

CHAPTER 3

Constitutional Protections

Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority.

- *Duncan v. Louisiana*, cited in Section 2

1. APPLICABILITY OF THE CONSTITUTION

LEARNING OBJECTIVES

1. Distinguish between the two types of constitutional protections.
2. Compare unconstitutional on its face with unconstitutional as applied.
3. Distinguish among different standards of judicial review.
4. Compare bill of attainder with ex post facto laws.
5. Ascertain the three types of ex post facto laws.



Source: Image courtesy of Tara Storm.

In addition to statutory and common-law defenses, a criminal defendant has extensive protections that are set forth in the United States Constitution. As stated earlier in this book, the federal Constitution is applicable in all criminal cases because the government is prosecuting. State constitutions typically mirror the federal Constitution because it sets the *minimum* standard of protection that is guaranteed to all citizens. States can and often do provide *more* constitutional protections to criminal defendants than the federal Constitution, as long as those state protections do not violate notions of federal supremacy. In this chapter, the federal Constitution is analyzed with reference to state constitutional protections when relevant.

1.1 Constitutional Protections

Generally, two types of constitutional protections exist. First, a defendant can challenge the constitutionality of a criminal statute or ordinance (from this point forward, the term *statute* includes ordinances unless otherwise noted). Recall from Chapter 1 that these codified laws cannot conflict with or attempt to supersede the Constitution. An attack on the constitutionality of a statute can be a claim that the statute is **unconstitutional on its face**, is **unconstitutional as applied**, or *both*. A statute is unconstitutional on its face when its wording is unconstitutional. A statute is unconstitutional as applied when its enforcement is unconstitutional. The difference between the two is significant. If a statute is unconstitutional on its face, it is invalid under *any circumstances*. If the statute is unconstitutional as applied, it is only unconstitutional under certain circumstances.

A second type of constitutional protection is *procedural*. The defendant can protest an unconstitutional procedure that occurs during prosecution. Procedure during prosecution includes, but is not limited to, arrest, interrogation, search, filing of charges, trial, and appeal. The defendant can make a motion to dismiss the charges, suppress evidence, or declare a mistrial. The defendant can also appeal and seek to reverse a conviction, among other remedies.

This book concentrates on criminal law rather than criminal procedure, so the bulk of this chapter is devoted to unconstitutional criminal statutes, rather than unconstitutional *procedures*. The exception is the right to a jury trial, which is discussed shortly.

Example of Constitutional Protections

Bill is on trial for obstructing a public sidewalk. Bill was arrested for standing in front of a restaurant's entrance with a sign stating "will eat any and all leftovers." The city ordinance Bill violated makes it a

unconstitutional on its face

The wording of a statute is unconstitutional.

unconstitutional as applied

The enforcement of a statute is unconstitutional.

misdeemeanor to “stand or sit on a public sidewalk with a sign.” To save money, the judge presiding over Bill’s trial declares that Bill will have a bench trial, rather than a jury trial. In this example, Bill can constitutionally attack the city *ordinance* for violating his freedom of speech because it prohibits holding a sign. The city ordinance appears unconstitutional *on its face* and *as applied* to Bill. Bill can also constitutionally attack *his bench trial* because he has the right to a jury trial. He could do this by making a motion to declare a mistrial, by petitioning an appellate court to halt the trial, or by appeal after a judgment of conviction.

FIGURE 3.1 Constitutional Protections



1.2 Judicial Review

strict scrutiny

A standard of judicial review used when a statute encroaches on a fundamental constitutional right; the statute is unconstitutional unless it is supported by a compelling government interest and uses the least restrictive means.

rational basis test

A standard of judicial review occasionally used when analyzing a statute pursuant to the equal protection clause; the statute is unconstitutional unless it is rationally related to a legitimate government interest.

As stated previously in this book, courts review statutes to ensure that they conform to the Constitution pursuant to their power of **judicial review**. Courts generally use different standards of review when constitutional protections are at stake. Typically, a court balances the *government’s* interest in regulating certain conduct against an *individual’s* interest in a constitutionally protected right. This balancing of interests varies depending on the right at stake. If a constitutional right is fundamental, the court uses **strict scrutiny** to analyze the statute at issue. A statute that violates or inhibits fundamental constitutional protections is presumptively invalid and can be upheld only if it uses the least restrictive means possible. The government also must prove the statute is supported by a compelling government interest. When the challenge is based on discrimination under the equal protection clause, the court may use a lower standard, called the **rational basis test**. The rational basis test allows a statute to discriminate if the statute is rationally related to a legitimate government interest. Most constitutional rights are considered fundamental and trigger the strict scrutiny of the courts.

Example of Strict Scrutiny

Review the example regarding Bill, who was arrested essentially for standing and holding a sign. The US Supreme Court has held that freedom of speech is a *fundamental right*. Thus a court reviewing the ordinance in Bill’s case will hold the ordinance presumptively invalid, unless the government can demonstrate a compelling interest in enacting it, and that it used the least restrictive means possible. The ordinance is broadly written to include all signs, and preventing individuals from holding signs does not serve a compelling government interest, so this difficult standard will probably result in the court holding the ordinance *unconstitutional*.

1.3 The Legislative Branch's Prohibited Powers

The legislative branch cannot punish defendants without a trial or enact retroactive criminal statutes pursuant to the Constitution's prohibition against **bill of attainder** and **ex post facto laws**. Article 1, § 9, clause 3 states, in pertinent part, "No Bill of Attainder or ex post facto Law shall be passed." The prohibition on bill of attainder and ex post facto laws is extended to the states in Article 1, § 10, clause 1: "No State shall...pass any Bill of Attainder, ex post facto Law." Many state constitutions also prohibit ex post facto legislative action, mirroring the federal Constitution.^[1]

Bill of Attainder

Bill of attainder is when the legislative branch of government punishes the defendant without a trial. The drafters of the Constitution wanted to ensure that criminal defendants have a full and fair adjudication of their rights before the government imposes punishment. Bill of attainder is usually accomplished by a statute that targets an individual or group of individuals for some type of government sanction. Bill of attainder protection enforces *separation of powers* by eliminating the ability of the legislature to impose criminal punishment without a trial conducted by the judicial branch.^[2]

Example of Bill of Attainder

Brianne is a member of the Communist party. Brianne applies for a job as a teacher at her local elementary school and is refused, based on this statute: "Members of any subversive group, including the Communist party, cannot hold public office nor teach for a public institution." Brianne could attack this statute as a bill of attainder. Its provisions, targeting members of the Communist party or any other subversive group, *punish* by eliminating career opportunities. The members targeted are punished without a trial or any adjudication of their rights. Thus this statute allows the legislature to impose a sanction without a trial in violation of the Constitution's prohibited powers.

Ex Post Facto

An ex post facto law punishes an individual *retroactively*, and severely encroaches on notions of fairness. There are three types of ex post facto laws. First, a law is ex post facto if it punishes behavior that occurred before the law was in effect. Second, ex post facto laws may increase the punishment for the offense after the crime occurred. Third, a law can be ex post facto if it increases the possibility of conviction after the crime occurred.

Example of an Ex Post Facto Law Punishing Behavior Retroactively

A state murder statute defines murder as the killing of a human being, *born alive*. The state legislature amends this statute to include the killing of a fetus, with the exception of abortion. The amendment extends the application of the statute to all criminal fetus killings that occurred *before* the statute was changed. This language punishes defendants for behavior that was legal when committed. If the state attempts to include this language, a court can strike the statute for violating the prohibition against ex post facto laws.

Example of an Ex Post Facto Law Increasing Punishment Retroactively

In the preceding example about amending the murder statute, the state also amends the statute to increase the penalty for murder to the *death penalty*. Before the amendment, the penalty for murder was *life in prison* without the possibility of parole. The state cannot give the death penalty to defendants who committed murder before the statute was amended. This is considered ex post facto because it increases the punishment for the offense after the crime is committed.

Example of an Ex Post Facto Law Increasing the Possibility of Conviction Retroactively

In the preceding example, the state amends the murder statute to remove the **statute of limitations**, which is the time limit on prosecution. Before the amendment, the statute of limitations was fifty years. The state cannot prosecute defendants who committed murder *more than fifty years ago*, pursuant to the amendment. This is considered ex post facto because it increases the chance of conviction after the crime is committed.

Changes That Benefit a Defendant Retroactively

Changes that *benefit* a criminal defendant are not considered ex post facto and may be applied retroactively. In the preceding example, if the state amended the murder statute to *shorten* the statute of limitations, this change actually benefits defendants by making it more difficult to convict them. Thus this amendment would be constitutional.

bill of attainder

A statute that punishes a defendant without a trial.

ex post facto law

A criminal statute that punishes a defendant retroactively.

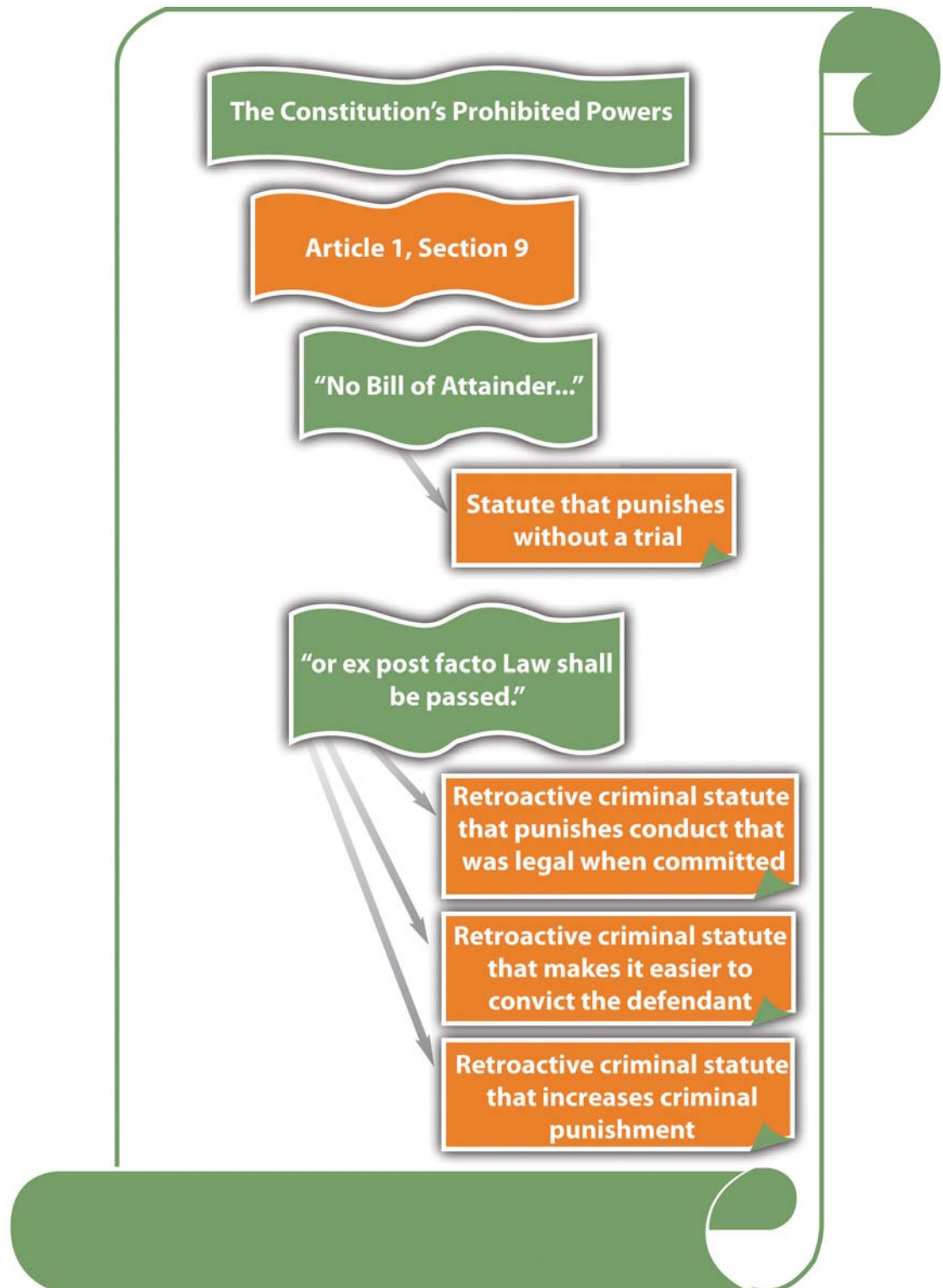
statute of limitations

A statute that limits the time period for a prosecution.

