Was the defendant discriminated against based on gender?

Wright, six feet tall and weighing 216 pounds, beat and kicked his wife Wendy on the evening of February 16, 1999. Her injuries were so severe that two of her ribs were fractured and her spleen had to be removed. Wright was indicted for criminal domestic violence of a high and aggravated nature. The aggravating factors alleged in the indictment were “a difference in the sexes of the victim and the defendant” and/or that “the defendant did inflict serious bodily harm upon the victim by kicking her in the mid-section requiring her to seek medical attention.” Wright contends the judge’s charge on the aggravating circumstance of a “difference in the sexes” violated his right to “equal protection.”

Learning Objectives

1. Explain the rule of legality.
2. Distinguish between bills of attainder and *ex post facto* laws.
3. Understand the importance of statutory clarity and know the legal test for identifying laws that are void for vagueness.
4. Describe the three levels of scrutiny under the Equal Protection Clause.
5. Discuss the importance of freedom of expression and the categories of expression that are not protected by the First Amendment.
6. Understand the constitutional basis for the right to privacy and the type of acts that are protected within the “zone of privacy.”
7. Know the meaning of the Second Amendment right to bear arms.

INTRODUCTION

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

Why did the framers create a *constitutional democracy*, a system of government based on a constitution that limits the powers of the government? The founding fathers were profoundly influenced by the harshness of British colonial rule and drafted a constitution designed to protect the rights of the individual against the tyrannical tendencies of government. They wanted to ensure that the police could not freely break down doors and search homes. The framers were also sufficiently wise to realize that individuals required constitutional safeguards against the political passions and intolerance of democratic majorities.
The limitations on government power reflect the framers’ belief that individuals possess natural and inalienable rights, and that these rights may be restricted only when absolutely necessary to ensure social order and stability. The stress on individual freedom was also practical. The framers believed that the fledgling new American democracy would prosper and develop by freeing individuals to passionately pursue their hopes and dreams.

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

Chapter 2 describes the core constitutional limits on the criminal law and examines the balance between order and individual rights. Consider the costs and benefits of constitutionally limiting the government’s authority to enact criminal statutes. Do you believe that greater importance should be placed on guaranteeing order or on protecting rights? You should keep the constitutional limitations discussed in this chapter in mind as you read the cases in subsequent chapters. The topics covered in the chapter are as follows:

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

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

**THE RULE OF LEGALITY**

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

- the constitutional prohibition on bills of attainder and *ex post facto* laws, and
- the constitutional requirement of statutory clarity.

**BILLS OF ATTAINDER AND *EX POST FACTO* LAWS**

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

**Bills of Attainder**

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

**Ex Post Facto Laws**

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

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

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

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

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

- A bill of attainder punishes a specific individual or specific individuals. An *ex post facto* law criminalizes an act that was legal at the time the act was committed.
- A bill of attainder is not limited to criminal punishment and may involve any disadvantage imposed on an individual; *ex post facto* laws are limited to criminal punishment.
- A bill of attainder imposes punishment on an individual without trial. An *ex post facto* law is enforced in a criminal trial.

### The Supreme Court and *Ex Post Facto* Laws

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

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

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

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

Due process requires that individuals receive notice of criminal conduct. Statutes are required to define criminal offenses with sufficient clarity so that ordinary individuals are able to understand what conduct is prohibited.

Due process requires that the police, prosecutors, judges, and jurors are provided with a reasonably clear statement of prohibited behavior. The requirement of definite standards ensures the uniform and nondiscriminatory enforcement of the law.

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

Clarity

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

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

Definite Standards for Law Enforcement

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

The U.S. Supreme Court explained in Kolender v. Lawson that the void-for-vagueness doctrine was aimed at ensuring that statutes clearly inform citizens of prohibited acts and simultaneously provide definite standards for the enforcement of the law. The California statute was clearly void for vagueness, because no standards were provided for determining what constituted “credible and reliable” identification, and “complete discretion” was vested in the police to determine whether a suspect violated the statute. Was a library or credit card or student identification “credible and reliable” identification? A police officer explained at trial that a jogger who was not carrying identification might satisfy the statute by providing his or her running route or
name and address. Did this constitute “credible and reliable” identification? The Court was clearly concerned that a lack of definite standards opened the door to the police using the California statute to arrest individuals based on their race, gender, or appearance.

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

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

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

**Void for Vagueness**

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

Judges appreciate the difficulty of clearly drafting statutes and typically limit the application of the void-for-vagueness doctrine to cases in which the constitutionally protected rights and liberties of people to meet, greet, congregate in groups, move about, and express themselves are threatened.

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


Facts

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

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

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

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

Issue

Is Section 61-8-303(1), MCA, so vague that it violates the Due Process Clause found at article 2 section 17 of the Montana Constitution? . . . Stanko contends that Section 61-8-303(1), MCA, is unconstitutionally vague because it fails to give a motorist of ordinary intelligence fair notice of the speed at which he or she violates the law, and because it deleges an important public policy matter, such as the appropriate speed on Montana’s highways, to policemen, judges, and juries for resolution on a case-by-case basis. Section 61-8-303(1), MCA, provides as follows:

A person operating or driving a vehicle of any character on a public highway of this state shall drive the vehicle in a careful and prudent manner and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account the amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to the view ahead. The person operating or driving the vehicle shall drive the vehicle so as not to unduly or unnecessarily endanger the life, limb, property, or other rights of a person entitled to the use of the street or highway.
The question is whether a statute that regulates speed in the terms set forth above gave Stanko reasonable notice of the speed at which his conduct would violate the law.

Reasoning

In Montana, we have established the following test for whether a statute is void on its face for vagueness: “A statute is void on its face if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden.” . . . No person should be required to speculate as to whether his contemplated course of action may be subject to criminal penalties.

We conclude that, as a speed limit, Section 61-8-303(1), MCA, does not meet these requirements of the Due Process Clause of article 2 section 17 of the Montana Constitution, nor does it further the values that the void-for-vagueness doctrine is intended to protect.

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

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

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

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

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

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

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

A. It is, your honor, using their judgment applying the standard set forth in the statute. . . .

It is evident from the testimony in this case and the arguments to the court that the average motorist in Montana would have no idea of the speed at which he or she could operate his or her motor vehicle on this state’s highways without violating Montana’s “basic rule” based simply on the speed at which he or she is traveling. Furthermore, the basic rule not only permits, but requires the kind of arbitrary and discriminatory enforcement that the Due Process Clause in general, and the void-for-vagueness doctrine in particular, are designed to prevent. It impermissibly delegates the basic public policy of how fast is too fast on Montana’s highways to “policemen, judges, and juries for resolution on an ad hoc and subjective basis.”

