion to the Selective Service System would conjure up such psychic stimulation in anyone likely to be confronted with Cohen's crudely defaced jacket.

This Court has also held that the States are free to ban the simple use, without a demonstration of additional justifying circumstances, of so-called "fighting words," those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction . . . While the four-letter word displayed by Cohen in relation to the draft is not uncommonly employed in a personally provocative fashion, in this instance it was clearly not "directed to the person of the hearer" . . . No individual actually or likely to be present could reasonably have regarded the words on appellant's jacket as a direct personal insult. Nor do we have here an instance of the exercise of the State's police power to prevent a speaker from intentionally provoking a given group to hostile reaction . . . There is, as noted above, no showing that anyone who saw Cohen was, in fact, violently aroused, or that appellant intended such a result.

Finally, in arguments before this Court, much has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest. Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense . . . While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue . . . we have at the same time consistently stressed that "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech" . . . The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.

In this regard, persons confronted with Cohen's jacket were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of one's own home. Given the subtlety and complexity of the factors involved, if Cohen's "speech" was otherwise entitled to constitutional protection, we do not think the fact that some unwilling "listeners" in a public building may have been briefly exposed to it can serve to justify this breach of the peace conviction where, as here, there was no evidence that persons powerless to avoid appellant's conduct did in fact, object to it, and where that portion of the statute upon which Cohen's conviction rests evinces no concern, either on its face or as construed by the

California courts, with the special plight of the captive auditor, but, instead, indiscriminately sweeps within its prohibitions all "offensive conduct" that disturbs "any neighborhood or person."

Against this background, the issue flushed by this case stands out in bold relief. It is whether California can excise, as "offensive conduct," one particular scurrilous epithet from the public discourse, either upon the theory . . . that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

The rationale of the California court is plainly untenable. At most, it reflects an "undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression" . . . We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with execrations like that uttered by Cohen. There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a governmental power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. The argument amounts to little more than the self-defeating proposition that, to avoid physical censorship of one who has not sought to provoke such a response by a hypothetical coterie of the violent and lawless, the States may more appropriately effectuate that censorship themselves . . .

Admittedly, it is not so obvious that the First and Fourteenth Amendments must be taken to disable the States from punishing public utterance of this unseemly expletive in order to maintain what they regard as a suitable level of discourse within the body politic. We think, however, that examination and reflection will reveal the shortcomings of a contrary viewpoint.

. . .

The principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

. . .

The State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense. Because that is the only arguably sustainable rationale for the conviction here at issue, the judgment below must be reversed.

Reversed.

Questions

1. What is the issue in *Cohen v. California*?
2. List two rationales the Supreme Court gave to justify its decision?
3. Assume you are a prosecutor for the state of California. Which facts help establish that Cohen had disturbed the "peace or quiet of any neighborhood or person"?

The Limits of Free Speech

The right of free speech does not mean that you may say whatever you want whenever you want to whomever you want. There are legal limits. To determine whether a particular type of speech is constitutionally protected, the Supreme Court engages in a balancing act—weighing an individual's right to free expression against society's larger interests. We now consider three categories of speech that do not have constitutional protection. If the speech is obscene, if the words can be classified as "fighting words," or if the language causes a "clear and present danger," it may be prohibited.

In 2010, Black students at U.C. Berkeley held a silent vigil to protest a noose that was hung in a library at U.C. San Diego.

Eddie Wright

Obscenity. **Obscenity** is not protected by the U.S. Constitution. The Supreme Court took many twists and turns on its path to define obscene speech. At one point, each Supreme Court Justice was allowed to set his own benchmark for obscenity. In *Jacobellis v. Ohio* (1964), the manager of a movie theater was convicted of possessing obscene material after he showed the French film, *The Lovers*. The Supreme Court decided that the film was not obscene. In the decision, Justice Potter Stewart famously commented that while he did not know how to define obscenity, "I know it when I see it."[5] Over decades, the Court looked at several factors to determine whether something was obscene, including whether the material was "prurient" (lewd), whether the material violated community standards, whether the material had social value, and whether the material was offensive.

In 1973, after the Supreme Court had decided several obscenity cases, it announced a new test for obscenity in **Miller v. California** (1973). The defendant, Marvin Miller, sent mass mailings of unsolicited brochures to individuals and businesses. The brochures advertised sexually explicit illustrated books and films, with titles including, *Sex Orgies Illustrated* and *An Illustrated History of Pornography*. One of the unsolicited brochures arrived at a restaurant in Newport Beach, California. The envelope was opened by the manager and his mother, who later complained to the police. Miller was convicted of knowingly distributing obscene material, a

misdemeanor. The case was appealed all the way to the Supreme Court. In a 5-4 decision, the Court outlined a 3-part test for the fact finder (jury or judge) in an obscenity case:

- The material, taken as a whole, appeals to the prurient interest in sex and portrays
- sexual conduct in a patently offensive way, based upon contemporary (state) standards;
- the material depicts or describes sexual conduct and is defined by the applicable state law; and the material taken as a whole, does not have serious literary, artistic, political, or scientific value.[6]

More than 50 years later, the Supreme Court continues to use the *Miller* test to decide whether material is obscene and therefore, without constitutional protection.