Ex Post Facto Applies Only to Criminal Laws

Ex post facto protection applies only to *criminal* laws. Laws that raise fees or taxes after payment are civil rather than criminal in nature. Thus these retroactive increases do not exceed governmental authority and are constitutional.

FIGURE 3.2 The Constitution's Prohibited Powers



KEY TAKEAWAYS

- The Constitution protects individuals from certain statutes and certain governmental procedures.
- A statute is unconstitutional on its face when its wording is unconstitutional. A statute is unconstitutional as applied when its enforcement is unconstitutional.
- A court reviews a statute for constitutionality using strict scrutiny if the statute inhibits a fundamental constitutional right. Strict scrutiny means that the statute is presumptively invalid, and the government must prove it is supported by a compelling government interest and uses the least restrictive means. Occasionally, a court reviews a statute for constitutionality under the equal protection clause using the rational basis test, which means that the statute is constitutional if rationally related to a legitimate government interest.
- A bill of attainder is when the legislative branch punishes a defendant without a trial. Ex post facto laws punish criminal defendants retroactively.
- Ex post facto laws punish defendants for acts that were not criminal when committed, increase the punishment for a crime retroactively, or increase the chance of criminal conviction retroactively.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. A public university raises tuition in the middle of the semester after students have already paid and sends all registered students a bill for “fees past due.” Does this violate the prohibition on ex post facto laws? Why or why not?
2. Read *Smith v. Doe*, 538 U.S. 84 (2003). Why did the US Supreme Court hold that Alaska’s Megan’s Law is constitutional? The case is available at this link: http://scholar.google.com/scholar_case?case=14879258853492825339&hl=en&as_sdt=2&as_vis=1&oi=scholar.
3. Read *Stogner v. California*, 539 U.S. 607 (2003). Why did the US Supreme Court hold that California’s Sex Offender statute of limitations was unconstitutional? The case is available at this link: <http://supreme.justia.com/us/539/607>.

2. THE DUE PROCESS AND EQUAL PROTECTION CLAUSES

LEARNING OBJECTIVES

1. Define the Bill of Rights.
2. Define the principle of selective incorporation.
3. Distinguish between substantive and procedural due process.
4. Compare void for vagueness and overbreadth.
5. Ascertain the purpose of the equal protection clause as it applies to criminal laws.

Although the legislative branch’s prohibited powers are in Article I of the Constitution, the Bill of Rights contains most of the constitutional protections afforded to criminal defendants. The **Bill of Rights** is the first ten amendments to the Constitution. In addition, the Fourteenth Amendment, which was added to the Constitution after the Civil War, has a plethora of protections for criminal defendants in the due process and equal protection clauses.

The Bill of Rights was originally written to apply to the federal government. However, US Supreme Court precedent has held that *any* constitutional amendment that is implicit to due process’s concept of ordered liberty must be incorporated into the Fourteenth Amendment’s protections and applied to the states.^[3] This doctrine is called **selective incorporation**, and it includes virtually all the constitutional protections in the Bill of Rights. Thus although the original focus of the Bill of Rights may have been limiting the federal government, modern interpretations of the Constitution ensure that its protections also extend to all levels of state and local government.

Bill of Rights

The first ten amendments to the Constitution.

selective incorporation

Applying the Bill of Rights’ constitutional protections to the states through the Fourteenth Amendment.

2.1 The Meaning of Due Process of Law

due process clause

A clause in the Fifth Amendment (which applies to the federal government) and the Fourteenth Amendment (which applies to the state government) providing that no individual will be deprived of life, liberty, or property without due process of law.

substantive due process

The government cannot unreasonably encroach on an individual's substantive constitutional rights.

procedural due process

The government cannot criminally punish individuals without providing notice and an opportunity to be heard.

void for vagueness

A criminal statute so imprecisely worded that it gives too much discretion to law enforcement, is unevenly applied, and fails to provide notice of what is criminal, violating the right to due process.

overbroad

A statute that criminalizes both constitutionally protected and constitutionally unprotected conduct, violating the right to due process.

The **due process clause** states, “No person shall...be deprived of life, liberty, or property, without due process of law.” The due process clause in the Fifth Amendment applies to *federal* crimes and federal criminal prosecutions. The federal due process clause is mirrored in the Fourteenth Amendment, which guarantees due process of law in *state* criminal prosecutions. Most states have a similar provision in their constitutions.^[4]

Substantive due process protects individuals from an unreasonable loss of substantive rights, such as the right to speak freely and the right to privacy. **Procedural due process** protects individuals from being criminally punished without notice and an opportunity to be heard. Both substantive and procedural due processes ensure that individuals are not denied their life (capital punishment), liberty (incarceration), or property (forfeiture) *arbitrarily*.

Void for Vagueness

Void for vagueness challenges the wording of a statute under the due process clause. A statute is void for vagueness if it uses words that are indefinite or ambiguous. Statutes that are not precisely drafted do not provide notice to the public of exactly what kind of behavior is criminal. In addition, and *more important*, they give too much discretion to law enforcement and are unevenly enforced.^[5] With a void for vagueness challenge, the statute must be so unclear that “men of common intelligence must guess at its meaning.”^[6] which is an objective standard.

Example of a Statute That Is Void for Vagueness

A state legislature enacts a statute that criminalizes “inappropriate attire on public beaches.” Larry, a law enforcement officer, arrests Kathy for wearing a two-piece bathing suit at the beach because in his belief, women should wear one-piece bathing suits. Two days later, Burt, another law enforcement officer, arrests Sarah for wearing a one-piece bathing suit at the beach because in his belief, women should not be seen in public in bathing suits. Kathy and Sarah can attack the statute on its face and as applied as void for vagueness. The term “inappropriate” is unclear and can mean different things to different people. Thus it gives too much discretion to law enforcement, is subject to uneven application, and does not give Kathy, Sarah, or the public adequate notice of what behavior is criminal.

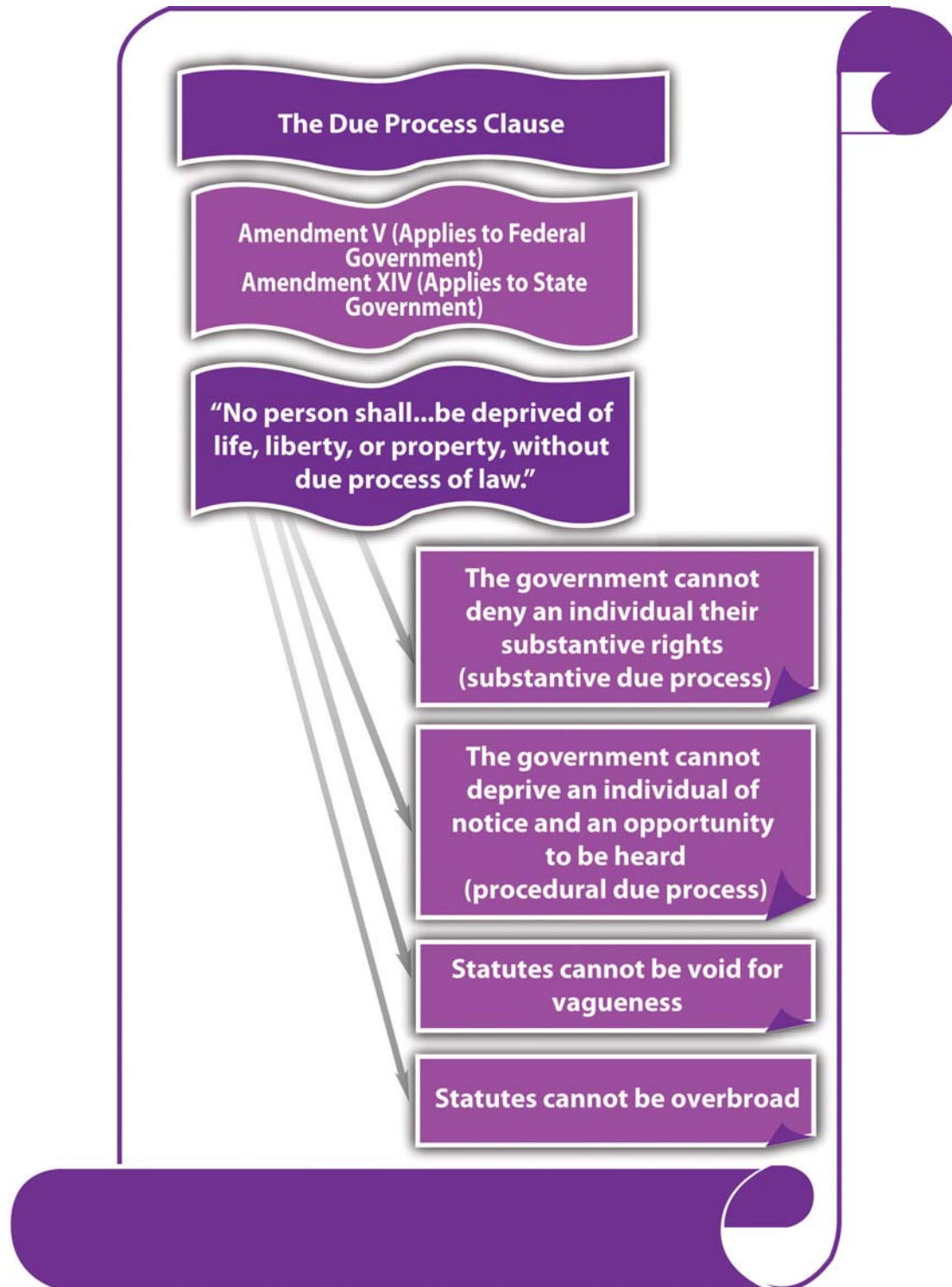
Overbreadth

A statute is **overbroad** if it criminalizes both constitutionally protected and constitutionally unprotected conduct. This challenge is different from **void for vagueness**, although certain statutes can be attacked on both grounds. An overbroad statute criminalizes *too much* and needs to be revised to target only conduct that is outside the Constitution’s parameters.

Example of an Overbroad Statute

A state legislature enacts a statute that makes it criminal to photograph “nude individuals who are under the age of eighteen.” This statute is probably overbroad and violates due process. While it prohibits constitutionally *unprotected* conduct, such as taking obscene photographs of minors, it also criminalizes First Amendment *protected* conduct, such as photographing a nude baby.

FIGURE 3.3 The Due Process Clause



2.2 The Equal Protection Clause

The Fourteenth Amendment states in relevant part, “nor shall any State...deny to any person within its jurisdiction the equal protection of the laws.” The **equal protection clause** applies to the *state* government. State constitutions generally have a similar provision.^[7] The equal protection clause prevents the state government from enacting criminal laws that *discriminate* in an unreasonable and unjustified manner. The Fifth Amendment due process clause prohibits the federal government from discrimination if the discrimination is so unjustifiable that it violates due process of law.^[8]