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

Holding

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

Dissenting, Turnage, C.J.

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

Dissenting, Regnier, J.

The arresting officer described in detail the roadway where Stanko was operating his vehicle at 85 miles per hour. The roadway was very narrow with no shoulders. There were frost heaves on the road that caused the officer’s vehicle to bounce. The highway had steep hills, sharp curves, and multiple no-passing zones. There were numerous ranch and field access roads in the area,
Stanko was arrested for reckless driving on August 13, 1996, and again on October 1, 1996. He was charged on both occasions with operating a vehicle with “willful or wanton disregard for the safety of persons or property.” Two officers cited the fact that Stanko was driving between 117 and 120 miles per hour on narrow, hilly highways with the risk of encountering farm, ranch, tourist, and recreational vehicles and wildlife and placing emergency personnel at risk. Stanko possessed extraordinary confidence in his driving ability and dismissed the suggestion that he was driving in a wanton and reckless fashion. He pointed out that he drove roughly 6,000 miles a month without an accident and that he had won several stock-car races in Oregon almost twenty years previously. The Montana Supreme Court unanimously ruled that Stanko should have reasonably understood that the manner in which he was driving posed a risk to other motorists who “do not assume the risk of driving in racetrack conditions.” The Montana Supreme Court stressed that Stanko’s conviction was not “based on speed alone” and dismissed his claim that the reckless driving law was unconstitutionally vague. See State v. Stanko, 974 P.2d 1139 (Mont. 1998).

Questions for Discussion

1. What were the facts the police officer relied on in arresting Stanko for speeding? Contrast these with the facts recited by Stanko in insisting that he was driving at a reasonable speed.

2. The statute employs a “reasonable person” standard and lists a number of factors to be taken into consideration in determining whether a motorist is driving at a proper rate of speed. Was the decision of the Montana Supreme Court based on the lack of notice provided to motorists concerning a reasonable speed or based on the failure to provide law enforcement officers with clear standards for enforcement?

3. Why does Chief Justice Turnage refer to Section 61-8-303(1), MCA as an “important traffic regulation” and stress that this has been the law for forty-three years? Can you speculate as to why Montana failed to post speed limits on highways?

4. Do you agree with the majority opinion or with the dissenting judges?

5. The Montana state legislature reacted by establishing speed limits of “75 mph at all times on Federal . . . interstate highways outside an urban area” . . . and “70 mph during the daytime and 65 mph during the nighttime on any other public highway.” Why did the legislature believe that this statute solved the void-for-vagueness issue?

Cases and Comments

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

You Decide

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

The U.S. Constitution originally did not provide for the equal protection of the laws. Professor Erwin Chemerinsky observes that this is not surprising, given that African Americans were enslaved and women were subject to discrimination. Slavery, in fact, was formally embedded in the legal system. Article I, Section 2 of the U.S. Constitution provides for the apportionment of the House of Representatives based on the “whole number of free persons” as well as three-fifths of the slaves. This was reinforced by Article IV, Section 2, the Fugitive Slave Clause, which requires the return of a slave escaping into a state that does not recognize slavery.19

Immediately following the Civil War in 1865, Congress enacted and the states ratified the Thirteenth Amendment, which prohibits slavery and involuntary servitude. Discrimination against African Americans nevertheless continued, and Congress responded by approving the Fourteenth Amendment in 1868. Section 1 provides that “no state shall deprive any person of life, liberty or property without due process of law, or deny any person equal protection of the law.” The Supreme Court declared in 1954 that the Fifth Amendment Due Process Clause imposes an identical obligation to ensure the equal protection of the law on the federal government.20

The Equal Protection Clause was rarely invoked for almost one hundred years. Justice Oliver Wendell Holmes, Jr., writing in 1927, typified the lack of regard for the Equal Protection Clause when he referred to the amendment as “the last resort of constitutional argument.”21 The famous 1954 Supreme Court decision in Brown v. Board of Education ordering the desegregation of public schools with “all deliberate speed” ushered in a period of intense litigation over the requirements of the clause.22

Three Levels of Scrutiny

Criminal statutes typically make distinctions based on various factors, including the age of victims and the seriousness of the offense. For instance, a crime committed with a dangerous weapon may be punished more harshly than a crime committed without a weapon. Courts generally accept the judgment of state legislatures in making differentiations so long as a law is rationally related to a legitimate government purpose. Legitimate government purposes generally include public safety, health, morality, peace and quiet, and law and order. There is a strong presumption that a law is constitutional under this rational basis test or minimum level of scrutiny test.23

In Westbrook v. Alaska, nineteen-year-old Nicole M. Westbrook contested her conviction for consuming alcoholic beverages when under the age of twenty-one. Westbrook argued that there was no basis for distinguishing between a twenty-one-year-old and an individual who was slightly younger. The Alaska Supreme Court recognized that there may be some individuals younger than twenty-one who possess the judgment and maturity to handle alcoholic beverages and that some individuals over twenty-one may fail to meet this standard. The court observed that states have established the drinking age at various points and that setting the age between nineteen and twenty-one years of age seemed to be rationally related to the objective of ensuring responsible drinking. As a result, the court concluded that “even if we assume that Westbrook is an exceptionally mature 19-year-old, it is still constitutional for the legislature to require her to wait until she turns 21 before she drinks alcoholic beverages.”24

In contrast, the courts apply a strict scrutiny test in examining distinctions based on race and national origin. Racial discrimination is the very evil that the Fourteenth Amendment was intended to prevent, and the history of racism in the United States raises the strong probability that such classifications reflect a discriminatory purpose. In Strauder v. West Virginia, the U.S. Supreme Court struck down a West Virginia statute as unconstitutional that limited juries to “white male persons who are twenty-one years of age.”25

Courts are particularly sensitive to racial classifications in criminal statutes and have ruled that such laws are unconstitutional in almost every instance. The Supreme Court observed that “in this context . . . the power of the State weighs most heavily upon the individual or the group.”26 In Loving v. Virginia, in 1967, Mildred Jeter, an African American, and Richard Loving, a Caucasian, pled guilty to violating Virginia’s ban on interracial marriages and were sentenced to twenty-five years in prison, a sentence that was suspended on the condition that the Lovingys leave Virginia. The Supreme Court stressed that laws containing racial classifications must be subjected to the “most rigid scrutiny” and determined that the statute violated the Equal Protection Clause.
The Court failed to find any “legitimate overriding purpose independent of invidious racial discrimination” behind the law. The fact that Virginia “prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their justification, as measures designed to maintain White Supremacy. . . . There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.”27 The strict scrutiny test also is used when a law limits the exercise of “fundamental rights” (such as freedom of speech).