While public displays of obscene material are not protected under the First Amendment, private displays may be constitutional. In **Stanley v. Georgia** (1969), the Supreme Court held that a person has a right to have obscene material in the privacy of his home. State and federal agents went to the home of Robert Stanley to carry out a search warrant for illegal gambling. While looking through a bedroom dresser, an agent discovered three reels of film. The agents located a projector in Stanley's home and watched the films. One of the agents concluded that the films, which contained pornography, were obscene and removed them. Stanley was arrested and convicted under a Georgia law that punished "knowingly hav[ing] possession of obscene matter." He appealed his conviction to the Supreme Court, arguing that he had the right to keep obscene material in his house. In his majority opinion, Justice Thurgood Marshall stated, "[T]he States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his home."[7]

Pornography is no longer confined to magazines and movies. Technological advances have increased the spaces that display obscene material. For instance, the transmission of sexually explicit photographs via cell phone—also known as *sexting*—has emerged as a controversial area of criminal prosecution. While sexting between consenting adults is generally protected speech under the First Amendment, other issues remain.

Fighting Words and Hate Speech. "Sticks and stones may break my bones, but words will never hurt me," goes the popular children's adage. **Fighting words** and words that single out people because they are different, force us to ask whether this maxim is true, and if so, whether the Constitution should protect harmful speech when it is directed at specific individuals.

Some speech is so inflammatory that it is considered an invitation to violence. In *Chaplinsky v. New Hampshire* (1942), the Supreme Court determined that fighting words are words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[8] These words involve language that is likely to provoke a person to a violent response. In the case, Chaplinsky, a Jehovah's Witness, referred to a local official as "a God Damned racketeer" and "Damned fascist." The Court held that fighting words, which were used in this case, are not protected by the Constitution. These words, "by their very utterance, inflict injury or tend

to incite an immediate breach of the peace." The Court held that because fighting words have "slight social value," they are outweighed by the "social interest in order and morality." Thus, fighting words are not protected speech under the Constitution. However, if someone is hurling fighting words at you, you are not legally allowed to punch the person; fighting words do not excuse an assault.

Issues involving **hate speech** arise in various contexts. Sometimes the circumstances involve symbolic speech, such as when someone burns a cross. In other instances, the speech is accompanied by conduct. An example is someone who uses an ethnic slur while committing an assault. These instances raise the question of whether it should be a separate crime to use hate speech while committing a criminal offense. In *R.A.V. v. St. Paul* (1992), the Supreme Court held that states may prohibit intentionally hateful communication (e.g., Whites had burned a cross on a Black family's lawn). However, the government cannot single out certain types of speech to punish, while deciding not to punish other types of speech. Speech prohibitions must be "content-neutral." In 1993, the Supreme Court decided *Wisconsin v. Mitchell*, a case involving a White youth who was targeted and assaulted by a group of Black youths. The defendant was convicted of aggravated battery and received an additional 2-year sentence because the victim had been targeted because of his race. The Court held that it is constitutional for a state to impose a longer sentence against an offender for a racially motivated crime.

Hate speech is sometimes joined with hateful actions. Some commentators believe that some hate speech is so connected to action that it should be criminal. Law professor Mari Matsuda, for instance, argues that race-based hate speech, by itself, should be a crime. She says her parents warned her that hateful language might be directed at her because she was a Japanese American child during a World War II:

> As a young child, I was told never to let anyone call me a J—P.[9] My parents . . . told me this in the tone reserved for dead-serious warnings. Don't accept rides from strangers. Don't play with matches. Don't let anyone call you that name. In their tone they transmitted a message of danger, that the word was a dangerous one, tied to violence.[10]

Professor Matsuda argues that the failure to punish hate speech encourages violence against some members of society. With the aim to encourage civil discourse and discourage hateful speech, many U.S. colleges have adopted speech codes. However, many college speech codes have been successfully challenged as infringements on free speech. This has led many to conclude that the impact of campus speech codes has been mostly symbolic—as a statement of a particular university's goal to foster and maintain an open learning environment. In 2023 and 2024, however, college speech codes faced widespread challenges as college stunts across the United States protested or supported U.S. involvement in the Israel/Hamas war.

Imminent Lawless Action. In *Schenck v. United States* (1919),[11] the Supreme Court applied a "clear and present danger" test to determine whether speech could be prohibited. In *Schenck*, Justice Oliver Wendell Holmes famously observed that the right to free speech does not give a person the right to yell "fire" in a crowded theater when there is no fire. In contemporary terms, the right to free speech does not give someone the right to send out a message on email or Instagram claiming there is a "fire" (unless there is an actual fire). In 1969, the court amended the "clear and

present danger" standard to "**imminent lawless action**" (discussed in *Brandenburg v. Ohio* [1969]; bold added). Speech that creates an immediate threat of violence or unrest is *not* constitutionally protected.

Time, Place, and Manner Restrictions. As the Supreme Court said in *Cohen v. California* (1971), even protected forms of speech may be regulated by the state. The government and its entities can decide when, where, and under what circumstances public speech is permissible. For instance, states, municipalities, counties, cities, parks, airports, and schools may impose rules for public gatherings (e.g., rallies), establish hours during which public protests can be held, and set the noise level for gatherings in public spaces. In response to college student protests and encampments against the Israel/Hamas war, many universities implemented restrictions such as times during the day protests would be permitted, maximum noise levels for rallies, and how far rallies must be held from campus buildings. These are known as **time, place, and manner** restrictions. These restrictions must be content-neutral and not imposed against groups based on the subject matter of their message.

Freedom of Assembly

The First Amendment protects "the right of the people peaceably to assemble." The next case, **Edwards v. South Carolina** (1963), demonstrates that this constitutional right was an important legal tool in the fight for racial equality during the 1960s civil rights movement. Without it, civil rights advocates could have been banned from planning and participating in large group demonstrations, including marches such as the Selma to Montgomery marches in Alabama and the 1963 March on Washington. Earlier protests, including the Montgomery bus boycott in 1955 and sit-ins throughout the South, showed the power of nonviolent public assembly. The right to assemble is often raised along with other First Amendment guarantees, such as freedom of speech and the right to petition the government.