equal protection clause

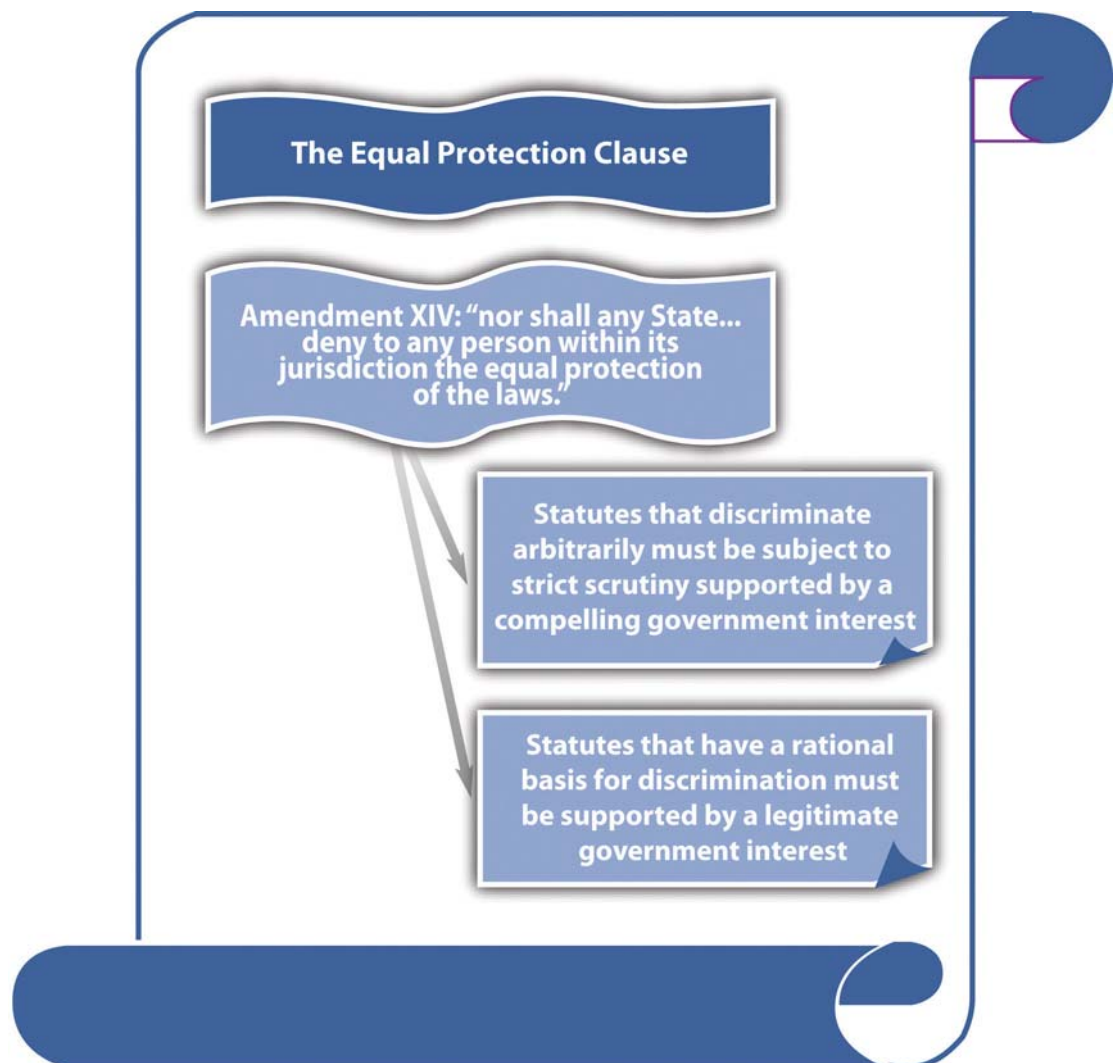
A clause in the Fourteenth Amendment that prohibits the state government from enacting statutes that arbitrarily discriminate.

The prohibition on governmental discrimination is not absolute; it depends on the class of persons targeted for special treatment. In general, court scrutiny is heightened according to a sliding scale when the subject of discrimination is an arbitrary classification. Arbitrary means random and often includes characteristics an individual is born with, such as race or national origin. The most arbitrary classifications demand **strict scrutiny**, which means the criminal statute must be supported by a *compelling* government interest. Statutes containing classifications that are not arbitrary must have a **rational basis** and be supported by a *legitimate* government interest.

Criminal statutes that classify individuals based on their race must be given strict scrutiny because race is an arbitrary classification that cannot be justified. Modern courts do not uphold criminal statutes that classify based on race because there is no government interest in treating citizens of a different race more or less harshly.^[9]

Criminal statutes that have a rational basis for discrimination and are supported by a legitimate government interest *can* discriminate, and frequently do. Criminal statutes that punish felons more severely when they have a history of criminal behavior, for example, three-strikes statutes, are supported by the legitimate government interests of specific and general deterrence and incapacitation. Note that the basis of the discrimination, a criminal defendant's *status as a convicted felon*, is rational, not arbitrary like race. Thus although these statutes discriminate, they are constitutional pursuant to the equal protection clause.

FIGURE 3.4 The Equal Protection Clause



KEY TAKEAWAYS

- The Bill of Rights is the first ten amendments to the Constitution and contains many protections for criminal defendants.
- Selective incorporation applies most of the constitutional protections in the Bill of Rights to the states.
- Substantive due process protects criminal defendants from unreasonable government intrusion on their substantive constitutional rights. Procedural due process provides criminal defendants with notice and an opportunity to be heard before imposition of a criminal punishment.
- A statute that is void for vagueness is so imprecisely worded that it gives too much discretion to law enforcement, is unevenly applied, and does not provide notice of what is criminal. A statute that is overbroad includes constitutionally protected conduct and therefore unreasonably encroaches upon individual rights.
- The equal protection clause prevents the state government from enacting criminal laws that arbitrarily discriminate. The Fifth Amendment due process clause extends this prohibition to the federal government if the discrimination violates due process of law.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. A local ordinance makes it a misdemeanor to dress in “gang attire.” Is this ordinance constitutional? Why or why not?
2. Read *Smith v. Goguen*, 415 U.S. 566 (1974). Why did the US Supreme Court strike down the Massachusetts flag misuse statute? The case is available at this link: http://scholar.google.com/scholar_case?case=14723025391522670978&hl=en&as_sdt=2&as_vis=1&oi=scholar.
3. Read *Grayned v. City of Rockford*, 408 U.S. 104 (1972). In *Grayned*, the US Supreme Court analyzed an ordinance prohibiting individuals from willfully making a noise or disturbance on grounds adjacent to a school building that disturbs the peace or good order of the school session. Did the Court hold that this ordinance was constitutional? Why or why not? The case is available at this link: <http://supreme.justia.com/us/408/104/case.html>.
4. Read Justice Sandra Day O’Connor’s concurring opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003). Why did Justice O’Connor feel that Texas’s sodomy law was unconstitutional? The case is available at this link: <http://www.law.cornell.edu/supct/html/02-102.ZC.html>.

3. FREEDOM OF SPEECH

LEARNING OBJECTIVES

1. Define speech under the First Amendment.
2. Identify five types of speech that can be governmentally regulated in spite of the First Amendment.
3. Ascertain the constitutional parameters for statutes that criminalize speech.

The **First Amendment** states, in relevant part, “Congress shall make no law...abridging the freedom of speech.” Although this language specifically targets *federal Congress*, the First Amendment has been held applicable to the states by virtue of selective incorporation.^[10] Most state constitutions have a similar provision protecting freedom of speech.^[11]

Freedom of speech has been the focus of countless judicial opinions. To summarize US Supreme Court precedent, the word *speech* has been interpreted to cover virtually any *form* of expression, including verbal and written words, pictures, photographs, videos, and songs. First Amendment speech also includes expressive *conduct* such as dressing a certain way,^[12] flag burning,^[13] and cross burning.^[14]

First Amendment

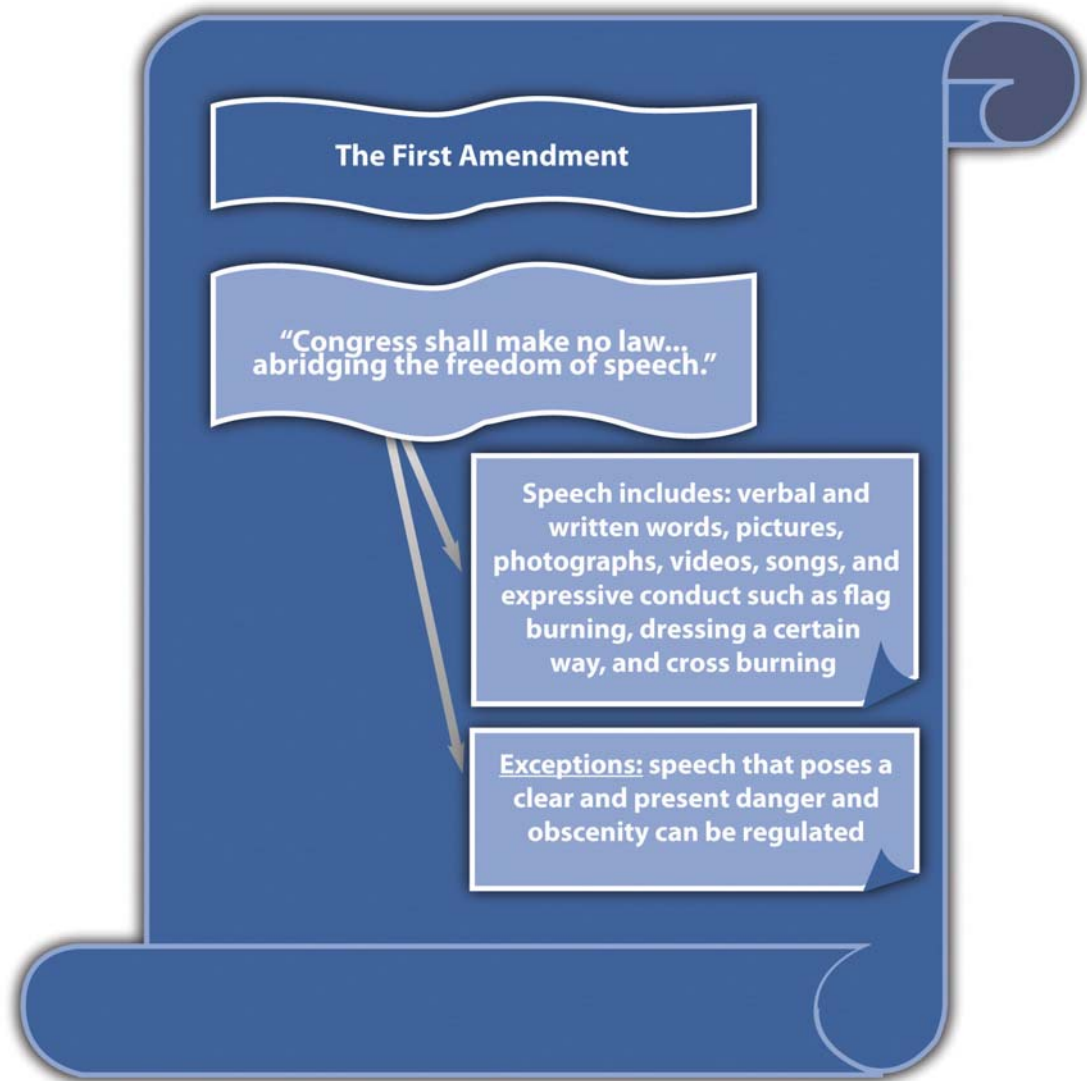
Prohibits the government from suppressing speech, which includes any form of expression or expressive conduct.

3.1 Exceptions to the First Amendment’s Protection of Free Speech

In general, courts have examined the history of the Constitution and the policy supporting freedom of speech when creating exceptions to its coverage. Modern decisions afford freedom of speech the

strictest level of scrutiny; only a compelling government interest can justify an exception, which must use the least restrictive means possible.^[15] For the purpose of brevity, this book reviews the constitutional exceptions to free speech in statutes criminalizing **fighting words**, **incitement to riot**, **hate crimes**, and **obscenity**.

FIGURE 3.5 The First Amendment



Fighting Words

Although the First Amendment protects *peaceful* speech and assembly, if speech creates a **clear and present danger** to the public, it can be regulated.^[16] This includes fighting words, “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”^[17]

Any criminal statute prohibiting fighting words must be narrowly tailored and focus on *imminent* rather than *future* harm. Modern US Supreme Court decisions indicate a tendency to favor freedom of speech over the government’s interest in regulating fighting words, and many fighting words statutes have been deemed unconstitutional under the First Amendment or void for vagueness and overbreadth under the Fifth Amendment and Fourteenth Amendment due process clause.^[18]

Example of an Unconstitutional Fighting Words Statute

Georgia enacted the following criminal statute: “Any person who shall, without provocation, use to or of another, and in his presence...opprobrious words or abusive language, tending to cause a breach of the peace...shall be guilty of a misdemeanor” (Ga. Code § 26-6303). The US Supreme Court determined that this statute was overbroad, void for vagueness, and unconstitutional under the First Amendment.^[19]

The Court held that the dictionary definitions of “opprobrious” and “abusive” give them greater reach than fighting words. Thus the statute is overbroad and does not restrict its prohibition to *imminent* harm. Opprobrious and abusive have various meanings, so the statute is also subject to uneven enforcement and is void for vagueness. As the Court stated, this language “licenses the jury to create its own standard in each case.”^[20]

Incitement to Riot

Incitement to riot can also be regulated under the clear and present danger exception. Similar to fighting words, an incitement to riot statute must prohibit *imminent* lawless action.^[21] Statutes that prohibit simple advocacy with no imminent threat or harm cannot withstand the First Amendment’s heightened scrutiny.