The Supreme Court has adopted a third, intermediate level of scrutiny for classifications based on gender. The decision to apply this standard rather than strict scrutiny is based on the consideration that although women historically have confronted discrimination, the biological differences between men and women make it more likely that gender classifications are justified. Women, according to the Court, also possess a degree of political power and resources that are generally not found in “isolated and insular minority groups.” Intermediate scrutiny demands that the State provide some meaningful justification for the different treatment of men and women and not rely on stereotypes or classifications that have no basis in fact. Justice Ruth Ginsburg applied intermediate scrutiny in ordering that the Virginia Military Institute admit women and ruled that gender-based government action must be based on “an exceedingly persuasive justification. . . . The burden of justification is demand[ing] and it rests entirely on the State.”28

In Michael M. v. Superior Court, the U.S. Supreme Court upheld the constitutionality of California’s “statutory rape law” that punished “an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years.”29 Is it constitutional to limit criminal liability to males?

The Supreme Court noted that California possessed a “strong interest” in preventing illegitimate teenage pregnancies. The Court explained that imposing criminal sanctions solely on males roughly “equalized the deterrents on the sexes,” because young men did not face the prospects of pregnancy and child rearing. The Court also deferred to the judgment of the California legislature that extending liability to females would likely make young women reluctant to report violations of the law.30

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

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

The next case in the textbook, Wright v. South Carolina, asks you to consider whether the defendant was sentenced under a statutory provision that reflects an outdated view of women. Is this a case of gender discrimination against the male defendant under the intermediate scrutiny test? You will want to refer back to this case when we discuss equal protection and sentencing in Chapter 3.

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**Was the defendant’s prison sentence based on a statutory provision that discriminated against men?**


Todd William Wright was convicted of criminal domestic violence of a high and aggravated nature (CDVHAN) and sentenced to ten years imprisonment, suspended upon service of eight years, and five years probation. We affirm.

**Facts**

Wright, six feet tall and weighing 216 pounds, beat and kicked his wife Wendy on the evening of February 16, 1999. Her injuries were so severe that two of her
ribs were fractured and her spleen had to be removed. Wright was indicted for criminal domestic violence of a high and aggravated nature. The aggravating factors alleged in the indictment were “a difference in the sexes of the victim and the defendant” and/or that “the defendant did inflict serious bodily harm upon the victim by kicking her in the mid-section requiring her to seek medical attention.”

The offense of CDVHAN incorporates the aggravating factor of an assault and battery of a high and aggravated nature (ABHAN). The elements of ABHAN that result in a defendant receiving a harsher sentence are (1) the unlawful act of violent injury to another, accompanied by circumstances of aggravation. Circumstances of aggravation include the use of a deadly weapon, the intent to commit a felony, infliction of serious bodily injury, great disparity in the ages or physical conditions of the parties, a difference in gender, the purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority. . . .

Wright objected to the judge’s charge on the aggravating circumstance of “a difference of the sexes,” contending it violated equal protection. The objection was overruled; Wright was found guilty as charged.

**Issue**

Does the aggravating circumstance of a “difference in the sexes” violate equal protection in violation of the Fourteenth Amendment Section 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws”)?

**Reasoning**

Wright contends the judge’s charge on the aggravating circumstance of a “difference in the sexes” violated his right to equal protection. We disagree. The Equal Protection Clause prevents only irrational and unjustified classifications, not all classifications. For a gender-based classification to pass constitutional muster, it must serve an important governmental objective and be substantially related to the achievement of that objective. A law will be upheld where the gender classification realistically reflects the fact that the sexes are not similarly situated in certain circumstances. See Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981) (holding that as long as the rule of nature that the sexes are not similarly situated in certain circumstances is realistically reflected in a gender classification, the statute will be upheld as constitutional). In Michael M., Justice Stewart wrote that “when men and women are not in fact similarly situated . . . the Equal Protection Clause does not mean that the physiological differences between men and women must be disregarded. While those differences must never be permitted to become a pretext for invidious discrimination . . . the Constitution . . . does not require a State to pretend that demonstrable differences between men and women do not really exist.”

In State v. Gurganus, 250 S.E.2d 668 (N.C. 1979), the North Carolina Supreme Court upheld a statute enhancing the punishment for males convicted of assault on a female stating, “We base our decision . . . upon the demonstrable and observable fact that the average adult male is taller, heavier and possesses greater body strength than the average female.” We . . . think that the South Carolina General Assembly was also entitled to take note of the differing physical sizes and strengths of the sexes. Having noted such facts, the General Assembly could reasonably conclude that assaults and batteries without deadly weapons by physically larger and stronger males are likely to cause greater physical injury and risk of death than similar assaults by females. Having so concluded, the General Assembly could choose to provide greater punishment for these offenses, which it found created greater danger to life and limb, without violating the Fourteenth Amendment. . . .

Certainly some individual females are larger, stronger, and more violent than many males. The General Assembly is not, however, required by the Fourteenth Amendment to modify criminal statutes that have met the test of time in order to make specific provisions for any such individuals. The Constitution of the United States has not altered certain virtually immutable facts of nature, and the General Assembly of South Carolina is not required to undertake to alter those facts. The South Carolina statute establishes classifications by gender that serve important governmental objectives and are substantially related to achievement of those objectives. Therefore, we hold that the statute does not deny males equal protection of law in violation of the Fourteenth Amendment to the Constitution of the United States. . . .

**Holding**

We find that the “difference in gender” aggravator is legitimately based upon realistic physiological size and strength differences of men and women such that it does not violate equal protection. . . . We therefore affirm Wright’s convictions.