EDWARDS V. SOUTH CAROLINA (1963)

U.S. Supreme Court 372 U.S. 229

MR. JUSTICE STEWART delivered the opinion of the Court. The petitioners, 187 in number, were convicted in a magistrate's court in Columbia, South Carolina, of the common-law crime of breach of the peace. Their convictions were ultimately affirmed by the South Carolina Supreme Court . . . . We granted certiorari . . . to consider the claim that these convictions cannot be squared with the Fourteenth Amendment of the United States Constitution.

There was no substantial conflict in the trial evidence. Late in the morning of March 2, 1961, the petitioners, high school and college students of the Negro race, met at the Zion Baptist Church in Columbia. From there, at about noon, they walked in separate groups of about 15 to the South Carolina State House grounds, an area of two city blocks open to the general public. Their purpose was "to submit a protest to the citizens of South Carolina, along with the Legislative Bodies of South Carolina, our feelings and our dissatisfaction with

the present condition of discriminatory actions against Negroes, in general, and to let them know that we were dissatisfied and that we would like for the laws which prohibited Negro privileges in this State to be removed."

Already on the State House grounds when the petitioners arrived were 30 or more law enforcement officers, who had advance knowledge that the petitioners were coming. Each group of petitioners entered the grounds through a driveway and parking area known in the record as the "horseshoe." As they entered, they were told by the law enforcement officials that "they had a right, as a citizen, to go through the State House grounds, as any other citizen has, as long as they were peaceful." During the next half hour or 45 minutes, the petitioners, in the same small groups, walked single file or two abreast in an orderly way through the grounds, each group carrying placards bearing such messages as "I am proud to be a Negro" and "Down with segregation."

During this time a crowd of some 200 to 300 onlookers had collected in the horseshoe area and on the adjacent sidewalks. There was no evidence to suggest that these onlookers were anything but curious, and no evidence at all of any threatening remarks, hostile gestures, or offensive language on the part of any member of the crowd. The City Manager testified that he recognized some of the onlookers, whom he did not identify, as "possible trouble makers," but his subsequent testimony made clear that nobody among the crowd actually caused or threatened any trouble. There was no obstruction of pedestrian or vehicular traffic within the State House grounds. No vehicle was prevented from entering or leaving the horseshoe area. Although vehicular traffic at a nearby street intersection was slowed down somewhat, an officer was dispatched to keep traffic moving. There were a number of bystanders on the public sidewalks adjacent to the State House grounds, but they all moved on when asked to do so, and there was no impediment of pedestrian traffic. Police protection at the scene was at all times sufficient to meet any foreseeable possibility of disorder.

In the situation and under the circumstances thus described, the police authorities advised the petitioners that they would be arrested if they did not disperse within 15 minutes. Instead of dispersing, the petitioners engaged in what the City Manager described as "boisterous," "loud," and "flamboyant" conduct, which, as his later testimony made clear, consisted of listening to a "religious harangue" by one of their leaders, and loudly singing "The Star Spangled Banner" and other patriotic and religious songs, while stamping their feet and clapping their hands. After 15 minutes had passed, the police arrested the petitioners and marched them off to jail.

Upon this evidence the state trial court convicted the petitioners of breach of the peace, and imposed sentences ranging from a $10 fine or five days in jail, to a $100 fine or 30 days in jail. In affirming the judgments, the Supreme Court of South Carolina said that under the law of that State the offense of breach of the peace "is not susceptible of exact definition," but that the "general definition of the offense" is as follows:

In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquility, by any act or conduct inciting to violence . . ., it includes any violation of any law enacted to preserve peace and good order. It may consist of an act of violence or an act likely to produce violence. It is not necessary that the peace be actually broken to lay the foundation for a prosecution for this offense. If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required. Nor is actual personal violence an essential element in the offense . . .

By "peace," as used in the law in this connection, is meant the tranquility enjoyed by citizens of a municipality or community where good order reigns among its members, which is the natural right of all persons in political society.

The petitioners contend that there was a complete absence of any evidence of the commission of this offense, and that they were thus denied one of the most basic elements of due process of law . . . Whatever the merits of this contention, we need not pass upon it in the present case. The state courts have held that the petitioners' conduct constituted breach of the peace under state law, and we may accept their decision as binding upon us to that extent. But it nevertheless remains our duty in a case such as this to make an independent examination of the whole record . . . And it is clear to us that in arresting, convicting, and punishing the petitioners under the circumstances disclosed by this record, South Carolina infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances.

It has long been established that these First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States. . . . The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form. The petitioners felt aggrieved by laws of South Carolina which allegedly "prohibited Negro privileges in this State." They peaceably assembled at the site of the State Government and there peaceably expressed their grievances "to the citizens of South Carolina, along with the Legislative Bodies of South Carolina." Not until they were told by police officials that they must disperse on pain of arrest did they do more. Even then, they but sang patriotic and religious songs after one of their leaders had delivered a "religious harangue." There was no violence or threat of violence on their part, or on the part of any member of the crowd watching them. Police protection was "ample."

This, therefore, was a far cry from the situation in *Feiner v. New York*, 340 U.S. 315, where two policemen were faced with a crowd which was "pushing, shoving and milling around," id., at 317, where at least one member of the crowd "threatened violence if the police did not act," id., at 317, where "the crowd was pressing closer around petitioner and the officer," id., at 318, and where "the speaker passes the bounds of argument or persuasion and undertakes incitement to riot." Id., at 321. And the record is barren of any evidence of "fighting words." See *Chaplinsky v. New Hampshire*, 315 U.S. 568.

We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed. If, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public, this would be a different case. . . . These petitioners were convicted of an offense so generalized as to be, in the words of the South Carolina Supreme Court, "not susceptible of exact definition." And they were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection.