Example of an Unconstitutional Incitement to Riot Statute

Ohio enacted a statute that criminalized “advocat[ing]...the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and “voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism” (Ohio Rev. Code Ann. § 2923.13). A Ku Klux Klan leader was convicted under the statute after the media broadcast films of him leading a KKK meeting. The US Supreme Court held, “Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. [Footnote 4] Such a statute falls within the condemnation of the First and Fourteenth Amendments.”^[22]

Hate Crimes

Many states and the federal government have enacted hate crimes statutes. When hate crimes statutes criminalize speech, including expressive conduct, a First Amendment analysis is appropriate. When hate crimes statutes enhance a penalty for criminal conduct that is *not expressive*, the First Amendment is not applicable.^[23]

Hate crimes statutes punish conduct that is targeted at specific classifications of people. These classifications are listed in the statute and can include race, ethnicity, gender, sexual orientation, or religion. Hate crimes statutes that criminalize speech can be constitutional under the clear and present danger exception if they are tailored to apply only to speech or expressive conduct that is supported by the *intent to intimidate*.^[24] This can include speech and expressive conduct such as threats of imminent bodily injury, death, or cross burning. Hate crimes statutes must be narrowly drafted, and cannot be void for vagueness or overbroad.

Hate crimes statutes that criminalize the *content* of speech, like a prejudicial *opinion* about a certain race, ethnicity, gender, sexual orientation, or religion are unconstitutional under the First Amendment.^[25] Statutes of this nature have been held to have a “chilling effect” on free expression by deterring individuals from expressing unpopular views, which is the essence of free speech protection. Although this type of speech can stir up anger, resentment, and possibly trigger a violent situation, the First Amendment protects content-based speech from governmental regulation without strict scrutiny exposing a compelling government interest.

Example of an Unconstitutional Statute Prohibiting Cross Burning

St. Paul, Minnesota, enacted the Bias-Motivated Crime Ordinance, which prohibited the display of a symbol that a person knows or has reason to know “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender” (Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990)). In *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), the US Supreme Court held that this ordinance was unconstitutional on its face because regulation was based on the *content* of speech, with no additional requirement for *imminent lawless action*. The Court held that the ordinance did not proscribe the use of fighting words (the display of a symbol) toward specific groups of individuals, which would be an equal protection clause challenge. Instead, the Court determined that the statute prohibited the use of specific *types of fighting words*, for example, words that promote racial hatred, and this is impermissible as viewpoint-based censorship. As the Court stated, “[c]ontent-based regulations are presumptively invalid.”^[26]

Example of a Constitutional Statute Prohibiting Cross Burning

Virginia enacted a statute that makes it criminal “for any person..., with the intent of intimidating any person or group..., to burn...a cross on the property of another, a highway or other public place” (Va. Code Ann. § 18.2-423). The US Supreme Court held this statute constitutional under the First Amendment because it did not single out cross burning *indicating racial hatred*, as the Minnesota cross-burning ordinance did. The Court stated, “Unlike the statute at issue in *R. A. V.*, the Virginia statute does

not single out for opprobrium only that speech directed toward ‘one of the specified disfavored topics.’ *Id.*, at 391.” It does not matter whether an individual burns a cross with intent to intimidate because of the victim’s race, gender, or religion, or because of the victim’s “political affiliation, union membership, or homosexuality.”^[27]

Obscenity

Another exception to free speech is *obscenity*. Obscenity is usually conveyed by speech, such as words, pictures, photographs, songs, videos, and live performances. However, obscenity is not *protected* speech under the First Amendment.^[28]

In *Miller v. California*, 413 U.S. 15 (1973), the US Supreme Court devised a three-part test to ascertain if speech is obscene and subject to government regulation. Generally, speech is obscene if (1) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest in sex; (2) it depicts sexual conduct specifically defined by the applicable state law in a patently offensive way; and (3) it lacks serious literary, artistic, political, or scientific value.^[29]

Example of Speech That Is Not Obscene

In *Jenkins v. Georgia*, 418 U.S. 153 (1974), the US Supreme Court viewed the film *Carnal Knowledge* to determine whether the defendant could be constitutionally convicted under an obscenity statute for showing it at a local theater. The Court concluded that most of the film’s sexual content was suggestive rather than explicit, and the only direct portrayal of nudity was a woman’s bare midriff. Thus although a jury convicted the defendant after viewing the film, the Court reversed the conviction, stating that the film does not constitute the hard-core pornography that the three-part test for obscenity isolates from the First Amendment’s protection. The Court stated, “Appellant’s showing of the film ‘Carnal Knowledge’ is simply not the ‘public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain’ which we said was punishable in *Miller*, *Id.*, at 35.”^[30]

Nude Dancing

Statutes that regulate nude dancing have also been attacked under the First Amendment. Although the US Supreme Court has ruled that nude dancing is constitutionally protected expression, it has also upheld reasonable restrictions on nudity, such as requirements that nude dancers wear pasties and a g-string.^[31]

TABLE 3.1 Statutes Prohibiting Speech under a First Amendment Exception

Conduct Prohibited	Potential Constitutional Challenge	Necessary Statutory Requirements
Fighting words	First Amendment, vague, overbreadth	Must proscribe imminent lawless action, be narrowly drafted, precise
Incitement to riot	First Amendment, vague, overbreadth	Must proscribe imminent lawless action, be narrowly drafted, precise; cannot prohibit simple advocacy
Hate speech	First Amendment, vague, overbreadth	Must be narrowly drafted, precise; must target speech supported by the intent to intimidate; cannot be content based without a compelling government interest
Obscenity	First Amendment, vague, overbreadth	Must be narrowly drafted, precise; must target speech that appeals to a prurient interest in sex, depicts sex in a patently offensive way, lacks serious social value
Nude dancing	First Amendment, vague, overbreadth	Can be reasonably restricted

LAW AND ETHICS

Should Depictions of Animal Cruelty Be Protected by the First Amendment?

Congress enacted 18 U.S.C. § 48, which criminalizes commercial creation, sale, or possession of a visual or auditory depiction in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if that conduct violates federal or state law where the creation, sale, or possession takes place. In *United States v. Stevens*, 552 U.S. 442 (2010), the US Supreme Court held that this statute is *facially overbroad* and violative of the *First Amendment*. Specifically, the Court held that depictions of animal cruelty are entitled to First Amendment protection, and the statute is *presumptively invalid* because it is *content based*. In addition, the Court stated that the government's interest in censoring this type of material is not compelling enough to outweigh the prohibition on protected speech and that the statute on its face included material that may have redeeming social value. The Court's opinion is available at this link: <http://www.law.cornell.edu/supct/html/08-769.ZO.html>.

1. Do you think the First Amendment should protect material depicting animal cruelty? Why or why not?
2. What are some possible consequences of criminalizing this type of speech?

Check your answers to both questions using the answer key at the end of the chapter.

U.S. v. Stevens Video**American Civil Liberties Union (ACLU) Explains the *U.S. v. Stevens* Case**

This video of ACLU legal director Steven R. Shapiro analyzes the *U.S. v. Stevens* case:



View the video online at: <http://www.youtube.com/v/a4xUyviw6zY>

KEY TAKEAWAYS

- Speech under the First Amendment is any form of expression, such as verbal or written words, pictures, videos, and songs. Expressive conduct, such as dressing a certain way, flag burning, and cross burning, is also considered First Amendment speech.
- Five types of speech that can be governmentally regulated are fighting words, incitement to riot, hate speech, obscenity, and nude dancing.
- Statutes that prohibit fighting words and incitement to riot must be narrowly drafted to include only speech that incites imminent unlawful action, not future harm or general advocacy. Statutes that prohibit hate speech must be narrowly drafted to include only speech that is supported by the intent to intimidate. Statutes that prohibit obscenity must target speech that appeals to a prurient interest in sex, depicts sexual conduct in a patently offensive way, and has little or no literary, artistic, political, or scientific value. Nude dancing can be regulated as long as the regulation is reasonable, such as requiring dancers to wear pasties and a g-string.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. A state statute enhances the penalty for battery if the crime is committed “because of the victim’s race.” To prove race-biased intent, it is frequently necessary to admit evidence of the defendant’s statements indicating racial hatred and intolerance. Does this statute violate the First Amendment’s free speech protection? Why or why not? Read the case on which this question is based, *Wisconsin v. Mitchell*, 508 U.S. 47 (1993). The case is available at this link: <http://www.law.cornell.edu/supct/html/92-515.ZO.html>.
2. Read *Reno v. American Civ. Liberties Union*, 521 U.S. 844 (1997). This case reviews the constitutionality of a federal statute regulating Internet activity to protect minors. Why did the US Supreme Court hold that certain provisions of the federal Communications Decency Act of 1996 were unconstitutional? The case is available at this link: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=96-511>.
3. Read *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). Did the US Supreme Court uphold a federal statute prohibiting aid to terrorist groups? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=3116082426854631219&hl=en&as_sdt=2&as_vis=1&oi=scholar.

4. THE RIGHT TO PRIVACY

LEARNING OBJECTIVES

1. Ascertain the constitutional amendments that support a right to privacy.
2. Ascertain three constitutionally protected individual interests that are included in the right to privacy.

right to privacy

The Constitution’s protection of individual autonomy against government intrusion.

The federal Constitution does not explicitly protect privacy. However, several of the amendments in the Bill of Rights ensure and protect individual decision making and autonomy from governmental intrusion. Thus modern interpretations of the Constitution by the US Supreme Court have created a **right to privacy**.^[32] This right is considered fundamental and subject to strict scrutiny; only a compelling government interest can justify a statute encroaching on its protections. Many states include an explicit right to privacy in their state constitutions.^[33]

4.1 The Constitutional Amendments Protecting Privacy

US Supreme Court precedent has held that the right to privacy comes from the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. The First Amendment protects the right to speak freely, assemble peacefully, and worship according to individual choice. The Third Amendment prohibits the government from forcing individuals to quarter, house, or feed soldiers. The Fourth Amendment prevents the government from unreasonably searching or seizing an individual or an individual’s property. The Fifth and Fourteenth Amendments provide due process of law before the government can deprive an individual of life, liberty, or property. The Ninth Amendment states that rights not explicitly set forth in the Constitution may still exist. Taken together, these amendments indicate that the Constitution was written to erect a barrier between individuals and an *overly intrusive and regulatory* government. In modern society, this right to privacy guarantees the right to use *birth control*, the right to an *abortion*, and the right to *participate in consensual sexual relations*.

The Right to Use Birth Control

The right to privacy was first established in the US Supreme Court case of *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, the defendants, Planned Parenthood employees, were convicted of prescribing birth control as accessories under two Connecticut statutes that criminalized the use of birth control. The Court found the statutes unconstitutional, holding that the First, Third, Fourth, Fifth, and Ninth Amendments created a “penumbra” of unenumerated constitutional rights, including zones of privacy.^[34] The Court stated that *marital privacy*, especially, deserved the utmost protection from governmental intrusion. The *Griswold* case set the stage for other fundamental privacy rights related to intimacy, including the right to an abortion and the right to consensual sexual relations.