**Concurring, Toal, J.**

While I concur with the majority’s decision to affirm Wright’s CDVHAN conviction, I disagree with the majority’s conclusion that the “difference in the sexes” aggravating circumstance does not violate equal protection. I believe the “difference in the sexes” aggravating circumstance, as a gender-based classification, violates equal protection. . . . The CDVHAN statute was designed to address violence in the home; it applies when any person harms any member of his or her household. The statute then is designed to prevent domestic violence against men, women, and children by perpetrators of both sexes (household members include spouses, former spouses,
parents and children, relatives to the second degree, persons with a child in common, and males and females who are cohabiting or have previously cohabited. Having an aggravating circumstance based solely on gender does not substantially further this objective or the narrower objective of protecting women from domestic abuse. In my opinion, this gender-based classification is no different than the classification . . . in In the Interest of Joseph T. In that case, this court held that a statute criminalizing communication of indecent messages to females violated the Equal Protection Clause. Although the court recognized that some gender-based classifications that realistically reflect that men and women are not similarly situated can withstand equal protection scrutiny on occasion, it clarified that distinctions in the law that were based on “old notions” that women should be afforded “special protection” could no longer withstand equal protection scrutiny. In my opinion, this “difference in gender” aggravating circumstance is a distinction that perpetuates these “old notions.” There is no logical purpose for it except to protect physically inferior women from stronger men. . . . Deterring domestic violence is more efficiently and appropriately accomplished through other aggravators, such as the “great disparity in ages or physical conditions of the parties” and “infliction of serious bodily injury” aggravators. In many cases, there may be a great disparity in strength between a male and a female, but if there is not, there is no reason why a difference in gender should serve as an aggravating circumstance to “protect” women to the detriment of men. Therefore, I would find that the “difference in the sexes” aggravating circumstance violates equal protection, because it fails to substantially relate to the government objective of preventing domestic violence. However, I would affirm Wright’s conviction, because the jury also found a permissible, gender-neutral aggravating circumstance: infliction of serious bodily injury. Accordingly, I respectfully concur in result only.

Questions for Discussion

1. Explain why Wright claims that his enhanced sentence is based on gender discrimination. Would this aggravator apply to a homosexual couple or in a case in which a daughter abused her mother?
2. Why does Judge Waller reject the defendant’s equal protection claim?
3. Do you agree with Judge Toal that the “difference in gender” aggravating factor reflects outdated stereotypes concerning women? What is his solution?
4. How would you rule as a judge in this case?

Cases and Comments

Detention of Japanese Americans During World War II. In Korematsu v. United States, the U.S. Supreme Court upheld the conviction of Fred Korematsu, an American citizen of Japanese descent, for remaining in San Leandro, California, in defiance of Civilian Exclusion Order No. 34 issued by the commanding general of the Western Command, U.S. Army. This prosecution was undertaken pursuant to an act of Congress of March 21, 1942, that declared it was a criminal offense punishable by a fine not to exceed $5,000 or by imprisonment for not more than a year for a person of Japanese ancestry to remain in “any military area or military zone” established by the president, secretary of defense, or a military commander. Japanese Americans who were ordered to leave their homes were detained in remote relocation camps. Exclusion Order No. 34 was one of a number of orders and proclamations issued under the authority of President Franklin Delano Roosevelt; it stated that “successful prosecution of the war [World War II] requires every possible protection against espionage and against sabotage to national defense material, national defense premises and national-defense utilities.” Justice Hugo Black recognized that legal restrictions that “curtail the civil rights of a single racial group are immediately suspect” and that individuals excluded from the military zone would be subject to relocation and detention without trial in a camp far removed from the West Coast. The Supreme Court nevertheless affirmed the constitutionality of the order by a vote of six to three. The majority concluded the following:

Korematsu was not excluded from the Military Area because of hostility to him or to his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast
We next look at constitutional protections for freedom of speech and privacy.

**FREEDOM OF SPEECH**

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

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

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

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

You Decide

2.2 Jeanine Biocic was walking on the beach on the Chincoteague National Wildlife Refuge in Virginia with a male friend. Biocic wanted to get some extra sun and removed the top of her two-piece bathing suit, exposing her breasts. She was observed by a U.S. Fish and Wildlife Service officer who issued a summons charging Biocic with an “act of indecency or disorderly conduct. . . . prohibited on any national wildlife refuge.” Biocic was convicted and fined $25 and appealed on the grounds that her conviction violated equal protection under law. Her claim was based on the fact that the ordinance prohibited the exposure of female breasts and did not prohibit the exposure of male breasts. How would you rule? See United States v. Biocic, 928 F.2d 112 (4th Cir. 1991).

You can find the answer at www.sagepub.com/lippmancc13e.
The First Amendment is vital to the United States’ free, open, and democratic society. Justice William Douglas wrote in *Terminello v. Chicago*\(^3\) that speech may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with the conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Justice Robert H. Jackson, reflecting on his experience as a prosecutor during the Nuremberg trials of Nazi war criminals, cautioned Justice Douglas that the choice is not between order and liberty. It is between liberty with order and anarchy without either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.

Justice Jackson is clearly correct that there must be some limit to freedom of speech. But where should the line be drawn? The Supreme Court articulated these limits in *Chaplinsky v. New Hampshire* and observed that there are “certain well-recognized categories of speech which may be permissibly limited under the First Amendment.” The Supreme Court explained that these “utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”\(^3\) The main categories of speech for which content is not protected by the First Amendment and that may result in the imposition of criminal punishment are as follows:

- **Fighting Words.** Words directed to another individual or individuals that an ordinary and reasonable person should be aware are likely to cause a fight or breach of the peace are prohibited under the *fighting words* doctrine. In *Chaplinsky v. New Hampshire*, the Supreme Court upheld the conviction of a member of the Jehovah’s Witnesses who, when distributing religious pamphlets, attacked a local marshal with the accusation that “you are a God damned racketeer” and “a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.”