The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views. "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with 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. That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by

legislatures, courts, or dominant political or community groups." *Terminiello v. Chicago*, 337 U.S. 1, 4-5. As in the *Terminiello* case, the courts of South Carolina have defined a criminal offense so as to permit conviction of the petitioners if their speech "stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand." Id. at 5.

As Chief Justice Hughes wrote in *Stromberg v. California*, "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment. . . . " 283 U.S. 359, 369.

For these reasons we conclude that these criminal convictions cannot stand. Reversed.

Questions

1. Which constitutional issues do the protesters raise in this case?
2. What rationales does the Supreme Court give for its decision? What does the Court say about the decision by the South Carolina Supreme Court?
3. What if instead of peaceful and religious songs the protesters had sung anti-American chants, and in response, some onlookers had begun to fight and scream at the protesters? Would that have led to a different outcome in the case?

Free Exercise of Religion

Religion and the goals of religious freedom have played a central role in development of American jurisprudence. During the early 1600s, many people, including Pilgrims and Puritans, fled England. They left Europe on the Mayflower to escape religious persecution and to start a new life on another continent. They traveled across the Atlantic to the New World, to a land inhabited by Native Americans. Religion continued to be a flashpoint and led to political conflict, including the American Revolution. Scholars, politicians, and working people fought over the role of religion in government. On the topic of religious autonomy, Thomas Jefferson said it is "the most inalienable and sacred of all human rights."[12] James Madison stated that religion "must be left to the conviction and conscience of every man. This right is in its nature an unalienable right" (see Endnote 12). These core beliefs held by Jefferson and Madison, among others, are now enshrined in the First Amendment's protection of religious freedom. It protects an individual's right to worship and practice religion. It also protects a person's choice to not believe in God. The **free exercise clause** is broadly interpreted and subject to careful curtailment.

In a variety of cases, courts have determined that the right to the free exercise of religion outweighs the government's interest in promoting concerns related to public health and safety. For instance, members of the Amish religion cannot be forced to have their children attend school past the eighth grade.[13] Likewise, the Supreme Court upheld the practice of animal sacrifice for members of the Santeria religion.[14] **Wooley v. Maynard**, a 1977 Supreme

Court case, offers another example of the free exercise clause. The case involved a challenge to a New Hampshire law that required drivers to display the state motto on their vehicle license plates (see license plate image). George and Maxine Maynard, a married couple who were Jehovah's Witnesses, objected to the state motto, "Live Free or Die." They used tape to cover up the motto on the license plates for both of their cars. Within a 5-week period, the Maynards were stopped three times by the police. The couple covered up the state motto because it conflicted with their religious, moral, and political beliefs. At trial, Maynard testified:

> I believe my government—Jehovah's Kingdom—offers everlasting life. It would be contrary to that belief to give up my life for the state, even if it meant bondage . . . [T]his slogan is directly at odds with my deeply held religious convictions.[15]

On appeal, the U.S. Supreme Court agreed that the covered license plate was protected speech under the First Amendment. The freedom to exercise religion does not mean being forced to become a "mobile billboard" for the state.

The state motto on the New Hampshire license plate was challenged in *Wooley v. Maynard*.

Ian Dagnall/Alamy Stock Photo

Not all challenges brought under the free exercise clause have been successful. In these cases, courts have held that a person's religious practices do not outweigh health and public safety concerns. For instance, some courts have held that parents cannot deny their sick child medical care based on religious doctrine.

SECOND AMENDMENT

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

The **Second Amendment** is no shrinking violet when it comes to stirring public comment and stoking controversy. Second Amendment advocates interpret the text as bestowing U.S.

citizens with an unfettered and unlimited right to bear arms. On the other side, gun control advocates interpret the amendment as granting a right to bear arms, with limitations. In a duet of deeply divided cases, the Supreme Court has upheld the right of citizens to bear arms. In *District of Columbia v. Heller* (2008), the Court heard an appeal in a case involving a Washington, DC, police officer. The officer, Dick Heller, sought a permit to keep a handgun in his private residence for protection. At the time of Heller's request, DC had a ban on handgun ownership. His request was denied, and he appealed the decision as a denial of his Second Amendment rights. In a five to four decision, the Court held that the Second Amendment's "right of the people to keep and bear arms" language protects the right of individuals to maintain firearms for lawful purposes. While the Court was clear about the rights protected by the Second Amendment, it left unanswered a big question: Did the *Heller* ruling extend to all 50 states or was it limited to Washington, DC, and other federal enclaves? Two years later, in *McDonald v. City of Chicago* (2010), the Court determined that the Second Amendment applies to the states through the Fourteenth Amendment's **Due Process Clause**. (See chapter on "Justification Defenses," for a discussion of firearms and self-defense.) The Supreme Court rarely hears substantive challenges to the Second Amendment. However, the issue of gun legislation has been a hot topic in Congress and in state legislatures across the country. Congress and some states have outlawed bump stocks. Legislative debates about whether people should be allowed to openly carry weapons or to carry arms without a permit continue, along with debates about whether longer waiting periods should be imposed and discussions about the need to adopt stricter background checks. In 2021, the United States had nearly 50,000 gun-related deaths—a rate of 14.6 deaths per 100,000 people. More than one half of the deaths were suicides.[16] In 2023, more than 16.4 million guns were sold in the United States. There has been a marked increase in the number of mass killings involving guns. These killings have taken place in grocery stores, shopping malls, colleges, bowling alleys, elementary schools, nightclubs, churches, movie theaters, and music concerts.