The Right to an Abortion

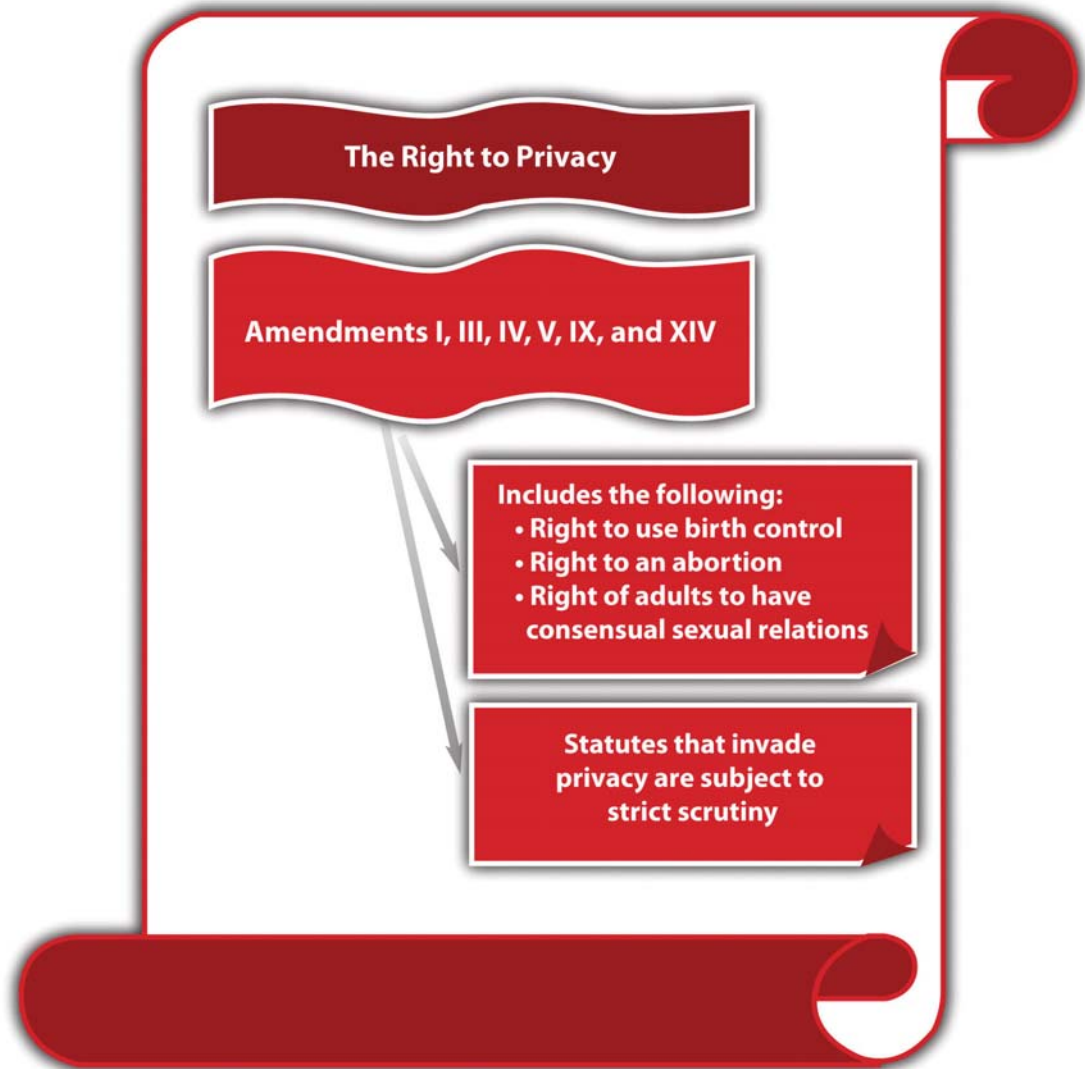
The right to an abortion was set forth in the seminal US Supreme Court case of *Roe v. Wade*, 410 U.S. 113 (1973). In *Roe*, which examined a Texas statute criminalizing abortion, the Court held that every woman has the right to a legal abortion through the first trimester of pregnancy. In the aftermath of the *Roe* decision, more than half of the nation's state laws criminalizing abortion became unconstitutional and unenforceable. The Court held that state government has a *legitimate* interest in protecting a pregnant woman and her fetus from harm, which becomes a *compelling* interest when she has reached full term. However, during the first trimester, health concerns from abortion do not justify the erosion of a woman's right to make the abortion decision.^[35] The Court thereafter struck down the Texas antiabortion statute as overbroad under the Fourteenth Amendment due process clause. Specifically, the Court held that during the first trimester of pregnancy, the abortion decision must be left to the pregnant woman and her attending physician.^[36] In a recent decision post-*Roe*, the Court upheld a federal statute criminalizing partial-birth abortion, on the grounds that it was not void for vagueness or overbroad under the Fifth Amendment due process clause.^[37]

The Right to Consensual Sexual Relations

Even in the aftermath of *Roe v. Wade*, courts were reluctant to interfere with states' interests in enacting and enforcing statutes that criminalized sexual conduct. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the US Supreme Court upheld a Georgia statute that made it a crime to engage in consensual sodomy.^[38] The Court stated that there is no *fundamental* right to engage in sodomy and that the history of protecting marriage and family relationships should not be extended in this fashion.^[39] Many years later, the Court changed its stance and overruled *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, a Texas statute criminalizing homosexual sodomy was attacked on its face and as applied to two men who were discovered engaging in sex in their bedroom during a law enforcement search for weapons. The *Lawrence* decision rested on the due process clause of the Fourteenth Amendment. The Court held that *intimate choices* are a form of liberty protected by the due process clause, whether or not consenting individuals are married. The Court thereafter struck down the Texas sodomy statute because it was not justified by a sufficient government interest.^[40]

Example of a Right to Privacy Analysis

Most states have statutes criminalizing consensual incest, which is sexual intercourse between family members who cannot legally marry. If an individual attacks a consensual incest statute as unconstitutional under the right to privacy, the court will balance the state's interest in preventing harm to an infant, such as birth defects, with an individual's interest in having consensual sexual intercourse with a family member, using *strict scrutiny*. If the court finds that the government interest is compelling, it can uphold the statute as long as it is not vague or overbroad.

FIGURE 3.6 The Right to Privacy**KEY TAKEAWAYS**

- The constitutional amendments supporting the right to privacy are the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.
- The right to privacy in the Constitution protects an individual's right to use contraceptives, to receive an abortion through the first trimester, and to engage in consensual sexual relations.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. A state statute prohibits inmates in state prison from engaging in consensual sodomy. An inmate is prosecuted under the statute. How will a court determine whether this statute is constitutional? Read the statute on which this exercise is based: California Penal Code § 286(e), <http://law.onecle.com/california/penal/286.html>.
2. Read *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). In *Casey*, Pennsylvania modified its abortion statute to include a twenty-four-hour waiting period and informed consent for minors. Did the US Supreme Court uphold the Pennsylvania abortion statute? The case is available at this link: <http://www.law.cornell.edu/supct/html/91-744.ZS.html>.

5. THE RIGHT TO BEAR ARMS

LEARNING OBJECTIVE

1. Ascertain the constitutional parameters of an individual's right to possess a handgun under the Second Amendment.

Although the federal Constitution specifically references a right to bear arms in the **Second Amendment**, the US Supreme Court has not interpreted this amendment in a significant fashion until recently. The Second Amendment provides “[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.” Many state constitutions have a similar provision.^[41] In 2008, the US Supreme Court explored the Second Amendment and its effect on weapons possession in a case attacking Washington, DC, firearms legislation.^[42]

In *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), the Court affirmed the Court of Appeals for the D.C. Circuit in striking provisions of the Firearms Control Regulations Act of 1975. The Court struck the portions of this act that banned the possession of handguns and mandated that all legal firearms must be kept unloaded and disassembled while in the home. Although the District Court held that the Second Amendment applies only to the militia, the US Supreme Court emphasized that the Second Amendment is exercised individually and belongs to all Americans. The Court also expanded previous interpretations of the Second Amendment to cover an individual's right to possess a usable handgun in the home for self-defense. The *Heller* case is unprecedented and is the first to address individual handgun possession under the Second Amendment. However, the *Heller* ruling is narrow and specifically excludes firearms restrictions on *felons*, the *mentally ill*, firearm possession in or near *schools* or government buildings, and the *commercial sale* of firearms. The *Heller* decision also fails to extend the Second Amendment's protections to the *states* because Washington, DC, is a federal enclave.

In *McDonald v. Chicago*, 130 S.Ct. 3020 (2010), the US Supreme Court revisited the gun possession issue by reviewing and rejecting as unconstitutional a handgun ban in the city of Chicago, Illinois. In *McDonald*, the Court took the extra step of extending the *Heller* ruling to the states, holding that the Second Amendment applies to the states via its **selective incorporation** into the due process clause. However, *McDonald* did not expand the ruling in *Heller* in other ways and reemphasized the *Heller* exceptions of firearms restrictions on felons, the mentally ill, firearm possession in or near schools or government buildings, and the commercial sale of firearms.

Second Amendment

Protects an individual's right to possess a usable handgun in the home for self-defense.

5.1 Example of an Appropriate Restriction on Firearms

Dirk is a public middle-school janitor. Occasionally, with the permission of the principal, Dirk stays overnight in an outbuilding on campus when he works a particularly late shift. Dirk wants to keep a handgun in the outbuilding, for protection. If Dirk's state has a statute prohibiting the possession of a handgun within one mile of any public school, Dirk *cannot* keep a handgun in the outbuilding for self-defense. Modern US Supreme Court precedent holds that the Second Amendment protects an individual's right to possess a handgun in the home for self-defense. However, this precedent specifically *exempts* firearm possession near schools. Unless newer precedent expands the ruling to include firearm possession near schools, the statute in Dirk's state is constitutional.

FIGURE 3.7 The Second Amendment



KEY TAKEAWAY

- Pursuant to recent US Supreme Court precedent, the Second Amendment protects an individual's right to possess a usable handgun in the home for self-defense. This protection does not cover felons, the mentally ill, firearm possession near schools and government buildings, or the commercial sale of firearms.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. A state court order forbids the defendant from possessing a handgun while on probation. This makes it impossible for the defendant to resume his career as a police officer. How will this court order be analyzed under recent US Supreme Court precedent interpreting the Second Amendment?
2. Read *Lewis v. U.S.*, 445 U.S. 55 (1980). In *Lewis*, the defendant, a felon, was convicted under a federal statute for possession of a firearm by a convicted felon. The defendant claimed that this was unconstitutional because he was not represented by counsel during his trial on the original felony. The defendant never sought a pardon or reversal of his conviction for the original felony on appeal. Did the US Supreme Court uphold the defendant's conviction for possession of a firearm by a convicted felon? The case is available at this link: http://scholar.google.com/scholar_case?case=1988023855177829800&hl=en&as_sdt=2&as_vis=1&oi=scholar.
3. Read *U.S. v. Lopez*, 514 U.S. 549 (1995). In *Lopez*, the US Supreme Court held that a federal statute prohibiting firearms near schools was unconstitutional because it regulated conduct that had no effect on interstate commerce and thus exceeded Congress's authority under the commerce clause. If a state enacts a similar statute, would this be constitutional under the Second Amendment? The case is available at this link: http://scholar.google.com/scholar_case?case=18310045251039502778&hl=en&as_sdt=2&as_vis=1&oi=scholar.

6. EXCESSIVE PUNISHMENT

LEARNING OBJECTIVES

1. Compare an inhumane procedure with disproportionate punishment under the Eighth Amendment.
2. Identify the most prevalent method of execution pursuant to the death penalty.
3. Ascertain crime(s) that merit capital punishment.
4. Identify three classifications of criminal defendants who cannot be constitutionally punished by execution.
5. Define three-strikes laws, and ascertain if they constitute cruel and unusual punishment pursuant to the Eighth Amendment.
6. Ascertain the constitutionality of sentencing enhancements under the Sixth Amendment right to a jury trial.

The prohibition against cruel and unusual punishment comes from the **Eighth Amendment**, which states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." State constitutions often have similar provisions.^[43] Although the ban on cruel and unusual punishment relates directly to *sentencing*, which is a criminal *procedure* issue, criminal statutes mandating various penalties can be held unconstitutional under the Eighth Amendment just like statutes offending the due process clause, so a brief discussion is relevant to this chapter. Another facet of excessive punishment is a criminal sentencing enhancement that is based on facts not found beyond a reasonable doubt by a jury. This has been held to violate the **Sixth Amendment**, which states, "In all criminal prosecutions, the accused shall enjoy the right to a...trial, by an impartial jury of the State and district wherein the crime shall have been committed."

In this section, three issues are analyzed and discussed: the infliction of *cruel punishment*, a criminal sentence that is *too severe*, and a criminal sentence that is invalid under the right to a *jury trial*.

Eighth Amendment

Prohibits inhumane and disproportionate punishments.

Sixth Amendment

Guarantees a criminal defendant the right to a jury trial.

6.1 Infliction of Cruel Punishment

In general, the government must refrain from inflicting cruel or barbaric punishments on criminal defendants in violation of the Eighth Amendment. In particular, cases asserting that a criminal punishment is inhumane often focus on **capital punishment**, which is the death penalty.

capital punishment

The death penalty.