- **Incitement to Violent Action.** A speaker, when addressing an audience, is prohibited from *incitement to violent action*. In *Feiner v. New York*, Feiner addressed a racially mixed crowd of seventy-five or eighty people. He was described as “endeavoring to arouse” the African Americans in the crowd “against the whites, urging that they rise up in arms and fight for equal rights.” The Supreme Court ruled that “when clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.”\(^3\) On the other hand, in *Terminello v. Chicago*, the Supreme Court stressed that a speaker could not be punished for speech that merely “stirs to anger, invites dispute, brings about a condition of unrest, or creates a disturbance.”\(^3\)

- **Threat.** A developing body of law prohibits threats of bodily harm directed at individuals. Judges must weigh and balance a range of factors in determining whether a statement constitutes a political exaggeration or a *true threat*. In *Watts v. United States*, the defendant proclaimed to a small gathering following a public rally on the grounds of the Washington Monument that if inducted into the army and forced to carry a rifle that “the first man I want to get in my sights is L.B.J. [President Lyndon Johnson] . . . They are not going to make me kill my black brothers.” The onlookers greeted this statement with laughter. Watts’s conviction was overturned by the U.S. Supreme Court, which ruled that the government had failed to demonstrate that Watts had articulated a true threat and that these types of bold statements were to be expected in a dynamic and democratic society divided over the Vietnam War.\(^3\)

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

• Libel. You should remain aware that the other major limitation on speech, libel, is a civil
law rather than a criminal action. This enables individuals to recover damages for injury to
their reputations. In New York Times v. Sullivan, the U.S. Supreme Court severely limited the
circumstances in which public officials could recover damages and held that a public official
may not recover damages for a defamatory falsehood relating to his or her official conduct
“unless . . . the statement was made with ‘actual malice’—that is, with knowledge that it was
false or with reckless disregard of whether it was false or not.” The Court later clarified that
this “reckless disregard” or actual knowledge standard applied only to “public figures” and
that states were free to apply a more relaxed, simple negligence (lack of reasonable care in
verifying the facts) standard in suits for libel brought by private individuals.

Speech lacking First Amendment protection shares several common characteristics:

- The expression lacks social value.
- The expression directly causes social harm or injury.
- The expression is narrowly defined in order to avoid discouraging and deterring individuals
  from engaging in free and open debate.

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

Overbreadth

The doctrine of overbreadth is an important aspect of First Amendment protection. This provides
that a statute is unconstitutional that is so broadly and imprecisely drafted that it encompasses and
prohibits a substantial amount of protected speech relative to the coverage of the statute. In New
York v. Ferber, the U.S. Supreme Court upheld a New York child pornography statute that criminally
punished an individual for promoting a “performance which includes sexual conduct by a child less
than sixteen years of age.” Sexual conduct was defined to include “lewd exhibition of the genitals.”
Justice Byron White was impatient with the concern that although the law was directed at hardcore
child pornography, “[s]ome protected expression ranging from medical textbooks to pictorials in the
National Geographic would fall prey to the statute.” White doubted whether these applications of
the statute to protected speech constituted more than a “tiny fraction of the materials” that would
be affected by the law, and he expressed confidence that prosecutors would not bring actions against
these types of publications. This, in short, is the “paradigmatic case of state statute whose legitimate
reach dwarfs its arguably impermissible applications.”
Hate Speech

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

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

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

The most important U.S. Supreme Court ruling on hate speech is R.A.V. v. St. Paul. In R.A.V., several Caucasian juveniles burned a cross inside the fenced-in yard of an African American family. The young people were charged under two statutes, including the St. Paul Bias Motivated Crime Ordinance (St. Paul Minn. Legis. Code § 292.02), which provided that “whoever places on public or private property a symbol, object, . . . including and not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment . . . on the basis of race, color, creed, religion or gender commits disorderly conduct . . . shall be guilty of a misdemeanor.”

The Supreme Court noted that St. Paul punishes certain fighting words, yet permits other equally harmful expressions. This discriminates against speech based on the content of ideas. For instance, what about symbolic attacks against a greedy real estate developer?

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

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

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

In the next case in the text, George T. v. California, the California Supreme Court was asked to determine whether a student who wrote a poem that stated that he may be the “next kid to bring guns to kill students at school” constituted a “true threat.”

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<th>Was George’s poem a criminal threat?</th>
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**Issue**

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

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

**Facts**

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

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

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

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

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

She understood the term “dark poetry” to mean “angry threats; any thoughts that aren’t positive.” Rasmussen called Mary on Sunday regarding her e-mail. Mary sounded very shaken during the conversation, and based on this and on what she stated about the contents of the poem, Rasmussen contacted the school principal and the police. He read “Faces” for the first time during the jurisdictional hearing and, upon reading it, felt personally threatened by it, because, according to Rasmussen, “He’s saying he’s going to come randomly shoot.” His understanding of “dark poetry” was that it entailed “the concept of death and causing and inflicting a major bodily pain and suffering. . . . There is something foreboding about it.”

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

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

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

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

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

Minor testified the poem “Faces” was not intended to be a threat, and, because Erin and Natalie were his friends, he did not think they would have taken his poems as such. He thought of poetry as art and stated that he was very much interested in the subject, particularly as a medium to describe “emotions instead of acting them out.” He wrote “Faces” during his honors English class on the day he showed it to Mary and Erin. Minor was having a bad day as a consequence of having forgotten to ask his parents for lunch money and

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

Look at all these faces around me. They look so vacant. They have their whole lives ahead of them. They have their own individuality. Those kind of people make me wanna puke. For I am a slave to very evil masters. I have no future that I choose for myself. I feel as if I am going to go crazy. Probably I would be the next high school killer. A little song keeps playing in my head. My daddy is worth a dollar not even 100 cents. As I look at these faces around me I wonder why r [sic] they so happy. What do they have that I don’t. Am I the only one with the messed up mind. Then I realize, I’m cursed!!
having to forgo lunch that day, and because he was unable to locate something in his backpack. He had many thoughts going through his head, so he decided to write them down as a way of getting them out. The poem “Who Am I,” which was given to Natalie, was written the same day as “Faces,” but was written during the lunch period. Neither poem was intended to be a threat. Instead they were “just creativity.”

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

The poems were labeled “dark poetry” to inform readers that they were exactly that, and minor testified, if anybody was supposed to read this poem, or let’s say if my mom ever found my poem or something of that nature, I would like them to know that it was dark poetry. Dark poetry is usually just an expression. It’s creativity. It is not like you’re actually going to do something like that, basically.

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

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

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

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

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

Following a contested jurisdictional hearing, the juvenile court found true the allegations with respect to Mary and Erin but dismissed the allegation with respect to Rasmussen. At the hearing, the court adjudicated minor a ward of the court and ordered a 100-day commitment in juvenile hall. Minor appealed, challenging the sufficiency of the evidence to support the juvenile court’s finding that he made criminal threats. Over a dissent, the court of appeal affirmed the juvenile court in all respects with the exception of remanding the matter for the sole purpose of having that court declare the offenses to be either felonies or misdemeanors. We granted review and now reverse.