FIFTH AMENDMENT

Due Process

The U.S. Constitution has two due process clauses. One is in the Fifth Amendment, the other is in the 14th Amendment. The **Fifth Amendment** guarantees due process for federal laws and the 14th Amendment for state laws. There are two forms of due process: procedural and substantive. Procedural due process refers to how the law is enforced. For instance, there must be practices in place to inform the public. A notice requirement of what actions constitute criminal behavior is an example. The law must be written so that it can be understood and provide notice to the general public. When this is not done, the law may be unconstitutional and struck down as "**void for vagueness**." Substantive due process refers to the constitutional guarantee of fundamental rights. These rights include not depriving someone of life, liberty, or property without due process.

EIGHTH AMENDMENT

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> *Eighth Amendment, U.S. Constitution*

The brevity of the **Eighth Amendment**—sixteen words—belies its weight and promise.

The first part addresses bail. Bail refers to what an arrestee must provide to the court before they are allowed to leave state or federal custody. As noted in the first chapter, a person may be released from custody on their own personal recognizance, based on their promise to return to court on a specific date or time. A person who has been arrested may also receive a conditional release. In this instance a judge agrees to release the arrestee if they agree to some condition (e.g., pretrial supervision). The arrestee may also be released if they pay a bond (secured or unsecured). If it is an unsecured bond, the arrestee will owe the bond amount if they do not show up to court. If the court imposes a secured bond, the person can be released if they pay an amount of money set by the court. This **cash bail** system treats people differently based on their socioeconomic status. If, for instance, the arrestee cannot afford to pay the amount (typically 10% of the total set by the court), they will be incarcerated. The cash bail system has been challenged as a violation of both the Eighth Amendment and the Equal Protection Clause of the 14th Amendment.

The Eighth Amendment also prohibits **cruel and unusual punishment**. This refers to post-conviction punishments, not for instance, to a pretrial jail term. Most discussions of the Eighth Amendment are about capital punishment and whether it is cruel and unusual punishment for the state to impose. However, claims of cruel and unusual punishment extend beyond death penalty cases. In *Harmelin v. Michigan* (1991), the defendant was convicted of possessing 672 grams of cocaine (approximately one and one-half pounds) and sentenced to a mandatory term of life imprisonment. He argued that the sentence violated the Eighth Amendment because it was "cruel and unusual" and "significantly disproportionate" to the crime. The U.S. Supreme Court held that as long as a sentence is not grossly disproportionate to the crime, it may be upheld, concluding that mandatory punishments may be cruel, but they are not unusual.

In *Graham v. Florida* (2010), the Supreme Court addressed whether it is constitutional to sentence a juvenile to a life sentence for a crime that did not result in death. The Court answered no. Terrance Graham, the defendant, who was 17 years old at the time of his offense, was convicted of armed robbery and received a life sentence. He argued that the punishment was grossly disproportionate to his crime and, therefore, a violation of the Eighth Amendment. The Supreme Court agreed and held that a state cannot sentence a minor to life in prison for a nonhomicide offense. The Court observed that many countries reject life sentences for juveniles in non-homicide cases. When *Graham* was decided, more than one hundred juvenile offenders were serving life sentences for non-homicide crimes. In, *Miller v. Alabama* (2012), the Supreme Court determined that a juvenile who committed a murder cannot be subject to a *mandatory* life sentence. In her majority opinion, Justice Elena Kagan stated that because adolescence involves "transient rashness, proclivity for risk, and inability to assess consequences,"[17] these factors should be part of the sentencing decision. (See chapter on "Punishment and Sentencing," for a discussion of other issues raised by the death penalty.)

FOURTEENTH AMENDMENT

Equal Protection Clause

The **Fourteenth Amendment** was passed in 1868, just 3 years after the end of the U.S. Civil War. The **Equal Protection Clause** was explicitly written to level the racial playing field. Congressional representative Thaddeus Stevens, one of the drafters of the Fourteenth Amendment, said that his goal in crafting the amendment was to establish that "no distinction would be tolerated in this purified Republic but what arose from merit and conduct."[18] Cases brought under the Fourteenth Amendment's equal protection clause represent a history-making group of Supreme Court decisions.[19] The 14th Amendment mandates the "equal protection of the laws." Laws are required to treat people equally, unless the government can show that it has a "compelling state interest" to treat people differently. Equal protection clause challenges have been raised in a wide array of criminal law cases, including ones involving racial desegregation in public spaces, interracial marriage, and capital punishment. A Florida law that made it unlawful for Blacks and Whites to live together is addressed in the next case.

A few years after the Supreme Court decided **McLaughlin v. Florida** (1964), it was asked to determine the constitutionality of laws that criminalized interracial marriage. The case was **Loving v. Virginia**,[20] and when the Court heard the case in 1967, 16 states had anti-miscegenation laws on the books. In 1958, Richard Loving, a White man, and Mildred Jeter, a Black woman, were married in Washington, DC. The newly wedded couple returned to Virginia, and they were charged with violating a Virginia law that banned Whites from marrying non-Whites. According to the statute:

> If any White person intermarry with a colored person, or any colored person intermarry with a White person he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five years.[21]

The Lovings pled guilty to violating the law and were each sentenced to a 1-year prison term. The trial court judge offered to waive the sentences if the married couple would agree not to return to Virginia for at least 25 years. He stated:

> Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents . . . The fact that he separated the races shows that he did not intend for the races to mix. (see Endnote 20, p. 3)

The Lovings moved back to Washington, DC, and filed papers stating that their convictions should be set aside because the Virginia law violated the 14th Amendment's equal protection clause. The Supreme Court heard the case and determined that Virginia's anti-miscegenation laws were unconstitutional holdovers from the era of slavery: "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justifications, as measures designed to maintain White Supremacy" (see Endnote 20, p. 11). Racial classifications in the law must be subjected to the "most rigid scrutiny" and must be necessary to accomplish a permissible state goal. The state of Virginia could not establish that it had a compelling reason for making interracial marriage illegal.