Synopsis of the History of Capital Punishment

The death penalty has been used as a criminal punishment since the eighteenth century BC. American death penalty law is influenced by the British because the colonists brought English common-law

principles, including capital punishment, with them to the New World. The first execution in America took place in 1608, for spying.^[44] Methods of execution and capital crimes varied from colony to colony. In the late 1700s, a movement to abolish the death penalty began, and in 1846 Michigan was the first state to eliminate the death penalty for all crimes except treason.^[45] Throughout the nineteenth and twentieth centuries, the United States fluctuated in its attitude toward capital punishment. Executions were at an all-time high in the 1930s.^[46] However, in 1972, in the landmark decision of *Furman v. Georgia*, 408 U.S. 238 (1972), the US Supreme Court held that Georgia's death penalty statute, which gave the jury complete discretion to sentence a criminal defendant to death, was *arbitrary* and therefore authorized *cruel and unusual* punishment in violation of the Eighth Amendment. This decision invalidated death penalty statutes in forty states. Later, in 1976, the US Supreme Court case of *Gregg v. Georgia*, 428 U.S. 153 (1976), affirmed the procedure of a bifurcated trial, separating the guilt phase from the penalty phase for death penalty cases. *Gregg* also affirmed the death penalty's constitutionality under the Eighth Amendment. Currently, thirty-four states and the federal government authorize the death penalty, while sixteen states and the District of Columbia do not.^[47]

Inhumane Capital Punishment

A claim that capital punishment is *inhumane* and therefore unconstitutional under the Eighth Amendment focuses on the *method* of execution. Throughout the history of the death penalty, many methods of execution have been employed, including shooting, hanging, electrocution, the gas chamber, and lethal injection. At the time of this writing, the law is in a state of flux as to which methods of execution are constitutional because many state and federal decisions have stricken virtually every method available. The current focus of the courts is *lethal injection* because it is one of the few methods that has not been condemned as unconstitutional. Most states that authorize the death penalty use lethal injection as the primary method of execution. In a recent statement on this issue, the US Supreme Court in *Baze v. Rees*, 128 S. Ct. 1520 (2008), held that Kentucky's four-drug lethal injection procedure was *not* cruel and unusual punishment under the Eighth Amendment. In other states, including Missouri and Tennessee, federal courts using different facts have ruled the multidrug procedure *unconstitutional*.^[48] It is impossible to predict the future of death penalty methodology under the Eighth Amendment because each case will be decided based on the circumstances presented. However, it is clear that the law in this area is ripe for a definitive statement of constitutionality under the Eighth Amendment's cruel and unusual punishment clause.

6.2 Disproportionate Punishment

three-strikes

Statutes that enhance a sentence when a defendant commits a felony after a previous conviction for one or two serious or violent felonies.

Disproportionate punishment is a different issue than inhumane punishment, but it is still within the parameters of the Eighth Amendment. Disproportionate punishment asserts that a criminal punishment is *too severe* for the crime. Two criminal punishments garner many disproportionate punishment claims: **capital punishment** and punishment pursuant to **three-strikes** statutes.

Capital Punishment as Disproportionate

Capital punishment can be disproportionate because it is too severe for the *crime* or because it is too severe for the *criminal defendant*.

Examples of Capital Punishment That Is Disproportionate to the Crime

Death is the ultimate punishment, so it must be equivalent to the crime the defendant committed. Although the states and the federal government have designated many capital crimes that may not result in death, for example, treason that does not lead to death, the US Supreme Court has confirmed that the death penalty is too severe for most crimes. In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court held that capital punishment is disproportionate for the crime of raping an adult woman. Many years later in *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008), the Court extended the disproportionality principle to invalidate the death penalty for child rape. *Kennedy* maintained the distinction between crimes committed against *individuals* and crimes committed against the *government*, like treason. The only crime against an individual that currently merits the death penalty is criminal homicide, which is the unlawful killing of one human being by another. Criminal homicide is discussed in detail in Chapter 9.

FIGURE 3.8 Crack the Code

Crack the Code

Compare the following state laws:

Ga. Code § 16-6-1:

(a) A person commits the offense of rape when he has carnal knowledge of:

- (1) A female forcibly and against her will; or
- (2) A female who is less than ten years of age.

Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. The fact that the person allegedly raped is the wife of the defendant shall not be a defense to a charge of rape.

(b) A person convicted of the offense of rape **shall be punished by death...**

Mont. Code Ann. § 45-5-503:

45-5-503. Sexual intercourse without consent.

(1) A person who knowingly has sexual intercourse without consent with another person commits the offense of sexual intercourse without consent...

c) If the offender was previously convicted of an offense under this section or of an offense under the laws of another state or of the United States that if committed in this state would be an offense under this section and if the offender inflicted serious bodily injury upon a person in the course of committing each offense, the offender shall be:

- (i) **punished by death...**

Georgia and Montana still authorize capital punishment for rape under certain circumstances. These statutes are most likely unconstitutional under *Kennedy v. Louisiana*.

Examples of Capital Punishment That Are Disproportionate to the Criminal Defendant

Recent US Supreme Court precedent has targeted specific classifications of criminal defendants for whom capital punishment is overly severe. Recent cases hold that the death penalty is cruel and unusual punishment for a criminal defendant who was a *juvenile* when the crime was committed,^[49] who is *mentally ill*,^[50] or has an *intellectual disability*^[51] at the time of the scheduled execution. Although states vary in their classifications of juveniles (discussed in detail in Chapter 6), the Eighth Amendment prohibits capital punishment for an individual who was under eighteen years of age when he or she

committed criminal homicide. Mental illness could cover a variety of disorders, but the US Supreme Court has held that a criminal defendant has a constitutional right to a determination of sanity before execution.^[52] Intellectual disability is distinct from mental illness and is defined by the US Supreme Court as a substantial intellectual impairment that impacts everyday life, and was present at the defendant's birth or during childhood.^[53] However, this standard is broad, so states vary in their legislative definitions of this classification.^[54]

Example of Capital Punishment That Is Inhumane and Disproportionate to the Crime and the Criminal Defendant

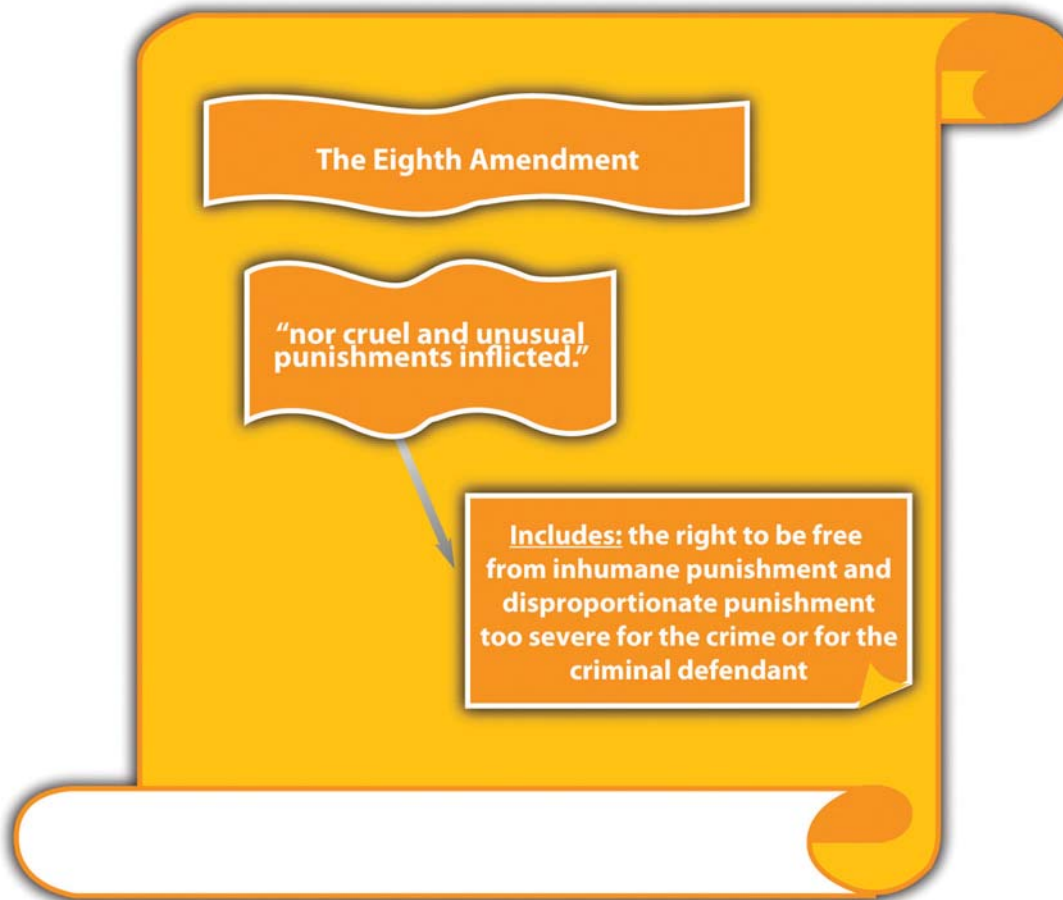
Jerry is sentenced to death for rape. The state death penalty statute specifies death by decapitation. While on death row, Jerry begins to hear voices and is diagnosed as schizophrenic by the prison psychiatrist. The state schedules the execution anyway. In this example, the state death penalty statute is *inhuman* because death by decapitation is too severe a punishment for any crime. The death penalty statute is also *disproportionate* to the *crime* because execution is not a constitutional punishment for the crime of rape. Lastly, the death penalty statute is *disproportionate* to Jerry, *the criminal defendant*, because it is cruel and unusual to execute someone who is mentally ill.

Disproportionate Punishment Pursuant to Three-Strikes Laws

California was the first state to enact a “three strikes and you’re out” law.^[55] Generally, three-strikes statutes punish habitual offenders more harshly when they commit a second or third felony after an initial serious or violent felony.^[56] To date, California’s three-strikes law is the toughest in the nation; it mandates a minimum twenty-five-year- to life sentence for felons convicted of a third strike. California enacted its three-strikes legislation after the kidnapping, rape, and murder of Polly Klaas by a habitual offender. Twenty-four states followed, indicating public support for the incapacitation of career criminals.^[57]

Three-strikes statutes vary, but those most likely to be attacked as disproportionate count *any* felony as a strike after an initial *serious* or *violent* felony. Counting any felony might levy a sentence of *life in prison* against a criminal defendant who commits a *nonviolent* felony. However, the US Supreme Court has upheld lengthy prison sentences under three-strikes statutes for relatively minor second or third offenses, holding that they are not cruel and unusual punishment under the Eighth Amendment.^[58]

FIGURE 3.9 The Eighth Amendment



6.3 Sentencing that Violates the Right to a Jury Trial

Modern US Supreme Court precedent has expanded the jury's role in sentencing pursuant to the Sixth Amendment. Although a detailed discussion of sentencing procedure is beyond the scope of this book, a brief overview of sentencing and the roles of the judge and jury is necessary to a fundamental understanding of this important trial right, as is set forth in the following section.

The Role of the Judge and Jury in Sentencing Fact-Finding

As stated in Chapter 2, the trier of fact decides the facts and renders a decision on innocence or guilt using **beyond a reasonable doubt** as the standard for the burden of proof. The trier of fact in a criminal prosecution is almost always a *jury* because of the right to a jury trial in the Sixth Amendment. Occasionally, the defendant waives the right to a jury trial and has a bench trial with a judge playing the role of trier of fact. Although the jury determines innocence or guilt during a jury trial, the verdict defines the end of their role as the trier of fact, and the *judge* sets the sentence. The death penalty is an exception to the jury's limited role in sentencing; a jury must decide whether to sentence the defendant to death at a separate hearing after the trial has concluded.

Generally, criminal sentencing takes place after the trial. Although the sentencing procedure varies from state to state and from state to federal, a sentencing hearing is typically held after guilt has been determined at trial or after a guilty plea. For many years, judges have had almost *exclusive* control of sentencing. Although judges are restricted by the fact-finding done at trial, they can receive new evidence at sentencing if it is relevant. For example, a judge is bound by a jury determination that the defendant used a weapon when committing an armed robbery. However, the judge can accept new evidence at sentencing that reveals the defendant had two prior convictions for armed robbery and can enhance the sentence under a habitual offender or three-strikes statute.

Sentencing Enhancement by Judges

Until recently, judges could use evidence received at the sentencing hearing to enhance a sentence beyond the statutory maximum by making a determination of the *new* facts to a **preponderance of**

evidence. However, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the US Supreme Court held that the right to a jury trial prohibits judges from enhancing criminal sentences beyond the statutory maximum based on facts not determined by a jury **beyond a reasonable doubt**. In *Apprendi*, the trial court enhanced the defendant's sentence beyond the statutory maximum for possession of a firearm with an unlawful purpose under New Jersey's hate crimes statute. Although the jury did not determine that the defendant's crime was a hate crime, the judge accepted new evidence at sentencing that indicated the defendant's shooting into a residence was racially motivated. The US Supreme Court reversed the New Jersey Supreme Court, which upheld the sentencing procedure. The Court held that *other than evidence of a prior conviction*, a judge cannot enhance a defendant's sentence beyond the statutory maximum unless there has been a factual determination by a jury beyond a reasonable doubt of the facts supporting the sentencing enhancement. The Court based its holding on the Sixth Amendment right to a jury trial as incorporated and applied to the states through the Fourteenth Amendment due process clause.