Reasoning

We made clear that not all threats are criminal and enumerated the elements necessary to prove the offense of making criminal threats under section 422. The prosecution must prove

1. that the defendant “willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,”
2. that the defendant made the threat “with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,”
3. that the threat—which may be “made verbally, in writing, or by means of an electronic communication device”—was “on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,”
4. that the threat actually caused the person threatened “to be in sustained fear for his or her own safety or for his or her immediate family’s safety,” and
5. that the threatened person’s fear was “reasonabl[e]” under the circumstances.
Minor challenges the juvenile court’s findings that he made criminal threats in violation of section 422 and contends that his First Amendment rights were infringed by the court’s conclusion that his poem was a criminal threat.

In cases raising First Amendment issues, it has repeatedly held that an appellate court has an obligation to “make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression.” The current version of section 422 was drafted with the mandates of the First Amendment in mind, incorporating language from a federal appellate court true-threat decision:

... to describe and limit the type of threat covered by the statute. Independent review is particularly important in the threat's context, because it is a type of speech that is subject to categorical exclusion from First Amendment protection, similar to obscenity, fighting words, and incitement of imminent lawless action. “What is a threat must be distinguished from what is constitutionally protected speech.”

As discussed above, this court ... enumerated five elements the prosecution must prove in order to meet its burden of proving that a criminal threat was uttered. Minor challenges the findings with respect to two of the five elements, contending that the poem “was [not] ‘on its face and under the circumstances in which it [was disseminated] so unequivocal, unconditional, immediate, and specific as to convey to [Mary and Erin] a gravity of purpose and an immediate prospect of execution of the threat’” and that the facts fail to establish he harbored the specific intent to threaten Mary and Erin.

With respect to the requirement that a threat be “so unequivocal, unconditional, immediate, and specific as to convey to the person threatened a gravity of purpose and an immediate prospect of execution of the threat,” we explained that the word “so” in Section 422 meant that “‘unequivocality,’ ‘unconditionality,’ ‘immedlacy and ‘specificity’ are not absolutely mandated, but must be sufficiently present in the threat and surrounding circumstances. ... The four qualities are simply the factors to be considered in determining whether a threat, considered together with its surrounding circumstances, conveys those impressions to the victim.” A communication that is ambiguous on its face may nonetheless be found to be a criminal threat if the surrounding circumstances clarify the communication’s meaning.

With the above considerations in mind, we examine the poem at issue—“Faces.” What is readily apparent is that much of the poem plainly does not constitute a threat. “Faces” begins by describing the protagonist’s feelings about the “faces” that surround him:

Where did they come from? They would probably become the next doctors or lawyers [sic] or something. All really intelligent and ahead in their game. I wish I had a chance on what I want to be like they do. All so happy and vibrant. Each original in their own way. They make me want to puke.

These lines convey the protagonist’s feelings about the students around him and describe his envy over how happy and intelligent they appear to be, with opportunities he does not have. There is no doubt this portion of the poem fails to convey a criminal threat, as no violent conduct whatsoever is expressed or intimated. Neither do the next two lines of the poem convey a threat: “For I am Dark, Destructive, & Dangerous. I slap on my face of happiness but inside I am evil!!” These lines amount to an introspective description of the protagonist, disclosing that he is “destructive,” “dangerous,” and “evil.” But again, such divulgence threatens no action.

Only the final two lines of the poem could arguably be construed to be a criminal threat: “For I can be the next kid to bring guns to kill students at school. So parents watch your children cuz I’m BACK!!” Mary believed this was a threat, but her testimony reveals that her conclusion rested upon a considerable amount of interpretation:

I feel that when he said, “I can be the next person,” that he meant that he will be, because also he says that he’s dark, destructive, and dangerous person. And I’d describe a dangerous person as someone who has something in mind of killing someone or multiple people.

The juvenile court’s finding that minor threatened to kill Mary and Erin likewise turned primarily on its interpretation of the words, “For I can be the next kid to bring guns to kill students at school” to mean not only that minor could do so, but that he would do so. In other words, the court construed the word “can” to mean “will.” But that is not what the poem says. However the poem was interpreted by Mary and Erin and the court, the fact remains that “can” does not mean “will.” While the protagonist in “Faces” declares that he has the potential or capacity to kill students given his dark and hidden feelings, he does not actually threaten to do so. While perhaps discomforting and unsettling, in this unique context this disclosure simply does not constitute an actual threat to kill or inflict harm.

As is evident, the poem “Faces” is ambiguous and plainly equivocal. It does not describe or threaten future
conduct, because it does not state that the protagonist plans to kill students, or even that any potential victims would include Mary or Erin. Such ambiguity aside, it appears that Mary actually misread the text of the poem. In her e-mail to Rasmussen, she stated that the poem read, “He’s going to be the next person to bring a gun to school and kill random people.” She did not tell Rasmussen that this was her interpretation of the poem but asserted that those were the words used by minor. Given the student killings in Columbine and Santee, this may have been an understandable mistake, but it does not alter the requirement that the words actually used must constitute a threat in light of the surrounding circumstances.

The court of appeal rejected minor’s contention that the protagonist in the poem was a fictional character rather than minor, because he gave the poem to Mary with a note stating that the poem described “me and my feelings.” There is no inconsistency, however, in viewing the protagonist as a fictional character while also concluding that the poem reflects minor’s personal feelings. And when read by another person, the poem may similarly describe that reader’s feelings, as minor implied when he asked Mary if the poem also “described [her] and [her] feelings.” More important, the note is consistent with the contention that the poem did nothing more than describe certain dark feelings. The note asked whether Mary had the same feelings; it did not state or imply something to the effect of, “This is what I plan to do; are you with me?” (Of course, exactly what the poem means is open to varying interpretations, because a poem may mean different things to different readers.)

As a medium of expression, a poem is inherently ambiguous. In general, “reasonable persons understand musical lyrics and poetic conventions as the figurative expressions which they are,” which means they “are not intended to be and should not be read literally on their face, nor judged by a standard of prose oratory.” Ambiguity in poetry is sometimes intended: “‘Ambiguity’ itself can mean an indecision as to what you mean, an intention to mean several things, a probability that one or the other or both of two things has been meant, and the fact that a statement has several meanings.” As the court of appeal observed in a case involving a painting graphically depicting a student shooting a police officer in the back of the head, “a painting—even a graphically violent painting—is necessarily ambiguous because it may use symbolism, exaggeration, and make-believe.” This observation is equally applicable to poetry, since it is said that “painting is silent poetry, and poetry painting that speaks.”