MCLAUGHLIN V. FLORIDA (1964)

U.S. Supreme Court 379 U.S. 184

Mr. Justice WHITE delivered the opinion of the Court. At issue in this case is the validity of a conviction under [Florida statute section] 798.05, providing that:

> Any negro man and White woman, or any White man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars.

Because the section applies only to a White person and a Negro who commit the specified acts and because no couple other than one made up of a White and a Negro is subject to conviction upon proof of the elements comprising the offense it proscribes, we hold 798.05 invalid as a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment . . . .

It is readily apparent that 798.05 treats the interracial couple made up of a White person and a Negro differently than it does any other couple. No couple other than a Negro and a White person can be convicted under 798.05 and no other section proscribes the precise conduct banned by 798.05. Florida makes no claim to the contrary in this Court. However, all whites and Negroes who engage in the forbidden conduct are covered by the section and each member of the interracial couple is subject to the same penalty. . . .

We deal here with a racial classification embodied in a criminal statute. In this context, where the power of the State weighs most heavily upon the individual or the group, we must be especially sensitive to the policies of the Equal Protection Clause which, as reflected in congressional enactments dating from 1870, were intended to secure "the full and equal benefit of all laws and proceedings for the security of persons and property" and to subject all persons "to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." R.S. 1977, 42 U.S.C. 1981 (1958 ed.). Our inquiry, therefore, is whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a White person and a Negro, but not otherwise. Without such justification the racial classification contained in 798.05 is reduced to an invidious discrimination forbidden by the Equal Protection Clause.

The Florida Supreme Court, relying upon *Pace v. Alabama*, supra, found no legal discrimination at all and gave no consideration to statutory purpose. The State in its brief in this Court, however, says that the legislative purpose of 798.05, like the other sections of chapter 798, was to prevent breaches of the basic concepts of sexual decency; and we see no reason to quarrel with the State's characterization of this statute, dealing as it does with illicit extramarital and premarital promiscuity.

We find nothing in this suggested legislative purpose, however, which makes it essential to punish promiscuity of one racial group and not that of another . . . . That a general evil will be partially corrected may at times, and without more, serve to justify the limited application of a criminal law; but legislative discretion to employ the piecemeal approach stops short of permitting a State to narrow statutory coverage to focus on a racial group. Such classifications bear a far heavier burden of justification. 'When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment (citations omitted).

There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy. . . . Florida has offered no argument that the State's policy against interracial marriage cannot be as adequately served by the general, neutral, and existing ban on illicit behavior as by a provision such as 798.05 which singles out the promiscuous interracial couple for special statutory treatment. In short, it has not been shown that 798.05 is a necessary adjunct to the State's ban on interracial marriage. We accordingly invalidate 798.05 without expressing any views about the State's prohibition of interracial marriage, and reverse these convictions.

Reversed.

Questions

1. What is the issue in the case?
2. What is the holding in *McLaughlin*? What is the two-part test that the Supreme Court uses to determine whether the Florida law is constitutional?
3. The Florida law punished intimate relationships between White people and Black people. Assume the law had prohibited *all* mixed-race marriages. Under the Court's reasoning, would such a law have been constitutionally permissible?

Due Process

Papachristou v. Jacksonville, a 1972 decision by the U.S. Supreme Court, tackles the issue of due process.[22] Several individuals were convicted of violating a Jacksonville, Florida, vagrancy ordinance. In one incident, a man was arrested when he arrived home early one morning and was charged with being a "common thief." Although he was not issued a speeding ticket, police officers said the man had been stopped because he had been speeding. In another incident, two men were arrested after driving to a friend's home. Police were in the friend's driveway, arresting another person. When the defendants began to back out of the driveway, the officers told them to stop and get out of the car. A police search of the car revealed no incriminating evidence. However, police arrested both men—one was charged with being a "common thief" based on his reputation, the other with "loitering." The defendants argued that the ordinance violated the due process clause because the statutory language was vague. The Jacksonville ordinance included the following:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants.[23]

The Supreme Court decided that the ordinance was unconstitutional. It stated that the law allowed for arbitrary and discriminatory enforcement and provided a "convenient tool" for singling out people who are members of unpopular groups. Using a kitchen-sink approach, the legislation punished both activities that were unlawful as well as ones that were lawful.

Papachristou affirmed the Supreme Court's earlier decision in *Coates v. Cincinnati* (1971). Following his participation in a student antiwar demonstration, Dennis Coates was charged with violating a Cincinnati ordinance that made it unlawful for three or more people to gather on sidewalks, vacant lots, or street corners "in an annoying manner." The Court struck down the law as unconstitutionally vague, saying the ordinance made "a crime out of what under the Constitution cannot be a crime."[24] The Supreme Court has consistently held that laws should be written to minimize unfair discretion on the part of police officers. The defendant in *Kolender v. Lawson* (1983), Edward Lawson, was a tall Black man who wore locks. Lawson enjoyed taking long nighttime walks. He walked in mostly White areas of San Diego, California. He was stopped by police 15 times in 22 months. Lawson was convicted under a California law that allowed police to request "credible and reliable" identification from people they think are loitering. Lawson argued that the law was unconstitutionally vague. In its 1983 decision, the Supreme Court agreed with Lawson and struck down the state law.[25]

One of the key concerns with vague laws is that they may be used to punish members of socially marginalized groups. For instance, a law that allows broad police discretion could be used to target members of disfavored groups, such as the homeless, or readily identifiable people who are racial, ethnic, or religious minorities. (See chapter on "Public Order Crimes and Offenses Against Public Decency," for further discussion of vagrancy and other public order offenses.)