Post-*Apprendi*, this holding was extended to federal sentencing guidelines in *U.S. v. Booker*, 543 U.S. 220 (2005). In *Booker*, a federal judge enhanced a sentence following mandatory US Sentencing Guidelines, which permitted judges to find the sentencing enhancement facts using the preponderance of evidence standard. The US Supreme Court ruled that the enhancement was invalid under the Sixth Amendment right to a jury trial and held that the US Sentencing Guidelines would be *advisory* only, never mandatory. *Booker* was based on *Blakely v. Washington*, 542 U.S. 296 (2004), which invalidated a similar Washington State sentencing procedure.

Pursuant to *Apprendi*, *Booker*, and *Blakely*, a criminal defendant's sentence is unconstitutional under the Sixth Amendment right to a jury trial if it is *enhanced* beyond the statutory maximum by facts that were *not* determined by a jury beyond a reasonable doubt. This premise applies in *federal* and *state* courts and also to *guilty pleas* rather than jury verdicts.^[59]

Example of an Unconstitutional Sentence Enhancement

Ross is tried and convicted by a jury of simple kidnapping. The maximum sentence for simple kidnapping is five years. At Ross's sentencing hearing, the judge hears testimony from Ross's kidnapping victim about the physical and mental torture Ross inflicted during the kidnapping. The victim did not testify at trial. The judge finds that the victim's testimony is credible and rules that Ross used cruelty during the kidnapping by a **preponderance of evidence**. The judge thereafter enhances Ross's sentence to eight years, based on a statutory sentencing enhancement of three years for "deliberate cruelty inflicted during the commission of a crime." The three-year sentencing enhancement is most likely unconstitutional. Under the Sixth Amendment right to a jury trial, the jury must find deliberate cruelty **beyond a reasonable doubt**. A court can strike the enhancement of three years on appeal, and on remand, the trial court cannot increase the sentence beyond the five-year maximum.

FIGURE 3.10 The Sixth Amendment

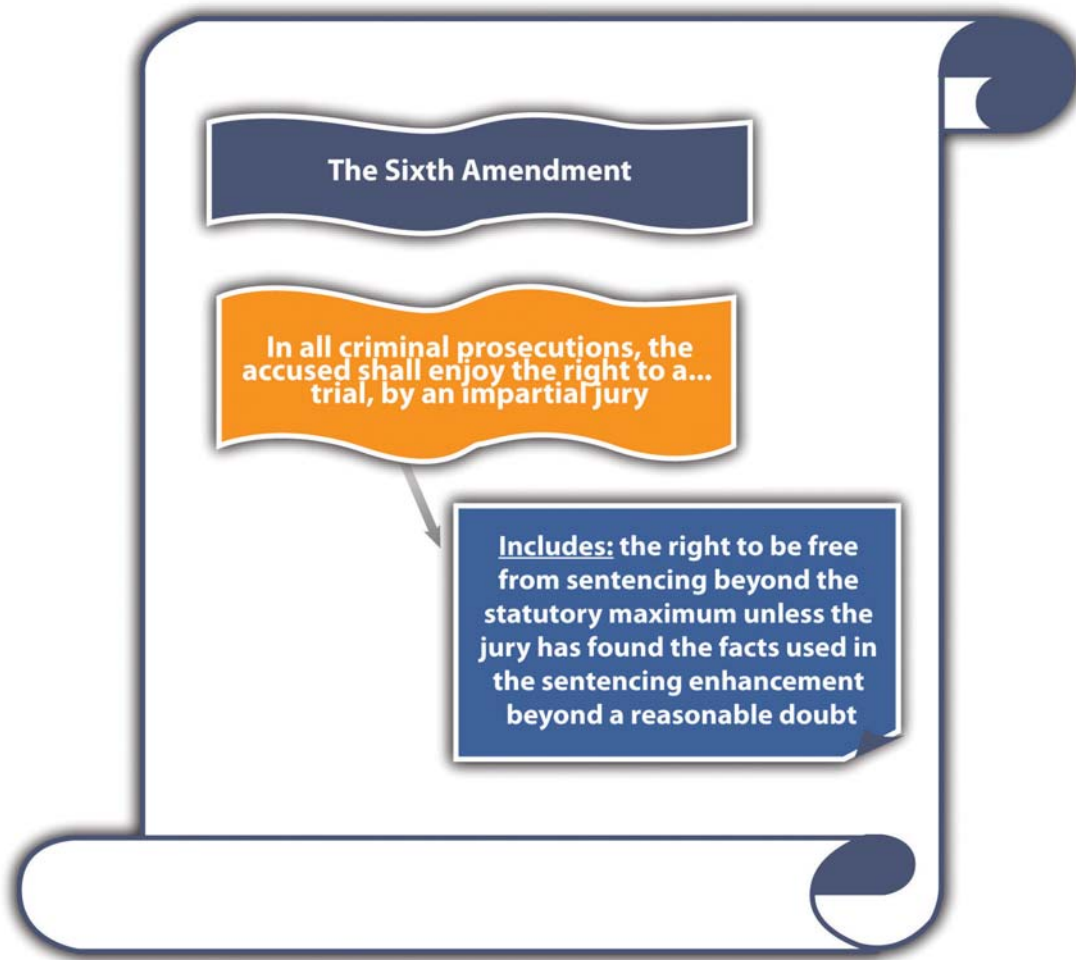
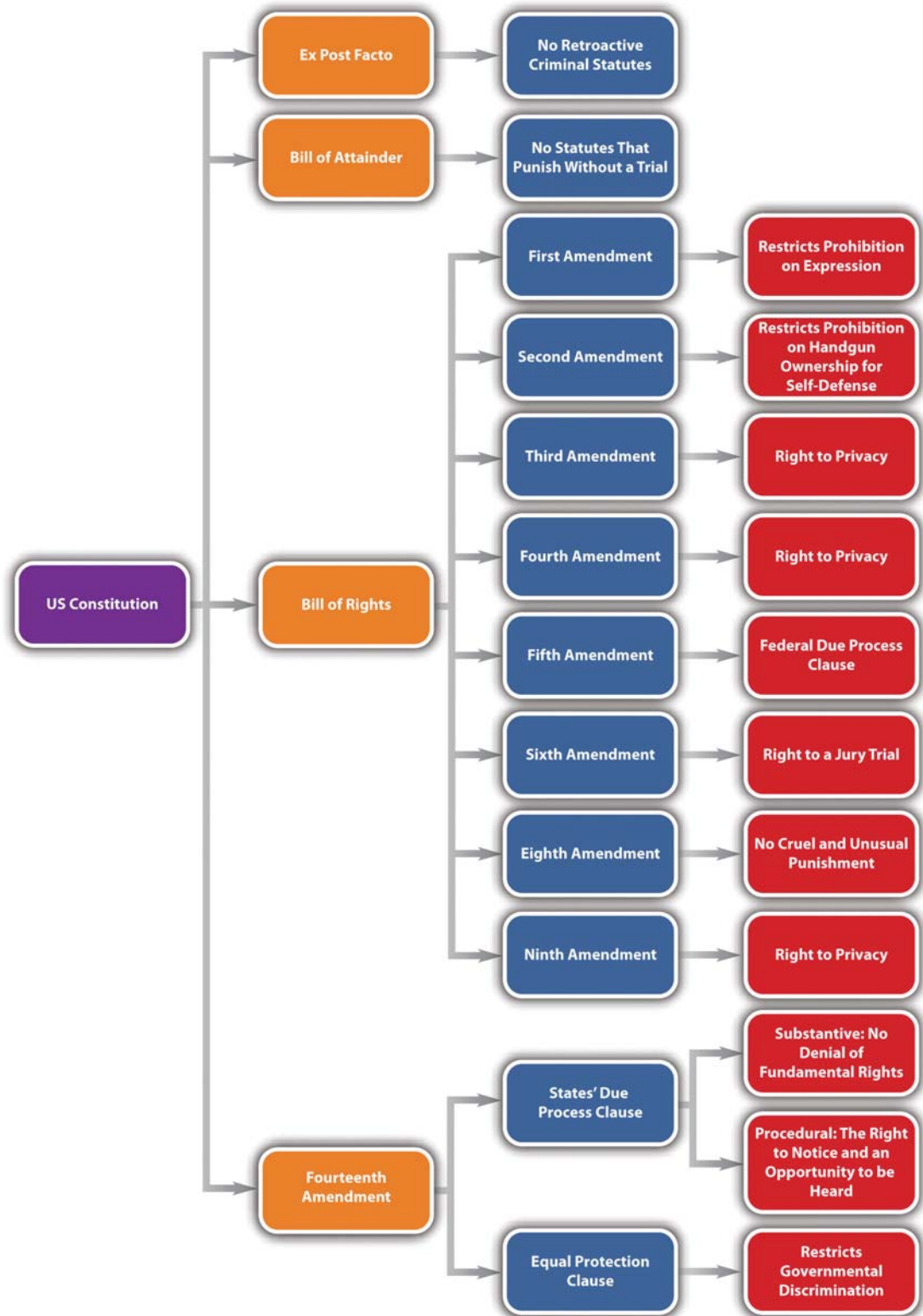


FIGURE 3.11 Diagram of Constitutional Defenses



KEY TAKEAWAYS

- An inhumane procedure punishes a defendant too severely for any crime. A disproportionate punishment punishes a defendant too severely for the crime he or she committed.
- Lethal injection is the most prevalent method of execution pursuant to the death penalty.
- Criminal homicide is the only crime against an individual that merits capital punishment.
- Criminal defendants who were juveniles when the crime was committed, are mentally incompetent, or have an intellectual disability cannot be subjected to capital punishment.
- Three-strikes laws punish criminal defendants more severely for committing a felony after they have committed one or two serious or violent felonies. Three-strikes laws have been held constitutional under the Eighth Amendment, even when they levy long prison sentences for relatively minor felonies.
- Sentencing enhancements beyond the statutory maximum are unconstitutional unless they are based on facts determined by a jury beyond a reasonable doubt under the Sixth Amendment right to a jury trial.

EXERCISES

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Andrew is sentenced to death for torture. In Andrew's state, there is an "eye-for-an-eye" statute that mandates punishment that mimics the crime the defendant committed. Pursuant to this statute, Andrew will be tortured to death. Is the state's eye-for-an-eye statute constitutional under the Eighth Amendment? Why or why not?
2. Read *Lockyer v. Andrade*, 538 U.S. 63 (2003). What was the defendant's sentence in *Lockyer*? What was the defendant's crime? Did the US Supreme Court hold that the defendant's sentence was constitutional under the Eighth Amendment? The case is available at this link: http://scholar.google.com/scholar_case?case=1810564739536423477&hl=en&as_sdt=2&as_vis=1&oi=scholar.
3. Read *Fierro v. Gomez*, 77 F.3d 301 (1996). Did the US Court of Appeals for the Ninth Circuit hold that the gas chamber procedure in California was constitutional under the Eighth Amendment? The case is available at this link: http://scholar.google.com/scholar_case?case=26906922262871934&hl=en&as_sdt=2&as_vis=1&oi=scholar.
4. Read *Gall v. U.S.*, 128 S. Ct. 586 (2007). In *Gall*, the federal judge departed from the US Sentencing Guidelines and imposed a sentence of probation because the defendant had reformed and rejected his criminal lifestyle. Did the US Supreme Court uphold this sentence? Why or why not? The case is available at this link: http://scholar.google.com/scholar_case?case=5158806596650877502&q=Gall+v.+U.S.&hl=en&as_sdt=2,5&as_vis=1.

7. END-OF-CHAPTER MATERIAL

Summary

The US Constitution protects criminal defendants from certain statutes and procedures. State constitutions usually mirror the federal and occasionally provide more protection to criminal defendants than the federal Constitution, as long as the state constitutions do not violate federal supremacy. Statutes can be unconstitutional as written or as enforced and must be supported by a sufficient government interest. Statutes that punish without a trial (bills of attainder) or criminal statutes that are applied retroactively (ex post facto) are unconstitutional under Article 1 §§ 9 and 10. Other constitutional protections are in the Bill of Rights, which is the first ten amendments, and the Fourteenth Amendment, which contains the due process clause and the equal protection clause.

The due process clause prohibits the government from taking an individual's life, liberty, or property arbitrarily, without notice and an opportunity to be heard. Statutes that are vague or criminalize constitutionally protected conduct (overbroad) violate due process. The Fifth Amendment due process clause applies to the federal government, and the Fourteenth Amendment due process clause applies to the states. The Fourteenth Amendment due process clause also selectively incorporates fundamental rights from the Bill of Rights and applies them to the states. Rights incorporated and applied to the states are the right to free speech, the right to privacy, the right to bear arms, the right to be free from cruel and unusual punishment, and the right to a jury trial. The Fourteenth Amendment also contains the equal protection clause, which prevents the government from enacting statutes that discriminate without a sufficient government interest.