In short, viewed in isolation the poem is not “so unequivocal” as to have conveyed to Mary a gravity of purpose and an immediate prospect that minor would bring guns to school and kill them. Ambiguity, however, is not necessarily sufficient to immunize the poem from being deemed a criminal threat, because the surrounding circumstances may clarify facial ambiguity. As Section 422 makes clear, a threat must “on its face and under the circumstances in which it is made, [be] so unequivocal, unconditional, immediate, and specific as to convey . . . a gravity of purpose and an immediate prospect of execution of the threat.” When the words are vague, context takes on added significance, but care must be taken not to diminish the requirements that the communicator have the specific intent to convey a threat and that the threat be of such a nature as to convey a gravity of purpose and immediate prospect of the threat’s execution.

Unlike some cases that have turned on an examination of the surrounding circumstances given a communication’s vagueness, incriminating circumstances in this case are noticeably lacking: there was no history of animosity or conflict between the students . . . no threatening gestures or mannerisms accompanied the poem . . . and no conduct suggested to Mary and Erin that there was an immediate prospect of execution of a threat to kill. Thus the circumstances surrounding the poem’s dissemination fail to show that as a threat, it was sufficiently unequivocal to convey to Mary and Erin an immediate prospect that minor would bring guns to school and shoot students.

The themes and feelings expressed in “Faces” are not unusual in literature:

> Literature illuminates who ‘we’ are: the repertory of selves we harbor within, the countless feelings we experience but never express or perhaps even acknowledge, the innumerable other lives we could but do not live, all those ‘inside’ lives that are not shown, not included in our resumes.40

> “Faces” was in the style of a relatively new genre of literature called “dark poetry” that . . . is an extension of the poetry of Sylvia Plath, John Berryman, Robert Lowell, and other confessional poets who depict “extraordinarily mean, ugly, violent, or harrowing experiences.” Consistent with that genre, “Faces” invokes images of darkness, violence, discontentment, envy, and alienation. The protagonist describes his duplicitous nature—malevolent on the inside, felicitous on the outside.

**Holding**

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

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

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

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

Concurring, Baxter, J.

Applying the independent review standard proper for cases implicating First Amendment interests, I agree the evidence does not establish this specific element.

The writing, in the form of a poem, that defendant handed to Mary S. and Erin S. said that the protagonist, “Julius AKA Angel,” “can be the next kid to bring guns to kill students at school.” It did not say, in so many words, that defendant presently intended to do so. And the surrounding circumstances did not lend unconditional meaning to this conditional language. That said, there is no question that defendant’s ill-chosen words were menacing by any common understanding, both on their face and in context. The terror they elicited in Mary S., and the concern they evoked in the school authorities, were real and entirely reasonable. It is safe to say that fears arising from a raft of high school shooting rampages, including those in Colorado and Santee, California, are prevalent among American high school students, teachers, and administrators. Certainly this was so on March 16, 2001, only eleven days after the Santee incident had occurred. That is the day defendant selected to press his violent writing on two vulnerable and impressionable young schoolmates who hardly knew him. Defendant admitted at trial that he intentionally combined the subject matter and the timing for maximum shock value. Indeed, he acknowledged, his words would be interpreted as threats by “kids who didn’t know [he was] just kidding.”

Under these circumstances, as the majority observe, school and law enforcement officials had every reason to worry that defendant, deeply troubled, was contemplating his own campus killing spree. The important interest that underlies the criminal-threat law—protection against the trauma of verbal terrorism—was also at stake. Accordingly, the authorities were fully justified, and should be commended, insofar as they made a prompt, full, and vigorous response to the incident. They would have been remiss had they not done so.

Nothing in our very narrow holding today should be construed as suggesting otherwise.

Questions for Discussion

1. Summarize the facts in George T.
2. Describe the responses of Mary, Erin, and Natalie to George T.’s poem. What occurred when the police confronted George T. and conducted an investigation at George T.’s school?
3. What are the elements of the crime of a “true threat” under Section 422 of the California Penal Code?
4. Why did the California Supreme Court conclude that George T.’s poem did not constitute a clear threat? Did the court fully consider the circumstances surrounding the threat? Should the court have analyzed whether George T. intended to harm other students?
5. Do you think that the supreme court’s decision was influenced by the fact that George T. was a juvenile and that the alleged threat was contained in a “poem”? Note that a number of prominent writers viewed George T.’s prosecution as a violation of artistic freedom and urged the court to dismiss the charges against George T. Would the court have ruled differently if the poem had stated clearly that George T. planned to return to school with a gun? What if George T. had expressed the sentiments in the letter directly to various students and teachers?
6. Does the California Supreme Court’s focus on specific words lead the court to overlook that the poem was interpreted as a threat by Mary and Erin?
7. Do you agree with the California Supreme Court’s ruling that George T.’s poem is protected speech under the First Amendment?
Cases and Comments

1. Flag Burning. In Texas v. Johnson, the U.S. Supreme Court addressed the constitutionality of Texas Penal Code Annotated section 42.09 (1989), which punished the intentional or knowing desecration of a “state or national flag.” Desecration under the statute was interpreted as to “efface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.”

Johnson participated in a political demonstration during the Republican National Convention in Dallas in 1984. The purpose was to protest the policies of the Reagan administration and certain Dallas-based corporations and to dramatize the consequences of nuclear war. The demonstrators gathered in front of the Dallas City Hall, where Johnson unfurled an American flag, doused the flag with kerosene, and set it on fire. The demonstrators chanted “America, the red, white, and blue, we spit on you” as the flag burned. None of the participants was injured or threatened retribution.

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

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

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

2. Picketing Military Funerals. The American embrace of freedom of speech was tested in the 2011 case of Snyder v. Phelps, where the U.S. Supreme Court overturned a judgment against the Westboro United Church for the civil tort of the intentional infliction of emotional distress. The case was brought by Al Snyder, the father of Lance Corporal Matthew Snyder who had been killed in the line of duty in Iraq.

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

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

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


You Decide

Lori MacPhail, a peace officer in Chico, California, assigned to a high school, observed Ryan D. with some other students off campus during school hours. She conducted a pat down, discovered that Ryan possessed marijuana, and issued him a citation. Roughly a month later, Ryan turned in an art project for a painting class at the high school. The projects generally are displayed in the classroom for as long as two weeks. Ryan’s painting pictured an individual who appeared to be a juvenile wearing a green hooded sweatshirt discharging a handgun at the back of the head of a female peace officer with badge No. 67 (Officer MacPhail’s number) and the initials CPD (Chico Police Department). The officer had blood on her hair and pieces of her flesh and face were blown away. An art teacher saw the painting and found it to be “disturbing” and “scary,” and an administrator at the school informed Officer MacPhail.