RIGHT TO PRIVACY

The U.S. Constitution protects the **right to privacy**. Unlike the other constitutional guarantees discussed in this chapter, the right to privacy was not written into the wording of the Constitution. In fact, the word "privacy" is not explicitly referenced in the document. However, the right to privacy is a protected right that has evolved over the decades through Supreme Court decisions. The right to privacy is based on the idea that an individual should be allowed to make personal decisions without interference from the government. The right to privacy covers a broad range of areas, including contraception, family relations, adoption, sexual relations, and the private possession of obscene material. This protection has roots in several parts of the Constitution, including the First, Fourth, Fifth, Ninth, and Fourteenth amendments. Some legal scholars argue that because the right to privacy is not explicitly referenced in the Constitution, it should not receive constitutional protection.

One of the most controversial areas involving the right to privacy is a woman's right to terminate a pregnancy. This was the issue in **Roe v. Wade** (1973). The Supreme Court concluded that during the first 3 months of pregnancy, women have the right to choose abortion, in consultation with a physician, without interference from the government. However, the state's

authority to regulate and outlaw abortion increases as pregnancy advances. During the final 3-month period of pregnancy (third trimester), states may ban abortion, except where it is necessary to protect the health or life of the woman. While upholding the main finding in *Roe*, subsequent Supreme Court cases upheld greater restrictions on a woman's decision to end a pregnancy—such as a 24-hour waiting period, informed consent provisions, parental consent for minors, and a ban on late-stage abortions.

In 2022, the U.S. Supreme Court decided **Dobbs v. Jackson Women's Health Organization**, which involved a direct challenge to the *Roe v. Wade* decision. The plaintiffs argued that the Mississippi law that made it unlawful to abort a pregnancy after the 15th week (prior to viability) violated a woman's constitutional right to an abortion. In a 6-3 decision, the Court overruled *Roe*. Justice Alito, writing for the majority stated, "[T]he Constitution does not confer a right to abortion. *Roe* . . . must be overruled, and the authority to regulate abortion must be returned to the people and their elected representatives."[26] With this decision, the Court gave states the authority to determine whether to regulate or ban abortion. Legal commentators have noted that by overruling *Roe* the Supreme Court has placed the right to privacy in jeopardy.

The Supreme Court has also addressed rights related to LGBTQ+ community members. In *Bowers v. Hardwick*, the Court upheld a Georgia law that made sodomy unlawful. In 2003, the Court decided **Lawrence v. Texas**. The case involved John Lawrence and Tyron Garner, two men observed engaging in a sexual act. They were charged with violating a Texas law that outlawed sexual intercourse considered to be deviant. On appeal, the U.S. Supreme Court overruled *Bowers* and held that private consensual sodomy between adults is constitutionally protected activity. The Court stated that the Constitution should be interpreted through a contemporary lens:

> [The Founders] knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[27]

In 2015, the Supreme Court decided **Obergefell v. Hodges**. Several same-sex couples raised constitutional challenges to state laws in Kentucky, Michigan, Ohio, and Tennessee. These laws either denied same-sex couples the right to marry or were states that did not give full legal recognition to same-sex marriages granted in another state. The couples argued that the state laws violated the 14th Amendment's Due Process and Equal protection clauses. The Supreme Court agreed and upheld the right to same-sex marriage. In his majority opinion, Justice Kennedy concludes:

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.[28]

In response to *Dobbs*' restrictive view of rights, legal commentators have considered its long-term impact on the *Obergefell* decision. Some argue that the Supreme Court's decision

has severely confined the right to privacy, while others argue that Dobbs' limitation on the right to privacy may be short lived.[29]

EX POST FACTO LAWS & BILLS OF ATTAINDER

In addition to the Amendments, the Articles of the Constitution also address criminal law issues. Under Article 1, section 9, "No Bill of Attainder or **ex post facto** Law shall be passed." A **Bill of Attainder** exists where a legislatively created punishment would allow a person to be punished without a trial. To determine this, the court examines whether specific persons or groups have been targeted for punishment. In *U.S. v. Brown* (1965), the Supreme Court held that a federal law that made it a crime for a member of the Communist Party to serve as an officer of a labor union was a bill of attainder. The Court said the goal of the law was to make sure that labor unions did not have leaders who were believed to engage in subversive acts or who were believed to have subversive associations.

Ex post facto laws punish conduct that was *not* unlawful at the time the "crime" was committed. Written laws give us notice that certain actions violate the law. In fact, the Constitution requires that our laws be made public. Accordingly, a person can only be punished for actions that were criminal *prior* to the time of their action. Imagine the harm that would occur if people faced criminal punishment for actions that were not known to be criminal at the time of their actions. It would make deterrence—one of the stated purposes of punishment—impossible to achieve (for further discussion, see chapter on "Punishment and Sentencing"). We cannot deter people from committing crimes that are nonexistent. We would question the law's fairness if someone could be charged with wrongdoing when they had no reasonable way of knowing their actions were against the law. Further, studies show that people are less likely to respect and obey the law if they think it is arbitrary and unfair.

To determine whether a law is ex post facto, the courts examine two factors. First, they consider whether the law is retrospective (applies to events that occurred before its enactment) and second, whether it would disadvantage the offender. The U.S. Supreme Court's decision in *Lynce v. Mathis* (1977) offers a case discussion of ex post facto laws. In 1986, Kenneth Lynce was convicted of attempted murder and sentenced to 22 years in prison. While serving time, he earned credit for good behavior, which reduced his sentence. Beginning in 1982, in response to the problem of overcrowded prisons, Florida passed legislation that allowed some prisoners to receive an early release. In 1992, Lynce, who had accumulated good time credits, was released from prison. However, later that year, Florida decided to cancel the early release credit system. Lynce was rearrested and returned to prison. The Supreme Court held that Florida could not cancel early release credits for prisoners. They agreed with Lynce's argument that the new law violated the ex post facto clause of the U.S. Constitution.