The First Amendment protects speech, expression, and expressive conduct from being criminalized without a compelling government interest and a statute that uses the least restrictive means possible. Some exceptions to the First Amendment are precise statutes targeting fighting words, incitement to riot, hate crimes, obscenity, and nude dancing. The First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments also create a right to privacy that prevents the government from criminalizing the use of birth control, abortion, or consensual sexual relations.

The Second Amendment protects an individual's right to possess a usable handgun in the home for self-defense. This right is not extended to convicted felons, the mentally ill, commercial sale of firearms, and firearm possession near schools and government buildings. The Eighth Amendment protects criminal defendants from inhumane and excessive punishments. The Sixth Amendment ensures that all facts used to extend a criminal defendant's sentencing beyond the statutory maximum must be determined by a jury beyond a reasonable doubt.

YOU BE THE LEGISLATIVE ANALYST

You are an expert on *constitutional law*. Your state's legislature has hired you to analyze some proposed statutes to ensure that they are constitutional. Read each proposed statute and determine the following: (1) which **part** of the constitution is relevant, (2) whether the statute is **constitutional**, and (3) your **reasoning**. Check your answers using the answer key at the end of the chapter.

1. The proposed statute increases penalties for overdue state income tax **retroactively**. Is the proposed statute constitutional?
2. The proposed statute makes it a misdemeanor to display **nude art** in a public place. Is the proposed statute constitutional?
3. The proposed statute enhances the sentence for rape by three years of imprisonment if the defendant is infected with **AIDS**. Is the proposed statute constitutional?
4. The proposed statute prohibits a defendant with a conviction for any crime involving **alcohol** to possess a handgun in the home. Is the proposed statute constitutional?
5. The proposed statute mandates fifteen years of **solitary confinement** in prison if the defendant is convicted of forcible rape. Is the proposed statute constitutional?

Cases of Interest

- *South Dakota v. Asmussen*, 668 N.W.2d 725 (2003), discusses void for vagueness and overbreadth: <http://www.lexisone.com/lx1/caselaw/freecaselaw?action=OCLGetCaseDetail&format=FULL&sourceID=beehfd&searchTerm=ejDa.ecea.aadj.eddQ&searchFlag=y&l1loc=FCLOW>.
- *Christian Legal Society v. Martinez*, 130 S. Ct. 2971 (2010), discusses the First Amendment: http://scholar.google.com/scholar_case?case=10772194664096336702&q=Christian+Legal+Society+v.+Martinez&hl=en&as_sdt=2,5.
- *U.S. v. Alvarez*, 617 F.3d 1198 (2010), discusses freedom of speech: http://scholar.google.com/scholar_case?case=3332503989513069132&q=U.S.+v.+Alvarez&hl=en&as_sdt=2,5&as_ylo=2010.
- *Snyder v. Phelps*, No. 09-751 (2011), discusses the First Amendment: <http://www.law.cornell.edu/supct/html/09-751.ZO.html>.
- *Robinson v. California*, 370 U.S. 660 (1962), discusses cruel and unusual punishment: <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=370&invol=660>.

Articles of Interest

- Selective incorporation: <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/incorp.htm>
- Violent video games and the First Amendment: http://www.huffingtonpost.com/2011/06/27/supreme-court-violent-video-games_n_884991.html
- Ohio abortion bill: <http://abcnews.go.com/Politics/ohio-heartbeat-bill-abortion-paves-ro-wade-challenge/story?id=12876224>

- Second Amendment and gun control: http://usgovinfo.about.com/od/guncontrol/Gun_Control_and_the_Second_Amendment.htm
- Recent US Supreme Court case on three strikes and its application to juveniles: <http://www.correctionsone.com/juvenile-offenders/articles/2050079-High-Court-Calif-can-apply-3-strikes-law-to-juveniles>

Websites of Interest

- First Amendment information: <http://www.firstamendmentcenter.org/default.aspx>
- Hate crimes: http://www.fbi.gov/about-us/investigate/civilrights/hate_crimes/hate_crimes
- Death penalty information: <http://www.deathpenaltyinfo.org>

Statistics of Interest

- Hate crimes in the United States: <http://www2.fbi.gov/ucr/hc2009/index.html>
- US executions pursuant to the death penalty: <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976>

Answers to Exercises

From Section 1

1. The public university can impose a retroactive tuition because this is not a *criminal* statute or procedure and does not violate the prohibition against ex post facto laws.
2. In *Smith*, the US Supreme Court held that Alaska's Megan's Law statute was not *criminal*, but part of a civil regulatory scheme, and thus did not violate the prohibition against ex post facto laws.
3. In *Stogner*, the US Supreme Court held that California cannot eliminate a statute of limitations and thereafter prosecute defendants who would have been time-barred from prosecution because this action violates the prohibition against ex post facto laws. The Court held that this statute *increased the chances of conviction* retroactively.

Answers to Exercises

From Section 2

1. The ordinance is void for vagueness and overbroad, violating the First Amendment and the Fourteenth Amendment due process clause. The term *gang attire* is **void for vagueness** because it is imprecise, can mean different things to different people, fails to give notice of what is criminal, and gives too much discretion to law enforcement. The ordinance is **overbroad** because prohibiting all individuals from wearing gang attire probably includes First Amendment constitutionally protected conduct, such as wearing a gang-related Halloween costume or wearing a costume to act in a play or movie.
2. In *Smith*, the US Supreme Court held that the flag misuse statute was **void for vagueness**. The Court stated,

But there is no comparable reason for committing broad discretion to law enforcement officials in the area of flag contempt. Indeed, because display of the flag is so common and takes so many forms, changing from one generation to another and often difficult to distinguish in principle, a legislature should define with some care the flag behavior it intends to outlaw.^[60]

3. In *Grayned*, the US Supreme Court held that the ordinance was *not* void for vagueness because, with *fair warning*, it criminalized actual or imminent and willful interference with school activity. The Court also held that the statute was not overbroad because it prohibited only acts that “materially interfered with schoolwork,” which is not protected by the First Amendment.
4. Justice O'Connor said that the Texas sodomy statute was unconstitutional pursuant to the **equal protection clause**. The statute only criminalized sodomy between *persons of the same sex*, so it targeted gay couples without a rational basis.

Answers to Exercises

From Section 3

1. The statute does not violate the First Amendment's free speech protection because *battery* is not speech and is not covered by the First Amendment.
2. The US Supreme Court held that the provisions were unconstitutional under the First Amendment because they were *vague* and *content based*. The Act did not specifically define “indecent” communications, or demonstrate that offensive material lacks any value under the three-part test for obscenity set forth in *Miller*.
3. The US Supreme Court upheld 18 U.S.C. § 2339B (a) (1) *as applied*. The Court ruled that the federal government can prohibit aid to terrorist groups, even if it consists of training and advice on *legal* activities, without violating the First Amendment.

Answers to Exercises

From Section 4

1. The court will probably analyze whether the statute is constitutional under the **right to privacy** and the **equal protection clause**. The right to privacy analysis will use *strict scrutiny* because the right to privacy is *fundamental*. The state must demonstrate a *compelling* state interest in regulating sex in prison. The state's arguments will probably focus on maintaining integrity, safety, and security in the institution. Under the equal protection clause analysis, the state has to show a *legitimate* state interest pursuant to the rational basis test because the category targeted—inmates in prison—is *rational*, not arbitrary.
2. The Court upheld the statute, even though this case was post-*Roe v. Wade*. The Court reaffirmed *Roe*, but imposed a new standard for abortion laws. The new standard analyzes whether a state abortion law places an *undue burden* on a woman seeking an abortion. The Court held that the twenty-four-hour waiting period and informed consent for minors do not place such a burden. The Court did strike a separate requirement, which mandated husband notification before an abortion could take place.

Answers to Exercises

From Section 5

1. The court will uphold the order under the Second Amendment if the defendant was convicted of a felony. The recent US Supreme Court precedent in *Heller* and *McDonald* both *exclude* convicted felons from their holdings. However, if the defendant was convicted of a *misdemeanor*, the court has to determine whether *Heller* and *McDonald* extend the Second Amendment's right to possess a usable handgun in the home for self-defense to a convicted police officer who wants to resume his career.
2. The US Supreme Court upheld the conviction, stating that a defendant convicted unconstitutionally can and should challenge that conviction before owning or possessing a firearm.
3. A state could criminalize firearm possession near schools because two recent US Supreme Court rulings (*Heller* and *McDonald*) both exempt firearms near schools from their protection of individual gun ownership and possession.

Answers to Exercises

From Section 6

1. The eye-for-an-eye statute is unconstitutional because it mandates an inhumane punishment under the Eighth Amendment. Torture is too severe a punishment for *any* crime.
2. The defendant's sentence was two consecutive terms of twenty-five years to life in prison under California's three-strikes statute. The defendant's crime(s) were stealing five videotapes from Kmart worth \$84.70 on one occasion and stealing four videotapes from Kmart worth \$68.84 on another, with two previous strikes. The US Supreme Court *upheld* the sentence and denied the defendant's petition for habeas corpus.
3. The US Court of Appeals for the Ninth Circuit held that the gas chamber under California's protocol was *cruel and unusual punishment* in violation of the Eighth Amendment.
4. The US Supreme Court reversed the US Court of Appeals for the Eighth Circuit, which held that the sentence was unreasonable according to the US Sentencing Guidelines. The Court reaffirmed that the Guidelines were advisory, but stated that the trial court has *great discretion* in setting the sentence, as long as the basis of the sentence is explained on the record.

Answers to Law and Ethics Questions

1. The *categorization* of some speech as outside the First Amendment's protection generally focuses on speech that can produce immediate or imminent harm or lawless action, like **fighting words**, or speech that is devoid of social value, like **obscenity**. Depictions of animal cruelty probably fall within the second category. Whether you believe depictions of animal cruelty should be criminalized depends on whether you feel another category should be added to the list. The US Supreme Court was reluctant to expand categorization, indicating that First Amendment protections far exceed government interests in content-based regulations.
2. Some possible consequences of expanding categorization are the increase of government censorship into areas that may have value, either literary, artistic, political, or scientific. Any time case precedent limits the First Amendment, individual rights of expression are likewise inhibited, and the government's power to regulate and enact laws encroaching upon individual freedoms is *enhanced*.

Answers to You Be the Legislative Analyst

1. (1) The **ex post facto clause** is relevant. (2) The statute is most likely **constitutional**. (3) Even though the statute is retroactive, the statute is not a criminal law, but a tax increase, so there is no violation of the ex post facto clause.
2. (1) The **First Amendment** and the **due process clause** in the Fourteenth Amendment are relevant. (2) The proposed statute is most likely **unconstitutional**. (3) The statute is probably void for vagueness and overbroad. The word "art" can be interpreted differently by different people, so it leads to uneven application by law enforcement. The statute also fails to give the public notice of what is criminal. In addition, because the statute criminalizes the display of "art," it is overbroad and includes expressive works that may have artistic value and are protected under the First Amendment pursuant to the *Miller* test of obscenity.
3. (1) The **equal protection clause** of the Fourteenth Amendment is relevant. (2) The proposed statute is most likely **constitutional**. (3) The statute discriminates against criminal defendants infected with the AIDS virus. However, this classification has a rational basis and is not arbitrary. The state government has an interest in preventing the spread of AIDS, so the statute will probably be upheld under the equal protection clause, even though it is discriminatory.
4. (1) The **Second Amendment** and the **due process clause** in the Fourteenth Amendment are relevant. (2) The proposed statute is most likely **unconstitutional**. (3) The US Supreme Court has held that the Second Amendment, as applied to the states through the Fourteenth Amendment, protects an individual's right to possess a usable handgun in the home for self-defense. Although the Court held that an exception could be made for convicted felons, the proposed statute covers *any* crime that involves alcohol, including misdemeanors (such as misdemeanor DUI). Thus it is overbroad and encroaches on the Second Amendment's guarantee of the right to bear arms.
5. (1) The **Eighth Amendment** and the **due process clause** in the Fourteenth Amendment are relevant. (2) The proposed statute is most likely **unconstitutional**. (3) The proposed statute appears to be inhumane and excessive for the crime, which makes it cruel and unusual punishment.

ENDNOTES

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