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


You can find the answer at www.sagepub.com/lippmancc13e.

PRIVACY

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

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

The Constitutional Right to Privacy

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

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

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

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

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

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

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

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

There are several key Supreme Court decisions on privacy.

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

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

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

The zone of privacy also was extended to an individual’s intellectual life in the home in 1969 in Stanley v. Georgia. A search of Stanley’s home for bookmaking paraphernalia led to the seizure of
The Constitutional Right to Privacy and Same-Sex Relations Between Consenting Adults in the Home

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

In 1986, in *Bowers v. Hardwick*, the Supreme Court affirmed Hardwick’s sodomy conviction under a Georgia statute. Justice White failed to find a fundamental right deeply rooted in the nation’s history and tradition to engage in acts of consensual sodomy, even when committed in the privacy of the home. He pointed out that sodomy was prohibited by all thirteen colonies at the time the constitution was ratified, and twenty-five states and the District of Columbia continued to criminally condemn this conduct.59

*Bowers v. Hardwick* was reconsidered in 2003, in *Lawrence v. Texas*. In *Lawrence*, the Supreme Court called in doubt the historical analysis in *Bowers* and noted that only thirteen states currently prohibited sodomy and that in these states, there is a “pattern of nonenforcement with respect to consenting adults in private.” The Court held that the right to privacy includes the fundamental right of two consenting males to engage in sodomy within the privacy of the home.60

You can find *Lawrence v. Texas* at the study site www.sagepub.com/lippmancc3e.

**Cases and Comments**

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

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

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

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

You can find more cases on the study site: Utah v. Holm, www.sagepub.com/lippmancc3e.
THE RIGHT TO BEAR ARMS

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

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

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

Gun rights activists contended that the Second Amendment protection of the "right of the people to keep and bear Arms" is not limited to members of the militia. They argued that the Second Amendment also protects individuals' right to possess firearms "unconnected" with service in a militia. The founding fathers, according to gun activists, viewed gun ownership as essential to the preservation of individual liberty. A state or federal government could abolish the state national guard and leave citizens unarmed and vulnerable. The framers concluded that the best way to safeguard and to protect the people was to guarantee individuals' right to bear arms.

In District of Columbia v. Heller, the U.S. Supreme Court adopted the view of gun rights activists. The Court majority held that the Second Amendment protects the right of individuals to possess firearms. Dick Heller, a special police officer, was authorized to carry a handgun while on duty at the Federal courthouse in the District of Columbia (D.C.) and applied for a registration certificate from the D.C. government for a handgun that he planned to keep at home for self-defense. A D.C. ordinance prohibited the possession of handguns and declared that it was a crime to carry an unregistered firearm. A separate portion of the D.C. ordinance authorized the Chief of Police to issue licenses for 1-year periods. Lawfully registered handguns were required to be kept "unloaded and dissembled or bound by a trigger lock or similar device" when not "located" in a place of business or used for lawful recreational activities.

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

The Court decision noted that while D.C. could not constitutionally ban the possession of firearms in the home, the right to bear arms is subject to limitations. The Court did not limit the ability of states to prohibit possession of firearms by felons and the mentally challenged, to prohibit the
The United States is a constitutional democracy. The government's power to enact laws is constrained by the constitution. These limits are intended to safeguard the individual against the passions of the majority and the tyrannical tendencies of government. The restrictions on government also are designed to maximize individual freedom, which is the foundation of an energetic and creative society and dynamic economy. Individual freedom, of course, must be balanced against the need for social order and stability. We all have been reminded that "you cannot yell 'fire' in a crowded theater." This chapter challenges you to locate the proper balances among freedom, order, and stability.

The rule of legality requires that individuals receive notice of prohibited acts. The ability to live your life without fear of unpredictable criminal punishment is fundamental to a free society. The rule of legality provides the philosophical basis for the constitutional prohibition on bills of attainder and ex post facto laws. Bills of attainder prohibit the legislative punishment of individuals without trial. Ex post facto laws prevent the government from...
The constitutional provision for due process insures that individuals are informed of acts that are criminally condemned and that definite standards are established that limit the discretion of the police. An additional restriction on criminal statutes is the Equal Protection Clause. This prevents the government from creating classifications that unjustifiably disadvantage or discriminate against individuals; a particularly heavy burden is imposed on the government to justify distinctions based on race or ethnicity. Classifications on gender are subject to intermediate scrutiny. Other differentiations are required only to meet a rational basis test.

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

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

**CHAPTER REVIEW QUESTIONS**

1. Explain the philosophy underlying the United States’ constitutional democracy. What are the reasons for limiting the powers of state and federal government to enact criminal legislation? Are there costs as well as benefits in restricting governmental powers?

2. Define the rule of legality. What is the reason for this rule?

3. Define and compare bills of attainder and *ex post facto* laws. List the various types of *ex post facto* laws. What is the reason that the U.S. Constitution prohibits retroactive legislation?

4. Explain the standards for laws under the Due Process Clause.

5. Why does the U.S. Constitution protect freedom of expression? Is this freedom subject to any limitations?

6. What is the difference among the “rational basis,” “intermediate scrutiny,” and “strict scrutiny” tests under the Equal Protection Clause?

7. Where is the right to privacy found in the U.S. Constitution? What activities are protected within this right?

8. Write a short essay on the constitutional restrictions on the drafting and enforcement of criminal statutes.

9. As a final exercise, consider life in a country that does not provide safeguards for civil liberties. How would your life be changed?

**LEGAL TERMINOLOGY**

- bill of attainder
- Bill of Rights
- constitutional democracy
- equal protection
- *ex post facto* law
- fighting words
- First Amendment
- hate speech
- incitement to violent action
- incorporation theory
- intermediate level of scrutiny
- libel
- minimum level of scrutiny test
- *nullum crimen sine lege*, *nulla poena sine lege*
- obscenity
- overbreadth
- privacy
- rational basis test
- rule of legality
- strict scrutiny
- true threats
- void for vagueness
Log on to the Web-based student study site at www.sagepub.com/lippmanccl3e to assist you in completing the Criminal Law on the Web exercises, as well as for additional features such as podcasts, Web quizzes, and video links.

1. Read about flag burning and freedom of speech.
2. Consider the debate over the meaning of the Second Amendment and the right to bear arms.

BIBLIOGRAPHY