Table 2.2 "Bill of Rights, Summary Chart" gives an overview of the constitutional protections the key terms and concepts, and cases discussed in this chapter. The chart provides a visual summary you can use to review, organize, and think through the material. Try your hand at summarizing the right to privacy.

TABLE 2.2 ■ Bill of Rights, Summary Chart

Amendment	Terms & Concepts	Key Cases
First Amendment Freedom of Speech	Symbolic speech Obscenity Fighting Words	*Brandenburg v. Ohio* *Cohen v. California* *Spence v. Washington* *Texas v. Johnson* *Chaplinsky v. New Hampshire* *Miller v. California* *Stanley v. Georgia* *Edwards v. S. Carolina*
Freedom of Assembly		
Freedom of Religion	Free Exercise of Religion	*Wooley v. Maynard*
Second Amendment	Right to Bear Arms	*D.C. v. Heller* *McDonald v. Chicago*
Fifth Amendment	Notice	*Miranda v. Arizona (1966)*
Eighth Amendment	Cruel & Unusual Punishment	*Harmelin v. Michigan* *Graham v. Florida*
Fourteenth Amendment Due Process	Vagueness	*Papachristou v. Jacksonville* *Kolender v. Lawson*
Equal Protection	Equal Treatment Strict Scrutiny	*Loving v. Virginia* *McLaughlin v. Florida*

CONCLUDING NOTE

This chapter has provided an overview of the constitutional limits placed on states and the federal government in defining criminal activity. The First, Second, Fifth, Eighth, and 14th Amendments and the right to privacy set boundaries for criminal legislation. The constitutional protections discussed in this chapter lay the foundation for the cases and materials we discuss in the coming pages. We further analyze these issues and discuss their policy implications. Now test yourself on the material covered in this chapter. Good luck with the Issue Spotter exercise.

ISSUE SPOTTER

The Issue Spotter is based on an actual U.S. Supreme Court case, *Snyder v. Phelps* (2011). Read the hypothetical and spot the issues discussed in this chapter.

The Funeral Protest

Felicia Anson is cofounder and pastor at the Eastside Baptist Church in Kansas City, Missouri. Eastside congregation members steadfastly believe that God hates the United States because it tolerates homosexuality. Members believe it is an abomination against

God to allow gay men and women to serve in the U.S. military. Eastside Baptist church members make their views known by picketing, frequently at military funerals. Over the years, the group has protested at more than 100 military funerals.

Marine Lance Corporal Jeffrey Yu was killed in Iraq in the line of duty. Lance Corporal Yu's parents selected a nondenominational church in their hometown of Silver Spring, Maryland, for their son's memorial service. Through news reports, Anson learned details regarding Jeffrey Yu's funeral and arranged to travel to Maryland with six other members of Eastside Baptist.

At 1:00 p.m. on the day of the service, members of Eastside Baptist picketed across the street from the church on public property. They stood approximately 100 feet from the church entrance. The picketers carried signs that read: "God Hates the USA/Thank God for 9/11," "Thank God for Dead Soldiers," "God Hates Fags," and "You're Going to Hell." The protesters did not have a permit to protest.

Members of Eastside Baptist raised their signs, sang hymns, and recited Bible verses as people arrived for the 2:30 p.m. memorial service. As they were driving by, many people screamed at the picketers, "Go home!" Some gave the picketers "the middle finger" (a derogatory gesture). One man was so enraged that he jumped out of his car and began to run over to where the picketers stood. He yelled, "You are a disgrace to mankind!" The man was held back by friends who then led him into the church.

After receiving numerous calls, Silver Spring police officers arrived and arrested Anson and the other members of Eastside Baptist Church. They were charged with the following:

- Violating a law that prohibits the "gathering of five or more persons in a public space in a disruptive or disorderly manner."
- Violating an ordinance that requires advance written permission from the city to hold a protest and that only permits protests between the hours of 9:00 a.m. and 3:00 p.m.

Following a jury trial, Pastor Felicia Anson is convicted on both counts. Assume that her appeal is heard by the U.S. Supreme Court. Answer the following questions:

1. Assume that you are Pastor Anson's attorney. Which arguments would you make to convince the court that the statutes are unconstitutional? Which cases would you use to support your arguments?
2. If you were the attorney for the state of Maryland, what arguments would you make in support of the constitutionality of the statutes? Which cases from this chapter would you use to support your arguments?
3. How do you think the Court would decide this case? What would be the rationale(s)?

KEY TERMS AND CASES

Bill of Attainder
Bill of Rights
Brandenburg v. Ohio
Cash bail
Cohen v. California
Cruel and unusual punishment
Dobbs v. Jackson Women's Health Organization
Due process clause
Edwards v. South Carolina
Eighth Amendment
Equal protection clause
Ex Post Facto
Fifth Amendment
Fighting words
First Amendment
Fourteenth Amendment

Free exercise clause
Freedom of speech
Hate speech
Imminent lawless action
Incorporation
Lawrence v. Texas
Loving v. Virginia
McLaughlin v. Florida
Miller v. California
Obergefell v. Hodges
Obscenity
Right to privacy
Roe v. Wade
Second Amendment
Spence v. Washington
Stanley v. Georgia
Symbolic speech
Texas v. Johnson
Time, place, and manner
Void for vagueness
Wooley v. Maynard